INTRODUCTION

Twenty-five years ago, the *Harvard Law Review* published its annual *Developments in the Law* on the topic of "Sexual Orientation and the Law."[1] The impetus for that choice was clear. The Introduction described the "[s]harply conflicting attitudes toward homosexuality [that] share[d] an uneasy existence in . . . society" at the time.[2] There were four "competing conceptions": a "sin" conception that "homosexual acts [are] immoral and wrong," a "sickness" conception that sees homosexuality "negatively . . . albeit [as] a potentially curable component" of one's personality, a "neutral difference" conception that sexual orientation is a part of identity that "should not be a basis for discriminatory treatment," and a "social construct" conception that rejects any categorization on the basis of sexual orientation.[3] According to the editors of that volume, those four conceptions "inform[ed] much of the law and policy concerning gays and lesbians,"[4] and the purpose of that edition was to "examine[] the legal *problems* faced by gay men and lesbians" as a result.[5]

In many ways, that year's *Developments in the Law* edition was ahead of its time, making creative legal and political arguments that would foreshadow debates regarding sexual orientation law for years to come. One Part argued that classifications based on sexual orientation should be scrutinized under heightened review[6] — a conclusion that the Supreme Court has yet to reach twenty-five years later.[7] In

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[1] *Developments in the Law — Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) [hereinafter *Developments*].

[2] *Id.* at 1511.

[3] *Id.* at 1512.

[4] *Id.* at 1518.

[5] *Id.* at 1519 (emphasis added).

[6] *Id.* at 1564–71. The editors argued that "gay men and lesbians have suffered from a history of discrimination," that "classifications that discriminate against gay men and lesbians are based on inaccurate stereotypes that frequently bear no relation to ability to perform or contribute to society," that "gay men and lesbians cannot rely on the political process to make themselves heard," *id.* at 1567, and finally that "scientific research has suggested that sexual orientation is largely immutable," *id.* at 1567–68. They even argued that *Bowers v. Hardwick*, 478 U.S. 186 (1986), the case that rejected any constitutional right to engage in private, homosexual sodomy, "does not preclude a finding that sexual orientation classifications should be accorded heightened equal protection scrutiny." *Developments*, *supra* note 1, at 1568. Not only is homosexual sex "simply not the defining characteristic of a homosexual sexual orientation," they argued, but "[d]iscrimination against gay men and lesbians . . . often has little to do with a disapproval of homosexual sodomy." *Id.* at 1569.

[7] In *United States v. Windsor*, 133 S. Ct. 2675 (2013), last Term's case finding section 3 of the Defense of Marriage Act unconstitutional, the Second Circuit below had held that classifications based on sexual orientation deserve heightened scrutiny. *See* Windsor v. United States, 699 F.3d 169, 181–85 (2d Cir. 2012). The Supreme Court did not address that argument, however, and did not appear to rely on anything more than rational basis review in striking down the Section. *See*

another Part, after analyzing private employment law and concluding that "the existing legal framework does not adequately protect the rights of gay and lesbian employees," the editors suggested that "Congress . . . adopt legislation explicitly forbidding public and private employers from basing hiring or firing decisions on an individual's sexual orientation."[8] Even today, Congress has failed to heed that recommendation.[9] And the Part entitled "Same-Sex Couples and the Law" advocated that the Court "strike . . . down" state bans on same-sex marriage[10] and "recognize that the fundamental right to marry should extend to gay and lesbian couples."[11]

In other ways, however, the edition was a product of the era in which it was published — looking only at "problems," not "accomplishments." Three years earlier, the Supreme Court had upheld a Georgia statute[12] that criminalized consensual oral or anal sex against a constitutional challenge,[13] and twenty-four states had similar sodomy statutes on the books at the time of that edition's publication.[14] Therefore, that year's *Developments in the Law* understandably dedicated seventeen pages to discussing and criticizing the Court's holding and to suggesting various strategies through which sodomy statutes could still be challenged.[15] The edition also focused on issues like the

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Windsor, 133 S. Ct. at 2693 ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973))). Some state courts, however, have applied heightened scrutiny in striking down state bans on same-sex marriage. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008). Some federal courts, too, have recently relied on *Windsor* in finding that classifications based on sexual orientation trigger heightened scrutiny. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) ("[W]e conclude that *Windsor* compels the same result with respect to equal protection that *Lawrence* compelled with respect to substantive due process: *Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.").

[8] *Developments*, *supra* note 1, at 1584.

[9] *See* Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES, Nov. 7, 2013, http://www.nytimes.com/2013/11/08/us/politics/senate-moves-to-final-vote-on_workplace-gay-bias-ban.html (noting that the Senate for "the first time . . . voted to include gay, lesbian, bisexual and transgender people in the country's nondiscrimination law," but that "nothing is guaranteed in the House").

[10] *Developments*, *supra* note 1, at 1611.

[11] *Id.* at 1608.

[12] The Georgia statute read: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2(a)(2) (2011), *invalidated by* Powell v. State, 510 S.E.2d 18 (Ga. 1998).

[13] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[14] *See Developments*, *supra* note 1, at 1519 n.2 (listing state sodomy statutes).

