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# Introduction: Talking Around Marriage

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## INTRODUCTION: TALKING AROUND MARRIAGE

*Douglas NeJaime\**

The *Loyola of Los Angeles Law Review* convened its 2011 Symposium, *LGBT Identity and the Law*, at a momentous time. New York had opened marriage to same-sex couples just a few months earlier.<sup>1</sup> Lawyers at Lambda Legal recently had filed a lawsuit in New Jersey demanding full marriage equality.<sup>2</sup> The Justice Department, at the direction of President Obama, had announced earlier in the year that it would no longer defend the federal Defense of Marriage Act (DOMA).<sup>3</sup> That decision substantially changed the complexion of lawsuits challenging DOMA in Massachusetts, Connecticut, and New York.<sup>4</sup> In California, the leading legislative

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\* Associate Professor of Law, Loyola Law School Los Angeles. I am grateful to all of the participants who made the Symposium such a successful event. An accomplished and engaging group of scholars and advocates shared their work over the course of the day, and Dr. Gary J. Gates delivered a thoughtful keynote address, exploring the very concept of lesbian, gay, bisexual, and transgender (LGBT) identity. The editors of the *Loyola of Los Angeles Law Review* did a tremendous job developing, coordinating, and executing this Symposium. Joshua Rich, the Editor-in-Chief, expertly guided the Symposium. Kayla Burns, the Chief Symposia Editor, worked tirelessly to ensure that the Symposium was superb, both in its substantive components and in its logistical workings. OutLaw, the Loyola LGBT student group, and the Lesbian & Gay Lawyers Association of Los Angeles cosponsored the Symposium. The law school, including the media relations, alumni, and events departments, especially Brian Costello, Lisa O'Rourke, Deanna Donnini, Hamid Jahangard, Alicia Mejia, and Carmen Ramirez, made this event possible. Dean Victor Gold and Associate Dean Michael Waterstone provided invaluable support. Finally, I am especially grateful to Professor Brietta Clark, who played a pivotal role, both substantively and logistically, in making this Symposium happen. Her vision, spirit, and commitment are unmatched. I also benefited from her thoughtful comments on this Introduction. In addition, the editors of the law review, especially Michelle Han and Scott Klausner, did an excellent job editing this Introduction.

1. N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

2. See Complaint for Declaratory and Injunctive Relief, *Garden State Equal. v. Dow*, No. L-001729-11, 2012 WL 540608 (N.J. Super. Ct. Law Div. June 29, 2011).

3. See Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to the Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

4. See *Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); First Amended Complaint for Declaratory

advocacy organization, Equality California, was conducting a series of town hall meetings to determine whether the organization should attempt to repeal Proposition 8 in 2012, thereby establishing marriage equality through the initiative process.<sup>5</sup> Equality California ultimately decided not to pursue a ballot proposition while *Perry v. Brown*,<sup>6</sup> the suit challenging Proposition 8, was ongoing.<sup>7</sup> In *Perry*, the California Supreme Court was considering, at the request of the Ninth Circuit, whether the proposition proponents could step into the shoes of the state to defend the initiative and appeal an adverse ruling when state officials refused to do so; a month after the Symposium, the court decided that they could and sent the case back to the Ninth Circuit.<sup>8</sup> Meanwhile, California had become the latest site of a DOMA suit, as Lambda Legal challenged the law in *Golinski v. U.S. Office of Personnel Management*.<sup>9</sup>

Marriage equality was pushing its way forward in legislatures and courts, at both the federal and state levels, in California and the rest of the country. The Symposium brought together leading scholars and advocates in the field of lesbian, gay, bisexual, and transgender (LGBT) law at a time when the country was focusing more and more attention on marriage for same-sex couples.

Yet the Symposium's schedule did not feature a single panel dedicated to marriage. Instead, speakers contributed to panels on antidiscrimination law, constitutional culture, health care, and family law. And Dr. Gary J. Gates delivered a keynote address on the demography of the LGBT population.<sup>10</sup> A whole day, it seemed, without marriage.

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and Injunctive Relief at 2, *Pedersen v. Office of Pers. Mgmt.*, No. 310 CV 1750 (VLB) (D. Conn. Jan. 14, 2011).

5. See Karen Ocamb, *Equality California Town Hall in WeHo Split on Repealing Prop 8*, LGBT POV (May 24, 2011, 8:57 PM), <http://lgbtpov.frontiersla.com/2011/05/24/equality-california-town-hall-in-weho-split-on-repealing-prop-8>.

