



TEXAS JOURNAL OF WOMEN, GENDER, AND THE LAW

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Articles

LGBT ELDERS IN A POST-*WINDSOR* WORLD:
THE PROMISE AND LIMITS OF MARRIAGE EQUALITY

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CHEMICAL KIDS

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THE SYSTEMATIC FAILURE TO REPORT WORKPLACE HARASSMENT AND ABUSE

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Mission Statement

We celebrate the legal, social, and political advances made by women's and gender advocates and enhance the relationship between theoretical and practical perspectives by promoting discourse on gender and the law issues. We seek to enrich the dialogue between the sexes by cultivating interdisciplinary discussions and encouraging the affirmation of differences. Finally, we are committed to the challenge of presenting an integrated perspective: one that will empower all women.

History and Purpose

The Texas Journal of Women and the Law was established in 1990, fulfilling the vision of our founding members who sought to create a journal that would inspire dialogue about legal, social, and political issues affecting women—their rights, their bodies, their careers, their families. Our founders recognized the need for a forum within The University of Texas School of Law in which to confront, discuss, and challenge legal issues facing women. The *Journal* created such a forum. Our focus has grown to include all areas of gender and law. As students of the law and participants in the evolution of the status of women in society, we recognize that feminist legal inquiry should incorporate a broad spectrum of social equality issues, including issues related to race, ethnicity, class, religion, sexual orientation, and basic human and civil rights.

Texas' rich history and cultural diversity provide a fertile ground for producing innovative approaches to persistent questions of social equality. We identify with the tradition of progressive women and men in Texas as well as the generation of unheralded individuals who have fought for gender equality in their own time. Our generation has benefited from the efforts of other feminists, and we strive now to make our contribution to the next generation.

Our focus has continued to grow to include issues related to transgender persons, sexual harassment, and reproductive rights. As such, in 2014, the Volume 24 Editorial Board sought to change the name of the *Journal* to reflect the evolution of our focus, and to increase the inclusiveness of our *Journal* in the face of a changing nation. We present the Texas Journal of Women, Gender, and the Law.

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LGBT ELDERS IN A POST-*WINDSOR* WORLD: THE PROMISE AND LIMITS OF MARRIAGE EQUALITY

Nancy J. Knauer^{*}

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^{*} Herman Stern Professor of Law and Director of Law and Public Policy Programs, Temple University, Beasley School of Law. An earlier version of this Article was presented at a plenary session on the “Mismeasure of Equality” held at the 2014 annual meeting of the Law & Society Association in Minneapolis, Minnesota on May 31, 2014.

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This Article addresses the uncertain post-Windsor legal landscape from the perspective of LGBT elders and older adults. The demise of DOMA has enhanced access to federal benefits, but it has also increased the complexity that LGBT individuals and their families face as they begin to plan for retirement and beyond. Additionally, marriage equality—even when it is recognized nationwide—will not help LGBT elders and older adults tackle many of the obstacles they face when trying to navigate the challenges of aging. Fully addressing these challenges will require comprehensive legal reform and social change that includes greater recognition for chosen family, legal protections that span the life course, and broad-based cultural competency awareness with respect to LGBT aging and related issues.

Although systemic legal and social change may take decades, LGBT elders and older adults can take concrete planning steps to improve their chances of aging in dignity, to preserve their autonomy, and to protect their interests. After discussing some of the unique challenges facing LGBT elders and older adults, this Article reviews the current state of marriage equality and the conflicting federal rules governing the recognition of same-sex marriage with respect to federal taxes, Social Security, and other benefits. It then outlines the types of financial, estate, and personal planning options available to address (1) the absence of uniform marriage equality, (2) the legal fragility of chosen family, and (3) the persistence of anti-LGBT bias and discrimination. In particular, this Article urges LGBT older adults to develop an integrated elder care plan that addresses a number of issues not typically covered in the traditional estate plan, such as issues related to gender identity, living arrangements, and caregivers.

INTRODUCTION

At the age of 84, Edie Windsor, a petite, well-coifed widow, became the unlikely face of the marriage equality movement.¹ Edie had married her long-time partner Thea Spryer in Canada in 2007 after Thea was diagnosed with a life-threatening illness.² The couple first met in 1963 and, by the time they married, they had been engaged for over 40 years.³ When Thea

1. Eliza Gray, *Edith Windsor, The Unlikely Activist*, TIME, Dec. 11, 2013, available at <http://poy.time.com/2013/12/11/runner-up-edith-windsor-the-unlikely-activist/> (noting that Edie has been “transformed into an icon of the gay rights movement”).

2. Peter Applebome, *Reveling in Her Supreme Court Moment*, N.Y. TIMES, Dec. 10, 2012, <http://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html> (noting Thea’s “grim prognosis”).

3. EDIE & THEA: A VERY LONG ENGAGEMENT (Bless Bless Productions, Sundance Channel & Graphic Pictures 2009) (detailing the story of Edie and Thea’s engagement in an award-winning documentary). See also Diane Anderson-Minshall, *How a Love Story Led to*

died in 2009, Edie was presented with a federal estate tax bill for \$363,053 because she did not qualify for the unlimited marital deduction that is designed to provide tax relief for surviving spouses.⁴ Section 3 of the Defense of Marriage Act (DOMA) mandated that for all federal purposes marriage was only between a man and a woman, and the Internal Revenue Service (IRS) had no choice but to disallow Edie's claim for the marital deduction.⁵ Edie challenged Section 3 of DOMA on the grounds that it violated the Due Process Clause and Equal Protection guarantees of the Fifth Amendment, and a majority of the U.S. Supreme Court agreed.⁶ In *United States v. Windsor*, the Court ruled that Section 3 "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."⁷

On the day the case was argued, Edie appeared triumphant on the steps of the U.S. Supreme Court, flanked by her lawyers.⁸ The picture of Edie with her arms outstretched in victory, dressed in her stylish pantsuit and bright pink scarf, has become an iconic and galvanizing image of the lesbian, gay, bisexual, and transgender (LGBT) rights movement.⁹ Heralded as a landmark opinion, the change brought about by *Windsor* was immediate and swift, affecting every married same-sex couple in the United States who pays taxes or receives federal benefits.¹⁰ The potential scope of

the Supreme Court: Edie & Thea's Long Engagement, ADVOCATE (Apr. 22, 2013, 7:16 AM), <http://www.advocate.com/politics/marriage-equality/weddir-g-channel/2013/04/22/how-love-story-led-supreme-court-edie-theas>.

4. Andrew M. Harris, *Widow's \$363,000 Tax Bill Led to Obama Shift on Marriage Act*, BLOOMBERG (Feb. 27, 2011, 11:01 PM), <http://www.bloomberg.com/news/2011-02-28/a-363-000-tax-bill-to-widow-led-to-obama-shift-in-defense-of-marriage-act.html> (noting that Thea's "death triggered a \$363,053 federal tax bill from which her widow would have been exempt had she been married to a man").

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

6. See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding that Section 3 of DOMA violated the Due Process and Equal Protection Clauses of the Fifth Amendment). See also Sheryl Gay Stolberg, *After Rulings, Same-Sex Couples Grapple with Diverging State Laws*, N.Y. TIMES, June 28, 2012, <http://www.nytimes.com/2013/06/29/us/after-rulings-same-sex-couples-grapple-with-diverging-state-laws.html> (noting that Edie will be entitled to a refund "with interest").

7. *Windsor*, 133 S. Ct. at 2696.

8. Larry McShane & Joseph Straw, *Edith Windsor is 'Thrilled and Exalted' After Presenting Her Gay Marriage Equality Case Before Supreme Court Justices*, N.Y. DAILY NEWS (Mar. 27, 2013, 10:39 PM), <http://www.nydailynews.com/new-york/edith-windsor-thrilled-gay-marriage-supreme-court-case-article-1.1300919>.

9. Justin Snow, *From the Supreme Court Forward: What Was & What's Next for the Marriage Equality Movement*, METRO WEEKLY (Apr. 3, 2013), available at <http://www.metroweekly.com/2013/04/from-the-supreme-court-forward/>.

10. See, e.g., Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES, June 26, 2013,

the ruling extends beyond the issue of federal recognition and has overshadowed the higher profile companion case of *Hollingsworth v. Perry* that was argued by the legal dream team of Ted Olson and David Boies.¹¹ When Edie filed her lawsuit in 2010, only five states recognized same-sex marriage.¹² The number now stands at thirty-six states with full marriage equality,¹³ and decisions from U.S. Circuit Courts and numerous federal district courts have invalidated state prohibitions on same-sex marriage, citing *Windsor* as precedent.¹⁴

Post-*Windsor*, the pace of change with respect to marriage equality was so rapid and the outlook so bright that some members of the media declared that the struggle for LGBT rights was won.¹⁵ Of course, such reports

<http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html> (referring to *Windsor* as a “civil rights landmark”); Gray, *supra* note 1 (“It is difficult to overstate the practical benefits to every gay American following *Windsor*’s victory in June.”); see also Bucks Editors, *Same-Sex Marriage and Personal Finances: Further Reading*, N.Y. TIMES, June 26, 2013, <http://bucks.blogs.nytimes.com/2013/06/26/same-sex-marriage-and-personal-finances-further-reading/> (providing several sources addressing the financial implications of the recognition of same-sex partnerships).

11. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (holding that opponents of same-sex marriage did not have standing, effectively leaving intact the California Supreme Court’s ruling that invalidated a ballot initiative defining marriage as a union of a man and a woman). See Richard Socarides, *Fighting, and Winning, Against Prop 8*, NEW YORKER, Apr. 19, 2014, available at <http://www.newyorker.com/news/news-desk/fighting-and-winning-against-prop-8> (noting that “[i]t was the Court’s ruling in *Windsor*, not the Proposition 8 case, that has become the legal basis for a number of other cases seeking full federal recognition of same-sex marriage rights, which are now working their way through the appeals courts”); see also Adam Goodheart, *A Fight for Marriage Equality, and Over History*, N.Y. TIMES, Apr. 30, 2014, <http://www.nytimes.com/2014/05/01/books/forcing-the-spring-by-jo-becker.html> (reviewing a controversial book on the *Perry* litigation).

12. Gray, *supra* note 1.

13. *Marriage Center*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/marriage-center> (last visited Jan. 24, 2015). As of January 6, 2015, thirty-six states and the District of Columbia recognize same-sex marriage. *Id.*

14. See, e.g., *Bishop v. Smith*, 760 F.3d 1070, 1096 (10th Cir. 2014) (holding that the Oklahoma same-sex marriage ban violates the Due Process Clause and Equal Protection Clause of U.S. Constitution); *Kitchen v. Herbert*, 755 F.3d 1193, 1229-30 (10th Cir. 2014) (holding the same for Utah’s ban); *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) (holding the same for Texas’s ban); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014) (holding the same for Virginia’s ban). The U.S. Supreme Court will hear four consolidated appeals from the Sixth Circuit. U.S. SUPREME COURT, ORDER LIST: 574 U.S. (Jan. 16, 2015), available at http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf.

15. See, e.g., David Von Drehle, *How Gay Marriage Won*, TIME, Mar. 28, 2013, available at <http://swampland.time.com/2013/03/28/how-gay-marriage-won/> (declaring victory after the cases were argued before Supreme Court); see also David Crary, *Gay Rights Victories in 2013 Pile Up*, HUFFINGTON POST (Nov. 5, 2013), http://www.huffingtonpost.com/2013/11/05/gay-rights-victories-2013_n_4217854.html (“Even though we’re making rapid progress on marriage equality, and the entire movement seems unstoppable, there are still big pockets of resistance.”); Luisita Lopez Torregrosa,

were not only premature, but they conflated marriage equality with the larger LGBT-rights movement. Marriage remains highly contested in the United States,¹⁶ and even the federal government has not been able to implement the *Windsor* decision with a uniform rule regarding marriage recognition.¹⁷ Moreover, marriage equality will only mandate access to the institution of marriage and its attendant rights, obligations, and benefits.¹⁸ Many other pressing issues face LGBT individuals, such as bullying in schools, health disparities, and anti-LGBT bias or discrimination.¹⁹ Apart from its normalizing influence, marriage equality will not directly address these issues. In particular, it will not address some of the primary concerns expressed by LGBT elders and older adults, including income insecurity, the availability of LGBT-friendly senior housing, the legal fragility of chosen family, and anti-LGBT bias and discrimination that extends far beyond the workplace to senior services, medical care, and housing.²⁰

Victories Roll On, But Is the Battle for Gay Rights Over?, WASH. POST, Feb. 28, 2014, <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/02/28/victories-roll-on-but-is-the-battle-for-gay-rights-over/>. Some commentators had begun to declare victory in anticipation of the pending cases. See, e.g., LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION 344 (2012) (discussing “celebrating the [v]ictory of the gay revolution”).

16. As of January 6, 2015, fourteen states still prohibit gay marriage. *Marriage Center*, *supra* note 13.

17. For many purposes, the federal government will recognize all legal same-sex marriages even if the couple lives in a nonrecognition state, but for other purposes it follows a strict “state-of-domicile” rule. See *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting). See, e.g., *Boyer v. Comm’r*, 732 F.2d 191, 194 (D.C. Cir. 1984) (holding that law of the state of domicile controls); *Chagra v. Comm’r*, 68 T.C.M. (RIA) ¶ 91,366, at 91-1839 n.3 (1991) (holding that the law of the state of celebration controls); Rev. Rul. 58-66, 1958-1 C.B. 60 (holding that the law of the state of celebration controls for common law marriage); *Peveier v. Comm’r*, 48 T.C.M. (CCH) 502 (1979) (holding that the law of the state of residence controls); *Feinberg v. Comm’r*, 198 F.2d 260, 263 (3d Cir. 1952) (holding that the law of the state of celebration controls for divorce).

18. The benefits attached to marital status are considerable. For example, there are an estimated “1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.” Dayna K. Shah, Associate Gen. Counsel, GAO-04-353R Defense of Marriage Act, Letter to Majority Leader Senator Frist, U.S. GOV’T ACCOUNTABILITY OFF. (Jan. 23, 2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

19. See, e.g., Robin S. Maril, *Creating an Inclusive Administrative Response to Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 291 (2013) (describing federal executive response to LGBT bullying in schools); *Lesbian, Gay, Bisexual, and Transgender Health*, HEALTHY PEOPLE 2020, <http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last visited Oct. 28, 2014) (noting “[r]esearch suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights”); Emma Margolin, *Studies Show Connection Between Anti-Gay Bias and Death*, MSNBC (Feb. 23, 2014, 9:15 AM), <http://www.msnbc.com/msnbc/can-homophobia-kill-you> (summarizing two research studies showing connection between anti-gay bias and high mortality).

20. See Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1 (2009) [hereinafter Knauer, *LGBT Elder Law*] (discussing the unique concerns

This Article addresses the uncertain post-*Windsor* legal landscape from the perspective of LGBT elders and older adults. The demise of DOMA has enhanced access to federal benefits, but it has also increased the complexity that LGBT individuals and their families face as they begin to plan for retirement and beyond. Additionally, marriage equality—even when it is recognized nationwide²¹—will not help LGBT elders and older adults tackle many of obstacles they face when trying to navigate the challenges of aging. Fully addressing these challenges will require comprehensive legal reform and social change that includes greater recognition for chosen family, legal protections that span the life course, and broad-based cultural competency awareness with respect to LGBT-aging and related issues.²² As attitudes on high-profile issues such as marriage equality continue to evolve, it is likely that anti-LGBT bias will continue to decrease, but systemic legal and social change may take decades.²³

In the meantime, there are concrete planning steps that LGBT elders and older adults can take to improve their chances of aging in dignity and with security, preserve their autonomy, and protect their interests. This Article outlines the types of financial, estate, and personal planning options available to address: (1) the absence of uniform marriage equality, (2) the legal fragility of chosen family, and (3) the persistence of anti-LGBT bias and discrimination. In particular, this Article urges LGBT older adults to develop an integrated elder care plan that addresses a number of issues not typically covered in the traditional estate plan, such as issues related to gender identity, living arrangements, and caregivers.

Part I of this Article provides a brief overview of the unique challenges that LGBT individuals face as they age. Part II reviews the current state of marriage equality and the conflicting federal rules governing the recognition of same-sex marriage with respect to federal taxes, Social Security, and other benefits. Part III discusses the special importance of advance planning for LGBT elders and older adults. Although all older adults

facing LGBT elders and older adults).

21. On January 16, 2015, the U.S. Supreme Court granted certiorari in four appeals challenging state marriage bans from the Sixth Circuit. U.S. SUPREME COURT, ORDER LIST: 574 U.S., *supra* note 14. The Court consolidated the following cases: *Obergefell v. Hodges*, *Tanco v. Haslam*, *DeBoer v. Snyder*, and *Bourke v. Beshear*. *Id.* They represent appeals from Ohio, Tennessee, Michigan, and Kentucky, respectively. *Id.* An opinion is expected in June 2015 and has the potential to mandate marriage nationwide. Adam Liptak, *Taking Up Gay Marriage, But on Its Own Terms*, N.Y. TIMES, Jan. 17, 2015, <http://www.nytimes.com/2015/01/18/us/supreme-court-same-sex-marriage.html>.

22. Knauer, *LGBT Elder Law*, *supra* note 20.

23. See, e.g., Jo Becker, *How the President Got to 'I Do' on Same-Sex Marriage*, N.Y. TIMES MAG., Apr. 16, 2014, available at <http://www.nytimes.com/2014/04/20/magazine/how-the-president-got-to-i-do-on-same-sex-marriage.html> (discussing President Obama's statement that his thinking on same-sex marriage had been "evolving" over time).

should plan for financial security in retirement and develop an estate plan, these steps are essential for LGBT individuals, who often must plan against the strong legal and normative preferences for next of kin.²⁴ Recognizing that private planning documents are necessarily an imperfect alternative for meaningful legal and social reform, Part IV explores the types of reform that is necessary to address the challenges faced by LGBT older adults, specifically considering reforms on the federal and state level, as well as market-based strategies. A brief conclusion reflects on the complexity of living (and planning) on the edge of equality.

I. LGBT ISSUES AND AGING

The brief that Edie Windsor filed with the Supreme Court details some of her experiences in pre-Stonewall²⁵ America when homosexuality was both pathologized and criminalized, and gender variance was strictly policed.²⁶ This history has had a profound impact on many members of her generation—those LGBT individuals who came of age before the advent of the Gay Liberation movement in the 1970s.²⁷ The members of the pre-Stonewall generation are more likely to be estranged from their families of origin,²⁸ and they are less likely to have had children.²⁹ They are more like-

24. The general default rules for probate and decisionmaking purposes will prioritize next of kin, leaving unmarried partners and chosen families in the status of mere legal strangers. See discussion *infra* Part III. B.

25. The term “pre-Stonewall” refers to the Stonewall riots that began on June 27, 1969 when police raided a gay bar, the Stonewall Inn, in Greenwich Village. See generally MARTIN DUBERMAN, STONEWALL (1993) (discussing history of Stonewall through the lives of six individuals). The disturbances continued sporadically for several days. *Id.* at 203-09. The date of the riots is routinely used to mark the beginning of the contemporary gay rights movements, although historians differ as to the importance of the event. See ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 30 (1996) (“Stonewall functions in a symbolic register as a convenient if somewhat spurious marker of an important cultural shift away from assimilationist policies and quietist tactics, a significant if mythological date for the origin of the gay liberation movement.”)

26. The brief notes that, “Ms. Windsor’s own life experiences compellingly reflect the history of lesbians and gay men in our nation over the past decades” Response in Support of Writ of Certiorari Before Judgment at 9, *Windsor*, 133 S. Ct. 786 (No. 12-307).

27. See generally *id.* at 30-43.

28. Judith C. Barker, *Lesbian Aging: An Agenda for Social Research*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 60-61 (Gilbert Herdt & Brian de Vries eds., 2004) [hereinafter entire collection referred to as GAY AND LESBIAN AGING]. Estrangement from next of kin can be understood as a natural consequence of the pre-Stonewall views on homosexuality. *Id.*

29. Brian de Vries & John A. Blando, *The Study of Gay and Lesbian Aging: Lessons for Social Gerontology*, in GAY AND LESBIAN AGING, *supra* note 28, at 3, 7 (describing how gay men and lesbians are less likely to have children). For the pre-Stonewall generation, children were most likely the product of prior heterosexual relationships, rather than intentionally conceived within same-sex relationships. See generally DANIEL WINUNWE RIVERS,

ly to be single and to live alone.³⁰ As long-time survivors of homophobia and transphobia, they experience high levels of financial insecurity,³¹ as well as health disparities.³² They are also much more likely than younger LGBT individuals to be closeted in at least some aspect of their lives.³³ Indeed, they are “the last generation who had to spend their adolescence and young adult years in hiding.”³⁴

Although Edie shares a common history with her age cohort, it is important to resist viewing Edie as the symbol of LGBT aging, just as it is important to resist conflating marriage equality with the larger LGBT-rights movement. Edie Windsor, a runner up for the 2013 TIME Magazine Person of the Year,³⁵ is simply not representative of the pre-Stonewall gen-

RADICAL RELATIONS: LESBIAN MOTHERS, GAY FATHERS, & THEIR CHILDREN IN THE UNITED STATES SINCE WORLD WAR II (2013). Even gay and lesbian elders who do have children from prior heterosexual relationships may be estranged from them and therefore not able to call on them for support as they age. *Id.* Transgender elders may have similar experiences with respect to children from pre-transition marriages. *Id.*

30. Anthony R. D’Augelli & Arnold H. Grossman, *Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, and Bisexual Older Adults*, 16 J. INTERPERSONAL VIOLENCE 1008, 1011 (2001) (reporting results of large national study where 63% of respondents lived alone). See also *Social Isolation, SERVS. & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS* (SAGE), <http://www.sageusa.org/issues/isolation.cfm> (last visited Oct. 15, 2014) (noting that “LGBT elders are more likely to live alone and with thinner support networks”).

31. RANDY ALBELDA, M.V. LEE BADGETT, ALYSSA SCHNEEBaum & GARY J. GATES, WILLIAMS INST., *POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* ii (Mar. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf> (detailing economic factors that influence the levels of poverty among lesbian, gay, and bisexual individuals).

32. MOVEMENT ADVANCEMENT PROJECT ET AL., *LGBT OLDER ADULTS AND HEALTH DISPARITIES* (Sept. 2010), available at <https://www.lgbtmap.org/file/lgbt-older-adults-and-health-disparities.pdf>.

33. FUNDERS FOR LESBIAN & GAY ISSUES, *AGING IN EQUITY: LGBT ELDERS IN AMERICA* 10 (2004), available at <http://www.lgbtfunders.org/files/AgingInEquity.pdf> [hereinafter *AGING IN EQUITY*] (describing how “[f]or many LGBT elders in their 70s and 80s ‘passing’ as heterosexual has been a lifelong strategy,” while “LGBT elders of the baby boom generation have lived most of their lives out of the closet”). The study also showed that “seventy-five percent of LGBT elders reported not being completely open about their sexual orientation to health care workers.” *Id.*

34. SKI HUNTER, *MIDLIFE AND OLDER LGBT ADULTS: KNOWLEDGE AND AFFIRMATIVE PRACTICES FOR THE SOCIAL SERVICES* 13-14 (2005). To put these dates in perspective, the LGBT elders who turn sixty-five in 2014 were twenty years old in 1969, the year of the Stonewall riots. They were twenty-four when homosexuality was declassified as a mental illness by the American Psychiatric Association in 1973. See generally RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987) (describing history of controversy relating to declassification of homosexuality and its deletion from the *Diagnostic and Statistical Manual III* and how the classification of homosexuality as a severe sociopathic personality disorder was used to justify a wide range of legal and social disabilities).

35. Eliza Gray, *Person of the Year 2013 Shortlist: Edith Windsor*, TIME,

eration as a whole. Many members of that generation are facing the challenges of aging under very different circumstances—estranged from family, disconnected from the larger LGBT community, and ignored by senior service providers.³⁶

Over the last several years, there has been increased interest in issues related to LGBT older adults and LGBT aging. National advocacy organizations now address LGBT aging issues,³⁷ as do mainstream aging and senior organizations.³⁸ The federal government has recognized LGBT seniors as an especially vulnerable population in administrative guidance interpreting the Older Americans Act (OAA).³⁹ State governments have also taken notice. California passed anti-discrimination protections specifically aimed at LGBT seniors,⁴⁰ and Massachusetts convened a Commission on LGBT Aging.⁴¹ Notwithstanding this new level of awareness, considerable disparities remain.

Many LGBT elders and older adults are at a severe disadvantage as they age with respect to caregiving. In the United States, over 80% of all caregiving is provided on an “informal” or unpaid basis, and the vast majority of that care is performed by younger relatives.⁴² However, LGBT el-

http://content.time.com/time/video/player/0,32068,2916156422001_2159858,00.html (last visited Nov. 10, 2014).

36. See generally Knauer, *LGBT Elder Law*, *supra* note 20.

37. For example, the Human Rights Campaign (HRC), the largest LGBT-advocacy organization, includes “Health & Aging” as one of its primary issues. *Topics*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/topics> (last visited Nov. 16, 2014).

38. The website of the American Association of Retired Persons (AARP) now includes special resources for the LGBT Community. *LGBT News*, AARP, <http://www.aarp.org/relationships/friends-family/aarp-pride.html> (last visited Oct. 10, 2014).

39. In 2012, the Administration on Aging issued administrative guidance clarifying that LGBT elders could be targeted as a population of “greatest social need” for purposes of the OAA. *Frequently Asked Questions: Targeting*, ADMIN. FOR CMTY. LIVING, ADMIN. ON AGING, http://www.aoa.gov/AOA_programs/OAA/resources/faqs.aspx (last visited Oct. 11, 2014) (recognizing “isolation due to sexual orientation or gender identity may restrict a person’s ability to perform normal daily tasks or live independently”).

40. *California Legislature Passes Bill to Ensure LGBT Seniors Receive Respectful, Competent Elder Care*, EQUAL. CAL. (Sept. 3, 2013), <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=5609563&ct=13257279¬oc=1> [hereinafter *California Legislature Passes Bill*] (explaining that California Assembly Bill 663 integrated LGBT-cultural-competency instruction into the training received by residential care facility administrators).

41. Janson Wu, *Equal Dignity at Every Stage of Our Lives: The MA Commission on LGBT Aging*, GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD) (Apr. 16, 2014), <http://www.glad.org/current/post/equal-dignity-at-every-stage-of-our-lives-the-ma-commission-on-lgbt-aging> (noting the Commission “is the first statewide commission in the country to focus on the needs of LGBT seniors”).

42. BARBARA COLEMAN & SHEEL M. PANDYA, AARP PUB. POLICY INST., FAMILY CAREGIVING AND LONG-TERM CARE (2002), *available at* http://assets.aarp.org/rgcenter/il/fs91_ltc.pdf. A 2009 national study showed that the average

ders and older adults are often estranged from their next of kin, given the negative views that were prevalent in pre-Stonewall America.⁴³ As noted above, they are also more likely to be single and less likely to have children.⁴⁴ Instead, they rely on what anthropologists refer to as “chosen family” for support.⁴⁵ These families of choice have two primary shortcomings: they are legally very fragile, and they are often single-generational.⁴⁶ The single-generational nature of chosen family means that a friendship group will age in unison, thereby creating reciprocal and overlapping caregiving responsibilities.⁴⁷

Without natural caregivers, LGBT elders and older adults may be more likely to require assisted living arrangements or home health care.⁴⁸ However, LGBT elders also report deep concern that they will experience anti-LGBT bias on the part of service providers and extreme trepidation regarding any sort of congregate living facilities.⁴⁹ For these reasons, LGBT elders are often determined to “age in place.”⁵⁰ They will resist assisted liv-

age of caregivers for the group studied was 50 years old, while the average age of care recipients was seventy-seven years old; relatives comprise 89% of all unpaid caregivers for the group studied. LINDA L. BARRETT, NAT'L ALLIANCE FOR CAREGIVING, CAREGIVING IN THE U.S.: A FOCUSED LOOK AT THOSE CARING FOR SOMEONE AGE 50 OR OLDER 14, 16 (2009), available at <http://www.caregiving.org/data/FINALRegularExSum50plus.pdf>.

43. See Barker, *supra* note 28 (discussing likelihood of estrangement).

44. See *supra* note 29 (discussing lack of partners and children).

45. See generally KATH WESTON, *FAMILIES WE CHOOSE* (1997). See also Douglas C. Kimmel, *Issues to Consider in Studies of Midlife and Older Sexual Minorities*, in *GAY AND LESBIAN AGING*, *supra* note 28, at 267 (describing “family of choice”); de Vries & Blando, *supra* note 29, at 8-11 (explaining that many LGBT individuals have alternate family structures based on camaraderie and caring); Jacqueline S. Weinstock, *Lesbian Friendships At and Beyond Midlife: Patterns and Possibilities for the 21st Century*, in *GAY AND LESBIAN AGING*, *supra* note 28, at 177-210 (explaining that for many lesbians, “friends [are] like family”).

46. See Andrew J. Hostetler, *Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men*, in *GAY AND LESBIAN AGING*, *supra* note 28, at 143, 159-61 (noting that intergenerational relationships are not common in the gay and lesbian community).

47. In one study, 90% of LGBT elders reported that their primary support group consisted of close friends. Arnold H. Grossman, Anthony R. D'Augelli & Scott L. Herschberger, *Social Support Networks of Lesbian, Gay, and Bisexual Adults 60 Years of Age and Older*, 55 J. GERONTOLOGY: PSYCHOLOGICAL SCI. 171, 174 (2000) (arguing that gay and lesbian elders surveyed received more social support from friends, whereas heterosexual elders received more social support from family). This same study found that close friends provided 80% of the social support (“socializing”), 62% of the emotional support, 55% of the practical support, and 10% of the financial support for LGBT elders. *Id.* at 176.

48. The majority of aging individuals rely solely on informal (i.e., unpaid) caregiving. COLEMAN & PANDYA, *supra* note 42.

49. See Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, <http://www.nytimes.com/2007/10/09/us/09aged.html> (noting that LGBT elders “live in fear of the day when they are dependent on strangers for the most personal care”).

50. LGBT elders, like the majority of Americans, also desire to “age in place,” and this preference is reinforced by intense fear that they will experience discrimination and anti-

ing or long-term care options but also underutilize supportive services that are designed to help elders live independently in the community.⁵¹ As a result, LGBT elders and older adults are at an enhanced risk of self-neglect and social isolation.⁵²

LGBT elders who are required to enter senior living facilities report a strong pressure to be closeted—a feeling that is shared by LGBT older adults.⁵³ As one aging LGBT baby boomer explained, “as strong as I am today . . . when I’m at the gate of the nursing home, the closet door is going to slam shut behind me.”⁵⁴ The resort to the closet is not surprising given the history of the pre-Stonewall generation who are very familiar with the use of the closet as an adaptive strategy.⁵⁵ In addition to the dignitary harm of having to keep an essential part of oneself hidden, it is clear that the closet has adverse health consequences. The *New York Times* quoted Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York, who explained, “There is something special about having to hide this part of your identity at a time when your entire identity is threatened.”⁵⁶ Dr. Lantz notes that closeted seniors face “a faster pathway to depression, failure to thrive and even premature death.”⁵⁷

LGBT bias in mainstream senior housing options. Nancy Orel, *Community Needs Assessment: Documenting the Need for Affirmative Services for LGBT Older Adults*, in *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES* 226, 233 (Douglas Kimmel, Tara Rose & Steven David eds., 2006) [hereinafter entire collection referred to as *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING*].

51. For example, according to a study conducted by the U.S. Department of Health and Human Services (HHS), LGBT elders are only 20% as likely as their non-LGBT peers to take advantage of federally funded aging services, as well as other entitlements such as housing assistance and food stamps. Elizabeth Kling & Douglas Kimmel, *SAGE: New York City’s Pioneer Organization for LGBT Elders*, in *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING*, *supra* note 50, at 266.

52. JAIME M. GRANT, WITH GERARD KOSKOVICH, M. SOMJEN FRAZER, SUNNY BJERK & SAGE, NAT’L GAY & LESBIAN TASK FORCE POLICY INST., *OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS* 91-92 (2010), available at http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf (explaining that isolation occurs when a person cannot access needed social and medical support services).

53. According to a 2006 Metlife survey of 1000 LGBT individuals age forty to sixty-one, 27% of participants reported a deep concern that they would be discriminated against as they age because of their sexual orientation. METLIFE, *OUT AND AGING: THE METLIFE STUDY OF LESBIAN AND GAY BABY BOOMERS* 5 (2006), available at <https://www.metlife.com/assets/cao/mmi/publications/studies/mmi-out-aging-lesbian-gay-retirement.pdf>.

54. See Gross, *supra* note 49 (quoting LGBT older adult).

55. For example, a 2004 report on LGBT elders explained that “‘passing’ as heterosexual has been a lifelong survival strategy.” *AGING IN EQUITY*, *supra* note 33, at 5.

56. Gross, *supra* note 49, at 2.

57. *Id.*

For transgender elders, the closet is not always an option because many pre-Stonewall transgender individuals transitioned without medical intervention.⁵⁸ Even transgender individuals who transition with medical assistance often do not have “bottom surgery.”⁵⁹ As a result, a transgender elder’s physical characteristics may not conform to his or her gender identity and performance, making the elder vulnerable to the prejudice and hostility of personal health aides.⁶⁰ Transgender elders may also have difficulty navigating sex-segregated senior facilities.⁶¹ Transgender elders in long-term care facilities have been forced to wear the “wrong” clothes and to room with members of the opposite sex because the facility refused to honor the elder’s gender identity.⁶² There have also been reports of service providers refusing to wash or provide personal care assistance for transgender residents.⁶³

In addition to the concerns over housing and encountering anti-LGBT bias, LGBT elders report high levels of financial insecurity and high levels of health disparities. For example, partnered same-sex elder couples lag behind their different-sex peers on all economic indicators.⁶⁴ Elder partnered female same-sex couples are almost twice as likely to live below the poverty line as elder heterosexual couples.⁶⁵ In addition, disability signifi-

58. See generally Barker, *supra* note 28.

59. See John Eligon, *Suits Dispute City’s Rule on Recording Sex Changes*, N.Y. TIMES, Mar. 22, 2011, <http://www.nytimes.com/2011/03/23/nyregion/23gender.html> (reporting 80% of transgender women and 95% of transgender men in New York have not had genital conforming surgery, “bottom surgery”).

60. See SEAN CAHILL, KEN SOUTH & JANE SPADE, POLICY INST. OF THE NAT’L GAY & LESBIAN TASK FORCE FOUND., OUTING AGE: PUBLIC POLICY ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS 17 (2000), <http://nwnetwork.org/wp-content/uploads/2012/08/2000-NGLTF-Outing-Age.pdf> (explaining that transgender individuals fear entering long-term care due to fear of embarrassment and harassment).

61. Daniel Redman, *Fear, Discrimination and Abuse: Transgender Elders and the Perils of Long-Term Care*, AGING TODAY, Mar.-Apr. 2011, <http://www.asaging.org/blog/fear-discrimination-and-abuse-transgender-elders-and-perils-long-term-care>.

62. LAMBDA LEGAL, TRANS AGING: WE’RE STILL HERE!, available at http://www.lambdalegal.org/sites/default/files/publications/downloads/ll_toolkit_trans-aging_high.pdf (last visited Dec. 5, 2014). See also NAT’L SENIOR CITIZENS LAW CTR. ET AL., LGBT OLDER ADULTS IN LONG-TERM CARE FACILITIES: STORIES FROM THE FIELD (2011), available at <http://nwnetwork.org/wp-content/uploads/2012/08/2010-NSCLC-LGBT-Older-Adults-in-Long-Term-Care-Survey-Report2.pdf> (providing responses from a survey of LGBT older adults).

63. *Id.* at 16.

64. Andrea Gallagher, *Living in Hiding*, SENIOR CONCERNS (May 2014), available at <http://www.seniorconcerns.org/Information/TheOtherSideof50/TabId/1710/ArtMID/3800/ArticleID/2941/Living-in-hiding.aspx>. See also M.V. LEE BADGETT, LAURA E. DURSO & ALYSSA SCHNEEBAUM, WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY 1 (June 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.

65. *Id.* at 15. To some extent, this financial insecurity represents the inevitable effect of

cantly increases the likelihood of living in poverty for same-sex couples.⁶⁶ LGBT elders may also have a difficult relationship with the medical profession, given their experience of living through a time when homosexuality was classified as a severe mental illness and grounds for being institutionalized.⁶⁷ Surveys indicate a widespread distrust of the medical profession among LGBT elders and a lack of confidence that they will receive treatment that is not tainted by anti-LGBT bias.⁶⁸

To some extent, the challenges facing LGBT elders may be generational. The LGBT older adults who now are approaching senior status have benefited more directly from greater freedom and recognition—not to mention the expanding legal protections.⁶⁹ Younger generations of LGBT individuals are less likely to be estranged from their families and more likely to parent by creating intentional LGBT families.⁷⁰ Despite these changing demographics, the experiences of our LGBT elders provide a cautionary tale about the effect of the aging process on our ability to withstand and navigate bias. Studies indicate that LGBT individuals who are approaching their senior years are more fearful of aging than their non-LGBT peers.⁷¹ They also worry about encountering anti-LGBT bias from service provid-

a lifetime of discrimination, but is it also aggravated by affirmative legal barriers that prohibit the recognition of same-sex relationships. *Id.* at 5.

66. *Id.* at 15.

67. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 62 (1999) (describing medical intervention in the form of civil commitment, electro-shock therapy, even “lobotomies, electrical and pharmacological shock therapy, and . . . castration”).

68. In terms of health care, research suggests pre-Stonewall life experiences continue to inform the way LGBT elders approach their relationships with medical professionals. For example, Judith Barker notes that older lesbians are “especially wary and fearful of health care and other service providers with their power to disrupt everyday life.” Barker, *supra* note 28, at 54. LGBT elders often fail to disclose their sexual orientation and will avoid encounters with medical professionals to the extent possible. For example, the Gay and Lesbian Medical Association found “in an effort to avoid . . . bias or because of internalized homophobia, LGBT patients frequently withhold personal information about their sexual orientation, gender identity, practices, and behavioral risks from their health care providers.” GAY & LESBIAN MED. ASS’N, *HEALTHY PEOPLE 2010: COMPANION DOCUMENT FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) HEALTH* 49 (Apr. 2001), available at <http://www.nalgap.org/PDF/Resources/HP2010CDLGBTHealth.pdf>.

69. Wisconsin was the first state to extend antidiscrimination protection on account of sexual orientation. Justin Tanis, *30 Years Since Wisconsin Became the First State to Ban Discrimination, OUT & EQUAL* (Mar. 28, 2012), <http://outandequal.wordpress.com/2012/03/28/30-years-since-wisconsin-became-the-first-state-to-ban-discrimination/>.

70. For a discussion of the increasing trend among gay men and lesbian to form recognized families, see Weinstock, *supra* note 45, at 198-200. Some commentators have referred to the increase in intentional parenting within same-sex couples as the “gayby boom.” See Erica Goode, *A Rainbow of Differences in Gays’ Children*, N.Y. TIMES, July 17, 2001, <http://www.nytimes.com/2001/07/17/health/a-rainbow-of-differences-in-gays-children.html>.

71. See, e.g., METLIFE, *supra* note 53, at 5.

ers⁷² and express concern that they will not be able to be “out” in senior living facilities.⁷³ The observation that fear of experiencing anti-LGBT bias or discrimination increases with age makes intuitive sense. It is easy to see how incidents that one may have successfully weathered at thirty-five may be much more menacing when experienced by a frail, housebound, eighty-five-year-old. In this regard, the aging process seems to amplify both feelings of difference and vulnerability.⁷⁴

As discussed below, marriage equality will not directly address this sense of vulnerability, the fear of encountering anti-LGBT bias, or the need for LGBT-friendly senior housing alternatives. In terms of income insecurity and the legal fragility of chosen family, there can be no question that the advent of marriage equality will offer partnered LGBT elders and older adults a much-needed measure of legal protection and security, but for some LGBT individuals, marriage is a bit of a mixed bag and may not be a wise financial move.⁷⁵ Going forward, LGBT individuals will have to weigh the benefits of marriage and their newfound equality against its at-

72. A recent study of the treatment of LGBT elders in long-term care facilities documents the fears of LGBT elders, as well as the experiences of friends and family of LGBT elders and social service providers. NAT'L SENIOR CITIZENS LAW CTR. ET AL., *supra* note 62. Released in 2011, the study reports a widespread fear on the part of the LGBT elders regarding the treatment they will receive in a long-term care facility. *Id.* A majority of the LGBT respondents believed that both the staff and the other residents of long-term care facilities would discriminate against an LGBT elder, and only 22% thought that it would be safe to be open about one's identity. *Id.* at 6. In terms of the mistreatment that they had experienced, respondents complained that service providers had refused to provide basic services, such as bathing, toileting, and feeding, because they objected to touching an LGBT individual. *Id.* at 14-15. A number of respondents also reported that long-term care facilities attempted to discharge or refused to admit patients based on their sexual orientation or gender identity. *Id.* at 16. Additional problems included the restriction of medical care and the refusal to honor health care powers of attorney. *Id.* at 11-13. The most frequently reported problem was verbal abuse and harassment on the part of other residents. *Id.* at 10.

73. Jane Gross notes:

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

See Gross, *supra* note 49.

74. Jonathan Starkey, *Gays and Lesbians: Out of Isolation*, NEWSDAY (Feb. 1, 2008, 10:23 AM), available at http://lgbtcare.org/wp-content/uploads/Article_NEWSDAY_Gays_and_lesbians_Out_of_Isolation.pdf.

75. *See generally* SCOTT SQUILLACE, *WHETHER TO WED: A LEGAL AND TAX GUIDE FOR LESBIAN AND GAY COUPLES* (2014). For example, a portion of Social Security benefits may be subject to the federal income tax when an individual's income exceeds a specified threshold. *Benefits Planner: Income Taxes and Your Social Security Benefits*, SOC. SEC. ADMIN. (SSA), <http://www.ssa.gov/planners/taxes.htm> (last visited May 10, 2014). Though married couples' incomes are combined, the benefits threshold is not double that of an individual. *Id.* As a result, seniors may recognize a tax penalty upon marriage. *Id.*

tendant costs.⁷⁶ Additionally, marriage may simply be irrelevant for some LGBT elders and older adults who are not partnered or for whom marriage does not fit with their individual beliefs or worldviews.⁷⁷ For these individuals, the intense focus on marriage equality misses the mark entirely and fails to address their more urgent needs and concerns, including greater legal recognition for chosen families, countering anti-LGBT bias, and finding LGBT-friendly senior housing.

II. LIVING ON THE EDGE OF (MARRIAGE) EQUALITY

The recent advancements in marriage equality have left an uncertain landscape for LGBT individuals and their families. Planning considerations have been greatly complicated by conflicting federal and state rules.⁷⁸ The current federal court challenges have also introduced a high level of uncertainty as marriages have started in some states only to be later blocked by judicial stays.⁷⁹ LGBT individuals who attempt to navigate this post-*Windsor* landscape find that they may be legally married in some states, but not others.⁸⁰ For legally married same-sex couples who reside in nonrecognition states, the situation is even more complicated.⁸¹ Although they are not considered married under the laws of their state of residence, the federal government will recognize their marriage for federal tax purposes under a “state-of-celebration” rule.⁸² They will not, however, be considered married for all federal purposes, because Social Security benefits are subject to

76. *Id.*

77. The debate within the LGBT community over marriage can be traced to an exchange that took place between Paula Ettlebrick and Tom Stoddard in responsive articles in *OUT Magazine*. Paula Ettlebrick, *Since When Was Marriage a Path to Liberation?*, in *LESBIANS, GAY MEN, AND THE LAW* 401-05 (William B. Rubenstein ed., 1993); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIANS, GAY MEN, AND THE LAW*, *supra* at 398-401.

78. See Anthony C. Infanti, *The Moonscape of Tax Equality: Windsor and Beyond*, 108 NW. U. L. REV. COLLOQUY 110 (2013) (describing the conflict between federal and state tax treatment of same-sex couples).

79. For example, in Arkansas 541 same-sex couples were married in 2014 immediately following a favorable court decision, but the courts then stopped the issuance of marriage licenses to same-sex couples pending appeal. *Same-Sex Marriage Bans in Mississippi, Arkansas Overturned*, L.A. TIMES, Nov. 25, 2014, available at <http://www.latimes.com/nation/nationnow/la-na-nn-arkansas-mississippi-same-sex-marriage-20141125-story.html>.

80. See *Marriage Center*, *supra* note 13 (listing thirty-six states and the District of Columbia that now allow same-sex marriages).

81. See *infra* text accompanying notes 117-20 (describing the fourteen states that prohibit same-sex marriage).

82. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

a statutorily imposed “state-of-domicile” rule.⁸³ The resulting confusion presents an ongoing source of stress and uncertainty.⁸⁴

This section provides an overview of the shifting landscape of marriage equality in the United States. It first reviews the current breakdown of marriage laws and marriage prohibitions, as well as the pending court cases. It then explores the confusing state of federal recognition of same-sex marriage, explaining the difference between the “state-of-celebration” rules versus the “state-of-domicile” rule, with special care paid to how they impact the lives of LGBT elders and older adults with respect to federal taxes, Social Security benefits, Medicare and Medicaid, pension and retirement funds, and other federal benefits.

A. *The Present State of Marriage Equality*

The history of marriage equality in the United States has been one of fits and starts, characterized by institutional jockeying where court-mandated marriage has often been thwarted by legislative action and state constitutional amendments.⁸⁵ The campaign for marriage equality, both pro and con, has expended tens of millions of dollars in individual state campaigns,⁸⁶ consumed countless hours of judicial resources, created a variety of new legal relationships along the way, such as civil unions and reciprocal beneficiaries, and forever changed our understanding of family and relationships. Over 70% of the United States population currently lives in a jurisdiction with marriage equality.⁸⁷ Since the *Windsor* decision in 2013,

83. See Lisa Rein & Steve Vogel, *Administration Says It Will Press to Provide Marriage Benefits in All States*, WASH. POST, June 27, 2013, http://www.washingtonpost.com/politics/administration-says-it-will-press-to-provide-marriage-benefits-in-all-states/2013/06/27/2f84d8e6-df5f-11e2-963a-72d740e88c12_story.html.