[15] *See id.* at 1521–37. Many of these suggestions were bold and inventive. *See, e.g.*, *id.* at 1531–32 (arguing that facially neutral sodomy statutes are subject to an equal protection challenge, since the "most plausible reading of *Griswold* requires that married couples have the right

denial of government security clearances to gays and lesbians,[16] the "gay advance defense" that many perpetrators of crimes against gays and lesbians used to justify a "violent reaction when confronted with a homosexual proposition,"[17] and discriminatory enforcement of solicitation statutes against gays and lesbians[18] — all of which, while still important, are less salient issues today.[19] Meanwhile, that edition of *Developments in the Law* failed to mention legal issues regarding transgender individuals and their rights, which have emerged as major areas for advocacy today.[20] In short, while parts of that edition could be seamlessly transposed into this year's *Developments in the Law*, other sections existed only because the year was 1989.

How the times have changed. In 2003, the Supreme Court overruled *Bowers v. Hardwick*,[21] finding a constitutional right to engage in private sexual activity[22] and holding unconstitutional the final few state statutes that criminalized gay sex.[23] A year later, Massachusetts became the first state to permanently legalize same-sex marriage.[24]

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to engage in sodomy," and since "*Eisenstadt* supports the extension of that right to all unmarried couples," *id.* at 1532).

16 *See id.* at 1560 ("The government's claim that gay and lesbian individuals are greater blackmail risks than the population at large is simply not supported by evidence.").

17 *Id.* at 1542.

18 *See id.* at 1537–38 (noting the constitutional trouble with the fact that "police officers frequent gay bars to make arrests under the solicitation statutes, but do not make similar efforts in heterosexual bars").

19 Denials of security clearances on the basis of sexual orientation were outlawed by Executive Order 12,968 in 1995. *See* Exec. Order No. 12,968 § 3, 60 Fed. Reg. 40,245, 40,250 (Aug. 7, 1995), *available at* http://www.dod.mil/dodgc/doha/EO_12968.pdf. The "gay advance defense" is still a very real concern, but hate crime statutes are in philosophical tension with the defense and may serve to neutralize it by providing greater punishment for homophobic violence. *See* Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 663 (2001). Finally, since courts generally construe solicitation statutes as "prohibit[ing] the solicitation of *illegal* sexual activity in order to avoid vagueness challenges," *Developments*, *supra* note 1, at 1537 (emphasis added), the fact that engaging in private, consensual sodomy is now a constitutional right, *see* Lawrence v. Texas, 539 U.S. 558 (2003), suggests that application of solicitation statutes to such conduct is unconstitutional.

20 Admittedly, the title of the *Developments in the Law* edition was "Sexual Orientation and the Law," not "Gender Identity and the Law," but the absence of any treatment of transgender legal issues is nonetheless striking given the close connection between sexual orientation and gender identity advocacy today.

21 478 U.S. 186 (1986); *see also Lawrence*, 539 U.S. at 578 ("*Bowers v. Hardwick* should be and now is overruled.").

22 *See Lawrence*, 539 U.S. at 578 ("[The petitioners'] right to liberty under the Due Process Clause gives them the full right to engage in their [homosexual sexual] conduct without intervention of the government.").

23 *See* Associated Press, *Supreme Court Strikes Down Texas Law Banning Sodomy*, N.Y. TIMES (June 26, 2003), http://www.nytimes.com/2003/06/26/politics/26WIRE-SODO.html (noting that while in 1960 every state had an antisodomy law, at the time of *Lawrence* thirteen states had sodomy laws, only four of which targeted solely same-sex couples).

24 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003); Goodridge v. Dep't of Pub. Health, No. 01-1647-A, 2004 WL 5064000 (Mass. Super. Ct. May 17, 2004).

Over the past decade, sixteen additional states, as well as the District of Columbia, have achieved marriage equality — most recently New Mexico.[25] Meanwhile, advocates have raised constitutional challenges in federal court to state and federal laws that discriminate against gay and lesbian couples. One such challenge to the federal Defense of Marriage Act[26] (DOMA), the law that withheld federal benefits from same-sex couples, led the Supreme Court to strike down that section of the law in 2013.[27] Justice Kennedy's language in the majority opinion was sweeping: DOMA "places same-sex couples in an unstable position of being in a second-tier marriage."[28] Another challenge — to the military's "Don't Ask, Don't Tell" policy, which required gay and lesbian servicemembers to remain in the closet — resulted in a district court judge striking down the policy.[29] "Don't Ask, Don't Tell" was subsequently repealed by federal statute before any appeal could be taken.[30] And although a challenge to California's Proposition 8 referendum, which prevented same-sex couples from marrying, was dismissed on standing grounds by the Court in 2013,[31] numerous similar challenges have been filed in district courts around the country.[32] It seems to be only a matter of time before marriage equality becomes a constitutional requirement nationwide.[33]

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[25] *See* Fernanda Santos, *New Mexico Becomes 17th State to Allow Gay Marriage*, N.Y. TIMES, Dec. 19, 2013, http://www.nytimes.com/2013/12/20/us/new-mexico-becomes-17th-state-to-legalize-gay-marriage.html. Given how rapidly states are legalizing marriage equality, it is likely that this citation will be out of date in just a matter of weeks or months.

[26] 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

[27] *See Windsor*, 133 S. Ct. 2675.

[28] *Id.* at 2694.

[29] *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010) (holding that "Don't Ask, Don't Tell" violated the First and Fifth Amendment rights of gay and lesbian servicemembers).