6. Nos. 10-16696, 11-6577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

7. See EQUAL. CAL., BUILDING A STATE OF EQUALITY: 2011 YEAR-END REPORT 3 (2012), available at <http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/2011REPORT.PDF>.

8. *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011).

9. See Second Amended Complaint at 1–2, *Golinski v. U.S. Office of Pers. Mgmt.*, No. C 10-00257 JSW, 2012 WL 569685 (N.D. Cal. Feb. 22, 2012).

10. Dr. Gary J. Gates, Williams Distinguished Scholar, Williams Inst., UCLA Sch. of Law, Keynote Address at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

Marriage, though, was always lurking in the background. It set the stage for discussion, provided the context for analysis, furnished the basis for comparison, and highlighted the points of conflict. On the Antidiscrimination panel,<sup>11</sup> Jennifer Pizer urged the passage of an updated version of the Employment Non-Discrimination Act (ENDA), the proposed federal law that would outlaw workplace discrimination based on sexual orientation and gender identity.<sup>12</sup> In discussing necessary updates to the bill, Pizer had to grapple with the issue of marriage.<sup>13</sup> More same-sex couples have access to marriage under state law, yet ENDA, a federal law, adheres to DOMA's restrictive definition of "spouse" and explicitly excludes employee benefits from its coverage. In arguing that ENDA should provide for partner and family benefits—a key component of employee compensation—Pizer appealed to the increasing recognition of same-sex couples by both private and public employers.<sup>14</sup>

On the Constitutional Culture panel,<sup>15</sup> Jon Davidson discussed Lambda Legal's decision making regarding case selection, specifically focusing on Supreme Court litigation strategy.<sup>16</sup> While Davidson analyzed a wide range of issues and cases, his comments seemed especially pertinent to the trajectory of marriage litigation, particularly the interaction between the pending DOMA cases, including Lambda Legal's *Golinski* suit, and *Perry*, the Proposition 8 challenge brought by the American Foundation for Equal Rights.<sup>17</sup> Marriage litigation informs debates within the movement about litigation timing, and some of the pending marriage cases provide the most likely candidates for eventual Supreme Court review.

On the Health Care panel,<sup>18</sup> Dr. Ilan Meyer introduced the concept of minority stress, which he developed in the context of sexual minorities, to discuss the adverse health effects that LGB

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11. James Gilliam, Deputy Executive Director of the ACLU of Southern California and Adjunct Professor at Loyola Law School Los Angeles, expertly moderated this panel.

12. Jennifer C. Pizer, Legal Dir. & Arnold D. Kassoy Senior Scholar of Law, Williams Inst., UCLA Sch. of Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

13. *Id.*

14. *Id.*

15. I moderated this panel.

16. Jon Davidson, Legal Dir., Lambda Legal, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

17. *Id.*

18. Professor Clark skillfully structured the conversation on this panel.

individuals experience because of discrimination and prejudice.<sup>19</sup> While multiple forms of discrimination in a variety of domains harm LGB individuals, the exclusion of same-sex couples from marriage constitutes a key form of discrimination that perpetuates stigma and feelings of exclusion.<sup>20</sup> Indeed, Meyer used the *Perry* trial as a lens through which to explore the impact of minority stress, recounting how, as an expert witness at the trial, he explained that the state's restrictive marriage law exposes LGB individuals to stigma that impacts physical and mental health outcomes.<sup>21</sup>

Finally, on the LGBT Families panel,<sup>22</sup> marriage set the backdrop for all three presentations, even though the speakers explicitly drew attention to children in nonmarital families. Professor Courtney Joslin developed a model of parentage that looked to voluntary participation and functionality to address parentage across a range of contexts, including situations involving assisted reproductive technology—without regard to marital status.<sup>23</sup> Professor Nancy Polikoff addressed the needs of children and parents in nonmarital families, including households headed by both same-sex and different-sex couples.<sup>24</sup> Polikoff argued that marriage advocacy by LGBT rights groups marginalizes the needs of these families by shoring up the connection between parentage and marriage.<sup>25</sup> Finally, Professor Melissa Murray critiqued the rhetoric around illegitimacy in LGBT rights work, arguing that positioning the stigma of illegitimacy as a harm stemming from the denial of marriage to same-sex couples props up racialized notions of single

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19. Dr. Ilan Meyer, Williams Senior Scholar for Pub. Policy, Williams Inst., UCLA Sch. of Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011). Because Dr. Meyer addressed sexual orientation distinctions in relationship recognition, he dealt explicitly with lesbian, gay, and bisexual individuals and did not include transgender individuals in his analysis.

20. *Id.*

21. *Id.*; see *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010).

