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A journal of legal theory and practice "to the end that human rights shall be more sacred than property interests."

—Preamble, NLG Constitution

The push for Lesbian, Gay, Bisexual, Trangender, and Queer (LGBTQ) rights has gained momentum during the past few years. A national discussion on how LGBTQ people should be treated under our laws has been stoked in courts, legislatures, and media around the country. It's especially appropriate that in the midst of this exciting, complex, and fast-evolving debate we present this theme issue containing progressive views and analysis on some of the legal issues relating to LGBTQ justice.

In 2003, the Massachusetts Supreme Judicial Court, riding a national wind of change, ruled that its gay residents should be allowed to marry in the historic case of *Goodrich v. Department of Public Health*. The decision was both a victory for equality and an electoral opportunity for reactionaries. George W. Bush tapped into the homophobic backlash to *Goodrich* by gay-baiting in his 2004 campaign, which included a proposed amendment to the U.S. Constitution banning same-sex marriage as part of his platform.

Just nine years later, it's hard to imagine such overt anti-gay animus as part of a winning presidential electoral strategy. The country's tolerance for this particular sort of bigotry is starting to ebb. The age demographics amenable to it are receding and dying out as America's collective closet empties and LGBTQ people make themselves known to younger generations. As a sign of this change, all three branches of the federal government, and many state governments, are moving toward marriage equality.

Also in 2004 Michigan voters approved the "Michigan Marriage Amendment" ("MMA") which enshrined some of the most homophobic and discriminatory laws in the nation into that state's constitution. In addition to banning same-sex marriage, the MMA bars the recognition of civil unions and the formation of contracts conferring certain rights similar to those enjoyed by married heterosexual couples. Pushed toward passage by the same moral

Continued inside the back cover

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Brendan Beery
& Daniel Ray

MICHIGAN'S INVISIBLE PEOPLE

Introduction

The Michigan Marriage Amendment[1] (the "Amendment" or the "MMA") was enacted to prevent Michigan from recognizing same sex relationships.[2] Gays and lesbians who are in committed, intimate relationships must live in two realities. In the first, they as individuals live side-by-side with heterosexual couples whose relationships are recognized by Michigan law. But in a second alternate reality, same-sex couples and their families are cast into a legal and political Pottersville[3] where, as far as Michigan is concerned, they do not exist.

In our view, this alternate reality for same sex couples violates the Fourteenth Amendment promise of equal protection of the laws. We are the principal authors of an amicus brief filed on behalf of a Michigan couple, April DeBoer and Jayne Rowse, who are challenging the MMA. Their case, *DeBoer v. Snyder*,[4] is pending in the United States District Court for the Eastern District of Michigan. This article summarizes, and excerpts heavily from, our amicus brief.[5]

April and Jayne, and their constitutional claims

April DeBoer and Jayne Rowse live in Hazel Park, Michigan. They are in a long-term, committed relationship, and they would marry if allowed to by Michigan law. Rowse adopted N, an infant child, in 2009. She later adopted J, also an infant child. In 2011, DeBoer adopted infant child R.[6] DeBoer and Rowse wanted to jointly adopt all three children, but the Michigan Adoption Code restricts joint adoption to married couples.[7] DeBoer and Rowse challenged this restriction in an equal protection suit. They later added Equal Protection and Due Process claims against the MMA. As of this writing, the parties have filed cross-motions for summary judgment, and the District Court is expected to rule later this year.

Controlling law

Courts usually defer when the government classifies us, as long as the classification is not drawn on suspect or quasi-suspect grounds. The rule is a familiar one:

> Our decisions presume the constitutionality of … statutory discriminations and require only that the classification challenged be rationally related to a legitimate

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Brendan Beery is an associate professor at Thomas M. Cooley Law School, Lansing, Michigan. Daniel Ray is a professor, also at Thomas M. Cooley Law School.

> state interest."[8] The challenger bears the burden of negating any legitimate interest that might justify the law, or must prove that the classification does not rationally relate to any legitimate interest. The government enjoys a presumption of constitutionality,[9] and courts are free to assume any reasonable justification for the law, even if that justification is not something the government actually had in mind.[10] This means that on rational basis review, the government usually wins on rational basis review.

Formally, classifications based on sexual orientation get rational basis review. But the judicial scrutiny at work in anti-gay discrimination cases is qualitatively different from the garden-variety rational basis review we see in the typical case. This is because more careful judicial attention is required when the evidence shows disparate treatment of a politically unpopular group. The Second Circuit, applying intermediate scrutiny—the level above rational basis review—said that "several courts have read the Supreme Court's recent cases in this area to suggest that rational basis review should be more demanding when there are 'historic patterns of disadvantage suffered by the group adversely affected by the statute.'"[11]

The history of a "more demanding" review between rational basis and intermediate scrutiny is traced to *United States Dept. of Agriculture v. Moreno*,[12] where the Supreme Court said that animus is not a legitimate state interest. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare…desire to harm a politically unpopular group cannot constitute a legitimate government interest."[13] Not surprisingly, the idea that the government cannot target an unpopular group and then seek judicial cover in rationality review has found a meaningful place in cases involving anti-gay discrimination.[14]

Romer v. Evans[15] was the first Supreme Court decision to apply the *Moreno* rule to a case involving gay rights. In *Romer*, a Colorado ballot measure denied gays and lesbians the protection of municipal anti-discrimination ordinances. Justice Kennedy, writing the majority opinion, cited *Moreno*, stating "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[16] More recently, in *United States v. Windsor*,[17] the Supreme Court ruled § 3 of the federal Defense of Marriage Act invalid, under the equal protection language of the Fifth Amendment Due Process Clause. Citing *Moreno*, Justice Kennedy instructed that "[i]n determining whether a law is motivated by an improper animus or purpose, 'discriminations of an unusual character' especially require careful consideration."[18]

The Supreme Court's decisions in *Moreno*, *Romer*, and *Windsor* should be understood as modifying the burden of persuasion in cases involving politically unpopular groups. In the typical rational basis case, the challenger has

the burden of showing that no legitimate interest justifies the law or that the means adopted are not rationally related to some legitimate end.[19] But even with rational basis review, when the law targets a politically unpopular group, the Supreme Court has said, "We insist on knowing the relation between the classification adopted and the object to be attained."[20]

In a case like *Romer* or *Windsor*, once the challenger has shown that a law targets a "politically unpopular group,"[21] the burden shifts to the state to satisfy a more careful means-ends inquiry. The Supreme Court has mandated that, in cases involving purposeful discrimination against minorities, the burden of persuasion rests with the state by insisting that the connection between the classification drawn and the interest to be obtained be more closely related.

Arguments

Our amicus brief makes two main points. First, the amendment was motivated by the same kind of discriminatory animus the Supreme Court found in *Romer* and *Windsor*. As one of more than a dozen anti–same-sex marriage initiatives put up nationwide for a vote during the 2004 elections, the MMA was part of a pattern and practice of discrimination against gays and lesbians designed to assure their continuing legal and political inferiority. Second, the amendment is a facially overbroad, status-based enactment—one that punishes same-sex couples because of who they are. Gays and lesbians are set apart from all others on the basis of a single characteristic—sexual orientation —and their relationships are denied any recognition under Michigan law. Ultimately, the MMA renders same-sex relationships invisible in the eyes of the state. It deprives citizens in those relationships of the benefits and protections, as well as the burdens, of Michigan law. Little need be said about such a law except that "[i]t is not within our constitutional tradition to enact laws of this sort."[22]

Discriminatory animus

Many courts have recognized the incontrovertible evidence that gays and lesbians have suffered a long history of invidious discrimination.[23] More specifically, Judge Walker, whose opinion in *Perry v. Schwarzenegger*[24] was reinstated when the Supreme Court vacated and remanded the Ninth Circuit opinion in *Hollingsworth v. Perry*,[25] created a thorough record with findings and conclusions like these:

- "Gays and lesbians have been victims of a long history of discrimination."[26]
- "Public and private discrimination against gays and lesbians occurs…in the United States."[27]
- "Well-known stereotypes about gay men and lesbians…imagine [them] as disease vectors or as child molesters who recruit young children into homosexuality."[28]

- "Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians."[29]

Statements made by various authors and proponents of the MMA suggest that the motivating force behind it was "a bare…desire to harm a politically unpopular group."[30] For example, the Michigan American Family Association (MI-AFA) describes itself as "Michigan's leading voice for the preservation of traditional values and institutions such as marriage between one man and one woman."[31] Gary Glenn, MI-AFA's president, claims to have co-authored the MMA.[32] Because it was "the initial proponent, a co-author, and a leading advocate of the Amendment," MI-AFA felt itself well suited to "assist the [Michigan Supreme] Court in confirming the intent of the authors of the Amendment and as understood by the citizens who approved it."[33]

The point of the MMA, "[a]s Glenn explained in scores of public appearances, debates, and media interviews in 2004," was "government *recognition*."[34] The MI-AFA and other supporters of the amendment did not want the State of Michigan to recognize same-sex relationships *for any purpose*.[35] In other words, the purpose of the MMA was to make all relationships between same-sex partners legally invisible to the state. Any law that seeks to make an entire class of citizens a nullity—to place those citizens beyond the state's recognition—must be constitutionally infirm. A clearer denial of equal protection of the laws is impossible to imagine.

Status-based enactment

The MMA is a classic status-based enactment. It singles out one group of people—gays and lesbians—and treats them differently because of the immutable characteristic that defines the class: sexual orientation. This discriminatory treatment results not from anything that is morally culpable or blameworthy but, as Justice Jackson stated in a different context, because of a characteristic over which the targeted group "had no choice, and…from which there is no way to resign."[36]

This was, in part, what caused the Supreme Court to take such offense at the Colorado ballot initiative in *Romer*. As architect of the decision Justice Kennedy recalled the lessons of the past. "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'"[37] But the constitutional amendment in *Romer* went beyond just creating a second class of citizens. Colorado tried to make "a class of persons *a stranger to its laws*."[38] Michigan has chosen a more direct route than Colorado by barring *any* recognition by the state of same-sex relationships for *any* purpose. While the tactics differ the outcome is no more acceptable in Michigan than it was in Colorado.

For equal protection purposes, the key word in the MMA is "recognized." Gays and lesbians who stand publicly as dignified and committed couples may not be recognized by the state. Michigan may not see them; it may not acknowledge their humanity; it may not even grant that they exist under the law.

The Michigan Supreme Court interpreted the MMA in *National Pride at Work, Inc. v. Granholm*,[39] by stating, "'Recognize' is defined as 'to perceive or acknowledge as existing, true, or valid[.]' When a public employer attaches legal consequence to a relationship, that employer is clearly 'recognizing' that relationship. That is, by providing legal significance to a relationship, the public employer is acknowledging the validity of that relationship."[40] So Michigan may not perceive or acknowledge that same-sex couples even exist.

This prohibition extends to any "similar union" between same-sex persons that approximates marriage. Returning to *National Pride at Work*, the Michigan Supreme Court construed "union" in the broadest conceivable terms to mean "'something formed by uniting two or more things; a combination … joined … for some common purpose.' Certainly, when two people join together for a common purpose and legal consequences arise from that relationship, i.e., a public entity accords legal significance to this relationship, a union may be said to be formed."[41] Thus, Michigan must make a stranger to its laws any associated same-sex persons whose combination might implicate any legal significance.

And to remove any doubt, the Michigan Supreme Court explained the phrase, "for any purpose":

> "Any" means "every; all[.]" Therefore, if there were any residual doubt regarding whether the marriage amendment prohibits the recognition of a domestic partnership …, this language makes it clear that such a recognition is indeed prohibited "for any purpose," which obviously includes for the purpose of providing health-insurance benefits. Whether the language "for any purpose" is essential to reach the conclusion that health-insurance benefits cannot be provided under the instant circumstances, or merely punctuates what is otherwise made clear in the amendment, the people of this state could hardly have made their intentions clearer."[42]

The MMA, as authoritatively construed by the Michigan Supreme Court, requires that any time a same-sex couple "join[s] together for a common purpose and legal consequences arise from that relationship," for every reason and all reasons, including the provision of health-care benefits, the State of Michigan must treat that relationship as if it does not exist. The purpose of the MMA could not be "clearer." For this reason alone, the MMA is facially unconstitutional. No society that relies on the goodness and decency of its citizens for its continuing vitality as a body politic may treat any person or class of persons as invisible or non-existent.

Conclusion

The reasoning that led to the *Romer* Court finding that Colorado's ballot measure was unconstitutional applies with equal force here, as does its ultimate conclusion: "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[43] The MMA is a brazen exemplar of majoritarian overreach, motivated by those who feel the need to subordinate gays and lesbians for who they are. As decided by the Michigan Supreme Court, the MMA is so overbroad as to be beyond salvage.

We close here as we closed our brief. Ours is not a Constitution of caste or class. It is not a Constitution that allows a political majority to subordinate a defenseless minority just because it can. It is not a Constitution that turns its back on any class, much less a class that is morally blameless. "It is not within our constitutional tradition to enact laws of this sort."[44] The Michigan Marriage Amendment is unconstitutional.

NOTES

1. MICH. CONST. art. I, § 25, which says, "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."
2. *See infra* notes 30-35 and accompanying text.
3. With apologies to fans of *It's a Wonderful Life* (1946), which tells the story of George Bailey, who gets to see what the world would have been like had he never been born.
4. No. 2:12-cv-10285-BAF-MJH. Defendants are Governor Richard Snyder, Attorney General Bill Schuette, and the County Clerk of the plaintiffs' county of residence, Lisa Brown. Brown, a Democrat, was elected to the county clerk's office in November 2012 over the incumbent, Bill Bullard, a Republican. Bullard opposed plaintiffs' suit, and had moved to dismiss. Brown withdrew Bullard's motion to dismiss. *See* Notice of Withdrawal of Defendant Bullard's Motion to Dismiss (Doc. No. 52), DeBoer v. Snyder, No. 2:12-cv-10285-BAF-MJH.
5. *See* Brief of Michigan Law Professors as Amici Curiae in Support of Plaintiffs (Doc. No. 65), DeBoer v. Snyder, No. 2:12-cv-10285-BAF-MJH. While we are the principal authors, the brief was a collaborative effort on the part of all its many signatories. We are grateful for their help and support.
6. These facts are taken from the district court's Opinion and Order Denying Defendants' Motion to Dismiss the Amended Complaint (Doc. No. 54) at 2, DeBoer v. Snyder, No. 2:12-cv-10285-BAF-MJH.
7. *See* MICH. COMP. LAWS § 710.24 (2004), which permitted adoption by a single person or by a married couple. In 2012, this section was amended to allow adoption by one spouse acting without the other.
8. New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

9. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).
10. *See id*. at 154.
11. Windsor v. United States, 699 F.3d 169, 180 (2d Cir. 2012) (quoting Massachusetts v. United States, 682 F.3d 1, 10-11 (1st Cir. 2012)), aff'd, United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013).
12. 413 U.S. 528 (1973).
13. *Id*. at 534.
14. A similar analysis can be seen in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), involving denial of a group home permit for a facility to house mentally disabled persons. Justice White concluded "that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded… ." *Id*. at 450.
15. 517 U.S. 620 (1996).
16. *Id*. at 634.
17. 570 U.S. ___, 133 S. Ct. 2675 (2013). Lawrence v. Texas, 539 U.S. 558 (2003) is also instructive. There, the Supreme Court ruled that Texas had no legitimate government interest that would justify criminalizing the consensual, private, intimate conduct of adults.
18. *Windsor*, 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633).
19. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).
20. *Romer,* 517 U.S. at 632.
21. United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
22. *Romer*, 517 U.S. at 633.
23. *See, e.g.*, Massachusetts v. United States, 682 F.3d 1, 11 (1st Cir. 2012) ("As with the women, the poor and the mentally impaired, gays and lesbians have long been the subject of discrimination."); High Tech Gays v. Defense Indus. Security Clear. Office, 895 F.2d 563, 573 (9th Cir. 1990) ("[H]omosexuals have suffered a history of discrimination."); Ben-Shalom v. Marsh, 881 F.2d 454, 465-66 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree."); Golinski v. United States Office of Pers. Mgmt., 824 F.Supp.2d 968, 985 (N.D. Cal. 2012) ("There is no dispute in the record that lesbians and gay men have experienced a long history of discrimination."). *See also* Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (quoting Plyler v. Doe, 457 U.S. 202, 216, n. 14 (1982)) ("[H]omosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely…to reflect deep-seated prejudice rather than…rationality.'")
24. 704 F.Supp.2d 921 (N.D. Cal. 2010), aff'd *sub nom* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).
25. 570 U.S. ___, 133 S. Ct. 2652 (2013).
26. *Perry*, 704 F. Supp.2d at 981.
27. *Id*.
28. *Id*. at 982-83.
29. *Id*. at 985.
30. United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

31. Brief of Amicus Curiae American Family Association of Michigan, in National Pride at Work, Inc. v. Granholm, 481 Mich. 56, 748 N.W.2d 524 (2008), *available at* 2007 WL 3325618 at *1.
32. *Id*.
33. *Id*.
34. *Id*. (emphasis in original).
35. MICH. CONST. art. I, § 25 (emphasis added).
36. Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting).
37. Romer v. Evans, 517 U.S. 620, 623 (1996) (*quoting* Plessy v. Ferguson, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting)).
38. *Romer,* 517 U.S. at 635 (emphasis added).
39. 481 Mich. 56, 748 N.W.2d 524 (2008).
40. *Nat'l. Pride at Work*, 748 N.W. 2d at 537 (2008) (quoting Random House Webster's College Dictionary (1991) (emphasis added)).
41. *Nat'l. Pride at Work*, 748 N.W. 2d at 533-534 (quoting Random House Webster's College Dictionary (1991)).
42. *Nat'l. Pride at Work*, 748 N.W. 2d at 538 (quoting Random House Webster's College Dictionary (1991)).
43. *Romer*, 517 U.S. at 635.
44. *Id*. at 633.