[30] *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

[31] *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

[32] *See* Marisol Bello, *Emboldened, Gay Marriage Activists Eye 50 States*, USA TODAY, Nov. 14, 2013, http://www.usatoday.com/story/news/nation/2013/11/02/gay-marriage-states-supreme-court/3175799 ("Since June [2013], couples have filed 23 lawsuits to end bans [on gay marriage] in 21 states; governors and state attorneys general in at least three states have refused to defend their state bans in court; and county clerks in four states have issued marriage licenses to gay couples despite laws against it.").

[33] Justice Scalia predicted in his 2003 dissent in *Lawrence* that the Court's decision there would be a harbinger of same-sex marriage rights. *See* Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (arguing that after the Court's decision in *Lawrence*, there could be no justification "for denying the benefits of marriage to homosexual couples"). Even if the Supreme Court does not take up a marriage-equality case in the near future, statistician Nate Silver has predicted that by 2016, thirty-two states would be likely to vote in favor of gay marriage in a referendum. Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES: FIVETHIRTYEIGHT BLOG (Mar. 26, 2013, 10:10 AM), http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means.

These legal developments have been coupled with an extraordinary shift in public opinion on lesbian, gay, bisexual, and transgender (LGBT) individuals and rights.[34] Asked whether gay or lesbian relations between consenting adults should or should not be legal, 64% percent of Americans said such relations should be legal in 2013, compared with only 43% in 1977.[35] Similarly, from 1996 to 2013, the percentage of Americans favoring legal recognition of same-sex marriages jumped from 27% to 54%.[36] Gay and lesbian characters now appear in numerous television shows,[37] the President of the United States for the first time supports legalizing same-sex marriage,[38] and the number of Americans that say they know someone who is gay or lesbian has steadily increased.[39] All told, these data demonstrate a substantial shift away from the "sin" and "sickness" conceptions of sexual orientation that the *Harvard Law Review* described twenty-five years ago; even the "neutral difference" conception is being displaced by a more affirming norm of "positive acceptance."

Looking back at the legal developments since the last "Sexual Orientation and the Law" issue, the most substantial gains in legal recognition and equality for LGBT people have unquestionably been in the arena of marriage. And understandably so. After the Supreme Court of Hawaii became the first court to find a constitutional right to same-sex marriage,[40] many gay rights advocates realized that the marriage-equality fight was one they could win.[41] The issue was appealing: it

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[34] *See generally* Michael J. Klarman, Comment, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 132–35 (2013) (offering a more detailed look at the "extraordinary changes in attitudes and practices regarding sexual orientation" over the past decade, *id.* at 132).

[35] *See Gay and Lesbian Rights*, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Mar. 1, 2014).

[36] *See id.*

[37] *How TV Brought Gay People Into Our Homes*, NPR (May 12, 2012, 4:30 PM), http://www.npr.org/2012/05/12/152578740/how-tv-brought-gay-people-into-our-homes (noting not only the "many popular shows on television right now that feature gay characters," but also research demonstrating that "the presence of gay characters on television programs decreases prejudices among viewers").

[38] Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

[39] *See* Brian Montopoli, *Poll: With Higher Visibility, Less Disapproval For Gays*, CBS NEWS (June 9, 2010, 7:02 AM), http://www.cbsnews.com/news/poll-with-higher-visibility-less-disapproval-for-gays (noting that the number of Americans answering "yes" to the question "Do you know someone who is gay or lesbian?" increased from 42% to 77% between 1992 and 2010).

[40] *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993). Hawaii voters subsequently approved an amendment to the state constitution that allowed the state "to reserve marriage to opposite-sex couples." *See* HAW. CONST. art. I, § 23.

[41] *See* Erik Eckholm, *Battle Nears End in First Front Line on Gay Marriage*, N.Y. TIMES, Nov. 9, 2013, at A11 (The Hawaii ruling "opened a huge new front for the gay rights movement, laying the groundwork for scores of legal and political battles ever since," because, as LGBT legal advocate Mary L. Bonauto noted, "it showed that a court can get it."). That said, some gay rights

was both mainstream — invoking traditional family values — and salient — demanding equal access to a revered social institution.[42] For gay and lesbian couples who had formed long-term relationships, particularly those with children, gaining access to the rights and privileges of marriage was not only desirable, but critical.[43] And the demand for access to marriage benefits among gay couples is evident from the high number of same-sex marriages in states that afford the right.[44]

Still, the outsized focus on marriage equality among LGBT advocates has not been without detractors. Three lines of criticism have emerged. First, some have suggested that early advocates erred strategically: by "tr[ying] to achieve [same-sex marriage] reforms too quickly" the movement may have "engender[ed] a political backlash."[45] Evidence suggests the existence of such a backlash, particularly after the Massachusetts Supreme Judicial Court recognized a right to same-sex marriage under the Massachusetts Constitution in 2003.[46] Today, however, that fear has largely dissipated; were the Supreme Court to hold that same-sex marriage is a constitutional right, it "almost

advocates dreamed of marriage equality as early as the Stonewall riots in the 1960s. *See* Carlos A. Ball, *Symposium: Updating the LGBT Intracommunity Debate over Same-Sex Marriage*, 61 RUTGERS L. REV. 493, 495 (2009).

