

## Respecting LGBTQ Dignity Through Vital Capabilities

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### I. INTRODUCTION: AIMS OF THIS ARTICLE

With the recent Supreme Court victory by LGBTQ<sup>1</sup> workers seeking protection under Title VII (the federal workplace discrimination statute)<sup>2</sup> and earlier victories regarding same-sex marriage,<sup>3</sup> sodomy laws,<sup>4</sup> and other equal rights issues,<sup>5</sup> the LGBTQ movement has secured formal legal equality for LGBTQ people in many areas of life. Nonetheless, we know from other civil rights movements that formal equality alone will not guarantee LGBTQ people the ability to live the life they choose. LGBTQ people in the United States—like all people—strive to live satisfying and productive lives with dignity, respect, and meaning. Aristotle said the question of what constitutes a good life, and how we should achieve it, is fundamental for all human beings.<sup>6</sup> It is the duty of political leaders, claimed Aristotle, to formulate policies that benefit citizens.<sup>7</sup> Like Aristotle, this Article seeks to identify what kinds of policies will improve the lives of LGBTQ people in the United States. The capability approach is used as the central framework for guiding this inquiry.

Until recently, the opportunities to fully consider these questions have been relatively limited. Policy options to help LGBTQ people flourish in a

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<sup>1</sup> This Article uses the alphabetism LGBTQ (lesbian, gay, bisexual, transgender, and queer) as an umbrella term to refer to the population of people in the United States (and elsewhere) whose sexual orientation, gender identity and gender expression do not conform to cultural expectations.

<sup>2</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

<sup>3</sup> *Obergefell v. Hodges*, 576 U.S. 644, (2015) (regarding same-sex marriage); *United States v. Windsor*, 570 U.S. 744 (2013) (regarding the Defense of Marriage Act).

<sup>4</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (discussing the Texas sodomy statute).

<sup>5</sup> *Romer v. Evans*, 517 U.S. 620 (1996) (relating to the Colorado constitutional amendment).

<sup>6</sup> See ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, at 3 (Harris Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.).

<sup>7</sup> See MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 125 (Harv. U. Press 2011).

way that affirms diverse sexualities<sup>8</sup> and genders<sup>9</sup> have been foreclosed by laws that criminalize, stigmatize, and exclude LGBTQ people from full citizenship.<sup>10</sup> The Supreme Court, by virtue of its holdings in cases related to LGBTQ people, has lifted many normative barriers to the advancement of policies benefitting LGBTQ people. Additionally, increases in the level of empirical knowledge regarding LGBTQ people in the United States provide a more accurate picture of their lived experience.

Currently, the advocacy efforts of the LGBTQ movement are framed by the normative ideal of equality. Though achieving equality is an indispensable step toward full dignity for each LGBTQ person, it is not sufficient. This Article stands on the premise that the goal of policymaking regarding LGBTQ people should be to expand the real opportunities available for each LGBTQ person, so that they can live their lives as they choose. Indeed, all people in the United States should have the capability to grow and live with dignity according to their sexuality and gender.

This Article proceeds as follows. Part II briefly reviews the different goals that have been pursued by the LGBTQ movement and assesses the extent to which the ideal of equality has been adopted by the movement as its current goal. Part III sets out four guiding principles that will serve as a foundation for the capability approach framework. Throughout this Part, this Article will compare and contrast equality with the suggested principles.

The first principle is that each LGBTQ person is an equal bearer of human dignity. Since the creation of the Universal Declaration of Human Rights, this principle has been widely recognized internationally.<sup>11</sup> In the United States, Justice Kennedy has given the concept of dignity a more secure constitutional footing by using the concept in opinions dealing with LGBTQ rights.<sup>12</sup>

The second principle is that each person should be able to have pride in themselves, including their sexuality and gender. Pride consists of two elements. The first is self-respect, defined under the Rawlsian meaning of having a positive view of one's worth and life plan, as well as the confidence of being

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<sup>8</sup> This Article uses the term "sexuality" to refer to all aspects of sexual orientation, including those not tied to sexual orientation identity.

<sup>9</sup> This Article uses the term "gender" to refer to a person's self-determined gender or, when indicated, gender assigned at birth.

<sup>10</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

<sup>11</sup> G.A. Res. 217 (III), Universal Declaration of Human Rights, (Dec. 10, 1948).