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Nathan Goetting

GAY MARRIAGE IS A FUNDAMENTAL RIGHT

Introduction[1]

The Supreme Court's right-to-marry and gay rights jurisprudence are in an untenable state. A sea change is sure to occur, probably sooner rather than later. The much-celebrated case of *U.S. v. Windsor*,[2] decided earlier this year, which overturned a homophobic statute[3] denying federal recognition of gay marriages that state laws had already recognized, will eventually be surpassed in significance by a case that ends once and for all our current bifurcated constitutional definition of marriage according to which straight people enjoy a fundamental constitutional right to marry while states may deny that same right to gays and lesbians.[4] This case will do what *Windsor* foreshadowed but fell short of doing—end debate by issuing new interpretations of the Due Process and Equal Protection clauses of the Constitution. *Windsor* will be to this future case what *Sweatt v. Painter*[5] is to *Brown v. Board*[6] and *McLaughlin v. Florida*[7] is to *Loving v. Virginia*[8]—the intimation, not the institutionalization, of irreversible systemic change. *Windsor* isn't the landmark case. The one that's coming will be.

The status quo can't last. Politics, society, and the courts are evolving fast. Gay marriage in all 50 states, as a matter of constitutional right, is coming. At this point, it's only a question of when and how embarrassed we'll be while explaining the delay to future generations.

This essay seeks to provide some background and context on the Supreme Court's marriage jurisprudence while we wait for the upcoming landmark case to get to the Court.

Since its earliest marriage cases in the nineteenth century the Court has stated that marriage is an essential institution, deeply personal yet by nature public, which reconditions the moral and legal relationships individuals have with their communities, nation, and sense of self. The Court has always thought of marriage as both an individual right and a positive social good—as the "foundation of the family and of society, without which there would be neither civilization nor progress."[9]

Nathan Goetting is an associate professor of Criminal Justice and Jurisprudence and chair of the Department of Sociology & Criminal Justice at Adrian College, Adrian, Michigan. He serves as editor-in-chief of *National Lawyers Guild Review*, to which he regularly contributes, He writes and teaches in the areas of constitutional law, civil liberties and critical legal studies. This essay is dedicated to the inspiring activism of his friend and colleague Richael Faithful.

It's the coalescence of three distinct legal principles asserted by the Court, and the reasoning undergirding them, that makes the Court's recognition of the fundamental right to marry for LGBTQ individuals inevitable:

(1) Marriage is a socially valuable institution. The Court has always shown a special reverence for marriage, especially in its nineteenth century cases. It's generally regarded a positive social good that the state should encourage.

(2) The right to marry, and to marry the person of one's choice, is a fundamental right and a necessary aspect of human happiness. This has been an explicitly stated abiding principle since the Court used its power of judicial review to strike down as unconstitutional a legislature's definition of marriage in 1967.[10]

(3) Gay people are both actually gay and actually free people to whom the Constitution applies. The human race isn't comprised entirely of straight people, some of whom have forgotten themselves. The Court's three most recent gay rights cases, each majority opinion written by Justice Anthony Kennedy (*Romer v. Evans*,[11] *Lawrence v. Texas*,[12] and *U.S. v. Windsor*—here called the "Kennedy Triumvirate"), were meant to further include gays and lesbians—as gays and lesbians—more fully and equally into our scheme of constitutional protections.

Add these three principles together—marriage is valuable, free people must be allowed to choose their spouses, and gays (as gays) are free people like everyone else—and the logical path toward a fundamental right to marry is inexorable.

The nineteenth century

In the nineteenth century the Court heard only a few cases—two, really—dealing with the definition and regulation of marriage. In both the Court did the same thing: (1) affirm the social value of marriage, then (2) defer to the power of the legislature to define that institution.

In the 1878 case of *Reynolds v. U.S.*,[13] the Court heard a Free Exercise challenge to a statute designed to curtail the growing power of the Mormon Church by criminalizing bigamy and polygamy, which was then taught as a solemn religious duty among the Mormon faithful. The Court unanimously upheld the statute. Chief Justice Waite didn't contest that the Morill Anti-Bigamy Act burdened the right of Mormons to practice their sincerely held religious beliefs. Instead, as one might have expected during a time of strong anti-Mormon sentiment, after praising marriage as an indispensable social institution, the Court deferred to the legislature's power under the Constitution to regulate how marriage will function in society. The Court emphasized that marriage is a "sacred obligation" and "upon it society may be said to

be built."[14] But it also a "civil contract"[15] conferring a legal status that in turn creates numerous public obligations, making governmental regulation necessary. "Polygamy has always been odious" within Anglo-American society and has always been a crime in every state, Waite wrote.[16] The sincerely held religious beliefs of a new Church, even a regionally powerful and fast-growing one, would not justify the use the First Amendment to broaden the legislature's definition of marriage. The Free Exercise Clause protected "belief and opinion," not conduct or "practices."[17] For these reasons, legislatures have the power to insist that marriage be monogamous.

Perhaps in no case does the Court hammer home both the social value of marriage and its own unwillingness to second-guess legislatures than in 1888's *Maynard v. Hill*.[18] *Maynard* involved a dastardly husband, a bamboozled wife, a pair of angry, abandoned children, and something that I didn't even know existed until several years after I graduated from law school—a "legislative divorce"—and by "several years" I mean about a week-and-a-half ago, when I first read the case. *Maynard* also involves a few things our rugged frontier forbears were utterly dependent upon while "civilizing" the newly charted frontiers of the Wild West—litigation and government handouts.

In 1850 David S. Maynard said goodbye to his wife, Lydia, and two children in Ohio and rushed toward the gold that had just been discovered in California, promising to either return home or send for his family after he'd established himself out west. Meanwhile he'd send them money. At some point Maynard decided to change his plans.

When he arrived out west he took advantage of a provision in the recently passed Donation Land Claims Act that granted 640-acre allotments of land to married men settling in western territories. He was granted possession of a parcel of land, and in short order he divorced Lydia, remarried, and sought to live happily ever after far away from his Lydia and the kids.

Decades later, after both David and Lydia Maynard had died, their two sons asked the Court to rule that the divorce the Oregon territorial legislature had granted their father was illegal and should be void. Legislatures don't grant divorces, the sons claimed, courts do. And because their father had never legally divorced their mother, a complex tangle of property and estate laws that would delight the heart of sadistic bar examiners should have applied in a way that gave land the government had long ago given their father to them.

As with *Reynolds*, the Court refused to interfere with the legislature's power to regulate marriage. Marriage, Justice Field wrote for the Court, is "the most important relation in life."[19] It has "more to do with the morals and civilization of a people than any other institution."[20] And it "has always been subject to the control of the legislature."[21] If legislatures wanted to, they could

grant divorces instead of judges. The Court wasn't going to stop them. It's precisely because of the power identified by Justice Field to alter morals and reshape social norms that legislatures have used the tremendous deference given them by courts to deny certain categories or combinations of persons the ability to marry.

The Court Gives Us *Loving*

The 1883 case of *Pace v. Alabama*[22] brought the legal status of interracial relationships—and, indirectly, marriage—to the Court's attention. Pace involved a couple who, barred from marriage by the state's anti-miscegenation law, nevertheless set up house. They were convicted of "living together in a state of…fornication"[23] and sentenced to two years imprisonment. The Court took no notice of the fact that the "fornication" likely only occurred because Alabama had denied them the right to marry.

The fornication statute this couple was prosecuted under punished mixed-race couples more severely than same-race couples. However, in his majority opinion Justice Field wrote that he could see no racial discrimination against which the Equal Protection Clause should serve as a shield since the statute punished both members of the convicted interracial couple, one black and the other white, equally.

We can at least be grateful that the Court, with its heightened sense of decorum, did the dirty work of upholding Alabama's interest in criminalizing interracial relationships without deploying the more honest language used by the state supreme court—explaining the need to avoid the creation of a "mongrel population"[24] and a "degraded civilization"[25]and so on—to describe that interest. Later that year the Court would embolden Jim Crow and set racial justice in America back decades by striking down the Civil Rights Act of 1875.[26]

Pace was finally overturned in 1964—the year the next great civil rights act was passed—with *McLaughlin v. Florida*, which struck down a statute that criminalized interracial, but not same-race, cohabitation. *McLaughlin* laid the foundation for the truly landmark case of *Loving v. Virginia*, which came three years later.

It's with *Loving* that the Court finally shows a willingness to check the hitherto virtually plenary police power of legislatures over the institution of marriage. By 1967 Earl Warren's tenure as Chief Justice was nearing its end. He'd led a jurisprudential revolution that had dramatically scaled back state police power over the nation's criminal justice, educational, and electoral systems through a series of expansive constitutional interpretations, many written to further the cause of racial justice. *Loving* involved a

statute criminalizing interracial marriage that was part of a longstanding and comprehensive statutory scheme to embed old-fashioned white supremacy into Virginia law.

The Warren Court had no patience for Virginia's numerous specious claims, including that the law reasonably served the legitimate purpose of protecting from stigma children who would be raised by interracial couples like the Lovings. The Court asserted its power as ultimate custodian of the Constitution and struck the law down. Marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[27] For the state to constrict an individual's freedom to choose his or her spouse on the basis of race is "unsupportable"[28] and "directly subversive of the principle of equality at the heart of the Fourteenth Amendment."[29] Chief Justice Warren's opinion struck down Virginia's anti-miscegenation law both as an infringement on the individual's substantive due process right to freely make personal, intimate decisions and as a policy of "invidious racial discriminations"[30] prohibited under the Equal Protection Clause.

After *Loving* the Court was emboldened to strike legislative restrictions on the right to marry. In *Zablocki v. Redhail*,[31] decided in 1978, the Court voided a Wisconsin law barring non-custodial parents behind in child support payments from marrying. In *Turner v. Safley*,[32] decided in 1987, the Court struck down a Missouri prison regulation restricting the marriage rights of inmates. The Court was now in the business of protecting the right to marry—and the right to marry the person of one's own choice—from the legislature's police power.

The Kennedy Triumvirate

Kennedy had once been the great hope of the right-wing Reagan administration—whose callous disregard of the AIDS epidemic is well-documented[33]—after the failed Supreme Court nominations of Robert Bork and Douglas Ginsburg. Now we know that he will go down in history as the Court's great gay rights champion. His opinions are to homophobia what the first Justice Harlan's were to racism, only Kennedy's opinions aren't written in dissent. He writes for a Court, and a nation, that has undergone a great awakening over the past twenty years.

While space prohibits anything like a complete analysis of each case here, there is a core insight animating all three cases of the Kennedy Triumvirate that's essential to understanding the Court's gay rights jurisprudence, both generally and in the specific context of marriage. This insight is neither legal nor constitutional in its origin. Rather it derives from recognition of a truth that is psychological and sociological—perhaps even ontological. Kennedy sees homosexuality not as a kind of behavior, which may or may not be

punished, but as a core personal attribute, an aspect of one's being. Being gay isn't what gay people do. Rather gayness is a part of who a person is. It's something innate, ineradicable, and fundamental to one's self-definition. Just as anti-miscegenation statutes punished based on an immutable characteristic—one's race—so too did the statutes at issue in the Triumvirate, only in these cases sexual orientation is the characteristic.

In each case in the Triumvirate, Justice Antonin Scalia writes a dissent containing a mixture of contempt, petulance, reactionaryism, and self-righteousness so unique for a Supreme Court Justice that we can only call it "Scalia-esque." Kennedy's and Scalia's opinions are best read together as a study in contrasts and irreconcilable differences. Same-sex eroticism is only deviant if one believes, as Scalia's opinions suggest he must, that there is no such thing as gayness as an immutable characteristic, and that expressions of same-sex desire are immoral and can be made illegal. To Scalia, gay people are really straight but just don't know it and won't act like it.[34]

Romer v. Evans[35] involved a Colorado plebiscite that amended the state's constitution so as to overturn laws protecting gays from discrimination. The amendment also barred any prospective legislation anywhere in the state resembling the laws it had just overturned. It had become illegal under the Colorado Constitution to pass laws to protect the civil rights of gay people.

Kennedy saw this amendment as an unconstitutional attack against gay people, identifying one trait that they possess and relegating them to second class legal status for possessing that trait. The amendment is rooted in discriminatory animus toward a class of people and, wrote Kennedy, overt animosity toward a class of persons can never be a legitimate purpose for legislation.[35]

To Scalia, the amendment is about conduct. Sodomy, after all, has traditionally been a crime. He holds that it is perfectly normal and certainly constitutional for laws to discourage conduct a majority of people disapprove of.

In 1986, the year before Kennedy joined the Court, a majority of five justices voted to uphold a Georgia anti-sodomy statute used to deter and punish gay intimacy.[36] Seventeen years later, in *Lawrence v. Texas*, the Court undertook the extraordinary measure of reversing itself based on the above-mentioned new insights on gay identity. In his majority opinion in *Lawrence*, Kennedy recognizes that gay sex can be an expression of a loving relationship that has value. *Lawrence* struck down anti-sodomy laws less because they punished conduct than because they made criminals of gay men who use sex—the most intimate form of intimate association—as an expression of love. For Kennedy the watchword, deployed more frequently with every case, is "dignity."

At least one part of Scalia's dissent in *Lawrence* is correct. The right to intimate association for gay people—protecting the dignity of gay relationships from the stigma of criminal prosecution—does point toward the fundamental right of LGBTQ persons to marry.[37]

Windsor, which compels the federal government to recognize gay marriage in states that allow it, represents only the next—but hardly the final—step in that direction.

NOTES

1 This is a revised version of a speech given at Thomas M. Cooley Law School on September 20, 2013. It was given as a part of a Constitution Day event on the issue of gay marriage titled "*DeBoer v. Snyder*: Finding Michigan's Invisible People." DeBoer deals directly with whether the U.S. Constitution affords LGBTQ persons a fundamental right marry. For analysis of *DeBoer* see "Michigan's Invisible People" by Brenden Berry and Daniel Ray on page 129 of this issue.

2 570 U.S.__ (2013).

3 1 U.S.C. § 7; 28 U.S.C. § 1738C.