22. Professor Jennifer Rothman, Professor of Law and Joseph Scott Fellow at Loyola Law School Los Angeles, did a wonderful job moderating the lively discussion on this panel.

23. Professor Courtney Joslin, Acting Professor of Law, UC Davis Sch. of Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

24. Professor Nancy Polikoff, Professor of Law, Am. Univ. Wash. Coll. of Law; McDonnell/Wright Visiting Chair of Law & Faculty Chair, Williams Inst., UCLA Sch. of Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

25. *Id.*

parenthood that continue to harm African American and low-income women.<sup>26</sup>

Marriage, it seemed, was nowhere and everywhere at the same time. What the Symposium accomplished has become an increasingly rare feat: the speakers devoted an entire day of discussion and debate to LGBT rights and managed to contextualize marriage within the conversation. Marriage did not define and structure the dialogue around sexuality and gender. Rather, it provided a lens for analysis and often receded into the background.

This defining aspect of the Symposium allowed the speakers to uncover and develop important themes that otherwise might never have emerged. In this Introduction, I highlight four of those themes: (1) the connections and cleavages between the LGBT movement and other identity-based social movements; (2) the broader normative debates and conflicts into which LGBT rights fit; (3) the importance of “looking to the bottom”<sup>27</sup> or “mapping the margins”<sup>28</sup> in a way that departs from, rather than reproduces, the debate over who marriage helps and hurts; and (4) the continuing significance of the closet in the lives of LGBT individuals. In the discussion that follows, I briefly explore the interventions by the Symposium participants, with particular attention to the authors contributing to this Symposium issue, along these four dimensions.

#### I. EXPLORING INTERMOVEMENT COMMONALITY AND CONFLICT

Zooming out from the issue of marriage exposed past, present, and future connections between the LGBT rights movement and other identity-based social movements. It also uncovered divisions to which LGBT scholars and advocates should attend moving forward. The panelists suggested both the possibilities and the limitations of cross-pollination between movements, locating the potential for

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26. Professor Melissa Murray, Professor of Law, Berkeley Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

27. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”).

28. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991) (urging attention to the intersectional identities marginalized by conventional discourses of identity politics).

coalitional social-justice campaigns while also alerting us to the obstacles to collaboration in a world increasingly hostile to state interventions on behalf of subordinated groups. Ultimately, they located two particularly important cross-movement relationships for the LGBT movement: the women's movement and the disability movement.

In this issue, Brad Sears<sup>29</sup> and his coauthors present original empirical research on HIV discrimination in Los Angeles County.<sup>30</sup> They connect low levels of HIV discrimination by dentists to successful legal advocacy, which, in part, brought HIV/AIDS under the umbrella of disability.<sup>31</sup> The disability movement had secured passage of the Americans with Disabilities Act (ADA), an omnibus federal antidiscrimination law, which offered opportunities to LGBT-rights lawyers.<sup>32</sup> In *Bragdon v. Abbott*,<sup>33</sup> attorneys at Gay & Lesbian Advocates & Defenders successfully argued to the U.S. Supreme Court that the ADA covered people living with HIV/AIDS.<sup>34</sup> As Sears and his colleagues explain, California activists had pursued HIV-discrimination litigation against Western Dental, a large-scale dental provider, well before the Supreme Court's landmark decision.<sup>35</sup> In the Western Dental litigation, advocates seized on a 1985 Los Angeles ordinance that provided antidiscrimination protection to people living with HIV/AIDS.<sup>36</sup> In that litigation, advocates from the American Civil Liberties Union, Lambda Legal, and AIDS Project Los Angeles joined lawyers from the Western Law Center for the Handicapped.<sup>37</sup> In the fight against HIV discrimination, intermovement coordination and collaboration produced multidimensional and creative strategies at all levels of government. Ultimately, the research conducted by Sears and his

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29. Executive Director & Roberta A. Conroy Senior Scholar of Law and Policy, Williams Institute, Assistant Dean, UCLA School of Law.

30. See Brad Sears, Christian Cooper, Fariba S. Younai & Tom Donohoe, *HIV Discrimination in Dental Care: Results of a Testing Study in Los Angeles County*, 45 LOY. L.A. L. REV. 909 (2012).

31. *Id.* at 946–47.

32. See *id.* at 920–21.

33. 524 U.S. 624 (1998).

34. *Id.* at 655.