[42] As one gay rights activist argued, although "[t]he general public seems to feel that being gay is an individual existence that precludes family life, . . . [i]n fact, it often involves being part of a family in every possible sense: as spouse, as parent, as child." David W. Dunlap, *Thomas Stoddard, 48, Dies; An Advocate of Gay Rights*, N.Y. TIMES, Feb. 14, 1997, at B6 (quoting Thomas Stoddard) (internal quotation marks omitted).

[43] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013) (noting that the Defense of Marriage Act prevented same-sex couples from, inter alia, "obtaining government healthcare benefits they would otherwise receive," utilizing the "Bankruptcy Code's special protections for domestic-support obligations," and "being buried together in veterans' cemeteries," *id.* at 2694); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 452–85 (1996) (describing the myriad benefits tied to marriage).

[44] *See* Drew DeSilver, *How Many Same-Sex Marriages in the U.S.? At Least 71,165, Probably More*, PEW RESEARCH CTR. (June 26, 2013), http://www.pewresearch.org/fact/tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more (estimating that since Massachusetts legalized same-sex marriage in 2004, at least 71,165 same-sex marriages have occurred).

[45] *See* Ball, *supra* note 41, at 494.

[46] *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 466 (2005) (noting that following *Lawrence* — the Supreme Court case overturning Texas's sodomy ban — and *Goodridge* — the Massachusetts state court case recognizing a right to same-sex marriage — thirteen states passed constitutional amendments defining marriage as between a man and a woman, and that "[h]ad *Lawrence* and *Goodridge* not focused public attention on the issue of same-sex marriage, none of these measures would likely have appeared on the ballot"). Indeed, perhaps fearing such a reaction, when some same-sex couples sought the assistance of the ACLU and Lambda Legal to pursue same-sex marriage through the courts in the early 1990s, those organizations refused. Ball, *supra* note 41, at 493.

certainly would . . . generate[] much less political backlash than an analogous decision ten or twenty years ago."[47]

Second, some have criticized the marriage equality movement on a broader philosophical level. In her famous essay, years before the movement's successes, Paula Ettelbrick, the late LGBT rights advocate, warned that achieving same-sex marriage would render gays and lesbians invisible by threatening their unique identity: "Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms of relationships."[48] Ettelbrick argued that fighting for same-sex marriage would perpetuate the societal preference for traditional marriage — an institution she abhorred[49] — and would discriminate against those who do not adhere to traditional sexual norms.[50] In other words, proponents of this line of criticism wonder, why should so many of society's rights and benefits be dependent on joining the institution of marriage?[51] Supporters of the focus on same-sex marriage would respond that fighting for equal marriage rights simply affords gays and lesbians the *opportunity* to marry and does not force anyone to adhere to any sexual norms.[52] And anyway, even if the institution

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[47] Klarman, *supra* note 34, at 149; *see also id.* at 150–53 (suggesting that backlash is less likely following a holding in favor of same-sex marriage than a pro–racial equality or pro-choice holding because "it is hard to imagine how opponents of same-sex marriage can experience it as affecting their lives as directly and powerfully as critics of *Brown* and *Roe* believed those rulings affected theirs," *id.* at 150, and because "[t]he country is different; the issue is different; and public officials almost certainly would not slyly encourage violence as extremist southern politicians . . . did a half century ago" following *Brown v. Board of Education*, *id.* at 153).

[48] Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 8, 14.

[49] *Id.* at 9 ("[Marriage is] [s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis . . . .").

[50] *See* Paula L. Ettelbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. SCH. J. HUM. RTS. 753, 757 (2000) ("Those who fail to conform to the legal and social structures of family and sexuality — as enforced primarily through marriage — are nonetheless entitled to the expanding number of privileges and benefits awarded to families who conform."); *see also* Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 543 (2009) (exhorting the gay rights movement to "actively resist the glorification of marriage, the bestowal of tangible and intangible advantages on those who marry, and the blaming of the decline of marriage for our many social problems").

[51] This criticism has been extended not only to the gay rights movement's focus on marriage equality, but also to the way in which *Lawrence* was argued and eventually written. *See, e.g.*, Katherine M. Franke, Commentary, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1400 (2004) ("[I]n *Lawrence* the Court relies on a narrow version of liberty that is both geographized and domesticated — not a robust conception of sexual freedom or liberty as is commonly assumed. In this way, *Lawrence* both echoes and reinforces a pull toward domesticity in current gay and lesbian organizing.").

[52] *See* Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 8, 13 (arguing that the author's belief that "two lesbians or two gay men should be entitled to a marriage license does not mean [the author] think[s] all gay people should find appropriate partners and exercise the right").

of marriage is to be scorned in theory, should not equal rights be afforded to gays and lesbians to the extent the institution already exists? Whatever the validity of either side's arguments, the truth is that the gay rights movement has essentially been a marriage equality movement since at least 2004.[53] The Ettelbrick argument has, in other words, been rendered largely moot; most gay rights advocates chose to fight for marriage equality, and that plan has achieved successes.