4 Whether the right to marry will actually improve the lives of LGBTQ individuals is a subject of intense debate among queer activists and theorists. Both those who support the liberal line on marriage equality and those (mostly radicals) who view gay marriage as integration into an oppressive institution are capable of making thoughtful and compelling arguments. At present, I haven't been persuaded that winning the right to marry won't at least reduce the painful and still-ubiquitous menace of homophobia in America, which is the cause of so much despair, especially among LGBTQ youth. For that reason, mostly, I'm willing to subordinate my sympathy for many of the anti-marriage critiques and support the marriage equality movement. *See* Dean Spade and Craig Willse, *Marriage Will Never Set Us Free*, ORGANIZING UPGRADE, Sep. 6, 2013, *available at* http://www.organizingupgrade.com/index.php/modules-menu/beyond-capitalism/item/1002-marriage-will-never-set-us-free. For a leftist embrace of the marriage equality movement, see Zachary Wolfe, *Gay Marriage: Accommodationist Demands Expand the Conception of Human Dignity*, 70 NAT'L LAW. GUILD REV. 88 (2013).

5 339 U.S. 629 (1950).

6 347 U.S. 483 (1954).

7 379 U.S. 184 (1964).

8 388 U.S. 1 (1967).

9 Maynard v. Hill, 125 U.S. 190, 210 (1888).

10 *See* Loving v. Virginia, 388 U.S. 1.

11 517 U.S. 620 (1996).

12 539 U.S. 558 (2003).

13 98 U.S. 145, 8 Otto 145 (1878).

14 *Id*. at 165.

15 *Id*.

16 *Id*. at 164.

17 *Id*. at 166.
18 125 U.S. 190 (1888).
19 *Id*. at 205.
20 *Id*.
21. *Id*.
22. 106 U.S. 583 (1883).
23. *Id*. at 583.
24. Pace v. State, 69 Ala. 231, 232 (1883).
25. *Id*.
26. The Civil Rights Cases, 109 U.S. 3 (1883).
27. *Loving*, 388 U.S. at 12.
28. *Id*.
29. *Id*.
30. *Id*.
31. 434 U.S. 374 (1978).
32. 482 U.S. 78 (1987)
33. *See* Randy Shilts, And the Band Played On (1987).
34. Comedian Bill Maher was essentially correct when, referring to the general mentality of the Christian right on the existence of gay people, he said, "In their world there are no gay people. There are just straight people who are sinning." *Real Time with Bill Maher*, *Episode 4.23*, (HBO television broadcast Nov. 10, 2006). Scalia's jurisprudence is generally adored among American Christianists. In their effort to quell gay liberation, Scalia is their champion on the Court.
35. *Romer,* 517 U.S. 620 (1996).
36. Bowers v. Hardwick, 478 U.S. 186 (1986),
37. *Lawrence*, 539 U.S. at 604-605.

National Lawyers Guild
San Francisco Bay Area
Chapter et al.

A KNOW-YOUR-RIGHTS MANUAL FOR THE TRANSGENDER COMMUNITY: IMMIGRATION LAW

Using the manual

This manual was created to be a first-stop reference for community members, lawyers, and service providers, who need legal information about a transgender-specific issue or question of law. For ease of use, the content has been divided by common problems or needs. Case law, statutes, print and web resources, and other service organizations can be found embedded throughout the manual, referenced in the endnotes, and listed at the end of this manual.

This resource was created by and for people in the San Francisco Bay Area,[1] and therefore much of the information is specific to California and San Francisco Bay Area resources and law. We hope that this manual will be a helpful resource to readers outside of California as well because it includes information that is nationally relevant. However, it is important that non-California readers pay close attention to what information appears to be specific to California or the Bay Area, and not presume that the local information contained in this manual will transfer to other cities and states. Non-California readers are encouraged to use the national resources listed in the directory at the back to locate up-to-date information about the laws and precedent in their state or city.

It is important to note that, although the researchers who assembled this information did their best to be accurate on points of both black letter law and how the law tends to play out in the real world, there may be inaccuracies. Nothing in this manual should be relied on as legal advice. Legal advice can only come from a lawyer. This manual is, however, a good starting place to understand the law and how it affects transgender[2] people and communities in California and the Bay Area specifically.

Finding the law for free

Legal documents, such as cases and statutes, are actually public documents. This means that everyone (including members of the public) has the right to research and read these documents. The problem is that sometimes these documents can be hard to find or access.

For questions, comments, corrections, and suggestions, please contact carlos@nlgsf.org.

If a case is cited in this document and a person wants to find and read the actual case, we can find it by following a series of steps. The first step is to avoid getting flustered by the complicated series of numbers, letters, and punctuation that follows the name of the case. The next step is to simply go to http://scholar.google.com/, click the "Legal opinions and journals" button and type in the volume number, the journal name, and the page number from the case citation. For example, to find the case of *State v. Jordan*, 742 N.W.2d 149 (Minn. 2007), we can ignore the name of the case (*State v. Jordan*), and copy the volume number (742), then the journal name (N.W.2d), followed by the page number (149). Those three things are all that's needed to find the case on Google scholar. Sometimes the journal name will be different, but as long as the right information is copied into the search bar, Google Scholar should be able to pull it up.

Many transgender people report barriers to accessing legal services for a number of reasons. The cost of hiring a lawyer is a major issue for many, along with fears that lawyers will not be respectful of transgender clients, will not know enough about how laws specifically affect transgender people, or that the court system is prejudiced against transgender people. While all of these fears are justified, attorneys, activists, and advocates across the country are making huge strides in increasing legal services and resources for transgender people. Many states have lesbian, gay, bisexual, and transgender (LGBT) bar associations that can be helpful in locating legal information or finding lawyers who are knowledgeable about transgender law and sensitive to the specific concerns of transgender clients. Many of the organizations listed in the resource section below are happy to assist individuals in finding legal services. Although legal services often seem too expensive, there are a lot of organizations and individual attorneys committed to making justice more accessible. You may be eligible for pro bono (free of charge) representation or fee structures that work for you (such as contingency fees, where you only pay if you win your case). Additionally, many attorneys are happy to meet with potential clients for free to assess your case. This can be a good way to learn more about your options and whether it's worth it to you to pursue legal action.

A note to professionals

This manual was designed to be a resource to clients, but it is our hope that service providers and legal professionals will also find it useful. Attorneys may find this manual to be a helpful starting point for legal research and a useful tool for locating additional resources. All manuals in this series contain footnotes to case law, law review articles, and statutes that we hope will assist you. As with any compilation of research, attorneys are urged to

check all cited law before relying on it to make sure there haven't been substantive changes and that it will apply to your client's particular case. Many of the organizations listed in the resource section of this document provide assistance to attorneys representing clients, and can be excellent sources for information and insight. When advocating for transgender clients, attorneys can advocate for the use of appropriate name and pronoun for their client in court and other proceedings.

Basic rights

Both citizens and non-citizens alike have rights under the United States Constitution. The Fifth Amendment gives every person the right to remain silent—that is, to not answer questions asked by a police officer or government agent. The Fourth Amendment restricts the government's power to enter and search a person's home or workplace, although there are many exceptions and new laws have expanded the government's power to conduct surveillance, as well as the authority for the police to search a person or belongings. The First Amendment protects a person's right to speak freely and to advocate for social change. Nonetheless, however, the Department of Homeland Security (DHS) has targeted and continues to target for deportation non-citizens based on political activities. These Constitutional rights are absolute, and cannot be suspended—even during wartime.[3]

Getting started: A notable transgender immigration law resource

Because transgender individuals with immigration concerns are doubly vulnerable to unjust actions by police and immigration authorities, there is a strong network of support for transgender community members dealing with immigration issues. This manual aims to be a general and broad resource to answer common and locally-specific questions, but there are many resources on the internet that are also very thorough and helpful. One notable resource was written by Immigration Equality, a national organization, and the Transgender Law Center, an organization based in San Francisco, and published by the American Immigration Lawyers Association. This resource, entitled "Immigration Law and the Transgender Client," is a lengthy and thorough manual that provides in-depth information about a large scope of transgender-specific concerns. It is available for sale at http://aila.stores.yahoo.net/transgender.html and for free online at http://www.immigrationequality.org/issues/law-library/trans-manual/.

Government agencies

After September 11, 2001, the U.S. government abolished the Immigration and Naturalization Service (INS), formed the new Department of Homeland Security (DHS), and re-organized the agencies that oversee immigration. DHS is now the umbrella organization for Immigration and Customs Enforcement

(ICE), which is the enforcement and deportation branch; Citizenship and Immigration Services (CIS), which is the immigration service and application processing branch; and Customs and Border Patrol (CBP), which oversees border protection.

Immigration law trends in San Francisco

Immigrant Youth Policy

Former San Francisco Mayor Gavin Newsom had instituted a policy to report allegedly undocumented minors to Immigration and Customs Enforcement (ICE) for deportation immediately after their arrest, without affording them legal counsel.[4] This ran counter to San Francisco's sanctuary city policy. More than 160 young people were referred to ICE for deportation under this policy.

Immigration rights advocates worked hard to lobby the San Francisco Board of Supervisors, which passed a new policy by a veto-proof majority. This new policy gives arrested minors a hearing and requires that the court find that the minor committed a felony before the individual can be referred to ICE. Mayor Edwin Lee instituted the new policy.[5]

Sanctuary City and "Secure Communities," or "S-Comm"

There has been a major change that affects the previous long-standing "Sanctuary City" policy in San Francisco. Under the 1989 Sanctuary City policy, law enforcement was only required to report felony suspects whose legal status could not be confirmed upon booking to federal officials.

On June 1, 2010, a new program was implemented that is a collaboration between San Francisco Police and ICE, called "Secure Communities," or "S-Comm." This new program automatically checked the immigration status of anyone who is arrested and fingerprinted for any crime, even before a conviction, regardless of the severity of the crime. All people are checked, whether citizens or non-citizens, and their fingerprints are electronically cross-checked against an ICE database. Individuals whose legal status cannot be confirmed are then held in jail for ICE to detain them. This is a federal program that is being implemented across the United States, including California. Currently, immigrant rights groups are lobbying and protesting to persuade local law enforcement not to participate in this program. The San Francisco Sheriff's Office tried to opt out of participating, but then California Attorney General Jerry Brown said that the San Francisco Sheriff's Department could not opt out.

At the time of this writing, local San Francisco police are participating in this program but recently-retired San Francisco Sheriff Michael Hennessey claimed the office is only turning undocumented immigrants over to federal immigration authorities if they have been booked on serious charges or have

extensive criminal records.[6] Recently, the Department of Homeland Security announced that Secure Communities is mandatory and there is no way to opt-out.

Car Impounding in San Francisco

Immigrants have reported a significant increase in car impoundments since 2008 and early 2009. When a driver could not produce a valid driver license after being stopped in a vehicle, the car would be impounded. A city-wide policy mandates that impounded vehicles are automatically impounded for thirty days, with new fees every day that it is impounded.

Local advocates lobbied the San Francisco Police Department (SFPD). In 2009 SFPD began a new policy that requires police to give a driver who cannot produce a valid license twenty minutes to get someone else who does have a valid license to arrive and drive the vehicle away to prevent impoundment. Community members report that this new policy is not being observed, and individuals are not being given twenty minutes to get someone else to drive the vehicle and avoid impoundment.

Trangender discrimination in immigration law

Until 1990, openly-LGBT immigrants were banned from immigrating to the United States. Currently, there is no law expressly prohibiting transgender people from visiting or immigrating to the United States. Nevertheless, gender identity and presentation often play a significant role in a person's ability to immigrate. Transgender immigrants should be able to obtain identity documents in the "outward, claimed and otherwise documented sex of the applicant."[7] Unfortunately, it is often not clear what CIS means by "otherwise documented." Furthermore, CIS has applied this rule unevenly, often (but not always) requiring sex reassignment surgery (SRS) and even failing to correct gender on documents for individuals who have had SRS.[8] The following resource is a free guide to changing gender markers on California and federal identity documents developed by the Transgender Law Center: http://transgenderlawcenter.org/pdf/TLC%20ID%20Guide.pdf.

One way that transgender persons can get legal status in the United States is by seeking asylum, claiming that they were harmed or fear harm in their home country.[9] Another way that transgender immigrants can get legal status is if they are in a bi-national opposite-sex relationship at the time of marriage, where one partner is a U.S. citizen or permanent resident and the other is not. In such a case, the person's sex, or that of the non-immigrant partner, may affect the ability of the person to immigrate based on a marriage or engagement.

In immigration law, DHS must respect any marriage that is considered valid in the applicant's home country and is not contrary to public policy.[10]

Until recently, some transgender individuals were asked to provide immigration officials with proof of having undergone a sex reassignment surgery to be eligible for marriage benefits. In *Matter of Lovo-Lara*,[11] a 2005 decision, the Board of Immigration Appeals (BIA) addressed Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, which defines marriage as only between one man and one woman.[12] The BIA held that DOMA does not prohibit recognition of a marriage involving a "postoperative transsexual,"[13] where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex. In other words, there is no specific federal policy against marriages where one spouse is a "postoperative transsexual;" so long as it was legal when and where the marriage took place, it should be valid for a marriage-based "green card" application. More recently, the USCIS released a policy memo that explicitly stated that proof of sex reassignment surgery is not required for determining the validity of a marriage involving a transgender person as long as they can provide proof of "appropriate clinical treatment."[14] Unfortunately, in spite of the good law on the books in this area, transgender individuals continue to have difficulties enforcing their rights, and CIS officials continue to misapply the law.

One issue that might arise when transgender people seek to immigrate to the U.S. is the classification of that person's name or gender on his or her immigration papers. Official immigration papers may include a passport from the home country, a visa permitting the person to enter and remain in the U.S., a permanent resident card, or naturalization papers. If a person wishes to change their name after they have already obtained a permanent resident card or naturalization papers, they must provide the government with a court-ordered name change. If a person changed their name prior to receiving immigration papers, they can request that their correct, changed name be used at the time of issuance.[15] The Department of State recently issued guidelines for correcting the gender marker on U.S. passports: if all of the required identity documents have the same gender, no medical documentation is required but if there is a discrepancy in the gender marker on required documents, then the applicant must submit a certification from a treating physician.[16]

Non-citizens are legally obligated to carry their green card or other immigration papers with them. Presenting false or expired papers to the DHS may lead to deportation or criminal prosecution. An unexpired green card, I-94 (Arrival-Departure Record), Employment Authorization Card, Border Crossing Card or other papers that prove legal status generally satisfy this requirement. If people do not carry these documents with them, they could be charged with a crime. It is smart to keep copies with a trusted friend or family member who can easily fax the documents if need be.

Recent litigation and changes in LGBT immigration law

In 2009, the Department of State also issued a directive that gives equal benefits to same-sex partners of U.S. diplomats, including diplomatic passports.[17]

In February 2011, the Obama Administration announced that it would not defend DOMA's definition of opposite-sex marriage in federal court challenges.[18] However, the Attorney General also said that the Department of Justice would still "enforce" DOMA pending a legislative repeal of DOMA or a "final judicial decision."

Following that announcement, with regards to same-sex bi-national couples generally, the Attorney General issued a precedential immigration decision in the case of a UK citizen who entered into a civil union with his U.S. citizen partner.[19] The decision vacated the person's removal order and remanded the case to the Board of Immigration Appeals "to make such findings as may be necessary to determine whether and how the constitutionality of DOMA is implicated." Importantly, the Attorney General's decision does not allow immigration judges to grant immigration status or relief to persons who have a U.S. citizen or legal permanent resident partner of the same sex. It does, however, provide a basis for seeking to administratively close or continue immigration cases where that strategy may benefit the non-citizen.[20]

Some critics say that the Attorney General's decision was a legal maneuver to keep legal challenges to DOMA out of federal courts for as long as possible. However, many of the LGBT litigators who are challenging DOMA in the federal courts prefer to have the courts first decide the constitutionality in a non-immigration case for legal strategy reasons that are beyond the scope of this manual.

In June 2011, after several years of pressure and advocacy on the part of undocumented youth to place a moratorium on all deportations, Director John Morton of Immigration and Customs Enforcement (ICE) issued a memo outlining new guidance on the use of prosecutorial discretion in a wide range of circumstances.[21] The memo does not address LGBT immigrants directly but signals a greater commitment to using limited resources to enforce immigration law with an understanding of the need for measured action and fairness in the immigration context. With the use of the memo, immigration lawyers have been able to obtain deferred action or continuances for several same-sex bi-national couple clients in removal proceedings. It is too early to say whether the memo will generally lead to greater prosecutorial discretion for immigrants in removal proceedings. For more information on how to stop the deportation of your client or yourself post a final order of removal, please check the Education Not Deportation Guide available at: http://e4fc.org/images/E4FC_DeportationGuide.pdf.