84. Early on in the marriage equality struggle, the American Psychological Association identified the lack of portability as a significant source of stress. AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE (2004), available at <http://www.apa.org/pi/families/resources/task-force/military-deployment.pdf>.

85. See generally Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23 (2005). See also Carolyn Marshall, *Rushing to Say 'I Do' Before City is Told 'You Can't'*, N.Y. TIMES, Feb. 17, 2004, <http://www.nytimes.com/2004/02/17/national/17GAYS.html> (describing couples waiting in long lines to get marriage licenses).

86. See Sean J. Miller, *The Gay Marriage Price Tag: \$30 Million for Four States, and Not Even Brad Pitt Can Guarantee a Win*, TAKEPART (Oct. 31, 2012), <http://www.takepart.com/article/2012/10/31/marriage-equality-campaign-price-tag-nears-30m-brad-pitt-donation>.

87. *Percent of Population Living in States with Marriage Equality*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/percent-of-population-living-in-states-with-marriage-equality> (last updated Jan. 6, 2015).

the state of marriage equality has been evolving rapidly, and it has become increasingly difficult to stay up to date with the latest developments. The Human Rights Campaign (HRC) maintains statewide maps that show the status of relationship recognition (and prohibitions) as of January 6, 2015.⁸⁸ The following summary is current as of January 2015.

1. Marriage and Marriage Equivalent

Thirty-six states and the District of Columbia issue marriage licenses to same-sex couples.⁸⁹ Same-sex marriages have been legally performed in the United States for over eleven years⁹⁰—Massachusetts became the first state to adopt marriage equality pursuant to the 2003 state supreme court decision *Goodrich v. Public Health*.⁹¹ States first began recognizing same-sex relationships in 1996 when Hawaii enacted its reciprocal beneficiary legislation, granting same-sex couples (and others) the right to designate individuals for certain limited rights.⁹² Vermont followed in 1997 with the status of civil union that extended to same-sex couples all the rights and obligations of marriage.⁹³ In both instances, the legislative creation of an alternate status was designed to forestall the judicial imposition of marriage rights for same-sex couples.⁹⁴

88. *Marriage Center*, *supra* note 13.

89. Alaska (2014), Arizona (2014), California (2013), Colorado (2014), Connecticut (2008), Delaware (2013), District of Columbia (2010), Florida (2015), Hawaii (2013), Idaho (2014), Illinois (2014), Indiana (2014), Iowa (2009), Kansas (2014), Maine (2012), Maryland, (2013), Massachusetts (2004), Minnesota (2013), Montana (2014), Nevada (2014), New Hampshire (2010), New Jersey (2013), New Mexico (2013), New York (2011), North Carolina (2014), Oklahoma (2014), Oregon (2014), Pennsylvania (2014), Rhode Island (2013), South Carolina (2014), Utah (2014), Vermont (2009), Virginia (2014), Washington (2012), West Virginia (2014), Wisconsin (2014), and Wyoming (2014). *Id.*

90. The first marriage litigation actually dates from the 1970s. *See infra* note 105 (citing cases litigated as early as 1971).

91. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

92. Act 383, Session Laws of Hawai'i 1997; HAW. REV. STAT. § 572C (West 2013). The Reciprocal Beneficiary Act extends some rights and benefits to same-sex partners, primarily those related to property interests, but the status of reciprocal beneficiaries is not limited to same-sex couples; it is available to two single adults who are not eligible to marry. § 572C-1. It grants approximately sixty rights and responsibilities commonly associated with marriage, including wrongful death rights, the right to inherit through intestate succession, and the right to make certain health care decisions. § 572C-6. Individuals must sign a "declaration of reciprocal beneficiary relationship" in order to be eligible for the benefits. § 572C-5. A reciprocal beneficiary is afforded the same status as a spouse under the rules of intestate succession. HAW. REV. STAT. § 560:2-102 (West 2013).

93. Act Relating to Civil Unions, § 3, 2000 VT. ADV. LEGIS. SERV. 91 (LexisNexis); *codified in* VT. STAT. ANN. tit. 15, §§ 1201-1207 (West 2004).

94. *See, e.g., Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding that same-sex couples are entitled under the Vermont state constitution to all of the protections and benefits

Other states eventually followed suit. By 2004 two additional states, California and Maine, extended partial rights to same-sex couples,⁹⁵ bringing the total number of states providing some form of state-wide recognition of same-sex relationships to five.⁹⁶ In recent years, the number of states with an alternative status relative to marriage has declined as states have begun to transition to full marriage equality.⁹⁷ For example, the first states to offer same-sex couples legal recognition, Hawaii and Vermont, now have full marriage equality.⁹⁸ Other early movers, including California and Maine, also have full marriage equality.⁹⁹ Currently, no state offers

provided by marriage).

95. The California legislature extended to “registered domestic partners” substantially all the rights and responsibilities enjoyed by spouses under California law. CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for “Registered domestic partners”). In 2005, the California legislature passed legislation that would have legalized same-sex marriage, but Governor Schwarzenegger vetoed the bill. Dean E. Murray, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, Sept. 8, 2005, <http://www.nytimes.com/2005/09/08/national/08arnold.html>. Also in 2004, Maine enacted legislation establishing a statewide domestic partner registry and extending to same-sex couples certain health care decisionmaking authority and inheritance rights equivalent to spouses. 2004 ME. LEGIS. SERV. Ch. 672 (H.P. 1152) (L.D. 1579) (West 2004), *codified by* 22 M.R.S. § 2710 (2004).

96. The states were: Hawaii, Vermont, Massachusetts, California, and Maine. *See supra* notes 91-95.

97. For example, Washington state first enacted relationship recognition in 2007. 2007 WASH. LEGIS. SERV. Ch. 156 (S.S.B. 5336) (West 2007), *codified in* WASH. REV. CODE. § 26.60.010 (2007). On April 15, 2009, the Washington state legislature passed an “everything but marriage” bill that extended full marriage rights to domestic partners. Rachel La Corte, *Washington Legislature Expands Gay Partnerships*, SEATTLE TIMES, Apr. 15, 2009, http://seattletimes.com/html/localnews/2009060436_apwaxgrdomesticpartnerships.html. In November that same year, the law withstood an attempt to repeal it through a citizen’s referendum. *Washington, FREEDOM TO MARRY*, <http://www.freedomtomy.org/states/entry/c/washington> (last visited Oct. 28, 2014). Washington state voters approved marriage equality by a citizen’s referendum in 2012. *Same-Sex Marriage Rivals Concede in Washington*, N.Y. TIMES, Nov. 8, 2012, <http://www.nytimes.com/2012/11/09/us/washington-state-gay-marriage-opponents-concede.html>.

98. In 2009, the Vermont legislature overrode the Governor’s veto and passed a marriage equality law; Vermont was the fourth state to recognize same-sex marriage. Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 7, 2009, <http://www.nytimes.com/2009/04/08/us/08vermont.html>. *See also* 2009 Vermont Laws No. 3 (S. 115), *codified in* VT. STAT. ANN. tit. 15, § 8 (West 2009).

99. Same-sex marriage in California was mandated by the U.S. Supreme Court decision in *Hollingsworth*, which let stand a federal district court ruling that had invalidated Proposition 8. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). In 2009, the Maine legislature passed marriage-equality legislation, but it was repealed by a voter referendum in November 2009 before it could take effect. Goodnough, *supra* note 98. Three years later, Maine became one of the first states to approve same-sex marriage by voter initiative. Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, <http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html>.

same-sex couples an equivalent status in lieu of marriage or a lesser degree of rights.¹⁰⁰

2. Marriage Prohibitions

The organized drive for marriage equality began in the 1990s with the litigation that led to the groundbreaking Supreme Court of Hawaii case, *Baehr v. Lewin*.¹⁰¹ Not surprisingly, the pushback against marriage equality started almost immediately, led by organizations describing themselves as “pro-family.”¹⁰² At the time, the majority of marriage statutes in the United States were gender neutral and did not specify that marriage had to be between a man and a woman.¹⁰³ The inherently gendered understanding of marriage, or what could be referred to as heteronormativity, was so strong that there was no perceived need to limit access to different-sex couples.¹⁰⁴ In the 1970s, several cases brought by same-sex couples seeking marriage licenses were swiftly resolved on definitional grounds.¹⁰⁵ The courts easily ruled that marriage, by definition, was necessarily between a man and a woman.¹⁰⁶

100. *Marriage Center*, *supra* note 13.

101. *See Baehr v. Lewin*, 852 P.2d 44, 53 (Haw. 1993) (finding marriage ban violated the Equal Rights Amendment to the Hawaii State Constitution and, therefore, the state must establish a compelling state interest).

102. *See generally* DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* (1997) (describing development of a “pro-family” political strategy). George Chauncey writes that, “‘defending marriage’ as the union of one man and one woman had special symbolic significance for the opponents of gay rights.” GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 145 (2005). The traditional values movement considers same-sex marriage “both the ultimate sign of gay equality and the final blow to their traditional ideal of marriage.” *Id.*

103. CHAUNCEY, *supra* note 102, at 90-91.

104. Chauncey notes that that changed after a few early attempts by same-sex couples to secure marriage licenses. *Id.*

105. There were several same-sex marriage cases that date from the early 1970s around the same time when states began adopting equal-rights amendments and ratification of the federal Equal Rights Amendment was pending before the states. *See, e.g.*, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974). *See* CHAUNCEY, *supra* note 102, at 146-47 (describing the federal Equal Rights Amendment). The claims for equal marriage rights were rejected largely on definitional grounds; opponents believed that marriage could only exist between a man and a woman. *Id.*

106. For example, in *Jones*, the Court of Appeals of Kentucky consulted two dictionaries in determining that the failure to issue a marriage license to Marjorie Jones and Tracey Knight did not implicate any constitutional rights. 501 S.W.2d at 589. The state statute did not specify that the applicants for a marriage license had to be of opposite sex. *Id.* That notwithstanding, the court concluded that, by definition, Jones and Knight could not marry. *Id.* The judge reasoned: “It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the county court clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is

The 1993 decision of *Baehr v. Lewin* placed that definitional certainty in doubt.¹⁰⁷ When the Supreme Court of Hawaii held that the denial of marriage licenses to same-sex couples constituted discrimination on account of sex and had to satisfy strict scrutiny, legislatures all over the country began to take notice.¹⁰⁸ Many legislatures amended their marriage statutes to provide that marriage is a union that can only exist between a man and a woman.¹⁰⁹ In 1996, a favorable trial court decision on remand held that the Hawaii statute was presumptively unconstitutional.¹¹⁰ On the first day of the 1996 trial, the U.S. Congress passed the Defense of Marriage Act (DOMA) to clarify that the federal government would only recognize marriages between one man and one woman.¹¹¹ DOMA also addressed the concern that same-sex marriage would spread across the country via the Full Faith and Credit Clause of the U.S. Constitution, by stating that states have the authority to refuse to recognize same-sex marriages legally performed in other states.¹¹² The concern that Hawaii would export same-sex marriage to other states proved premature. In 1998 the voters of Hawaii approved the first state constitutional amendment that restricted marriage to different-sex couples,¹¹³ effectively mooting the pending decision of the Supreme Court of Hawaii.

defined.” *Id.*

107. See generally *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

108. The Supreme Court of Hawaii remanded the case to be considered under the appropriate constitutional standard of strict scrutiny. *Baehr v. Lewin*, 852 P.2d at 48 (“HRS 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants’ sex [and] establishes a sex-based classification.”). The trial was postponed for 3 years; it finally started in 1996 on the same day the U.S. Senate approved DOMA. CHAUNCEY, *supra* note 102, at 125.

109. In 1996, fifteen state legislatures enacted marriage prohibitions. CHAUNCEY, *supra* note 102, at 126-27.

110. *Baehr v. Miiike*, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. 1996), *aff’d* 950 P.2d 1234 (Haw. 1997).

111. CHAUNCEY, *supra* note 102, at 125.

112. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *codified at* 28 U.S.C. § 1738C (1997), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013). This section of DOMA was not challenged in *Windsor* and, therefore, remains in effect. For a contemporaneous discussion of the Full and Faith and Credit concerns raised by Section 2, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1996-1997).

113. See HAW. CONST. art. I. § 23 (2004) (“The legislature shall have the power to reserve marriage to opposite-sex couples.”). In 2013, the Hawaii state legislature passed SB 1, the Hawaii Marriage Equality Act of 2013. *Hawaii: Same-Sex Marriage Becomes Law*, N.Y. TIMES, Nov. 13, 2013, <http://www.nytimes.com/2013/11/14/us/hawaii-same-sex-marriage-becomes-law.html>. Hawaii had previously passed civil union legislation in 2012. Peter J. Reilly, *Hawaiian Civil Unions Will Be Same as Marriage for State Income Taxes*, FORBES (Dec. 7, 2011, 10:51 PM), <http://www.forbes.com/sites/peterjreilly/2011/12/07/hawaiian-civil-unions-will-be-same-as-marriage-for-state-income-taxes/>. See also Erick Eckholm, *Gay Marriage Battle Nears End in Hawaii, the First Front Line*, N.Y. TIMES, Nov. 8, 2013,

The chain of events in Hawaii showed the pro-family forces that legislation alone would not be sufficient to withstand a court decision based on state constitutional grounds.¹¹⁴ Turning to citizen initiatives and referenda, the pro-family forces organized highly successful campaigns to amend state constitutions to prohibit same-sex marriage.¹¹⁵ A proposed Federal Marriage Amendment was introduced in 2004, but ultimately failed to receive sufficient congressional support.¹¹⁶

Currently, a total of fourteen states continue to have either a constitutional amendment or a law prohibiting same-sex marriage still in force.¹¹⁷ Many states have both a constitutional amendment and a statutory prohibition.¹¹⁸ In addition, eleven states have particularly aggressive constitutional amendments that seek to ban any form of legal recognition of same-sex relationships.¹¹⁹ These so-called mini-DOMAs with teeth¹²⁰ purport to ban

<http://www.nytimes.com/2013/11/09/us/gay-marriage-battle-nears-end-in-hawaii-the-first-front-line.html> [hereinafter Eckholm, *Gay Marriage Battle*] (discussing history of same-sex marriage in Hawaii).

114. The Report of the House Judiciary Committee warned that there was “an orchestrated legal assault” on traditional marriage. Eckholm, *Gay Marriage Battle*, *supra* note 113.

115. Hawaii was the first state to amend its state constitution to include a DOMA restriction in 1998. See CHAUNCEY, *supra* note 102, at 125 (discussing Hawaii decision as a “historical breakthrough”).

116. The Federal Marriage Amendment provides in full: Marriage in the United States shall consist only of a union of a man and a woman. Neither this Constitution or the constitution of any State, nor State or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003). For an argument in support of the Amendment, see 150 CONG. REC. S8061-03, (daily ed. July 14, 2004) (statement of Sen. Santorum).

117. *Marriage Center*, *supra* note 13 (listing states that prohibit same-sex marriage: Alabama (2006), Arkansas (2004), Georgia (2004), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Nebraska (2000), North Dakota (2004), Ohio (2004), South Dakota (2006), Tennessee (2006), and Texas (2005)).

118. For example, North Carolina first prohibited same-sex marriage by statute. N.C.G.S.A. § 51-1.2 (Westlaw 2014). In 2012, the North Carolina voters passed Amendment 1 that amends the state constitution to prohibit same-sex marriage. Campbell Robertson, *North Carolina Voters Pass Ban on Same-Sex Marriage*, N.Y. TIMES, MAY 8, 2012, <http://www.nytimes.com/2012/05/09/us/north-carolina-voters-pass-same-sex-marriage-ban.html>.

119. The states are: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, South Dakota, and Texas. See *Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-prohibitions_10-2014.pdf (last updated Oct. 17, 2014). This type of prohibition has been held to prohibit the grant of domestic partner benefits to public employees. *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008).

120. See Steve Sanders, *Next on the Agenda for Marriage Equality Litigators*, SCOTUSBLOG (June 26, 2013, 5:40 PM), <http://www.scotusblog.com/2013/06/next-on-the-agenda-for-marriage-equality-litigators/> ([M]ini-DOMAs are understood to deny legal

the grant of any of the incidents of marriage, which would include the creation of any equivalent or alternative status, such as domestic partnership or civil unions.¹²¹

3. Marriage Litigation

In numerous federal courts across the country, same-sex couples are currently challenging state-level marriage prohibitions under the federal Constitution.¹²² These federal constitutional challenges represent a new chapter in the struggle for marriage equality and could potentially have national application. Until recently, the road to marriage equality has been very state-specific. Some states adopted marriage equality as the result of legislative action,¹²³ whereas others did so as a result of a judicial mandate.¹²⁴ Three states embraced marriage equality as a result of a popular referendum.¹²⁵ The pro-same-sex-marriage judicial decisions were from state supreme courts and were based on state constitutional protections.¹²⁶ The first decision invalidating a marriage prohibition on federal constitutional principles was the California decision, *Perry v. Schwarzenegger*, which later became *Hollingsworth v. Perry*.¹²⁷

recognition to the marriages of same-sex couples who migrate from states where such marriages are perfectly legal.”).

121. Compare O.H. Const. art. XV, § 11 (2005) (held unconstitutional on Apr. 14, 2014) (“[O]nly a union between one man and one woman may be a marriage valid in or recognized by this state.”) (emphasis added) with M.S. Const. art. 14 § 263A (“[M]arriage may take place and be valid under the laws of this state only between a man and a woman.”) (emphasis added).

122. Editorial Board, Op-Ed., *Surge Forward on Marriage Equality*, N.Y. TIMES, May 1, 2014, <http://www.nytimes.com/2014/05/02/opinion/a-surge-forward-on-marriage-equality.html> (noting cases are pending in more than thirty states). Reliance on federal constitutional protections represents a change in strategy that began in earnest after *Perry v. Hollingsworth*. The earlier state supreme court decisions that led to marriage equality had all been based on state constitutional principles, making a state supreme court decision the final appeal, but also limiting the scope of the ruling to that state. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding the state’s provision banning same-sex marriage unconstitutional).

123. See, e.g., *Hawaii: Same-Sex Marriage Becomes Law*, *supra* note 113 (reporting that the governor of Hawaii signed the Marriage Equality Bill of 2013).

124. See, e.g., *Goodridge*, 798 N.E.2d at 969 (holding denial of marriage license violated the Massachusetts State Constitution).

125. The three states are: Maine, Maryland, and Washington. Chelsea J. Carter & Allison Brennan, *Maryland, Maine, Washington Approve Same-Sex Marriage; 2 States Legalize Pot*, CNN (Nov. 7, 2012, 11:51 AM), <http://www.cnn.com/2012/11/01/politics/ballot-initiatives/>.

126. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010) (*aff’d sub nom*); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (*vacated and remanded sub nom*); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

127. In *Perry v. Schwarzenegger*, the U.S. District Court for the Northern District of California invalidated the citizens’ initiative known as Proposition 8, which had banned

The pending federal cases have the potential to require nationwide marriage equality.¹²⁸ Since the *Windsor* decision, numerous federal appellate and district courts have invalidated state constitutional marriage bans on the basis that they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.¹²⁹ The first circuit court decisions came out of the Tenth Circuit, where two marriage cases were pending, *Bishop v. Holder* from Oklahoma¹³⁰ and *Kitchen v. Herbert* from Utah.¹³¹ A three-judge panel of the Tenth Circuit heard argument in both cases in early 2014.¹³²

The two lower court decisions from the Tenth Circuit were issued within a month of each other.¹³³ In the first decision, the U.S. District Court for the District of Utah held that the Utah marriage ban “conflicts with the United States Constitution’s guarantees of equal protection and due process under the law.”¹³⁴ The decision applied rational basis review and found that the prohibition on same-sex marriage served to “deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean[ed] the

same-sex marriage. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 930; *Perry v. Brown*, 671 F.3d 1052; *Hollingsworth*, 133 S. Ct. 2652. The court held that Proposition 8 violated both the Due Process Clause and the Equal Protection Clause of the U.S. Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 994-97. After a confusing procedural posture, which was further complicated due to the refusal of the state of California to defend the marriage ban, the U.S. Supreme Court held that the supporters of Proposition 8 did not have standing. *Hollingsworth*, 133 S. Ct. at 2668. As a result, the decision of the district court stood, and marriage equality was reinstated in California in 2013. Lyle Denniston, “*Proposition 8*” Case Ends, SCOTUSBLOG (Aug. 14, 2013, 6:00 PM), <http://www.scotusblog.com/2013/08/prop-8-case-ends/>.

128. While the Court has refused to hear these cases during the current session, a future finding by the U.S. Supreme Court that a state prohibition on same-sex marriage violates the U.S. Constitution would mandate marriage equality nationwide.

129. See, e.g., *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (“We have arrived upon another moment in history when We the People becomes more inclusive, and our freedom more perfect.”); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (holding Oklahoma’s marriage ban unconstitutional); *De Leon v. Perry*, 975 F. Supp. 2d 632, 639 (W.D. Tex. 2014) (“Texas’ prohibition on same-sex marriage conflicts with the United States Constitution’s guarantees of equal protection and due process . . . [these] laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason.”); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (holding Utah marriage prohibition unconstitutional).

130. *Bishop*, 962 F. Supp. 2d 1252.

131. *Kitchen*, 961 F. Supp. 2d 1181

132. Kirk Mitchell, *10th Circuit Arguments on Gay Marriage Ban Focus on Family, Fairness*, DENVER POST, Apr. 10, 2014, http://www.denverpost.com/news/ci_25537246/10th-circuit-appeals-court-hear-oral-arguments-about.

133. The Utah decision was issued on December 20, 2013. *Kitchen*, 961 F. Supp. 2d 1181. The Oklahoma decision followed three weeks later on January 14, 2014. *Bishop*, 962 F. Supp. 2d 1252.

134. *Kitchen*, 961 F. Supp. 2d at 1188.

dignity of these same-sex couples for no rational reason.”¹³⁵ The decision was not stayed until the state appealed to the U.S. Supreme Court for an emergency stay pending final disposition by the Tenth Circuit.¹³⁶ As a result, same-sex couples in Utah were able to marry for a period of several weeks.¹³⁷ U.S. Attorney General Eric Holder announced that the federal government would recognize those couples as legally married for federal purposes.¹³⁸ The Utah State Tax Commission has also ruled that it would recognize the estimated more than 1300 marriages that took place in Utah before the stay was approved.¹³⁹

In *Bishop v. Holder*, the U.S. District Court for the Northern District of Oklahoma ruled that the Oklahoma marriage ban that was passed overwhelmingly by voters in 2004 violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.¹⁴⁰ Applying rational basis review, the decision held that the marriage ban was “an arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit.”¹⁴¹ Noting the uncertainty regarding the appropriate standard of review, the decision stated:

The Supreme Court has not expressly reached the issue of whether state laws prohibiting same-sex marriage violate the U.S. Constitution. However, Supreme Court law now prohibits states from passing laws that are born of animosity against homosexuals, extends constitutional protection to the moral and sexual choices of homosexuals, and prohibits the federal government from treating opposite-sex marriages and same-sex marriages differently. There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one.¹⁴²

The judge stayed his decision pending appeal to the Tenth Circuit, so same-sex marriages did not immediately take place in Oklahoma.¹⁴³

135. *Id.*

136. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014).

137. Jack Healy & Adam Liptak, *Justices' Halt to Gay Marriage Leaves Utah Couples in Limbo*, N.Y. TIMES, Jan. 6, 2014, <http://www.nytimes.com/2014/01/07/us/justices-block-gay-marriage-in-utah-pending-appeal.html>.

138. Charlie Savage & Jack Healy, *U.S. to Recognize 1,300 Marriages Disputed by Utah*, N.Y. TIMES, Jan. 10, 2014, <http://www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html>.

139. Matt Pearce, *Utah Says Married Same-Sex Couples Can File Joint Tax Return*, L.A. TIMES, Jan. 17, 2014, <http://articles.latimes.com/2014/jan/17/nation/la-na-nn-utah-marriage-taxes-20140117>.

140. *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014)

141. *Id.* at 1296.

142. *Id.* at 1295-96.

143. *Id.*

The Tenth Circuit opinions upheld the district court decisions.¹⁴⁴ The court concluded that “[s]tate bans on the licensing of same-sex marriage significantly burden the fundamental right to marry, and arguments based on the procreative capacity of some opposite-sex couples do not meet the narrow tailoring prong” required by strict scrutiny.¹⁴⁵ Both opinions were issued by the same three-judge panel,¹⁴⁶ and both decisions were stayed pending appeal.¹⁴⁷

The Tenth Circuit opinions were quickly followed by favorable opinions from the Fourth and Seventh Circuits.¹⁴⁸ The parties appealed to the U.S. Supreme Court, but the Court denied cert and declined to review the decisions in October 2014.¹⁴⁹ A later decision from the Sixth Circuit upheld a marriage prohibition, presenting a circuit split and increasing the likelihood that the Supreme Court will decide the issue.¹⁵⁰

B. *Post-Windsor Federal Marriage Recognition*

In *United States v. Windsor*, the U.S. Supreme Court invalidated § 3 of DOMA, declaring it unconstitutional under the Due Process Clause and Equal Protection guarantees of the Fifth Amendment.¹⁵¹ Section 3 of DOMA had amended the Dictionary Act to provide that for all federal purposes, marriage was only between one man and one woman.¹⁵² Prior to

144. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (holding that the Utah marriage ban violates the Due Process Clause and Equal Protection Clause of the U.S. Constitution); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (holding that the Oklahoma marriage ban violates the Equal Protection Clause of the U.S. Constitution).

145. *Bishop v. Smith*, 760 F.3d at 1080 (referring to holding in *Kitchen*, 755 F.3d 1193).

146. *Id.*

147. *See id.* (ordering stay of mandate pending appeal); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (same).

148. *Bostic v. Schaefer*, 769 F.3d 352 (4th Cir. 2014) *cert. den.* 2014 WL 3924685 (Oct. 6, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) *cert. den.* 135 S. Ct. 316 (2014).

149. U.S. SUPREME COURT, ORDER LIST: 574 U.S. (Oct. 6, 2014), available at <http://www.supremecourt.gov/orders/courtorders/100614zor.pdf>.

150. *DeBoer v. Snyder*, 2014 U.S. App. LEXIS 21191 (Nov. 6, 2014); Lyle Denniston, *Sixth Circuit: Now, a Split on Same-Sex Marriage*, SCOTUSBLOG, (Nov. 6, 2014, 4:50 PM), <http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/>.

151. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

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

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

DOMA, marriage had been the traditional province of the states, and there was generally no federal common law definition of marriage.¹⁵³ In questions involving federal law, the validity of a marriage would be determined by reference to state law.¹⁵⁴ As early as 1993, however, *Baehr v. Lewin* and the ongoing Hawaii marriage litigation raised the possibility that a state might recognize same-sex marriage or might be forced to do so by its courts.¹⁵⁵

DOMA was designed to address the eventuality of same-sex marriage by adopting a restrictive definitional standard on the federal level.¹⁵⁶ Section 3 of DOMA made it clear that same-sex couples who were legally married under state law would not qualify for any of the 1,138 federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.”¹⁵⁷ Once same-sex marriage began to be recognized at the state level, the federal restriction was a continuing source of complexity, as well as inequality. For example, a same-sex couple who was legally married and lived in Massachusetts could file their state income taxes jointly but had to file their federal taxes as if they were unmarried.¹⁵⁸

The *Windsor* decision overturned the blanket ban on recognizing same-sex marriage on the federal level, but its implementation has not been seamless.¹⁵⁹ *Windsor* has raised a number of difficult questions, the most

Id.

153. When DOMA was enacted in 1996, the House Judiciary Report stated that the legislation furthered four government interests: (1) defending and nurturing the institution of traditional marriage, (2) defending traditional notions of morality, (3) protecting states' sovereignty and democratic self-governance, and (4) preserving scarce government resources. H.R. REP. NO 104-664, at 12-18 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2916-22.

154. See *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) (“DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes.”).

155. The U.S. Senate voted to approve DOMA on the day the trial began in *Baehr v. Lewin* on remand from the Supreme Court of Hawaii. See CHAUNCEY, *supra* note 102.

156. Section 2 of DOMA also purported to authorize states to refuse to recognize same-sex marriages from sister states in order to stop the potential spread of same-sex marriage. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C (1997), invalidated by *Windsor*, 133 S. Ct. 2675. *Windsor* did not address this section of DOMA or the Full and Faith and Credit concerns.

157. In 2004, the U.S. General Accounting Office found 1,138 federal laws implicated by DOMA. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

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

159. *Windsor*, 133 S. Ct. 2675; Att’y Gen. Eric Holder, *Statement of Attorney General Eric Holder on the Implementation of the Supreme Court’s Decision in United States v.*

central of which is whether federal law should respect all marriages that are legal in their state-of-celebration or only marriages that are legal in the state where the couple is domiciled.¹⁶⁰ Justice Scalia specifically raised this concern in his dissent in *Windsor*, noting that the majority decision left unanswered “difficult choice-of-law issues.”¹⁶¹ This section discusses the application of the two competing rules—the state-of-celebration rule and the state-of-domicile rule—in the context of the major federal benefits that are most relevant to LGBT older adults, including Social Security, Medicare, and Medicaid, as well as the rules governing pension and retirement funds.

1. State-of-Celebration or State-of-Domicile?

Windsor invalidated the federal definition of marriage and reinstated the importance of state law to determine whether a marriage is valid.¹⁶² However, given the patchwork nature of marriage equality, it has not always been clear exactly which state law should control.¹⁶³ Many same-sex couples who live in nonrecognition states are legally married under the laws of another state or a foreign country.¹⁶⁴ They either traveled to a recognition jurisdiction to get married and then returned home, or they

Windsor, DEP’T OF JUSTICE (June 28, 2013), available at <http://www.justice.gov/opa/pr/2013/June/13-ag-740.html>.

160. The question of which state law applies not only goes to whether a marriage is valid, but also *when* a marriage is valid. The length of a marriage is significant for a number of different federal spousal benefits, such as Social Security benefits. For example, a former spouse can qualify for spousal benefits provided the marriage lasted for ten years or longer. 42 U.S.C. § 416(d)(1), (2) (2014).

161. *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting).

162. See generally *id.* (majority opinion).

163. See *id.* at 2708 (Scalia, J., dissenting). See, e.g., *Boyer v. Comm’r*, 732 F.2d 191, 194 (D.C. Cir. 1984) (holding that the law of the state-of-domicile controls); *Chagra v. Comm’r*, 68 T.C.M. (RIA) ¶ 91,366, at 91-1839 n.3 (1991) (holding that the law of the state-of-celebration controls); Rev. Rul. 58-66, 1958-1 C.B. 60 (holding that the law of the state-of-celebration controls for common law marriage); *Peveler v. Comm’r*, 48 T.C.M. (CCH) 502 (1979) (holding that the law of the state of residence controls); *Feinberg v. Comm’r*, 198 F.2d 260, 263 (3d Cir. 1952) (holding that the law of the state-of-celebration controls for divorce).

164. See *supra* text accompanying notes 89-100 (summarizing state of marriage equality in thirty-six states and the District of Columbia). In addition, numerous countries have also adopted marriage equality. See, e.g., Griff White, *Gay Marriage Ban Ending in England and Wales on Saturday*, WASH. POST, Mar. 29, 2014, http://www.washingtonpost.com/world/gay-marriage-ban-ends-in-england-and-wales-on-saturday/2014/03/28/f2f15453-6502-4557-ad3c-10e24fddb746_story.html. Canada was one of the first countries to embrace same-sex marriage in 2003, and many same-sex couples from the United States traveled to Canada to marry. Even though Massachusetts began issuing marriage licenses in 2004, it applied a residency restriction so out-of-state couples could not marry. Jeremy W. Peters, *New York to Back Same-Sex Unions From Elsewhere*, N.Y. TIMES, May 28, 2008, <http://www.nytimes.com/2008/05/29/nyregion/29marriage.html>.

lived in a recognition jurisdiction at the time of their marriage but have since moved to a nonrecognition state. For example, Edie Windsor and her long-term partner Thea Spryer traveled to Canada in 2007 to get married when Thea was diagnosed with a life-threatening disease because they were worried that their home state of New York would not recognize same-sex marriages in the time they had remaining.¹⁶⁵ For couples such as Edie and Thea, who return home to nonrecognition states, the question becomes whether federal law should respect only marriages that are valid in the couple's state or domicile or whether the state-of-celebration should control.

Shortly after the *Windsor* decision, President Obama signaled that his administration would take an expansive view of marriage and adopt a state-of-celebration rule wherever possible.¹⁶⁶ Despite the willingness of the administration, some statutory schemes specifically reference state-of-domicile, thereby making it much more difficult to adopt a state-of-celebration rule.¹⁶⁷ Although a number of agencies were quick to issue guidance, the administrative implementation of *Windsor* continues to have some significant gaps, especially in the area of Social Security benefits.¹⁶⁸ The following outlines the rules currently in place with respect to a number of benefits of special interest to LGBT elders and older adults.¹⁶⁹

165. New York did not start issuing marriage licenses to same-sex couples until 2011. See Javier C. Hernández, *Gay Marriage: With a Kiss and a Vow, the Day Begins*, N.Y. TIMES (July 24, 2011, 12:16 AM), <http://cityroom.blogs.nytimes.com/2011/07/24/gay-marriage-with-a-kiss-and-a-vow-the-day-begins/> (describing the first same-sex wedding in New York).

166. Rein & Vogel, *supra* note 83. Speaking at a news conference while in Dakar, Senegal, President Obama remarked, "My personal belief—but I'm speaking now as a president as opposed to as a lawyer—that if you've been married in Massachusetts and you move someplace else, you're still married, and that under federal law you should be able to obtain the benefits of any lawfully married couple." *Id.* See also Michael D. Shear, *Obama, in Africa, Praises U.S. Ruling on Gay Marriage*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/28/world/africa/obama-in-africa.html>.

167. This expansive approach was confirmed by the Justice Department in a memorandum from Attorney General Eric Holder to President Obama dated June 20, 2014. Eric Holder, Memorandum to the President, Implementation of *United States v. Windsor* (June 20, 2014), [available at http://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf](http://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf). See also *infra* text accompanying notes 186-206 (discussing Social Security).

168. See, e.g., *Technical Release No. 2013-04: Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" Under ERISA and the Supreme Court's Decision in United States v. Windsor*, U.S. DEP'T OF LABOR (Sept. 18, 2013), <http://www.dol.gov/ebsa/newsroom/tr13-04.html> [hereinafter *Technical Release No. 2013-04*].

169. This section does not cover immigration and spousal preferences.

2. Federal Tax Laws—State-of-Celebration

The Internal Revenue Service (IRS) has adopted a state-of-celebration rule, but it does not recognize any marriage equivalents, such as civil unions or domestic partnerships.¹⁷⁰ Marriage equality is important in the tax context because, for many federal tax purposes, a married couple is considered to be a single taxable unit. This is evident from the joint filing provisions in the income tax arena,¹⁷¹ as well as the unlimited marital deduction for estate and gift tax purposes.¹⁷² The spousal provisions in federal tax law do not always favor marriage, and, in some instances, may give rise to a marriage penalty for certain taxpayers.¹⁷³

The *Windsor* decision was a case that involved one of the instances where married couples are treated quite favorably—the federal estate tax.¹⁷⁴ When Edie Windsor’s spouse Thea died in 2009, Edie did not qualify for the marital deduction that is designed to benefit surviving spouses because DOMA treated Edie and Thea as if they were unmarried taxpayers.¹⁷⁵ As a married taxpayer, Edie would have owed no federal estate tax, but under DOMA she was presented with a staggering federal estate tax bill for \$363,053.¹⁷⁶ Edie paid the tax and then sued for a refund on the grounds that DOMA violated the Due Process Clause and Equal Protection guarantees of the Fifth Amendment.¹⁷⁷ While the litigation was pending, Edie explained to reporters that if the name of her spouse had been *Theo* instead of *Thea*, she would have owed no tax.¹⁷⁸

170. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

171. Married couples are permitted to file a joint federal income tax return and are subject to a separate rate of tax. 26 U.S.C. § 1(a) (2013).

172. 26 U.S.C. § 2053 (2013) (estate tax marital deduction); 26 U.S.C. § 2523 (2013) (gift tax marital deduction).

173. Tara Siegel Bernard, *Gay and Married Couples in New Land of Taxation*, N.Y. TIMES, Aug. 30, 2013, <http://www.nytimes.com/2013/08/31/your-money/gay-marrieds-enter-new-land-of-federal-taxation.html> [hereinafter Bernard, *Gay and Married Couples*] (noting “plenty . . . will pay more [taxes]”).

174. 26 U.S.C. § 2001 et seq. (2013).

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

176. Jim Dwyer, *She Waited 40 Years to Marry, then when Her Wife Died, the Tax Bill Came*, N.Y. TIMES, June 7, 2012, <http://www.nytimes.com/2012/06/08/nyregion/woman-says-same-sex-marriage-bias-cost-her-over-500000.html>.

177. In order to get into federal court, a taxpayer must first pay the tax and then sue for a refund. 26 U.S.C. § 7422 (2014). A taxpayer can refuse to pay the tax purported due, but then must sue in Tax Court. 26 U.S.C. § 6213(a) (2014).

178. Nina Totenberg, *Meet the 83-Year-Old Taking on the U.S. over Same-Sex Marriage*, NPR, Mar. 21, 2013, <http://www.npr.org/2013/03/21/174944430/meet-the-83-year-old-taking-on-the-u-s-over-same-sex-marriage> (“If Thea was Theo . . . I would not have had to pay.”).

In *Windsor*, the Court did not expressly address the question of which state law applies—state-of-celebration or state-of-domicile—because the trial court had established that Edie and Thea were legally married in New York at the time of Thea’s death.¹⁷⁹ Accordingly, the decision left open the possibility that a couple who lived in a nonrecognition state but had legally married in another state could be considered married for federal tax purposes. In the federal tax context, the Internal Revenue Code is silent as to which state law controls, and there is a confusing and sometimes conflicting assortment of precedent dealing with common law marriage and *ex parte* divorces.¹⁸⁰

A little over two months after the *Windsor* decision, the IRS released Revenue Ruling 2013-17, which set forth the state-of-celebration rule¹⁸¹ and clarified that an equivalent status in lieu of marriage would not constitute marriage for federal tax purposes.¹⁸² Under DOMA, legally married couples who lived in marriage-equality states could file their state taxes jointly, but then had to file their federal taxes separately as unmarried taxpayers.¹⁸³ Although *Windsor* eliminated this breach of uniformity, the adoption of a state-of-celebration rule created a new difficulty. Currently, legally married couples who live in nonrecognition states may now file their federal taxes jointly but remain unmarried for state tax purposes.¹⁸⁴ To further complicate matters, a number of states require taxpayers to use the same filing status for state purposes as they do for federal purposes.¹⁸⁵ Some states, such as Utah, have acquiesced and will allow same-sex mar-

179. The state of New York began recognizing same-sex marriages performed out of state and in foreign jurisdictions in 2008. *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 742–43 (2008).

180. *Boyer v. Comm’r*, 668 F.2d 1382, 1385 (4th Cir. 1981) (“We agree with the government’s argument that under the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status.”). See also Thomas J. Tumola, *Income Tax Validity of Invalid Migratory Divorces and the Rule of Validation*, 11 VILLANOVA L. REV. 831, 832 (1966) (discussing “rule of validation” for *ex parte* divorce).

181. See Shaun Terrill, *A State of Celebration—Treasury and IRS Issue Ruling Implementing Effect of Windsor Decision*, BLOOMBERG (Aug. 29, 2013), <http://www.bna.com/state-celebration-treasury-b17179876615/>.

182. See Rev. Rul. 2013-17, 2013-38 IRB 201 (clarifying that “the term ‘marriage’ does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state’s law”).

183. See E.J. Graff, *Marrying Outside the Box*, N.Y. TIMES MAG. (Apr. 10, 2005), available at <http://www.nytimes.com/2005/04/10/magazine/10PHENOM.html> (noting that for the first time, individuals married under state law will be denied right to file as married for federal income tax purposes).

184. Infanti, *supra* note 78.

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

ried couples to file jointly,¹⁸⁶ whereas others have hastily issued regulatory guidance providing an exception for same-sex couples.¹⁸⁷

3. Social Security—Domicile

Social Security provides a number of different spousal benefits, including retirement, disability, and survivor.¹⁸⁸ The rules regarding who qualifies for spousal benefits are complicated by statutory language that makes an administrative imposition of a state-of-celebration rule more challenging, but the language also leaves room for the recognition of marriage equivalents.¹⁸⁹ The fact that some married same-sex couples may not qualify for Social Security benefits is particularly disturbing given that benefits are based on work history and contributions made over a worker's lifetime.¹⁹⁰

The potential amount of a spousal benefit can be quite significant.¹⁹¹ Social Security is a major source of income for seniors in the United States.¹⁹² For many seniors, a spousal benefit may be the only thing keeping them above the poverty level. It is estimated that Social Security benefits lift more than one-third of all seniors out of poverty.¹⁹³ More than one

186. Pearce, *supra* note 139.

187. See, e.g., GA. DEP'T OF REVENUE, INFORMATIONAL BULLETIN IT-2013-10-25, U.S. SUPREME COURT AND THE DEFENSE OF MARRIAGE ACT (Oct. 25, 2013), available at http://dor.georgia.gov/sites/dor.georgia.gov/files/related_files/document/LATP/Bulletin/DO_MA_bulletin_10-25-2013_1.pdf.

188. The Congressional Budget Office (CBO) estimated that 30% of same-sex couples would receive higher benefits if federal law recognized same-sex marriage and all partnered same-sex couples chose to marry. CONG. BUDGET OFFICE, POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 7 (June 21, 2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>. The CBO Report estimated that by 2014, recognizing same-sex marriage would translate to an increase in benefits of \$350 million annually. *Id.*

189. See 42 U.S.C. § 416 h (1)(A)(ii) (2013) (stating that for Social Security purposes, marital status also includes individuals who would be treated as spouses under state law).

190. See generally Nancy J. Altman, *Government Finances Today and Economic Prosperity Tomorrow: Response: Social Security and Intergenerational Justice*, 77 GEO. WASH. L. REV. 1383 (2009).

191. ROBIN S. MARIL & CAROL ESTES, HUMAN RIGHTS CAMPAIGN, LIVING OUTSIDE OF THE SAFETY NET: LGBT FAMILIES & SOCIAL SECURITY 13 (July 2014), available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/LGBT_Families_and_Social_Security_July_2014-2.pdf (discussing the difference in income between a couple receiving benefits and a couple not receiving benefits).

192. Press Office, *Social Security Basic Facts*, SSA (Apr. 2, 2014), <http://www.socialsecurity.gov/news/press/basicfact.html> (explaining that Social Security benefits account for 38 to 90% or more of income for seniors).

193. See Alison Shelton, *Social Security: Still Lifting Many Older Americans Out of Poverty*, AARP (July 1, 2013), <http://blog.aarp.org/2013/07/01/social-security-still-lifting-many-older-americans-out-of-poverty/> (estimating that Social Security lifts 35% of older

in five seniors rely on Social Security benefits for their sole source of income.¹⁹⁴ Approximately, 52% of married couples and 74% of unmarried couples among elderly beneficiaries rely on Social Security benefits for at least 50% of their income.¹⁹⁵

Out of all the potential spousal benefits, the retirement benefit and the survivor benefit are the most significant Social Security benefits that include a spousal benefit.¹⁹⁶ Upon retirement, the spouse of the retired worker is entitled to up to 50% of her spouse's retirement benefit in addition to the worker's benefit.¹⁹⁷ Upon the retired worker's death, a surviving spouse is entitled to receive the entire amount of the benefit that had been paid to the deceased spouse if that amount is greater than what the survivor would be entitled to in her own right.¹⁹⁸ Even divorced spouses are eligible for spousal benefits, provided the marriage lasted at least ten years and the non-worker divorced spouse has not remarried.¹⁹⁹ The amount a divorced spouse receives does not reduce the amount a current spouse receives and a single worker can generate more than one spousal retirement benefit.²⁰⁰

Americans out of poverty). See also Paul N. Van de Water, Arloc Sherman & Kathy Ruffing, *Social Security Keeps 22 Million Americans Out Of Poverty: A State-By-State Analysis*, CTR. ON BUDGET & POLICY PRIORITIES (Oct. 25, 2013), <http://www.cbpp.org/cms/?fa=view&id=4037>.

194. John Waggoner, *Millions of Americans Get by on Social Security Alone*, USA TODAY, Aug. 15, 2005, http://usatoday30.usatoday.com/money/perfi/general/2005-08-15-getting-by-usat_x.htm.

195. *Social Security Basic Facts*, *supra* note 192.

196. When a worker is entitled to receive Social Security disability insurance, the worker's spouse is qualified to receive a payment equal to up to one half of the worker's disability benefit, if the spouse is 62 or older or is caring for the worker's child who is less than 16 years of age or disabled. As with the retirement benefit, a divorced spouse may also qualify for the benefit provided the marriage lasted 10 years. SSA, SOCIAL SECURITY—UNDERSTANDING THE BENEFITS 13 (2014), available at <http://www.socialsecurity.gov/pubs/EN-05-10024.pdf>.

197. 42 U.S.C. § 402 (2013).

198. A surviving spouse qualifies for Social Security death benefits. 42 U.S.C. § 402. The surviving spouse of a deceased retired worker receives 100% of the deceased spouse's benefits. *Id.*

199. The requirement that a former spouse must have been married at least 10 years introduces another complication because it means that the SSA must determine the legality of the marriage over time. The SSA has issued guidance that purports to establish when states first recognized same-sex marriages, although it contains several inaccuracies. *GN 00210.100 Same-Sex Marriages and Non-marital Legal Relationships—Aged Spouse and Spouse with Child-in-Care, Program Operation Manual System (POMS)*, SSA (Sept. 11, 2014), <https://secure.ssa.gov/poms.nsf/lnx/0200210100> [hereinafter *GN 00210.100 Same-Sex Marriages*]. Moreover, it is difficult to establish a time frame in instances where a law is subsequently declared unconstitutional. If a same-sex couple marries in Massachusetts in 2004 and then moves to New Jersey in 2007 and divorces in 2015, they should satisfy the ten-year-minimum requirement, even though New Jersey did not start recognizing same-sex marriages until 2013.