<sup>12</sup> See Courtney Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U.L. REV. 425, 426 (2017).

able to carry it out.<sup>13</sup>The second element is understanding and asserting one's moral worth. Traditionally, the LGBTQ movement has bracketed discussions about morality, seeking to avoid them in favor of discussions of neutral rights. This Section argues in favor of the use of moral-based advocacy.

The third guiding principle is that sexuality and gender play an important role in human flourishing. Here, we look at empirical evidence of the impact that differences in sexuality and gender have on the lived experiences of LGBTQ people. We also look at whether equality advocacy tends to overlook these differences, resulting in an assimilationist policy agenda.

The fourth guiding principle is that the goal of LGBTQ advocacy and policy should be to improve the lives of LGBTQ people. Implicit in this principle is the belief that the goal of perfecting institutions (and seeking equal treatment from them) should not be the end goal of LGBTQ advocacy. Instead, improving people's lives is the goal, while improving institutions serves as a means to this end.

Part IV sets out the capability approach. The capability approach is a framework initially used in the field of international human development to assess the freedoms and outcomes of individuals along a variety of dimensions, such as income, health, education, and civic participation. According to the capability approach, freedoms are conceptualized as capabilities, or real opportunities that each person possesses to live the life they choose. The role of government is to expand each person's capabilities. Capabilities themselves can relate to any dimension of human development, including the capabilities to live a long life, be educated, and earn a living.

Part V applies the capability approach to LGBTQ policy advocacy in the United States. Ideally, the population impacted by government policy should have the primary voice in choosing the list of capabilities that should be prioritized. In lieu of a process to involve the LGBTQ population in such a choice, this Article proceeds through a series of analytical steps to identify what capabilities are important to LGBTQ people. Based on a tripartite examination of the ontology of sexuality and gender, the factors that support the development of a positive sexual and gender identity, and the factors that limit the ability of individuals to live as LGBTQ persons, the Article identifies capabilities that are vital to LGBTQ people. The Article then suggests how each of these capabilities can form the basis for movement priorities, including their adoption as a theory of justice, a set of messaging and policy

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<sup>13</sup> See JOHN RAWLS, A THEORY OF JUSTICE 386–87 (Harvard Univ. Belknap Press, rev. ed. 1999). For Rawls, self-respect is an important primary good, or something that each person should possess in order to be able to rationally identify principles of justice and work towards them in a system of social cooperation. *Id.* When we feel our plans have no value, or that we cannot obtain our objectives, we cease to work for them and those around us begin to lose regard for our value, thus eroding our fundamental abilities to participate in a well-ordered society. *Id.*

priorities for the movement, and a framework in which to improve human development outcomes for LGBTQ people.

## II. GOALS OF LGBTQ POLICY ADVOCACY

From the time that LGBTQ people in the United States first started advocating for civil rights,<sup>14</sup> the LGBTQ movement has adopted a number of related, but different goals. LGBTQ people have sought privacy as a means to establish private gay spaces (bars, cars, the home) and guard against intrusion by others.<sup>15</sup> Privacy was a core value of some early LGBTQ organizations who felt that privacy was the best way to ensure the safety of members.<sup>16</sup> Constitutional values of privacy and personal liberty drove efforts to decriminalize same-sex sexual activity.<sup>17</sup> In the 1980s, the Human Rights Campaign Fund focused on privacy in advocacy and fundraising appeals,<sup>18</sup> and in the 1990s, the National Gay and Lesbian Task Force operated a Privacy Project meant to repeal sodomy laws.<sup>19</sup>

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<sup>14</sup> Civil rights advocacy is premised on a particular view of human sexuality, which divides people into an LGBTQ minority and a non-LGBTQ majority. Liberationists hold a different view of sexuality and gender, viewing homosexuality as one of many variations of human sexuality that can be experienced by any person, and gender as a fluid concept heavily tied to social norms and forms of oppression. Gay Liberation Front member Allen Young proclaimed “Gay is good for all of us . . . . The artificial categories of “heterosexual” and “homosexual” have been laid on us by a sexist society.” *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* 29–32 (Karla Jay & Allen Young eds., 1972). The goal of liberationists was not to liberate the homosexual, but to liberate homosexuality in all people. They tied sexual oppression to the oppression based on class, race, and gender. The Gay Liberation Front’s statement of purpose announced that “complete sexual liberation for all people cannot come about unless existing social institutions are abolished. We reject society’s attempt to impose sexual roles and definitions on our nature.” *Gay Liberation Front Statement of Purpose*, July 31, 1969, reprinted in *RAT*, August 12, 1969, cited in JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970* 234 (1983).