The Heartland Alliance National Immigrant Justice Center has filed a lawsuit against the Department of Homeland Security alleging that jailers nationwide have deprived gay and transgender detainees of basic rights.[22] These complaints detail denial of hormone replacement therapy, sexual assault, denials of basic medical care, arbitrary confinement, and severe harassment and discrimination against LGBT immigrants.

Deferred action for individuals who came to the U.S. as children

On June 15, 2012, the Obama Administration released a memorandum in response to nationwide calls for an alternative path to citizenship for individuals that were brought into the country as children.[23] Though not LGBT-specific, "deferred action" may provide some assistance to transgender individuals that came to the U.S. as children and meet the other eligibility criteria for deferred action. However, there are also several areas of concern with the new policy adopted by the Department of Homeland Security. For instance, the eligibility criteria are very narrow and will likely only apply to a small subset of people. To seek deferred action, the following criteria must be met:

- Came to the U.S. under the age of sixteen;
- Has lived in the United States continuously for at least five years before the date of June 15, 2012, and was present in the U.S. on the date of June 15, 2012;
- Is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- Has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- Is not above the age of thirty.[24]

One of the major areas of concern with deferred action is that it is *not* a pathway to citizenship, as many immigration advocates had hoped. Instead, individuals that meet the above criteria, including members of the LGBT community, might be able to use deferred action as a way to temporarily slow down the removal process and/or receive work authorization during the period of deferred action. The memo clearly states that the new policy does not confer a "substantive right, immigration status or pathway to citizenship"[25]

Furthermore, even if someone qualifies for deferred action, the memo only encourages the exercising of "prosecutorial discretion," meaning that cases will be reviewed on an individual basis, giving the Department of Homeland Security wide latitude in deciding who should receive relief and who should not.

The National Lawyers Guild strongly suggests seeking the advice of an experienced immigration attorney before considering submitting an application for deferred action because, in some cases, it could jeopardize an individual's immigration case.

Immigration status and educational access

Immigration status and access to higher education can be a serious issue for immigrants, especially individuals who came to the United States as children. Anecdotal evidence seems to indicate that transgender and gender nonconforming youth are disproportionately more likely to immigrate to the U.S. without the presence of an adult in order to escape the pervasive violence and discrimination they faced in their home countries. However, documented and undocumented students alike also face significant financial barriers and other challenges in pursing their education once they arrive in the United States, oftentimes due to lack of family support and restrictions on their ability to obtain financial aid and in-state tuition.

However, in California, the passage of the Dream Act of 2011 makes undocumented and documented students in California eligible for in-state tuition (usually much lower than tuition for international students and students from other states) and private scholarships.[26] Starting April 2, 2012 (application dates: January 1–March 2), they may also be able to access educational funding in the form of University of California (UC) and California State University (CSU) grants, California Community College Board of Governor's fee waiver, Cal Grants, and other state-administered financial aid by submitting a Dream Act Application to the state student aid commission.[27]

Asylum

Asylum is a legal mechanism for protecting immigrants who know or believe that they will be harmed if they return to their home countries. People who are granted asylum are allowed to stay in the United States, get a work permit, have access to some public benefits, and eventually apply for a green card. In general, many transgender people have claims for asylum. Deciding whether to apply for asylum, however, is sometimes a tough decision. If the applicant is given asylum, that person would be able to stay in the U.S. and to apply for several public benefits. If the applicant does not win asylum, however, the individual might eventually be ordered to leave the U.S. and return to that person's home country. Applying for asylum if the applicant has a weak case can be very risky. For some people, it is better if they do not apply. Ideally, the decision should be made after having spoken to an immigration attorney or accredited representative.

Applying for Asylum

A person can affirmatively apply for asylum before the local asylum office or, if they are in deportation proceedings, before the immigration judge. If the person applies affirmatively and the asylum officer does not grant asylum, the person's case is referred to an immigration court which is part of the Executive Office for Immigration Review (EOIR).

Emilia Bardini, Director of the San Francisco Asylum Office, states that the office weighs each case on its individual merits. It handles around 3,000 cases each year, with 5–10 percent being claims based on sexual orientation or gender identity, 90 percent of which are from men and 70–80 percent from Mexico. The most frequent LGBT asylum cases involve forced psychiatric treatments, forced marriage, and harm experienced either as children or by family members.

There are many resources and legal service providers that can help someone assess the merits of their claims for asylum, withholding of removal, or relief under the United Nations Convention Against Torture. Some names of such providers in California, including the San Francisco Bay Area, are available on the immigration courts' website: http://www.justice.gov/eoir/probono/freelglchtCA.htm.

To apply for asylum, applicants must prove:

(1) that the applicant has well-founded fear of persecution or has suffered past persecution;

(2) that such persecution is on account of race, religion, nationality, membership in a particular social group or political opinion, and;

(3) that asylum should be granted in the exercise of discretion.[28]

To qualify for asylum, applicants need to prove a well-founded fear of persecution. The U.S. Supreme Court has held that a "well-founded" fear means a "reasonable" fear of actual persecution, which means that someone with only a one in ten chance of persecution may be eligible for asylum.[29]

In order to prove a *well-founded fear* of persecution, the applicant must show:

(1) that she or he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;

(2) the persecutor is already aware, or could become aware, that she or he possesses this belief or characteristic;

(3) the persecutor has the capability of punishing the alien, and;

(4) the persecutor has the inclination to punish the alien.[30]

The Supreme Court has held that individuals seeking asylum "must prove specific facts through objective evidence to prove either past persecution

or good reason to fear future persecution."[31] Additionally, the government of the applicant's home country must either be the persecutor or unable/ unwilling to offer protections against persecution at the hands of another. Though not defined expressly by statute, courts have defined "particular social group" to mean that the characteristic that defines the group "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[32] The Ninth Circuit has interpreted "social group" to extend broadly to many groups.[33]

Courts have determined that sexual orientation qualifies an applicant as part of a particular social group, but have not ruled on whether transgender people meet this requirement.[34] Some transgender people identify as gay or lesbian, and therefore could argue that their persecution is based on sexual orientation. Those who do not identify as homosexual or gay might still present an argument based on sexual orientation, arguing that they are persecuted against because of their perceived sexual orientation. Absent either of these two arguments, transgender people still have a strong argument for proving that being transgender classifies them in a particular social group. In fact, courts have recognized that male-bodied people who sleep with men and have female gender identities constitute a social group and may be persecuted because of this identity.[35]

Certain factors in an application for asylum might cause a dismissal. An applicant must apply for asylum within one year of that person's last arrival in the United States.[36] The DHS requires the applicant to mail in the application before the one-year deadline. It is safest to mail it at least several weeks before the deadline. Under certain circumstances, an applicant may still apply for asylum even if it has been more than one year since last entry into the U.S. If the individual can show either the existence of changed circumstances that materially affect eligibility for asylum or extraordinary circumstances that justify the delay in filing, the applicant may still be eligible for asylum.[37] However, these situations are rare. Some examples may include:

- HIV positive status as a material change in circumstances
- Turning 21 on an asylum application and losing derivative status
- Coming out as LGBT as a material change in circumstances
- Trauma and depression

A pending immigration visa petition such as an I-140 labor certification can also be an extraordinary circumstance excusing failure to file within the one-year time period.

A criminal record is another factor that might stand in the way of a successful application for asylum. The government will deny asylum to anyone

who has been convicted of an "aggravated felony."[38] In this case, the applicant should talk to a lawyer to see if the person still qualifies for asylum or the person qualifies for other relief, such as withholding of removal or relief under the UN Convention Against Torture. Ideally, in this situation, the immigration lawyer will communicate with the criminal defense attorney who helped with the criminal case. It is important that the applicant be as forthcoming about his or her criminal past as possible. The lawyer needs to know about every arrest in order to provide the most accurate advice to the individuals. If the attorney is unaware of an arrest, this can negatively impact an asylum case. If the immigration judge denies an application for asylum, the person has the right to appeal this decision to the Board of Immigration Appeals, whose members are also appointed by the Justice Department. In addition, DHS can appeal an immigration judge's decision granting asylum. If the BIA holds that the person is not eligible for or does not merit asylum (or other immigration relief), the person can appeal to a U.S. court of appeals.

Work permits

To apply for an Employment Authorization Document (EAD), individuals must use Form I-765. It is difficult for applicants to get a temporary work permit during their asylum application period.[39] If an applicant has not received a decision after 150 days from the date of filing, the individual can apply for a work permit.[40] Most applicants do not get any kind of work permit until after winning asylum.

Getting legal help

Because asylum law is confusing and because everything an applicant says or gives to the DHS may become a part of her or his asylum record, it is strongly encouraged that an applicant talk to a lawyer before sending anything to DHS. If the one year filing deadline for asylum is coming up or has already passed, the applicant should get legal help immediately.

Applicants should be aware that some people who say they are immigration experts are not experts and may not even be lawyers. Sometimes asylum applicants will pay a *notario* or paralegal to help them apply for asylum. Using these kinds of services is often a mistake. Many times these people can ruin a person's chances for asylum. If you want to use one of these businesses or think you were harmed by one of them, call the Anti-Fraud Unit of the Immigrant Legal Resource Center at (415) 255-9499, extension 774.

The most important thing a person can do for his or her attorney is to be as honest as possible. If an applicant meets with someone from the Asylum Program at the Immigrant Legal Resource Center or hires a private lawyer on his or her own, anything he or she says to that lawyer is confidential. That means that this lawyer is not allowed to tell this information to the U.S. gov-

ernment or to anyone else without the permission of the applicant. Speaking with an attorney is also a good way to calm fears about the risk of applying for asylum. It is very helpful for an applicant to collect documents for the case. Some helpful documents include pictures from when the applicant lived in his or her home country, a birth certificate or identity card, and letters from relatives or friends that will help prove the case. These documents are not necessary, but can be helpful. The Asylum Program at the Immigrant Legal Resource Center is a good resource for obtaining "country packets." These packets contain information about different countries' persecution of people based on sexual orientation and/or HIV status.

Asylum practical pointers[41]

- Do define the particular social group by an immutable and unchangeable characteristic or a characteristic that members should not be compelled to change. Do not define a particular social group by the harm experienced or feared.
- Address decisions that require social visibility of the group and particularity of the group as a discrete class of persons in that society.
- Present evidence of membership within the particular social group.
- Raise more than one particular social group if supported by the facts or in combination with other grounds.
- Clearly articulate the theory of your claim and make sure to address every element.
- Present evidence of past persecution or fears of persecution. Document the harm, provide evidence of the severity, present evidence of any gender-specific types of persecution.
- If the government is not the persecutor, present evidence to demonstrate a failure of state or police protection. Present evidence of discriminatory laws and if the laws appear to provide protection, show how they are inadequately enforced.
- Present evidence, either direct or circumstantial, of the nexus between the harm and the particular social group or other grounds. This includes any and all evidence that the persecutor or persecution is motivated based on membership in a particular social group or protected category.

Anne Tamar-Mattis, Executive Director of Advocates for Informed Choice, offers some pointers on dealing with cases of intersex individuals:

- Chromosome patterns are not determinant in any way. Avoid creating precedent that uses sex as marker or chromosome marker, i.e., state that the client has Y chromosome and is male, but not because of the Y chromosome.

- Be aware that there is a longstanding practice of lying to intersex individuals so they may not be aware of their own chromosome patterns, absent a medical test.
- An intersex person is not necessarily transgender and may not struggle with gender identity.
- Try to cast a wider net when defining the persecution such as persecution due to birth defects or giving birth to a child with birth defects.

Alternatives to asylum

If an applicant cannot get asylum, there may be other ways for the person to stay in the United States if the individual fears harm upon returning to their home country. The applicant should ask a lawyer about "Withholding of Removal" and "The Convention Against Torture." These other options may allow an applicant to stay in the U.S. legally and get a work permit. The applicant will not get all of the benefits of asylum, but both are potential options if the person does not qualify for asylum.

Withholding of removal[42]

Withholding of removal is an alternative form of relief that might be available to someone facing persecution in his or her home country.[43] In order to be granted withholding of removal, an applicant must meet a higher standard than for asylum. Courts have held that the applicant must show that there is at least a 51 percent likelihood of suffering future persecution in the applicant's country of origin, as compared to a likelihood of at least 10 percent in asylum cases.[44] It can only be granted by an Immigration Judge, not by an Asylum Officer.

It is common practice for applicants to file for asylum and withholding of removal, both of which can be done with the I-589 form. Unlike asylum, withholding of removal is not subject to a one-year filing deadline and may be available for applicants who have been convicted of an aggravated felony. Further, granting withholding of removal is mandatory if the applicant can show a well-founded probability of facing persecution in that person's home country.[45]

An applicant who has won withholding does not receive as many benefits as an applicant who was granted asylum. The individual can seek work authorization, but will not be able adjust citizen status to become a legal permanent resident, nor become a citizen. Additionally, a winner of withholding can never travel internationally, and does not have the ability to petition for derivative status for immediate relatives.

Examples of cases under withholding of removal

In *Molathwa v. Ashcroft*, the Eighth Circuit found that there was not enough evidence demonstrating that Molathwa, a gay man from Botswana,

would more likely than not be subject to persecution if returned to Botswana. Molathwa had missed the one-year filing deadline, and the Court determined that an incident where the police entered Molathwa's apartment without a warrant, the beating of a friend by relatives on the basis of his sexual orientation, and the incarceration for two days of a gay man who was caught engaging in sexual activity with another man, did not amount to a pattern of harassment.[46] In the *Matter of Toboso-Alfonso*, a gay Cuban man who had been forced to report regularly to the government and had been forced to attend a labor camp, did meet the heightened standard for withholding.[47]

The Convention Against Torture[48]

Relief under the Convention Against Torture (CAT) is the third form of relief an individual fearing persecution can seek. An applicant bears the burden of demonstrating that torture is more likely than not if the applicant is removed to the country of origin. The Board of Immigration Appeals has found that torture "must be an extreme form of cruel and inhuman punishment" that "must cause severe pain or suffering."[49] There are no bars to eligibility for relief under CAT. Therefore, since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, an applicant is not required to establish that her fear of torture is on account of membership in a particular social group. However, the United Nations Committee Against Torture has consistently held that the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to that country.

Immigration regulations create two separate types of protection under CAT.[50] The first type of protection is a new form of withholding of removal under CAT. Withholding under CAT prohibits the return of an individual to that person's home country. It can only be terminated if the individual's case is reopened and DHS establishes that the individual is no longer likely to be tortured in his or her home country. The second type of protection is called deferral of removal under CAT. Deferral of removal under CAT is a more temporary form of relief. Deferral of removal under CAT is appropriate for individuals who would likely be subject to torture, but who are ineligible for withholding of removal. It can be terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to his or her home country. Additionally, an individual granted deferral of removal under CAT may be detained by the DHS if an individual is deemed to be a threat to the community.

Examples of cases under CAT

Lawrence Eneh, a parolee from Nigeria, was convicted of a federal offense, sentenced to 36 months imprisonment, and placed in removal proceedings. Eneh testified that he would be imprisoned upon return and intentionally deprived of necessary medications while in prison as a form of punishment for having AIDS. In *Eneh v. Holder*, the sole issue on appeal to the Ninth Circuit was whether the BIA erred in denying Eneh deferral of removal under CAT. The Ninth Circuit vacated and remanded the BIA's decision, stating that both the Immigration Judge and the BIA had failed to acknowledge and analyze testimony and documentary evidence that Eneh would be individually and intentionally targeted for mistreatment because of his HIV status and associated medical problems.[51] In *Reyes-Reyes v. Ashcroft*, the Ninth Circuit ruled that the term "government acquiescence" was broad enough to include the government's failure to address severe physical abuse inflicted by non-government actors. The case involved a transgender woman who was kidnapped, severely beaten, and raped by a group of men. In addition, she was also threatened by her abusers and feared retaliation if she reported the crimes.[52]

Temporary Protected Status and Deferred Enforced Departure

Temporary Protected Status (TPS) may be granted to people who originate from countries that the DHS has designated as having "ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions."[53]

TPS is designated for specific and limited periods of time. Individuals who benefit from TPS protection may remain and work in the United States during this time, but may not apply for permanent residence. At the end of the designated period, their immigration status reverts to the same status they held before receiving TPS. As of May 2012, the countries granted TPS are El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria.