200. *Benefits for Your Divorced Spouse*, SSA,

For Social Security purposes, an individual will qualify as a spouse provided (1) she is recognized as a spouse by her state-of-domicile, referred to as a “legal spouse,”²⁰¹ (2) she is entitled to inherit under the rules of intestacy as if she were a spouse, referred to as a “putative spouse,”²⁰² and (3) the couple tried to marry, but there was a legal impediment, referred to as a “deemed spouse.”²⁰³ The Social Security Administration (SSA) has issued guidance confirming that married same-sex couples who live in states with marriage equality qualify for spousal benefits.²⁰⁴ In order to qualify as a “legal spouse,” the state-of-domicile must recognize the marriage at the time of (1) the application for benefits, (2) the death of the first spouse to die, or (3) at any point while the application for benefits is pending.²⁰⁵ The SSA has not yet released guidance regarding the application of the putative spouse rules to same-sex couples, although same-sex couples who are in civil unions and other marriage equivalents, as well as couples who are registered domestic partners in Wisconsin should qualify.²⁰⁶

4. Medicare and Medicaid—Domicile and Celebration

Medicare is the primary health insurance program for seniors, and Medicaid is a health insurance program for low-income individuals.²⁰⁷ Some seniors will qualify for both Medicare and Medicaid, provided they meet certain income and asset limitations.²⁰⁸ Medicare and Medicaid take marriage into account in a number of instances, including benefits eligibility and certain income and asset limitations.²⁰⁹ Spouses are also entitled to

<http://www.ssa.gov/retire2/yourdivspouse.htm> (last visited Oct. 11, 2014).

201. 42 U.S.C. § 416 h(1)(A)(i) (2014) (defining “spouse”); *RS 00207.001 Widow(er)’s Benefits Definitions and Requirements*, POMS, SSA (May 14, 2013), <https://secure.ssa.gov/poms.nsf/lnx/0300207001>.

202. § 416(h)(1)(A)(ii) (2013) (defining “spouse”).

203. § 416(h)(1)(B)(i) (defining “deemed spouse”).

204. See *GN 00210.001 Windsor Same-Sex Marriage Claims—Introduction*, POMS, SSA (Sept. 6, 2013), <https://secure.ssa.gov/poms.nsf/lnx/0200210001> (“Because of [*Windsor*], we are no longer prohibited from recognizing same-sex marriages for purposes of determining benefits.”).

205. *GN 00210.100 Same-Sex Marriages*, *supra* note 199.

206. Although the status of a domestic partner under Wisconsin law does not grant an individual all the rights and responsibilities of marriage, it does provide the surviving partner the equivalent of spousal intestacy rights. WIS. STAT. § 770 (2012).

207. CTRS. FOR MEDICARE & MEDICAID SERVS. (CMS), WHAT’S MEDICARE? WHAT’S MEDICAID?, available at <http://www.medicare.gov/pubs/pdf/11306.pdf> (last revised June 2014).

208. Approximately 4.6 million low-income seniors qualify for Medicaid. *By Population*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Population/By-Population.html> (last visited Oct. 26, 2014).

209. For example, the amount of premium an individual is required to pay for Medicaid

special protections, such as the Medicaid spousal impoverishment rule.²¹⁰ For Medicare and Medicaid purposes, the definition of spouse is generally the same as that used for Social Security purposes, although the Centers for Medicare and Medicaid Services (CMS) has recently released guidance that follows a state-of-celebration rule in certain limited circumstances.²¹¹

Although eligibility for Medicare is primarily based on age, there are a number of instances where work history and income can play a role.²¹² As with Social Security, spouses and certain former spouses can qualify for Medicaid based on their spouse's work history.²¹³ Medicare is divided into four separate parts, each of which provides a distinct type of coverage. Part A provides hospital coverage, skilled nursing care, and hospice care.²¹⁴ Part B covers doctors' visits, outpatient services, medical supplies, and preventive care.²¹⁵ Part C allows for Medicare Advantage plans—private health plans that supplement Medicare coverage.²¹⁶ Part D provides prescription drug coverage.²¹⁷

All four parts of Medicaid involve spousal benefits. To qualify for Medicaid Part A insurance without paying a premium, an individual must be sixty-five years of age and must have worked for forty quarters (i.e., ten years).²¹⁸ If an individual does not have sufficient work history, she may qualify based on her spouse's work history, even if the spouse is de-

Part B and Part D is determined by income, and spousal incomes are combined. See SSA, MEDICARE PREMIUMS: RULES FOR HIGHER-INCOME BENEFICIARIES (Jan. 2014), available at <http://www.ssa.gov/pubs/EN-05-10536.pdf>.

210. See generally Richard L. Kaplan, *Elder Law as Proactive Planning and Informed Empowerment During Extended Life*, 40 STETSON L. REV. 15 (2010).

211. See *Important Information for Same-Sex Couples*, SSA, <http://www.ssa.gov/people/same-sex-couples/> (last visited Nov. 7, 2014) (explaining that the "Social Security Act requires the agency to follow state law in Social Security cases"); *Important Information for Individuals in Same-Sex Marriages*, MEDICARE.GOV, <http://medicare.gov/sign-up-change-plans/same-sex-marriage.html> (last visited Nov. 7, 2014) ("Medicare is no longer prevented by DOMA from recognizing same-sex marriages for determining entitlement to, or eligibility for, Medicare.").

212. Patricia Berry, *Do You Qualify for Medicare?*, AARP, <http://www.aarp.org/health/medicare-insurance/info-04-2011/medicare-eligibility.html> (last updated Jan. 21, 2014). An individual can qualify for benefits at age sixty-five, provided that either she or her spouse worked for at least forty quarters (i.e., ten years). *Id.* An individual can also qualify for Medicare on her spouse's work record, provided her spouse is at least sixty-two and she is at least sixty-five. *Id.* See also SSA, MEDICARE, (July 2014), available at <http://www.socialsecurity.gov/pubs/EN-05-10043.pdf> (explaining when individuals qualify for Medicare).

213. Berry, *supra* note 212; see also SSA, MEDICARE, *supra* note 212.

214. 42 U.S.C. § 1395c (2014).

215. § 1395j.

216. § 1395w21.

217. *Important Information for Individuals in Same-Sex Marriages*, *supra* note 211.

218. § 1395c.

ceased.²¹⁹ Former spouses who were married for at least ten years can also qualify.²²⁰ Current spouses must have been married for at least one year before applying for benefits.²²¹ Spousal eligibility under Part A follows the rules applicable for Social Security benefits that are discussed above.²²²

Medicare Part B requires that individuals enroll during an “initial enrollment period” that begins three months before they turn sixty-five or face a lifetime penalty of higher premiums.²²³ The penalty does not apply if an individual is still working and has coverage through her employer or has coverage through her spouse’s employment-based health insurance plan.²²⁴ In this instance, CMS takes the position that the more restrictive Social Security rules do not apply, and it instead applies a state-of-celebration rule.²²⁵ CMS also has adopted a state-of-celebration law with respect to spouses covered by Part C Medicare Advantage plans.²²⁶ In August 2013, CMS announced that all beneficiaries in private Medicare Advantage plans

219. § 1395p. The couple must have been married for at least nine months prior to the date of death. This requirement is another instance where it is essential to know the length of a marriage. *See supra* note 198 (describing the importance of length of marriage for Social Security purposes).

220. § 1395p.

221. *Id.*

222. *Important Information for Individuals in Same-Sex Marriages, supra* note 211 (“When the work history of your same-sex spouse is needed for you to be eligible for premium-free Part A, Social Security will use the same rules for recognizing your marriage or treating a non-marital legal relationship (such as a civil union or domestic partnership) as a marriage when determining eligibility for Medicare as it uses for determining eligibility for Social Security benefits.”).

223. SSA, MEDICARE, *supra* note 212. The penalty is an additional 10% for every year the individual fails to enroll. *Id.* If an individual is covered by her spouse’s health insurance, then she can delay enrollment in both Part B and Part D without paying late enrollment penalties. *Id.*

224. 42 C.F.R. § 407.20 (2012). In such case, the individual qualifies for a “special enrollment period.” 42 U.S.C.S. § 1395p(i) (2012). Problems have occurred for same-sex couples when one spouse turns sixty-five and assumes that she does not need to sign up for Part B supplemental insurance because she is already covered under her spouse’s health plan. *See SSA, MEDICARE, supra* note 212. Centers for Medicare & Medicaid Services (CMS) had taken the position that DOMA prohibited a same-sex spouse or partner from qualifying for the special enrollment period by reason of his spouse’s employment status. There is a provision for a waiver of the penalty. 42 U.S.C.S. § 1395p(h) (2012); 42 C.F.R. § 407.32 (2012).

225. *Important Information for Individuals in Same-Sex Marriages, supra* note 211. CMS explains that the “rules for recognizing a marriage for purposes of Medicare Special Enrollment Periods aren’t the same as the rules for determining eligibility for Social Security benefits and premium-free Part A,” meaning the state-of-domicile rules do not apply. *Id.* The guidance provides that the “date of the marriage and where you and your same-sex spouse live aren’t considered for Special Enrollment Period eligibility.” *Id.*

226. *See HHS Announces First Guidance Implementing Supreme Court’s Decision on the Defense of Marriage Act*, HHS (Aug. 29, 2013), <http://www.hhs.gov/news/press/2013pres/08/20130829a.html> (clarifying that coverage applies in a legally recognized same-sex marriage, regardless of domicile).

must have access to equal coverage when it comes to care in a nursing home where their spouse lives, including joint placement.²²⁷

One of the most important protections afforded spouses under Medicare or Medicaid is the exception to the Medicaid “spend down rules” that is designed to ensure that a healthy spouse is not left destitute in order to qualify the other spouse for Medicaid benefits, referred to as the “spousal impoverishment rules.”²²⁸ Because Medicare does not cover the cost of long-term care,²²⁹ Medicaid is often the only option for many middle-income seniors who do not have long-term care insurance.²³⁰ In order to satisfy the income and asset thresholds imposed by Medicaid, individuals have to “spend down” or transfer their assets in order to qualify for coverage.²³¹ The spousal impoverishment rules protect the healthier spouse by exempting the marital home, prohibiting a Medicaid lien from attaching to the marital home until after the death of the non-institutionalized spouse, and allowing the non-institutionalized spouse to keep one-half (or more) of the couple’s joint assets.²³² Prior to *Windsor*, Health and Human Services (HHS) notified the states that they had the discretion to treat same-sex “domestic partners” as “opposite-sex spouses” for purposes of the spousal impoverishment rules.²³³ HHS has not revisited or clarified this guidance,

227. DANIEL R. MOON, IMPACT OF *UNITED STATES V. WINDSOR* ON SKILLED NURSING FACILITY BENEFITS FOR MEDICARE ADVANTAGE ENROLLEES (Aug. 29, 2013), available at http://www.cms.gov/Medicare/Health-plans/HealthPlansGenInfo/Downloads/HPMS_Memo_US_vs_Windsor_Aug13.pdf. The guidance specifically provides that the rule applies to couples in a legally recognized same-sex marriage, “without regard to whether they are domiciled in a state or territory that recognizes their relationship as a marriage.” *Id.*

228. See 42 U.S.C. § 1396r-s (2012) (exempting certain resources including residence, car, qualifying irrevocable trusts, limited burial expenses, and life insurance policies).

229. Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid’s History*, 26 GA. ST. U. L. REV. 937, 938 (2010). The Medicaid program differs from Medicare in that it is organized on a state-by-state basis, but with significant funding coming from the federal government. *Id.*

230. *Id.* at 932. It is estimated that 4.6 million seniors are eligible for Medicaid. *By Population*, *supra* note 208.

231. See Catherine M. Reif, *A Penny Saved Can Be a Penalty Earned: Nursing Homes, Medicaid Planning, the Deficit Reduction Act of 2005, and the Problem of Transferring Assets*, 34 N.Y.U. REV. L. & SOC. CHANGE 339 (2010) (discussing the difficulties and importance of transferring assets); Timothy L. Takacs & David L. McGuffey, *Perspectives on Elder Law: Medicaid Planning: Can It Be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111, 112 (2002) (noting “the unfortunate fact that impoverishing oneself is a prerequisite for Medicaid assistance”).

232. 42 U.S.C. § 1396p(b)(2)(Aa) (2010) (“Any adjustment or recovery . . . may be made only after the death of the individual’s surviving spouse, if any, and only at a time . . . when he has no surviving child who is under age 21, or . . . is blind or permanently and totally disabled . . .”). In addition, no lien may attach to the residence if a qualified sibling, son, or daughter of the decedent resides in the home. § 1396p(b)(2)(B).

233. *LGBT Health and Well-Being*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (HHS) (Apr. 1, 2011), <http://www.hhs.gov/secretary/about/lgbthealth.html>.

but it is likely that HHS would recommend a state-of-celebration approach given its previous guidance.²³⁴

5. ERISA, Pensions, and Retirement Funds—Celebration

The Employee Retirement Security Act of 1974 (ERISA) regulates employer-sponsored retirement funds (both defined benefit plans and defined contribution plans), as well as the welfare plans that provide health insurance and disability benefits.²³⁵ ERISA generally preempts state law.²³⁶ It mandates a number of spousal protections, including favorable tax treatment for amounts received from a decedent spouse's retirement fund.²³⁷ Prior to *Windsor*, DOMA barred legally married same-sex couples from qualifying for these protections.²³⁸ In some instances, same-sex spouses were even denied survivor benefits from plans that restricted permissible beneficiaries to "spouses."²³⁹

Through administrative guidance, the Department of Labor (DOL) has announced that it will follow a broad state-of-celebration rule.²⁴⁰ For purposes of ERISA, DOL will recognize as spouses individuals who are "lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such

234. See, e.g., Moon, *supra* note 227 (adopting state-of-celebration rule).

235. 29 U.S.C. § 1001 (2013).

236. § 1144.

237. A taxpayer can roll over her spouse's interest in a qualified retirement plan, government plan, or tax sheltered annuity and will not be taxed until distributions are taken. 26 U.S.C. § 402(c) (2013). This favorable treatment gives the survivor the benefit of tax-deferred savings.

238. The restrictive definition of DOMA applied for all federal purposes. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

239. Prior to *Windsor*, when a plan limited the class of beneficiaries to the exclusion of same-sex spouses and partners, the only option for a plan participant was to urge the employer to amend the terms of the plan. When Laurel Hester, a police lieutenant in Ocean County, New Jersey, was diagnosed with terminal cancer, she realized that her partner would not receive her accrued pension benefits. See Damien Cave, *Dying Officer Again Turned Down on Benefits for Companion*, N.Y. TIMES, Jan 19, 2006, <http://www.nytimes.com/2006/01/19/nyregion/19benefits.html>. In 2006, Hester successfully lobbied the county board of freeholders to pass a resolution allowing county law enforcement officers to designate someone other than their spouse as the beneficiary of their pension funds. *Id.* See also Michael Wilson, *Lieutenant Who Won Pension Rights for Her Domestic Partner Dies at 49*, N.Y. TIMES, Feb. 20, 2006, <http://www.nytimes.com/2006/02/20/obituaries/20partner.html>. A film about the ordeal, titled *Freeheld*, received the Academy Award for best short documentary in 2008. Robin Finn, *A Filmmaker Triumphant, a Film About Triumph*, N.Y. TIMES, Mar. 7, 2008, <http://www.nytimes.com/2008/03/07/nyregion/07lives.html>.

240. *Technical Release No. 2013-04*, *supra* note 168. The stated rationale is to "provide[] a uniform rule of recognition that can be applied with certainty by stakeholders, including employers, plan administrators, participants, and beneficiaries." *Id.*

marriages, but who are domiciled in a state that does not recognize such marriages.”²⁴¹ The recognition, however, does not extend to couples who have entered into an equivalent status, such as civil union or domestic partnership.²⁴² The blanket state-of-celebration rule should ensure legally married same-sex spouses equal treatment in the context of retirement funds.²⁴³ However, there is continuing concern that some defined benefit plans may use exclusionary language that defines “spouse” to mean only different-sex couples or references a discriminatory state law.²⁴⁴ In those cases, the plan document will have to be amended in order to comply with the DOL interpretation of the meaning of spouse.²⁴⁵

241. *Id.*

242. The terms “spouse” and “marriage,” however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law.*Id.*

243. When Jennifer Farley died in 2010, she was employed by the Philadelphia-based firm of Cozen O’Connor. *Case Summary and History, Case: Cozen O’Connor, P.C. v. Jennifer J. Tobits, et al. and Estate of Sarah Ellyn Farley (IL)*, NAT’L CTR. FOR LESBIAN RIGHTS (NCLR), <http://www.nclrights.org/cases-and-policy/cases-and-advocacy/cozen-oconnor-p-c-v-jennifer-j-tobits-et-al-and-estate-of-sarah-ellyn-farley-il/> (last visited Oct. 19, 2014). She left the bulk of her estate to her surviving spouse, Ellyn Tobits, whom she had married in Canada in 2006. *Id.* When Jennifer died, her parents claimed that they should be entitled to receive the proceeds of her profit sharing plan, arguing that Tobits does not qualify as a spouse in light of DOMA. *Id.* See also Jennifer Tobit’s Opposition to Plaintiff Cozen O’Connor, P.C.’s Motion for Judgment on the Pleadings, Connor v. Tobits, No. 2:11-cv-00045, 2013 WL 3878688 (E.D. Pa. July 29, 2013), available at http://www.nclrights.org/wp-content/uploads/2013/09/2011_09_22_Tobits_Opp_to_Cozen_MJP.pdf. The case was pending when *Windsor* was announced.

244. See TERESA S. RENAHER, JULIE WILENSKY & NINA WASOW, POST-DOMA EMPLOYEE BENEFITS ISSUE AFFECTING EMPLOYEES IN SAME-SEX MARRIAGES, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS (2014), available at http://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/9a_post-doma.authcheckdam.pdf.

245. There are instances where individuals have successfully changed the plan document. For example, when William Swensor died unexpectedly at the age of sixty-six, his surviving same-sex partner of fifty-one years did not qualify as a surviving “spouse.” *Union Changes Policy to Provide Equal Pension Benefits to Domestic Partners: After Two-Year Struggle, Gay Man Receives Deceased Partner’s Pension Benefits*, NCLR (Aug. 22, 2007), <http://www.nclrights.org/press-room/press-release/union-changes-policy-to-provide-equal-pension-benefits-to-domestic-partners/>. Two years later, the International Longshore and Warehouse Union was able to re-negotiate the terms of its contract to provide pension benefits for domestic partners and made the new contract coverage retroactive to the date of Swensor’s death. *Id.* By that time, however, his surviving partner had lost the house that they had shared for 35 years. *Id.*

6. Veterans' and Other Federal Benefits—Celebration

There are numerous other federal benefits that include spousal protections, including veterans' benefits and federal workers' benefits. Within weeks after the *Windsor* decision, the Office of Personnel Management announced that it would apply a state-of-celebration rule and recognize legally married same-sex couples regardless of the laws of their state-of-domicile.²⁴⁶ The extension of veterans' spousal benefits was more difficult because the relevant statutory language had been amended to include a DOMA-like restriction that specifically defined "spouse" as "a person of the opposite sex."²⁴⁷ In September 2013, U.S. Attorney General Eric Holder announced that the Department of Justice would no longer enforce the restriction,²⁴⁸ citing *Windsor* and a recent decision from the Central District of California that declared the restriction unconstitutional.²⁴⁹

III. THE IMPORTANCE OF ADVANCE PLANNING

As discussed in the prior section, the *Windsor* decision has increased access to marital benefits for married same-sex couples, but it has also added new layers of complexity for those married couples living in nonrecognition states. It has created a ripple effect across the country, as federal courts have begun to invalidate state constitutional restrictions on federal constitutional grounds.²⁵⁰ However, even nationwide marriage equality will not address some of the most pressing concerns facing LGBT elders and older adults, including the persistence of anti-LGBT bias and discrimination and the need for culturally competent senior services, especially in the context of housing. Accordingly, LGBT elders and older adults find themselves at a unique moment in history. Living on the edge of equality, they must balance their hopes for the future with the reality of the present.

As advocacy organizations and others continue to work for change, it is incumbent on LGBT individuals to use all available planning methods to secure a future that allows them to age in dignity and security while pre-

246. John O'Brien, Director for Healthcare and Insurance, No. 13-203, Benefits Administration Letter: Coverage of Same-Sex Marriage, OFFICE OF PERSONNEL MGMT. (July 17, 2013), available at <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>.

247. 38 U.S.C §§ 101(3), 101(31) (2013).

248. Eric H. Holder, Jr., U.S. Att'y Gen., Letter to John Boehner, Speaker of the U.S. House of Representatives, (Sept. 4, 2013), available at <http://www.justice.gov/iso/opa/resources/557201394151530910116.pdf>.

249. *Cooper-Harris v. United States*, 965 F. Supp. 2d 1139, 1141 (C.D. Cal. 2013).

250. See *supra* notes 129, 144 (discussing cases where federal courts have struck marriage bans for violating the Due Process and Equal Protection Clauses of the U.S. Constitution).

serving their autonomy and their preferences. For partnered LGBT individuals, part of this planning will include determining whether to marry and where to retire. Although private planning documents can go a long way to providing a certain level of security, there are obvious limitations. Private ordering will always be, at best, an imperfect substitute for systemic legal, social, and political change.

This section breaks down these opportunities for personal planning into three distinct, yet interrelated categories: planning for income security, traditional estate planning, and elder-care planning. In all three instances, LGBT elders and older adults can leave nothing to chance because the default rules that are in place prioritize legally recognized spouses and next of kin and may not reflect their choices or preferences. Accordingly, LGBT elders and older adults should create an integrated elder-care plan that goes beyond the typical estate plan and includes express directions regarding such important issues as gender identity, caregiving, and housing.²⁵¹

A. *Income Security—Whether to Wed and Where to Retire*

Planning for financial security in retirement is especially important for LGBT older adults given the current state of marriage equality, the uncertainty regarding some federal spousal benefits, and the high levels of income insecurity reported by the current generation of LGBT elders.²⁵² As explained in Part I, elder same-sex partnered households lag behind different-sex married elders on all important financial indicators, including income, retirement savings, and home ownership.²⁵³ The disparity is most striking at the lower rungs of the economic ladder where elder same-sex partnered households are more likely to live in poverty than different-sex married elders, and elder female same-sex partnered households are nearly twice as likely to live in poverty than the different-sex married elders.²⁵⁴ To some extent, these statistics should not be surprising because LGBT elders

251. See *infra* text accompanying notes 308-310 (describing the integrated elder care plan).

252. The three basic components of an individual's retirement savings are: individual non-deferred savings, Social Security benefits, and pensions or other retirement vehicles. Alicia H. Munnell, Annika Sunden & Catherine Taylor, *Perspectives: What Determines 401(K) Participation and Contributions?*, 64 SOC. SEC. BULLETIN (2001/2002), <http://www.socialsecurity.gov/policy/docs/ssb/v64n3/v64n3p64.html>. Obviously, the ability to save is a function of income level. Pension and other tax-deferred retirement savings plans are often tied to an individual's employment. *Id.* Social Security benefits are also tied to employment and earnings history, as well as marital status. 42 U.S.C. §§ 402(b)(c); 414(a); 415(a).

253. See generally BADGETT, DURSO & SCHNEEBAUM, *supra* note 64 (analyzing poverty data that support the view that LGBT individuals face economic challenges affecting their income and opportunities).

254. *Id.* at 15.

are longtime survivors of homophobia and transphobia.²⁵⁵ The statistics also reflect, at least in part, the historical disparity in spousal Social Security, pension, and veterans' benefits—a disparity that continues in some instances even after the *Windsor* decision.²⁵⁶

For LGBT older adults who are partnered, marriage is now a viable and obtainable option, even if it entails traveling out of state. However, it is not always a smart financial move. Accordingly, it is important to weigh the positive impact of marriage with its potential downside. Individuals who are receiving benefits must determine whether marriage will adversely affect their eligibility. This includes individuals who are receiving any sort of means-tested benefits or individuals who may be receiving benefits through a former or deceased spouse.²⁵⁷ Marriage can also have an adverse impact on federal tax liability, with some individuals experiencing a so-called marriage penalty.²⁵⁸

Even if marriage does make sense financially, it should never be entered into lightly. LGBT individuals, regardless of age, should consider prenuptial agreements and the possibility that marriage may not be forever.²⁵⁹ Unfortunately, it is currently much easier to enter into a same-sex marriage than to dissolve one.²⁶⁰ States do not generally impose residency requirements on marriage (or a marriage equivalent), whereas they frequently impose residency restrictions on divorce.²⁶¹ This difference has created significant problems due to the number of same-sex couples who live in non-marriage jurisdictions but have traveled out of state to get married, as did Edie and Thea.²⁶² Given the present state of divorce laws, such couples may end up making a much stronger commitment than they anticipated.²⁶³ When they return home, they will be considered married for cer-

255. For a discussion of the conditions for LGBT individuals in pre-Stonewall, see Knauer, *LGBT Elder Law*, *supra* note 20, at 5.

256. *See supra* text accompanying notes 162-69 (discussing difference between state-of-celebration and state-of-domicile rule).

257. *See supra* note 196, at 13-14 (stating that spousal benefits based on the work history of a former or deceased spouse will terminate on remarriage).

258. *See* Bernard, *Gay and Married Couples*, *supra* note 173 (discussing marriage penalty).

259. *See generally* Monica J. Franklin, *Late-Life Love: To Tie the Knot or Not*, 48 TENN. BAR J. 23 (2012).

260. *See generally* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669 (2011) (discussing domicile rule issues faced by same-sex couples legally married in one state but living in a state that does not recognize same-sex marriage).

261. Margaret Klaw, *Gay Divorce, the Next Frontier*, WASH. POST, July 5, 2013, http://articles.washingtonpost.com/2013-07-05/opinions/40390073_1_marriage-equality-marriage-license-marriage-act.

262. *See supra* text accompanying notes 2-3 (discussing Edie and Thea's trip to Canada).

263. Joslin, *supra* note 260.

tain federal purposes, but will not be legally married for state purposes, nor will they be able to divorce in their state-of-domicile.²⁶⁴ The unhappy couple can only secure a divorce if they married in one of the states that retains jurisdiction of marriage or if they establish residency in a state that has marriage equality.²⁶⁵ Accordingly, if a same-sex couple does choose to marry out of state, they should pick the state carefully. Otherwise, their only option will be to establish another domicile, which will be costly and may not be feasible.²⁶⁶

In addition to choosing where to wed, LGBT elders and older adults must consider carefully where to retire. As discussed in Section A of Part II, nationwide marriage equality has not yet been achieved.²⁶⁷ Married same-sex couples will find that in some states and for some federal purposes their spouses may be considered legal strangers. For example, Florida, a major retirement state, was until recently an anti-same-sex-marriage state.²⁶⁸ In 2014, if a legally married same-sex couple moved from New York to Florida, they would have been recognized as married when they traveled in the states with marriage equality, as well as the District of Columbia, but they would not have been considered married under Florida law. Instead, the spouses would have been considered legal strangers under Florida law, which could have profound consequences in terms of probate and property law, medical decisionmaking, and fiduciary appointments.²⁶⁹

The couple would have been considered married for federal tax purposes, but the question of Social Security benefits is much more complicated. As explained in Section B of Part II, Social Security spousal benefits are determined by a modified domicile rule.²⁷⁰ The operative point in time is when the application for benefits is made.²⁷¹ Accordingly, it would have been essential for the couple to file for benefits in New York before they established a new domicile. A similar rule applies for certain Medicare benefits.²⁷² If the couple moved to Florida in anticipation of retirement and

264. *Id.*

265. Jurisdictions are increasingly passing legislation that maintains continuing jurisdiction over out-of-state marriages, thereby eliminating the residency requirement. Tracy A. Thomas, *Same-Sex Divorce*, 5 CAL. L. REV. CIR. 218, 219 (2014).

266. *Id.*

267. See *supra* text accompanying notes 88-102 (describing current state of marriage equality).

268. See *Marriage Center*, *supra* note 13 (listing non-marriage states).

269. See *infra* text accompanying notes 301-06 (discussing strong preference for next of kin).

270. See *supra* text accompanying notes 186-205 (describing Social Security eligibility rules).

271. See *supra* note 203.

272. LGBT ORGS. FACT SHEET SERIES, AFTER DOMA: WHAT IT MEANS FOR YOU: MEDICARE SPOUSAL PROTECTIONS (2013), available at http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_post-doma-

then filed for Social Security benefits once they relocated, they would not qualify as spouses for Social Security purposes because in 2014, they were not spouses under the law of their state-of-domicile, and they were not entitled to inherit under the rules of intestacy.²⁷³ Married same-sex couples who live in nonrecognition states and are not able to move before applying for Social Security benefits will have to continue to plan for retirement as unmarried individuals and not rely on the availability of spousal benefits.²⁷⁴

In light of the disproportionate level of income insecurity among LGBT elders, it is likely that Social Security plays a central role in their retirement plans.²⁷⁵ For example, research shows that elder female-partnered households rely more heavily on Social Security income as a percentage of their overall income than different-sex married couples.²⁷⁶ They also receive, on average, 15% less in Social Security benefits than their peers in different-sex marriages.²⁷⁷ Accordingly, LGBT elders and older adults must plan carefully to maximize the availability of these benefits.

In addition to Social Security, it is important to consider the other two major sources of retirement income: savings and pensions or retirement funds.²⁷⁸ In the case of savings, a primary concern is to make sure that any investments are accurately titled or disposed of correctly at death.²⁷⁹ As explained in the following section, it is not possible to rely on the default settings that govern the rules of intestacy to make sure that an individual's preferences are respected.²⁸⁰ Accordingly, LGBT individuals must execute

medicare-2013.pdf. In other words, benefits eligibility is determined by the law of domicile at the time of application. *Id.*

273. *Id.*

274. Of course, their recognized status may change depending on the outcome of the pending court challenges, which means that LGBT individuals must carefully monitor legal developments. Nancy J. Knauer, *Legal Consciousness and LGBT Research: Law and the Everyday Lives of LGBT Individuals*, 59 J. HOMOSEXUALITY 748 (2012) (discussing the importance of law in the everyday lives of LGBT individuals).

275. See *supra* text accompanying notes 64-68 (discussing high level of financial insecurity among LGBT older adults).

276. NAOMI G. GOLDBERG, WILLIAMS INST., THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS (Oct. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf>.

277. *Id.*

278. Emily Brandon, *The 4 Most Important Sources of Retirement Income*, U.S. NEWS & WORLD REP. (Mar. 22, 2012, 10:31 AM), <http://money.usnews.com/money/blogs/planning-to-retire/2012/03/22/the-4-most-important-sources-of-retirement-income> (reporting that the fourth most important source is employment).

279. This concern is primarily focused on the well-being of surviving beneficiaries. Accounts can be titled with right of survivorship. See generally Lawrence M. Jones, *The Use of Joint Bank Accounts as a Substitute for Testamentary Disposition of Property*, 17 U. PITT. L. REV. 42 (1955).

280. See Chauncey, *supra* note 102, at 100 ("If the couple had been able to marry, his partner would have automatically received his estate (or a substantial share of it, depending

wills or retitle assets such that they do not become part of the probate estate at death.²⁸¹ Avoiding probate can be accomplished by titling the property, including real estate, in joint name with right of survivorship or using other designations applicable to investment accounts, such as Payable on Death (POD) or Transfer on Death (TOD).²⁸²

Benefits payable under retirement and pension plans are nonprobate assets, meaning that they do not pass under the decedent's will or the rules of intestate succession.²⁸³ Accordingly, it is of the utmost importance that covered individuals execute the appropriate beneficiary designations. As explained in Section B of Part II, the Department of Labor (DOL) has clarified that it will apply a state-of-celebration rule in the case of all retirement plans governed by ERISA.²⁸⁴ Accordingly, where a plan document directs that benefits are payable to a surviving "spouse," a legally married same-sex spouse will qualify as a "spouse."²⁸⁵ Spouses qualify for favorable tax treatment on any amounts payable under the retirement plan of a deceased spouse.²⁸⁶ Legally married spouses are also entitled to certain ERISA spousal protections.²⁸⁷ For example, an individual cannot designate a non-spousal beneficiary without the written consent of her spouse. Divorced spouses are entitled to a Qualified Domestic Relations Order (QDRO), which splits the value of a retirement fund to reflect the contribution of the divorced spouse during the marriage.²⁸⁸

Traditional pension plans, also referred to as defined benefit plans, sometimes prescribe the beneficiaries and do not grant the covered em-

on the existence and age of children), even without a will.").

281. See *infra* text accompanying notes 292-98 (describing default rules). LGBT individuals who do not have children and who rely on single-generational chosen family may find some limitations when attempting to follow traditional estate planning techniques. For example, in some instances, the threat of a will challenge by estranged next of kin may make it advisable for LGBT individuals to try to avoid probate entirely. However, the type of lifetime giving that is necessary to avoid or minimize probate may be impracticable where the potential beneficiaries are all of the same generation.

282. See UNIF. PROBATE CODE §§ 6-201, 6-233, 6-301 (2014) (explaining survivorship, which assets are payable on death, and which assets automatically transfer on death).

283. See generally James J. Carroll, *The Interplay of Probate Assets and Nonprobate Assets in the Administration of a Decedent's Estate*, 25 DEPAUL L. REV. 363, 363-64 (1975). Life insurance is another important nonprobate asset that can provide significant financial assistance to survivors.

284. *Technical Release No. 2013-04*, *supra* note 168.

285. *Id.*

286. NANCY J. KNAUER, *GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS* 122 (2011).

287. Charles Delafuente, *Spouse's Consent Is Required to Change Retirement Account Beneficiary*, N.Y. TIMES, Sept. 11, 2012, <http://www.nytimes.com/2012/09/12/business/retirementspecial/spouses-consent-is-required-to-change-retirement-account-beneficiary.html>.

288. 26 U.S.C. § 414 (p)(1)(A) (2013) (defining a "qualified domestic relations order").

ployee power to designate a beneficiary of her own choosing.²⁸⁹ In such cases, chosen family will be left out unless the plan is amended.²⁹⁰ For this reason, it is always important to check the terms of the plan document. Some plans that were amended or drafted in recent years may include DOMA-like language that defines spouse and marriage to the exclusion of same-sex couples.²⁹¹ It is likely that such plan restrictions would not be enforced in light of the DOL guidance, but they should be amended to remove the offending language.²⁹²

B. Traditional Estate Planning: The Basics

For LGBT individuals and their families, estate planning documents have long been recognized as an essential part of relationship and family formation.²⁹³ Before the advent of legal relationship recognition, individuals could use the standard set of estate planning documents to grant their partners a wide range of rights and responsibilities.²⁹⁴ For example, a durable power of attorney could authorize a partner to manage the finances and make medical decisions.²⁹⁵ An advance medical directive could empower a partner to withdraw life-sustaining treatment and make decisions regarding organ donation.²⁹⁶ A will could appoint a partner as representative and beneficiary of the estate. Combined, these documents provided a modicum of security for partners, but they were, and remain, an imperfect substitute for legally recognized relationships.²⁹⁷ Such documents are susceptible to challenge by next of kin on multiple grounds, including lack of mental capacity and undue influence.²⁹⁸ They are also ineffective at addressing a number of instances where the law or social norms grant decisionmaking authority to legally recognized next of kin, such as in the case of funeral and burial instructions or hospital visitation.²⁹⁹

289. Defined benefit plans are distinct from the more popular employee-directed defined contribution plans. KNAUER, *supra* note 286, at 120.

290. See 26 U.S.C. § 414.

291. *After DOMA: Private Employment Issues and Benefits*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/after-doma-private-employment> (last visited May 10, 2014).

292. *Id.*

293. CHAUNCEY, *supra* note 102, at 100-04.

294. *Id.* at 104.

295. UNIF. PROBATE CODE § 5B-101.

296. See generally UNIF. HEALTH-CARE DECISIONS ACT § 2 (1993) (stating rules regarding advance health-care directives).

297. These documents can also provide limited security for chosen family members because of the imbedded preferences for legally recognized family relationships. KNAUER, *supra* note 286, at 100 (discussing ability of next of kin to challenge a will).

298. CHAUNCEY, *supra* note 102, at 100-01.

299. Same-sex couples can draft documents that try to anticipate such circumstances,

Ignoring these considerable shortcomings, anti-marriage opponents have incorrectly argued that same-sex couples do not need marriage equality because they can secure all the rights and benefits of marriage through personal planning documents.³⁰⁰ Of course, even the best estate plan will not entitle a beneficiary or fiduciary to receive Social Security spousal benefits.³⁰¹ Personal planning can establish property rights vis-à-vis the parties and appoint fiduciaries, but it cannot force third parties, including the government, to respect the relationships that the documents are designed to protect.

Even with these clear limitations, LGBT individuals cannot afford to forego basic estate planning because the default settings that arise automatically by operation of state law generally do not reflect their preferences or the composition of their chosen families.³⁰² Approximately two-thirds of all decedents in the United States die without a valid will,³⁰³ but intestacy is simply not a luxury that LGBT individuals can afford. The order of priority established by the law of intestacy privileges next of kin to the exclusion of all others, which means that spouses in marriage-equality states or partners in those states with marriage equivalents will be protected, but chosen family members will not be protected in any state.³⁰⁴ In the absence of legal

but the extent to which the documents can legally bind third parties such as funeral directors or cemeteries is uncertain, except where such documents are expressly authorized by law. For example, Virginia expressly authorizes the designation of an individual who “shall make arrangements . . . for [the declarant’s] funeral and the disposition of [the declarant’s] remains, including cremation . . . upon [the declarant’s] death.” VA. CODE ANN. § 54.1-2825 (2001). See Jennifer E. Horan, “When Sleep at Last Has Come”: Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423 (1999) (discussing obstacles encountered by surviving same-sex partners). See also *infra* text accompanying notes 351-61 (discussing burial and visitation issues).

300. Peter Sprigg, *Questions and Answers: What’s Wrong with Letting Same-Sex Couples ‘Marry?’*, FAMILY RES. CTR., <http://www.frc.org/whats-wrong-with-letting-same-sex-couples-marry> (last visited May 10, 2014).

301. The fact that individuals in a chosen family tend to be in the same age cohort also complicates fiduciary designations. In a traditional estate plan, an individual would usually appoint his or her spouse and then a child or perhaps even a grandchild to serve as the alternate fiduciary. When the grantor of the power of attorney, the attorney-in-fact, and the alternate attorney-in-fact are all in the same generation, it is important to name more than one alternate to guard against the possibility that the attorneys-in-fact may not be able to serve due to death or incapacity, thereby resulting in the need for a guardianship. See *supra* note 279 (discussing other limitations of planning with single-generational chosen family).

302. See, e.g., UNIF. PROBATE CODE § 2-101 (2014) (“Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession . . .”).

303. Bina Brown, *Estate Planning: Make a Will*, CNN (June 26, 2006, 6:41 AM), <http://edition.cnn.com/2006/BUSINESS/06/12/btn.will/index.html> (reporting 66% of people in the United States die without wills).

304. The state has priority over legal strangers no matter how well the “strangers” might know the individual in question. For example, when a decedent is not survived by any relatives within the prescribed degrees of relationship, the decedent’s probate property will escheat to the state. UNIF. PROBATE CODE § 2-105 (2014).

recognition, partners and chosen family will be considered legal strangers. They will not take under traditional intestacy laws or be included in the order of priority for guardianship appointments or other similar fiduciary appointments.³⁰⁵ This strong preference for next of kin is ubiquitous throughout the law and extends far beyond the distribution of a decedent's probate estate. It is replicated across the board in situations involving substituted decisionmaking and other benefits, ranging from the right to receive crime victim compensation to the power to authorize organ donation.³⁰⁶ It also establishes who has standing to contest a will.³⁰⁷

C. *Developing an Integrated Elder Care Plan*

For LGBT older adults, the traditional trio of estate planning documents—will, durable power of attorney, and advance directive—are not sufficient to preserve their autonomy and protect their chosen families. For example, as typically drafted, health care powers of attorney and advance directives do not address a number of important decisions that are customarily left to family, such as funeral or burial instructions, and they do not address issues specific to transgender individuals.³⁰⁸ To supplement the traditional estate planning documents, LGBT older adults should develop an integrated elder care plan that may require the assistance of financial advisers and medical service providers, as well as the coordination of both formal and informal caregivers. The comprehensive elder care plan can incorporate the traditional estate planning documents while also providing

305. UNIF. PROBATE CODE § 2-101 (2014) (rules governing distribution by intestacy); UNIF. PROBATE CODE § 5-310 (2014) (rules governing appointment of a guardian).

306. All states have crime victim compensation boards that provide monetary assistance to the victims of crime and their survivors. The National Association of Crime Victim Compensation Boards provides links to each of the state programs. *State Links*, NAT'L ASS'N OF CRIME VICTIM COMPENSATION BDS., <http://www.nacvcb.org/index.asp?sid=6> (last visited May 10, 2014). The assistance awards are designed to meet emergency expenses, but not to compensate for amounts that would otherwise be recoverable in tort. A survivor is generally eligible to receive compensation if she is either related to the victim or economically dependent on the victim for her "principal support." *Benefits*, NAT'L ASS'N OF CRIME VICTIM COMPENSATION BDS., <http://www.nacvcb.org/index.asp?bid=16> (last visited Nov. 5, 2014).

307. Individuals who would stand to gain under the rules of intestate succession have standing to challenge a will. Accordingly, in the absence of marriage or its statutory equivalent, when a surviving same-sex partner is the primary beneficiary under the will, the decedent's intestate heirs have standing to challenge the will. Gifts to chosen family members will always be subject to challenge by legally recognized next of kin. *See In re Getty Estate*, 149 Cal. Rptr. 656, 660 (1978) (holding contingent trustee lacked standing to challenge the will of J.P. Getty because she did not have a "pecuniary interest" if the will were invalidated).

308. *See, e.g.,* CARING CONNECTIONS, DISTRICT OF COLUMBIA: ADVANCE DIRECTIVE: PLANNING FOR IMPORTANT HEALTH-CARE DECISIONS (2005), available at <http://www.caringinfo.org/files/public/ad/DistrictofColumbia.pdf>.

clear written instructions with respect to caregivers, housing, visitation, burial, gender identity, and anything else an individual feels strongly about, such as the care of their pets or organ donation.³⁰⁹ In many instances, the actual legal force of these instructions may be unclear, but, at the very least, they will provide some indicia of what the individual would have wanted had she been able to express her wishes. They should be designed to speak beyond incapacity and provide protection for both the individual and her chosen family from the potentially conflicting wishes and values of next of kin or public guardians.³¹⁰

The following outlines five different areas where an LGBT older adult may wish to memorialize her wishes and preferences: gender identity, housing, caregiving and capacity, visitation, and burial and funeral instructions. In each case, the individual's wishes and preferences can be reflected in a single document or incorporated in another document, such as an advance directive. Whenever possible, the document should be executed with the same legal formalities applicable to wills: signed, dated, witnessed, and notarized.³¹¹ Given the potential for a will challenge, it is also important to maximize and memorialize that the individual has the requisite capacity to execute the documents.³¹²

309. *Advanced Care Planning*, CAREGIVER RES. CTR., http://www.caregiverresourcecenter.com/advanced_elder_care_planning.htm (last visited Nov. 5, 2014) (advising how to plan for healthcare decisions for the elderly).

310. The increased risk for social isolation among LGBT older adults and elders means that there may not be any relatives or next of kin who would want to interfere or take responsibility. In such cases, the concern is that the local equivalent of the office of public guardian would step in and assume responsibility. This was what occurred in the tragic case of two older gay men in Sonoma County, California where county officials separated the men and placed them both in secure "dementia" facilities. Gerry Shih, *Suit Charges Elderly Gay Partners Were Forced Apart*, N.Y. TIMES (Apr. 20, 2010, 2:09 AM), <http://bayarea.blogs.nytimes.com/2010/04/20/suit-charges-elderly-gay-couple-was-forced-apart/> ("For gay men and lesbians, the series of events outlined in the complaint hits very close to home."). It took Clay Greene nine months to gain his release, by which time his long-time partner, Harold Scull was dead, and the county had sold all of the couple's belongings to pay for their care. *Id.*

311. UNIF. PROBATE CODE § 2-502 (2014).

312. The precautions are especially important given the high prevalence of dementia among older adults and the fact that a planning scheme favoring chosen family over next of kin will be considered unusual. When the potential for dementia is combined with non-normative estate plans, the wills of LGBT elders and older adults are vulnerable to challenges brought by disappointed heirs on the grounds of lack of capacity. Potential precautions include: monitoring medication to make sure a client is functioning at peak when the documents are signed, securing the equivalent of a doctor's note, and videotaping the execution of the documents. See generally AM. BAR ASS'N COMM'N ON LAW & AGING & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005), available at <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

1. Gender Identity

As discussed in Part I, aging can pose a set of specific challenges for transgender individuals, who often express a deep concern over encountering transphobic service providers, especially in senior living facilities.³¹³ There are reports that senior living facilities sometimes refuse to respect an individual's gender identity, resulting in extreme dignitary and psychological harm to the elder.³¹⁴ For example, facilities may force a transgender elder to wear gender inappropriate clothing or insist on calling the elder by the wrong name and using the wrong pronouns.³¹⁵ Dementia or cognitive issues can greatly increase the likelihood that a transgender elder may experience such bias and discrimination.³¹⁶

Accordingly, it is extremely important to leave express and detailed directions regarding gender identity issues, including pronouns and gender-appropriate clothing, as well as desired supportive medical therapy. These directions can be easily incorporated into a durable medical power of attorney or advance directive to the extent they are directed at service providers and involve medical care. It is also important to make sure that any substituted decisionmakers are aware of the individual's wishes, especially if estranged next of kin would be hostile to these wishes. For many LGBT elders who struggle with social isolation, it is possible that there may be no next of kin or chosen family, in which case a public guardian would assume responsibility for the individual's care.³¹⁷ In that situation, it is especially crucial to leave clear and uncontroverted evidence of gender identity, so there can be no questions raised by either the public guardian or a senior living facility.³¹⁸

2. Housing and "Aging in Place"

LGBT individuals overwhelmingly report that they would prefer to "age in place," and they express extreme trepidation over the prospect of moving to any form of congregate living facility, such as a nursing home or

313. See *supra* text accompanying notes 58-63 (discussing unique challenges facing transgender older adults).

314. See generally NAT'L SENIOR CITIZENS LAW CTR. ET AL., *supra* note 62.

315. *Id.*

316. In one recent study, the prevalence of dementia among individuals age seventy-one and older was 13.9%, but the percentage increased to 37.4% for individuals aged ninety and older. Brenda L. Plassman et al, *Prevalence of Dementia in the United States*, 29 NEUROEPIDEMIOLOGY 125, 131-32 (2007).