<sup>15</sup> See WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 99–100 (1999).

<sup>16</sup> D’EMILIO, *supra* note 14, at 64. (describing the importance of privacy in the Mattachine Society, known as the first gay organization in the United States, which was initially designed as a series of secret cells so that no single member would know the identity of all other members).

<sup>17</sup> ESKRIDGE, *supra* note 15, at 104–05.

<sup>18</sup> Letter from Stephen R. Edean, Human Rights Campaign Fund Treasurer, to Sam Gejdenson, Representative for the 2nd Congressional District of Connecticut (Oct. 14, 1982), [<https://perma.cc/3Z8W-R6RT>] (“The Human Rights Campaign Fund is a political action committee operating to assist Congressional candidates based on their positions on civil rights, human dignity and personal privacy.”); Poster from Human Rights Campaign Fund, Jerry Falwell Wants to Take Us Back to the 1950s!, *HRCF RECORDS* (1982), [<https://perma.cc/PPW9-E494>] (featuring the prominence of privacy in HRCF fundraising efforts in a 1982 appeal asked for support “[t]o guarantee that a small band of zealots do not succeed in defeating candidates who support human rights and personal privacy.”).

<sup>19</sup> See Press Release, National Gay and Lesbian Task Force, *NGLTF Announces Opening for Director of Privacy Project/Civil Rights Project* (Nov. 1990), [<https://perma.cc/T5D7-N4JJ>].

Freedom of expression and association have been particularly important to the LGBTQ movement.<sup>20</sup> Coming-out has been a central strategy to achieve acceptance.<sup>21</sup> The LGBTQ movement has enjoyed particular success with first amendment litigation, beginning with a 1958 challenge against prohibitions of using the US mail service to distribute a gay magazine.<sup>22</sup> Freedom of expression became a rallying cry in the multi-year political battle surrounding funding for the National Endowment of the Arts.<sup>23</sup> Litigation to protect the ability of students and public employees to engage in speech and expressive conduct continues through present times.<sup>24</sup>

While today's LGBTQ movement continues to work on a broad range of issues, it has currently adopted the ideal of equality as its central organizing goal (a review of the mission statements and websites<sup>25</sup> of leading LGBTQ groups confirms this). The Human Rights Campaign, now the largest LGBTQ advocacy group in the US, adopted the equality symbol as its logo in 1995.<sup>26</sup> Its most recent mission statement is focused almost entirely on equality.<sup>27</sup> Many groups signal their focus on equality by including the word in their names, such as the National Center for Transgender Equality,<sup>28</sup> American Veterans for Equal Rights, Immigration Equality, Out and Equal

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<sup>20</sup> See MICHAEL BRONSKI, *A QUEER HISTORY OF THE UNITED STATES* 209 (2011).

<sup>21</sup> *Id.*

<sup>22</sup> See generally *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (reversing a lower court ruling that ONE magazine, which featured stories, poems, and advertisements with pro-LGBTQ themes, violated obscenity laws).

<sup>23</sup> See Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2088 (1991).

<sup>24</sup> See, e.g., *LGBT Rights: Current Issues*, ACLU, [https://perma.cc/XK82-FZQ3#current] (last visited June 5, 2021).

<sup>25</sup> Organizations use mission statements to communicate their organizational goals and activities. Thus, mission statements are an appropriate place to look when assessing organizational goal and activities.

<sup>26</sup> *About*, HUMAN RIGHTS CAMPAIGN, [https://perma.cc/87E7-UUST] (last visited June 5, 2021).

<sup>27</sup> *Mission Statement*, HUMAN RIGHTS CAMPAIGN, [https://perma.cc/HVM4-DV4X] (last visited June 5, 2021) ("The Human Rights Campaign and the Human Rights Campaign Foundation together serve as America's largest civil rights organization working to achieve LGBTQ equality. By inspiring and engaging individuals and communities, HRC strives to end discrimination against LGBTQ people and realize a world that achieves fundamental fairness and equality for all. The Human Rights Campaign envisions a world where lesbian, gay, bisexual, transgender and queer people are ensured equality and embraced as full members of society at home, at work and in every community.")

<sup>28</sup> *About Us*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, [https://perma.cc/UWY9-HWVP] (last visited June 5, 2021) ("The National Center for Transgender Equality advocates to change policies and society to increase understanding and acceptance of transgender people. In the nation's capital and throughout the country, NCTE works to replace disrespect, discrimination, and violence with empathy, opportunity, and justice.")