35. See Sears et al., *supra* note 30, at 946–47.

36. See Scott Harris, *Suit Claims Dental Chain Turned Away 4 with AIDS Virus*, L.A. TIMES, Mar. 6, 1992, at B3.

37. See *id.*

colleagues demonstrates that activism at the intersection of LGBT rights and disability rights produced important social and cultural changes; the remarkably low incidence of overt HIV discrimination by dental providers in Los Angeles County owes much to the coalitional legal campaign against such discrimination.

While Sears and his coauthors look back at a successful intermovement collaboration and trace its positive effects, Professor Julie Greenberg<sup>38</sup> imagines new possibilities for multimovement coalitions.<sup>39</sup> In her contribution to this issue, Greenberg explores whether intersex activists could turn to the legal frameworks in the contexts of disability, sex discrimination, and LGBT rights “to advance the intersex movement’s major goal of modifying current medical practices.”<sup>40</sup> While the intersex movement generally has, up to this point, relied on extralegal strategies,<sup>41</sup> Greenberg sees space for legal tools other movements developed.<sup>42</sup> Specifically, she carefully analyzes legal concepts that intersex advocates could deploy to prevent early medical interventions in the lives of children with an intersex condition. Seizing on doctrine developed by women’s and LGBT rights advocates, Greenberg considers the space provided by antidiscrimination law governing gender performance and stereotypes.<sup>43</sup> As she concludes, “Now that courts recognize that statutory prohibitions against sex discrimination protect people from discrimination based on sex and gender stereotypes, a sex discrimination framework could be an effective tool for challenging cosmetic genital surgeries and other medical protocols performed on infants with an intersex condition.”<sup>44</sup> In this way, Greenberg opens up productive avenues for future work, by both legal scholars and movement activists, on the potential for intermovement borrowing.

Greenberg’s analysis, though, shows that, in considering whether and how to borrow legal strategies from other movements, activists should contemplate not only the benefits but also the constraints of cross-movement relationships. Just as the LGBT

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38. Professor of Law, Thomas Jefferson School of Law.

39. See Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 *LOY. L.A. L. REV.* 849 (2012).

40. *Id.* at 852.

41. *Id.*

42. See *id.*

43. See *id.* at 882–84.

44. *Id.* at 888.

movement has successfully used opportunities created by the disability movement to protect people living with HIV/AIDS from discrimination, Greenberg considers whether intersex advocates can use a disability framework to stop early medical interventions on children with an intersex condition. She argues that the ADA and state disability laws could provide viable legal claims to limit early surgical interventions.<sup>45</sup> The move to a disability framework, however, is not simply a tactical choice for legal advocates. Instead, as Greenberg shows, some intersex activists fear that resort to disability terminology “will perpetuate,” rather than erode, “stigma and social prejudice.”<sup>46</sup> When compared to the HIV/AIDS context, then, we see that the stigma experienced by the particular constituency may influence the ease with which advocates for that constituency can draw on a disability framework. Rather than consign herself to this obstacle, Greenberg urges a turn to the critical work of disability theorists, who have displaced the medical model with a social model that relates disability to structures and norms that create barriers to individuals, rather than to the individuals themselves.<sup>47</sup> By presenting a complicated picture of cross-movement pollination between the intersex and disability movements, Greenberg suggests that intermovement coalition building can prove both liberating and constraining at the same time.

Lest we confine ourselves to the domestic context, Professor Holning Lau focused our attention abroad, interrogating some of the common assumptions about the globalization of LGBT rights work.<sup>48</sup> Lau, an expert on sexual orientation and gender identity issues in East Asia, questioned the reductive use of “Westernization” as a description of reforms occurring throughout the world to promote the rights of LGBT individuals.<sup>49</sup> Instead, Lau argued that the picture is more complex: action on LGBT rights emerges from a complicated interaction of global and local norms and experiences.<sup>50</sup> Lau claimed that by resisting the simplistic use of the rhetoric of “Westernization” and instead producing a more sophisticated understanding of LGBT

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45. *See id.* at 896–902.

46. *Id.* at 903.

47. *See id.* at 903–04.

48. Professor Holning Lau, Assoc. Professor of Law, Univ. of N.C. Sch. of Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

49. *Id.*

50. *Id.*

rights in non-Western countries, we can better understand the dynamics of social change.<sup>51</sup> Ultimately, through Lau's lens, we can transcend the politicized discourse on LGBT rights and assess distinctive local developments on their own terms.

## II. LOCATING LGBT RIGHTS IN BROADER NORMATIVE CONFLICTS

As the foregoing discussion illustrates, the Symposium speakers attended to a variety of LGBT issues, of which marriage was only one. By understanding the relevant stakes in contests not only over marriage but also over antidiscrimination law, constitutional doctrine, health care, and family policy, the Symposium participants demonstrated that the struggle over LGBT rights involves much more than recognition of LGBT equality and liberty. Instead, it features a contest over the roles of women and men, the proper location for sexual expression, healthy child development, and the normative structure of the family itself.