317. See Shih, *supra* note 310 (discussing role of public guardians).

318. See Redman, *supra* note 61 (discussing abuse of transgender residents at long-term care facilities).

assisted living facility.³¹⁹ As explained in Part I, gay and lesbian seniors who do enter into senior-specific housing have reported strong pressure to remain closeted, but transgender elders may not have that same option.³²⁰ For individuals who enter senior facilities, the closet can take a decisive toll on their health and wellbeing.³²¹ Those who attempt to age in place, however, often underutilize the supportive services that are designed to help seniors remain in the community because they fear encountering anti-LGBT bias on the part of service providers.³²² This reluctance to access services can place LGBT elders at an increased risk of social isolation and self-neglect.³²³

Assuming an LGBT older adult desires to age in place, the goal of her elder care plan should be to maximize autonomy and the ability to live independently for as long as possible. In addition to supportive services, the prospect of aging in place often requires assistance from informal caregivers.³²⁴ As discussed in Part I, the vast majority of informal care in the United States is provided by younger relatives.³²⁵ This strong reliance on informal caregiving presents a difficulty for LGBT elders and older adults, who are much more likely than their non-LGBT peers to be estranged from their next of kin and less likely to have had children.³²⁶ Chosen families may also be limited in how much support they can provide because their members will all age together at the same time, thereby creating overlapping and reciprocal caregiving responsibilities that require home health care assistance and other supportive services. As explained above, however, LGBT elders are less likely to access these services,³²⁷ and they are also less likely than their non-LGBT peers to have the financial wherewithal to pay for long-term care, which can leave Medicaid as their only financing option.³²⁸

319. To “age in place” means to age within the community as opposed to in some form of senior living facility. The preference LGBT elders and older adults voice to age in place is reinforced by fear that they will experience discrimination and anti-LGBT bias in mainstream senior housing options. Orel, *supra* note 50, at 233.

320. See *supra* text accompanying notes 59-62 (discussing challenges faced by transgender elders).

321. See *supra* text accompanying notes 56-57 (quoting Dr. Lantz on negative health effects of the closet).

322. See Kling & Kimmel, *supra* note 51 (noting LGBT elders and older adults underutilize services).

323. *Id.* (defining social isolation).

324. See *supra* text accompanying note 42 (discussing informal caregiving).

325. See MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 32 (discussing LGBT health disparities).

326. See Barker, *supra* note 28 (discussing the likelihood that LGBT elders will be estranged from their family).

327. See Kling & Kimmel, *supra* note 51 (noting LGBT elders and older adults underutilize services).

328. See *supra* text accompanying note 64 (discussing financial insecurity of LGBT el-

In terms of housing and other long-term care, the market has recently begun to respond to the concerns of LGBT elders and older adults by creating LGBT-friendly or even LGBT-centered senior housing developments.³²⁹ Although these proposed projects have garnered considerable press coverage, there are relatively few expressly LGBT-centered facilities that are currently open and serving clients, and the demand for such housing far outstrips supply.³³⁰

For LGBT elders who can no longer live independently and do not have access to LGBT-centered housing, it is important to identify a facility that is at least LGBT-friendly.³³¹ At a minimum, this would require a facility to have an antidiscrimination policy that includes sexual orientation and gender identity.³³² Ideally, in addition to an antidiscrimination policy, a facility should have LGBT-inclusive policies and programs, cultural competency training for staff, and anti-bullying policies to control the homophobic and transphobic behavior of other residents.³³³ It is important to identify these types of housing options well in advance of their need, and an integrated elder care plan should list potential housing options in order of preference.

3. Caregiving and Capacity Questions

LGBT elders and older adults who rely on chosen family must take special care to spell out their wishes with respect to their preferred caregivers and appoint substitute decisionmakers through health care proxies and durable medical powers of attorney. Their durable medical powers of attorney should also nominate an individual or individuals whom they wish to

ders).

329. See generally Mickey Rapkin, *The Gay Retiree Utopia*, BLOOMBERG BUSINESSWEEK, May 16, 2013, available at <http://www.businessweek.com/articles/2013-05-16/the-gay-retiree-utopia>.

330. *Id.* See also Catherine Trevison, *Gay Retirement Homes Still Difficult to Market*, ST. PAUL PIONEER PRESS, Mar. 20, 2008, at 7E (noting some developments have “difficulty filling”).

331. Larger metropolitan areas increasingly have resources specifically for LGBT seniors that are provided by LGBT organizations, but LGBT elders may be unable or unwilling to access the services because many members of the pre-Stonewall generation have little contact with LGBT organizations and may be reluctant to initiate such contact. See *supra* text accompanying notes 28-34.

332. HRC has rated healthcare facilities through its Healthcare Equality Index that measures four “core criteria”: (1) patient non-discrimination, (2) equal visitation, (3) employment non-discrimination, and (4) training in “LGBT-centered patient care.” *Healthcare Equality Index: The HEI Core Four Leader Criteria*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/hei/the-core-four-leader-criteria> (last visited Nov. 5, 2014).

333. HRC recommends, among other things, inclusive intake forms. *Resources: LGBT-Inclusive Intake Forms*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/lgbt-inclusive-intake-forms> (last visited Nov. 5, 2014).

serve as guardian should one be needed.³³⁴ In the absence of these documents, the law will privilege next of kin over chosen family, regardless of the strength of the relationship.³³⁵ Where no next of kin are available or willing to serve, the state will assume the responsibility for elders in need of care through the office of the public guardian or, if the elder has private funds, through a private fiduciary.³³⁶ In most instances, the state will be deemed to have a greater interest in an individual than chosen family, who will be considered legal strangers.³³⁷

Although an adult guardianship is considered an option of last resort, there are an estimated 1.5 million adults in the United States living under a plenary guardianship.³³⁸ The adoption of broad durable power-of-attorney laws in the 1970s was designed, in part, to avoid the need for plenary guardianships.³³⁹ However, guardianships are sometimes necessary to prevent harm or neglect and, even with fair warning, not everyone has a durable power of attorney. Some LGBT elders and older adults who are socially isolated may find themselves in a position where they have no one to appoint as attorney-in-fact or nominate as a guardian,³⁴⁰ in which case the public guardian may indeed be the option of last resort.

334. UNIF. PROBATE CODE § 5-310 (2014). The law gives priority to an individual appointed to serve as guardian under a power of attorney. *Id.*

335. *Id.*

336. BRENDA K. UEKERT, CTR. FOR ELDER & COURTS, ADULT GUARDIANSHIP AND COURT DATA FROM AN ONLINE SURVEY (Mar. 2, 2010), available at http://www.guardianship.org/reports/Guardianship_Survey_Report.pdf. Although there is no reliable national data set, estimates show that approximately 72% of appointed guardians are family or friends of the ward, 14% are handled by private professional guardians, and 14% by public guardians. *Id.*

337. State laws will prioritize next of kin, although some states allow anyone with an interest to serve as guardian. UNIF. PROBATE CODE § 5-310 (2014). See also *In re Guardianship of Atkins*, 868 N.E.2d 878, 880 (Ind. App. 2007), rehearing den. *Conrad v. Atkins*, 2007 Ind. App. LEXIS 2068 (Ind. Ct. App., Aug. 31, 2007), trans. den. *Atkins v. Atkins*, 2008 Ind. LEXIS 60 (Ind., Jan. 17, 2008).

338. There are no reliable statistics on the number of adults in the United States who are under guardianships, but estimates place the number at upwards of 1.5 million. BRENDA K. UEKERT & RICHARD VAN DUIZEND, NAT'L CTR. FOR STATE COURTS, ADULT GUARDIANSHIPS: A "BEST GUESS" NATIONAL ESTIMATE AND THE MOMENTUM FOR REFORM (2011), available at <http://nscs.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1846>. There is also some indication that the use of guardianships has been increasing. *Id.*

339. Lisa Brodoff, *Planning for Alzheimer's Disease with Mental Health Advance Directives*, 17 ELDER L.J. 239 (2010).

340. An elder living in this type of isolation is also referred to as an "unbefriended elder." See generally VOLUNTEERS OF AM. OF MINN. & WIS., UNBEFRIENDED ELDER, available at http://www.voamnwi.org/pdf_files/protective-services-unbefriended-elders-project (last visited Jan. 28, 2015) ("Unbefriended elders' have no close family or friends and thus may be subjected to over- or under-treatment if they are not able to provide medical providers with guidance about their wishes for treatment and care.").

4. Visitation Issues

Hospital visitation authorization forms became a fairly common feature of LGBT estate planning after the first wave of the HIV/AIDS epidemic in the 1980s.³⁴¹ Such forms were necessitated by standard hospital policies that restricted visitors to “family members” and were used to bar partners and friends from visiting sick and dying patients.³⁴² Although it has long been unclear whether these documents carried any legal force, hospital visitation authorization forms can serve as indicia of the wishes of the patient. For LGBT older adults and elders, however, visitation documents should be broad enough to cover both hospitals and senior living facilities.

After a heart-wrenching case in Florida where hospital workers refused to allow a same-sex partner access to her dying partner despite the fact that she was her partner’s attorney-in-fact, President Obama issued a Presidential Memorandum affirming a patient’s right to visitation.³⁴³ The Memorandum directs that “participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability.”³⁴⁴ In response, HHS issued regulations “to provide visitation rights to Medicare and Medicaid patients.”³⁴⁵ It directed that participating hospitals must “[n]ot restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.”³⁴⁶ The regu-

341. In the 1980s, the legal fragility of chosen family was exposed during the first wave of the HIV/AIDS epidemic as a generation of young men faced a premature death and the prospect that their partners and chosen family would be denied access to their hospital rooms by often estranged and disapproving parents or hospital staff. *See* CHAUNCEY, *supra* note 102, at 95-104 (discussing role of epidemic in creating demand for same-sex marriage). In the 1990s, the highly publicized case of Sharon Kowalski, who suffered a brain injury in a car accident and whose parents refused to allow her to see her partner, inspired a public education campaign by LGBT advocacy groups to induce same-sex couples to write wills and sign healthcare powers of attorney. *See id.* at 111-15 (discussing emphasis on documents and role in forming demand for same-sex marriage).

342. *Id.*

343. Memorandum from Barack Obama, President of the United States, to Kathleen Sebelius, Secretary of HHS, Respecting the Rights of Hospital Patients To Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies (Apr. 15, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

344. *Id.*

345. Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients, 75 Fed. Reg. 70,831 (Nov. 19, 2010) (to be codified at 42 C.F.R. pt. 482 and 485).

346. 42 C.F.R. § 482.13(h); 42 C.F.R. §485.635(f) (2014).

lations also reasserted the right of patients to designate the person of their choosing to make medical decisions on their behalf.³⁴⁷

Hospital visitation policies have obvious relevance to LGBT elders and older adults, who will be more likely to require hospital care than younger healthy individuals.³⁴⁸ However, for this group, the question of visitation policies extends beyond just hospital stays. With respect to individuals who reside in senior living facilities, the question of visitation impacts their day-to-day lives. In 2013, CMS clarified that the visitation rules apply to long-term care facilities receiving Medicare or Medicaid funds, thereby increasing protections for LGBT elders.³⁴⁹ The CMS guidance provides that visitors must be given “full and equal visitation privileges, consistent with resident preference.”³⁵⁰ For individuals experiencing cognitive decline, it is extremely important to memorialize these resident preferences.³⁵¹

Individuals typically use visitation documents to allow visitation by a non-family member. However, it is also possible to use such documents to disallow visitation by family members who would otherwise be authorized under most visitation policies. In some instances, individuals who have strained relationships with their next of kin may wish to restrict or disallow visitation entirely. This negative use of visitation documents may have particular applicability for LGBT elders and older adults given the relatively high level of family estrangement.

5. Burial and Funeral Instructions

After the death of an LGBT elder, disappointed and incredulous heirs may not only challenge wills, but also burial and funeral instructions, leaving a surviving partner and chosen family out in the cold.³⁵² Given the importance of this issue and the strong emotions it can trigger, LGBT older adults should execute a separate document that sets forth their directions

347. *See id.* (“The patient or his or her representative (as allowed under State law) has the right to make informed decisions regarding his or her care.”)

348. *See supra* note 64 (discussing greater incidence of disability).

349. Memorandum from the Director, Survey & Certification Group, Centers for Medicare & Medicaid Services, to State Survey Agency Directors, Reminder: Access and Visitation Rights in Long Term Care (June 28, 2013), *available at* <http://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertificationgeninfo/downloads/survey-and-cert-letter-13-42.pdf>.

350. *Id.*

351. In some instances, it may be desirable to include negative resident preferences that restrict visitation to exclude certain family members who may be hostile or not supportive.

352. *See* Starkey, *supra* note 74 (quoting a fifty-nine-year-old lesbian’s concern that she could be mistreated by her partner’s family after her partner’s death, who said: “You can’t know how people are.”).

and not rely on general powers granted to their personal representative.³⁵³ In the absence of legislation, it may not be clear whether an individual has the authority to direct the terms of her funeral and burial arrangements, but the document will serve as indicia of the individual's wishes.

Although states have recently begun to enact enabling legislation, the approach followed has been far from uniform.³⁵⁴ Some states provide that a decedent's written instructions concerning burial must be honored.³⁵⁵ Other states allow the appointment of a funeral-planning agent who has decisionmaking authority, and other states have adopted some combination of the two approaches.³⁵⁶ In some instances, state law requires individuals to execute a separate document, but other states, such as Vermont, have incorporated the power in their advance directive forms.³⁵⁷ Even individuals who reside in states that have not yet adopted enabling legislation should execute a generic form expressing their wishes that can then serve as indicia of their intent in case that intent is later challenged.

When individuals do not have any legally recognized next of kin or are totally estranged from their families of origin, the interest of the state may override that of chosen family. A 2009 case in Rhode Island provided a stark illustration of what it means to be considered a legal stranger.³⁵⁸ The medical examiner's office refused to allow a surviving partner to claim his partner's remains despite the fact that they had lived together for seventeen years, were legally married in a neighboring state, and had the full complement of traditional estate-planning documents.³⁵⁹ At the time, Rhode Island was a nonrecognition state and only certain relatives were authorized to claim remains.³⁶⁰ It took the surviving partner thirty-two days to convince the authorities to release the body.³⁶¹ Rhode Island now has marriage equality.³⁶²

353. Some states include these provisions as part of their advance directives. *See, e.g.*, VT. STAT. ANN. tit. 18, § 9700 *et seq.* (2013).

354. *See generally Who Has the Right to Make Decisions About Your Funeral?*, FUNERAL CONSUMERS ALLIANCE, <http://www.funerals.org/forconsumersmenu/your-legal-rights/funeral-decision-rights> (last updated Dec. 2, 2013) (listing various personal preference laws by state, if any).

355. For example, Alabama generally restricts authority to next of kin with the exception of individuals designated in a "pre-need" funeral contract or the executor of the decedent's will. ALA. CODE § 34-13-11 (2013).

356. *See, e.g.*, WASH. REV. CODE § 68.50.160 (2013) (personal preference law); N.H. REV. STAT. ANN. § 290:17 (2013) (authorizing designated agent).

357. *See, e.g.*, VT. STAT. ANN. tit. 18, § 9700 *et seq.* (2013).

358. Roger Edgar, *Lack of Funeral Rights Turns Mourner into Gay Activist*, PROVIDENCE J., Nov. 15, 2009, available at <http://connectingdirectors.com/articles/905-lack-of-funeral-rights-turns-mourner-into-gay-activist>.

359. *Id.*

360. *Id.*

361. *Id.*

362. *See Marriage Center, supra* note 13 (listing states with marriage equality).

IV. REMAINING AREAS FOR REFORM

Despite the recent gains in the struggle for marriage equality, there remains much to be done to safeguard LGBT elders and their chosen families. Nationwide marriage equality will provide a much-needed level of security for many LGBT individuals, their partners and their children, but marriage equality alone will not resolve many of the disparities facing LGBT individuals. This is especially true in the case of LGBT older adults and elders, who are some of the most vulnerable members of the LGBT community. As explained in Part III, personal planning documents can provide some protections, but they are not a viable substitute for systemic legal, social, and political change.

This section provides a brief overview of some of the areas where broader reform is needed to address the concerns of LGBT older adults and elders—reform that extends beyond marriage equality. As LGBT elders and older adults grapple with the challenges of aging, they also face widespread financial insecurity, the legal fragility of chosen family, the scarcity of LGBT-friendly senior housing, and the persistence of anti-LGBT bias. To address these specific concerns, there must be greater legal recognition of chosen family, widespread cultural competency training, and broader antidiscrimination protections. The following outlines five specific areas for reform: marriage equality, recognition of chosen family, guardianship, broad antidiscrimination measures, and cultural competency training.

A. Marriage Equality

As explained in Part II, the current state of marriage equality is a source of confusion and complexity in the lives of LGBT individuals.³⁶³ The continuing lack of uniformity produces gross inequities as couples are married in some states, but not others. The fact that marriages performed in jurisdictions with marriage equality are not portable to other jurisdictions means that a couple's relationship can change automatically as they cross the state line and enter a non-recognition state.³⁶⁴ A couple may be married in Pennsylvania, but a quick trip to Ohio will render them unmarried for the duration.³⁶⁵ Federal marriage recognition is also far from uniform, some-

363. See *supra* text accompanying notes 84 (describing current state of marriage equality).

364. See *supra* note 84 (explaining stress created because relationship status is not portable).

365. Pennsylvania is a marriage-equality state. *Marriage Center*, *supra* note 13. Ohio continues to prohibit same-sex marriage. *Id.*

times following a state-of-celebration rule and other times following a modified state-of-domicile rule.³⁶⁶

The state specific nature of marriage recognition, even for federal benefits, arguably infringes on an individual's constitutional right to travel.³⁶⁷ Before moving or retiring, LGBT elders and older adults must evaluate the laws and policies of their target state. There is a special concern in the case of Social Security benefits because the operative timeframe references the law of the state-of-domicile that was in effect at the time the application for benefits was made.³⁶⁸

The disqualification for benefits, the added burden of investigating state law, and the complexity all contribute to what has been referred to as the "high price of being gay."³⁶⁹ Given that LGBT elders report a high level of insecurity, these extra costs are being imposed on those who are least able to bear them.³⁷⁰ Obviously, nationwide marriage equality would eliminate much of the current uncertainty. Until such time, the adoption of a uniform state-of-celebration rule on the federal level would at least eliminate the disparities that currently exist with respect to certain federal benefits. For example, a couple who was legally married in New York but resides in Texas will be considered married for federal tax purposes, but not for Social Security purposes.³⁷¹ The adoption of a uniform federal recognition rule, however, is complicated by the language of the various statutes that govern the different benefits schemes.³⁷² Although an administrative fix is possible for federal tax purposes, the controlling statutory language for Social Security benefits makes such a solution more challenging.³⁷³

366. See *supra* text accompanying notes 160-67 (discussing difference between a state-of-celebration rule and a state-of-domicile rule).

367. The right to travel is guaranteed under the Privileges and Immunities Clause in Article IV of the U.S. Constitution. U.S. CONST. art. IV, § 2, cl. 1.

368. See *supra* text accompanying notes 204-05 (discussing rules for Social Security benefits eligibility).

369. See, e.g., Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. TIMES, Oct. 3, 2009, <http://www.nytimes.com/2009/10/03/your-money/03money.html>.

370. For example, the concept of exit would hold that an individual should "vote with her feet" and move to a jurisdiction where there are more favorable laws. Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirming Hearings*, 65 S. CAL. L. REV. 1283, 1290 (1992) ("The ordinary concept of exit . . . is based on the idea of competition, of having somewhere else to go or another choice to make."). As an analytic construct, the myth of exit can be very useful, but when applied to everyday people it becomes immediately apparent that not everyone has the means or the heart to leave their home and relocate to another state.

371. See *supra* text accompanying notes 168-84 (discussing different recognition rules for federal tax purposes and Social Security).

372. See *supra* text accompanying notes 185-204 (discussing eligibility rules for Social Security benefits).

373. Congressional action is unlikely, although legislation may be proposed that is de-

B. Greater Legal Recognition of Chosen Family

Nationwide marriage equality will not address the larger issue of protecting chosen family. As explained in Part I, many LGBT individuals rely heavily on chosen family for support. The practice of “friends as family” emerged as a creative way to build relationships in the face of pervasive homophobia and transphobia.³⁷⁴ LGBT individuals created non-filial families partly out of necessity because so many LGBT individuals were historically estranged from their next of kin and denied the ability to form their own families through marriage and parenting. Remarkable on this practice, anthropologist Kath Weston has described how pre-Stonewall gay men and lesbians were uniquely without family.³⁷⁵

Looking backward and forward across the life cycle, people who equated their adoption of a lesbian or gay identity with a renunciation of family did so in the double-sided sense of fearing rejection by the families in which they had grown up, and not expecting to marry or have children as adults.³⁷⁶

Although younger generations have had greater access to both marriage and parenting options, chosen family remains a significant component of the lives of LGBT older adults and elders. With the advent of marriage equality, an LGBT individual can now make her partner a member of her family. However, there is no comparable way that an individual can make her best friend a member of her family and imbue her with the rights and privileges extended to next of kin. The law continues to prioritize the interests of next of kin regardless of the strength or quality of the relationship, whereas chosen family members are considered to be legal strangers.

Prior to the recognition of same-sex marriage, some jurisdictions had begun to respect de facto family structures with respect to both partners and parents.³⁷⁷ This ad hoc relationship recognition was largely the province of the courts and often the result of protracted litigation.³⁷⁸ Approaching the question of who counts as family from a functional rather than a definitional stance, the courts disaggregated the characteristics of family and asked

signed to apply a state-of-celebration rule in the Social Security context.

374. Weinstock, *supra* note 45.

375. WESTON, *supra* note 45, at 24.

376. *Id.*

377. See generally Doug NeJamie, *Before Marriage: The Unexplored History of Non-marital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87 (2014).

378. It would make sense that this innovation occurred in the courts where equity and a focus on the facts of the individual case could lead to highly particularized outcomes. It is also possible that such outcomes occurred where there was individual discretion in the application of laws and regulations, although this could also lead to an opportunity for anti-LGBT bias.

whether the parties behaved as if they were a family.³⁷⁹ These decisions opened new space to recognize chosen family, but they were decided in the shadow of marriage prohibitions at a time when same-sex couples could not legally marry.³⁸⁰

The increasing availability of same-sex marriage may now raise questions as to whether the failure of a same-sex couple to marry should be interpreted as a negative reflection on the relationship. It is possible that the availability of marriage will put pressure on some LGBT individuals to marry and, therefore, further marginalize chosen family. It is also unclear whether states with marriage equivalents will maintain the alternate status when the state finally embraces marriage equality or whether the state will transform the alternative status to marriage.³⁸¹ A similar issue arises at the employer-employee level where the question is whether employers will continue to extend domestic-partnership benefits to employees with same-sex partners or whether they will require employees with same-sex partners to marry in order to receive the benefits.³⁸²

Colorado has taken an innovative and creative approach to this question of who counts as family.³⁸³ In 2009, Colorado passed the Designated Beneficiary Agreement Act, a unique statutory scheme that grants individuals the legal autonomy to choose who is entitled to certain property rights and who is granted certain decisionmaking authority, including making funeral arrangements, receiving death benefits, and inheriting property without a will.³⁸⁴ The recognition need not be reciprocal and seems to offer the potential for greater legal recognition for chosen family and a unique *menu* approach to designating beneficiaries and substituted decisionmakers. The

379. For example, the groundbreaking 1989 case *Braschi v. Stahl Associates Co.*, extended legal protection for purposes of rent control to a surviving same-sex partner through the adoption of a functional definition of family, with an emphasis on mutual interdependence. *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49, 54-55 (N.Y. 1989).

380. With the advent of marriage equality, many employers are discontinuing their domestic partner benefits because same-sex couples can now marry. Joanne Sammer & Stephen Miller, *The Future of Domestic Partner Benefits: If Same-Sex Couples Can Wed, Should Employers Provide Benefits to Unmarried Partners?*, SOCIETY FOR HUMAN RES. MGMT. (Oct. 8, 2013), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/domestic-partner-benefits.aspx>.

381. See, e.g., GLAD, QUESTIONS AND ANSWERS ABOUT CONNECTICUT'S TRANSITION FROM CIVIL UNIONS TO MARRIAGE (May 2009), available at <https://www.glad.org/uploads/docs/publications/ct-cu-to-marriage.pdf> (explaining the complexity created by the transition to marriage equality).

382. Sammer & Miller, *supra* note 380.

383. See COLO. REV. STAT. 2009. § 15-22-101 (2013) (granting limited rights to "designated beneficiaries"). Colorado's statute is similar to the "reciprocal beneficiary" status that is still offered in Hawaii. See *supra* note 91 (describing the reciprocal beneficiary status under Hawaii law).

384. COLO. REV. STAT. 2009. § 15-22-101 (2013).

Colorado statute provides a way to protect and safeguard the interests of chosen family.

C. Guardianship Reform

As explained in Section C of Part III, LGBT elders and older adults may be at an increased risk of needing a guardian.³⁸⁵ Although the last several decades have seen tremendous progress in the area of guardianship reform, these reform efforts have been silent with respect to the needs of LGBT individuals.³⁸⁶ There are numerous places within the guardianship system where otherwise facially neutral guardianship provisions can operate to erase LGBT identity, deny autonomy, and ignore partners and chosen family. These areas include capacity standards, preferences for next of kin, decisionmaking standards, and alternatives to guardianship.³⁸⁷

In order to protect the interests of LGBT individuals and their families, respect for a ward's sexual orientation and gender identity must be recognized as an essential element of dignity and self-determination—the core principals that undergird guardianship policies and reform.³⁸⁸ The pervasive silence with respect to LGBT identities leaves guardianship law open to the influences of anti-LGBT bias that can range from cultural insensitivity to outright hostility. For example, the continued preference for family has led to instances where partners were denied access to the ward by disapproving family members.³⁸⁹ Even where there is no overt anti-LGBT bias, the seemingly neutral capacity standards can greatly disadvantage individuals with non-normative sexual orientations, family relationships, and gender identity or expression.³⁹⁰ Choices that may be perfectly normal for an LGBT individual may appear, incorrectly, to be outside the norm.³⁹¹ Moreover, in the absence of cultural-competency training, guardians may not be sensitive to the needs of their LGBT wards and, in fact, may not even recognize that their ward is LGBT.³⁹²

385. See *supra* text accompanying notes 26-76 (describing LGBT elders and older adults).

386. NAT'L GUARDIAN NETWORK, THIRD NATIONAL GUARDIANSHIP SUMMIT: STANDARDS OF EXCELLENCE—GUARDIAN STANDARDS (Oct. 2011), available at http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_summit_recs_1111.authcheckdam.pdf.

387. See Nancy J. Knauer, *LGBT Issues and Adult Guardianship: A Comparative Perspective*, in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP* 297 (Kim Dayton ed., 2013) [hereinafter Knauer, *A Comparative Perspective*].

388. NAT'L GUARDIAN NETWORK, *supra* note 386.

389. See, e.g., *Conrad v. Atkins* (In re Atkins), 868 N.E.2d 878, 880 (Ind. Ct. App. 2007) (affirming appointment of parents as guardians of estate and person over partner).

390. Knauer, *A Comparative Perspective*, *supra* note 387.

391. *Id.*

392. This was the case with Harold Scull and Clay Greene, the Sonoma County couple

D. Broad Antidiscrimination Protections in Senior-Specific Venues

After marriage equality, the second biggest priority for the LGBT-rights movement has been securing workplace non-discrimination protections. At the federal level, the most widely discussed LGBT antidiscrimination measure is the Employment Non-Discrimination Act (ENDA), which has been pending before Congress in one form or another since 1994.³⁹³ For LGBT older adults, however, the importance of employment as a venue for discrimination diminishes as they retire or prepare to leave the workforce. Instead, LGBT older adults and elders need antidiscrimination protections that extend far beyond the workplace and reach the provision of health care, senior services, and housing.³⁹⁴ Protection in these areas requires comprehensive legislative and administrative reforms that are not covered by ENDA.

At the federal level, one obvious example of necessary legislative reform is amending the OAA to ensure LGBT older adults and elders receive equal access to senior services and resources.³⁹⁵ In addition to prohibiting discrimination, the amendment could mandate LGBT-specific services, training, and research.³⁹⁶ At the state and local level, there are many opportunities on the state level to address the concerns of LGBT elders and older adults with regard to health care, senior services, and housing in terms of licensing and regulations.³⁹⁷ Currently, California is the only state with special legislation designed to protect LGBT elders and older adults.³⁹⁸

that authorities separated. *See supra* note 310 (explaining that the case settled before trial).

393. *Employment Non-Discrimination Act: Legislative Timeline*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline> (last visited Oct. 16, 2014). As its name suggests, the Employment Non-Discrimination Act (ENDA) is limited to employment and is less expansive than many of the antidiscrimination measures enacted at the state level. ENDA would provide non-discrimination protection on the federal level for sexual orientation and gender identity, but only in the workplace. H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013).

394. These protections exist in some states and local municipalities, but enactment on the federal level remains uncertain given the inability to pass ENDA, which currently has 206 cosponsors. H.R. 1755, 113th Cong. (2013).

395. *Older Americans Act*, SAGE, <http://www.sageusa.org/issues/oa.cfm> (last visited May 10, 2014).

396. *Id.*

397. Currently, eighteen states and the District of Columbia prohibit discrimination in employment based on sexual orientation and gender identity. HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAW AND POLICIES (Oct. 9, 2014), available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/statewide_employment_10-2014.pdf. The states are:

California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. *Id.* In addition, there are three states that extend antidiscrimination protection in employment based only on sexual orientation: New Harp-

E. Cultural Competency and Market-Based Solutions

In addition to the enactment of greater antidiscrimination protections, it is possible to pursue market-based solutions. From the beginning of the struggle for marriage equality, private employers have been in the vanguard.³⁹⁹ The term “domestic partner” was a human relations construct—an invented term to describe same-sex partners who would qualify for spousal health insurance coverage.⁴⁰⁰ Today, the overwhelming majority of Fortune 500 companies not only offer domestic-partner benefits, but also have anti-discrimination policies that include sexual orientation and gender identity.⁴⁰¹ HRC rates companies based on a Corporate Equality Index that measures how welcoming the company is toward its LGBT employees.⁴⁰² HRC also maintains a similar rating index in the health context; both are designed to provide useful information to consumers and employers, creating new industry norms.⁴⁰³

As industry norms regarding LGBT issues continue to evolve, senior living facilities and service providers will have an increased incentive to adopt antidiscrimination policies and LGBT-inclusive policies.⁴⁰⁴ Cultural competency training can be an effective way to educate service providers

shire, New York, and Wisconsin. *Id.*

398. California Assembly Bill 663 integrated LGBT cultural competency instruction into the training received by residential care facility administrators. *California Legislature Passes Bill*, *supra* note 40.

399. NeJamie, *supra* note 377. See also Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998).

400. The first private employer to offer domestic partner benefits was the alternative weekly, *The Village Voice*. James Angelini, *The Federal and State Taxation of Domestic Partner Benefits*, TAX ANALYSTS (Nov. 8, 2011), <http://www.taxanalysts.com/www/features.nsf/Articles/03CEC7C26C62E94A852579420059DC81>. Two years later, Berkeley became the first municipal employer to offer the benefits. Leland Traiman, *A Brief History of Domestic Partnerships*, GAY & LESBIAN REV., July 1, 2008, available at <http://www.greview.org/article/article-635/>. Domestic partner benefits have now been accepted as part of the corporate mainstream. Michele Lerner, *Are Domestic Partner Benefits a Good Deal?*, BANKRATE (Mar. 19, 2013), <http://www.bankrate.com/finance/jobs-careers/domestic-partner-benefits-good-deal.aspx>.

401. Specifically, 91% of all Fortune 500 companies have non-discrimination policies for sexual orientation. *Corporate America Champions LGBT Equality in Record Numbers*, HUMAN RIGHTS CAMPAIGN (Dec. 9, 2013), <http://www.hrc.org/press-releases/entry/corporate-america-champions-lgbt-equality-in-record-numbers>. Sixty-one percent extend protection based on gender identity and 67% have domestic partner benefits. *Id.* In other words, protection for LGBT employees in the private sector are greater than the protections currently offered at the state level. See *supra* note 397 (listing the number of states with antidiscrimination protections).

402. *Id.*

403. See *supra* note 332 (discussing the Healthcare Equality Index).

404. See *supra* note 401 (discussing the percentage of Fortune 500 companies with LGBT-friendly employment policies).

about the needs and concerns of LGBT older adults and elders.⁴⁰⁵ Even where there is no direct abuse or discrimination, common policies in place at senior living facilities can greatly disadvantage and silence LGBT elders.⁴⁰⁶ For example, some nursing homes have policies against same-sex partners living together in the same room and will separate partners.⁴⁰⁷ Many retirement communities will also not allow two unrelated individuals to buy into the living unit.⁴⁰⁸ The restriction that the individuals must be “related” continues to impact same-sex couples living in nonrecognition states.⁴⁰⁹ However, it also adversely affects LGBT elders and their chosen family members. Whereas two siblings could live together, two lifelong friends who consider each other “family” would not be able to live together even in a state with marriage equality.

CONCLUSION

After more than twenty years of litigation and advocacy, the United States stands on the edge of marriage equality.⁴¹⁰ Although marriage equality is not a foregone conclusion, favorable court decisions, media coverage, and public opinion all strongly suggest that the United States may soon join the seventeen other countries around the world that recognize same-sex

405. An example of such cultural competency training is the Mautner Project of Whitman-Walker Health in Washington, D.C., “committed to improving the health of women who partner with women including lesbian, bisexual and transgender individuals, through primary medical care, support services, education and advocacy.” *Mautner Project of Whitman-Walker Health*, WHITMAN-WALKER HEALTH, <http://www.whitman-walker.org/mautnerproject> (last visited Dec. 5, 2014).

406. A recent study found widespread housing discrimination against LGBT elders. EQUAL RIGHTS CTR., OPENING DOORS: AN INVESTIGATION OF BARRIERS TO SENIOR HOUSING FOR SAME-SEX COUPLES (2014), available at http://www.equalrightscenter.org/site/DocServer/Senior_Housing_Report.pdf.

407. See DARLENE YEE-MELICHAR, ANDREA RENWANZ BOYLE & CRISTINA FLORES, ASSISTED LIVING ADMINISTRATION AND MANAGEMENT: EFFECTIVE PRACTICES AND MODEL PROGRAMS IN ELDER CARE 350 (2011) (noting that the “inequities” LGBT elders face include discriminatory policies).

408. For example, a national chain of retirement communities reached a settlement with an older same-sex couple that the community had prohibited from purchasing due to its policy requiring cotenants to be “related.” *Lesbian Couple Settles Lawsuit Against Westminster Oaks Retirement Community*, NCLR (May 25, 2004), <http://www.nclrights.org/press-room/press-release/lesbian-couple-settles-lawsuit-against-westminster-oaks-retirement-community/>. The case settled. *Id.* See also Deb Price, *Gay Retirees Need Protection from Discrimination*, DETROIT NEWS, Feb. 12, 2007, <http://www.globalaging.org/elderrights/us/2007/gayretirees.htm>.

409. See *Marriage Center*, *supra* note 13 (listing states with prohibitions against same-sex marriage).

410. The first contemporary marriage case was decided in 1993. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

marriage.⁴¹¹ Numerous federal court challenges continue to wind their way through the court system,⁴¹² increasing the likelihood that the U.S. Supreme Court will ultimately decide the issue.⁴¹³ The media have been declaring victory for a couple years,⁴¹⁴ and a clear majority of Americans now support legally recognized same-sex marriage.⁴¹⁵

With the advent of marriage equality, it is important to remember that marriage equality is only one goal of the broader LGBT-rights movement. Marriage equality will not eradicate many of the disparities that exist, especially in the case of LGBT elders and older adults where marriage may be somewhat of a mixed bag. There can be no question that the advent of marriage equality offers LGBT elders a much-needed measure of legal protection and security as they attempt to navigate the challenges of aging. However, marriage for some LGBT elders may not be a wise financial move, forcing them to weigh the benefits of the status against its attendant costs.⁴¹⁶ Most importantly, marriage equality will not address many of the pressing concerns of LGBT elders, including the legal fragility of their extended chosen families, their high levels of financial insecurity, and their fear of encountering anti-LGBT bias across a wide range of senior services.⁴¹⁷ After marriage equality, there will remain much to be done to respond to the unmet needs of LGBT elders.

Until then, the recent advancements have greatly complicated planning considerations and introduced a high level of uncertainty for same-sex couples. Even with the end of DOMA, legally married couples continue to be considered married for some purposes and legal strangers for other purposes.⁴¹⁸ These conflicting rules can place a particularly heavy burden on older LGBT adults who must contend with a confusing array of recognition rules. Advance planning can help LGBT elders and older adults mitigate the impact of these rules. Beyond issues of marriage, however, there are concrete planning steps that LGBT elders and older adults can take to improve their chances of aging in dignity and with security, to preserve their autonomy, and to protect their interests.⁴¹⁹ Although advance planning

411. *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited Sept. 15, 2014).

412. See *supra* text accompanying note 122 (describing the court challenges).

413. Lyle Denniston, *Same-Sex Marriage Cases Set for Early Look*, SCOTUSBLOG (Sept. 10, 2014, 4:51 PM), <http://www.scotusblog.com/2014/09/same-sex-marriage-cases-set-for-early-look/>.

414. See *supra* note 15 (describing media coverage).

415. *Law and Civil Rights: Same-Sex Marriage, Gay Rights*, POLLINGREPORT.COM, <http://www.pollingreport.com/civil.htm> (last visited Sept. 15, 2014).

416. See *supra* note 75 (discussing a possible tax penalty upon marriage).

417. See generally Knauer, *LGBT Elder Law*, *supra* note 20.

418. See *supra* text accompanying note 304 (discussing the state's priority over "legal strangers").

419. See *supra* text accompanying notes 313-62.

documents can provide important protections, they are no substitute for the systemic type of legal, social, and political change that is necessary to address the challenges facing LGBT elders, including financial insecurity, the legal fragility of chosen family, the scarcity of LGBT-friendly senior housing, and the persistence of anti-LGBT bias.⁴²⁰

420. See *supra* text accompanying notes 48-77.

CHEMICAL KIDS

Kim H. Pearson *

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Courts and other state actors are often involved in making decisions that impact families. Making these decisions means routinely measuring parental behavior to determine what is best for children using metrics drawn from the cultural landscape of parenting advice and norms. Parenting advice combines medically informed behaviors with suggestions that parents can produce certain childhood outcomes, increasing pressure for parents and implicitly valuing some outcomes over others. In situations like substance abuse, society has largely agreed that there is a negative health outcome if a parent uses drugs during pregnancy. Newly discovered risks to children's health create parenting norms and legal responses to parental compliance with protective behaviors. Unlike parenting norms that are directly linked to obvious health risks, like death and serious injury, some risks to children are a complex mix of health risks and bias against certain outcomes. This Article considers parenting norms related to chemical exposure in children to interrogate the interplay between social values and legal responses to non-conforming childhood outcomes.

The popular media has been warning parents about exposing pregnant women and young children to Endocrine Disrupting Chemicals (EDCs) in household items, food, toys, and water for years, citing dangerous risks to sexual and reproductive health outcomes. Headlines like "Boys with Boobs" and "Why are Boys Turning into Girls?" frame the risks of EDC exposure as a possible external disruptor of children's development. Parents are not yet legally or socially responsible for limiting EDC exposure in their children like they are for smoking, substance abuse, and other behaviors that pose a health risk to children. The possibility that courts will begin to hold parents legally responsible is not improbable; the scientific community has been aware of EDCs for over twenty years and is moving towards establishing a causal link between exposure and negative health outcomes. EDCs are different from other risks to children captured in legally enforced parenting norms because there is no widespread agreement that the kinds of outcomes linked to exposure are purely health concerns. The confusion fueled by popular science about identity development and legal regulation of outcome-focused parenting can lead to fears of parental liability, conviction, or child removals when parents fail to conform to mainstream parenting norms, particularly norms concerned with childhood development and health. This Article uses the developing concern over chemical exposure as a threat to development to critique legally enforcing norms without paying attention to the interaction between "high intensity" production-focused parenting and the valuation of childhood outcomes, particularly where insufficient clarity about the nature of those outcomes may harm families with gender and sexual non-conforming children.

INTRODUCTION

*“Are You Poisoning Your Baby?”*¹

Headlines warn of girls growing pubic hair at age six² and an increasing number of infant boys with “genital deformities”³ due to chemicals found in everyday environments. There are easily accessible popular science and media stories about reduced egg viability for women,⁴ lower sperm counts for men,⁵ and the possibility of increased risk of breast, testicular and prostate cancers⁶ as a result of exposure to chemicals in household products. People unknowingly consume and are exposed to endocrine disrupting chemicals (EDCs) because they are found in common products like food, water, and plastics.⁷ EDCs are characterized as an insidious danger because they are present in most households and yet they

1. Amy Ziff, *Are You Poisoning Your Baby?*, HUFFINGTON POST (Mar. 5, 2013), http://www.huffingtonpost.com/amy-ziff/endocrine-disruptors_b_2760207.html (noting example of popular media effort to raise awareness about health risks associated with EDCs).

2. See, e.g., Elizabeth Weil, *Puberty Before Age 10: A New ‘Normal’?*, N.Y. TIMES, Mar. 30, 2012, <http://www.nytimes.com/2012/04/01/magazine/puberty-before-age-10-a-new-normal.html>.

3. See, e.g., Nicholas D. Kristof, Op-Ed., *It’s Time to Learn From Frogs*, N.Y. TIMES, June 27, 2009, <http://www.nytimes.com/2009/06/28/opinion/28kristof.html>.

4. See, e.g., Rachel Rettner, *BPA May Worsen Women’s Fertility Problems*, HUFFINGTON POST (Oct. 10, 2012), http://www.huffingtonpost.com/2012/10/10/bpa-may-worsen-womens-fertility-problems_n_1954609.html (citing a new study showing that women with higher levels of Bisphenol A were not able to produce as many eggs and that, of the eggs procured, fewer were successfully fertilized).

5. See, e.g., Liat Clark, *Decline in French Sperm Count Should Be Considered Global Warning*, WIRED, Dec. 5, 2012, available at <http://www.wired.co.uk/news/archive/2012-12/05/french-sperm-decline>; *Scientists Warn of Sperm Count Declines Linked to Pesticide Exposure*, ECOWATCH (Mar. 1, 2013, 10:38 AM), <http://ecowatch.org/2013/sperm-declines-pesticide-exposure/>.

6. See, e.g., *Endocrine Disruptor Research Initiative: Fact Sheet*, U.S. ENVTL. PROTECTION AGENCY (EPA), <http://www.epa.gov/edrlupvx/edrifact.html> (last visited Mar. 12, 2013) (“Reported increases in incidences of certain cancers (breast, testes, prostate) may also be related to endocrine disruption.”); Ana M. Soto & Carlos Sonnenschein, *Environmental Causes of Cancer: Endocrine Disruptors as Carcinogens*, 6 NATURE REVIEWS ENDOCRINOLOGY 363 (2010); Bradley D. Anawalt, *The Silent Spermatozoon: Are Man-Made Endocrine Disruptors Killing Male Fertility?*, 15 ASIAN J. ANDROLOGY 165 (2013); Ian Sample, *Studies Show Alarming Sperm Count Falls, But Some Distrust the Figures*, GUARDIAN (Dec. 4, 2012, 8:12 PM), <http://www.guardian.co.uk/science/blog/2012/dec/05/sperm-count-fall-is-it-real/>.

7. Mary O’Brien, *Our Current Toxics Use Framework, Our Stolen Future, and Our Options*, 11 J. ENVTL. L. & LITIG. 331, 339 (1996) (reviewing COLBORN ET AL., *infra* note 153).

continue to be used despite posing a major threat to human sexual development and reproduction.⁸

Even though studies suggest that EDCs should be treated as seriously as preventing lead poisoning or avoiding controlled substances while pregnant,⁹ limiting EDC exposure is not a mainstream-parenting norm, yet. EDC exposure is not currently a legally enforced parenting norm because causation is nearly impossible to prove.¹⁰ However, as scientific knowledge continues to develop in the area, parenting norms may develop more quickly, resulting in informal and formal legal regulations for parents who fail to limit EDC exposure in children. This Article uses the lens of parenting norms to highlight the implicit belief that parental behavior impacts children's development and the fear of legal enforcement to consider the state's role in defining good outcomes. The pressure, informed by social trends and legal decisions, to create the optimal conditions for a child's natural development has been ratcheting up for middle class, mainstream parents and is driving the standards by which poor parents are judged, too.¹¹

The fear that there are or will be legal consequences for parenting behaviors that are linked to bad childhood outcomes puts increased pressure on parents to take responsibility for childhood development.¹²

8. See *id.* at 334 (citing research showing that “[h]ormone-disrupting substances alter the normal production, distribution, and functioning of hormones in animals”).

9. See generally THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, EXPOSURE TO TOXIC ENVIRONMENTAL AGENTS (2013), available at <http://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/ExposuretoToxic.pdf>.

10. See Melanie Leitman, *Water Rx: The Problem of Pharmaceuticals in our Nation's Waters*, 29 UCLA J. ENVTL. L. & POL'Y 395, 425-26 (2011) (discussing the low probability of being able to prove causation in a tort). See also Elizabeth Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 533 (2013) (discussing the concern that “helicopter parents’ . . . will establish unrealistically high legal standards for parenting”).

11. See generally Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221 (2010) (discussing how upper and middle class parenting norms trickle down to poor parents); see also JENNIFER SENIOR, ALL JOY AND NO FUN: THE PARADOX OF MODERN PARENTHOOD 11-12 (2014) (discussing parenting norms by mainly focusing on the middle class because the concerns of the wealthy are not “easily relatable” and the “concerns of poor parents as parents are impossible to view on their own”). This Article takes an approach similar to Senior's approach.