Deferred Enforced Departure (DED) is a temporary and discretionary administrative stay of removal granted by Presidential order to individuals from designated countries.[54] This rarely-used form of protection allows individuals to remain in the United States and to obtain work permits. Liberian nationals have been granted DED from October 1, 2007, through March 31, 2013.

HIV exclusion

Prior to July 30, 2008, people with HIV were excluded from immigrating to, or even visiting, the United States. On July 30, 2008, President Bush signed into law the President's Emergency Plan for AIDS Relief, which repealed the ban on HIV-positive tourists and immigrants in the United States. When HIV positive persons wanted to travel to the United States or apply for legal permanent resident status, they still needed to obtain a waiver of inadmissibil-

ity. On January 4, 2010, the HIV ban was finally lifted, and new regulations published by the Department of Health and Human Services became law. These regulations officially remove HIV from DHHS' list of "communicable diseases of public health significance." This means that a person can now enter the United States without disclosing his or her HIV status, and there is no longer a requirement for HIV testing of lawful permanent resident applicants.[55] The website of the National Immigration Project of the National Lawyers Guild contains information of the 2010 change in policy, including government memoranda. See: http://nationalimmigrationproject.org/.

As this major change is implemented, many questions arise about how this will impact people, and there have been inconsistent results.[56] Some doctors still use the old medical forms, which do require HIV testing and disclosure, but Centers for Disease Control is working to ensure that physicians do not test for HIV or request disclosure. Individuals who were denied lawful permanent residency only because the applicant was HIV positive after July 2009 (when the final regulations were published) can move to reopen their applications.[57]

Because there is still a great deal of inconsistency and confusion about what the lifting of the HIV travel ban actually means for individuals, many groups have published FAQs to share the information that is currently known. Immigration Equality, a national organization working to end discrimination in immigration law and reduce its negative impact on LGBT individuals and families, has produced a helpful web document in English and Spanish about what the end of the HIV ban actually means for individuals. It can be viewed online at: http://www.immigrationequality.org/issues/hiv/the-hiv-ban/.

Criminal record issues

For applicants

An applicant is ineligible for a visa or admission if convicted of a crime involving "moral turpitude" or in violation of any law of a State, the United States, or a foreign country related to a controlled substance.[58] The Board of Immigration Appeals has defined *malum in se* crimes (often referred to as crimes of moral turpitude) to be those crimes "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons."[59] Examples of *malum in se* crimes are: larceny, rape, and murder. An individual currently in the U.S. but ineligible for admission should not apply for naturalization because immigration authorities will start proceedings to have him or her deported.

For legal residents

Individuals who have been awarded legal immigration status remain at risk for deportation if they commit a crime. As a general rule, most crimes

that are considered malum in se (see above) are deportable offenses.[60] Legal permanent residents, who would like to travel abroad, need to consider whether reentry would succeed. One of the harshest consequences of changes to the immigration law in 1996 was to apply some of the strictest provisions retroactively.[61] This means that anyone who has any criminal convictions should speak with an experienced immigration attorney before doing anything which would lead to a review of their immigration record. Actions which can trigger review (and possible removal proceedings), include: international travel, any application with DHS such as applying for naturalization or applying to replace a "green card," contact with the police (arrests, traffic stops), and contact with border patrols within 100 miles of the U.S. Border. Any foreign national who has a criminal conviction is strongly advised to consult with a qualified immigration attorney to determine what effect the conviction(s) may have on their immigration status.

REAL ID concerns

The REAL ID Act is a federal law enacted in 2005. It mandates security, authentication, and issuance procedures standards for state driver licenses and ID cards, which must be followed in order for the ID's to be considered valid for "official purposes." The Secretary of Homeland Security defines "official purposes" as presenting state driver licenses and identification cards for boarding commercially operated airline flights and entering federal buildings and nuclear power plants. The REAL ID Act has created potential problems for asylum seekers and transgender people trying to legitimately acquire or change identification.[62]

Asylum

Asylum officers are now given broad discretion in requesting that "the applicant should provide evidence which corroborates otherwise credible testimony," including proof of persecution and additional proof of identification from those in their home country. This kind of proof can be very difficult to obtain. REAL ID gives asylum officers the right to reject asylum based on material inconsistencies. In many cases, inconsistencies in documents, such as different first names or gender references may simply reflect the applicant's efforts to navigate different systems as a transgender person. However, these inconsistencies may be flagged by asylum officers nonetheless. Inconsistencies like these are very common, since people seeking asylum can be fearful and distrust officials, or lack understanding of the system and cultural codes of conduct. Furthermore, the REAL ID system gives Immigration Judges the power to reject an asylum applicant's case based on their demeanor, such as appearing uncomfortable or laughing nervously, things people might inadvertently do while recounting serious or traumatic details.

State Identification Documents

REAL ID requires the states to adopt stricter laws regarding the issuance of state ID cards, which could make it more difficult for transgender people to obtain legitimate ID especially if the state in which they were born does not re-issue birth certificates (such as Ohio, Tennessee, and Idaho). These requirements force states to make electronic copies of all documents used to support a license or state ID application so the state will also make copies of documents used to change the name and/or gender marker on a license. These electronic copies will then be available in a national database to an undefined group of people, which gives rise to privacy concerns.

Individual's rights when dealing with DHS[63]

Transgender people frequently report that they are disproportionately stopped on the street by police. It is extremely important for transgender individuals to not only be aware of their rights when dealing with the police, but also to feel empowered to navigate a dangerous situation as safely as possible. Because police do sometimes unfairly target and harass individuals and retaliate when individuals stand up for themselves, it is important that you make careful and personalized decisions about what to say to the police or ICE officers, and how to say it. Particularly when refusing to provide officers with information, being polite and respectful at all times can help to de-escalate interactions with the police, even when the police are not being respectful to you.

It is important that people assert their rights when dealing with DHS. Failing to demand one's rights or signing papers waiving those rights may lead to deportation before the individual is able to see a lawyer or an Immigration Judge. Individuals should never sign anything without reading, understanding and knowing the consequences of signing it. Individuals should speak with a lawyer and, if possible, even carry the name and phone number of an immigration lawyer. DHS will not explain the different options available to an individual.

Based on today's laws, regulations, and DHS guidelines, non-citizens usually have the rights enumerated below, no matter what their immigration status. The following information may change, so it is important to contact a lawyer. The rights below apply to non-citizens who are inside the United States. Non-citizens at the border who are trying to enter the U.S. do not have the same rights. A non-citizen inside the U.S. has the right to call a lawyer or family if detained, and has the right to be visited by a lawyer in detention. A detainee has the right to have an attorney at any hearing before an immigration judge, but does not have the right to a government-appointed attorney for immigration proceedings. If the individual has been arrested, immigration officials must provide a list of free or low cost legal service providers.

Immigration status

Everyone has the same rights if a police or an officer with Immigration and Customs Enforcement (ICE) stops you on the street. An officer may not request evidence of a person's immigration status in that person's home or other private place unless the officer has a proper warrant. A person is not legally required to show proof of legal presence unless an officer has proof that the person is not a U.S. citizen. A person is not required to talk to government officers about his or her immigration history. Once a person has shown evidence of immigration status, the individual does not have to talk to officers further.

You do not have to answer any questions, even if you are arrested. You should not and do not have to say anything about where you were born or how you entered the United States. You do not have to show any documents, unless you were stopped while driving a vehicle, in which case you may get in trouble for failing to produce a valid driver license. It is extremely important to not show false documents, because doing so is a crime and can make the situation much worse. Note that falsely claiming U.S. citizenship can result in a felony charge and bar from the United States.

You have the right to demand to speak to a lawyer, and you do not have to say anything to the police before you talk to a lawyer. Don't sign anything, especially an "Order of Voluntary Departure" without first talking to a lawyer. Do not sign anything that you cannot read or do not understand. If you are arrested and charged, ask to have your hearing in the city with an immigration court closest to where you live, so that you and your case are not transferred. If ICE agents come to your house, you do not have to open the door unless they show you a search warrant. The Immigrant Legal Resource Center has produced red cards that you can keep in your wallet and give to police or ICE agents if you are stopped on the street or if agents come to your home. You can order or download and print your own cards online from: http://www.ilrc.org/for_immigrants/red_cards.php

Hearings

Anyone arrested for an immigration violation has the right to a hearing before an immigration judge to defend themselves against deportation charges. In most cases, only an Immigration Judge can order that someone be deported, unless they have waived their rights or taken "voluntary departure," agreeing to leave the country. Other instances when a person might be deported without a hearing is if the individual has a criminal record, was arrested within 100 miles of the border, came to the U.S. through the visa waiver program or has a prior deportation order. If a person gives up the right to a hearing or leaves the U.S. before the hearing is over, the person could lose eligibility

for certain immigration benefits, and could be barred from returning to the U.S. for a number of years.

Note that the Board of Immigration Appeals has ruled that DHS has the discretion to place arriving immigrants in removal proceedings under INA §240, even if they may also be subject to expedited removal under INA §235(b)(1)(A)(i).[64]

Detention and Deportation

For service providers, locating a client who has been detained by ICE can be a challenge. It will always be helpful to have your client's alien number (number starting with "A#"). Contact U.S. Immigration and Customs Enforcement's Enforcement and Removal Operations or use the Online Detainee Locator System, which will be discussed later. If your client is or was on parole, it may be helpful to contact the parole officer. Non-citizens convicted of a crime are generally placed in deportation proceedings while in detention. ICE serves them a "notice to appear" (NTA) and a detainer so they cannot obtain release prior to deportation.

The NTA is the document the government gives the individual and the court to explain why an individual should be removed from the United States. The NTA starts the case against that person. ICE must give the individual the NTA within 72 hours of detention. The NTA is divided into two parts. The first part, "Allegations," has the person's name, the country of origin, and the date and manner of entry into the United States. It also gives the factual basis or reason for removal. The second part "Charges," lists the sections of the law under which the individual may be removed. The individual's first date to see the Immigration Judge is usually scheduled within one or two weeks after receiving the NTA, though it may be longer.

The first appearance before an Immigration Judge is known as the "Master Calendar Hearing." At the first court appearance, the court will ask the individual if he or she has an attorney or would like time to obtain one, and will then grant time to find an attorney, if necessary. At the beginning of the case the judge will "take the pleadings," which means that the judge will review the NTA with the individual. The judge will ask if the facts contained in the NTA are true, if the individual admits to being removable, and whether they will be applying for any type of relief from removal. The government will need to prove both that the individual is a foreign citizen and that he or she is removable.[65] Transgender people are placed in detention facilities according to genitalia. For example, a transgender woman who has not had SRS would be placed in a men's detention facility. Advocates can petition on behalf of transgender prisoners for release or alternative sentencing on the grounds that the transgender person is in imminent danger while housed in an inappropriate detention facility as a transgender person.[66]

Almost all facilities holding ICE detainees have implemented the ICE Detention Standards to ensure consistent treatment and care for detainees in immigration custody. However, these standards are not legally enforceable, leaving many detainees without access to phones, adequate medical care, and basic legal materials. To file a grievance related to a situation or event related to a person's detention, a complaint should be sent to Department of Homeland Security, Office for Civil Rights and Civil Liberties, Review and Compliance, 245 Murray Lane, SW, Building 410, Mail Stop #0190, Washington, DC 20528, or email to: crcl@dhs.gov.

Online Detainee Locator System

One common problem in immigration law is that people who are detained by Immigration and Customs Enforcement (ICE) can be very difficult to track, as they are often transported to different states and facilities. To address this long-standing problem, on July 23, 2010, ICE announced the launch of a new public, internet-based system to help people locating individuals who have been detained in ICE custody. This system is called the Online Detainee Locator System (ODLS), and is on ICE's public website: http://www.ice.gov/locator. This detainee locator program only searches for exact match names, so you have to enter the individual's information as it appears in their detention paperwork; preferred names will not be honored.

Consulates

Non-citizens arrested in the U.S. have the right to call their consulate or to have the police tell the consulate of their arrest. The police must let the consulate visit or speak with them if consular officials decide to do so. The consulate might help find a lawyer or offer other help. A non-citizen has the right to refuse help from the consulate.

Resources

Below is a brief list of resources that may be especially helpful. This collection is only a small representation of transgender-welcoming services in California and the United States. Searching online for additional resources may yield more specific information or assistance. Resources are divided by California-specific organizations, national organizations, and general resources, which includes legal documents, publications, research tools, and "know your rights" resources. For ease of use, we have specified whether organizations provide direct or support services, and to what extent they serve the LGBT communities, and specifically, to what extent they serve transgender communities. National Lawyers Guild interns spoke with representatives of almost all of these organizations to ensure that our description of their services is correct and up-to-date, and that they are explicitly welcoming of transgender community members.

Contact a Legal Service Provider or Immigration Attorney

The U.S. Department of Justice maintains a handy list of pro bono immigration services by state that can be accessed here:
http://www.justice.gov/eoir/probono/states.htm

California Resources

AIDS Legal Referral Panel www.alrp.org
1663 Mission Street, Suite 500
San Francisco, CA 94103
Phone: (415) 701-1100

The ALRP Immigrant HIV Assistance Project (IHAP) provides free immigration legal services to HIV positive immigrants living in San Francisco. IHAP services include assistance with obtaining legal permanent residence (green cards), HIV waivers, political asylum, suspension of deportation, and naturalization.

Asian Law Caucus www.asianlawcaucus.org
55 Columbus Avenue
San Francisco, CA 94111
Phone: (415) 896-1701

Legal and civil rights organization serving the low-income Asian Pacific American communities in San Francisco & Bay Area region.

Asylum Access www.asylumaccess.org
39 Drumm Street, 4th Floor
San Francisco, CA 94111
Phone: (415) 399-1700

Asylum Access moves beyond band-aid humanitarian assistance to address the root cause of refugees' needs: denial of rights.

Lawyer's Committee for Civil Rights Asylum Program
http://www.lawyerscommittee.org/issues?id=0009
131 Steaurt Street, Suite 400
San Francisco, CA 94105
Phone: (415) 543-9444

The Asylum Program may be able to find a lawyer to represent the applicant for free, otherwise, they can provide a list of attorneys who charge lower than average fees. All information shared with them is confidential and cannot be shared with the U.S. government or anyone else without your permission.

Organization for Refuge, Asylum & Migration
www.oraminternational.org
39 Drumm Street, 4th floor
San Francisco, CA 94111
Phone: (415) 373-5299

ORAM provides LGBT clients and refugees with free legal services to break free of sexual and gender-based discrimination and persecution.

San Francisco Immigrant Legal and Education Network
www.sfimmigrantnetwork.org
938 Valencia Street

San Francisco, CA 94110
Phone: (415) 282-6209 ext.115

SFILEN works to achieve immigrants' rights through building grassroots leadership, providing free immigration legal services and comprehensive legal assistance, promoting community education, and organizing to empower the immigrant community.

Survivors International www.survivorsintl.org
2727 Mariposa Street, Suite 100
San Francisco, CA 94110
Phone: (415) 546-2080

Survivors International is a 501 (c)(3) non-profit organization dedicated to providing essential psychological and medical services to survivors of torture who have fled from around the world to the San Francisco Bay Area. CIaims to help survivors put the pieces back together by providing the support they need to re-establish healthy and productive lives after their experiences of torture.

Transgender Law Center www.transgenderlawcenter.org
870 Market Street, Room 400
San Francisco, CA 94102
Phone: (415) 865-0176
Email: info@transgenderlawcenter.org

The Transgender Law Center (TLC) is a civil rights organization advocating for transgender communities. TLC provides direct legal services, engages in public policy advocacy and education and works to change laws and systems that fail to incorporate the needs and experiences of transgender people.