Conflicts over LGBT rights, along both dimensions of sexual orientation and gender identity, have a mutually constitutive relationship with conflicts implicating the role of women. Several years ago, Professors Sylvia Law and Andrew Koppelman each argued persuasively that gender and sexual orientation are metaphors for each other.<sup>52</sup> Contributing to this rich body of work, Professor Cary Franklin's remarks at the Symposium exposed the relationship between the contested definition of sex for purposes of Title VII and conflicts over sexuality.<sup>53</sup> More specifically, her analysis suggests that the conservative framing of "sex" as biological limited the reach of sex-discrimination prohibitions for women—defining gender roles out of Title VII coverage and shoring up sex-differentiated family roles—and simultaneously constructed separate categories of sexual orientation and gender identity that operated outside the bounds of

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51. *Id.*

52. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

53. Professor Cary Franklin, Assistant Professor of Law, Univ. of Tex. Sch. of Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

“sex” itself.<sup>54</sup> In this sense, Title VII provided the terrain on which the left and right constructed and contested the very meanings of sex, gender, and sexual orientation.

Staying in the realm of antidiscrimination law, Professor Clifford Rosky showed how social-conservative opponents of LGBT rights have turned to anxiety about children’s sexual and gender development to frame their opposition to ENDA, a law that would provide workplace nondiscrimination protection for LGBT employees.<sup>55</sup> Rosky showed that the most recent anti-LGBT campaigns harken back to Anita Bryant’s 1977 “Save Our Children” campaign; yet rather than reproduce blatantly offensive themes of recruitment, activists leading the current efforts opt instead for what they take to be seemingly more innocuous notions of protecting children from “gender confusion.”<sup>56</sup> By fitting ENDA into broader conflicts over gender variation and its relationship to childhood development, anti-ENDA forces have made a debate about workplace nondiscrimination part of a far-reaching ideological conflict about the proper roles of women and men.

Professor Julie Nice’s<sup>57</sup> contribution to this issue explores the ways in which anti-same-sex-marriage forces use the “responsible procreation” argument to define marriage and family in a way that excludes same-sex couples and their children.<sup>58</sup> In charting the trajectory of the “responsible procreation” argument, Nice shows how social conservatives abandoned some of the central tenets of their case against same-sex couples in order to integrate rationales about procreation into an increasingly pro-gay world.<sup>59</sup> As straightforward procreation arguments grew outmoded in light of contemporary family law and policy, anti-same-sex-marriage advocates reworked arguments about procreation and childrearing by reconceptualizing the state’s specific role in family formation and support. Casting same-sex couples as ultrasensible, deliberate,

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54. *Id.*

55. Professor Clifford Rosky, Assoc. Professor of Law, Univ. of Utah S.J. Quinney Coll. of Law, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

56. *Id.*

57. Herbst Foundation Professor of Law, University of San Francisco School of Law.

58. See Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781 (2012).

59. See *id.* at 812–14.

and affluent procreators, Christian Right advocates argue that lesbians and gay men do not need state support and encouragement.<sup>60</sup> Heterosexuals, in contrast, require the state's guiding hand in order to channel irresponsible nonmarital sex into stable, marital households.<sup>61</sup> Nice, an expert on both sexual orientation and poverty law, shows that deployment of the "responsible procreation" argument in anti-same-sex-marriage rhetoric shares much with antiwelfare advocacy, in which conservatives used marriage promotion as welfare reform.<sup>62</sup> As she explains, the use of marriage as a private welfare system in the 1990s relied on "racialized and gendered stereotypes of the 'welfare queen' and 'deadbeat dad.'"<sup>63</sup> The gendered dimensions of those stereotypes would reemerge in anti-same-sex-marriage discourse, informing the "responsible procreation" argument that social conservative activists use to justify the exclusively heterosexual channeling function of marriage.

All three contributions—Franklin's, Rosky's, and Nice's—track the historical trajectory of anti-LGBT argumentation and, in doing so, uncover the broader contest over gender at stake. Conservatives framed sex for purposes of Title VII in a way that sought to stabilize conventional notions of gender not simply in the workplace but also in the family. Indeed, Franklin noted that the short legislative debate over Title VII's prohibition on sex discrimination was framed explicitly in terms of gendered family roles.<sup>64</sup> In the current fight over ENDA, social-conservative activists again attempt to shield traditional gender roles. They argue that antidiscrimination protection for transgender teachers threatens to show children that gender roles are malleable and socially constructed, and, in that way, schools may undermine the sex-differentiated roles that some parents model for their children in the home. This exact sex differentiation forms the normative underpinnings of the "responsible procreation" argument against marriage for same-sex couples. The idea that marriage binds men to the women they impregnate relies on gendered framings of women as vulnerable and dependent mothers

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60. *See id.* at 791–92.