12. See, e.g., Ziff, *supra* note 1; Alyssa Newcomb, *Obese Third Grader Taken From Mom, Placed in Foster Care*, ABC NEWS (Nov. 27, 2011, 3:17 PM) <http://abcnews.go.com/blogs/health/2011/11/27/obese-third-grader-taken-from-family-placed-in-foster-care/> (citing example of state action that did not resolve weight issue, but expressed the desire for the state to take some step to intervene); Julia Marsh & Reuven Fenton, *Dad an 'Unfit Parent for Refusing Son McDonald's'*, N.Y. POST, Nov. 7, 2013, <http://nypost.com/2013/11/07/psychologist-called-dad-unfit-parent-for-refusing-son-mcdonalds-suit/> (relating father's experience in custody dispute, and the confusion related to complying with norms to provide healthy food, to not reward bad behavior, and to not

Taking responsibility for childhood outcomes can be tricky where there is disagreement about how a child develops. The persistent intuition that external factors can shape a child's development, if not the child itself, conflicts with the intuition that a child's identity is innate, requiring the preservation of the natural, unadulterated developmental path for the child. Where there is confusion and disagreement, as there is in the case of EDCs, about the value of children's sexuality and gender identity outcomes—because parents are not certain whether childhood development is shaped or discovered—a nuanced conversation about outcomes must be had in case parenting norms reinforced by the fear of legal reprisal define all EDC-related outcomes as disfavored.¹³

Just as smoking during pregnancy is understood now as a risk to a developing fetus,¹⁴ so too should the public be aware that EDC exposure poses a risk of harm to human health. How those health threats are characterized, though, requires a critical look before a developing parenting norm is naturalized and embedded in legal decisionmaking because the outcomes threatened are not wholly agreed upon negative outcomes. When a woman smokes during pregnancy, there is widespread consensus that her behavior poses a risk of negative health outcomes for the child.¹⁵ With EDC exposure, the potential outcomes are more complex; some are bad, like cancer¹⁶ and reproductive failure. But other outcomes are more difficult to characterize because of disagreement about how children's sexuality and gender identity are formed.

Tying together the increasing pressure of parenting studies and cases where legal decisionmakers judge parental choices by mainstream parenting norms, the nascent norm of protecting children from EDCs bears a critical look because the state is implicitly taking a position about a child's developmental outcome without adequately considering the value of the outcome.¹⁷ If a parenting norm were legally enforced because of the possibility that limiting EDC exposure could prevent a child from being gay, that is substantially different from a legally enforced parenting norm that demands protection from EDCs because of childhood cancer or malformed genitalia. The differences between cancer and sexual orientation

deprive child of food).

13. See *infra* Section I, Part A.

14. See U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. HEALTH SERV. & OFFICE OF THE SURGEON GEN., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS 7 (2014), available at <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf> (“Since the 1964 Surgeon General’s report, cigarette smoking has been causally linked to . . . harm to the fetus.”).

15. See generally *id.*

16. See, e.g., *Endocrine Disruptor Research Initiative: Fact Sheet*, *supra* note 6 and accompanying text.

17. See *infra* Section I, Part B.

are obvious, but not all of the potential outcomes tied to EDC exposure are so easily categorized. This Article focuses on sexuality and gender identity, because there is no mainstream consensus on how they are developed. The motivation behind legal decisions about parental behavior should be visible, particularly when those decisions support implicit beliefs about the ability of parental behavior to shape children's outcomes and the pressure to produce pre-defined "good" outcomes that parents should strive for and desire. Otherwise, the legal system's role in reinforcing mechanisms that make parents complicit in producing "good" children and "bad" children will remain invisible and unchanged.

Section I introduces the relationship between parenting norms and legal enforcement. Parenting norms are increasingly focused on producing childhood outcomes, suggesting that good parents are involved and attuned to dangers that children face: from injuries to weight gain. Parents are encouraged to buy numerous child-centric products that purport to help them produce good childhood outcomes. Parents who do not comply can be held legally responsible for bad parenting through overt measures, like child removal, or more subtle measures, as in the case of custody disputes where a parent's care for a child is measured through compliance with parenting norms.

Section II illustrates how legal enforcement of parenting norms is fueled by the valuation of childhood outcomes. Courts look increasingly to social science and health professionals to help determine which outcomes are good for children. The question about whether the state should be neutral regarding childhood outcomes depends on the social and health definition of the risk. Where there is widespread consensus that a risk to a child involves injury or death, parenting norms that provide protective benefits and are supported by legal responses provide an instance where society would not support an outcome-neutral approach. In contrast, where there is confusion about the health effects and social value of outcomes, it is less clear that the state should take an outcome-neutral approach.

Section III interrogates the ability of the state to take an outcome-neutral approach in complicated cases such as preventing EDC exposure in children to prevent disrupted sexual and gender development. The popular science framing of disrupted childhood development tied with gender non-conforming identity status suggests that there is a health basis to support the continuing fears about socially undesirable outcomes. Combining high intensity parenting norms with the legal reliance on pre-determined scientific valuations of desirable childhood outcomes creates the conditions for legal adoption of norms without sufficient critical attention to how value is determined. This approach ignores the existing social and legal landscape for gender and sexual non-conformity and may encourage parents to reject rather than accept non-conforming children.

I. PARENTING AS PRODUCTION

*“Dad an ‘Unfit’ Parent for Refusing Son McDonald’s”*¹⁸

The culture of parenting in mainstream America has long been experts providing opinions to parents anxiously seeking the best method for raising children. Amid a flood of conflicting and confusing advice for parents, it can be difficult for a parent to keep up with various bits of advice. Conflicting parenting advice from experts has left “parents, teachers, policymakers, ministers, and the media . . . convinced that expert counsel is precisely what it was not supposed to be: constantly shifting and conflicting” as “popular advisors have regularly lined up at opposite poles . . . sounding more ambitious and more embattled as the century progressed.”¹⁹ The conflict among experts makes it difficult to discern between credible scientific evidence²⁰ and norms that are purely cultural.²¹ The momentousness of parenting choices cannot be underestimated as evidenced by the increasing number of hours that mothers, even working mothers as compared to full-time mothers in the 1960s, now spend on actively parenting their children²² and the growing pressure on fathers to more actively engage in parenting.²³ Parenting advice is not just about

18. Marsh & Fenton, *supra* note 12.

19. ANN HULBERT, RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN 6-7 (2003).

20. See generally RIMA APPLE, PERFECT MOTHERHOOD: SCIENCE AND CHILDREARING (2006) (discussing the evolution of scientific motherhood in the United States since the mid-nineteenth century).

21. See, e.g., DEBORAH BLUM, LOVE AT GOON PARK: HARRY HARLOW AND THE SCIENCE OF AFFECTION 37 (2002) (noting that societal norms included advice from experts of the time that “[e]juddling and comfort were bad for children”).

22. See Stephanie Coontz, Op-Ed., *The Triumph of the Working Mother*, N. Y. TIMES, June 1, 2013, <http://www.nytimes.com/2013/06/02/opinion/sunday/coontz-the-triumph-of-the-working-mother.html> (“Employed moms spend fewer hours per week with their children than stay-at-home mothers, but they spend more time with their children than homemakers did in 1965!”); Stephanie Pappas, *5 Ways Motherhood Has Changed Over Time*, LIVE SCI. (May 10, 2013, 4:02 PM), <http://www.livescience.com/29521-5-ways-motherhood-has-changed.html> (“Moms (and dads) actually spend more time with their kids today than in the past.”). See also Shirley S. Wang, *A Field Guide to the Middle-Class U.S. Family*, WALL ST. J., Mar. 13, 2012, <http://online.wsj.com/news/articles/SB10001424052702304450004577277482565674646> (writing about the study performed on middle class families observing the families in the study had child-centric homes as compared to cultures that had group or adult-centric families).

23. See BRAD HARRINGTON ET AL., BOSTON COLL. CTR. FOR WORK & FAMILY, THE NEW DAD: EXPLORING FATHERHOOD WITHIN A CAREER CONTEXT (2010), available at http://www.bc.edu/content/dam/files/centers/cwf/pdf/BCCWF_Fatherhood_Study_The_New_Dad1.pdf (finding, in part one of a multi-part series on the changing role of fathers in America, that men are experiencing more pressure to participate in active parenting);

preventing harm, but also a matter of improving the health and future prospects of children. The stakes are high because children's outcomes are tied to parenting and the gap between children's good outcomes (education and a high paying job) and poor outcomes is growing. The project of parenting as production has led to helicopter parents,²⁴ tiger mothers,²⁵ free-range kids,²⁶ and high-intensity parenting.²⁷ This Section introduces the heightened sense of protectiveness that parents exhibit and the high stakes related to serious injury and death or happiness and financial success that drive parental compliance with norms. Using the examples of child removals and subtle, less formal areas for decisions that have legal implications like child custody and visitation, this Section illustrates how norms are incorporated into legal decisionmaking so that the state is an instrument in shoring up mainstream parenting norms.

A. Parenting Norms

In the fast growing literature of pop science parenting, a child's ability to develop cognitive skills, socialize appropriately with peers and adults, attend elite colleges, and land a lucrative career is attributed to parenting. Parenting literature often uses studies to shore up claims and imply that engaging in certain behaviors or consuming products and services in particular ways will result in better outcomes for children. Parents are told that if they attend college,²⁸ marry or partner long-term,²⁹ exclusively

GRETCHEN LIVINGSTON & KIM PARKER, PEW RESEARCH CTR., A TALE OF TWO FATHERS: MORE ARE ACTIVE, BUT MORE ARE ABSENT (2011), *available at* <http://www.pewsocialtrends.org/files/2011/06/fathers-FINAL-report.pdf> (finding that fathers who live with their children are more involved in active parenting, but that the rate of children living without their fathers has risen and that the rate of fathers who live with children is correlated to race and educational attainment).

24. See Katie Roiphe, *The Seven Myths of Helicopter Parenting*, SLATE (July 31, 2012), http://www.slate.com/articles/double_x/roiphe/2012/07/madeline_levine_s_teach_your_children_well_we_are_all_helicopter_parents.html (responding to the Madeline Levine parenting book and arguing that helicopter parenting is a natural response to the heightened anxiety that surrounds parenting now).

25. See generally AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* (2011).

26. See Lenore Skenazy, *Raising a Free-Range Kid*, PBS PARENTS, <http://www.pbs.org/parents/experts/archive/2010/02/raising-a-free-range-kid.html> (describing the importance of balancing children's need for safety with their desire to explore and play).

27. See Richard V. Reeves, *How to Save Marriage in America*, ATLANTIC, Feb. 13, 2014, *available at* <http://www.theatlantic.com/business/archive/2014/02/how-to-save-marriage-in-america/283732/> (positing that college graduates are "reinventing marriage as a child-rearing machine for a post-feminist society").

28. See, e.g., Laura Roberts, *Mothers Are Strongest Role Models for Children's Education, Report Claims*, TELEGRAPH, Sept. 20, 2010, <http://www.telegraph.co.uk/education/educationnews/8012011/Mothers-are-strongest-role->

breast feed,³⁰ breast feed children longer,³¹ introduce food at certain times,³² allow children to play,³³ encourage children to get dirty,³⁴ monitor

models-for-childrens-education-report-claims.html (“Maternal influence was found to be the leading factor over whether children stayed on at school and went on to study at university and to social mobility within the family.”).

29. See, e.g., *Why Married Parents Are Important for Children*, FOR YOUR MARRIAGE, <http://www.foryourmarriage.org/married-parents-are-important-for-children/> (last visited Nov. 9, 2014); Steve Doughty, *Why Children Thrive with Married Parents*, DAILY MAIL, Apr. 20, 2010, <http://www.dailymail.co.uk/news/article-1267383/Why-children-thrive-married-parents.html> (citing the Independent Institute for Fiscal Studies’ study that shows children are more likely to thrive if their parents are married); Katherine Bindley, *National Marriage Project: ‘Why Marriage Matters’ Study Says Cohabiting Parents Do Kids Harm*, HUFFINGTON POST (Aug. 20, 2011), http://www.huffingtonpost.com/2011/08/20/national-marriage-project_n_931974.html (arguing that unmarried, cohabiting parents may be putting their kids at risk for a host of personal problems); Sandhya Somashekhar, *Social Science Struggles for Data on Effects of Same-Sex Parenting on Children*, Mar. 26, 2013, WASH. POST, http://articles.washingtonpost.com/2013-03-26/national/38038657_1_mark-regnerus-gay-parents-social-science (noting that “the quality of parenting and the family’s economic well-being” matters more to children’s well-being than the sexual orientation of the parents and that the American Academy of Pediatrics, in looking at the data available from the past 30 years, “concluded that legalizing same-sex marriage would strengthen families and benefit children”).

30. See, e.g., *Healthy Milk, Healthy Baby*, NATURAL RES. DEF. COUNCIL (NRDC), <http://www.nrdc.org/breastmilk/benefits.asp> (last updated Mar. 25, 2005) (noting the American Academy of Pediatrics recommends that mothers breastfeed for at least the first year of a child’s life and continue until they both feel they are ready to stop and that, in the first six months, the baby should be nourished exclusively by breast milk); Alice Park, *Study: Breast-Feeding Improves Academic Performance, Especially for Boys*, TIME MAG., Dec. 20, 2010, available at <http://healthland.time.com/2010/12/20/want-smarter-kids-consider-breastfeeding/> (finding that children who were breastfed scored higher on tests of math, reading, and writing skills at 10 years old, compared with those who were bottle-fed as babies); *Breastfeeding Associated With Increased Intelligence, Study Suggests*, SCI. DAILY (May 6, 2008), <http://www.sciencedaily.com/releases/2008/05/080505162902.htm> (reporting that breastfeeding raises children’s IQs and improves their academic performance in the largest randomized study of breastfeeding ever conducted); Anneli Rufus, *15 Signs You’ll Raise a Genius*, DAILY BEAST (Oct. 24, 2011), <http://www.thedailybeast.com/articles/2011/10/24/smarter-kids-and-how-they-got-that-way.html> (reporting that six-year-olds who were breastfed consistently as babies score 5 percent higher on IQ tests than their six-year-old peers who were not).

31. See, e.g., *Healthy Milk, Healthy Baby*, *supra* note 30 (finding that infants who are breast-fed longer have fewer dental cavities throughout their lives).

32. See, e.g., Jessica Grose, *It’s OK to Feed Your Four-Month-Old Solid Food*, SLATE (Mar. 28, 2013), http://www.slate.com/blogs/xx_factor/2013/03/28/solid_foods_for_infants_are_not_dangerous.html (noting that formerly the American Association of Pediatrics recommended introducing solids between 4 and 6 months, whereas it now recommends waiting until 6 months of age to introduce solid foods because an early introduction of solid foods may lead to food allergies, diabetes, and obesity); Sumathi Reddy, *Food Allergy Advice for Kids: Don’t Delay Peanuts, Eggs*, WALL ST. J., Mar. 4, 2013, <http://online.wsj.com/article/SB10001424127887324662404578334423524696016SB10001424127887324662404578334423524696016>; Tamara Duker Freuman, *How (and Why) to Introduce Allergens to Your Infant*, U.S. NEWS & WORLD REP. (Mar. 19, 2013, 6:55 PM),

weight and exercise,³⁵ eat natural foods, read to children,³⁶ read in front of children,³⁷ dig up stories about family history to tell children,³⁸ limit screen

<http://health.usnews.com/health-news/blogs/eat-run/2013/03/19/how-and-why-to-introduce-allergens-to-your-infant>; Jennifer Rainey Marquez, *New Thinking on Preventing Food Allergies*, PARADE, Mar. 18, 2013, available at <http://parade.condenast.com/121778/jmarquez/18-new-thinking-on-preventing-food-allergies/>.

33. See, e.g., Karen Bilich, *The Importance of Play*, PARENTS MAG., <http://www.parents.com/fun/sports/exercise/the-importance-of-play/> (last visited Nov. 10, 2014); Scott Barry Kaufman, *The Need for Pretend Play in Child Development*, PSYCHOL. TODAY (Mar. 6, 2012), <http://www.psychologytoday.com/blog/beautiful-minds/201203/the-need-pretend-play-in-child-development>; Stephanie Pappas, *The Top 5 Benefits of Play*, LIVE SCI. (Aug. 12, 2011), <http://www.livescience.com/15541-top-5-benefits-play.html>; *Play: Why It's So Important*, BABYCENTER, http://www.babycenter.com/0_play-why-its-so-important_6772.bc (last visited Nov. 10, 2014).

34. See, e.g., Jane E. Brody, *Babies Know: A Little Dirt Is Good for You*, N.Y. TIMES, Jan. 26, 2009, <http://www.nytimes.com/2009/01/27/health/27brod.html> (discussing dirt and children's health, and quoting a doctor who stated, "Children raised in an ultraclean environment . . . are not being exposed to organisms that help them develop appropriate immune regulatory circuits Children should be allowed to go barefoot in the dirt, play in the dirt, and not have to wash their hands when they come in to eat."); Bridget Moret, *A Healthy Baby Needs a Little Dirt: How a Clean House Can Impact Your Baby's Health*, WASH. TIMES, July 13, 2012, <http://communities.washingtontimes.com/neighborhood/parenting-first-time-through/2012/jul/13/healthy-baby-needs-little-dirt-how-clean-house-can>; Melinda Beck, *Can Dirt Do a Little Good?*, WALL ST. J., May 17, 2010, <http://online.wsj.com/article/SB10001424052748703315404575250390129070502.html>.

35. See, e.g., Amanda Gardner, *Does Obesity Affect School Performance?*, CNN (June 14, 2012), <http://www.cnn.com/2012/06/14/health/obesity-affect-school-performance> (reporting that obesity is associated with poorer academic performance beginning as early as kindergarten and that studies have found that obese students, especially girls, tend to have lower test scores than their slimmer peers, are more likely to be held back a grade, and are less likely to go on to college); Rebecca Smith, *Obesity Linked to Poor Academic Performance*, TELEGRAPH, Sep. 3, 2012, <http://www.telegraph.co.uk/health/healthnews/9515864/Obesity-linked-to-poor-academic-performance.html>; *Children's Brain Development Is Linked to Physical Fitness, Research Finds*, SCI. DAILY (Sept. 16, 2010), <http://www.sciencedaily.com/releases/2010/09/100915171536.htm>; Suzy Kerr Casarez, *Does Exercise Improve Learning in Children?*, LIVESTRONG (Jan. 31, 2014), <http://livestrong.com/article/226065-does-exercise-improve-learning-in/children> (noting that "exercise in children not only increases blood flow but promotes neurogenesis, a process that generates neurons in the brain").

36. See, e.g., Rufus, *supra* note 30 ("A child who is raised in a home containing at least 500 books is 36 percent more likely to graduate from high school and 19 percent more likely to graduate from college than an otherwise similar child raised in a home containing few or no books."); MARGARET SPELLINGS, U.S. DEP'T OF EDUC., *HELPING YOUR CHILD BECOME A READER 3* (2005), available at <http://www2.ed.gov/parents/academic/help/reader/reader.pdf> ("When you and other family members read with your children, help them with homework, talk with their teachers, and participate in school or other learning activities, you give your children a tremendous advantage It is no exaggeration to say that how well children learn to read affects directly not only how successful they are in school but how well they do throughout their lives.").

37. See, e.g., Rufus, *supra* note 30 ("Parents who love to read demonstrate to their

time,³⁹ and so forth, their children are likelier to develop better cognitive skills, immune systems, fewer allergies, greater resilience to adversity, appropriate eating and exercise habits, and become the best possible children in a world filled with dangerous consequences.

Norms embodied in various parenting styles give rise to trends that are concerned with affirmatively helping a child gain an advantage by improving skills, discipline, cognitive development, or independence. These norms can be viewed as optional choices that parents adopt if they are so inclined and have the resources to do so. There is no formal or functional legal punishment or social opprobrium for failing to follow these

children that reading is interesting, enjoyable, and worthwhile.”); *Children Better Prepared for School if Their Parents Read Aloud to Them*, SCI. DAILY (May 12, 2008), <http://www.sciencedaily.com/releases/2008/05/080512191126.htm> (“Children who have been read aloud to are also more likely to develop a love of reading, which can be even more important than the head start in language and literacy. And the advantages they gain persist, with children who start out as poor readers in their first year of school likely to remain so.”); Laura Markham, *Raise a Child Who Loves to Read*, AHA! PARENTING, <http://www.ahaparenting.com/parenting-tools/raise-great-kids/intelligent-creative-child/child-loves-read> (last visited July 14, 2013).

38. See, e.g., Bruce Feiler, *The Stories That Bind Us*, N.Y. TIMES, Mar. 15, 2013, <http://www.nytimes.com/2013/03/17/fashion/the-family-stories-that-bind-us-this-life.html> (“[I]f you want a happier family, create, refine and retell the story of your family’s positive moments and your ability to bounce back from the difficult ones. That act alone may increase the odds that your family will thrive for many generations to come.”); Barb Riley, *Resilience Through Story Telling*, WRITTEN NOT WITH INK (Feb. 19, 2013, 9:09 AM), <http://written-not-with-ink.blogspot.com/2013/02/resilience-through-storytelling.html> (explaining that “[t]he more children know about their family’s history, the stronger their sense of control over their lives and the higher their self-esteem,” and that children who have this knowledge “have a strong sense of ‘intergenerational self’” and “understand that they belong to something bigger than themselves”); Anne Fishel, *Building Resilient Kids One Story at a Time*, THE FAMILY DINNER PROJECT (Apr. 15, 2013), <http://thefamilydinnerproject.org/food-for-thought/building-resilient-kids-one-story-at-a-time/> (“According to data from Emory University’s Center for Myth and Ritual, children who grow up knowing their family’s stories are more resilient and suffer from less anxiety and depression.”); Jodie McVittie, *The Power of Story: Weaving Threads of Resilience Across Generations*, PARENT MAP (Mar. 25, 2013), <http://www.parentmap.com/blog/19668/the-power-of-story-weaving-threats-of-resilience-across-generations>.

39. See, e.g., *Children and TV: Limiting Your Child’s Screen Time*, MAYO CLINIC (Aug. 16, 2013), <http://www.mayoclinic.org/healthy-living/childrens-health/in-depth/children-and-tv/art-20047952> (stating that the American Academy of Pediatrics recommends limiting a child’s use of TV, movies, video, and computer games to two hours a day or less, explaining that obesity, irregular sleep, behavioral problems, impaired academic performance, violence, and less time for play have all been linked to excessive “screen time”); Katherine Hobson, *Less or More? Parents Grapple With Kids’ Screen Time Limits*, TODAY PARENTS (March 25, 2013), <http://www.today.com/moms/less-or-more-parents-grapple-kids-screen-time-limits-1C9033794>; Molly Knight Raskin, *Managing Your Children’s Screen Time*, WASH. POST, Jan. 3, 2013, http://www.washingtonpost.com/lifestyle/style/managing-your-childrens-screen-time/2013/01/03/9c47cea2-2e84-11e2-89d4-040c9330702a_story.html.

norms. There is an argument that these norms create a divide between parents who have a great number of resources, including money, education, human capital, and time, and parents with fewer resources to devote to their children. Gaia Bernstein and Zvi Triger's work on *Over Parenting* highlights some of the legal and social ramifications of trends like helicopter parents.⁴⁰ Their concerns are not only for the children who may have a need for independence and freedom from constant parental surveillance and monitoring, but also for the parents who do not have resources to spare for such intense parenting and how they may be treated by judges who hold them to a more expensive standard of parenting.⁴¹

With advances in medicine and the ability to spread information widely, parenting advice that calls for intensive parental supervision and interaction with children is both overwhelmingly helpful and almost oppressive. Current parenting norms are focused on protecting children. Not surprisingly, discourse about protecting children has different implications for men and women. For some, discussions about children's safety is cover for controlling women's autonomy,⁴² implicating questions about class and race in the meantime.⁴³ When thinking about parenting

40. Bernstein & Triger, *supra* note 11.

41. The popular media has also noted that enforcing parental norms through criminal systems is on the rise. See, e.g., Michael Brendan Dougherty, *Why Are So Many Parents Being Arrested?*, WEEK, July 21, 2014, available at <http://theweek.com/article/index/265010/why-are-so-many-parents-being-arrested> ("This summer has seen a rash of stories of parents being hauled away in cuffs for such sins as letting their kids roam unaccompanied in a park, or keeping them in the car while performing a short errand, or even leaving them alone in their own home for a few hours.").

42. See, e.g., *Professor Linda Fentiman Challenges the Way Courts Tend to Reinforce Cultural Stereotypes*, PACE LAW, <http://www.law.pace.edu/in-focus/professor-linda-fentiman-challenges-way-courts-tend-reinforce-cultural-stereotypes> (last visited Nov. 10, 2014) (explaining that reinforcing cultural stereotypes "is not only bad for mothers but it is also bad for children because it means we are not dealing with the fundamental causes of children's health problems . . ."); Linda C. Fentiman, *Are Mothers Hazardous to Their Children's Health?: Law, Culture, and the Framing of Risk*, 21 VA. J. SOC. POL'Y & L. 295, 297 (2014) (arguing that "the failure to consider multiple sources of risk to children means in practice that mothers—rather than others—are disproportionately held legally responsible for the protection of their children's health and well-being"). The anti-abortion concepts of fetal pain and personhood also demonstrate how women are held more accountable for harm to children than are men. See, e.g., Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES, Sept. 16, 2014, <http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html> ("Several scientists have done research that abortion opponents say shows that fetuses can feel pain at 20 weeks after conception."); *What is Personhood?*, PERSONHOOD USA, <http://www.personhoodusa.com/about-us/what-is-personhood/> (last visited Nov. 10, 2014) ("In 1973, the science of fetology was not able to prove, as it can now, that a living, fully human, and unique individual exists at the moment of fertilization and continues to grow through various stages of development in a continuum until death.").

43. See Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J. L. & POL'Y 63, 72 (1999) ("A double standard exists along class and

norms, generally, the state may be pitted between parents and children. In extreme cases, parents worry about their neighbors reporting them to the Department of Child Services if they allow their young children to cry loudly at home or call the police if children are outside playing without an adult supervising.⁴⁴ The comedian, Louis C.K. does a stand-up comedy joke about telling his young child to eat, “You’ll die, you idiot. Eat the food . . . They have your footprint at the hospital . . . They know that I have you. I’m not allowed to let you die . . . You have a social security number; you’re on the grid . . . Eat! If you’re skinny, I go to jail.”⁴⁵ This is a comedic rendering of anxiety over private activities that are subject to public scrutiny.⁴⁶ The comedy routine is helpful in gauging changes in mainstream parenting attitudes; it is not an empirical study of reactions to parenting norms. But, it does provide insight in how parenting is changing from a more benign Bill Cosby approach (“Dad is great! He feeds us chocolate cake!”)⁴⁷ to the current norm of anxious hovering care. In the Cosby account of a parent feeding children, the family self-regulates without concern about any state intervention.⁴⁸ The mom in the Cosby comedy routine is the disciplinarian who disapproves of chocolate cake for breakfast, and the dad is not worried about losing custody because of his food choices if the children are overweight.⁴⁹ Understanding the context of popular parenting culture sheds light on why the law’s absorption of norms and intervention in family life ratchets up the anxieties families experience around parenting.

race lines as to who makes a suitable parent and who does not.”).

44. See Matt Harrigan, *Texas Mom Arrested for Letting Kids Play Outside*, SYRACUSE.COM (Sept. 20, 2012, 11:34 AM), http://www.syracuse.com/news/index.ssf/2012/09/texas_mom_arrested_for_letting.html (stating that a woman was arrested for allegedly endangering children because she allowed her six- and nine-year-old children to play with motorized scooters unsupervised); Jessica Grose, *Parents Are Now Getting Arrested for Letting Their Kids Go to the Park Alone*, SLATE (July 15, 2014), http://www.slate.com/blogs/xx_factor/2014/07/15/debra_harrell_arrested_for_letting_her_9_year_old_daughter_go_to_the_park.html (stating that a mother was arrested and her daughter placed with social services when the mother instructed her nine-year-old daughter to play by herself in the park rather than wait in McDonald’s for her mother’s shift to end).

45. LOUIS C.K.: CHEWED UP (Art & Industry Oct. 2008), available at <https://www.youtube.com/watch?v=ZPC0ZDQ9Hmk>.

46. Mary Elizabeth Williams, *Is Veganism Child Abuse?*, SALON (Jun. 26, 2014, 9:37 AM), http://www.salon.com/2014/06/26/is_veganism_child_abuse/ [hereinafter Williams, *Veganism*] (describing how one mother was arrested for infant neglect because of her vegan dieting choices).

47. BILL COSBY: HIMSELF, *Chocolate Cake for Breakfast* (Jemmin Inc. May 20, 1983) available at <http://www.youtube.com/watch?v=zuamIBQ2aW4>.

48. *Id.*

49. Compare *id.*, with Bernstein & Triger, *supra* note 11, at 1261 n.179 (citing eight cases in which mothers lost custody of their children, either temporarily or permanently, due to the children’s obesity and the mothers’ failure to address this issue).

B. Legal Enforcement

Child removals are an example of overt state action for child protective purposes. An incidental effect is widespread signaling of which parenting norms merit compliance at the risk of legal enforcement. The norm of parental monitoring of a child's weight promises to protect the child from the negative health conditions associated with being overweight and the possibility of producing a healthy child. Treating obesity in children as a medical risk is a new trend. There have been a number of cases where obese children were removed from parents not only because of the children's weight, but also because of actions the courts attributed to parental choice.⁵⁰

Bernstein and Triger detail the process of courts incorporating parenting norms into legal standards; as that process happens, courts impute knowledge of norms to parents because of popular media messaging or the commonsensical nature of the norms.⁵¹ The example of obese children being removed from parental custody is poignant; attention to health effects, social harms from bullying, and the disruption of a family's life hang in the balance. Courts impute knowledge about healthy food choices and fitness, assuming that because some people have the information and resources necessary to maintain a healthy weight, all parents must have them as well.⁵² For many people, it is intuitive that eating more food tends to make a person gain weight. The more complex human factors that contribute to weight gain like food as comfort, family tradition, or medication pale in significance to courts if there are parenting norms in place and the belief that failure to comply with the norm results in weight gain.

The link between parental knowledge of preventive actions and imputing parental responsibility happens when a trend is supported by widespread expert consensus about the effectiveness of the norm and dissemination by the popular media. Linda Fentiman posits that the lay public cannot, especially in the "Internet age, when much of media lacks scientific literacy,"⁵³ accurately assess risk to children. The rise in critical work about fat is growing,⁵⁴ but it is difficult to challenge widespread

50. *E.g.*, Bernstein & Triger, *supra* note 11, at 1261 n.179.

51. *Id.* at 1252-62.

52. *Id.* at 1261 n.179 (citing to removals where parents failed to meet with dieticians or were obese themselves). In one of these cases, the court equated "morbid obesity" with "life threatening malnourishment." *Id.*

53. Fentiman, *supra* note 42, at 297.

54. *See, e.g.*, ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 30-31 (2008) (arguing that fatness should be included in anti-discrimination discourse).

social disapproval of obesity, particularly when there is widespread consensus that weight gain is stigmatized.⁵⁵

The stakes for overweight children are serious health effects⁵⁶ and premature death.⁵⁷ The American Medical Association recently declared obesity a disease,⁵⁸ but parents continue to bear the responsibility for their children's weight because of choices parents make about food and exercise. It seems like a straightforward proposition to limit children's food and increase their exercise so that they do not become overweight. Considering the general belief in pervasive obesity,⁵⁹ it is unfair to imagine that parents alone should be held responsible for all weight gain in children.⁶⁰ Yet, stereotypes attach to parents with overweight children so that they are perceived as uneducated, willfully ignorant, lazy, or bad parents⁶¹ who do

55. *Id.* at ix (citing, as an example of stigmatizing fatness, the U.S. Surgeon General Richard Carmona's comment about weight gain as "the terror within").

56. *Basics About Childhood Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), <http://www.cdc.gov/obesity/childhood/basics.html> (last updated Apr. 27, 2012) (explaining that health risks for overweight children include high blood pressure, high cholesterol, heart disease, diabetes, and breathing problems).

57. U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. HEALTH SERV. & OFFICE OF THE SURGEON GEN., *THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 1* (2001) available at <http://www.ncbi.nlm.nih.gov/books/NBK44206/pdf/TOC.pdf> ("Studies show that the risk of death rises with increasing weight.").

58. *AMA Adopts New Policies on Second Day of Voting at Annual Meeting*, AMERICAN MEDICAL ASSOCIATION (June 18, 2013), <http://www.ama-assn.org/ama/pub/news/news/2013/2013-06-18-new-ama-policies-annual-meeting.page>.

59. *Worldwide Obesity Rates See 'Startling' Increase Over Past 3 Decades*, MED. NEWS TODAY (May 29, 2014, 12:00 AM), <http://www.medicalnewstoday.com/articles/277450.php>.

60. See KIRKLAND, *supra* note 54, at 74 (noting that the political left's framing of obesity shifts the blame to big food, but struggles to explain why everyone is not obese if the forces are overwhelming). Anna Kirkland suggests changing the conversation to one of genetic disposition and structural change. *Id.*

61. See, e.g., Rachel Dissell, *County Places Obese Cleveland Heights Child in Foster Care*, CLEVELAND.COM (Nov. 26, 2011, 9:00 PM), http://blog.cleveland.com/metro/2011/11/obese_cleveland_heights_child.html (discussing a case in which the Department of Children and Family Services took a child into custody, saying that the "child's weight gain was caused by his environment and that the mother wasn't following doctor's orders," an allegation that the mother disputed); Janice D'Arcy, *Ohio Mom Loses Custody of Obese Son: Using Government Intervention for a Childhood Epidemic*, WASH. POST (Nov. 29, 2011, 7:00 AM), http://www.washingtonpost.com/blogs/on-parenting/post/ohio-mom-loses-custody-of-obese-son-should-the-government-penalize-parents-of-obese-children/2011/11/28/gIQA1v665N_blog.html ("The third grader, who weighs more than 200 pounds, was removed from his mother's custody because of what officials have deemed medical neglect."); *Debate Over Obese Children vs. Parental Rights*, CBS NEWS (Nov. 29, 2011, 9:19 AM), <http://www.cbsnews.com/news/debate-over-obese-children-vs-parental-rights/> ("The case of an 8-year-old Cleveland Heights boy taken from his family because he weighs more than 200 pounds has renewed a debate on whether parents should lose custody

not care enough about their children. Rather than seeking to address the medical condition, those stereotypes about personal choice and responsibility can obscure the ability to see a more complex set of reasons for childhood obesity.⁶² It may be unrealistic to expect working parents to encourage healthy food choices, let alone monitor a child's food intake and exercise.⁶³ Children are encouraged to drink milk and eat cheese from a young age by pediatricians, parents, and schools, even though many children are sensitive to lactose and there is sufficient data about the unhealthy levels of saturated fat in both of those products.⁶⁴ With the AMA's decision to classify obesity as a disease, there is hope that attitudes may change so that medical treatment of obesity will improve.⁶⁵ Even so,

if a child is severely obese."); David L. Katz, *Should Obese Children Be Taken from Parents?*, HUFFINGTON POST (July 14, 2011), http://www.huffingtonpost.com/david-katz-md/children-obesity-parents_b_897667.html (stating that "[u]nless we start recognizing obesity for the serious threat that it is, the fate of our children will be cause for tears" and, in cases of severe obesity, the state might take children into custody); Brette Sember, *Can You Really Lose Custody When Your Child Is Overweight?*, MOMMA SAID (Jan. 4, 2012), <http://mommasaid.net/2012/01/04/custody-obesity/> (explaining that a court can consider a child's weight in a custody case).

62. See generally Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019-28 (2010).

63. See COMM. ON PREVENTION OF OBESITY IN CHILDREN & YOUTH, INST. OF MED., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE 8 (Jeffrey P. Koplan et al. eds., 2005).

In the United States in the 21st century, there are a great many pressures on parents and children that can adversely affect daily family life. For example, with the frequent need for both parents to work long hours, it has become more difficult for many parents to play with or monitor their children and to prepare home-cooked meals for them. Of two-parent households, 62.4 percent have both parents in the labor force; in one-parent homes, 77.1 percent of the mothers and 88.7 percent of fathers are working. Because the school day is shorter than the work day, many children come home to an empty house, where they may be unsupervised for several hours. In a national survey, parents report being well aware of the need to spend more time with their children but believe they do not have such time available. Parents from diverse socioeconomic categories actually cite a "parental time famine"—insufficient time to spend with their children. Economic and time constraints, as well as the stresses and challenges of daily living, may make healthful eating and increased physical activity a difficult reality on a day-to-day basis for many families.

Id. (citations omitted).

64. See Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251 (2013) (explaining that the United States Department of Agriculture (USDA) "encourages Americans to avoid high-fat dairy products, based on extensive medical research revealing their harmful effects").

65. See Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. TIMES, June 18, 2013, <http://www.nytimes.com/2013/06/19/business/ama-recognizes-obesity-as-a-disease.html> (quoting American Medical Association board member Dr. Patrice Harris, who stated, "Recognizing obesity as a disease will help change the way the medical community tackles this complex issue that affects approximately one in three Americans"); *Treating*

for working, low-income, single parents and those living in food deserts, it can be nearly impossible to purchase healthy, fresh foods, let alone monitor everything a child eats.⁶⁶ Any performance of compliance with the norm of limiting a child's weight is no longer solely about preventing the adverse health effects of excessive weight gain, but is a reflection of a parent's ability to comply with a norm and a measure of how much a parent loves a child.

State intervention is not limited to child removals; courts can take a parenting norm such as bonding into consideration when determining custody and visitation plans for divorcing parents with a newborn child, attachment issues for foster and adoption placements, and abuse and neglect determinations. Currently, many courts view parents with a more neutral eye towards gender and biology. With adoption, assisted human reproduction, surrogates, and LGBT families on the rise, custody and visitation presumptions like the "tender years" doctrine, where a woman would receive preference because of the belief that a very young child needs its mother, seems out of step. With new information about delaying the cutting of the umbilical cord to allow newborn infants to receive additional iron-rich blood from the placenta,⁶⁷ a norm of waiting several minutes before cutting the cord may be adopted. This recent discovery coupled with information about the benefits for newborns of skin-on-skin contact and colostrum might impact the way that some expectant parents agitate for care in the hospital.⁶⁸ But, the impact of new parenting

Obesity as a Disease, AM. HEART ASS'N, http://www.heart.org/HEARTORG/GettingHealthy/WeightManagement/Obesity/Treating-Obesity-as-a-Disease_UCM_459557_Article.jsp (last updated Jan. 5, 2015) ("[D]octors should consider obesity a disease and more actively treat obese patients for weight loss.").

66. See *Childhood Obesity Facts*, CDC (Aug. 13, 2014), <http://www.cdc.gov/healthyouth/obesity/facts.htm> (explaining that "[i]n 2012, more than one third of children and adolescents were overweight or obese" and that being overweight or obese can result from "caloric imbalance" as well as "various genetic, behavioral, and environmental factors"); Evelyn Theiss, *It's Tough These Days to Maintain a Healthy Diet for Children*, CLEVELAND.COM (Nov. 26, 2011, 9:00 AM), http://blog.cleveland.com/metro/2011/11/its_tough_these_days_to_mainta.html (reporting about a national conference to combat childhood obesity where speakers discussed "changing kids' palates; making it socially unacceptable to eat on the streets or to eat 1,500 calories in one sitting; making produce available in the city's food deserts; and acknowledging that the battle against obesity will be harder than the one successfully waged against tobacco").

67. See Denis Campbell, *Hospitals Warned to Delay Cutting Umbilical Cords After Birth*, GUARDIAN, Jul. 10, 2013, <http://www.guardian.co.uk/society/2013/jul/11/hospitals-nhs-umbilical-cords-babies-delay-cutting> (explaining that "Cochrane Library research finds newborns receive more iron if umbilical cord is left for several minutes before being clamped").

68. See, e.g., Simon Mehigan, *Can I Ask for a Delay to My Baby's Cord Being Clamped?*, BABYCENTRE, <http://www.babycentre.co.uk/x1043341/can-i-ask-for-a-delay-to-my-babys-cord-being-clamped> (last reviewed Mar. 2014) (instructing expecting parents to

information does not necessarily end there. As more information is gathered and norms become more widely accepted, it is not impossible to imagine that policymakers and courts may rethink standards for deciding the length of time that a birth mother has to consider relinquishing her infant or whether there is a biological basis for granting more time in a visitation plan for a birth mother.

Assessing large-scale state intervention can be subtle because family law decisions are taken on a case-by-case basis with judicial discretion for individual variances among families. It should be the site for greater care and attention to individual family circumstances that allows for the proliferation and protection of non-normative families and vulnerable populations who cannot comply with norms. Parents who refuse or cannot devote a high number of resources, far above the level of abuse and neglect, to parenting can be judged as bad parents.⁶⁹ Complying with product-focused parenting norms—such as buying certain food and household products to limit children’s chemical exposure—is a hugely expensive and ultimately impossible task that is nonetheless becoming part of the expectation for good parenting. A recent study found that toxic chemicals found in the body are indicative of people’s income status.⁷⁰ The sheer ubiquity of chemicals is staggering, as evidenced by the list of chemicals that the government is screening for negative health effects.⁷¹ Factor in the undeniable reality that water, food, and plastic are integral parts of modern households over which people have little individual control other than price point choices, and the project of limiting chemical exposure is overwhelming for parents. Nonetheless, parents are asked to make consumer choices while considering dire outcomes for their children.

Even though a parent might not understand the risk of exposure to chemicals like Bisphenol A (BPA), a parent pressured into believing that the baby’s health weighs in the balance could easily spend \$250.00 to replace all of the bottles he or she used with a previous child.⁷² Depending

“[a]sk your midwife what your hospital’s policy is on delayed cord clamping, so you can find out how it could work for you”).

69. See, e.g., David C. Bellinger & Andrew M. Bellinger, *Childhood Lead Poisoning: The Tortuous Path from Science to Policy*, 116 J. CLINICAL INVESTIGATION 853, 853 (2006) (arguing that “families that were politically and economically disenfranchised” were strongly affected by higher levels of lead exposure and were blamed for bad parenting).

70. Jessica Tyrrell et al., *Associations Between Socioeconomic Status and Environmental Toxicant Concentrations in Adults in the USA: NHANES 2001-2010*, 59 ENV’T INT’L 328 (2013).

71. EPA, ENDOCRINE DISRUPTOR SCREENING PROGRAM: UNIVERSE OF CHEMICALS AND GENERAL VALIDATION PRINCIPLES (Nov. 2012), available at http://www.epa.gov/endo/pubs/edsp_chemical_universe_and_general_validations_white_paper_11_12.pdf (listing many chemicals that may be tested in the Endocrine Disruptor Screening Program).

72. See Brian Alexander, *10 Ways to Reduce Your Family’s Exposure to Chemicals*,

on how much a person can or is willing to spend on raising a child, this amount may not be unduly burdensome. However, trying to replace all items that contain chemicals, not to mention water and food, would quickly add an untenable expense to the estimated \$245,340 average amount required to raise a child⁷³ in the face of falling household incomes.⁷⁴ The ubiquity of the chemicals and the relative inability of individual parents to control environments that include large farm pesticide and industrial runoff, degraded housing conditions, food deserts, and limited access to resources creates the conditions for some parents to fail at preventing chemical exposure in their children. “Environmental toxins; mental illness and substance abuse caused by domestic violence; inadequate medical care, including vaccinations and prenatal care—these are almost all about poverty. Rather than address poverty, we look at women as the cause even though they have no control over most of these hazards.”⁷⁵ In a Canadian documentary about chemical exposure, a filmmaker featured a group of indigenous people whose land was bordered by industrial plants that produced waste in the air and water.⁷⁶ The documentary suggested that the group’s level of reproducing boys had reached extinction levels, meaning that they did not have enough male children for the group to survive.⁷⁷

This failure to comply with expensive norms supports pre-existing stereotypes about low-income parents, non-normative parents, and parents of color who cannot conform to preventive norms that require a lot of resources. Certain groups of parents are particularly vulnerable to parenting norms that require an outlay of scarce resources. Women of color who are single and have low incomes are already targeted for their reproductive

REDBOOK, <http://www.redbookmag.com/health-wellness/advice/exposure-to-chemicals> (last visited Dec. 1, 2013) [hereinafter Alexander, *10 Ways*] (advising parents to “[u]se BPA-free baby bottles”). See also Brian Alexander, *Special Report: The New Boys’ Health Scare*, REDBOOK, <http://www.redbookmag.com/health-wellness/advice/exposure-to-chemicals> (last visited Dec. 1, 2013) [hereinafter Alexander, *New Boys’ Health Scare*] (explaining how one mother replaced all of her baby bottles and bought new bottles without BPA at the cost of \$250).

73. Associated Press, *Cost of Raising a Child Rising, Agriculture Dept. Says*, N.Y. TIMES, Aug. 18, 2014, <http://www.nytimes.com/2014/08/19/business/cost-of-raising-a-child-rising-agriculture-dept-says.html> (stating that, according to a report by the Agriculture Department, “[a] child born in 2013 will cost a middle-income American family an average of \$245,340 until he or she becomes an adult”). See also Eyder Peralta, *That 2012 Bundle Of Joy Will Cost You \$241,080 To Raise*, NAT’L PUB. RADIO (Aug. 14, 2013), <http://www.npr.org/blogs/thetwo-way/2013/08/14/212078144/that-2012-bundle-of-joy-will-cost-you-241-080-to-raise>.

74. Peralta, *supra* note 73 (explaining that median household income has dropped “by more than \$4,000 since 2000, after adjusting for inflation”).

75. PACE LAW, *supra* note 42.

76. THE DISAPPEARING MALE (CBC network broadcast 2008), available at <http://topdocumentaryfilms.com/the-disappearing-male/>.

77. *Id.*

choices and parenting skills.⁷⁸ The stereotypes about their parenting choices provide authorization for higher levels of child removals and strong social pressure to relinquish children to more “deserving” or “loving” homes. One might ask why the group featured in the Canadian documentary remained in the polluted area. Asking why the people remained on land that was surrounded by industrial waste presupposes that they had the economic ability to relocate or were not culturally or religiously tied to the land. Parents without educational attainments may not have access to information or understand how to process it so that they correctly assess harmful elements in a child’s life.

As parenting norms become widespread and accepted, a person’s ability to expend resources acts as a proxy for fitness as a parent, love for the child, and the child’s safety. The attitude that parents are expected to sacrifice as many resources as possible to protect their children because that is what loving parents do, unfairly ties expressions of love and parental fitness to economic status. The situation for low-income parents worsens as the threatened childhood outcomes are more severe and the demands made in the name of prevention are impossible to meet. Politicians who see little gain in making “sweeping policy changes” to fix public health problems blame the “parental ineptitude” of “poor, minority children” to avoid losing political capital.⁷⁹ Blaming parents for outcomes and creating the fear that parents will be blamed leads to parents modifying their behavior in the shadow of the law,⁸⁰ fearful of legal decisions because of the ever-shifting standards for good parenting.