Workplace Advocates,<sup>29</sup> and Family Equality.<sup>30</sup> The vision statement of the Equality Federation, the umbrella organization made up of statewide LGBTQ advocacy groups, states that “[w]e believe that [LGBTQ] people should have a fair and equal opportunity to thrive and provide for themselves and their families in every community.”<sup>31</sup> Among the members of the federation are twenty-seven state-level groups with the word equality in their name,<sup>32</sup> all of whom believe in a “fair and equal opportunity” for LGBT people.<sup>33</sup>

A study of the financing for the LGBTQ movement reveals that activities addressing “civil and human rights” received a larger share of funding (forty-four percent) than any other issue.<sup>34</sup> Though there is no further breakdown of this category, the fact that equality seems to be the central value asserted by LGBTQ movement groups raises a strong, probable inference that equality is the civil and human right that receives the most funding. Supporting this same conclusion is the fact that major LGBTQ funders articulate equality as their priority. The mission of the Gill Foundation, one of the top three funders of LGBTQ issues in the US, is “[t]o secure equal opportunity for all LGBTQ people.”<sup>35</sup> The LGBT-related work of the Evelyn and Walter Haas, Jr. Foundation, the fourth largest funder, are grouped under the title “LGBT

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<sup>29</sup> *Who We Are*, OUT & EQUAL WORKPLACE ADVOCES., [https://perma.cc/U72J-DKSF] (last visited June 6, 2021) (“Out & Equal is the premier organization working exclusively on LGBTQ workplace equality.”). Pride at Work, an LGBT organization based in the labor movement, also focuses on equality. *Our Mission*, PRIDE AT WORK, [https://perma.cc/6M7W-VSMZ] (last visited June 6, 2021) (“We seek full equality without restrictions or barriers for LGBTQIA+ individuals in our workplaces, unions, and communities.”).

<sup>30</sup> *Who We Are*, FAM. EQUALITY, [https://perma.cc/R4YL-E99R] (“Family Equality’s mission is to advance legal and lived equality for LGBT families, and for those who wish to form them . . . .”) (last visited June 5, 2021). The focus on equality in connection with family issues is particularly striking given that equality often has no role in adjudication about family relationships. Nancy Polikoff notes that cases about adoption and custody, arguably two of the most important family relationships for same-sex parents, are about the bests interest of the child, and that arguments about the equality of LGBTQ parents are not relevant and often backfire. See Nancy D Polikoff, *Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles*, 60 UCLA L. REV. DISC. 226, 226–239 (2012). This shows that the goal of equality is of central importance even though it may not factor in the actual advocacy efforts on behalf of LGBTQ parents.

<sup>31</sup> *About Us*, EQUALITY FEDERATION, [https://perma.cc/8YBQ-HKXN] (last visited June 5, 2021).

<sup>32</sup> *Federation Members*, EQUALITY FEDERATION, [https://perma.cc/9RND-V735] (last visited June 5, 2021).

<sup>33</sup> *About Us*, EQUALITY FEDERATION, *supra* note 31.

<sup>34</sup> ANDREW WALLACE & LYLE MATTHEW KAN, FUNDERS FOR LGBTQ ISSUES, 2018 TRACKING REPORT: LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER GRANTMAKING BY U.S. FOUNDATIONS 12 (2020). According to the report, civil and human rights received \$91 million. *Id.* The next largest category is health and wellbeing at roughly half that level (\$45.5 million). *Id.*

<sup>35</sup> GILL FOUNDATION, 2017 ANNUAL REPORT: OVERVIEW, [https://perma.cc/N6SK-DJEF] (last visited June 5, 2021).

Equality,” with the primary goal to “[a]dvance [f]ull [e]quality for LGBT [p]eople.”<sup>36</sup>

Equality advocacy became more viable once the Supreme Court struck down sodomy laws.<sup>37</sup> In *Bowers v. Hardwick*, the Supreme Court upheld Georgia’s sodomy law based on a state interest of discouraging homosexual behavior.<sup>38</sup> Sodomy laws, and the Supreme Court’s holding in *Bowers*, were routinely cited as grounds to deny LGBTQ people equality in employment, military service, foster care and child custody, access to public spaces, immigration, access to college facilities, and protection under hate crime laws.<sup>39</sup> The impact of sodomy laws began to fade as courts increasingly began to question whether *Bowers* was consistent with rule-of-law norms.<sup>40</sup> When the Supreme Court overturned sodomy laws in *Lawrence v. Texas*,<sup>41</sup> it invalidated a central justification to treat LGBTQ people unequally.