But this choice introduces a third strain of criticism, which drives this edition of *Developments in the Law*. Some argue that in focusing so much time and so many resources on achieving marriage equality, the gay rights movement has ignored other equally important causes.[54] Same-sex marriage, it may be said, helps one particular constituency — middle-aged and middle-class gays and lesbians in committed partnerships — but it does little to resolve problems that are most significant to other constituencies under the LGBT umbrella: for instance, the travails faced by LGBT children, discrimination against HIV-positive LGBT individuals, and issues related to LGBT military servicemembers, to name just a few. In addition, many transgender advocates argue that even when the movement has focused on some other issues affecting LGB people, it has largely ignored the "T" in "LGBT."[55]

Some gay and lesbian advocates contest these critiques. For one thing, they argue, it would be an overstatement to suggest that the gay rights movement has focused *solely* on marriage equality.[56] Additionally, some argue that a rising tide lifts all boats: even if the focus has been predominantly on marriage, achieving marriage equality will help

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[53] Polikoff, *supra* note 50, at 537 ("[T]he successes and failures of [the marriage equality] movement . . . have dominated all discussions of LGBT issues."). *But see* Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 573 (2009) ("The LGBT rights organizations have not . . . exclusively focused on same-sex marriage and have devoted substantial resources to other LGBT rights issues, including workplace discrimination, education, parenting, other forms of relationship recognition, and the rights of transgender people.").

[54] *See* David Crary, *Some Gay-Rights Activists Regret Focus on Marriage*, SAN JOSE MERCURY NEWS (June 18, 2013, 11:30 AM), http://www.mercurynews.com/breakingnews/ci_23686416/some-gay-rights-activists-regret-focus-marriage (noting that the same-sex marriage fight has "diverted energy and resources from causes that may be harder to market," and that for many in the LGBT community, the top concerns were actually "anti-gay bullying at schools, transgender rights, HIV and AIDS issues, and the need for more laws against anti-gay discrimination in employment, housing and health care").

[55] *See* Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 612 (2000) ("[M]any gay leaders and groups have been inclined to view transgender people as outsiders and to greet the suggestion that transgender people are an integral part of the gay community with equal parts of astonishment and anger.").

[56] *See* Stein, *supra* note 53, at 573.

end discrimination against LGBT people in other areas as well.[57] Yet a decade after the first successful marriage equality case, little progress has been made in numerous other areas rife with discriminatory laws and practices. Even more troubling going forward is the fear that once the marriage equality fight is won nationwide, the urgency of fighting for other LGBT rights will diminish. This fear has been borne out in other countries. Once marriage equality passed in the Netherlands, "it was very hard to get people to engage on other issues the movement cared about, like discrimination against LGBT seniors in nursing homes and bullying in schools."[58] Likewise, Canada's national LGBT organization saw a thirty to forty percent decrease in monthly donations following that country's legalization of same-sex marriage in 2004.[59] There is a similar concern that, after the success of the same-sex marriage movement in America, support and publicity for other LGBT issues will decline.

With that threat in mind, this edition of *Developments in the Law* addresses five legal issues removed from the marriage equality fight. Each of these areas of the law impacts a subset of the broader LGBT community — a subset that may not directly benefit from the legalization of same-sex marriage. In so doing, the chapters seek to shine light on the latest developments in each of those areas and to offer legal analysis for future challenges. The purpose is not to belittle the attention same-sex marriage has received or to dispute the need for continuing progress, but rather simply to turn the focus to other issues of equal importance as marriage equality is rapidly achieved.

Chapter I focuses on issues affecting LGBT students in public schools — in particular, bullying and anti-gay speech. Though bullying in schools is not solely a "gay" issue, LGBT students disproportionately face bullying,[60] and there have been a number of high-profile cases of LGBT students committing suicide as a result of bullying.[61]

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[57] *See* Stoddard, *supra* note 52, at 12 ("[M]arriage is . . . the political issue that most fully tests the dedication of people who are *not* gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men."). *But see* J. Lester Feder, *Could a Win on Marriage Weaken LGBT Organizations?*, BUZZFEED (Mar. 29, 2013, 2:02 PM), http://www.buzzfeed.com/lesterfeder/could-a-win-on-marriage-weaken-lgbt-organizations (noting that South Africa, despite "unprecedented LGBT protections" and the legalization of same-sex marriage in 2006, "suffers staggering rates of anti-LGBT hate crimes").

[58] Feder, *supra* note 57.

[59] *Id.*

[60] On the grave effects of anti-gay bullying, see, for example, Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 225 (2005), noting one study that found that, among teenage victims of anti-gay discrimination in particular, 75% experienced a decline in academic performance, 39% had truancy problems, and 28% dropped out of school.

[61] *See* Jesse McKinley, *Several Recent Suicides Put Light on Pressures Facing Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9.

In response, nearly every state has passed a statute requiring local schools to adopt antibullying policies.[62] The Chapter describes the legal developments in the case law regarding antibullying measures, with particular focus on two cases that have come before the circuit courts on the constitutionality of certain restrictions on anti-gay speech.[63] Applying the few Supreme Court cases on the issue of speech in schools, the Chapter argues that the Court's precedent does not offer a clear answer to whether prohibitions of anti-gay speech are constitutional.[64]

Still, the Chapter concludes that some prohibitions of purely political anti-gay speech should be treated as unconstitutional due to a comparison with similar cases upholding pro-gay speech. In short, the latter cases struck down schools' prohibitions of students promoting pro-gay messages,[65] wearing gender-nonconforming clothing,[66] and taking a same-sex partner to prom.[67] Courts achieved those outcomes by noting that, no matter how offensive speech may be, so long as the speech itself is "quiet and peaceful" and can be "easily ignored,"[68] a school must protect it against those who disagree[69] in order to promote debate and discussion of popular issues in schools.[70] Since the very same can be said about the more benign forms of anti-gay speech that were challenged in the two circuit court cases, such speech — though harmful — should be protected under similar First Amendment reasoning. Doing otherwise would threaten to roll back the protections afforded to pro-gay speech, protections that have been vital to promoting gay rights in schools and in society more generally.