II. VALUING OUTCOMES

*“Obese Third Grader Taken From Mom, Placed in Foster Care”*⁸¹

The medically informed parenting advice that pervades popular culture and law⁸² offers a formula that suggest adherence to certain

78. See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2003).

79. See James Hamblin, *The Toxins That Threaten Our Brains*, ATLANTIC, Mar. 18, 2014, available at <http://www.theatlantic.com/features/archive/2014/03/the-toxins-that-threaten-our-brains/284466/> (recounting how experts blamed lead poisoning on poor, minority parents rather than fixing the public health problem).

80. See Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (explaining that, in divorce custody disputes, parents modify behaviors and position themselves while undergoing court-ordered or statutorily required alternative dispute resolution processes). Though the authors mostly write about divorce cases, the same principle applies to parents who mold their behaviors according to beliefs and fears they have about the legal systems and its power to intervene between parents and children.

81. Newcomb, *supra* note 12.

behaviors increases the chances that a parent will successfully produce a certain outcome for a child. While there have been extensive studies and scientifically-informed methods developed for parents to embrace, parenting norms are inextricably tied to the culture in which they emerge. This Section demonstrates how legal decisionmakers rely on science and health professionals to distinguish healthful, desirable childhood outcomes from unhealthy, undesirable ones. Smoking while pregnant and sleeping infants on their backs are illustrative cases about the social value attached to scientifically-driven parenting norms, which emphasizes the need for critical examination of the conditions that lead to legal enforcement. There is a general agreement that death and serious injuries, linked through scientific studies to not sleeping infants on their backs and exposing unborn children to tobacco are undesirable outcomes. Even in cases where there is strong evidence that the risks of noncompliance with norms are high, the legal response is limited to social programming and already existing mechanisms, like abuse and neglect claims.

A. *For Science Tells Us So*

Experiments like those developed during the 1950s by Harry Harlow to counter the belief that children should not have extensive contact with a soft, nurturing mother figure were groundbreaking at the time they were conducted.⁸³ Harlow's research led to a change from sterile nursery settings and non-nurturing parenting styles that prevailed to encouraging skin-to-skin contact between newborn children and their mothers along with a nurturing, intensive parenting style.⁸⁴ Parenting advice from the past can seem ridiculous and uninformed, but is better understood in context when infant and childhood mortality rates were higher than they are now.⁸⁵

82. See generally RIMA APPLE, *PERFECT MOTHERHOOD: SCIENCE AND CHILDBREARING IN AMERICA* (2006); PETER N. STEARNS, *ANXIOUS PARENTS: A HISTORY OF MODERN CHILDBREARING IN AMERICA* (2003); ANN HULBERT, *RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN* (2003).

83. BLUM, *supra* note 21, at 37.

84. See, e.g., *Bonding After Birth*, BABYCENTRE (Oct. 2011), <http://www.babycentre.co.uk/a658/bonding-after-birth>; Puig G. & Sguassero Y., *Early Skin-to-Skin Contact for Mothers and Their Healthy Newborn Infants: RHL Commentary*, WORLD HEALTH ORG. REPROD. HEALTH LIBRARY, <http://apps.who.int/rhl/archives/gpcom/en/> (last revised Nov. 9, 2007); Jack Newman & Edith Kernerman, *The Importance of Skin to Skin Contact*, INT'L BREASTFEEDING CENTRE, http://www.nbci.ca/index.php?option=com_content&id=82:the-importance-of-skin-to-skin-contact (last revised 2009); ER Moore et al., *Early Skin-to-Skin Contact for Mothers and Their Healthy Newborn Infants*, 5 COCHRANE DATABASE SYST. REV. (2012).

85. See Therese Oneill, *'Don't Think of Ugly People': How Parenting Advice Has Changed*, ATLANTIC, Apr. 19, 2013, available at <http://www.theatlantic.com/health/archive/2013/04/dont-think-of-ugly-people-how->

There is general consensus now that bonding and nurturing infants is better for them—as science continues to uncover the cognitive benefits of bonding, the agreement is based on an implicit understanding that poor cognitive and emotional development are poor health outcomes. Similarly, widespread agreement that the health effects on infants of maternal smoking, substance abuse, and drinking are bad outcomes. Comparing parenting norms where society has learned that negative childhood outcomes are linked to parenting behaviors suggests that the social meaning of some parenting behaviors may be informing legal responses to compliance with parenting norms.

Sleeping infants on their backs is a parenting norm that has not been made into law, although there is social programming in the United States to teach and encourage parents to comply.⁸⁶ In South Australia, scientist Susan Beal tracked deaths attributed to Sudden Infant Death Syndrome (SIDS) for years.⁸⁷ She noted that ethnically Chinese babies died less frequently than other Australian babies.⁸⁸ At the time, experts believed the difference was genetic, but Beal considered cultural differences between Chinese-Australian parents and other Australian parents.⁸⁹ Chinese parents slept their infants on their backs and parents following European customs did not.⁹⁰ After she convinced a large group of non-Chinese parents to sleep their infants on their backs, the rate of SIDS deaths for that group dropped dramatically.⁹¹ Beal's findings were replicated in several countries with similarly positive results.⁹²

In 1930s Finland, the government wanted to give children an “equal start in life.”⁹³ Officials happened on a method for encouraging parents to sleep their infants on their backs in a safe bed. The government began issuing a cardboard box to all expectant mothers filled with a number of baby items, including a small mattress and bedding so that new babies could sleep in the box itself.⁹⁴ Expectant mothers could opt out of the

parenting-advice-has-changed/275108/ (explaining how outdated parenting advice made sense in the time it was given).

86. See *Safe to Sleep: Public Education Campaign*, SAFE TO SLEEP, NAT'L INST. OF CHILD HEALTH & HUMAN DEV. (NICHD), <http://www.nichd.nih.gov/sts/Pages/default.aspx> (last updated Nov. 24, 2014) (explaining the campaign's success and giving recommendations for preventing SIDS).

87. KATHLEEN STASSEN BERGER, *THE DEVELOPING PERSON THROUGH THE LIFE SPAN* 5 (8th ed. 2011).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Helena Lee, *Why Finnish Babies Sleep in Cardboard Boxes*, BBC NEWS MAG., June 4, 2013, available at <http://www.bbc.com/news/magazine-22751415>.

94. *Id.*

program by electing a small payment in exchange for receipt of the box with their first prenatal appointment.⁹⁵ The contents of the box were worth much more than the payout.⁹⁶ Currently and in the past, cultural significance attached to receipt and use of the box. It is now seen as a cultural equalizer; all Finnish babies start out in the same box, regardless of their socio-economic status.⁹⁷ So, the norm of sleeping a child on its stomach per European custom was replaced by a different norm because of direct intervention from the government. The state's programming in Finland created a different norm that resulted in a new cultural practice of sleeping infants in the maternity box.

The United States recorded similar results, cutting SIDS deaths in half,⁹⁸ but there has been no law requiring parents to sleep their children on their backs or punishing them for not doing so when a child dies of SIDS. While some norms like requiring car seats for infants and children are legally regulated, sleeping an infant on its back has not been. Not sleeping an infant on its back accounts for about one half of all SIDS deaths⁹⁹; that leaves half that cannot be attributed to how the infant sleeps. Perhaps because it seems unfair to create a law when there are still SIDS deaths that may occur even if a parent does sleep an infant on his back, no such law has been put in place.

Similar to the accepted norm that parents should sleep infants on their backs, it is generally accepted that women should not smoke during pregnancy. Women who smoke while pregnant risk negatively affecting the health of their unborn children.¹⁰⁰ A child may be born underweight or have physical deformities at birth for numerous reasons, but if a woman smokes while pregnant, she may face social opprobrium,¹⁰¹ encouragement to stop smoking,¹⁰² and efforts made to criminalize her behavior.¹⁰³ Until

95. *Id.*

96. *Id.*

97. *Id.*

98. See *Frequently Asked Questions (FAQs) About SIDS and Safe Infant Sleep*, SAFE TO SLEEP, NICHD, <http://www.nichd.nih.gov/sts/about/Pages/faq.aspx> (last updated Nov. 19, 2013).

99. *Id.*

100. R. Wickstrom, *Effects of Nicotine During Pregnancy: Human and Experimental Evidence*, 5 *CURR NEUROPHARMACOL.* 213 (2007).

101. See Britta Wigginton & Christina Lee, *Stigma and Hostility Towards Pregnant Smokers: Does Individuating Information Reduce the Effect?*, 28 *PSYCHOL. & HEALTH* 862, 862 (2013) (finding "that smokers—particularly if pregnant—are subject to negative moral judgment"); Sheryl Ubelacker, *Pregnant Women with Substance Abuse Problems Need Doctor's Compassion, Not Stigma, Report Says*, *GLOBE & MAIL*, Nov. 5, 2013, <http://www.theglobeandmail.com/life/health-and-fitness/health/pregnant-women-with-substance-abuse-problems-need-doctors-compassion-not-stigma-report-says/article15261724/> ("Dealing with stigma is the greatest challenge in trying to help pregnant women with an addiction . . .").

102. See, e.g., DAN STEINBERG & SHELLY GEHSAN, *NAT'L CONFERENCE OF STATE*

recently, no more than seventy years ago, the widely accepted view about pregnancy and risk factors to fetal development was that there was no danger if a mother consumed substances because the placenta was believed to act as an insuperable barrier.¹⁰⁴ That attitude changed with the advent of babies born blind because of Rubella in the 1940s and babies born with physical deformities tied to Thalidomide usage (a prescription drug) in the 1950s.¹⁰⁵ Since that time, there have been numerous studies detailing the effects of tobacco use on fetal development.¹⁰⁶

Reducing tobacco intake or not smoking at all during pregnancy is a mainstream parenting norm, such that cultural stigma attaches to women who continue to smoke during pregnancy.¹⁰⁷ Women who smoke while pregnant can be perceived as having no emotional connection to their unborn children, which for many is not true, as evidenced by their attempts to stop or reduce substance use.¹⁰⁸ Pregnant smokers may fear that they will lose their children to the legal system.¹⁰⁹ While women who use controlled substances during pregnancy face more significant obstacles to seeking treatment—mostly finding childcare or risk placing children in the foster care system¹¹⁰—pregnant smokers continue to have concerns about custody determinations, neglect proceedings, and tort and criminal actions because

LEGISLATURES, STATE RESPONSES TO MATERNAL DRUG AND ALCOHOL USE: AN UPDATE 4 (2000), *available at* <http://www.wkkf.org/~media/8ED4B4A721B14731B6F54B1E90F4372E.ashx> (“The state and federal responses to the problem have relied almost exclusively on public awareness campaigns.”); *Tobacco Use and Pregnancy*, BETOBACCOFREE.GOV <http://betobaccofree.hhs.gov/health-effects/pregnancy/index.html> (last visited Oct. 19, 2014) (identifying risks to unborn children, effects of secondhand smoke on small children, and related tips and warnings).

103. Cori S. Annapolen, *Maternal Smoking During Pregnancy: Legal Responses to the Public Health Crisis*, 12 VA. J. SOC. POL’Y & L. 744, 762-65 (2005).

104. *Id.*

105. See SCOTT F. GILBERT, *DEVELOPMENTAL BIOLOGY* (6th ed. 2000), *available at* <http://www.ncbi.nlm.nih.gov/books/NBK9998/>.

106. Annapolen, *supra* note 103, at 745-53 (summarizing recent studies that link maternal tobacco use to SIDS, lower birth weight, congenital deformities, intellectual defects, and behavioral and cognitive functions).

107. Wigginton & Lee, *supra* note 101.

108. Steinberg & Gehshan, *supra* note 102, at 6 (“Although many people perceive drug-using mothers as unemotional or uncaring toward their children, interviews with these women reveal that they frequently understand that there is a connection between drug use and the health of their fetuses, and many try to reduce or quit drug use during pregnancy.”).

109. *Id.* at 8 (“[M]any women fear losing custody or parental rights more than they fear criminal penalties.”). See also Ubelacker, *supra* note 101 (explaining that “many women are hesitant to seek treatment because of the stigma around using a substance that’s known to be harmful to their developing fetus”).

110. Steinberg & Gehshan, *supra* note 102, at 9 (“[W]omen will not enter treatment either because they fear their children will be placed in foster care if they admit to having a problem or because they do not wish to be separated from their children during treatment.”).

of smoking.¹¹¹ Arguments to legally hold women who use substances during pregnancy responsible for infant and childhood outcomes based on expanding fetal rights¹¹² are not in accordance with the reality that substance abuse during pregnancy is decreasing. Between 1990 and 1996, tobacco use during pregnancy fell from 18.4% to 13.6%, and of the women who did smoke, those women smoked fewer cigarettes.¹¹³ Additionally, the drop in usage could be attributed to the reliance on social programs instead of criminal and civil remedies.¹¹⁴ Reminding medical providers that smoking is an addiction also promises to reframe maternal smoking so that women may be more inclined to seek prenatal treatment and addiction support.

There is widespread consensus in medicine and law that the childhood outcomes associated with maternal smoking are undesirable, hence the push for significant social programming rather than mandatory reporting and large-scale criminalization to encourage women to stop smoking while pregnant. It seems obvious that increased risk for infant death or serious injury is an undesirable outcome, but the determination that all other, non-life threatening outcomes linked to maternal smoking are also framed as undesirable should be complicated. As with the example of sleeping infants on their backs norm, there are other reasons that children die from SIDS. Smoking is not the only reason an infant is born underweight; premature babies with other health conditions, women in medical distress, and malnourishment are just a few of the possible causes for underweight births. When parenting norms are not critically examined, judges feel authorized to make decisions like removing a child from its mother because a child is overweight or because experts urge removal.¹¹⁵ Outcome-focused, medically informed parenting norms hew to harm standards because the stakes are high and there seems to be a relationship between the parent's behavior and harm to the child. One can argue that the state has a health interest in its citizens and weight poses a serious medical issue with associated economic costs, so it should be able to act to protect. Similarly, the state has a health interest in outcomes for children whose

111. See Anapolen, *supra* note 103, at 770-75 (arguing that civil and criminal remedies should be used expansively to hold pregnant smokers liable).

112. See Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 *DRAKE L. REV.* 741, 745 (2000) (arguing that women should be held responsible for fetal and infant outcomes when a woman uses controlled substances because "everything a mother does during pregnancy can potentially affect her unborn child").

113. Steinberg & Gehshan, *supra* note 102, at 4.

114. See *id.*

115. See, e.g., *Newcomb*, *supra* note 12 (citing Dr. David Ludwig, a "high-profile pediatric obesity expert," who remarked that child removal in cases of obesity would be legally justifiable, while conceding that "state intervention is no guarantee of a good outcome, but to do nothing is also not an answer").

parents smoke during pregnancy, drive without car seats, or expose them to EDCs. When there is widespread consensus that certain health outcomes are medically and socially undesirable, such that parents are increasingly held legally responsible for their children's weight, it is difficult to find a counter to the prevailing wisdom that having a non-thin body shape is a poor health outcome or entirely controlled by parental behavior. The difficulty arises when there is no agreement about the nature of the childhood outcome. In the case of sexual and gender development in children, there is confusion about the "natural" process of children's development and the nature of the risk to children.

When sociocultural attitudes are translated into the law, it "diverts attention, and resources, from the many more serious threats of harm to children, thereby discouraging actions both to prevent future harm and to impose liability for past harms."¹¹⁶ Based on efforts to stigmatize and criminalize women's smoking and drinking during pregnancy,¹¹⁷ the social perception of doing those things while pregnant is perhaps far worse than sleeping a child on its stomach or not properly using an infant carrier in a car.¹¹⁸ Consider childhood poverty, a culprit for significant negative childhood outcomes.¹¹⁹ It is difficult to combat this equally serious and public social concern in a family law setting. Judging parental behavior, including holding parents responsible for their financial status, is built into the system of measuring individual parents by mainstream social and legal norms for an individual child before the bar. Just as legal decisionmakers

116. Fentiman, *supra* note 42, at 297.

117. See Callie Beusman, *First Woman Arrested Under Law Criminalizing Drug Use During Pregnancy*, JEZEBEL (July 14, 2014, 7:00 AM) ("Earlier this year, Tennessee passed controversial legislation allowing the state to criminally charge mothers for using narcotics while pregnant, calling it 'assault' against the fetus."). See also *Criminal Cases and Issues*, NAT'L ADVOCATES FOR PREGNANT WOMEN, http://www.advocatesforpregnantwomen.org/issues/criminal_cases_and_issues/ (last updated July 17, 2014) (stating that a 1992 report "documented over 160 incidents of arrest of women based on their status as pregnant people").

118. See Lenore Skenazy, *NJ Court Takes 'Child Neglect' to Extremes*, N.Y. POST, JAN. 21, 2014, <http://nypost.com/2014/01/21/nj-court-takes-child-neglect-to-extremes/> ("In an appeals court decision last week, three judges ruled that a mother who left her toddler sleeping in his car seat while she went into a store for five to 10 minutes was indeed guilty of abuse or neglect for taking insufficient care to protect him from harm."); BERGER, *supra* note 87 (discussing the history of the "Back to Sleep" campaign that stemmed from studies that showed a reduction in SIDS-related casualties); *Child Passenger Safety: Get the Facts*, CDC, http://www.cdc.gov/Motorvehiclesafety/child_passenger_safety/cps-factsheet.html (last updated Sept. 12, 2014) (listing prevention tips, including car seats and booster seats, as "[m]otor vehicle injuries are a leading cause of death among children in the United States").

119. PILYOUNG KIM ET AL., PROCEEDINGS OF THE NAT'L ACADEMY OF SCI. OF THE U.S., EFFECTS OF CHILDHOOD POVERTY AND CHRONIC STRESS ON EMOTION REGULATORY BRAIN FUNCTION IN ADULTHOOD (2013), available at <http://www.pnas.org/content/110/46/18442.full.pdf+html>.

adopt and absorb large-scale social norms into legal regulations, they can also engage in adopting frameworks for determining when and how the law should respond to developing parenting norms.

The example of sleeping infants on their backs illustrates how informal legal enforcement of parenting norms can make its way into families' lives. Just because a parenting norm is not yet enforced with formal laws does not prevent it from entering the legal calculus of parental fitness and children's interests. There is no legal requirement that parents sleep an infant on its back, but parents may still be indirectly accountable for compliance with that norm. Imagine a custody dispute where a parent alleges that the other parent intentionally sleeps their infant on his stomach instead of his back. A judge may simply think that it is a custom or culturally informed practice without scientific merit. If, however, the parent adds that the child's doctor recommended the behavior or if the judge happens to have exposure to the Safe to Sleep campaign and/or knows about scientific findings, the judge might weigh that allegation more heavily in favor of the parent complying with the norm. The same consideration might apply to a child removal scenario where a parent is questioned by a social worker about how an infant is slept to gauge the level of care the child receives and the parent's knowledge about parenting practices. Both custody and child removal examples illustrate how some families are more vulnerable to state intervention and monitoring than other families, making the awareness of parenting norms that have formal and informal legal ramifications crucial.¹²⁰

B. Conditions for Legal Enforcement

This Section explores the scientific authorization behind a norm as a method for it becoming mainstream and imputed to parents by the legal system as part of a commonsense approach to raising children. Then, it focuses on the case of gender identity to show that confusion about identity development persists, despite continuing social and scientific progress. Gaia Bernstein and Zvi Triger posited that over-parenting norms, which for the most part are norms for middle and upper class parents because they require intensive monitoring of children and a great deal of financial resources, have already begun to inform the legal regulations that affect families.¹²¹ They caution against too "hastily incorporate[ing] parenting

120. Noa Ben-Asher, *Paradoxes of Health and Equality: When a Boy Becomes a Girl*, 16 *YALE J.L. & FEMINISM* 275, 281 (2004) (arguing that the gag order in place signals to parents of transgender and other non-conforming children that they should remain silent lest they risk state removal of their children).

121. Bernstein & Triger, *supra* note 11, at 1252.

practices] into legal standards.”¹²² Bernstein and Triger demonstrate how the parenting norm of monitoring children may become “transformed . . . into legal duties.”¹²³ They cite to past cases where scientific evidence has led to incorporation of norms into law such as lead poisoning, pregnant women consuming alcohol, and obesity. Linda C. Fentiman argues that the legal system’s framing of women as risks to their own children shifts the burden of responsibility for harm to children from public health concerns like lead and BPA to a private responsibility.¹²⁴

Touching back on the example of Harlow and the monkey experiment shows how information about bonding becomes part of the legal system. Parenting norms that become formally absorbed into law tend to have a scientific basis that is widely accepted, disseminated by the popular media, and easily understood by the lay public. In the case of bonding, the experts could take a position about a parenting style, and that forms a basis for determining when a child is neglected or whether an adoption should be disrupted because of attachment failure. As with the cases of sleeping infants on their backs and maternal smoking, the success of the norms’ popular adoption could be measured by the level of stigma non-compliers face and the sense that compliance is commonsensical. Problems arise in areas like sexual and gender development in children, because there is little consensus about the process and etiology for human sexual biodiversity.

Popular media discussions contain a confused mix of health and identity development that does not always parse out the difference between socialization and biological condition. This confusion is mirrored in court decisions about transgender children who seek to attend school in apparel different from their birth gender¹²⁵ or directives that parents not wear clothing of another gender in front of a child.¹²⁶ The difficulty in determining if a child’s sexuality and gender identity is to be discovered or shaped persists, despite beliefs about innateness; i.e., being a boy is an innate quality or gender is a social construct. Noa Ben-Asher’s analysis of

122. *Id.*

123. *Id.*

124. Fentiman, *supra* note 42, at 340 (“Only by moving beyond a focus on individuals, especially mothers, as the source of risk and taking a broader view of the multiple contributors to children’s health can we provide an environment in which all children can thrive.”).

125. *See* Smith v. Smith, No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Ohio Ct. App. Mar. 23, 2007) (affirming the lower court’s decision to transfer custody to the father because the mother, after the son showed an affinity for female clothing, enrolled the son in school as a girl, treated the son like a girl, and intended to seek hormone therapy to change the son’s gender).

126. *See* In re Marriage of D.F.D., 862 P.2d 368 (Mont. 1993) (“[T]he District Court found that the mental health of the couple’s son was potentially at risk if his father deliberately or inadvertently cross-dressed in front of the child, because the child would face irreparable sexual misidentification if he saw his father as both a man and a woman.”).

Smith, a transgender child removed from the family and placed into foster care, reflects the state's confusion about how to discover and shape the child's "true identity."¹²⁷ The lower court believed the child had a "true identity," implying that parental efforts to support the child in developing as gender non-conforming was diverting the child. After mediation, the parents were allowed to visit separately with the child. Ben Asher analyzed the media coverage, highlighting how the chastened and reformed parents were finally "doing parenthood right."¹²⁸ The father was performing gender-specific socialization and the mother was nurturing.¹²⁹ The higher court aligned with the lower court's decision. Orly Rachmilovitz's analysis of the *Smith* appeals court opinion shows the continued confusion about transgender children expected to "discover" their "true" gender identities through social activities, "being raised as a boy by the father would enable the child to discover a 'true' gender identity," and having the child's father deemed the "residential parent,"¹³⁰ presumably to offer male role modeling and counteract the effects of the court's suspicion that the child's mother was coercing the child into acting like a girl.¹³¹ The *Smith* case may seem like an aberration in an age when LGBT rights are increasing, as seen in cases that are securing marriage rights for same-sex couples.¹³² However, a snapshot of just some of the science about childhood development reveals that anxiety and confusion still exist.

Legal decisionmakers and parents who think that gender is exclusively tied to biology may still behave as though the gender-coded social performance of being a boy or girl is determinative or a manifestation of biology. In a 1980 study, young boys were placed in a room with "sex-typed" toys, trucks and cooking toys or soldiers and a dollhouse.¹³³ The boys were shown the toys and could play with both sets of toys by themselves.¹³⁴ Then, the child's father was taken into the room to play with

127. Ben-Asher, *supra* note 120, at 294.

128. *Id.* at 284.

129. *Id.*

130. Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, MINN. L. REV. 1374, 1407 (2014) (discussing the influences of gender assimilation and gender dysphoria in parenting disagreements) (citing *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282, *31-32 (Ohio Ct. App. Mar. 23, 2007)).

131. *Id.*

132. See, e.g., Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES, Oct. 6, 2014, <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html> ("The Supreme Court on Monday let stand appeals court rulings allowing same-sex marriage in five states, a major surprise that could signal the inevitability of the right of same-sex marriage nationwide.").

133. Judith H. Langlois & A. Chris Downs, *Mothers, Fathers, and Peers as Socialization Agents of Sex-Typed Play Behaviors in Young Children*, 51 CHILD DEV. 1217, 1238 (1980).

134. *Id.* at 1238-39.

the boy. The fathers engaged in different behaviors to persuade the boys to play with the toys, including using negative language, withdrawing, and punishing the boys for playing with the cross-sex toys.¹³⁵ A parent who believes that gender-specific toys and parental gender performance will shape a child's gender identity could find it reasonable to find two gender parenting valuable for helping a child optimize gender development.¹³⁶

Add scientific findings that young mammals and children have for a biological preference for gender-specific toys,¹³⁷ and the confusion for the lay public can only grow. Playing with the correctly sex-typed toys as sign that a child is responding correctly to a biological state persists. It is a reflection of the confusion parents experience when raising children, arising from a mix of information, inadequate tools to understand information, anecdotes, and personal experience. Confusion about the nature of a child's identity leads to the problem of parenting that anxiously embraces shaping and discovering in such a way that reinforces hierarchical valuations of childhood outcomes. The increase in the gender-specificity of toys, perhaps responding to social pushes for gender equality or studies that found biological gender-specific toy preferences, focused on sorting children into binary gender categories. Sorting into categories based on scientific findings could overshadow the fact that the toys reinforce the hierarchy of boys versus girls and gender conforming versus non-conforming.

A 2008 study determined that toys were "more gender-delineated than ever" and "[d]idactic information, and aspects developing construction and literacy skills, were identified in the selected toys and resources for boys, and were lacking in those for girls."¹³⁸ In studies, the boys were shown to prefer "action" toys and girls were given "nurturing" toys.¹³⁹ When findings are translated into toy production and marketing, stereotypes reinforce gender hierarchy so toys aimed at girls are focused on "caring and nurturing" while toys for boys are aimed at action, "making things, using their hands and solving problems."¹⁴⁰

135. *Id.* at 1244-45.

136. *Id.* at 1245 (explaining that, according to the findings of the study, "it appears that fathers perpetuate sex-role differentiation" and that the findings corroborate earlier studies that argue for the "importance of fathers as the principal agent of sex-role socialization while mothers are relegated to a position of lesser importance").

137. See Laura Clark, *Why Boys Will Pick Bob Over Barbie—Children Are Genetically Programmed, Say Scientists*, DAILY MAIL (June 28, 2009, 7:13 PM), <http://www.dailymail.co.uk/news/article-1196183/Why-boys-pick-Bob-Barbie—children-genetically-programmed-say-scientists.html> ("Male monkeys spent more time playing with traditional male toys such as a car and a ball than did female monkeys.").

138. Becky Francis, *Gender Toys and Learning*, 36 OXFORD REV. EDUC. 325, 325-26 (2010) (arguing that the learning gap between the genders is related to gender-specific toys).

139. *Id.* at 330-31.

140. Dorothy Lepkowska, *Playing Fair?*, GUARDIAN, Dec. 15, 2008,

The parenting double bind with pre-determined good outcomes plays out in the discussion over chemical exposure and a child's sexual and reproductive development. The intuition that parents' direct intervention can shape a child's outcome exists alongside the belief that a child's sexual and gender identity should be discovered or uncovered organically as the child moves towards adulthood. In the context of same-sex marriage, opponents raise arguments about the value of two gender parenting¹⁴¹ to provide gender specific benefits. Similarly, concerns raised about EDCs causing sexual and gender non-conformity implies that there is an external force that changes a child's natural progression. Both threads of these concerns represent intuitions about the types of interventions parents can perform to affect a child's gender and sexual identity development.

Two-gender parenting could be representative of the social value of gender performance so that children know what men and women are supposed to do; parents guide a child through modeling gender-appropriate behaviors and give advice/instruction for the transition from childhood through puberty because they themselves have experienced it.¹⁴² While gender modeling is an important consideration, I do not directly address that argument in this Article. The connection between religion and gender modeling is so significant that it merits its own treatment and there is an already existing legal framework to handle parental behavior that crosses the line into abuse. However, the underpinning concerns about gender and sexuality are salient for people regardless of religious beliefs—not just because of the ambiguity about shaping and discovering sexual and gender identity, but also the possibility of legal intervention when embracing non-normative practices. Imagine that primary caregiving parents disagree with mainstream parenting norms and wish to raise their children per advice from their families, communities, and peers. Of course, this ability to disagree about norms and the value of the outcome tends to be the province of caregivers who are not in danger of state interventions in their parenting choices,¹⁴³ are unaware that their parenting is of public concern,¹⁴⁴ or are unable to change factors that impact the range of their parenting choices.

<http://www.theguardian.com/education/2008/dec/16/play>.

141. Reply in Support of Application to Stay Judgment Pending Appeal at 14, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (No. 13A687) (“[T]he combination of male and female parents is likely to draw from the strengths of both genders in ways that cannot occur with any combination of two men or two women, and that this gendered, mother-father parenting model provides important benefits to children.”)

142. This argument was roundly dismissed in the dissenting opinion in *Lofton v. Dep't of Children's Servs.*, 377 F.3d 1275 (11th Cir. 2004) (Barkett, J., dissenting) (“It is downright silly to argue that parents must have experienced everything that a child will experience in order to guide them.”)

143. See ROBERTS, *supra* note 78; see also SENIOR, *supra* note 11, at 11-12 (explaining that parenting norms and concerns vary by socioeconomic class).

III. CHEMICALS AND CHILDHOOD OUTCOMES

*“Hormone Disruptors Linked to Genital Changes and Sexual Preference”*¹⁴⁵

This Section considers whether parents’ failure to limit EDC exposure is similar to legally regulated parental behaviors that endanger children. By introducing EDCs via popular media and political life, this Section provides background for tracing the shift from public health concern to private parental responsibility. Consideration of the causal links between exposure and human health outcomes sheds light on EDCs as being similar to other health concerns, like lead,¹⁴⁶ smoking, or sleeping infants on their backs. Additionally, the political positioning sheds light on challenges faced when seeking industry-wide changes. The ubiquity of EDCs in everyday products would demand a large-scale overhaul in several major industries, most of which have no incentive to change their practices,¹⁴⁷ but industries that manufactured lead paint, pesticides, and cigarettes had to respond when scientific causal connection was established and society agreed that the health outcomes were negative. The same could happen for EDCs, if agencies charged with investigating the chemicals find the scientific evidence necessary to regulate and there is mainstream awareness of the danger. It is good for the popular media to raise awareness about health threats posed by EDC exposure.

Once the science does catch up with the popular fears about EDC exposure, though, legal regulation will not be far behind. This Section considers the practical ability of parents to limit EDCs and questions as to whether outcomes should be measured without acknowledging that there is little consensus about childhood gender and sexual development. Tying

144. The recent spate of stories like the parents arrested for letting their kids walk home has also sparked resistance. See, e.g., Hanna Rosin, *Police Investigate Family for Letting Their Kids Walk Home Alone. Parents, We All Need to Fight Back*, SLATE (Jan. 16, 2015), http://www.slate.com/blogs/xx_factor/2015/01/16/maryland_parents_investigated_by_the_police_for_letting_their_kids_walk.html; Williams, *Veganism*, *supra* note 46.

145. *Hormone Disruptors Linked to Genital Changes and Sexual Preference*, LIVING ON EARTH (Jan. 7, 2011), <http://www.loe.org/shows/segments.html?programID=11-P13-00001&segmentID=7>.

146. Bellinger & Bellinger, *supra* note 69 (referring to the history of lead poisoning as a private parental matter so long as the children harmed were poor, minority children, and noting that lead poisoning only became a public health matter when children of politically powerful parents were harmed).

147. See, e.g., *Dozen List of Endocrine Disruptors: 12 Hormone-Altering Chemicals and How to Avoid Them*, ENVTL. WORKING GROUP (Oct. 28, 2013), <http://www.ewg.org/research/dirty-dozen-list-endocrine-disruptors> (“Atrazine is widely used on the majority of corn crops in the United States, and consequently it’s a pervasive drinking water contaminant.”).

together the pressures of high-intensity parenting with inquiry into how society determines the value of outcomes reveals the danger of adopting norms without a granular approach to scientifically determined values. For now, social values and fear generated by the possibility that a child's gender and sexual outcome may be caused by EDC exposure should give legal decisionmakers pause before adopting a blanket determination that all non-conforming childhood outcomes are bad and that parental failure to limit EDC exposure should be legally enforced.

A. Here Come the EDCs

Limiting EDCs exposure is a high-stakes gamble for everyone, but much of the mainstream focus is on parents. Media efforts tie the concern for developing young with those likeliest to have their interests in mind, thus the strong focus on parents concerned about which chemicals may have a significant impact on their children's lives. In contrast, the scientific community tends to articulate the risks posed by EDC exposure as an environmental threat to the health of developing animals and humans. A brief description of the science follows to provide a foil for the media's emphasis on sexuality, gender, and reproductive development in children.

In the simplest terms, EDCs interfere with the endocrine system, which "manages and regulates the amount of hormones in the body."¹⁴⁸ There are chemicals and drugs that can mimic, block, or replace naturally produced hormones, resulting in the body "over-responding to the stimulus . . . or responding at inappropriate times."¹⁴⁹ The chemicals can directly stimulate or inhibit the endocrine system, causing the overproduction or underproduction of hormones.¹⁵⁰ Some drugs are specifically designed to disrupt the endocrine system's natural function (like growth hormones or birth control), but inadvertent effects on the endocrine system from chemicals in the environment are undesirable¹⁵¹ and thus characterized as dangerous. In 2011, John Peterson Myers presented a fifteen-year update¹⁵² on the 1996 book, *Our Stolen Future*, which called attention to the dangers that endocrine disruption can pose to the development of the fetus.¹⁵³ He updated the state of the science by

148. Gitanjali Deb, *Endocrine Disruptors: A Case Study on Atrazine*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 397, 400 (2005).

149. *What Are Endocrine Disruptors? Endocrine Disruptor Screening Program*, EPA, <http://www.epa.gov/endo/pubs/edspoverview/whatare.htm> (last visited Mar. 13, 2013).

150. *Id.*

151. *Id.*

152. OUR STOLEN FUTURE—REVISITED 15 YEARS LATER (ChemSec 2011), available at https://www.youtube.com/watch?v=5wBSdEkQ2cE&list=UU97v_GuqNrpAOrKgL3JmbOw&index=6 [hereinafter OUR STOLEN FUTURE—REVISITED].

153. THEO COLBORN ET AL., OUR STOLEN FUTURE: ARE WE THREATENING OUR

addressing major themes that had developed in the field since the publication of the book. The growing body of data supports the hypotheses and projections made in the book. Endocrine disruptors are more dangerous in lower levels¹⁵⁴ during fetal development,¹⁵⁵ and the effects can play out over a lifetime.¹⁵⁶ Lower levels of endocrine disruptors have more impact because they deceive endocrine systems into triggering actions that would not otherwise be activated.¹⁵⁷ The system shuts down as hormone levels rise, making larger levels of endocrine disruptors less likely to impact the endocrine system.¹⁵⁸ Exposure to endocrine disruptors while in vitro is significant because the impact increases depending on whether sex differentiation or similar developmental stages have been reached.¹⁵⁹ The urgency and import of this issue stems from the studies that show chemical “exposures are ubiquitous: everyone experiences them, and they take place in mixtures that can interact in unexpected ways.”¹⁶⁰ The nature of those undesirable effects on human health and how they are portrayed in the media is very different, but no less salient, from the scientific narrative that propelled EDC testing into the government’s purview. Despite the fact that there are thousands of chemicals being tested by the EPA, there are some chemicals that are more prominently featured in media stories.

Some EDCs such as Bisphenol A (BPA) and atrazine are of particular interest in media stories because they are so commonly found in food, water, and household goods. Atrazine is found in municipal water supplies because it is “the most heavily used herbicide in the [United States],” and there is concern about “potential hormonal effects observed in laboratory animals associated with shorter term exposure,”¹⁶¹ one of the most famous being the story of a male frog that becomes female and lays viable eggs after exposure to atrazine.¹⁶² BPA can be found in food cans, bottle tops,

FERTILITY, INTELLIGENCE, AND SURVIVAL?—A SCIENTIFIC DETECTIVE STORY (1996).

154. Laura N. Vandenberg et al., *Hormones and Endocrine-Disrupting Chemicals: Low-Dose Effects and Nonmonotonic Dose Responses*, 3 *ENDOCRINE REVIEWS* 33 (2012); *OUR STOLEN FUTURE—REVISITED*, *supra* note 152 (“Interactions take place at extremely low levels.”).

155. COLBORN ET AL., *supra* note 153, at 205 (“Exposures in the womb can set in motion things that play out over a lifetime.”).

156. *OUR STOLEN FUTURE—REVISITED*, *supra* note 152.

157. COLBORN ET AL., *supra* note 153, at 205 (“Contaminants interact with genes in unexpected ways.”).

158. *Id.*

159. COLBORN ET AL., *supra* note 153, at 43, 62.

160. *OUR STOLEN FUTURE—REVISITED*, *supra* note 152.

161. *Pesticides: Topical & Chemical Fact Sheets, Atrazine Background*, EPA, http://www.epa.gov/pesticides/factsheets/atrazine_background.htm (last visited Nov. 26, 2013).

162. Dashka Slater, *The Frog of War*, MOTHER JONES, Jan.-Feb. 2012, available at <http://www.motherjones.com/environment/2011/11/tyrone-hayes-atrazine-syngenta-feud-frog-endangered>.

water supply lines, dental sealants, and cash register receipts.¹⁶³ Seepage or leaching can occur if you microwave food in containers with BPA or wash dishes with BPA using harsh detergents.¹⁶⁴

In spite of the multiplicity of negative health effects,¹⁶⁵ including conditions that kill people, linked to endocrine disruptors, the focus in popular media is largely on chemical threats to fertility, sexual differentiation, and reproductive organs. Stories about fish¹⁶⁶ and frogs¹⁶⁷ that change gender, boys growing breasts after using lavender and tea tree oil hygiene products,¹⁶⁸ decreases in testicle size and declining sperm counts,¹⁶⁹ early onset of puberty and menstruation in girls, endometriosis, and misshaped reproductive organs¹⁷⁰ reflect serious concern about sexuality and sexual development. The focus on the disrupted development of reproductive organs, particularly in children, reveals anxiety about the nature of gender¹⁷¹ and the fragility of natural development. Only recently have mainstream popular science articles about EDC-related health effects expanded the focus on reproductive and sexual development to include

163. Katherine Zeratsky, *What is BPA, and What Are the Concerns About BPA?*, MAYO CLINIC (Dec. 2, 2010), <http://www.mayoclinic.com/health/bpa/AN01955>.

164. *Id.*

165. See Robert Preidt, *High BPA Levels in Kids Linked to Risk for Heart, Kidney Damage, Study Finds*, BABYCENTER (Jan. 9, 2013), http://www.babycenter.com/204_high-bpa-levels-in-kids-linked-to-risk-for-heart-kidney-dama_10377542.bc (noting that elevated levels of BPA in children are associated with increased risk of heart and kidney disease).

166. *Pollution 'Changes Sex of Fish'*, BBC NEWS (July 10, 2004), http://news.bbc.co.uk/2/hi/uk_news/3882159.stm; U.S. FISH & WILDLIFE SERV., INTERSEX FISH: ENDOCRINE DISRUPTION IN SMALLMOUTH BASS, available at <http://www.fws.gov/chesapeakebay/pdf/endocrine.pdf> (last visited Jan. 5, 2015); David Braun, *Intersex Fish More Widespread in U.S. Rivers Than Thought*, NAT'L GEOGRAPHIC, Sept. 14, 2009, available at http://newswatch.nationalgeographic.com/2009/09/14/intersex_fish_in_rivers/; Emily Sohn, *More Hermaphrodite Fish in U.S. Rivers*, DISCOVERY NEWS (Sept. 15, 2009), <http://news.discovery.com/animals/whales-dolphins/more-hermaphrodite-fish-in-us.htm>.

167. Deb, *supra* note 148, at 398; Slater, *supra* note 162.

168. Nat'l Insts. of Health, *Lavender and Tea Tree Oils May Cause Breast Growth in Boys*, NIH NEWS (Jan. 31, 2007), <http://www.nih.gov/news/pr/jan2007/nichs-31.htm>; Jeff Donn, *Lavender, Tea Tree Oils May Put Breasts on Boys*, ABC NEWS (Jan. 31, 2007), <http://abcnews.go.com/Health/story?id=2838840>.

169. Florence Williams, *The Little Princes of Denmark*, SLATE (Feb. 24, 2010), http://www.slate.com/articles/double_x/doublex_health/2010/02/the_little_princes_of_denmark.html.

170. Nicholas D. Kristof, *It's Time to Learn from Frogs*, N.Y. TIMES, June 27, 2009, <http://www.nytimes.com/2009/06/28/opinion/28kristof.html>; BEYOND PESTICIDES, PESTICIDES AND ENDOCRINE DISRUPTION, available at <http://www.beyondpesticides.org/health/endocrine.pdf> (last visited Dec. 1, 2014).

171. Unlike transgender adults who choose to modify their bodies to align with innate gender and gender performance, children who experience changes stemming from endocrine disruptor exposure are framed as assaultive, frightening malformations that go to the heart of what differentiates the sexes.

high blood pressure, obesity,¹⁷² heart disease, kidney damage, insulin problems, and learning and behavioral disorders.¹⁷³

Mainstream EDC warnings aimed at parents are contributing to parenting concerns and fears about dreaded childhood outcomes. I do not make empirical claims about the exact nature of the media's influence on parents in terms of measuring purchasing choices, but rather describe the nature of the popular articles. Parents featured in stories often attribute media warnings as inspiration for changing their own consumption habits, grassroots advocacy, filmmaking, and encouraging others to change their consumption habits. Parents are "inundated by studies finding toxic chemicals in the bodies of pregnant women and in [their] kids' favorite canned soups and pasta,"¹⁷⁴ and consumer groups that advocate for banning EDCs in household products identify themselves as "concerned parents (and grandparents)."¹⁷⁵ An example of this interplay between parents and media-driven activism is infant formula packaging. On July 11, 2013 the Food and Drug Administration (FDA) announced it would ban the use of BPA in infant formula packaging.¹⁷⁶ This new rule was considered a win for parents,¹⁷⁷ consumer groups,¹⁷⁸ and health advocates.¹⁷⁹ While the press

172. Charlotte Hilton Andersen, *The Latest Threat to Our Kids' Waistlines Is . . . Green Beans?*, REDBOOK, Sept. 20, 2012, available at <http://www.redbookmag.com/kids-family/blogs/mom-blog/childhood-obesity-linked-BPA>.

173. U.N. ENV'T PROGRAMME & WORLD HEALTH ORG., STATE OF THE SCIENCE OF ENDOCRINE DISRUPTING CHEMICALS – 2012 156 (Åke Bergman et al. eds., 2013), available at <http://www.who.int/ceh/publications/endocrine/en/> [hereinafter *State of the Science*, U.N.]; Hamblin, *supra* note 79 ("At Columbia, for instance, the children's center is investigating whether children exposed in the womb to BPA and polycyclic aromatic hydrocarbons (PAHs)—byproducts from burning fossil fuels—are more likely to develop learning and behavior disorders than children not exposed.").

174. Christine Lepisto, *BPA is Back—New Science Proves Safety*, TLC PARENTABLES, (Feb., 18, 2013), <http://parentables.howstuffworks.com/health-wellness/bpa-back-new-science-proves-safety.html>.

175. Meg Bohne, *Double Win for Kids' Safety in New BPA & Arsenic Rules*, NOTINMYFOOD.ORG (July 17, 2013), <http://notinmyfood.org/posts/3789-double-win-for-kids-safety-in-new-bpa-arsenic-rules>.

176. Benjamin Goad, *FDA Bans BPA in Baby Formula Packages*, REGWATCH: THE HILL'S REGULATION BLOG (July 11, 2013), <http://thehill.com/blogs/regwatch/legislation/310427-fda-bans-bpa-in-baby-formula-packages->.

177. Bohne, *supra* note 175. See also *Lawmakers Urged to Get Toxic BPA Out of Children's Food*, NATURAL RES. COUNCIL OF ME. (Apr. 11, 2013), <http://www.nrcm.org/projects-hot-issues/toxic-free-maine/lawmakers-urged-to-get-toxic-bpa-out-of-childrens-food> (referring to the stakeholders as "moms and doctors vs. governor and chemical industry").

178. Goad, *supra* note 176 ("[C]onsumer groups hailed the action as a major milestone in the push to prohibit BPA from all food and drink packaging."). See also Bohne, *supra* note 175 ("But a lot of us here at Consumers Union wear the badges of concerned parents (and grandparents) alongside our consumer advocate titles—and that's why we're doubly glad at two recent announcements from the FDA designed to reduce kids' exposure to BPA

release announcing the rule change was careful to note that the FDA did not make a finding that BPA was to blame for the adverse health outcomes, the ban was nonetheless still a “victory” for families and parents. A report described the groups fighting in Maine to create legislation banning BPA as “moms and doctors vs. governor and chemical industry.”¹⁸⁰ Despite some media questions about the accuracy of scientific findings, there is little question in media accounts that some parents are concerned about EDC exposure, and more parents should be.

In gathering media stories about EDCs, I searched for articles and advice about EDCs, parents, children, and human sexual and reproductive development. If articles were behind a paywall or part of an academic database requiring institutional access, they were categorized differently. All of the articles I cite in the Appendix are accessible with an internet connection and access to a public library. The articles I discuss are found in mainstream sources like *Redbook*, *The Huffington Post*, *Scientific American*, *National Geographic*, government and business sponsored parenting websites, blogs, and private individuals’ parenting websites. I tracked articles from the 1990s through 2013, observing that the number of articles increased over time and intensity related to human sexual and reproductive development also increased. The fact that access to the articles requires the use of a public library or internet connection assumes that the audience for the growing body of EDC articles are in a certain economic class with educational attainments, resources, and time sufficient to understand the danger and respond to EDC warnings.