Nationwide Resources

Dept of Homeland Security Office for Civil Rights and Civil Liberties
http://www.dhs.gov/xabout/structure/editorial_0371.shtm
Review and Compliance
245 Murray Lane, SW
Building 410, Mail Stop #0190
Washington, DC 20528
Phone: (866) 644-8360
Email: crcl@dhs.gov

The office is led by the Officer for Civil Rights and Civil Liberties who provides advice to the Secretary and the senior officers of the Department on a full range of civil rights and civil liberties issues. Contact this office to file complaints.

Immigrant Legal Resource Center www.ilrc.org
1663 Mission Street, Suite 602
San Francisco, CA 94103
Phone: (415) 255-9499

The Immigrant Legal Resource Center (ILRC) is a national non-profit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people.

Immigration Equality www.immigrationequality.org
National Headquarters

40 Exchange Place, Suite 1705
New York, NY 10005
Phone: (212) 714-2904

Immigration Equality is a national organization that advocates for the equality for lesbian, gay, bisexual, transgender (LGBT) and HIV-positive immigrants. They run a pro-bono asylum project, provide trainings to LGBT immigrants about immigration law, and match up people needing legal services with volunteer attorneys. Immigration Equality specifically provide support and resources to transgender and HIV positive individuals, and their website features written resources in English and Spanish about immigration law for transgender and HIV positive people.

Heartland Alliance's National Immigration Justice Center
www.immigrantjustice.org
208 S. La Salle Street, Suite 1818
Chicago, IL 60604
Phone: (312) 660-1370

The Immigrant Legal Defense Project serves immigrants applying for permanent residence through a family-based application; permanent residents applying for citizenship ; immigrants who are victims of domestic violence or violent crime and seek protection in the United States; and victims of international human trafficking.

National Center for Lesbian Rights www.nclrights.org
870 Market Street, Suite 370
San Francisco, CA 94102
Legal Helpline: (415) 392-6257 (9 am to 5 pm PST)
Toll free: (800) 528-6257 (9 am to 5 pm PST)

NCLR provides free legal assistance to LGBT immigrants nationwide. They help individuals understand various aspects of immigration law and provide direct representation to LGBT immigrants in impact cases and individual asylum claims.

National Lawyers Guild's National Immigration Project
www.nationalimmigrationproject.org
14 Beacon Street, Suite 602
Boston, MA 02108
Phone: (617) 227-9727

The National Immigration Project is a national non-profit organization that provides legal and technical support to immigrant communities, legal practitioners, and all advocates seeking to advance the rights of noncitizens. The Project is especially committed to working together with people who are marginalized to protect rights and to promote fairness, including battered women, people with HIV/AIDS, children, and noncitizen criminal offenders. Members of the Project include attorneys, law students, judges, jailhouse lawyers, advocates, community organizations, and other individuals seeking to defend and expand the rights of immigrants in the United States.

Sylvia Rivera Law Project www.srlp.org
147 W 24th Street, 5th Floor
New York, NY 10011
Phone: (212) 337-8550
Email: info@srlp.org

SRLP provides free legal services to transgender, intersex and gender nonconforming low-income people and people of color in the New York area. SRLP provides advice and referral for a wide variety of legal issues. Sometimes, they can also provide more help, such as advocacy, help with a case you are bringing on your own, or, more rarely, representation in a legal action.

NOTES

1. This manual is a project of the National Lawyers Guild San Francisco Bay Area Chapter; many additional individuals and organizations made valuable contributions. Thanks to Prerna Lal, Carlos Villarreal, and Alicia Virani, for drafting the original material which constitutes the bulk of this manual, and Kelly Densmore, John Fitzgerald, Sara Grant, Ted Gullickson, Andrea Horne, Erica Keiter, Alex Lee, Micah Ludeke, Ben Lunine, Joshua Melgaard, Esteban Rodriguez, Julie Shefchik, Ariel Speser, Michelle Syler, Dani Williams, Zahra Mojtahedi and numerous other individuals for reviewing a draft version of this manual and providing valuable insights based on their experience carrying out this work. Thanks also to Becky Straus for designing an earlier version of this manual.

   This effort was inspired by Thomas Steel, tireless advocate for the San Francisco Bay Area LGBT community and longtime friend and supporter of the National Lawyers Guild San Francisco Bay Area Chapter. His leadership and vision enabled the work which the *Transgender Know Your Rights* manuals seek to further. The *Transgender Know Your Rights* manuals were made possible by the Thomas Steel Fund.
2. For purposes of this manual, the word "transgender" is used as an umbrella term that includes transgender, gender variant, and intersex people who are at any point of self-identification or physical transition. Occasionally, the text will refer to individuals as "he or she" or "his or her." This reference does not indicate that a statement applies exclusively to persons who identify as male or female, but instead is used for legibility and accessibility.
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8. See Transgender Issues. Immigration Equality, *at* http://www.immigrationequality.org/issues/transgender/, (last visited August 1, 2012).
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11. Matter of Lovo-Lara, 23 I. & N. Dec. 746 (BIA 2005).
12. For more information, see Rachel Duffy Lorenz, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. Rev. 523 (2005).
13. The language of "postoperative transsexual" is taken from the text of the case and is not the language choice of the National Lawyers Guild. For an introductory list of related terms, *see* Gender Variance: A Primer, Gender Education & Advocacy, Inc., *available at* http://www.gender.org/resources/dge/gea01004.pdf, (last visited August 1, 2012).
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33. Sanchez-Trujillo v. Immigration and Naturalization Service, 801 F.2d 1571, 1576 (Ninth Cir. 1986).
34. Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (BIA 1990).
35. Hernandez-Motiel v. Immigration and Naturalization Service, 225 F.3d 1084 (9th Cir. 1997); see also Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004).
36. 8 U.S.C. § 1158(a)(2)(B).
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38. 8 U.S.C. § 1158(b)(2)(B)(i). Whereas the term "aggravated felony" may sound as if it includes only the most serious violent crimes, under the definition provided by the Immigration and Nationality Act, even theft offenses with a penalty of more than one year in prison, illegal gambling, and fraud are generally considered aggravated felonies. 8 U.S.C. § 1101(a)(43).
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Kris Franklin

"BATON BULLYING": UNDERSTANDING MULTI-AGGRESSOR ROTATION IN ANTI-GAY HARASSMENT CASES

In 2011, the Centers for Disease Control issued a factsheet entitled *Understanding Bullying*.[1] After defining what bullying is and how it occurs (in person, verbally, electronically), the factsheet asks "Why is bullying a public health problem?"[2] The answers, it seems, are multiple: "Bullying can result in physical injury, social and emotional distress, and even death. Victimized youth are at increased risk for mental health problems…. Youth who bully others are at increased risk for substance abuse, academic problems, and violence later in adolescence and adulthood."[3] The sheet concludes with the CDC's four-step prevention plan of definition and monitoring, identifying and protecting the victims, developing and testing prevention strategies, and urging for widespread adoption of these strategies.

What a long way we have come from the *laissez-faire* attitude toward bullying that characterized interaction among children and between children and adults until fairly recently. Indeed, the idea that bullying is a comprehensive social problem, an issue that like smoking, obesity, or teen pregnancy, affects the health of the entire nation as much as that of the individual, is so widespread that the CDC does not even proffer an argument that bullying is within its purview. The fact sheet's subtitle: "Why is bullying a public health problem?" presupposes that it is, and that its readers do not need convincing.

This consensus that bullying is a pervasive and potentially serious problem extends beyond the realm of public health[4] and has become a topic of ongoing national conversation. Reams of commentary have emerged,[5] while Emily Bazelon's recent book about teen bullying has become a national bestseller.[6] As *Newsweek* reported in 2010, consulting companies and software programs have sprung up to help schools and parents identify and resolve bullying in their communities.[7] Bullying of adolescents by their peers can take many forms, but it is strongly associated with anti-gay sentiment and homophobic aspersions, to the extent that columnist Dan Savage launched the "It Gets Better Project" in response to a well-publicized rash of suicides by gay and

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Kris Franklin is a professor of law at New York Law School. She extends tremendous thanks to Sarah E. Chinn for assistance in conceptualizing, drafting, and editing this project.

lesbian adolescents (or teenagers who were presumed to be gay) in the wake of bullying by their peers.[8]

Over the past few years, schools have intensified their efforts to prevent or respond to bullying.[9] This makes some sense: schools are where children spend the majority of their waking hours. They are the places in which kids interact with one another the most. Moreover schools are required to institute policies about any number of educational and public health issues, such as requirements for vaccination, achievement standards, health and safety principles, curricular expectations, teacher training levels. But the attention to bullying in schools is not just about protecting vulnerable children and punishing perpetrators, although that is certainly a significant part of their focus. Schools are also increasingly recognizing that they are the first place parents look to assign responsibility for countenancing bullying, and for failing to stop it in its tracks. That is to say, parents are suing, and school districts are paying.[10]

However, this increased focus on (and litigation around) the problem of peer bullying frequently overlooks a very particular kind of bullying that seems especially common, but is uniquely difficult for schools to address. Bullying, and the problem of anti-gay bullying in particular, may have received a fair amount of recent attention, sharpened by the increasing visibility of teenagers who openly identify as gay, lesbian, bisexual, or transgender,[11] yet there is still a troubling gap between acknowledging that homophobic bullying exists and understanding how, more often than not, it operates.

The consistent pattern that emerges in anti-gay bullying lawsuits from around the country does not easily fit the common image that the CDC invokes, in which bullying is seen as taking place between an individual perpetrator and a single victim.[12] Instead, while in most of these cases there was a sole victim (or at least only one plaintiff in the lawsuit), it is far more difficult to isolate a single bully. Rather, in these homophobic bullying cases at least, there is an array of perpetrators. It appears that children construct a culture in which the victimized child becomes fair game for anyone who chooses to bully him or her, and when one culprit is punished, another steps up in his or her place.

In this context it is much harder for schools and school systems to successfully ameliorate the bullying, which correspondingly diminishes the victim’s ability to hold the school or school systems liable for even horrific ongoing violence and harassment. Most importantly for children themselves, when bullying is imagined only as a two-party interaction between the bully and the bullied, the schools will not have the tools to address how anti-gay bullying actually works on the ground, so that despite what are often their best efforts, they may be incapable of putting a stop to the pattern of victimization.

Homophobic bullying in litigation

The foundational case of school liability for patterns of anti-gay harassment and bullying was *Nabozny v. Podlesny.*[13] According to facts alleged in his complaint to the federal district court, Jamie Nabozny was continually harassed and assaulted by his middle-school peers in Ashland, Wisconsin. After he came out as gay in the seventh grade, other children hit him, spat at him, and called him "faggot."[14] The abuse culminated in a sexual assault in which a fellow student pretended to rape him in front of twenty other children, and did not stop until Nabozny was taken out of the school system after a suicide attempt.[15] He returned to public high school and within days the harassment and violence resumed, leading to another suicide attempt. The following year, Nabozny was beaten to the ground and kicked repeatedly until he suffered internal bleeding.[16]

Throughout this relentless abuse, Nabozny contended, the Ashland school system was essentially inactive. The school principal promised to protect Nabozny, but made no real effort to address the problem.[17] Even after the simulated sexual assault, and his hospitalization later for internal injuries, none of the perpetrators was punished. Instead, by eleventh grade the school guidance counselor told him that the school was not willing to help him and he should simply leave the school if he wanted the bullying to end.[18] Ultimately, Nabozny moved to Minneapolis and sued the principals of Ashland's middle and high school for gender discrimination under 42 U.S.C. §1983.[19]

While the District Court granted summary judgment dismissing Nabozny's claim, the Seventh Circuit reversed this judgment. The Circuit Court reasoned that school leaders would not likely have allowed a girl to suffer the kind of verbal, physical, and sexual abuse that Jamie Nabozny underwent, and hence he potentially had a recognizable gender and sexual orientation discrimination claim.[20]

This case was widely viewed as opening the door for students and parents to sue school systems over anti-gay bullying. A prior Supreme Court decision in *Davis v. Monroe County Board of Education*[21] had invoked Title IX to require schools to act affirmatively in cases of peer-to-peer sexual harassment, and concluded that schools were liable if they demonstrated "deliberate indifference" to this kind of harassment.[22] Following the breakthrough in requiring schools to address anti-gay bullying in *Nabozny*, the *Davis* deliberate indifference standard was frequently invoked in cases alleging homophobic aggression as well as sexual harassment.

The pattern of these cases is astounding in its predictability: a child is singled out, and any number of other students join in victimizing him or her repeatedly, with a varying array of perpetrators over time. The question for

the courts then becomes whether the school has been deliberately indifferent if it intervenes in individual instances of reported student misconduct against a bullied student, but does not stop the pattern of repeated harassment that so often typifies anti-gay bullying. Courts have been divided on whether schools have met their legal obligations when the peer aggression is pervasive and genuinely interferes with bullied kids' education, but where school officials have taken action against reported abusers.

In the *Bellefonte* case,[23] for example, John Doe was repeatedly harassed by fellow students from ninth grade onwards. Children called him "fag," "queer," and "gay boy"; he could not go into any public space in the school without being called names, or having students make sexually explicit comments.[24] This abuse led him to withdraw from afterschool activities like soccer and student government. At least twelve different children are named or referenced in the court's decision as alleged perpetrators involved in bullying Doe,[25] with the suggestion that still others were involved at least tangentially in harassing him.[26]

In Tonganoxie, Kansas, Dylan Theno had a similar experience over the course of several years, although in his case the line between verbal and physical harassment was much thinner.[27] From seventh to eleventh grade, Dylan was called "queer" or a "fag" by other children; he was kicked and pushed as well. Fellow students threw rocks at him and yelled insults at him like "Dylan's a fag, Dylan likes to suck cock."[28] He was continually harassed in the lunchroom by other children who accused him of masturbating at school.[29] While teachers disciplined students as Dylan reported them,[30] the harassment was a widespread problem that continued regardless of who was punished. More to the point, the bullying was relentless, lasting for years. Students wrote homophobic slurs on chalkboards, and while the teasing was not constant, it re-emerged again and again.[31] While Dylan occasionally defended himself verbally and even physically, by eleventh grade he was begging his mother not to send him back to school.[32]

Still other cases escalated into serious violence, closer in character to *Nabozny*. In Michigan, Jon Martin was both verbally harassed and physically assaulted.[33] Classmates allegedly dumped food on his head in the lunch room, defaced his locker, threw BB pellets at him, sprayed him with water, grabbed his crotch and buttocks, and punched and shoved him in the hallways. In some instances the perpetrator(s) could not be identified, but at least seven different students are identified in Martin's complaint as having participated.[34]

Similarly, in Toms River, New Jersey, "L.W." was taunted as a "fag" and "homo" throughout elementary, middle, and high school.[35] Other students insulted him repeatedly, to the extent that L.W. considered it a "good day"

and "lucky" if no one had directed slurs at him.[36] The harassment intensified over time, to the extent that in seventh grade another child slapped him and whipped him in the neck with a silver chain, raising welts.[37] In high school, other students threatened to knife him, pushed him to the ground, and kicked him.[38] L.W.'s grades plummeted as he became increasingly fearful and resisted going to school. Again, the case references numerous children reported to have been involved in harassing or attacking L.W.,[39] and when a child was chastised and apologized, a hydra-headed alternate quickly arose to take his place.[40]

Similar stories abound, and new cases are filed regularly.[41] And as painful as these stories are, some cases are more serious still: school systems may also sued by parents whose children have committed suicide in the wake of ongoing harassment and violence.[42]

While the more recent cases are factually quite similar to *Nabozny*, there is one significant difference. In *Nabozny*, the plaintiff could convincingly argue that Jamie Nabozny's school, and specifically the guidance counselor and principal were genuinely "indifferent" to his suffering. When other students harassed or assaulted him they did nothing. While they promised to protect him, they neglected to do so. In fact, they implicitly blamed him for the violence visited upon him, and told him that the only way for it to end was for him to leave the school.[43]

In more recent cases, however, many schools have been at least somewhat more sensitive to the targeted child's plight. This, of course, is what advocates (and the CDC) would urge, yet it does make plaintiffs' Title IX claims harder to substantiate. In *Davis*, the Supreme Court was clear about the standards by which schools should be judged (although in the context of sexual harassment, rather than bullying): the harassment should be "so severe, pervasive, and objectively offensive that it could be said to deprive [students] of access to educational opportunities," that the school had "actual knowledge of the harassment," and, most importantly, that the school was "deliberately indifferent to the harassment."[44] In the cases discussed above it is not especially difficult to allege (or conclude) that the abuse the plaintiffs experienced was severe, pervasive, and objectively offensive, or even that the schools were aware of the problem the bullied child faced. But showing that schools have acted with deliberate indifference becomes a much more complicated question when school administrators do take action to address individual reported instances or violence or harassment, yet the bullying continues unabated, and often with renewed vigor, with an ever-changing array of new agents.