This focus on equality is understandable. Equality has resonance in American civic discourse. The late Professor Kenneth Karst, in his defense of the substantive value of the equality ideal, said “over and over in our history, from the earliest colonial beginnings, equality has been a rallying cry, a promise, an article of national faith.”<sup>42</sup> It “is central to the liberal political tradition.”<sup>43</sup> Among political and legal philosophers, most “political theories that are taken seriously today” have equality as a “foundational value.”<sup>44</sup>

Empirically, we know that humans dislike unequal treatment.<sup>45</sup> The vast majority of Americans believe that our society should do what is necessary

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<sup>36</sup> *Issues & Impact, Gay and Lesbian Rights*, HAAS JR., [<https://perma.cc/3FVZ-UHK7>] (last visited June 5, 2021).

<sup>37</sup> *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

<sup>38</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191–93 (1986).

<sup>39</sup> Brief for American Bar Association as Amicus Curiae Supporting Petitioners at 12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Brief for American Bar Association]; Brief of the Human Rights Campaign et al. as Amicus Curiae Supporting Petitioners at 9, 16, *Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (No. 02-102); Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 848 (2001).

<sup>40</sup> Brief for American Bar Association, *supra* note 39, at 23.

<sup>41</sup> *Lawrence*, 539 U.S. at 558.

<sup>42</sup> Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 245 (1983).

<sup>43</sup> Nirej Sekhon, *Equality and Identity Hierarchy*, 3 N.Y.U. J. OF L. & LIBERTY 349, 356 (2008).

<sup>44</sup> Nicholas Smith, *Why Do We Speak Of Equality*, 11 OTAGO L. REV. 53 (2005) (citing WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 4 (1990)). One review of political theories has identified equality as a “basic tenant[] of almost all contemporary moral and political theories.” *Id.* (quoting EQUALITY: SELECTED READINGS 1 (Louis Pojman & Robert Westmoreland eds., 1997)).

<sup>45</sup> See generally Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 427–428 (2004).

to ensure equal opportunity.<sup>46</sup> Ninety-one percent of Americans feel men and women should be treated equally.<sup>47</sup> Moreover, equality advocacy has been successful; seventy-six percent of Americans favor laws that would protect LGBTQ people from discrimination in the job market, public accommodations, and housing.<sup>48</sup>

Although equality is currently the most prominent goal of the LGBTQ movement, it is but one goal that the movement has adopted over decades of advocacy. Equality is neither the end of justice nor is it the sole component of envisioning a better life for LGBTQ people. Having achieved significant advancement, the LGBTQ movement should consider whether to expand beyond equality. Many advocates have already made this move, yet the movement has established a consensus around a set of post-equality goals. Part II sets out additional guiding principles to serve as goals and, by comparison, examine the limitations of the goal of equality when seeking to improve the lives of LGBTQ people. These guiding principles help set the stage for the capability approach in Part III.

### III. GUIDING PRINCIPLES

Political reform goals are often derived from particular views about human nature, the role of the state, and a vision of a desired outcome. This Section sets out four guiding principles that serve as a foundation for the policy and advocacy framework suggested in this Article. These principles will guide the process of constructing a capability approach for LGBTQ people.

Although these principles are articulated in terms of LGBTQ people, each one represents a universal principle that applies to all people. For example, the first principle states that LGBTQ people have inherent dignity. This reflects the more universal claim that all people have inherent dignity. The remaining three principles, as well as the capability approach analysis that follows, can be applied to all people regardless of sexuality or gender. This universalism ties this approach to a human rights framework in which all rights belong to all people. The principles are articulated only with respect to the LGBTQ population in order to more sharply illustrate how they apply to LGBTQ people, and how they might be expressed and defended in the context of policymaking and advocacy for LGBTQ people.

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<sup>46</sup> JILL MIZELL, *THE OPPORTUNITY AGENDA*, PUB. OPINION RES.: AN OVERVIEW OF RESEARCH ON ATTITUDES TOWARD EXPANDING OPPORTUNITY 5 (Ellen Braune et al. eds., 2012), [<https://perma.cc/K5M9-EJX3>].

<sup>47</sup> RICHARD WIKE & SHANNON SCHUMACHER, PEW RES. CTR., *DEMOCRATIC RIGHTS POPULAR GLOBALLY BUT COMMITMENT TO THEM NOT ALWAYS STRONG* 15 (2020), [<https://perma.cc/4VEA-PLJB>].