Articles like “Endocrine Disruptors and Other Scary Things”¹⁸¹ appeared in the 1990s. It framed the issue as a public, environmental concern in response to the book published by Theo Colborn about the detrimental effects of EDCs. *Discover Magazine* published an article called “Hormone Hell,” informing readers that the higher the levels of EDCs from farm and industrial run-off found in otters, the smaller the size of their reproductive organs.¹⁸² Comparing results found in some animal studies, the article warns that “these chemicals are believed to play havoc with hormonal systems, leading to abnormal reproductive organs, skewed sex ratios, odd mating behavior, and animals that seem to be neither entirely

and arsenic, changes we’ve been fighting for.”)

179. Goad, *supra* note 176 (quoting the director of the Breast Cancer Fund, that if the “entire infant-formula was able to go BPA-free, there is no earthly reason why canned food manufacturers can’t follow suit”).

180. *Lawmakers Urged to Get Toxic BPA Out of Children’s Food*, *supra* note 177.

181. Candice Douglas et al., *Endocrine Disruptors and Other Scary Things*, SEATTLE DAILY J. COM., Aug. 22, 1996, <http://www.djc.com/special/enviro96/10014103.htm>.

182. Catherine Dold, *Hormone Hell: Industrial Chemicals Can Mimic Natural Hormones and Wreak Havoc in Developing Animals*, DISCOVER MAG., Sept. 1, 1996, available at <http://discovermagazine.com/1996/sep/hormonehell865/>.

female nor entirely male.”¹⁸³ The chemical changes affected developing young wildlife,¹⁸⁴ so it was not surprising that in the next decade, writers began making connections between EDC effects seen in wildlife with human pregnancy and young children. In 2006, *The New York Times* published an article about children in preschool and kindergarten growing pubic hair.¹⁸⁵ The early onset puberty in the cases mentioned were a result of accidental exposure to “certain drugs, cosmetics and environmental contaminants, called ‘endocrine disruptors’ that can cause breast growth, pubic hair development and other symptoms of puberty.”¹⁸⁶

Articles and warnings shifted from environmental and general health concerns to human health shortly after wildlife scientists made their findings public in the early 1990s. What began in the late 1990s as media coverage of EDCs as an environmental issue shifted to stories applying the scientific findings to pregnant women and small children. Articles about EDCs possibly causing damage to children’s reproductive and sexual development became a platform for advice about limiting chemical exposure by avoiding or buying alternative products.¹⁸⁷ A few were only practical tips for avoiding chemicals. These lists of BPA-free products and tips on avoiding chemicals in cosmetics, flame retardant clothing, toys, and everyday products proliferated and remain a popular topic for parents.¹⁸⁸

183. *Id.*

184. *Id.* (citing to Rachel Carson’s *Silent Spring* about the chemical exposure affecting animals “in the earliest stages of . . . development”).

185. Darshak M. Sanghavi, *Factors Linked to a Risk of Early Puberty*, N.Y. TIMES, Oct. 18, 2006, <http://www.nytimes.com/2006/10/18/health/18iht-snearly.3202788.html>.

186. *Id.*

187. *E.g.*, Andersen, *supra* note 172 (“So what’s a mom to do with this new disturbing info? The researchers advise protesting with our pocketbooks: ‘We know that 99 percent of our exposure to BPA is from food, and cans are currently the major source. Choosing fresh [and frozen] fruits and vegetables can limit BPA exposure.’ They add, ‘The power of the purse or wallet can’t be underestimated. Families have a lot of latitude to choose a healthier lifestyle.’”); Alexander, *New Boys’ Health Scare*, *supra* note 72 and accompanying text. In spite of this mother’s uncertainty about whether her child was really at risk, she acted anyway. *Id.* Shadows of DDT loom whenever parents are advised about chemicals affecting pregnant women and parents with infants. *Id.*

188. *See, e.g.*, Alexander, *10 Ways*, *supra* note 72 (explaining how parents can reduce their children’s exposure to chemicals); Alexander, *New Boys’ Health Scare*, *supra* note 72 (explaining the risks of BPA for young boys); Heather Eng, *15 BPA-Free Baby Bottles and Sippy Cups*, PARENTS, <http://www.parents.com/baby/feeding/bottlefeeding/bpa-free-baby-bottles/> (last visited Dec. 1, 2014) (listing brands of bottles that do not contain BPA); Jenny Hope, *Pregnant Women Told to Avoid Painting the Nursery, Buying New Furniture or Going Near Non-stick Frying Pans as They May Expose Their Unborn Baby to Dangerous Chemicals*, MAIL ONLINE (June 4, 2013), <http://www.dailymail.co.uk/health/article-2336030/A-mum-Dont-paint-nursery-avoid-non-stick-frying-pans-Pregnant-women-warned-risk-baby-exposure-chemicals.html>; Alexandra Zissu, *To Avoid Flame Retardants, Avoid Polyurethane Foam*, HEALTHY CHILD, HEALTHY WORLD (May 22, 2013), <http://healthychild.org/to-avoid-flame-retardants-avoid-polyurethane-foam/>; *The Frugal*

One parenting article provides a hyperlink to a company that allows a consumer to text a company's name to check whether its products are BPA-free.¹⁸⁹ Not all articles aimed at parents incorporated gender and reproductive concerns, but when articles raise gender and sexual development concerns, these issues are often characterized as the main reason for parental concern with the suggestion that parents can prevent undesirable results.

The shift began with the use of provocative titles about parental concern and prevention of children's disrupted sexual and reproductive development. Titles like "Early Puberty in Girls—Is There a Connection to Plastics?"¹⁹⁰; "Hormone Disruptors Linked to Genital Changes and Sexual Preference"¹⁹¹; "Why Boys Are Turning into Girls"¹⁹²; "Boyish Brains—Plastic Chemical Alters Behavior of Female Mice"¹⁹³; "Boys with Boobs: Hidden Chemicals Fed to Kids Can Impact Their Health"¹⁹⁴; "Is Epigenetics Totally Gay?"¹⁹⁵; and "Are You Poisoning Your Baby?"¹⁹⁶ are just a sampling of the sensational titles employed in articles to raise

Way to Avoid Flame Retardants in Pajamas, FRUGAL BABE (Sept. 8, 2009), <http://www.frugalbabe.com/2009/09/08/the-frugal-way-to-avoid-flame-retardants-in-pajamas/>; *BPA Plastic Guide for Parents New!: 5 Tips for Avoiding BPA*, MAMA LOVES LISTS, <http://www.mamaloveslists.com/bpa-plastic-guide-for-parents-and-children.html> (last visited Dec. 1, 2014); *Are Plastic Baby Bottles and Formula Cans Safe?*, BABYCENTER, http://www.babycenter.com/0_are-plastic-baby-bottles-and-formula-cans-safe_14387.bc (last visited July 30, 2013); Matthew Hoffman, *Pots, Pans, and Plastics: A Shopper's Guide to Food Safety*, WEBMD, <http://www.webmd.com/food-recipes/features/cookware-plastics-shoppers-guide-to-food-safety> (last visited July 30, 2013); Jeanie Lerche Davis, *Give Your Baby the Best Start*, WEBMD, <http://www.webmd.com/parenting/baby/features/give-your-baby-best-start> (last visited July 30, 2013).

189. See Jeremiah McNichols, *BPA-Free Bottles for Parents and Kids*, WIRED: GEEKDAD (May 14, 2008) <http://archive.wired.com/geekdad/2008/05/bpa-free-bottle/> (providing links to a directory of kids' feeding products and the text-messaging service mentioned above).

190. Mike Schade, *Early Puberty in Girls—Is There a Connection to Plastics?*, CTR. FOR HEALTH, ENV'T & JUSTICE (Apr. 2, 2012), <http://chej.org/2012/04/early-puberty-in-girls-%E2%80%93-is-there-a-connection-to-plastics-3/>.

191. *Hormone Disruptors Linked to Genital Changes and Sexual Preference*, *supra* note 145.

192. Geoffrey Lean, *Why Boys Are Turning into Girls*, TELEGRAPH (Oct. 23, 2009), <http://www.telegraph.co.uk/earth/earthcomment/geoffrey-lean/6418553/Why-boys-are-turning-into-girls.html>.

193. Ben Harder, *Boyish Brains: Plastic Chemical Alters Behavior of Female Mice*, SCI. NEWS (May 3, 2006), <https://www.sciencenews.org/article/boyish-brains-plastic-chemical-alters-behavior-female-mice>.

194. Beth Greer, *Boys with Boobs: Hidden Chemicals Fed to Kids Can Impact Their Health*, HUFFINGTON POST (Mar. 15, 2013), http://www.huffingtonpost.com/beth-greer/bpa-health_b_2808888.html.

195. Jeremy Yoder, *Is Epigenetics Totally Gay?*, NOTHING IN BIOLOGY (Dec. 18, 2012), <http://nothinginbiology.org/2012/12/18/epigenetics-gay/>.

196. Ziff, *supra* note 1.

parental awareness post-1990s. One popular science book, attributes the “growing public notoriety” of EDCs in “toys, baby bottles, kids’ pajamas, popcorn bags, mattresses and thousands of other products we assume to be safe” with the grassroots work of environmental activists and popular media outlets.¹⁹⁷ The shift in media focus from general environmental concerns to children’s sexual development is not surprising considering that scientific studies included evidence of worrying genital malformations in young, developing wildlife. The shift in focus also tracks parenting norms that imply parents are responsible for and capable of affecting children’s outcomes.

The popular media is not alone in increased interest in EDC exposure. After years of gathering and assessing data, the Environmental Protection Agency (EPA) will begin making determinations about which chemicals affect human endocrine systems.¹⁹⁸ As the EPA is nearing its self-identified goal of “Understanding Potential Endocrine Effects of Chemicals,” it is becoming apparent that parenting norms are changing more quickly than regulations.¹⁹⁹ The shift from public to private responsibility for regulating EDCs has led to a focus on consuming the correct products, fear of certain outcomes, and legal enforcement of parenting norms.

In the 1990s, evidence about EDC exposure was strong enough for political action in the form of a major screening program, but not of immediate restrictions or regulations.²⁰⁰ As recently as 2002, organizations like the International Programme on Chemical Safety (IPCS) and World Health Organization (WHO) reviewed the scientific work available at the time and determined there was “weak evidence” that EDCs could be linked to negative health outcomes for humans, despite determining there was enough evidence of adverse effects of EDCs on wildlife to determine causation.²⁰¹ Although these international science and policy organizations declared there was not enough evidence to tie EDCs to negative effects on

197. RICK SMITH & BRUCE LOURIE, *SLOW DEATH BY RUBBER DUCK: THE SECRET DANGER OF EVERYDAY THINGS*, xiii (2009).

198. OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION & OFFICE OF WATER, EPA, *ENDOCRINE DISRUPTOR SCREENING PROGRAM COMPREHENSIVE MANAGEMENT PLAN 11* (2012), *available at* http://www.epa.gov/endo/pubs/EDSP_Comprehensive_Management%20Plan_%20021414_f.pdf [hereinafter EPA, EDSP COMPREHENSIVE MANAGEMENT PLAN].

199. *See id.* at 18, Figure 2.

200. *Id.* at 23 (“In August 1996, Congress passed both the Food Quality Protection Act and amendments to the Safe Drinking Water Act, calling for the screening and testing of chemicals and pesticides for possible endocrine-disrupting effect . . .”). Some countries move faster to restrict chemical exposure; for example, Canada and parts of Western Europe began restricting BPA much earlier than the United States. *See, e.g., Bisphenol A*, CHEM. SUBSTANCES, GOV’T OF CAN., <http://www.chemicalsubstanceschimiques.gc.ca/challenge-defi/batch-lot-2/bisphenol-a/index-eng.php> (last modified Apr. 12, 2012).

201. *State of the Science*, U.N., *supra* note 173, at 1.

human reproductive health, a few countries preemptively banned or more heavily regulated the production and use of EDCs.²⁰²

The same groups (IPCS & WHO) reviewed the relevant science for a 2012 report for decisionmakers about the human health effects of EDC exposure.²⁰³ The report notes the growth of scientific literature tying EDC exposure to human “adverse reproductive outcomes (infertility, concerns, malformations).”²⁰⁴ The report also suggests that there is “mounting evidence for effects of [EDCs] on thyroid function, brain function, obesity and metabolism, and insulin and glucose homeostasis.”²⁰⁵ Relying on the same body of science, legal academics writing about environmental law and policy echo the scientific progress narrative in the IPCS/WHO report. In a 1999 article published in the *Columbia Environmental Law Journal*, the author cited the possibility that “decreased fertility, malformed reproductive organs, increased levels of cancer in reproductive organs, impaired fetal development, and neurological, thyroid, and immune disorders” could be linked to EDC exposure.²⁰⁶ By 2011, an environmental law journal at Boston College published an article suggesting evidence of harm from EDC exposure is not limited to reproductive systems; there are links to insulin resistance, type 2 diabetes, obesity, and negative long-term effects after in vitro exposure.²⁰⁷

The United States did not ban or regulate EDCs when scientific studies first appeared, but did create a committee to establish a testing program.²⁰⁸ Following the committee’s recommendations, the EPA began the Endocrine Disruptor Screening Program (EDSP). This screening process took a few years without any major shifts in regulating the EDC-producing industry. The stakes were not just human health, but also massive industry changes, as EDCs are part of several profitable industries and widely used. The slower approach has drawn criticism regarding industry capture and political obstruction.²⁰⁹ Linda Fentiman argues that

202. See e.g., *Federal Laws and Programs*, CHEM. SUBSTANCES, GOV’T OF CAN., <http://www.chemicalsubstanceschimiques.gc.ca/approach-approche/laws-lois-eng.php> (last modified Apr. 20, 2007).

203. *State of the Science*, U.N., *supra* note 173.

204. *Id.* at 1.

205. *Id.*

206. Noah Sachs, *Blocked Pathways: Potential Legal Responses to Endocrine Disrupting Chemicals*, 24 COLUM. J. ENVTL. L. 289, 290 (1999).

207. Alana Van der Mude, *Endocrine-Disrupting Chemicals: Testing to Protect Future Generations*, 38 B.C. ENVTL. AFF. L. REV. 509, 510 (2011).

208. The Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC) was formed in 1996 to make recommendations for developing a testing program. *Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC)*, EPA, <http://www.epa.gov/endo/pubs/edspoverview/edstac.htm> (last updated Aug. 11, 2011).

209. Hamblin, *supra* note 79 (critiquing the ineffectiveness of government agencies and regulations, such as the Toxic Substances Control Act).

precautionary stances, deference to experts in legal decisionmaking, and “substantial pushback from political and economic conservatives” are responsible for the lengthy delay between awareness of a health threat and action.²¹⁰

The EPA’s testing program, the EDSP, has the fairly simple objective of finding and testing chemicals that interact with the endocrine system (and more recently, androgen and thyroid systems), discovering at which doses human health is negatively affected, and then reporting their findings to make recommendations. For the past twenty years, as concerns about the impact of EDCs in the environment have been raised by the scientific community,²¹¹ the focus in law has been on government agencies that regulate the production, use, and disposal of EDCs²¹² and how those chemicals are screened and tested. The implementation of policies based on the testing will happen in the near future.²¹³ In 1996, Congress passed the Food Quality Protection Act (FQPA) and the Safe Drinking Water Act (SDWA) Amendments, which require the EPA to screen for pesticide chemicals, and chemicals that may mimic estrogen hormones or other endocrine effects.²¹⁴ The EPA created the EDSP²¹⁵ as part of its mandated duties. The EDSP is a two-tier program that divides the testing process into two phases.²¹⁶ During the first tier, the purpose is to screen for interactions between the chemicals and human endocrine systems to determine which chemicals should continue into the second phase of testing.²¹⁷ The second tier is designed to discover which health effects are attributable to

210. Fentiman, *supra* note 42, at 43-46.

211. See Appendix A (listing articles from the 1990s).

212. Debra Goldberg, *What You Don’t Know About Chemicals Can Hurt You: EPA’s Proposed Policy Statement for the Endocrine Disruptor Screening Program*, 6 ENVTL. LAW. 209 (1999); Sachs, *supra* note 206; Holly E. Petit, *Shifting the Experiment to the Lab: Does EPA Have a Mandatory Duty to Require Chemical Testing for Endocrine Disruption Effects Under the Toxic Substances Control Act?*, 30 ENVTL. L. 413 (2000); Leitman, *supra* note 10; JULIE GOODMAN ET AL., ABA SECTION OF LITIGATION JOINT COMMITTEE, RIDING THE NEXT WAVE OF TOXIC TORT LITIGATION (Jan. 19-20, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_joint_le_materials1/4_1_Riding_the_Next_Wave.authcheckdam.pdf.

213. See *Endocrine Disruptor Program*, EPA, <http://www.epa.gov/endo/> (last visited Dec. 1, 2014) (providing a brief overview of the program and its projected timing for Tier 1 and 2 testing and screening of EDCs).

214. *Id.* (explaining that the EPA has included analyses of androgen hormones, thyroid systems, and the effects of EDCs on wildlife and fish in its screening program); Sachs, *supra* note 206, at 310-11 (explaining that the EPA “sets the regulatory standards for most of the federal toxics statutes”).

215. EDSP COMPREHENSIVE MANAGEMENT PLAN, *supra* note 198.

216. *Id.* at 2. The Comprehensive Management Plan also refers to chemicals that interact with the estrogen, androgen or thyroid hormone systems, reflecting the change in laws and move from a women’s issue to a human hormone issue. *Id.*

217. *Id.*

chemicals and at what dosage exposure to the chemicals create harmful effects.²¹⁸

The EPA's two-phase program is underway with the expectation that screening and testing will be done by 2018. The first tier screening ended early in 2013. Chemicals that pass through Tier 1 screening proceed to Tier 2, where tests may include "multiple generation reproduction studies to laboratory rates, fish, amphibians and birds."²¹⁹ Then, the chemicals are tested to see at what dose adverse effects occur.²²⁰ The second tier of the screening program is expected to conclude between 2016 and 2018.²²¹ Once the screening program concludes, the agency will be in a position to make recommendations for moving forward. At that point, the agency's recommendations may play a part in regulating the EDC-producing industry.

Even though there has been a great outlay of resources for screening and testing EDCs, the reality is that direct causal links may be difficult to establish because of complexities that obscure causation. Unlike parenting norms that have a visible cause and effect relationship, e.g., placing a child in a car seat will restrain the child in the event of a crash so the child will not be thrown from the car, EDC exposure is complicated by the timing of exposure, the interaction of multiple chemicals, the dosage of chemical that causes harm,²²² the person's health before exposure, and a variety of other factors that make declaring causation for a specific health outcome very difficult.²²³ The desire for a biomedical individualistic approach, a single biological factor to determine causation, has not been accepted as a sound scientific method for some time.²²⁴ Thinking about causation as a "causal web" of interrelated and diverse eco-social factors²²⁵ is more difficult and requires a legal approach that is flexible and responsive to multiple "other relevant scientific factors"²²⁶ that may otherwise be left out. Because causation is nearly impossible to prove in a legal setting, tort and criminal

218. *Id.*

219. *Id.* at 5.

220. *Id.* at 2.

221. *Id.* at 5.

222. Hamblin, *supra* note 79 (theorizing that public responses to chemical exposure is limited because the effects of chemicals "can be insidious," explaining that lead "lingered in gasoline, house paints, and children's toys for decades before scientists realized the true extent of the damage" and stating that people do not know how "little evidence there is for the safety of chemicals all around us, in our walls and furniture, in our water and air").

223. Sachs, *supra* note 206 (discussing toxic tort litigation and problems that arise in attempting to prove causation).

224. Federica Russo, *Causal Webs in Epidemiology*, 39 *PARADIGMI* 67 (2011).

225. *Id.*

226. This phrase is used by the EPA in its Comprehensive Management Plan for the EDSP. EDSP COMPREHENSIVE MANAGEMENT PLAN, *supra* note 198. The EPA announced that it would utilize epidemiological analysis during the screening and testing process. *Id.*

remedies for negative health outcomes are not likely to be available. However, that does not remove the possibility that parents will not still be held to standards requiring the active, expensive prevention or limitation of EDC exposure.

B. Childhood, Disrupted

The legal system needs to usefully distinguish between parents who want to avoid a medical condition and parents who cannot tell if a medical condition is the same as “feminine characteristics” or causes a child to become gay. Society does not want or need chemicals in children, but it is a bad thing for parents and the legal system to believe that boys having feminine characteristics (determined by social stereotypes? appearance? playing with dolls? wearing dresses?) or that being gay is an adverse health outcome.²²⁷ In comparison to norms like sleeping babies on their backs and reading to children to improve their literacy rates, where there are direct connections between the behavior and the outcome produced, EDC exposure concerns reveal the conflict between actual EDC exposure and intuitions that parents can shape children’s medical outcomes at the same time children’s identity outcomes are discovered. With this formulation of parents as producer and protector of natural childhood outcomes, asking legal decisionmakers to use an outcome-neutral approach is complicated. This Section considers the possibility of outcome neutrality in the face of legal responses to gender and sexual non-conformity. The pressure of high intensity parenting combined with the risk of determining that disfavored outcomes are also negative health outcomes illuminates the problem of adopting norms into the legal system without adequate critical attention to how society determines the value of socially disfavored outcomes.

Viewing media concerns through the lens of parenting norms helps uncover the social anxiety around the tension between protecting a child from medical harm and expressing a preference for mainstream gender and sexuality development. If a parent were trying to figure out what childhood outcome he or she would prevent through limiting chemical exposure by relying on media articles and representations, it would be very confusing. Some popular parenting articles feature stories about intersex or reproductively compromised animals designed to shock and frighten with

227. See Carlos A. Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 WM. & MARY BILL RTS. J. 691, 757 (2013) (positing that the government’s interest in discouraging homosexuality in general and homosexual conduct in particular is invalid under constitutional rational basis review); Cliff Rosky, *The Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013) (tracking the fear of reproducing queer children through exposure to homosexuality from a historical perspective to the present to show that while the description has changed, the fear persists).

suggestions that human children will be likewise affected if they are exposed to EDCs.²²⁸ Media discourse plays on fears of socially stigmatized, non-normative stereotypes of LGBT youth and sexually precocious girls to make parents fearful about EDC exposure while at the same time promising some method to avoid those outcomes. There is also confusion because terms that suggest social stigma like “feminized” or “unmanned” are used to describe conditions like penis malformation and lower testosterone levels in boys. A parent with an effeminate child might wonder if the child is suffering from EDC exposure and consider that child’s effeminate characteristics a negative outcome. Since the media rhetoric frames the adverse medical condition in the language of stereotypes and social stigma, it reinforces the disfavored status of children who are non-normative and suggests it is the fault of chemicals and poor parenting. Coupling negative health results with images and language evoking social stigma implies that the health condition is not only interchangeable with the social stigma, but that the health condition causes the social stigma and that parents should try to avoid both the social stigma and adverse health condition.

Cliff Rosky argues that the state should be neutral with regard to a child’s gender and sexuality outcome.²²⁹ This ideal is complicated in the case of EDCs because of the confusion over the intertwined health effects and identity status. Separating health effects and identity status is also challenging because non-conforming gender and sexuality outcomes are not like, and should not be treated like, the outcomes threatened if parents do not buckle children into car seats, smoke marijuana while pregnant, sleep them on their stomachs as infants, use crib bars that are too widely spaced, only buy their children fast food, or any other number of similar parenting norms.

The pressing need for a critique of how courts determine the value of outcomes can be seen in the interplay between parenting norms that suggest compliance will produce a pre-determined good outcome and legal enforcement of norms without a critical approach for assessing the value of the outcome. Simply applying the existing legal responses applied to other parenting norms could lead to further negative social stereotypes of effeminate boys, resulting in increased rates of parental rejection of LGBT children.²³⁰ Parents may fear that if their son is effeminate or gay that they have failed to limit EDC exposure properly. More distressingly, the

228. See, e.g., Schade, *supra* note 190; *Hormone Disruptors Linked to Genital Changes and Sexual Preference*, *supra* note 145.

229. Rosky, *supra* note 227.

230. CAITLYN RYAN, FAMILY ACCEPTANCE PROJECT, SUPPORTIVE FAMILIES, HEALTHY CHILDREN: HELPING FAMILIES WITH LESBIAN, GAY, BISEXUAL & TRANSGENDER CHILDREN (2009), available at http://familyproject.sfsu.edu/files/FAP_English%20Booklet_pst.pdf.

confusion between social constructs and a medical condition could lead some parents and professionals to believe that sexual orientation and gender identity are not innate, but are medical, biological conditions to be prevented or cured.²³¹ In the past, reparation or conversion therapy was believed to be effective.²³² Only now, after years of damaging LGBT individuals and their families, has the scientific and legal community begun to declare that it is defunct science and being an LGBT individual is part of human biodiversity, not a condition to cure. Despite great strides made in marriage equality and some areas of employment discrimination,²³³ the stereotype of the effeminate gay man persists. The idea of the effeminate man is not new and can have a pernicious effect on how a disfavored group experiences legal regulation. From classical antiquity²³⁴ to a boy dressing as Daphne from Scooby Doo for Halloween,²³⁵ there has been a long history of stigma and shame attached to boys and men who adopt or naturally exhibit socially feminine characteristics. Concepts that used to refer to women and feminine characteristics, such as passivity and delicacy, expressed social disapproval and shame when they were applied to homosexual men.²³⁶

231. Other examples of the conversation about prevention and remedying health conditions can be seen in looking at literature about deafness and autism. See Judith F. Daar, *Embryonic Genetics*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 81, 84-85 (2008) (describing the story of a lesbian couple seeking sperm donors that would give them their version of a "perfect" child—one that was deaf). Similar rhetoric about autism can be found in emerging autism culture. See, e.g., Elizabeth Svoboda, "I Am Not a Puzzle, I Am a Person", SALON (Apr. 27, 2009), http://www.salon.com/2009/04/27/autistic_culture/ (describing a "school of thought called 'neurodiversity' [in which] [a]utism is not a disease . . . but a 'neurological variation'").

232. Nick Clair, "Gay Conversion Therapy" Ban: Protecting Children or Infringing Rights?, 44 MCGEORGE L. REV. 550 (2013) (providing a history of conversion therapy); Jonathan Sacks, "Pray Away the Gay?" An Analysis of the Legality of Conversion Therapy by Homophobic Religious Organization, 13 RUTGERS J.L. & REL. 67 (2011).

233. See, e.g., Hona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561 (2007).

234. Wayne R. Dynes, *Effeminacy, Historical Semantics of*, in ENCYCLOPEDIA OF HOMOSEXUALITY 347, 348 (Wayne R. Dynes ed., 1990) (tracing the concept of effeminacy, reflecting disfavored status, words that meant "cowardly, unwarlike" and "bad" were used to describe effeminate men). Gay men were seen as "[e]nervated and effeminate," and it was said that "they remained unwillingly what nature had made them; the assailers of others' chastity, prodigal of their own." *Id.* Gay men "were believed to threaten the very foundations of civilization." *Id.*

235. Sarah Manley, *Lessons from a Halloween Costume*, N.Y. TIMES (Oct. 31, 2011), <http://well.blogs.nytimes.com/2011/10/31/lessons-from-a-halloween-costume/> (recounting the nationwide discussion about her son's costume choice, including suggestions that she should lose custody of her children because she allowed him to dress as a girl character).

236. See, e.g., Dynes, *supra* note 234, at 348-49 (explaining that "gay" was a reference to sexually promiscuous women or prostitutes, but that, in the nineteenth century, the term shifted to signify homosexual men).

A classic example of social bias driving legal regulation is the sodomy law in the *Bowers v. Hardwick* case. The sodomy law applied to both heterosexual and homosexual people engaging in the act, but was enforced selectively against homosexual men.²³⁷ Even though laws allowing same sex marriage are making their way slowly through states, it is disheartening to see that there are still thirteen states that continue to have and/or enforce anti-sodomy laws.²³⁸ Marriage and sodomy laws that treat gay men and lesbian women differently are a result of social bias and discrimination, and not because the actions are inherently negative for society.²³⁹ The enforcement of sodomy laws in states that have high populations of social and religious conservatives support other forms of non-legal enforcement of community norms. In this case, the norm of masculinity as heterosexuality is enforced through non-legal means such as clothing, occupation, and vehicle choices to signal manliness. Another form of legal regulation is sentence enhancement for HIV positive men who are criminally charged with a felony or receive sentence enhancements for having sex without disclosing their HIV status.²⁴⁰ Formal criminalization of HIV status does not promote disclosure and it marginalizes an already stigmatized, vulnerable group.²⁴¹ “The fear engendered by the contagion

237. Carlos Maza, *State Sodomy Laws Continue to Target LGBT Americans*, EQUAL MATTERS (Aug. 8, 2011, 3:26 PM), <http://equalitymatters.org/blog/201108080012> (explaining that anti-sodomy “laws typically targeted gays and lesbians” and that, even after *Lawrence v. Texas*, and “[e]ven in states where sodomy laws are understood by judges to be unconstitutional, the presence of sodomy laws can cause gays and lesbians to be dragged into humiliating, costly, and discriminatory legal disputes”). See also Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Eric Berger, *Lawrence’s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765 (2013) (“[A]nti-sodomy laws imposed harsh burdens on homosexuals extending far beyond the prohibition of particular sexual acts. Texas’s statute branded homosexuals as presumptive criminals, making it much more difficult for them to be treated like other members of society.”); Marc Spindelman, *Tyrone Garner’s Lawrence v. Texas*, 111 MICH. L. REV. 1111 (2013).

238. Mark Joseph Stern, *You Can Still Be Arrested for Being Gay in Red-State America*, SLATE (Aug. 5, 2013), http://www.slate.com/blogs/xx_factor/2013/08/05/gay_people_are_still_being_arrested_for_having_consensual_sex_in_some_red.html?wpisrc=flyouts.

239. M. Blake Huffman, *North Carolina Courts: Legislating Compulsory Heterosexuality by Creating New Crimes Under the Crime Against Nature Statue Post-Lawrence v. Texas*, 10 L. & SEXUALITY 1 (2011).

240. Aziz Ahmed & Beri Hull, *Sex and HIV Disclosure*, A.B.A. HUM. RTS. MAG., Spring 2011, available at http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol_38_2011/human_rights_spring2011/sex_and_hiv_disclosure.html.

241. *Id.* (explaining that sex workers and racial minorities are often more at risk of sentence enhancements because of bias and a larger police presence in those communities); Nancy J. Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401 (2000).

model of homosexuality has resulted in the enactment of more specifically anti-gay laws than ever before, despite the relative successes of the contemporary gay and lesbian movement in obtaining some state protections under anti-discrimination laws, the repeal of sodomy laws, and the recognition of same-sex relationships and the families they produce.”²⁴²

Adrien Leavitt discusses archetypes of queer people as “mentally unstable and deranged criminals” that authorize legal responses and social opprobrium against LGBT individuals.²⁴³ The archetype of the “queer disease spreader” is seen as “notoriously promiscuous and very particular in whom [he] pick[s] up, infected or otherwise. Indeed, ‘[s]een through the lens of this archetype, queers not only spread disease, they *are* a sexually transmitted disease.’”²⁴⁴

Non-legal enforcement includes deploying negative stereotypes and ostracizing those who reject group norms. Eric Posner explains “that individuals interested in showing their loyalty to the community will sanction anyone who can plausibly, or even just momentarily, be thought a threat to the community.”²⁴⁵ Examples of this ostracism include the overwrought rhetoric about civilization’s end with the extension of civil rights to LGBT individuals²⁴⁶ as well as the blatant use of stereotypes and imagery suggesting that effeminate men, both gay and straight, are not part of the dominant cultural group.²⁴⁷ Violence against those who deviate from group norms is an unfortunate but common occurrence. Effeminate men threaten the idea of masculinity as heterosexual and so violence is used to maintain the border between heterosexual and homosexual men.²⁴⁸ Non-legal social enforcement of the norm of heterosexuality could be one motivation for homophobic violence and bullying; another motivation might be that such violence is a way for individuals to signal that they belong to the dominant cultural group.

242. Knauer, *supra* note 241, at 407.

243. Adrien Leavitt, *Queering Jury Nullification: Using Jury Nullification as a Tool to Fight Against the Criminalization of Queer and Transgender People*, 10 SEATTLE J. SOC. JUST. 709, 743 (2012).

244. *Id.*

245. Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 256, 268 (F.H. Buckley ed., 1999).

246. Benjy Hansen-Bundy, *6 Reasonable Arguments For Why Gay Marriage Will End Civilization*, NEWS.MIC (May 17, 2013), <http://www.policymic.com/articles/42599/6-reasonable-arguments-for-why-gay-marriage-will-end-civilization> (providing links to statements made by public figures opposed to same sex marriage, including Pat Robertson, Rick Santorum, Pat Buchanan, Jerry Falwell, and James C. Dobson).

247. Luke Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. (2013) (discussing rural masculine stereotypes and norms).

248. See EVE SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* (1985) (noting that violence is used to patrol the borders of heterosexuality because homosociality can confuse the line between homosexuality and heterosexuality).

Bias and stereotypes about gay men also affect legal regulation in child custody disputes. When Cliff Rosky analyzed child custody cases involving a gay parent, evidence of bias against gay men appeared to play a part in decisions about which parent was awarded custody.²⁴⁹ Courts tend to reinforce group norms rather than support non-normative children and parents. For parents of children with gender dysphoria, supporting their child's desire to dress in a way that is gender transgressive and play with toys that are gender transgressive can put them at risk of losing custody of their child.²⁵⁰ As parents are bombarded with confusing messages about boys' sexual and reproductive risks, it may be impossible to tell if a son's desire to play with dolls is a socially meaningful activity or a signal that he has been exposed to chemicals that will disrupt his "natural" (presumably heterosexual) orientation. Courts faced with custody, abuse, neglect, and adoption decisions can be confronted with the same confusion as parents when it comes to effeminate boys. When trying to distinguish between social and biological factors, it may be easier for legal officials to rely on intuition about natural development rather than complex and contradictory information.

The confusion between social constructions and biological functions makes legal regulation problematic for girls who have sex or are perceived as sexy. Social attitudes towards figures like Lolita²⁵¹ and JonBenét Ramsey²⁵² are characterized as "continual cultural confusion about girls"

249. See generally Cliff Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM (2009) (discussing the influence of stereotypes of gay fathers as HIV carriers and sexual molesters in custody and visitation cases).

250. Ben-Asher, *supra* note 120. See generally Rachmilovitz, *supra* note 130; Tracie Stratton, *Mother of Transgender Toddler Gets a Lesson in Love*, ADVOCATE, Aug. 16, 2012, available at <http://www.advocate.com/arts-entertainment/books/2012/08/16/mother-transgender-toddler-gets-lesson-love> (quoting a mother of a transgender child as saying, "I realize that it is not very often when a custody battle involving a transgender child goes as well as mine did").

251. Orville Prescott, *Books of the Times: Lolita*, N. Y. TIMES, Aug. 18, 1958, <http://www.nytimes.com/books/97/03/02/lifetimes/nab-r-booksoftimes.html> ("'Lolita' is [main character Humbert's] account of his two-year love affair with a child aged 12 to 14. Part of its theoretical comedy probably lies in the fact that the child, Lolita, turns out to be just as corrupt as Humbert—a notion that does not strike one as notably funny."); M. GIGI DURHAM, *THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT* (2008).

252. See Clayton Sandell, *JonBenet Ramsey Murder: Grand Jury Wanted to Indict Parents*, ABC NEWS (Jan. 28, 2013), <http://abcnews.go.com/US/jonbenet-ramsey-murder-grand-jury-wanted-indict-parents/story?id=18333413> (reporting about the unsolved murder of a six-year-old girl who was involved in beauty pageants). See also Joann Conrad, *Lost Innocent and Sacrificial Delegate: The JonBenet Ramsey Murder*, 6 CHILDHOOD: A GLOBAL J. CHILD RES. 313-51 (1999). Erik Morse Interviews Meenakshi Gigi Durham: *A Portrait of the Young Girl: On the 60th Anniversary of "Lolita" Part II—An Interview Series*, L.A. REVIEW OF BOOKS (Jan. 8, 2015), <http://lareviewofbooks.org/interview/portrait-young-girl->

sexuality. As a culture . . . we seek to deny and suppress it, while exploiting it in the crassest ways.”²⁵³ Perhaps because of this cultural confusion, at times the people who should be regulated for having sex with underage girls are not regulated and the girls themselves are. Underage female sex workers are too often sent to juvenile detention and placed in probation programs²⁵⁴ because the legal system is not equipped to effectively handle girls that are victims of sexual assault engaging in illegal activities.²⁵⁵ They continue to suffer stigma and sometimes quickly relapse into sex work because there are no resources for them to reenter mainstream society.²⁵⁶ Girls who make rape allegations are themselves attacked online or forced to apologize to those against whom they have made allegations.²⁵⁷ Sometimes, the legal remedies for minor girls

60th-anniversary-nabokovs-lolita-part-ii [hereinafter *Erik Morse Interviews Meenakshi Gigi Durham*] (describing Britney Spears’s “midriff schoolgirl outfit and suggestive, BDSM lyrics [that] hybridized the sexual theatrics of Madonna and the guileless death mask of JonBenét Ramsey, the result of which summoned the Lolita mythos in the figure of the new pop princess”).

253. *Erik Morse Interviews Meenakshi Gigi Durham*, *supra* note 252.

254. *Weakest Suffer Twice: US Jails Child Victims of Sex Trafficking*, RT (Apr. 16, 2011, 4:40 AM), <http://rt.com/news/underage-prostitution-trafficking-us/> (reporting that sex trafficking victims, usually young girls around age 13, are often jailed or placed on probation). *See also* Meda Cheney-Lind, *Some Rescue: The FBI’s Dubious War on Street Girls*, FEMINISTING (Aug. 28, 2013), <http://community.feministing.com/2013/08/26/some-rescue-the-fbis-dubious-war-on-street-girls/>.

255. *See* Abby Sewell, *Most L.A. County Youths Held for Prostitution Come From Foster Care*, L.A. TIMES, Nov. 27, 2012, <http://articles.latimes.com/2012/nov/27/local/la-me-1128-sex-trafficking-20121128> (reporting on the shift of underage sex workers from the criminal system to the foster care system and stating that “advocates say the criminal justice system is not the proper setting for young victims of abuse and coercion”); Mary K. Flynn, *As More Oakland Youth Join the Sex Trade, Law Enforcement Explores Alternatives to Incarceration*, OAKLAND NORTH (Mar. 13, 2010, 10:02 AM), <https://oaklandnorth.net/2010/03/13/as-more-oakland-youth-join-the-sex-trade-law-enforcement-explores-alternatives-to-incarceration/> (reporting programmatic changes to traditional handling of underage sex workers that usually involved criminal misdemeanor charges and detainment in a juvenile facility).

256. *See Weakest Suffer Twice*, *supra* note 254 (“Many of the young people we served have been incarcerated and charged as an adult under the age of 16. So they have this lengthy 15, 20, 30, 40 arrests both as a juvenile and as ‘an adult’ for prostitution. When they go to apply for public housing, they are not eligible for that. When they go to do certain employment, that pops up in a background check and they are booted out of an employment training program.”).

257. *See, e.g.*, Marie Diamond, *Missouri School Sued for Allegedly Making Special Ed Student Write Apology Letter to Her Rapist*, THINK PROGRESS (Aug. 17, 2011, 5:24 PM), <http://thinkprogress.org/justice/2011/08/17/297888/missouri-school-sued-for-allegedly-making-special-ed-student-write-apology-letter-to-her-rapist/> (discussing the actions taken against a student who reported her rape that included writing an apology letter to her rapist and being expelled); Irin Carmen, *After Fundamentalist Church Expose, One Pastor Is Unrepentant*, JEZEBEL (Apr. 12, 2011, 6:30 PM), <http://jezebel.com/5791364/after-fundamentalist-church-expose-one-pastor-is-unrepentant> (discussing a church’s retaliation

victimized are “spectacularly awful,” including rulings that require a fourteen year-old rape victim to have a relationship with her rapist for sixteen years or allowing the teacher who raped his fourteen-year-old student to serve a sentence of thirty days for the crime.²⁵⁸ Step-father and boyfriend assault against young girls is so common²⁵⁹ that it has nearly become a cliché, as sexual assaults against girls generally are “promoted, glamorized and normalized through popular media.”²⁶⁰ Sometimes adult male perpetrators blame the young girls for being too sexually assertive or for looking older and more prepared for sexual interaction than their age suggests they are.²⁶¹ A study from Berkeley that finds girls without a biological father living in the home are more likely to experience early puberty²⁶² could confuse the issue, making it seem as though a man’s claim of mistake about a girl’s age and ability to understand sexual activity could be justified.

The fear of premature social and biological sexualization of girls may contribute to greater restrictions for girls.²⁶³ There is evidence that parents unintentionally physically restrict infant girls because they underestimate their abilities, even though infant girls and boys have similar physical abilities.²⁶⁴ This attitude and unintentional bias about girls’ abilities could

against rape victim by categorizing her rape as adultery and forcing her to apologize to the congregation).

258. Dahlia Lithwick, *A Spectacularly Awful Week in Rape*, SLATE (Aug. 29, 2013, 5:05 PM), http://www.slate.com/articles/double_x/doublex/2013/08/montana_massachusetts_rape_cases_when_judges_can_t_get_even_the_easy_cases.html.

259. E.g., Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 266-72 (2000) (noting evidence of significantly higher risk of sexual assault to girls by a stepfather or a parent’s intimate partner); HOWARD N. SNYDER, U.S. BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (July 2000), available at www.bjs.gov/content/pub/pdf/saycrle.pdf (indicating that 93% of juvenile sexual assault victims knew the person who assaulted them); Penelope K. Trickett et al., *The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study*, 23 DEV. PSYCHOPATHOL. 3 (2011) (“[Sixty percent] of perpetrators were the biological father [] or other father figure (stepfather or mother’s live-in boyfriend).”).

260. *Sexual Violence*, EQUAL. NOW, <http://www.equalitynow.org/our-work/sexual-violence> (last visited Oct. 30, 2014).

261. See Jessica Valenti, *Acting Older Isn’t Being Older: How We Fail Young Rape Victims*, NATION (Sept. 2, 2013, 9:27 AM), <http://www.thenation.com/blog/175991/acting-older-isnt-being-older-how-we-fail-young-rape-victims#>.

262. Julianna Deardorff et al., *Father Absence, BMI, and Pubertal Timing in Girls: Differential Effects by Family Income and Ethnicity*, 48 J. ADOLESC. HEALTH 441 (2010).

263. Danah Boyd, *How We Were Fooled Into Thinking That Sexual Predators Lurk Everywhere*, MEDIUM (Mar. 13, 2014), <https://medium.com/matter/fl21382adebb> (suggesting that adult restrictions based on fear of predation has led to “limiting teens’ engagement online,” surveillance of teens, isolation and vulnerability).

264. LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO

easily suffuse a girl's entire childhood with limitations and restrictions that are unfair and unwarranted. Fears of sexual assault at school,²⁶⁵ parties,²⁶⁶ the swimming pool, Wal-Mart,²⁶⁷ and other everyday locations creates a sense of fear about raising girls to be safe. Parents are taught that they should teach girls to not be alone in the dark, to wear non-sexy clothing, to be hyper aware of their surroundings, to not drink alcohol, and basically, to not be raped.²⁶⁸ Then, as too often happens, when underage girls are sexually assaulted, they are blamed for not effectively preventing it and activists have to remind the public that victims are not responsible for crimes committed against them.²⁶⁹

Parents do not want their daughters to have early puberty for any number of reasons, but it is unclear whether parents believe it is undesirable because of the related health and psychosocial risks or the social stigma. The social stigma of premature sexual readiness that is conflated with early puberty is similar to the implicit threat that boys will become gay or perceived as gay if they are exposed to EDCs. Sexually active underage girls, despite being victims of assault, are too often perceived and treated as a disfavored group that is deprived of the

TROUBLESOME GAPS—AND WHAT WE CAN DO ABOUT IT (2010) (explaining that gendered differences in nurture, as opposed to nature, may account from later gaps in female achievement).

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protections they should receive.²⁷⁰ The argument is not that society, in general, or parents, in particular, should support underage girls having premature sexual encounters. However, if underage girls do have sexual encounters because they are assaulted or are engaging in activities with other children, they should not be treated to shaming and criminalization. As parental norms that hold parents responsible for children's outcomes continue to gain traction, legal remedies for assault may be limited because of the perception that parents were responsible for preventing a girl from being sexy, in the wrong place, not protected enough, or whatever excuse shifts the blame from the perpetrator to the girl and her caregivers.

CONCLUSION

Some might argue that courts will never be in the business of punishing parents for failing to limit EDC exposure in their children. The amount of research and current level of social parental responsibility for children's health outcomes suggest otherwise. Whether or not formal legal regulations are adopted for EDCs misses the more important point about the implications of the process for determining the value of childhood outcomes. It is pressing for the legal system to consider how EDC concerns are also aimed at preventing disfavored childhood outcomes without consensus that those outcomes are negative or a health risk. The intuition about whether parents shape or discover their children's sexual and gender identity combined with the state's implicit preference for straight, gender conforming, non-sexualized children could be animating resistance to equality and better protections for gender and sexual non-conforming children. Interrogating the interplay between parenting norms and the state is useful for crafting legal responses to parents who overstep the bounds into abusive parenting, help cause advocates reach new supporters, and provide insights for rethinking disfavored and undesirable outcomes.