In many of these cases school officials took steps to punish students who were engaged in victimizing these children. For example: in the case of L.W., school officials counseled offending students, and even suspended some of

the perpetrators.[45] Teachers and administrators at Dylan Theno's schools (middle school and high school) made both individually-directed corrections and school-wide announcements condemning homophobic slurs.[46] John Doe's school investigated many of his claims, offered him an escort in school, and suspended one of his primary harassers.[47] Significantly, the court observed that "every time Doe reported an alleged incident of harassment" to the school's assistant principal, who warned or disciplined the student involved, "that perpetrator never bothered Doe again.[48] Accordingly, the trial court concluded that the school had acted responsibly, and that "no reasonable finder of fact could conclude that the School District was deliberately indifferent to the harassment of Doe,"[49] thus dismissing the case.[50] Yet despite school officials' responsiveness, Doe was harassed from middle school through high school graduation, to the point of reporting suicidal thoughts in 9th grade.[51]

So, what precisely do we expect schools to do when individual students appear to hand off turns at bullying the same victim, and will we hold the schools liable for an unending culture of victimization? Wrestling with this question provoked sharply diverging yet carefully considered opinions in the 2009 case of *Patterson v. Hudson Area Schools*.[52] Dane Patterson's experience is fairly typical of these cases: name-calling early on in middle school escalated over time into physical abuse. Coupled with allegations of almost-daily insults and slurs were pushing and shoving, and then vandalism of his belongings and school locker.[53] After Dane and his parents complained, the school disciplined the offending students, suspending some of them. They also assigned Dane to work with the teacher who ran the middle school's resource room, focusing on academics and social skills.[54]

The bullying carried on through high school, and in fact worsened.[55] In ninth grade, Dane experienced a traumatizing sexual assault: he reported that he was cornered by a student who rubbed his penis and scrotum on Dane's face and neck, while another student blocked the exit.[56] In the wake of this attack, Dane's parents sued the school under Title IX, claiming deliberate indifference to his harassment at the hands of his classmates. The school system counter-argued that it had acted appropriately, penalizing and even expelling perpetrators of peer aggression, offering resources for the targeted child, and educating students about the destructive effects of bullying.[57]

The District and Circuit Courts considered the claim of "deliberate indifference" carefully, but came to markedly different interpretations of what that phrase entailed in situations like Dane's.[58] The District Court maintained that officials in the Hudson Area School system "repeatedly took adequate and effective remedial action reasonably calculated to end harassment, eliminate the hostile environment and prevent harassment from occurring again."[59] The decision details at least six remedies that the schools put in place either to

address bullying generally or Dane's harassment in particular: written policies against bullying, assemblies and peer mediation programs, adult supervision of shared school space like locker rooms and hallways, and decisive disciplinary action against offending students.[60] Noting these efforts, that in each individual incident of reported harassment school officials intervened, and "that…perpetrator…did not cause Dane any further problems,"[61] the opinion concludes essentially that the school district had acted in good faith to end a particularly intransigent case of bullying.

The District Court's focus in its opinion seemed to be on the difficulty of eradicating adolescent bullying and the Hudson Area Schools' attempts to do so. Ironically, though, Dane Patterson's experience falls out of this analysis. Despite the fact that his schools seemed to have done a commendable job of talking about the problem of bullying,[62] and did in fact respond to individual incidents, Dane remained a constant target of seemingly escalating harassment and violence. At what point could the school district be said to be indifferent to Dane's suffering, if it continues even after the school acts against specific perpetrators?

The Sixth Circuit, to whom the Pattersons appealed after their case was initially dismissed, brought a strikingly different emphasis to their "deliberate indifference" analysis. The majority's opinion centers instead on the school's awareness of Dane's continual victimization, reasoning in effect that despite the anti-bullying interventions the schools had in place, it was possible for a jury to conclude that officials exhibited deliberate indifference evidenced by the fact that at least in Dane's case, the measures seemed not to work.

The circuit court decision zeroes in on Dane's experience almost immediately by dramatizing his "distraught, anxious, and angry" response to the school-mandated apologies he received from students who had bullied him, and his insistence that they were insincere.[63] The Court distinguishes between the discrete acts of violence and harassment Dane experienced, to which the schools did respond, and the "severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped."[64] It was all well and good for the Hudson schools to talk in vague terms about "kindness" and "respect," but, as the Court points out, school officials should have realized that none of their strategies were actually solving the problem—Dane Patterson was still being attacked.

For the Sixth Circuit, the "pervasive" nature of the bullying is its defining characteristic. The students bullying Dane were functioning not as individuals but as a collective. As one element of the collective fell away, another moved in to take its place, maintaining the structure of bullying within which Dane

existed.[65] Ultimately, the court points out, the argument that the Hudson Area Schools took action “misses the point,” and allows the schools to claim that they were responded effectually to counter bullying.[66] But they must not have been effective, the court reasoned: after all, Dane was still bullied, and more intensely. To disregard that fact “ignores the realities of [Dane’s] situation.”[67]

In looking at this case from Dane’s vantage point, and recognizing that a school in which a child can be this intensely victimized cannot claim that it is effective in responding to bullying, the Circuit court recasts *Patterson v. Hudson Area Schools* as a case about “the realities” of Dane Patterson’s situation, not about the good intentions of a school system. Bullying is an actual experience that a specific child undergoes, not just a difficult set of policy issues for a school to address.

But the Circuit court opinion was not a unanimous one. In fact there is a vigorous dissent that offers a very different set of standards by which to judge the Hudson Area Schools. The dissenting opinion contrasts the Hudson schools, which made numerous efforts to counter peer bullying, with cases in which schools did nothing to stem ongoing harassment even when they were well aware of the activities.[68] While the dissenting judge sympathizes with Dane Patterson,[69] he points out that no individual student ever harassed Dane more than once, and that this lack of recidivism shows the efficacy of the schools’ policies.[70]

It is unreasonable, the dissent contends, to expect a single school system to eradicate bullying. Rather, the fact that the schools were, in the dissent’s repeated mantra, “100% effective” in making sure that identified culprits never bullied again, should demonstrate that Hudson Area schools cared about bullying and took significant action to curb it.[71] They took Dane Patterson’s complaints seriously, punished students involved, provided school counselors and social workers, and engaged in educating students against bullying.[72] The schools could only act on incidents about which they knew, and could only discipline students whom they could identify. Asking any more of the school district would be “manifestly unreasonable,” since it would hold schools liable for acting to prevent future harassment by new harassers.[73]

Taken from a model of bullying behavior as the actions of one individual student against another, the dissent’s position seems eminently reasonable. What more could we ask the schools to do than implement bullying-awareness programs and respond decisively to any acts of harassment that nevertheless occur? But looked at from the harassed kids’ perspective, the very conclusion that the dissent finds so unreasonable—identifying and reacting to a steady pattern of offensive behavior directed toward a specifically-targeted victim—would hold schools responsible for addressing precisely the sort of

ongoing bullying patterns that Dane Patterson (and the many other plaintiffs like him) were actually enduring.

Addressing the pattern of multiple aggressors

The cases discussed here, and especially the various opinions in Patterson, show how crucial the framework for understanding how homophobic bullying works is in these cases of continued aggression. It may be easy under Title IX to identify a school's responsibility to respond to specific offenses, and to make sure that each perpetrator of harassment did not commit further offenses. But if few or none of the identified harassers are identified as bothering the bullied child again, it is possible to conclude that the schools' approach is entirely "effective" even when the harassment itself lingers for years in the hands of ever-replaceable actors.

The difference between the majority and the dissent in Patterson, then, is one of contextualization of how anti-gay bullying actually works. For the majority, Dane's harassment was "pervasive"— that is, constant, relentless, and occurring regularly and frequently. For bullying to be omnipresent in this way, and yet not have repeated perpetrators, there must be some sort of cultural consensus that Dane was an open target, available for the homophobic cruelty of any and all children. That is, the students at the Hudson Area Schools were engaging in multi-aggressor rotational harassment. They functioned as a relay team, so that if one child stepped back from bullying Dane, another or others could step forward; passing the baton from one to another (or others). When an individual student was caught, punished, and no longer operated as a bully the rest of the "relay team" would pick up the slack, receiving the baton from the student who had to fall back.

This reality frequently characterizes homophobic bullying in schools. As the cases discussed here show, the victimized students were the recipients of multi-aggressor rotational bullying. Identifying particular offenders was, to a certain extent, beside the point. In a culture of baton bullying, the only constant is the figure of the child-who-is-bullied. That is, for these homophobic victimization cases, the child who is perceived to be "the fag."[74] Indeed, the term "fag" is, in situations of homophobic baton bullying, synonymous with "recipient of harassment." Calling a child a "fag" appears frequently to initiate that child into a system of multi-aggressor bullying in which the perpetrators continue to hand the baton back and forth for as long as they are able.

If courts continue to evaluate Title IX claims of deliberate indifference to bullying through an interpretive frame that understands case-by-case (punish student X or Y) or vague generalized responses (Be kind! Be respectful!) as reasonable remedies—that is, as a frame that believes bullying is the work solely of individually-acting bullies—then they cannot actually address the

genuine experiences of the victimized children. Moreover the legal analysis of these Title IX cases can never move beyond the tension we see between the district and circuit court opinions in *Patterson*, or between the majority and the dissent in the Sixth Circuit.

And in this era of zero-tolerance, peer mediation, and anti-bullying public service announcements, litigators representing the victims of bullying will continue to have a difficult time proving deliberate indifference unless they can point to the realities of homophobic harassment: that it is frequently multi-aggressor and rotational, and that depends upon a group consensus that "faggots" deserve this kind of treatment. As we see with the cases discussed here, plaintiffs can succeed in holding schools responsible for indifference to their plight when courts understand the systemic nature of the way they are targeted. Therefore litigators raising these kinds of Title IX claims, and seeking to have schools sanctioned for ineffectual intervention even in the contemporary climate in which bullying is understood to be a genuine problem, will need to start educating the courts about the systemic nature of multi-aggressor rotational bullying. They will need to cultivate social scientific data, rely on expert witnesses, craft narratives of baton bullying, and in general sensitize the courts to the lived experience of the victims of this sort of culture of targeted harassment.

Beyond litigation, though, and as important as developing these strategies may be for lawyers, children who are at the mercy of multi-aggressor rotational bullying might be better served by a societal shift in how we understand anti-gay harassment. How might we develop in-service trainings for teachers, guidance counselors, and lunchroom workers that address the consensus inherent in this kind of bullying? Ultimately, of course, the goal is not to rely on retrospective litigation. Instead we must understand the pattern and frequency of rotational aggression, and examine where it comes from and how schools can effectively intervene. It's time for people who care about kids, especially kids who are especially vulnerable because of their sexual orientation, their gender identity or expression, to recognize the systemic mechanisms behind homophobic bullying to put an end to it, not just piece-by-piece but whole-cloth.

In the meantime, lawyers who pursue these cases can serve their clients well by helping courts understand the patterns that actually play out in these children's lives.

NOTES

1. National Center for Injury Prevention and Control, Understanding Bullying Fact Sheet, (2012) *available at* http://www.cdc.gov/violenceprevention/pdf/bullyingfactsheet2012-a.pdf.

2. *Id*. at 1.
3. *Id*.
4. Though it has gained significant traction there. For a summary of recent studies and discussion of public health strategies to address the problem, *see* Marcia Feldman Hertz, *Bullying and Suicide: A Public Health Approach*, 53 J. of Adolescent Health S1, (2013).
5. In books alone, a search of Amazon's titles for the subject of "bullying kids" returns 1797 hits (last visited Sept. 5, 2013). A Google search on the same date for "bullying articles 2013" returned over 38 million hits.
6. Emily Bazelon, Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy (2013). Attention to the book and the issue was significant enough to launch author Emily Bazelon's appearances on such popular television programs as *The Colbert Report* and *Morning Joe*.
7. Nancy Cook, *The Booming Anti Bullying Industry,* Newsweek (Oct. 4, 2010) available at http://www.thedailybeast.com/newsweek/2010/10/04/the-booming-anti-bullying-industry.html.
8. *See* http://www.itgetsbetter.org/. Nine out of ten LGBT teens report being bullied at school. *Gay Bullying Statistics*, http://www.bullyingstatistics.org/content/gay-bullying-statistics.html.
9. For just one of counteless informational projects and resources that have emerged to help schools address the problem of peer bullying, *see* http://www.stopbullying.gov/prevention/at-school/.
10. Just this summer, for example, an openly gay student in Indianapolis accepted $65,000 and a removal of discipline from his transcript after being expelled for bringing a stun gun to school and subsequently claiming that he did so in self-defense when the school had failed to protect him from bullying. Mark Hanson, *Gay Teen Settles Bullying Lawsuit Against School District*, ABA Journal (July 12, 2013, 3:23 PM), *at* http://www.abajournal.com/news/article/gay_teen_settles_bullying_lawsuit_against_school_district/.
11. LGBT legal advocates Lambda Legal suggest that the average age young people come out is now about 16, down from 19–23 just a short time ago. Facts: Gay and Lesbian Youth in Schools, *at* http://data.lambdalegal.org/pdf/158.pdf. *See also*, Jason Cianciotto & Sean Cahill, Education Policy: Issues Affecting Lesbian, Gay, Bisexual and Transgender Youth, 32 (Report of the National Gay and Lesbian Task Force Policy Institute, 2003) *available at* http://www.thetaskforce.org/downloads/reports/reports/EducationPolicy.pdf (suggesting that much more information about anti-LGBT harassment is available now in part because many more LGBT students self-identify earlier than used to be the case).
12. From the Fact Sheet: "definitions of bullying vary [but] most agree that bullying includes: . . . [r]epeated attacks or intimidation between the same children over time." National Center for Injury Prevention and Control, *supra* note 1 at 2.
13. 92 F.3d 446 (7th Cir. 1996).
14. *Id*. at 451.
15. *Id*. at 452.
16. *Id*.
17. *Id*. at 451-53.
18. *Id*. at 452-53.