<sup>48</sup> PRRI Staff, *Despite Partisan Rancor, Americans Broadly Support LGBTQ Rights*, PUB. RELIGION RESEARCH INST. (Mar. 23, 2021), [<https://perma.cc/9NT9-W8WH>].

These principles can also be used to evaluate state action. One can ask whether the state is acting in a manner that supports these principles. Thus, these principles, and the capability approach analysis which follows them, constitute a partial theory of justice. As set out here, the end of justice is to expand the capabilities of LGBTQ people, and the means to do it is through policies of the state and other important institutions.

These principles are also inherently political as well as politically optimistic. They are political in that they are meant to serve as a basis for a political advocacy strategy, and optimistic in that they assume a political context that is increasingly supportive of LGBTQ people. They support increasingly strident demands for government response to anti-LGBTQ bias and stigma. As such, they are articulated at a somewhat abstract level in order to be adaptable to particular political contexts. For instance, the principles encourage LGBTQ people to make public claims about their own worth and take pride in expressions of sexuality and gender. For many LGBTQ people in the United States, such activities risk violence, job loss, and rejection by others. Thus, the use of these principles should be tailored to individual situations. Nonetheless, as social and political changes bring more acceptance for LGBTQ people, new advocacy strategies become more viable.

#### *A. Dignity*

The first guiding principle is that each LGBTQ person is a bearer of human dignity. *Dignity* is an ideal that can be found at the center of most Western political thought,<sup>49</sup> religious traditions,<sup>50</sup> and modern democracies.<sup>51</sup> In this Section, we will look at the use of dignity internationally as well as its use in cases involving LGBTQ issues, particularly those authored by Justice Kennedy. His reliance on dignity in these cases opens up new possibilities to use it as a constitutional principle for LGBTQ people. Following that, we will look at three ways dignity is particularly relevant to LGBTQ people. First, dignity requires recognition of the intrinsic worth of each person. Such recognition stands in direct opposition to stigma, or the shared belief that LGBTQ people are worthless. Second, dignity protects the ability of an individual to envision their own view of a good life, including how to live according to their sexuality and gender. Lastly, dignity gives value to relationships, including sexual ones, and community ties that are vital to LGBTQ people.

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<sup>49</sup> Christopher Bracey, *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality*, 26 CHICANO-LATINO L. REV. 15, 17 (2006) (“Dignity is arguably the premier value underlying the last two centuries of moral and political thought in Western society.”).

<sup>50</sup> CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH 356-357, [https://perma.cc/K9HN-6FJX] (last visited June 6, 2021) (“[O]nly man is ‘able to know and love his creator’ . . . [I]his is the fundamental reason for his dignity.”).

<sup>51</sup> See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT. LJ. 655, 678 (2008).

### 1. Broadly Recognized

Dignity is frequently invoked by political leaders as a fundamental political value. During the first half of the twentieth century, only five countries referred to dignity in their Constitutions.<sup>52</sup> In 1948, dignity appeared in Article 1 of the Universal Declaration of Human Rights (UDHR): “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>53</sup> After it was used so prominently in the UDHR, dignity began to be regularly incorporated into national constitutions. A recent count revealed that 162 countries have used the term.<sup>54</sup>

The indeterminate meaning of dignity—often cited as a weakness—may actually be a basis for its appeal, as both a standard of justice and a rhetorical tool. In the negotiations of the UDHR, the term connected to people from various ideological backgrounds, yet it was sufficiently open-ended that it did not require political compromise for all to accept it. Jacques Maritain, a French Catholic political philosopher who advocated for the use of dignity in the UDHR, has recounted that the goal of the process was not to endorse a particular political conception, but to reach agreement on a set of beliefs that could help guide action.<sup>55</sup> Oscar Schacter, a highly influential lawyer who helped construct many of the legal frameworks under which UN bodies operate, noted that dignity’s “intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors.”<sup>56</sup>

Because dignity is both a fundamental value as well as one whose application is, one might say, flexible, it can be used as a touchstone when encountering new situations. Schacter notes that by “[d]rawing upon the conception of human dignity and the intrinsic worth of every person, we can extend and strengthen human rights by formulating new rights or construing existing rights to apply to new situations.”<sup>57</sup> It is not surprising that dignity has been used in adjudicating the rights of LGBTQ people (a population that has traditionally not factored in rights-based discourse). It has been used by

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<sup>52</sup> Doron Shultziner & Guy Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMP. L. 461, 461 (2013).