61. *See id.* at 791.

62. *See id.* at 805–06.

63. *Id.* at 806.

64. Franklin, *supra* note 53.

and men as irresponsible and uncommitted fathers.<sup>65</sup> Together, then, the speakers exposed the mutually constitutive relationship between sexuality and gender and located the overlapping sites on which those concepts are contested.

### III. ATTENDING TO THE MOST VULNERABLE POPULATIONS

Some scholars argue that marriage serves the most privileged lesbians and gay men—those who are already out, in relationships, and most likely to benefit from the rights and responsibilities, including joint property ownership and employer-sponsored health care coverage, that come with marriage.<sup>66</sup> Others, however, contend that marriage stands to benefit low-income and minority same-sex couples, who are more likely to raise children and less likely to have access to legal services necessary to engage in private ordering approximating the rights and benefits of marriage.<sup>67</sup> To some extent, this is an empirical question that is best answered once marriage for same-sex couples is available on a wide scale for several years.

Instead of conducting the debate over privilege and vulnerability in the LGBT population on the terrain of marriage itself, the Symposium participants addressed some of our most vulnerable populations in ways that would have not come to the fore had the discussion been organized around the specific topic of marriage. While keeping the question of marriage in mind, the panelists engaged in robust discussions of the hurdles that segments of the LGBT population face and questioned the politics of inclusion and exclusion within the LGBT community itself. Together our speakers and authors urged attention to important but underserved populations: people living with HIV/AIDS, transgender individuals, minors with an intersex condition, and children of nonmarital parents. As Dr. Meyer's remarks suggested, attention to these

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65. See Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 495 (2007).

66. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Cathy Cohen, *The Price of Inclusion in the Marriage Club*, GAY COMMUNITY NEWS, Winter 1996, at 27; Lisa Duggan, *The Marriage Juggernaut*, GAY COMMUNITY NEWS, Winter 1996, at 5, 5.

67. See, e.g., RANDY ALBELDA ET AL., WILLIAMS INST., *POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 15 (2009), available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/poverty-in-the-lesbian-gay-and-bisexual-community>.

populations is not simply a topic for legal advocacy but instead implicates social policy more generally.<sup>68</sup>

Brad Sears focused our attention on access to medical care for people living with HIV/AIDS. Discrimination has been a continuing experience that activists have attempted to confront with both legal and extralegal tools. Sears and his coauthors report some heartening news: even though their research documented rampant discrimination by many other kinds of medical providers, they found relatively little overt discrimination by dentists in Los Angeles County.<sup>69</sup> Because dentists were subject to litigation early in the HIV/AIDS struggle and because these suits produced favorable settlements and prompted protective state legislation, dentists have conformed their education and practices to meet the demands of legal regulation.<sup>70</sup> Unlike other medical contexts, in which the issue has not received as much attention, dentistry has internalized the legal norms that now govern the provision of medical care to HIV-positive patients.<sup>71</sup> Accordingly, a particularly vulnerable population—people living with HIV/AIDS—enjoys greater access to dental care and less discrimination.<sup>72</sup> Discrimination, however, continues to be more prevalent in areas with higher concentrations of low-income and minority HIV-positive individuals.<sup>73</sup> As Sears and his colleagues conclude, “HIV discrimination is higher in certain parts of Los Angeles, such as the San Gabriel Valley and South Central L.A., areas with higher proportions of HIV-positive people who are low-income, female, and people of color.”<sup>74</sup> In other words, even as law-based advocacy has benefited the HIV-positive population, more vulnerable segments within that population continue to face discrimination at higher rates than their counterparts.

Professor Katherine Pratt drew attention to the obstacles facing transgender individuals in the federal tax system and the relationship of those obstacles to access to medical care.<sup>75</sup> While other scholars

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68. Meyer, *supra* note 19.