Chapters II and III turn the focus to legal issues facing transgender persons in two arenas: schools and prisons. Addressing the former,

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[62] *See infra* ch. I, p. 1704.

[63] *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 875 (7th Cir. 2011) (holding that a school could not, absent a showing of a substantial disruption to academic activities, prohibit a student from wearing a shirt that read "Be Happy, Not Gay"); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171, 1182 (9th Cir. 2006) (holding that a school could, within the bounds of the First Amendment, prohibit a student from wearing a shirt reading "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'"), *vacated as moot,* 549 U.S. 1262 (2007).

[64] *See infra* ch. I, pp. 1713–17.

[65] *See* Gillman *ex rel.* Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1375 (N.D. Fla. 2008).

[66] *See* McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 701 (N.D. Miss. 2010).

[67] *See id.*; Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980).

[68] *Fricke*, 491 F. Supp. at 388.

[69] *See Gillman*, 567 F. Supp. 2d at 1373–74 ("Students who advocated tolerance and acceptance of homosexuals . . . did not force their views and opinions on other students," and "[s]tudents were free to disagree with the message or walk away." *Id.* at 1373. Therefore, "the law requires school officials to punish the disruptive student, not the student whose speech is lawful." *Id.* at 1374.).

[70] *Id.* at 1374 ("[P]olitical speech involving a controversial topic such as homosexuality is likely to spur some debate, argument, and conflict," but "[t]he nation's high school students, some of whom are of voting age, should not be foreclosed from that national dialogue.").

Chapter II begins by noting that as transgender students have come out at earlier and earlier ages,[71] the difficulties they face have become more pronounced. Transgender youth face psychological challenges in realizing that their physical bodies are out of sync with their gender identity, as well as societal challenges from the hostile climate they may face in public — particularly in schools.[72] Thus, schools have been forced to accommodate students' gender identities in a variety of contexts and have done so in a variety of ways.

The Chapter focuses on two areas: restrooms and sports. Regarding restrooms, under prevailing policies, students are forced to choose between using a bathroom that does not align with their gender identities or facing backlash from peers, school administrators, and parents for using the bathroom that does.[73] But policies are changing. The Chapter describes two state court cases,[74] as well as a California state statute,[75] all of which allow — to differing degrees — greater access for children to restrooms that correspond to their gender identities.[76] The Chapter analyzes these developments, concluding that the California statute — which promises equal access and deference to transgender students' self-understanding of their gender identities[77] — offers the best prospect of minimizing interference with transgender students' academic achievement while teaching other students to respect gender difference.[78]

Turning to sports, the Chapter emphasizes the importance of participation in school sports for all students and describes the difficulties that some students have under the status quo policy of assignment by biological sex.[79] But as with bathrooms, there have been a number of recent developments, both at the collegiate level and at the interscholastic level, that have allowed students access to sports teams based on their professed gender identities, and have thereby allowed such students to participate in school sports.[80]

Chapter III focuses on transgender inmates in American prisons, similarly describing both the status quo policies that have failed to

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[71] *See* Chris Purdy, *More Students Coming Out at* [sic] *as Transgender, Expert Says*, CTV NEWS (Sept. 3, 2013, 7:44 AM), http://www.ctvnews.ca/canada/more-students-coming-out-at-as-transgender-expert-says-1.1437649.

[72] *See infra* ch. II, pp. 1724–26.

[73] *See id.* at 1728–29.

[74] *See id.* at 1731–34.

[75] *See id.* at 1734–35.

[76] *See, e.g.*, *California Law Allows Transgender Students to Pick Bathrooms, Sports Teams They Identify With*, CBS NEWS (Aug. 12, 2013, 10:46 PM), http://www.cbsnews.com/8301-250_162-57598231.

[77] *See infra* ch. II, pp. 1734–35.

[78] *See id.* at 1735–36.

[79] *See id.* at 1737–38.

[80] *See id.* at 1737–42.

consider the needs of transgender inmates and highlighting the new policies that some jurisdictions have implemented, which represent an important step forward. Under the status quo, transgender inmates who have not undergone gender reassignment surgery are housed based on their birth sex.[81] This policy ignores gender identity entirely, housing transgender individuals with inmates who express the opposite gender identity — and thereby placing transgender inmates at risk.[82] Additionally, prisons routinely place transgender inmates in segregation or isolation against their will under the justification of keeping them safe[83] — a practice that itself can lead to serious health and safety problems.[84] These policies are especially deleterious to the transgender community given the community's disproportionate rate of incarceration.[85]

The Chapter makes two arguments: First, it argues that, because prisons receive great deference when their policies are challenged through litigation, it would be difficult, if not impossible, to invalidate the aforementioned policies in court.[86] Second, the Chapter therefore argues that reform at the policymaking level would be the most effective mode of change, and it describes three such recent policies that should serve as models for jurisdictions seeking to adopt new policies for transgender inmates.[87] Those policies implemented a variety of important changes that better take into consideration the needs of transgender inmates: they take gender identity and vulnerability into consideration along with genitalia when making housing decisions; they create review boards to assess inmates' gender-related issues, often including a transgender person or transgender expert on the panel; they limit the circumstances under which prisons can place transgender inmates in solitary confinement; and they include other policies related to the treatment of transgender inmates once housed.[88] Though the policies will not mollify all critics,[89] the Chapter argues

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[81] NAT'L CTR. FOR LESBIAN RIGHTS, RIGHTS OF TRANSGENDER PRISONERS 1 (2006), *available at* http://www.nclrights.org/legal-help-resources/resource/rights-of-transgender-prisoners.