19. §1983 cases address alleged civil rights violations that deprive a person or group of persons the privileges immunities of U.S. citizenship. In his complaint, Nabozny alleged equal protection and due process violations under the 14th Amendment. *Id*. at 449. Even though Nabozny was successful in his lawsuit, §1983 complaints for school bullying have not become commonplace. Instead, almost all subsequent anti-gay harassment cases have been litigated under Title IX of the Civil Rights Act of 1964, which prohibits sex discrimination in education.
20. *Id*. at 455-56.
21. 526 U.S. 629 (1999).
22. 526 U.S. 629, 644-45 (1991).
23. Doe v. Bellefonte Area Sch. Dist., 2003 WL 23718302 at 2-4 (M.D. Pa. 2003)(not reported)(note that "Doe" is a pseudonym to protect the identity of the plaintiff who was still a minor when the case began).
24. 2003 WL 23718302 at 2-4 (M.D. Pa. 2003)(not reported).
25. *Id*. at 2–5 (describing conduct of Josh F., Lance E., Sean B., Tyler R., Eric C., Josh H., Andy L., April H., Brandon R., Dan H., Tara T. and a "girl or girls" in Doe's 10th grade English class).
26. *E.g.,* references to harassment by further "unknown students." *Id*. at 4.
27. Theno v. Tonganoxie Unif. Sch. Dist., 377 F. Supp. 2d 952 (2005).
28. *Id*. at 954-958.
29. This seemed to stem from an admittedly made-up rumor about Dylan that began in seventh grade, but mentions of the story and harassment based on it continue well into Dylan's high school years. *Id*. at 958, 961.
30. *Id*. at 954, 955, 956, 957, 958, 959, 960 and 961.
31. *Id*. This despite the fact that even the plaintiff seemed to agree that school officials had on a number of occasions actively intervened when other students used homophobic slurs or otherwise taunted Dylan. *Id*. at 955, 956, , 957, 958, 959, 959, 961.
32. *Id*. at 961.
33. Martin v. Swartz Creek Comm. Schs., 419 F. Supp. 2d 967, 968-971(E.D. Mich. 2006).
34. Jake V., Patrick R., Nick C., Mike O., Jeff K., Kaylee B. and Ryan A. *Id*. at 969-971.
35. L.W. v. Toms River Reg'l Schs. Bd. of Ed., 915 A.2d 535 (N.J. 2007).
36. *Id*. at 540 and 541.
37. *Id*. at 542.
38. *Id*. at 542-44.
39. "A group of ten to fifteen students" in the middle school cafeteria, R.C., R.G., D.M., M.S., J.A., C.C., B.E., T.L., R.B., P.D., J.P., T.S., D.R., W.K., L.B., J.F., M.F., L.T.. *Id*. at 539-544.
40. See, for example, the very similar circumstances alleged by Joseph Ramelli and Megan Donovan in *Donovan v. Poway Unif. Sch. Dist*., 167 Cal. App. 4th 567 (Div. 1 2008).
41. Just one example that received a fair amount of national publicity was *Doe v. Anoka-Hennepin Sch. Dist*. No. 11-cv-01999-JNE-SER (D. Minn., filed July 21, 2011). The case was settled out of court in 2012. *See* Consent Decree, Doe v. Anoka-Hennepin Sch. Dist., No. 11-cv-01999-JNESER (D. Minn. Mar. 6, 2012), ECF No. 82, *available at* http://www.justice.gov/usao/mn/downloads/Anoka-Hennepin%20FINAL%20 Consent%20Decree.pdf.

42. *See,* for example, Estate of Brown v. Ogletree, 2012 WL 591190 (S.D. Tex).
43. *Nabozny*, *supra* note 13 at 452.
44. *Davis*, 526 U.S. at 633, 642.
45. *L.W.*, 915 A.2d at 542.
46. *Theno*, 377 F. Supp. 2d at 955, 956, 957,959-60,961.
47. *Doe*, 2003 WL 23718302 at 2, 3, 4 and 5.
48. *Id.* at 5.
49. *Id.* at 8.
50. *Aff'd* 106 Fed. Appx. 798, 800 (3d Cir. 2004)(not reported).
51. 203 WL 23718302 at 5.
52. 551 F.3d 483 (6th Cir. 2009), *rev'g and remanding* 2007 WL 4201137 (E.D. Mich.) (not reported).
53. *Id.* at 439-40.
54. *Id.* at 440-41. (This intervention in particular meant that Dane's eighth grade year was almost completely free of incident).
55. *Id.* at 442.
56. *Id.* at 442–43.
57. 2007 WL 4201137 at 8.
58. The other two prongs introduced in *Davis*: a (1) sustained and severe pattern of "objectively offensive" behavior that (2) school officials were aware of, were deemed satisfied by the District Court. *Id.* at 5-6
59. *Id.* at 8.
60. *Id.* at 8-10.
61. *Id.* at 8.
62. And in fact, the school district's general anti-bullying campaign forms the heart of the decisions discussion of the schools' efforts on Dane's behalf. The only remedy that seems to have been specific to Dane's specific situation was the punishments given to his various tormentors. Coming after the fact this could not possibly serve to prevent further harassment except as a general deterrent. And in even if so, the deterrence appears not to have been especially effective in this case.
63. 551 F.3d at 440.
64. *Id.* at 447.
65. *Id.* at 448. (holding that "[w]e cannot say that, as a matter of law, a school district is shielded from liability if [it] knows that its methods…, though effective against an individual harasser, are ineffective against persistent harassment against a single student.")
66. *Id.* at 449.
67. *Id.* (fn. 9).
68. *Id.* at 451 (Vinson, J., *dissenting*).
69. *Id.* (acknowledging that "this is a sad case").
70. *Id.* at 452-54.
71. *Id.* at 452, 452-55.

72. *Id*. Moreover, the dissent notes, Dane did not always report every incident of bullying, nor could he name the students who vandalized his locker or defaced his belongings. *Id*. (fn. 4).

73. *Id*. at 460.

74. Whether openly gay, such as Nabozny, Martin, and Ramelli & Donovan; perceived to be gay, such as L.W., Theno and Patterson, or different from majority students in a variety of ways, as was Brown.

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Nancy D. Polikoff

A SUPREME COURT RULING THAT'S ABOUT WAY MORE THAN PREEMPTION

During last summer's Supreme Court term, two marriage cases—*Hollingsworth v. Perry* (the Prop 8 case) and *U.S. v. Windsor* (the DOMA case)—were lauded as landmark gay rights victories. A decision in another case, *Hillman v. Maretta,*[1] was also handed down. At first glance, it is merely a federal preemption case, and seems unimportant in the nation's broader culture wars. But lurking within it are important questions about the purpose of employee survivor's benefits and the definition of a family that rival the two recent gay rights decisions. Concretely, the decision may have special significance for the estimated 88,000 LGBT federal government employees,[2] especially those who aren't married because they don't want to marry[3] or because their most important relationship is not with an intimate partner.

The facts are simple. Warren Hillman worked for the federal government. In 1996, he named his wife, Judy Maretta, as the beneficiary of his federal life insurance policy. According to the briefs, this life insurance benefit dates back to the Eisenhower years and was designed to enable employees to carry out their responsibilities to their families and to make the federal government competitive with the private sector. The couple divorced in 1998, and Hillman remarried in 2002. He was still married to his second wife, Jacqueline Hillman, when he died in 2008.[4]

Warren Hillman, however, never changed his beneficiary. Therefore, his life insurance proceeds, almost $125,000, were paid to Maretta, his first wife. At this point, Virginia state law kicked in. Virginia has a statute that wipes out designations to former spouses upon a divorce, unless the designation is reaffirmed after the divorce. Another way of saying this is that Virginia assumes that people don't want their ex-spouses to get their property, financial accounts, or any other benefit. Rather than require people to change designations they made during the marriage, the law wipes them out all at once.

But Virginia cannot trump federal law because of the preemption doctrine. Federal life insurance proceeds still go to whomever is designated by the employee because the preemption doctrine holds that a state statute cannot trump federal law.[5] No one disputed that the Virginia statute could not change who the insurance plan administrator paid. Another Virginia

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Nancy D. Polikoff is a professor of law at American University Washington College of Law. She is the author of *Beyond (Straight and Gay) Marriage* (Beacon Press 2008).

law, however, gives a claimant who would otherwise have received the benefit if state law in fact wiped out the designation, the right to sue the designated beneficiary and get all the money from her. That's the law that was challenged in this case.[6]

The arguments were as follows: Hillman, the second wife, argued that the Virginia law didn't interfere at all with plan administration; it simply gave a family member an equitable remedy under state law to effectuate what the state presumes is the intent of its divorced residents. Ex-wife, Maretta, responded that the Virginia statute was a backhanded way of accomplishing what everyone agreed Virginia could not do directly -- require the plan administrator to pay proceeds to someone other than the designated beneficiary. She also noted that the handbook for the program given to federal employees specifically says that divorce does not revoke the beneficiary designation to a former spouse.

The Supreme Court unanimously affirmed the Virginia Supreme Court's holding that federal law preempted the state statute. The Court found that the intent of the federal life insurance program was to pay the proceeds to whomever the employee chose.[7] (The employee can change his or her beneficiary at any time and this information is conveyed to employees.) Any state law frustrating that purpose is preempted, as was the challenged Virginia statute. Maybe Hillman intended to revoke his ex-wife when they got divorced (which was 10 years before he died), but he never did. The designation governs, so she gets the money, and Virginia can't circumvent the federal statute by allowing Hillman's widow to sue the ex-wife for the proceeds.

Widening the lens for evaluating the case's outcome requires addressing why Jacqueline Hillman would have won if the Virginia statute prevailed. The reason is because the designation of the ex-wife would have been wiped out and, with no named beneficiary, the right to the life insurance proceeds would go to the person at the top of the default list in the federal regulations. It should be no surprise that such person is the deceased employee's spouse, in this case Jacqueline Hillman.

There are two distinct problems with the typical default list, including that found in the federal regulations. The first is about who isn't there at all, and the second is about the order of priority.

A default order of preference never includes an unmarried partner living with the employee, even when it is obvious that the deceased employee would have chosen that person to receive a benefit. Other "nontraditional" relationships, including a close friend or a person the employee raised since childhood, even though there was no legal relationship, are also excluded from default lists. A firm rule that the beneficiary designated by the employee

gets the benefit does the best job of effectuating intent, preventing disgruntled family members from asserting a claim. That makes the ruling in this case correct, even though we suspect that Hillman did not actually want his ex-wife to get the money.

But maybe effectuating the employee's intent isn't the right purpose of a benefit that's payable upon an employee's death. If there's someone who depended upon the wages earned by the employee, I would argue, that's who should get the money. And that is why having a spouse—and even an unmarried partner—at the top of the list bugs me. Most adults can work and earn their own wages. Minor children can't. They are the ones who should top any default list.

When men weren't liable for the support of their non-marital children and the divorce rate was low, it was a pretty safe bet that the only minor children a man was obligated to were living with his wife. So the part of this benefit's purpose that was about allowing employees to carry out their family responsibilities was pretty well met by naming spouses as the default beneficiaries in the 1950's. But today's world looks different. An employee may be paying child support for a child he never lived with, or for a child living with a former spouse. He may have no children with his current spouse, and their marriage may be short term, yet she will get the money if he hasn't made an alternate designation.

We are so used to seeing a spouse at the top of a default list that we don't often consider how out-of-step it is with modern family life, especially with the needs of children who have no source of support other than their parents. Consider this: most states provide that a spouse cannot be disinherited but minor children can be. We hope parents will have obligations to their children in mind when writing a will, and, if they don't write a will, in most states children will share with a spouse under intestacy laws. But few states stop a parent from writing a will that leaves nothing to minor children. Such rules, like the default list for life insurance proceeds in this case, make marriage matter more than it should.

There's no indication that Warren Hillman had minor children, so my critique of default laws in general isn't relevant to the outcome of this case. I'm glad employees without dependent children can pick the beneficiaries they want. For LGBT employees, that means the maximum flexibility in determining what relationships mean the most to them. I just think it's better public policy to constrain the choice of parents and require survivor's benefits, including life insurance, to cushion the financial blow that comes with the loss of an economic provider. That blow hits children the hardest.

NOTES

1 133 S. Ct. 1943 (2013).

2 I got this figure by looking at the total number of federal government employees. This is my source: 2% of federal government employees who filled out an employee survey in 2012 said they were gay; *see* U.S. Office of Personnel Management, 2012 Federal Employee Viewpoint Survey Results, *available at* http://www.fedview.opm.gov/2012files/2012_Government_Management_Report.pdf.

I multiplied this number times the total number of federal government employees, which according to the following website was over 4.4 million in 2011; *see* U.S. Office of Personnel Management, Historical Federal Workforce Tables, *available at* http://www.opm.gov/policy-data-oversight/dataanalysis-documentation/federal-employmentreports/historical-tables/total-governmentemployment-since-1962/.

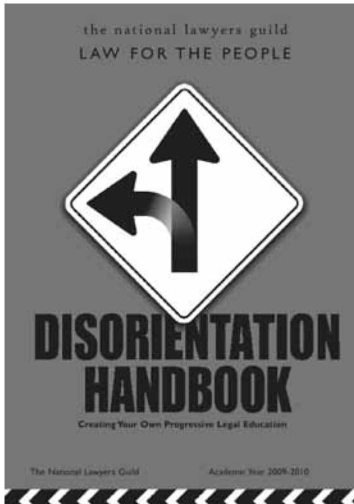
3 For example, some same-sex couples are choosing not to marry. *See e.g.*, Cara Buckley, *Gay Couples, Choosing to Say 'I Don't,'* N.Y. Times, Oct. 25, 2013, *at* http://www.nytimes.com/2013/10/27/style/gay-couples-choosing-to-say-i-dont.html?_r=2&adxnnl=1&hpw=&pagewanted=1&adxnnlx=1383584519-W4T1zucWQus2DVfo2mwsZQ

4 133 S. Ct. at 4-5.

5 *Id.* at 2.

6 *Id.* at 3-4.

7 *Id.* at 1.



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panic fanned by the Bush campaign, the MMA, and the process by which it became law, is a case study in the codification of a people's irrational fears.

In "Michigan's Invisible People," Professors Brendan Beery and Daniel Ray of Thomas M. Cooley Law School advocate the cause of April DeBoer and Jayne Rowse, a same-sex couple denied both marriage and the right to adopt children, who are challenging the constitutionality of the MMA in a case that is gaining increasing attention in Michigan and around the country, *DeBoer v. Snyder.*

"Gay Marriage is a Fundamental Right" is an adapted version of a Constitution Day speech that editor Nathan Goetting recently gave as part of a symposium on the potential impact *DeBoer* will have on marriage equality and LGBTQ rights generally. It places the current gay marriage debate in the context of the Supreme Court's marriage and gay rights jurisprudence going back to the nineteenth century.

Though gay marriage has monopolized a great deal of national attention, the struggle for LGBTQ self-determination is being fought on many fronts other than marriage, often by transgender and queer people of color seeking economic as well as social justice.

The "Know Your Rights Manual for the Transgender Community: Immigration Law," created by the National Lawyers' Guild San Francisco Bay Area Chapter is a helpful resource for attorneys representing transgender, gender non-conforming, and queer people as they navigate an often inscrutable and oppressive immigration system. We hope that practitioners will share this resource with their clients and others who might benefit from it.

In the same spirit of creative lawyering, Kris Franklin's "'Baton Bullying': Understanding Multi-Aggressor Rotation in Anti-Harassment Cases," offers a litigator's analysis of the different ways in which many young LGBTQ people experience intimidation and violence, and how courts must be more responsive to these new realities.

Professor Nancy Polikoff's essay, "A Supreme Court Ruling That's About Way More Than Pre-Emption," is another perspective-shifting analysis. It examines *Hillman v. Maretta*, a little-known survivor's benefits case recently decided by the Supreme Court, whose seemingly benign holding is actually a foray into the culture wars that may harm and stigmatize LGBTQ relationships.

While this LGBTQ theme issue only considers a small number of the legal battles underway in our courts, we hope that it shines light on those it covers and adds a voice of support to legal activists fighting for LGBTQ justice around the country.

As the struggle continues, and momentum continues to build, we hope to see many more victories ahead.

—Nathan Goetting & Richael Faithful, *issue editors*

National Lawyers Guild Review
Submission Guidelines

National Lawyers Guild Review is published quarterly by the NLG. Our readership includes lawyers, scholars, legal workers, jailhouse lawyers and activists, and with that audience in mind, we seek to publish lively, insightful articles that address and respond to the interests and needs of the progressive and activist communities. We encourage authors to write articles in language accessible to both legal professionals and intelligent non-experts. Submissions that minimize legal jargon are especially encouraged.

Citations should appear as endnotes and follow Bluebook style. Citations should identify sources completely and accurately. Lengthy textual commentary and string cites are discouraged.

Though we are open to manuscripts of any length, articles typically run about 7,000 words. Pages in issues of NLGR generally contain about 350 words.

Submit your manuscript in Microsoft Word format electronically as an attachment to an email. Include a short sentence or two describing your professional affiliation, background and area(s) of legal specialization. This description will appear with the article if it is accepted for publication. Please also include a phone number and ground mail address.

Manuscripts should be sent to the Articles Editor at nlgreview.articles@nlg.org, whereupon they will be forwarded to the Editor-in-Chief for review by members of the NLGR's editorial board. If accepted, manuscripts will be edited, and the edited manuscripts will be returned to the author for review; however, because of production schedules, late changes are prohibited and authors generally do not see typeset proofs. We make every effort to clear any changes with the author.

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132 Nassau Street, Suite 922
New York, NY 10038

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