<sup>53</sup> G.A. Res. 217 (III), *supra* note 11, at Art. 1.

<sup>54</sup> Shultziner and Carmi, *supra* note 52, at 465. The same study, which looked at the constitutions of 193 U.N. member states, found 649 instances that the term “dignity,” or some form of it, was used. *Id.* at 463.

<sup>55</sup> *Id.* at 472 (citing Jacques Maritain, *Introduction*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS—A SYMPOSIUM I (UNESCO ed., 1948)).

<sup>56</sup> Oscar Schacter, *Human Dignity as a Normative Concept*, 77 AM. J. INT. L. 848, 849 (1983).

<sup>57</sup> *Id.* at 853.

courts in LGBTQ rights cases in Canada,<sup>58</sup> South Africa,<sup>59</sup> Mexico,<sup>60</sup> Colombia,<sup>61</sup> and Costa Rica.<sup>62</sup>

In the United States, dignity does not appear in the Constitution, even though, according to at least one Supreme Court Justice, it is at the root of liberty and the motivating force behind the Constitution.<sup>63</sup> Dignity has been referenced in over 900 Supreme Court cases referring to everything from the dignity of people, to the dignity of the court, sovereign, and records.<sup>64</sup> However, the notion of human dignity began to be recognized in the United States more frequently in the mid-twentieth century, mirroring its appearance internationally. Justice Brennan invoked the concept of human dignity in thirty-nine opinions, while Justices Marshall, O’Conner, and Stevens have also used it.<sup>65</sup>

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<sup>58</sup> Halpern v. Canada, [2003] 65 O.R. 3d 161, 190 (Can. Ont. C.A.), [https://perma.cc/7JCA-X6YV] (holding that denial of marriage “offends the dignity of persons in same-sex relationships.”). Further, the Canadian Civil Marriage Act of 2005 states that marriage-like institutions, such as civil partnerships, would violate dignity. Civil Marriage Act, S.C. 2005, c 33 (Can.) (“[O]nly equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*.”).

<sup>59</sup> *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 9 para. 15 (S. Afr.), [https://perma.cc/L6KW-CS2Z] (“[G]ays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection; the impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels . . . .”); *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 19989 (1) SA 6 (CC) at 28 para. 26 (S. Afr.), [https://perma.cc/62UR-6FRG] (“Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level.”).

<sup>60</sup> Randal C. Archibold & Paulina Villegas, *With Little Fanfare, Mexican Supreme Court Legalizes Same-Sex Marriage*, N.Y. TIMES (June 14, 2015), [https://perma.cc/GH2E-C6RL].

<sup>61</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, Sentencia C-075/07 (Colom.), [https://perma.cc/3M8U-RP1N]. For a case summary in English, see *Sentencia C-075/07, Constitutional Court of Colombia (7 February 2007)*, INT’L COMM’N OF JURISTS (2009), [https://perma.cc/64QN-XZ3J].

<sup>62</sup> Sentencia 4524-12, Sala Constitucional de la Corte Suprema de Justicia, 5-7.

<sup>63</sup> Noah B. Lindell, *The Dignity Canon*, 27 CORNELL J. L. PUB. POL’Y 415–467 (2017).

<sup>64</sup> *Id.* at 419.

<sup>65</sup> *Id.* at 419–20.

## 2. Relevance to LGBTQ

In the United States, dignity has been invoked by courts adjudicating claims for same-sex marriage in Massachusetts, California,<sup>66</sup> Texas,<sup>67</sup> Connecticut,<sup>68</sup> Utah,<sup>69</sup> and Oklahoma.<sup>70</sup> Former Supreme Court Justice Anthony Kennedy brought attention to the value of dignity for LGBTQ people by invoking it in the four opinions that he wrote, which now make up the so-called LGBTQ canon of Supreme Court opinions (*Romer v. Evans*,<sup>71</sup> *Lawrence v. Texas*,<sup>72</sup> *US v. Windsor*,<sup>73</sup> and *Obergefell v. Hodges*<sup>74</sup>). In these cases, Kennedy sought to determine the nature of an individual's autonomous powers protected by dignity, as well as the nature of the government's duty owed to individuals and groups to exercise such autonomy. His conclusion is that all individuals are deserving in equal measure of personal autonomy and freedom to "define [their] own concept of existence" instead of having their identity and social role defined by the state.<sup>75</sup>

### a. Recognition of inherent worth

Contemporary conceptualizations of dignity are most often tied to a recognition of intrinsic human worth.<sup>76</sup> In other words, because each human

<sup>66</sup> See generally *In re Marriage Cases*, 183 P.3d 384, 399–401 (Cal. 2008).