[82] *See infra* ch. III, pp. 1747–49.

[83] *See* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 544 (2009).

[84] *See infra ch.* III, p. 1749–50 (arguing that isolating transgender inmates can have serious psychological and emotional consequences, and that isolation places them with other inmates who are usually the most violent).

[85] *See* JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (2011), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

[86] *See infra* ch. III, pp. 1751–56.

[87] *See id.* at 1758–62.

[88] *See id.*

[89] *See id.* at 1764–66.

that they are important steps forward and should prompt other jurisdictions to take similar steps.[90]

Chapter IV examines the role of animus in the Supreme Court's recent gay rights jurisprudence and argues that laws broadly criminalizing HIV exposure may be unconstitutional under an animus-centered critique. Although this issue, like that in Chapter I, does not only affect gay people, gay men are disproportionately likely to be infected with the HIV virus[91] — thus, the issue is particularly important to that subset of the LGBT community. The Chapter begins with a description of the Supreme Court's gay rights cases, including *Romer v. Evans*,[92] *Lawrence v. Texas*,[93] and *United States v. Windsor*,[94] and concludes that instead of applying traditional substantive due process or tiers of scrutiny in equal protection jurisprudence, those cases focused on how the government views and regulates politically unpopular groups — an animus-based reasoning — to strike down antigay legislation.[95] Turning then to HIV "exposure" crimes, the Chapter describes the general trends in some state laws: statutes tend not to include proof of intent to transfer HIV,[96] frequently do not require activities that create a high risk of transmission,[97] and are sometimes extraordinarily broad.[98]

Combining these analyses, the Chapter argues that the animus-based reasoning from gay rights cases suggests that some HIV-exposure statutes are unconstitutional. First, the statutes are overbroad because they criminalize a range of sexual activities that pose little to no risk of infection.[99] As a result, the statutes stigmatize much intimate contact involving HIV-diagnosed individuals that presents negligible risk of transmission, despite rational public policy reasoning

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[90] *See id.* at 1762–64.

[91] *HIV Among Gay, Bisexual, and Other Men Who Have Sex with Men*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/risk/gender/msm (last updated Feb. 21, 2014) ("Gay, bisexual, and other men who have sex with men (MSM) are more severely affected by HIV than any other group in the United States.").

[92] 517 U.S. 620 (1996).

[93] 539 U.S. 558 (2003).

[94] 133 S. Ct. 2675 (2013).

[95] *See infra* ch. IV, pp. 1768–75.

[96] *See, e.g.*, ARK. CODE ANN. § 5-14-123(b) (2013) (making it illegal for a person who knows his HIV-positive status to engage in any act of "sexual penetration with another person" without first informing his partner "of the presence" of HIV).

[97] *See, e.g.*, MICH. COMP. LAWS § 333.5210 (West 2011) (prohibiting "any . . . intrusion, however slight, of any part of [an HIV-positive individual's] body or of any object into the genital or anal openings of another person's body" when that person has not first been informed that her sexual partner is infected with HIV).

[98] *See, e.g.*, MISS. CODE ANN. § 97-27-14(1) (2006 & Supp. 2013) (merely criminalizing "exposure," but providing that "[p]rior knowledge and willing consent to the exposure is a defense to a charge brought under this paragraph").

[99] *See infra* ch. IV, pp. 1780–83.

to the contrary. Second, the social and political context surrounding the implementation of most state HIV-exposure statutes suggests that much of what drove legislatures to enact the broadest criminal exposure laws was "public hysteria" — in other words, animus — rather than rational policymaking.[100] Thus, the Chapter provocatively concludes, sweeping HIV-exposure statutes should be declared unconstitutionally overbroad under the same reasoning as the post-*Romer* gay rights cases.[101]

Finally, Chapter V focuses on LGBT issues in the military, looking back at the successful repeal of "Don't Ask, Don't Tell," analyzing how that success was brought about, and looking forward to the remaining issues yet to be addressed. The Chapter begins by tracking the treatment of gay and lesbian servicemembers through various eras of military history: the explicit bar on such servicemembers beginning in the 1940s, the increased enforcement of the bar after World War II, the passage of "Don't Ask, Don't Tell" in the early 1990s, the challenges to the "Don't Ask, Don't Tell" policy in federal court over the next two decades, and the eventual repeal of the policy in 2010.[102] In analyzing the repeal effort, the Chapter notes that the repeal was achieved through a mixture of litigation, grassroots advocacy, and legislation. Grassroots advocacy helped demonstrate the lack of legitimate reasons for forcing gay and lesbian servicemembers to remain in the closet,[103] and litigation ultimately forced Congress to repeal the law in order to allow military leaders to change the policy on their own terms.[104]

The Chapter looks both forward and backward. Looking forward, the Chapter notes areas in which LGB servicemembers still are not treated equally: the Uniform Code of Military Justice prohibits sodomy between consenting adults, servicemembers who were discharged under "Don't Ask, Don't Tell" have not been universally allowed to return to service, and many still suffer the consequences of other than honorable discharges.[105] Additionally, the military has not abolished or revised the outright ban on transgender servicemembers.[106] Only when these deficiencies are addressed will justice truly be achieved.