69. See Sears et al., *supra* note 30, at 912.

70. See *id.* at 924–26 (documenting the impact of litigation as well as the role of government enforcement agencies).

71. See *id.* at 912.

72. See *id.*

73. *Id.*

74. *Id.*

75. Professor Katherine Pratt, Professor of Law, Loyola Law School Los Angeles, Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

have documented discrimination on the basis of gender identity and expression by employers, health care providers, and a variety of administrative agencies, Pratt shifted the lens toward the tax system, focusing on the tax treatment of sex reassignment surgery and associated medical procedures.<sup>76</sup> She analyzed the United States Tax Court's opinion in *O'Donnabhain v. Commissioner of Internal Revenue*,<sup>77</sup> attending specifically to the offensive and harmful stereotypes inherent in the arguments made by the Internal Revenue Service in its attempt to deny the transgender taxpayer's medical deductions.<sup>78</sup> Pratt's remarks highlight the wide-ranging prejudice that denies the dignity of transgender individuals and makes access to medical care for an already economically vulnerable population more difficult.

Shifting our attention away from adults and toward children in the context of medical care, Professor Greenberg, in her contribution to this issue, forces us to confront a particularly vulnerable minor population—children with an intersex condition—that struggles simply for legal standing to contest its own medical treatment. Infants with an intersex condition often face medical intervention, obviously without their consent, that inflicts permanent psychological and physical harm.<sup>79</sup> By putting the well-being of these children at the center of her analysis, Greenberg considers the legal possibilities for advocacy efforts that seek to delay medical intervention until the children themselves have a sense of their own identity and can meaningfully contribute to the decision-making process.<sup>80</sup> In this way, Greenberg is a voice for those who are kept voiceless.

Speakers on the LGBT Families panel also focused on the needs of children. Professor Joslin articulated parentage standards that would recognize parent-child relationships both within and outside of marriage, in both same-sex and different-sex families, and from both sexual intercourse and assisted reproductive technology. Professor Polikoff encouraged advocacy efforts that make space for arguments protecting parent-child relationships for children in nonmarital

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76. *Id.*

77. 134 T.C. 34 (2010).

78. Pratt, *supra* note 75.

79. See Greenberg, *supra* note 39, at 862–65.

80. *Id.* at 868.

family arrangements. Professor Murray worried that deploying the “illegitimacy as injury” argument in favor of marriage equality further marginalizes single, low-income minority parents and their children. While other panelists, including Davidson, Pizer, and Nice, resisted Polikoff’s and Murray’s critiques of LGBT advocacy, they did so by keeping vulnerable children and their parents at the center of analysis. LGBT rights lawyers, they argued, continue to advocate for the children of nonmarital parents, both straight and gay, even as they deploy marriage-focused arguments to help *some* of their clients secure recognition of their parental rights.

While marriage shed important light on some of the hurdles confronting vulnerable populations, particularly in our discussions of parents and children, many of these topics arose because we resisted a focus on marriage. In attending to the unique problems faced by marginalized segments of the population, the speakers and authors uncovered the immense amount of work left to do for LGBT rights. Such work will continue to exist even if and long after marriage equality becomes a reality.

#### IV. THE CONTINUING SIGNIFICANCE OF THE CLOSET

Finally, by looking beyond marriage, which inherently features a level of outness, the Symposium speakers drew attention to the resonance of the closet in LGBT life. In his contribution to this issue, which draws heavily on his keynote address at the Symposium, Dr. Gates maps the contours of LGBT identity, explaining how and why demographers determine who counts as LGBT.<sup>81</sup> In doing so, Gates focuses on the intense political reaction to the numbers he himself has furnished—3.8 percent of adults identify as LGBT.<sup>82</sup> In teasing out the stakes in this debate, Gates attends to how notions of the closet affect both expectations and measures of the LGB population.<sup>83</sup> Even in a world of robust LGBT advocacy, increasing

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81. See Gary J. Gates, *LGBT Identity: A Demographer’s Perspective*, 45 LOY. L.A. L. REV. 693 (2012).

82. *Id.* at 698.

83. Gates provides a definition of the closet: “[T]he closet is more pathological, as it is associated with discordance in people’s lives between how they identify . . . and how they behave or how they feel. In this case, the closet is not the discordance, per se, but rather the pathology that the discordance creates.” *Id.* at 701. Because Gates focuses on measures of sexual orientation, he is concerned primarily with the lesbian, gay, and bisexual population.

marriage and relationship recognition for same-sex couples, and greater attention to discrimination against lesbians and gay men, the closet remains a force that structures the lives of many Americans. Gates argues that it is problematic to “limit our definition to identity measures, as this inherently minimizes the salience of the closet.”<sup>84</sup> By using data on individuals’ reports of relatively recent same-sex sexual encounters, Gates suggests that between 1 percent and 1.3 percent of adults are closeted, representing between 30 percent and 37 percent of the LGB population—a sizable portion indeed.<sup>85</sup>