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APPENDIX A

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INVISIBLE SURVIVORS: FEMALE FARMWORKERS IN THE UNITED STATES AND THE SYSTEMATIC FAILURE TO REPORT WORKPLACE HARASSMENT AND ABUSE

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INTRODUCTION

Angela, a single mother who has worked cutting and packing lettuce for over a decade, first came to the United States seeking a better life.¹ However, Angela's life in the United States has been far from easy. She works extremely long hours and suffers excruciating physical pain resulting from the arduous tasks required by her job.² Additionally, she suffers emotional trauma from the abusive nature of the workplace environment. She has been verbally harassed by her supervisors, who laugh at her, call her offensive names, and single her out for being a single parent.³ On one occasion, Angela was raped by a supervisor when she arrived at his house, at his request, to pick up some boxes.⁴ The supervisor then threatened Angela on a daily basis, and he openly told her co-workers about the assault; Angela recalls that the supervisor intended such actions to remind Angela that he was the one who wielded control in the workplace.⁵ Despite such terrible treatment, Angela stomached this behavior, continuing to work for the same employer cutting and packing lettuce, because she wanted to be promoted and earn a higher salary to be able to better support her daughter.⁶

Angela's narrative is, unfortunately, one that is commonplace among women working in the agricultural industry in the United States. Female farmworkers, who made up about 24% of the agricultural workforce in 2009-2010 and are primarily of Latina origin, are particularly vulnerable to sexual harassment and workplace discrimination.⁷ Often labeled as the "perfect victims," female farmworkers are isolated and thought to lack credibility, generally are unaware of their rights, and often are vulnerable due to their immigration status as either undocumented or H-2A workers.⁸

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However, Angela is unique because she has been willing to share her story in order to help other female farm workers suffering from a similar fate.⁹ Unlike most female farmworkers, Angela reported her rape to her company and, after no action was taken, spoke with a lawyer who helped her file a sexual harassment claim.¹⁰ Yet, Angela is among only a small number of women who ever report the workplace abuse they are forced to endure; in general, only 41% of women in the United States who have experienced sexual harassment have reported this conduct to their employers.¹¹

While the plight of female farmworkers has recently been highlighted by a number of scholars, the literature focuses on the substantive failures of existing legal frameworks and enforcement schemes for remedying discrimination and abuse.¹² This Note, however, argues that these existing remedies for workplace abuse, most notably Title VII and the U-Visa program, may not be providing survivors with enough opportunities for justice and recovery—not due to substantive deficiencies, but rather to a lack of enforcement resulting from the system’s inaccessibility. It notes that female farmworkers, who experience sexual harassment and abuse with greater frequency than other working women in the United States,¹³ rarely can or do take advantage of these existing legal remedies because they fail to report illegal workplace conduct, making it impossible to ever access justice because of the system’s reliance on the private attorney general model.¹⁴ Instead of fashioning new legal remedies to address the workplace abuse endured by female farmworkers, the focus should be on ensuring that

agricultural employers often abuse the system and ignore the regulations, subjecting workers to squalid and intolerable conditions that do not meet the DOL’s articulated standards. See Green, *supra* at 82. H-2A workers are protected by the Fair Labor Standards Act, Title VII, and the Alien Tort Claims Act, among others. See Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 145-53 (2009).

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13. Garcia, *supra* note 12, at 856; see also William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1079 (2000).

14. See, e.g., EEOC v. Christiansburg Garment Co., Inc., 550 F.2d 949, 951 (4th Cir. 1977) (noting that a plaintiff in a private Title VII suit is, in effect, a “private attorney general”); see also Kathleen Kim, *The Trafficked Worker As Private Attorney General: A Model For Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 253 (2009) (“The basic premise of the private attorney general is that, by empowering private persons with causes of action to sue for their injuries, the individual not only obtains direct relief, but also accomplishes important public policy goals.”).

the widespread protections already in place are being used as effectively as possible.

Part I of this Note discusses the demographics of the American agricultural workforce, focusing particularly on the unique identity characteristics of female farmworkers. Given the role identity plays in the relationship female farmworkers have with the agricultural workplace structure, such an exploration is essential to a full understanding of the challenges these women face. Part II provides basic information about the rampant sexual harassment and abuse from which female farmworkers disproportionately suffer. Part III takes a categorical approach to highlighting the reasons why female farmworkers fail to report harassment and abuse. Finally, Part IV discusses the potential for the existing legal structures to help female farmworker survivors so long as changes are made which give female farmworkers better and more meaningful access to the reporting process. While this Note does recognize that many of the problems faced by female farmworkers greatly implicate pressing and complicated issues in the field of immigration law, this paper does not attempt to address these issues in great detail. Instead, the focus of this Note is to give a general overview of a number of the challenges facing female farmworkers in the context of identifying and reporting sexual harassment and workplace abuse. This Note suggests that the creation of extensive "Know Your Rights" campaigns, the expansion of Equal Employment Opportunity Commission (EEOC) reporting requirements and procedures, the utilization of existing community partnerships, and the institution of more aggressive workplace inspection systems would greatly benefit female farmworkers by presenting them with the knowledge and opportunity to effectively report incidents of sexual harassment and abuse. As female farmworkers lack organizing and bargaining power, greater access to allies outside of the immediate workplace hierarchy is essential to ensuring the reporting of workplace abuse. This Note concludes with a brief summary.

I. FEMALE FARMWORKERS IN THE UNITED STATES

A. *Statistical Demographics*

While this Note's focus is on women in the agricultural workplace, it is important to recognize that the majority of farmworkers in the United States are men, allowing the agricultural industry to foster a culture of traditional male dominance.¹⁵ Most studies report that women compose

15. Runge, *supra* note 12, at 876.

only approximately one quarter of the farmworker population.¹⁶ Even in California the percentage of female farmworkers is only slightly higher than the national statistic.¹⁷ Sixty-two percent of farmworker women are married, 58% of farmworker women have children, and 97% of farmworker mothers live with their children.¹⁸

While farming has always played a significant role in the development of this country, and some scholars argue that even democracy itself is an outgrowth of American agrarianism,¹⁹ ironically and despite the deep ties between agriculture and the American ideal, the American agricultural industry has long been defined by the role foreign-born individuals play in its success.²⁰ Today, the Department of Labor (DOL), through its National Agricultural Workers Survey, estimates that of the upwards of 1.8 million migrant and seasonal farmworkers in the United States,²¹ approximately 72% are foreign-born.²² Approximately 400,000 thousand of the 1.8 million migrant workers in the United States are female.²³

Most studies show, and the federal government agrees, that approximately two-thirds of all farmworkers do not have legal status.²⁴ Many of the farmworkers who are documented are part of the H-2A temporary guestworker program, which allows American companies to recruit foreign workers and grant these workers authorization to enter the United States only for work on a temporary basis.²⁵ H-2A workers are only authorized to work for a single employer, so they are often faced with the choice of enduring exploitative working conditions or immediately returning to their country of origin.²⁶ Many scholars view the H-2A program as a modern version of the Bracero Program²⁷ of the mid-

16. INJUSTICE ON OUR PLATES, *supra* note 8, at 44.

17. See Garcia, *supra* note 12, at 858.

18. *Id.* at 859. See also Runge, *supra* note 12, at 877.

19. See, e.g., Victor Davis Hansen, *Democracy Without Farmers*, WILSON Q., Spring 2000, at 68, 69.

20. See Alexander E. Cance, *Immigrants and American Agriculture*, 7 J. FARM ECON. 102, 102 (1925) (noting the important place held by "men of foreign birth" in American agriculture in the early twentieth century).

21. See Runge, *supra* note 12, at 874-75.

22. NAT'L CTR. FOR FARMWORKER HEALTH, INC., FARMWORKER HEALTH FACTSHEET (2012), available at <http://www.ncfh.org/docs/fs-Migrant%20Demographics.pdf>.

23. See *id.*

24. Garcia, *supra* note 12, at 856; see also INJUSTICE ON OUR PLATES, *supra* note 8, at 44.

25. Garcia, *supra* note 12, at 866.

26. *Id.* at 866-67. See also Maria L. Ontiveros, *New Perspectives on Labor and Gender: Lessons From the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 162 (2003).

27. The Emergency Farm Labor Program, more commonly known as the Bracero Program, was created during World War II in order to address labor shortages in the United States. See Alejandro V. Cortes, *The H-2A Farmworker: The Latest Incarnation of the*

twentieth century, especially due to the high percentage of current H-2A workers from Mexico.²⁸

In fact, most farmworkers in the United States—approximately 78%—are Latinos.²⁹ The National Center for Farmworker Health estimates that 68% of farmworkers are from Mexico and that another 3% of farmworkers hail from other countries in Central America.³⁰ Most of these workers are marginally literate in their own language, and few, if any, speak English.³¹ Thirty-five percent of farmworkers said they had no English language skills.³²

B. Intersectional Identity

All of the aforementioned characteristics of female farmworkers—focusing specifically on gender, national origin, cultural background, and immigration status—play an essential role in understanding the challenges faced by this particular population. As noted by generations of sociological scholars and critical race theorists, “[t]he key insight of intersectionality theory is that discrimination and disadvantage are not just additive; categories may intersect to produce unique forms of disadvantage.”³³ Famously, Kimberlé Crenshaw stated that “[v]iolence against women is often shaped by other dimensions of their identities, such as race and class.”³⁴ By defining people by only a single facet of their identity – for example studying either gender or race, but not both, – society has come to reinforce and render completely invisible certain populations of workers.³⁵ Crenshaw’s theory of identity formation and politics is applicable in the

Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights, 21 OHIO ST. J. ON DISP. RESOL. 409, 410 (2006). It consisted of a bilateral agreement between the governments of the United States and Mexico under which Mexican workers were temporarily brought into the United States to perform agricultural work. *Id.* While Mexican Braceros were afforded certain labor protections under this program, like “payment at the prevailing wage rate, guaranteed work for at least 75 percent of the contract period, [and] protection against discriminatory acts,” these workers were routinely exploited by the growers and rarely granted any of the promised benefits. *Id.* at 410-11.

28. *E.g.*, Garcia, *supra* note 12, at 867.

29. *Id.* at 856.

30. NAT’L CTR. FOR FARMWORKER HEALTH, *supra* note 22.

31. Ontiveros, *supra* note 26, at 160.

32. NAT’L CTR. FOR FARMWORKER HEALTH, *supra* note 22.

33. Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC’Y REV. 991, 993 (2011).

34. Kimberlé Crenshaw, *Mapping the Margins, Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

35. Cathy Scarborough, *Conceptualizing Black Women’s Employment Experiences*, 98 YALE L.J. 1457, 1458 (1989).

context of American agriculture, as Latina farmworkers comprise a unique group within the agricultural workforce and, as such, are presented with unique challenges defined by their intersectional identity. The rampant sexual harassment and abuse discussed throughout this Note is one such challenge.

However, the relationship of intersectional identity to workplace abuse in agriculture is not something new. In fact, many previous studies of female farmworkers have made subtle assertions to this end. For example, one study noted that immigrant women, generally, are more likely to experience sexual harassment and employment discrimination than are immigrant men.³⁶ Another study found that Latina farmworkers are often bullied, threatened, and abused in ways that mirror the paternalism rooted in Latino culture.³⁷ That same study also noted that the labeling of farmworkers as “illegals” or “aliens” constructs them as a “less-than-human other,” which renders certain types of exploitation to be uniquely acceptable in the workplace.³⁸ It commonly is argued that Latina farmworkers are among the poorest and most exploitable workers in the country.³⁹

Yet, these studies often address the intersection of only two facets of identity; female farmworkers, on the other hand, are uniquely vulnerable in the workplace because of their identities as farmworkers, Latinas, women, *and* immigrants. As all of these aspects of identity are crucial to a complete understanding of the rampant sexual harassment and abuse that this population faces, existing scholarship has not yet properly addressed this topic.⁴⁰

II. SEXUAL HARASSMENT AND ABUSE IN THE AGRICULTURAL WORKPLACE

Female farmworkers in the United States suffer disproportionately from workplace abuse as a result of their intersectional identity coupled with the nature of agricultural labor.⁴¹ The type and extent of harassment and abuse experienced by female farmworkers is wide-ranging. Verbal harassment is commonplace; women in the fields are often subjected to offensive, vulgar, and degrading comments, usually regarding their sexuality or attire.⁴² Female farmworkers are often forced to endure

36. Garcia, *supra* note 12, at 861.

37. Ontiveros, *supra* note 26, at 169-70.

38. *Id.* at 169.

39. INJUSTICE ON OUR PLATES, *supra* note 8, at 44.

40. *E.g.*, Garcia, *supra* note 12, at 873.

41. Garcia, *supra* note 12, at 856; *see also* Tamayo, *supra* note 13, at 1079.

42. Garcia, *supra* note 12, at 862; *see also* HUMAN RIGHTS WATCH, *supra* note 1, at 28-29.

unwanted sexual attention, especially from supervisors and co-workers who hold more workplace authority.⁴³ Such authority figures constantly harass the female farmworkers for dates and sexual favors,⁴⁴ sometimes in exchange for more favorable workplace treatment like better hours and a higher salary.⁴⁵ In more extreme cases, farmworker women are subjected to physical abuse and rape, even as a condition of getting an agricultural job in the first place.⁴⁶ Once working, “[t]hey are routinely touched, groped, and assaulted”⁴⁷; many women have experienced this type of abuse particularly as “they stooped or bent over to plant or harvest crops.”⁴⁸ One worker in California even casually referred to a company’s field as the “field de calzon,” or “field of panties,” because of the unusually high number of rapes that occurred there.⁴⁹ In Florida, some women referred to the fields in which they work as “The Green Motel.”⁵⁰ The forms of sexual harassment and violence most commonly reported by female farmworkers to Human Rights Watch are “unwanted touching, verbal abuse, and exhibitionism.”⁵¹

Sexual harassment and abuse is widespread in agricultural workplaces, and the female farmworkers are “well aware of the risk[s]” of working in the industry.⁵² Studies report that almost all female farmworkers experience sexual harassment and abuse in the workplace. In a recent study, 80% of female farmworkers surveyed stated that “they had experienced some form of sexual harassment [at work].”⁵³ Another study found that almost 97% of women were survivors of sexual harassment and abuse.⁵⁴ Almost all of the women that Human Rights Watch interviewed reported personal experiences of workplace harassment and abuse or knew someone else who had such experiences.⁵⁵ Anecdotal evidence of this type of workplace treatment is extensive.⁵⁶ Unsurprisingly and rightfully so,

43. Ontiveros, *supra* note 26, at 169 (“If they reject these requests, they are fired or find themselves with lower pay and inferior job assignments”); *see also* HUMAN RIGHTS WATCH, *supra* note 1, at 27.

44. Ontiveros, *supra* note 26, at 169.

45. *E.g.*, HUMAN RIGHTS WATCH, *supra* note 1, at 27-28.

46. HUMAN RIGHTS WATCH, *supra* note 1, at 26.

47. Ontiveros, *supra* note 26, at 169.

48. HUMAN RIGHTS WATCH, *supra* note 1, at 28.

49. Tamayo, *supra* note 13, at 1080.

50. David L. Kern, *La Frontera Verde: “The Green Frontier” of Sexual Harassment Law*, 2012 WL 3058276, at *4 (Aug. 2012).

51. HUMAN RIGHTS WATCH, *supra* note 1, at 27.

52. *Id.* at 26 (detailing a number of anecdotes by women).

53. INJUSTICE ON OUR PLATES, *supra* note 8, at 46.

54. Garcia, *supra* note 12, at 861.

55. HUMAN RIGHTS WATCH, *supra* note 1, at 23.

56. *See* INJUSTICE ON OUR PLATES, *supra* note 8, at 42-44 (discussing the “rampant” anecdotal evidence, despite “little research on the extent of [workplace harassment or abuse]”).

most farmworker women view such rampant sexual harassment and violence as a huge problem.⁵⁷ However, despite such recognition, harassment and abuse is so common in their workplaces that many female farmworkers accept the harassment and abuse as an “unavoidable condition of agricultural work.”⁵⁸

III. CHALLENGES

In general, survivors of sexual harassment in the United States do not promptly report incidents of misconduct.⁵⁹ Most commonly, survivors’ responses to sexual harassment are informal, such as wearing more modest clothing or directly confronting the harasser.⁶⁰ However, female farmworker survivors of workplace harassment and abuse are even less likely to report incidents of misconduct—either informally or formally—than are their non-farmworker colleagues. The challenges faced by these workers in overcoming and addressing sexual harassment and abuse in the agricultural workplace fall into four main categories: (1) knowledge-based challenges; (2) work-based challenges; (3) immigration-based challenges; and (4) practical challenges. Each category of challenges will be addressed in turn.

A. Knowledge-Based Challenges

Many female farmworkers believe that abusive workplace conditions are “the rule, not the exception.”⁶¹ Individuals surveyed by the Southern Poverty Law Center believed that incidents of sexual harassment and violence were simply “unpleasant” parts of their jobs with which they simply had to deal.⁶² Because female farmworkers are often unaware that this type of workplace misconduct is, in fact, unlawful misconduct, they never think to report any incidents of harassment or abuse.⁶³ Female farmworkers are also less likely to seek aid or legal assistance because many are illiterate or do not speak English.⁶⁴

57. Garcia, *supra* note 12, at 856.

58. HUMAN RIGHTS WATCH, *supra* note 1, at 23.

59. See Runge, *supra* note 12, at 883 (discussing studies that indicate women who are sexually harassed tend not to report the misconduct); see also Anne Lawton, *Tipping the Scales of Justice in Sexual Harassment Law*, 27 OHIO N.U.L. REV. 517, 517 (2001) (noting that research consistently finds only 1-6% of survivors ever report harassment).

60. Runge, *supra* note 12, at 883.

61. Garcia, *supra* note 12, at 873.

62. INJUSTICE ON OUR PLATES, *supra* note 8, at 44.

63. Garcia, *supra* note 12, at 859.

64. *Id.*

B. Work-Based Challenges

Farm work makes female workers physically vulnerable, as they are often isolated from coworkers and are required to work alone at remote worksites.⁶⁵ More commonly, women are targeted because of the physically exposed and often suggestive positions required to properly do their jobs.⁶⁶ For example, women working and picking in strawberry fields must spend the majority of their time bent over.⁶⁷ While work sites are not gender segregated, men hold most of the supervisory positions. Because of the way farm work is structured, male supervisors and foremen are given tremendous power to manage the working conditions of their female colleagues.⁶⁸

Unfortunately, the dominance of men in the workplace is not unique to agricultural work. As scholars like Vicki Schultz have noted, hostile work environments are commonly linked to job segregation and the desire of men to maintain material and psychological advantages over women.⁶⁹ In the context of agriculture, the lack of women in supervisory positions is of particular importance because the men wielding workplace power can more easily take advantage of the women they supervise in order to address the particular masculine needs noted by Schultz, especially given the already unique nature of farming and fieldwork.

Many female farmworkers also are hesitant to report harassment and abuse because of the impact it might have on their working conditions and those of their family members.⁷⁰ Despite the fact that such conduct is illegal under Title VII,⁷¹ many farmworkers who report workplace discrimination fear and are faced with retaliatory punishment such as demotion, dismissal, or denial of basic necessities like water.⁷² Often, this retaliatory conduct is directed not only at the survivors themselves but also at their family members who work alongside them; relatives of survivors are commonly fired by abusive employers, which, as the Supreme Court held in *Thompson v. North American Stainless, LP*, only further discourages reporting of incidents of harassment and abuse.⁷³ Some women

65. HUMAN RIGHTS WATCH, *supra* note 1, at 34; *see also* Garcia, *supra* note 12, at 864.

66. Garcia, *supra* note 12, at 864.

67. *Id.* at 862.

68. *See id.* at 864 (describing the male-dominated workplace environment); *see also* HUMAN RIGHTS WATCH, *supra* note 1, at 32 (“The foreman is the law.”).

69. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1690-91 (1998).

70. HUMAN RIGHTS WATCH, *supra* note 1, at 5 (“[R]etaliatio[n] can mean the victim is fired along with her family . . .”).

71. 42 U.S.C. § 2000e-3(a) (2014).

72. Garcia, *supra* note 12, at 862.

73. *See Thompson v. N. Am. Stainless, LP*, 562 S. Ct. 170, 174 (2011) (“We think it

are even reluctant to report harassment and abuse because they are wary of bringing shame upon both their community and themselves.⁷⁴

C. Immigration-Based Challenges

Commonly, female farmworkers are wary of reporting misconduct because it puts their already tentative immigration statuses at risk.⁷⁵ Farmworker women who are undocumented or have relatives that are undocumented “suffer in silence for fear that the security of their entire families will be jeopardized should they seek help or otherwise call attention to themselves.”⁷⁶ Many survivors fear that employers will punish them for reporting harassment and abuse by calling immigration officials to initiate the removal process.⁷⁷ As a result, many female farmworkers—who often have children and are the primary caregivers for their families⁷⁸—choose to endure abuse and refrain from reporting harassment rather than risk deportation or familial separation.⁷⁹ Female farmworkers have a very real fear of “economic, social, and family implications of being fired from a job,” and they therefore commonly choose not “to assert their right to be free from sexual violence at work.”⁸⁰ Similarly, as noted recently by Wisconsin Representative Gwen Moore, the continued use of law enforcement as a means of identifying and detaining undocumented immigrants makes women suffering from abuse even less likely to come forward and report than they otherwise would, because the people to whom they must report workplace abuse are the same people who have the power to directly affect the immigration statuses of themselves and their loved ones.⁸¹

obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”); *see also* Runge, *supra* note 12, at 877-78.

74. Ontiveros, *supra* note 26, at 179.

75. Garcia, *supra* note 12, at 864.

76. Crenshaw, *supra* note 34, at 1249.

77. Tamayo, *supra* note 13, at 1082.

78. Garcia, *supra* note 12, at 859.

79. Tamayo, *supra* note 13, at 1082.

80. Runge, *supra* note 12, at 885.

81. *See* Gwen Moore, *Pass Comprehensive Immigration Reform to Help Immigrant Victims of Violence*, HUFFINGTON POST (Mar. 6, 2014, 5:59 PM), http://www.huffingtonpost.com/rep-gwen-moore/pass-comprehensive-immigr_b_4914310.html (advocating comprehensive immigration reform to decrease immigrant violence).

D. Practical Challenges

One of the greatest barriers to reporting sexual harassment and abuse in the agricultural industry is inaccessibility.⁸² Government bodies that hear and investigate complaints—like the EEOC and law enforcement agencies—are geographically distant from the places where female farmworkers live and work.⁸³ Notably, the EEOC requires complaints to be filed either in person or by mail,⁸⁴ which presents problems related to physical accessibility. First, many agricultural workers are confined to the local areas surrounding their workplaces. This is especially so for workers in the H-2A program, who are provided housing and daily transportation to and from the worksite by their employers as a requirement of the employer's H-2A participation.⁸⁵ Second, while the EEOC operates fifty-three field offices across the country, geographically large regions with high levels of agricultural still only have a few offices where reports can be filed; for example, the San Francisco District, which covers Alaska, Washington, Oregon, Idaho, Montana, and large portions of California and Nevada, only has three field offices located in Seattle, San Jose, and Oakland.⁸⁶ Without the ability to access these offices, it is nearly impossible for workers to file EEOC complaints on any subject falling under EEOC jurisdiction. Additionally, the requirement that complaints be filed by mail or in person presents problems relating to cultural and language barriers, since the majority of female farmworkers do not speak English and are marginally literate.⁸⁷

As a result of all of these factors, survivors more often than not never report incidents of sexual harassment and abuse, thus guaranteeing that they will never access the systems designed specifically to remedy and prevent this type of workplace misconduct.⁸⁸

82. See INJUSTICE ON OUR PLATES, *supra* note 8, at 42 (discussing the many obstacles facing female farmworkers).

83. See *EEOC Office List and Jurisdictional Map*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/field/> (last visited Apr. 2, 2014).

84. *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/howtofile.cfm> (last visited Mar. 6, 2014).

85. Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program's Purposes, Regulations, and Realities*, 29 VT. L. REV. 185, 192-93 (2004).

86. See *EEOC Office List and Jurisdictional Map*, *supra* note 83.

87. See Ontiveros, *supra* note 26, at 160.

88. INJUSTICE ON OUR PLATES, *supra* note 8, at 42.

IV. BETTERING ACCESS TO THE JUSTICE SYSTEM

There are a number of existing legal frameworks—notably Title VII of the Civil Rights Act and the U-Visa program administered by U.S. Citizenship and Immigration Service (USCIS)—which can provide female farmworkers with remedies for sexual harassment and abuse.⁸⁹ However, as discussed *supra*, one of the greatest barriers to justice for female farmworkers is the inability to access the legal system and its remedial schemes because of the failure to report sexual harassment and abuse in the first place.⁹⁰ By creating more aggressive “Know Your Rights” campaigns, reimagining the EEOC’s reporting procedures, establishing community partnership programs with local organizations, and building on existing infrastructure in federal agencies already overseeing agricultural labor, female farmworkers would be afforded both greater protection from abuse and greater opportunities to come forward to report unlawful workplace conduct.

A. *Opportunities for Success: Existing Legal Frameworks*

Title VII and the U-Visa program offer female farmworkers, as well as many other workers, avenues for justice in the wake of incidents of sexual harassment and workplace abuse.⁹¹ While each framework applies to only certain particularized situations, each framework can provide both protection and remedies to farmworker survivors of workplace misconduct.

Title VII of the Civil Rights Act, enacted in 1964, famously prohibits employment discrimination based on race, color, religion, sex, or national origin.⁹² It long has been established that sexual harassment is considered a form of discrimination based on sex, and such claims therefore are cognizable under Title VII.⁹³ Sexual assault is similarly considered a prohibited form of sex discrimination.⁹⁴ Plaintiffs may also establish discrimination based on sex in the form of a hostile work environment if they can demonstrate that the environment is both subjectively and objectively offensive.⁹⁵ As of 1991, successful Title VII plaintiffs filing sex discrimination claims can be awarded injunctive relief and can receive compensatory and punitive damages, as well as attorneys’ fees.⁹⁶ However,

89. See 42 U.S.C. § 2000e-2 (2013); see also 8 U.S.C. § 1101(a)(15)(U) (2013).

90. INJUSTICE ON OUR PLATES, *supra* note 8, at 42.

91. See 42 U.S.C. § 2000e-2 (2013); see also 8 U.S.C. § 1101(a)(15)(U) (2013).

92. See 42 U.S.C. § 2000e-2 (2013).

93. See 29 C.F.R. § 1604.11(a) (2014); see also Lawton, *supra* note 59, at 519-20.

94. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Runge, *supra* note 12, at 881.

95. See *Vinson*, 477 U.S. at 63-69; Runge, *supra* note 12, at 881.

96. Melissa Hart, *Litigation Narratives: Why Jensen v. Eveleth Didn’t Change Sexual Harassment Law, But Still Has a Story Worth Telling*, 18 BERKELEY WOMEN’S L.J. 282, 291

Title VII's remedies can only begin to be accessed upon the reporting of any discrimination to a local EEOC office within 180 (or sometimes 300) days.⁹⁷

The U-Visa program, in contrast to Title VII, is a relatively new creation of the federal government. Nonimmigrant "U" status was created in 2000 when the federal government enacted the Victims of Trafficking and Violence Prevention Act in response to congressional findings that immigrant women and children are disproportionately targeted as victims of crimes in the United States.⁹⁸ The U-Visa program allows women who are survivors of a number of enumerated crimes—including rape, domestic violence, abusive sexual contact, sexual exploitation, and sexual assault—to report any incidents without fear of deportation.⁹⁹ So long as a survivor has "suffered substantial physical or mental abuse as a result of" such criminal activity and the survivor is willing to work with law enforcement in the crime's investigation and prosecution, a survivor will be granted four years of nonimmigrant legal status and legal employment authorization.¹⁰⁰ USCIS will also grant U-Visa status to immediate family members of survivors in order to avoid extreme hardship and in the support of family unity.¹⁰¹ While U-Visas are unavailable for survivors of sexual *harassment* as defined under Title VII, the sad reality is that most female farmworkers that experience workplace harassment also experience the enumerated and more extreme forms of abuse that would qualify an individual for U-Visa.¹⁰² In fact, Congress specifically indicated that U-Visas were created to ensure that undocumented immigrant women, who are vulnerable in the workplace due to their lack of legal status, are protected from extreme forms of criminal activity and abuse.¹⁰³ However, like claims under Title VII, the success of the U-Visa system relies upon survivors of sexual abuse coming forward and cooperating with government enforcement officials.¹⁰⁴ And additionally, because the U-Visa program was created fairly recently, fewer workers are aware of its availability and potential to provide relief from workplace abuse.¹⁰⁵

(2003).

97. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL: THRESHOLD ISSUES (2009), available at <http://www.eeoc.gov/policy/docs/threshold.html>; Lawton, *supra* note 59, at 520.

98. Garcia, *supra* note 12, at 874.

99. *Id.* at 875-76.

100. 8 U.S.C. § 1101(a)(15)(U); see also Garcia, *supra* note 12, at 875.

101. Garcia, *supra* note 12, at 875.

102. See *id.* at 877-78.

103. *Id.*

104. See *id.* at 873, 875 ("Title VII law places a burden on the female victim to make a reasonable effort to report the harassment and use the grievance procedures instituted by the employer.").

105. See *id.* at 874, 880-81.

Thus, while Title VII and U-Visas offer a number of protections for female farmworkers suffering from workplace harassment and abuse, both frameworks rely on the private-attorney-general model and put the burden on the survivor to come forward and initially report any incidents of misconduct.¹⁰⁶ The challenges discussed *supra* make it nearly impossible for survivors to get their foot into the door of the justice system in the first place.

B. Changes Can Be Implemented To Make Reporting More Accessible

While scholars may argue that the current infrastructure for identifying and remedying workplace sexual harassment and abuse is substantively deficient, the institution of new programs which take into account the multifaceted intersectional identity of female farmworkers can make the existing frameworks much more effective in achieving the goals for which they were originally intended. As these existing remedial schemes rely on generalized assumptions about workers for their effectiveness – most importantly, that survivors will be willing and able to come forward and report unlawful conduct – and ignore the reality of intersectional identity formation, they are unable to adequately address workplace injustice.¹⁰⁷ New changes and programs must take into account the complications of identity in clearing the pathways for female farmworkers to access the justice system, and must make it easier for those who are geographically distant and culturally disadvantaged to report sexual harassment and abuse.

First, farmworkers will be more likely to report harassment and abuse if they are aware of their rights and the reporting procedures. This can be done by the creation of more extensive “Know Your Rights” campaigns by advocacy organizations already engaging with the farmworker population. Second, reporting will also be increased, bettering the chances that workers will be able to access the existing remedial schemes, if the EEOC’s reporting procedures are made more geographically and technologically accessible. The EEOC can undertake a number of positive changes to make reporting much more accessible, like allowing reporting by phone and by sending out inspectors who report to local satellite offices. Third, there are ways to increase reporting even without making changes to the EEOC procedures. Because the EEOC currently requires reporting in person or in writing,¹⁰⁸ local community organizations, of which farmworkers are dedicated members or have existing relationships of trust, can be called

106. *See id.*

107. *See* Crenshaw, *supra* note 34, at 1251.

108. *See How to File a Charge of Employment Discrimination*, *supra* note 84 (explaining that charges can be filed by mail or in person, but not over the telephone).

upon to provide workers with computer access or EEOC forms and to aid survivors in the reporting process. Fourth and finally, further duties of investigation can be imposed upon government actors employed by certain federal agencies, like the Department of Labor and the Occupational Safety and Health Administration (OSHA), which are already authorized or required to enter and inspect agricultural workplaces. If these proposals are implemented, female farmworker survivors will be more knowledgeable of their rights and the opportunities for relief, have better access to existing remedial frameworks, and hopefully will begin to come forward and report harassment and abuse with greater frequency.

1. Increasing Knowledge of Rights and Reporting Procedures

One of the greatest hurdles to reporting sexual harassment and abuse is a lack of knowledge about workplace rights and reporting procedures. As noted *supra*, many female farmworkers believe that the harassment and abuse they experience is simply a part of their jobs that they must endure without complaint.¹⁰⁹ It is logical, therefore, that many women do not report such experiences because they are unaware that such conduct should be reported; many female farmworkers do not know that this type of conduct is unlawful and is not something that must be tolerated in the workplace. The creation of extensive “Know Your Rights” campaigns by advocacy organizations already working with these populations can bring information about workplace rights directly to female farmworkers.

Some organizations already engage in this type of advocacy work, and new programs can be modeled and expand upon these existing structures. Most famously, the Southern Poverty Law Center created “Esperanza,” an Immigration Women’s Legal Initiative, to give female farmworkers a voice and to ensure that their rights are protected.¹¹⁰ Through this program, the Southern Poverty Law Center states that it is “educating women about their rights; helping women pursue justice by supporting them through criminal investigation against perpetrators of sexual violence; and raising public awareness about this pervasive problem,” among other things.¹¹¹ Through the Esperanza program, the Southern Poverty Law Center has been successful in creating sexual violence prevention materials for grassroots organizations, legal advocates, and social services providers and has become one of the leading organizations providing legal representation to farmworker women suffering from sexual harassment and abuse.¹¹² Other

109. INJUSTICE ON OUR PLATES, *supra* note 8, at 44.

110. *Immigrant Women*, S. POVERTY LAW CTR., <http://www.splcenter.org/what-we-do/immigrant-justice/in-this-section/immigrant-women> (last visited Mar. 9, 2014).

111. *Id.*

112. *Id.*

organizations across the country that already engage in advocacy work on behalf of farmworker women should create programs like Esperanza in order to better provide these workers with more information on workplace rights and opportunities for relief.

In addition, organizations that already have “Know Your Rights” pamphlets and fact sheets for farmworkers and the greater community should create additional items for the purpose of informing female farmworkers about their rights with regard to workplace discrimination and sexual abuse. For example, the North Carolina Justice Center already has many in-depth fact sheets covering a number of subjects of interest to farmworkers available on its website in both English and Spanish.¹¹³ However, these fact sheets have no information about sexual harassment or abuse, no information about procedures for reporting violations, and only mention workplace discrimination more broadly in a single sentence on a single document.¹¹⁴ Because organizations like the North Carolina Justice Center have the resources to create these type of informational documents, as evidenced by the fact that they exist for topics like Equal Pay and Wage Theft,¹¹⁵ they also should devote time to creating documents (in both English and Spanish) providing information about unlawful workplace treatment, reporting misconduct, and available remedies. Even though such fact sheets may not be particularly accessible to female farmworkers because of the necessity of accessing them through a computer with internet capabilities, it is telling that many organizations with these types of documents already in existence lack accessible information specifically about sexual harassment and abuse. Similarly, organizations that have information and guides for organizing informational seminars about women’s empowerment, like the Catholic Migrant Farmworker Network, provide information on domestic violence and human trafficking but lack similar information on workplace abuse.¹¹⁶ This is a change that easily can be implemented.

113. See *Know Your Rights/Conozca Sus Derechos*, NC JUSTICE CENTER, <http://www.ncjustice.org/?q=workers-rights/know-your-rightsconozca-sus-derechos> (last visited Mar. 9, 2014) (providing links to “Know Your Rights” factsheets on many topics, including equal pay, wage theft, and workers’ compensation, among others).

114. See NC JUSTICE CTR., KNOW YOUR RIGHTS: IMMIGRANT WORKERS’ RIGHTS, available at http://www.ncjustice.org/sites/default/files/KYR_ImmigrantWorkers_English.pdf (last visited Nov. 20, 2014) (“You have the right not to be discriminated against because of your race, color, sex, age, disability, religion, national origin, or citizenship status.”).

115. See *Know Your Rights/Conozca Sus Derechos*, *supra* note 113.

116. See *Resources for Migrant Ministry: Women’s Empowerment Process*, CATHOLIC MIGRANT FARMWORKER NETWORK, <http://cmfwn.org/resources/> (last visited Mar. 10, 2014) (explaining that the Women’s Empowerment Process was created for migrant women and that the resource covers four topics: self-esteem, dignity and human rights, domestic violence, and human trafficking).

Having information about sexual harassment and abuse in the workplace available and accessible allows female farmworkers who do have the capabilities to access it themselves, allowing them to better help themselves and their colleagues without requiring them to ask a third party, who might be wary of such a request, for assistance at the information gathering stage. When more female farmworkers are informed of their rights and of the avenues for relief, they are more likely to come forward to identify and report workplace harassment and abuse.

2. Reimagining the EEOC Reporting Process

The current EEOC structure and procedural regulations are inadequate because they make reporting harassment and abuse far too complicated and geographically inaccessible. Of course, any new programs or actions taken by federal agencies would need to be within the budgetary constraints and funds allocated by Congress; yet, even small changes in the way reporting is done will make positive improvements to the existing system.

First, the EEOC can take on a more active role in policing workplace abuse by dispatching inspectors and creating local satellite offices. As other scholars and even the EEOC itself have noted, the EEOC primarily serves an intake and processing role rather than an investigative one.¹¹⁷ The EEOC devotes huge amounts of resources to these functions, yet the processing of claims does not proactively prevent or eliminate workplace discrimination.¹¹⁸ If the EEOC created an investigatory unit and dispatched inspectors out into the fields, much like other agencies do in order to curb workplace abuse in other areas—like occupational safety and health, as discussed *infra*—sexual harassment and abuse could be much more easily detected and addressed. Such a program would greatly improve the ability of female farmworkers, who are geographically and culturally isolated from the EEOC and its reporting centers, to access the EEOC and more effectively report workplace misconduct. Similarly, these inspectors could be based in local satellite offices, which would fall under the jurisdiction of the currently existing regional and field offices. This would allow inspectors to be more readily accessible to vulnerable farmworker communities and would make reporting easier, especially given the current requirement that reports of misconduct be made in person or by mail.

Additionally, the EEOC should change the way it allows workplace misconduct to be reported. Currently, the EEOC requires all complaints to be filed in person or by mail.¹¹⁹ As noted *supra*, this type of reporting proves challenging for many female farmworkers because of the EEOC's

117. Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1240 (2010)

118. *Id.* at 1244.

119. *How to File a Charge of Employment Discrimination*, *supra* note 84.

geographic inaccessibility and many workers' limited English skills. If the EEOC allowed charges to be filed by phone, it would be able to send out Agency officials, such as the hypothetical inspectors located in local satellite offices mentioned above, to investigate and further substantiate any charges filed. This type of reporting would be inexpensive for the EEOC—in fact, this would be essentially the same as reporting misconduct in person—and would be an easy way for the EEOC to make positive change and more effectively reach at-risk populations.

3. Bringing Reporting Procedures Directly to Farmworkers

Partnerships with local community organizations can address the challenges created by the technical requirements of reporting sexual harassment and abuse, such as geographic inaccessibility to both EEOC and law enforcement offices and general illiteracy.

First, local community organizations have existing relationships with farmworker populations and have enough resources to allocate directly to these communities. For example, churches are such an integral part of the lives of farmworkers that it is not uncommon for supervisors to forbid workers from attending church as a method of incentivizing their submissiveness to workplace misconduct.¹²⁰ By taking advantage of both the resources and localized personal and community networks that churches have, information can better reach vulnerable farmworker populations. Churches and other local organizations—like small grocery and convenience stores, for example—can create partnership programs in which community members offer information and aid in reporting abuse to both the EEOC and local law enforcement agencies (to take advantage of criminal and immigration-based remedies, like the aforementioned U-Visa). Because many female farmworkers do not speak English or are illiterate, organizations with existing personal relationships with these worker populations—which are frequented by workers due to their proximity to their homes or workplaces and already have gained the trust and support of these workers—can be called upon to aid in the identification, remedying, and elimination of sexual harassment and abuse in the workplace.

Since government agencies and many advocacy groups do not have enough resources to reach farmworkers on the localized level required to identify and address all individual cases of sexual harassment and abuse, local organizations can make a concerted effort to come to the aid of their community members. Grassroots community aid, or what scholars often refer to as “identity-based organizing,” has been successfully utilized by

120. Guerra, *supra* note 77, at 207.

the United Farm Workers in more general attempts to organize migrant and seasonal farmworkers,¹²¹ and this infrastructure can be similarly utilized in increasing the reporting of workplace misconduct. It is only with direct, on-the-ground intervention that sexual harassment and abuse can be brought to light within these vulnerable communities, particularly because of the difficulty in reaching the far-away EEOC and law enforcement offices. Individuals involved in these local organizations can easily access members of the community and can share relevant information with those they know in order to help survivors navigate the complicated reporting process.

Additionally, because so many female farmworkers fail to report harassment and abuse out of fear of retaliation or deportation,¹²² advocates should work with community organizations that have existing relationships with farmworker populations to create programs that allow workers to report harassment and abuse to authorized officials without fear or distrust. Catholic churches, in particular, are frequented by Latina farmworkers and are often viewed as places of safety. In fact, the United States Conference of Catholic Bishops has even created an outreach program specifically catering to migrant and seasonal agricultural workers in the United States.¹²³ Advocates can build upon these connections to create safe spaces for discussing and reporting workplace abuse. If clergy members make available EEOC forms or are willing to help community members call the proper authorized officials or fill out and mail complaint forms, society can tap into the reverence, respect, and trust workers have for these individuals in order to better identify and address instances of misconduct. Individuals who regularly work with female farmworkers will be able to listen to their complaints and help them report any incidents, even when the survivors do not speak English, cannot fill out the forms themselves, or cannot physically access the proper reporting center.

It is worth noting, however, that the power dynamic that makes farmworkers hesitant to report abuse for fear of detection by immigration authorities might counteract the potential success of community partnership programs, even on the small and relatively subtle scale suggested here and despite the immigration immunities and protections granted through programs such as the U-Visa. Because fear of detection and deportation at the hands of agricultural employers drives the daily decisions many female

121. Ontiveros, *supra* note 26, at 185.

122. See Runge, *supra* note 12, at 885 (explaining that female farmworkers are inclined to avoid reporting abuse for fear of retaliation by their employers and fear of shaming by their communities); Moore, *supra* note 75 (describing farmworkers' hesitation to report abuse due to fear of detection by immigration authorities).

123. *Migrant Farm Worker Apostolate*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/cultural-diversity/pastoral-care-of-migrants-refugees-and-travelers/people-on-the-move/migrant-farm-worker-apostolate.cfm> (last visited Mar. 10, 2014).

farmworkers make, any programs which require workers to report harassment and abuse, even those which allow reporting to a trusted outside party or remove the immigration risks associated with reporting, will likely be ineffective.

4. Utilizing Existing Non-EEOC Government Inspectors

As stated *supra*, many female farmworkers fail to report workplace harassment and abuse due to their inability to access reporting opportunities.¹²⁴ Often, growers specifically warn farmworkers not to speak with advocates or attorneys.¹²⁵ As such, government agents who are already authorized and required to be on the premises of agricultural workplaces can take on additional responsibilities to allow farmworkers to report workplace abuse. While it might be difficult to create true, unbiased, and free access to such processes due to oppressive employer oversight and monitoring of government visits, any steps to increase the ability of female farmworkers to make official complaints without having to travel to distant law enforcement or EEOC offices will give them better access to the reporting process and would institute some measure of positive change, however minimal it might be.

Many agencies, namely the Department of Labor (DOL) and its related sub-agencies, already have extensive records of agricultural workplaces and hold the right to inspect agricultural facilities. The DOL and the Immigration and Naturalization Service, in jointly administering the H-2A program, are required to issue certifications to employers seeking to hire temporary guestworkers “to ensure . . . there exists an insufficient supply of U.S. workers, and . . . the employment of H-2A workers will not affect or depress U.S. farmworker wages or conditions.”¹²⁶ In fact, in submitting an H-2A certification application, an employer is required to certify that it will comply with all relevant United States laws.¹²⁷ Because the DOL knows which farms have large populations of immigrant guestworkers and has documentation certifying that employers will be compliant with the law, they can use this information to create inspection programs to ensure that these workplaces to which they have issued certifications are in compliance with the terms of the program and with

124. See Guerra, *supra* note 77, at 204.

125. *Id.*

126. *Id.* at 194.

127. See H-2A Application for Temporary Employment Certification, U.S. DEP'T OF LABOR, *available at* http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A_Appendix.pdf (last visited Apr. 24, 2014) (including the declaration that an employer “[w]ill comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws”).

U.S. labor laws more broadly. While some scholars have noted that the division of administrative roles within the DOL for overseeing the H-2A program has led to bias in favor of growers and an ineffective oversight of program compliance, the fact that so many agencies share in the responsibilities of overseeing the program suggests that the creation of additional inspection procedures for participating employers may be less financially burdensome than it otherwise might be if control was more centralized.¹²⁸

Similarly, agencies like OSHA, which is already required to inspect agricultural workplaces for other types of abuse as well as for compliance with health and safety regulations, can be called upon to police similar types of labor violations, such as sexual harassment and abuse. In fact, the General Duty Clause of the Occupational Safety and Health Act (OSH Act) requires employers to “furnish . . . a place of employment . . . free from hazards that are causing or are likely to cause death or serious physical harm to his employees”¹²⁹ and includes an inspection provision allowing OSHA inspectors to enter workplaces and inspect and investigate for compliance with the OSH Act.¹³⁰ First, sexual harassment and abuse might already fall within the OSH Act’s General Duty Clause because many types of harassment and abuse are likely to cause serious physical harm to female farmworkers; thus, OSHA inspectors already should be required to inspect for this type of misconduct. Second, even if sexual harassment and abuse does not fall within the purview of this provision, the knowledge and experience of OSHA inspectors, who are trained to identify subtle signs of labor violations and problems which are hidden by employers, can successfully be applied in this context, so long as inspectors undergo appropriate training on abusive working conditions. Even if this type of inspection is not already required by the OSH Act, it would not be that burdensome to require OSHA inspectors to additionally act as inspectors for identifying and reporting other types of workplace abuse because OSHA inspectors are granted expansive authority to inspect for workplace violations and have knowledge, training, and experience doing so.

If implemented, all of these suggestions would effectively utilize existing infrastructure to maximize the ability of vulnerable female farmworker populations to directly access complicated, and often geographically distant, avenues to justice.

128. See, e.g., Guerra, *supra* note 77, at 196-97.

129. 29 U.S.C. § 654(a)(1) (2013).

130. 29 U.S.C. § 657(a) (2013).

CONCLUSION

Angela's story, highlighted in this Note's introduction, provides us with some hope that sexual harassment and abuse can be detected and effectively addressed in the agricultural workplace, so long as survivors have the ability to come forward and access existing legal and reporting structures. While there are certain practical realities that might render efforts to increase accessibility ineffective, such as deeply entrenched workplace hierarchies and limited governmental funding, the expansion of current procedures and the institution of innovative programs which tap into existing legal structures, relationships, and localized resources can provide much aid in the fight to ensure that female farmworkers can go to work without fear for their dignity or safety. Even with the implementation of these proposals, however, there is still much work to be done in improving the working conditions of female farmworkers in the United States. As Representative Moore so elegantly stated, "[o]ur work is not done until all women are protected against violence and abusers face the full penalties of the law when they are brought to justice."¹³¹

131. Moore, *supra* note 81.