Looking backward, the Chapter explores the lessons learned from the repeal of "Don't Ask, Don't Tell." First, the Chapter concludes that impact litigation can be powerful, both in galvanizing the LGBT

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[100] *See id.* at 1787–89.
[101] *See id.* at 1789–90.
[102] *See infra* ch. V, pp. 1791–1802.
[103] *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated,* 658 F.3d 1162 (9th Cir. 2011) .
[104] *See infra* ch. V, pp. 1801–02.
[105] *See id.* at 1802–05.
[106] *See id.* at 1805–06.

movement when gay servicemembers lost cases and in prompting the legislature to act when a gay servicemember finally won in federal court.[107] Second, the Chapter suggests that LGBT advocates should be skeptical of using evidence alone to win civil rights cases: though evidence is important, courts lack standardized criteria for deciding which evidence to accept, and decisionmakers can sometimes choose to ignore evidence that does not support their preferred outcome.[108] The Chapter concludes by suggesting ways that these lessons could be applied to make progress in other areas of LGBT law, particularly those areas addressed by the other Chapters of this edition of *Developments in the Law*.[109]

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Sexual orientation and gender identity law is swiftly moving in the direction of equality. But while great progress has been made since the "Sexual Orientation and the Law" edition twenty-five years ago, the five chapters of this *Developments in the Law* edition are intended to contribute to areas where the fight must persist beyond marriage equality. Though the chapters are intended to address a wide swath of legal issues affecting the LGBT community, they are by no means the only issues, nor are they necessarily the most important. To name only a few more: it is currently legal to fire or refuse to hire someone based on their sexual orientation or gender identity in twenty-nine states;[110] since 1977, men who have had sex with men — even once — have been barred from donating blood in the United States;[111] public accommodations providing wedding services have refused to provide those services to same-sex marriage celebrants on religious and free speech grounds;[112] hate crimes against LGBT persons persist[113] despite

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[107] *See id.* at 1807–08.

[108] *See id.* at 1808–11.

[109] *See id.* at 1813–14.

[110] *Employment Non-Discrimination Act*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act (last visited Mar. 1, 2014).

[111] *See* Dwayne J. Bensing, Comment, *Science or Stigma: Potential Challenges to the FDA's Ban on Gay Blood*, 14 U. PA. J. CONST. L. 485, 486 (2011).

[112] Such a case recently came before the New Mexico Supreme Court. In *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), a photography company refused to offer its services to a customer because of her sexual orientation, in violation of the New Mexico Human Rights Act. *Id.* at 58–60. After the New Mexico Human Rights Commission held that Elane Photography violated that Act, the company appealed, claiming that the Act violated its constitutional freedoms of speech and religion. *Id.* at 60. The New Mexico Supreme Court rejected Elane Photography's arguments and affirmed summary judgment for the customer. *Id.* For a more detailed discussion of the free speech portion of *Elane Photography*, see Recent Case, 127 HARV. L. REV. 1485 (2014).

[113] *See, e.g.*, Alison Klayman, *'An Attack on Equality,'* N.Y. TIMES (Aug. 6, 2013), http://www.nytimes.com/2013/08/07/opinion/an-attack-on-equality.html (noting that even in "gay-

criminalization by federal statute;[114] and it is an open question whether a prison must pay for a transgender inmate's gender reassignment surgery.[115]

As part of an effort to ensure that these disparate constituencies too gain equality, it is incumbent on those in the academy to focus their scholarship and advocacy on issues other than same-sex marriage in the years ahead. Numerous scholars have done so already, and the chapters that follow contribute to that body of work. Following the inevitable success of the marriage equality movement in the United States, the numerous other forms of discrimination against LGBT people must too be eradicated. Only then, as President Obama demanded, will "our gay brothers and sisters [be] treated like anyone else under the law."[116]

friendly" New York City, a young, same-sex couple was called "faggots" and beaten on May 5, 2013, outside Madison Square Garden in broad daylight).

114 *See* Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, 18 U.S.C § 249 (2012).

115 *See* Kosilek v. Spencer, 889 F. Supp. 2d 190 (D. Mass. 2012) (holding, in an "unusual case," *id.* at 196, that a prisoner's gender identity disorder constituted a serious medical need that triggered Eighth Amendment protection, and that the transgender prisoner "has proven that his Eighth Amendment rights have been violated by the [Department of Correction's] refusal to provide the sex reassignment surgery prescribed by its doctors," *id.* at 204), *opinion withdrawn and reh'g en banc granted,* 2014 U.S. App. LEXIS 2660 (1st Cir. Feb. 12, 2014).

116 President Barack Obama, Second Inaugural Speech (Jan. 21, 2013) (transcript available at http://www.nytimes.com/2013/01/21/us/politics/obamas-second-inaugural-speech.html).