What, Gates asks, are we to do with this information? Ultimately, the size of the closet suggests a number of implications for legal and political organizations—implications that likely would not have emerged from a discussion of marriage for same-sex couples. While some issues in the LGBT movement assume outness,<sup>86</sup> others may productively incorporate experiences of the closet. What steps can the LGBT advocacy community take to make it safer for more individuals to come out? How might demographic differences in outness point toward different priorities for LGBT work in different regions? The closet, Gates claims, “can be an important aspect in how we document discrimination and how we assess stigma.”<sup>87</sup>

Indeed, the heroes of the most famous U.S. Supreme Court case on LGBT rights had to negotiate the difficult relationship between outness and discrimination. As Professor Dale Carpenter shows in *Flagrant Conduct*,<sup>88</sup> his book on the path to *Lawrence v. Texas*,<sup>89</sup> John Geddes Lawrence and Tyron Garner—arrested under Texas’s “homosexual conduct” law—had to decide whether to pursue their constitutional challenge when doing so meant complete outness to family and friends and to employers in a state without antidiscrimination protections.<sup>90</sup> In his remarks at the Symposium, Carpenter showed the unlikely course of events that placed Lawrence

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84. *Id.* at 712.

85. *Id.* at 704.

86. *See id.* at 711–12.

87. *Id.* at 712.

88. DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012).

89. 539 U.S. 558 (2003).

90. *See* CARPENTER, *supra* note 88, at 127 (“[T]he nonlegal stakes for Lawrence and Garner were real. Whatever the underlying truth, they were making a public declaration that they engaged in same-sex sodomy. It meant coming out as gay to the entire nation. Lawrence, for one, was still somewhat closeted on the job and to some members of his family.”).

and Garner, a working-class, interracial pair from a struggling Houston neighborhood, at the center of the LGBT rights movement.<sup>91</sup>

As the experiences of Lawrence and Garner suggest, the closet may structure LGBT lives in some locations, such as work, and not others, such as the home and social spaces. In their contribution to this issue, Pizer and her coauthors focus our attention on LGBT workers in a majority of states who have no recourse when subjected to employment discrimination.<sup>92</sup> In the absence of federal employment nondiscrimination mandates, the closet may shape the experiences of LGBT workers who fear losing their jobs. As Pizer and her colleagues show, “[n]umerous studies have documented that many LGBT people conceal their sexual orientation and/or gender identity in the workplace, which has been linked by research to poor workplace and health outcomes.”<sup>93</sup> Indeed, “[m]ore than one-third of LGB respondents to the [General Social Survey] reported that they were not out to anyone at work, and only 25 percent were generally out to their coworkers.”<sup>94</sup> Their vulnerability makes passage of ENDA especially pressing. Mustering the growing body of empirical research, including Dr. Meyer’s work on minority stress, Pizer and her coauthors show how workplace discrimination, for both closeted and out employees, negatively impacts the mental and physical health of LGBT individuals.<sup>95</sup> As for employees who remain in the closet, though, research shows that “even in the absence of actual discrimination, staying closeted at work for fear of discrimination can have negative effects on LGBT employees.”<sup>96</sup> Ultimately, ENDA may displace the necessity of the closet for some workers and thereby improve their well-being and productivity.<sup>97</sup> In this sense,

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91. Professor Dale Carpenter, Earl R. Larson Professor of Civil Rights and Civil Liberties Law, Professor of Law, Univ. of Minn. Law Sch., Remarks at Loyola of Los Angeles Law Review Symposium: LGBT Identity and the Law (Oct. 21, 2011).

92. See Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employee Benefits*, 45 LOY. L.A. L. REV. 715 (2012).

93. *Id.* at 735.

94. *Id.*

95. *Id.* at 738–42.

96. *Id.* at 736.

97. See *id.* at 742 (“[A]n emerging body of research shows that [sexual orientation and gender identity] discrimination has negative effects upon LGBT employees in terms of physical and emotional health, wages and opportunities, job satisfaction, and productivity.”).

attention to the closet, as Gates suggests, may provide compelling arguments in favor of antidiscrimination law.

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As I hope the foregoing discussion demonstrates, the *Loyola of Los Angeles Law Review* Symposium on *LGBT Identity and the Law* produced a lively and multifaceted conversation on LGBT rights issues. The participants shared new research, assessed and critiqued existing strategies, and bridged the gap between law and other disciplines. By critically reflecting on our history and carefully analyzing our present circumstances, they charted an ambitious course for future work.