<sup>67</sup> See generally *DeLeon v. Perry*, 975 F. Supp.2d 632, 658–59 (W.D. Tex. 2014) (holding that denial of marriage rights to gays and lesbians demeans their dignity and denies them the benefits and dignity of celebrating marriage).

<sup>68</sup> See generally *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 474 (Conn. 2008).

<sup>69</sup> See generally *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1188, 1200 (D. Utah 2013) (stating Utah's ban on same-sex marriage demeans "the dignity of these same-sex couples for no rational reason," and that individual choices pertaining to marriage were found to be protected because they are "integral to a person's dignity . . .").

<sup>70</sup> *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1278 (N.D. Okla. 2014) (relying on "dignity" language from *United States v. Windsor*, 570 U.S. 744, 768 (2013)).

<sup>71</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that a Colorado constitutional amendment violated the Equal Protection Clause because it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

<sup>72</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 560, 567 (2003).

<sup>73</sup> See, e.g., *United States v. Windsor*, 570 U.S. 744, 768 (2013).

<sup>74</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

<sup>75</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). See also Allyson Yankle & Daniel Tagliarina, *Adjudicating Dignity: Judicial Motivations and Justice Kennedy's Jurisprudence of Dignity*, 46 HASTINGS CONST. L.Q. 713, 740 (2019).

<sup>76</sup> Courts and political philosophers have recognized different types of dignity based on the characteristic from which dignity is derived. In the classical Roman period, the term *dignitas* referred to the honor and respect due to someone with a particular status. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183, 193 (2011). In many

life has worth, that life is worthy of dignity and of efforts to respect and preserve such dignity.<sup>77</sup> Intrinsic worth is not measured by an external standard of what counts as dignified.<sup>78</sup> It is a universal quality held by individuals by virtue of their humanity.<sup>79</sup>

For LGBTQ people, this interpretation of dignity stands in symmetrical opposition to *stigma*. In his seminal work, Erving Goffman explained that stigma is a belief held by members of society that a particular trait (in this case, variations in sexuality and gender) devalues the person who holds it—or the LGBTQ person.<sup>80</sup> The stigma is seen as an indicator of not only a degraded sexuality and gender, but also of the worthlessness of the person in all other functions of life (such as being a worker, parent, student, and citizen).<sup>81</sup> Acknowledging the dignity of LGBTQ people not only acknowledges their intrinsic worth, but also signifies that their sexuality and gender are part of their worth.

*b. Protects self-determination*

Classic liberal political thinkers have been heavily influenced by the idea that human worth is evident in the ability of individuals to engage in self-aware reasoning, judgement, and planning—a concept frequently credited to Emmanuel Kant.<sup>82</sup> Kant's commitment to the ideal that each person is an end in themselves, and not the means to an end, requires an acknowledgement of the dignity of each person.<sup>83</sup> Kant saw dignity both as a presumed

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hierarchical societies, such status-based dignity attached to an individual's position or nobility. *Id.* at 188. Dignity has also been recognized in relation to individuals or activities that are considered. This dignity depends on a positive judgement of a person or activity. *Id.* at 224.

<sup>77</sup> *Id.* at 197 (“Intrinsic dignity reflects the idea that personhood requires a certain degree of respect.”). See also Laurie W.H. Ackerman, *Equality and Non-Diminution: Some Analytical Thoughts*, 22 S. AFR. J. HUM. RTS. 597 (2006) (stating that the South African Constitution sees dignity as being based on inherent human worth).

<sup>78</sup> Rao, *supra* note 76, at 201.

<sup>79</sup> *Id.*

<sup>80</sup> See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). Stigma is a shared belief that LGBTQ people are “denigrated, discredited, and constructed as invalid.” Gregory M. Herek et al., *Sexual Stigma: Putting Sexual Minority Health Issues in Context*, in *THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POPULATIONS* 171 (Ilan H. Meyer & Mary E. Northridge eds., 2007).

<sup>81</sup> Herek et al., *supra* note 80.

<sup>82</sup> Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 41 (Amy Gutman ed., 1994) (“For Kant, whose use of the term *dignity* was one of the earliest influential evocations of this idea, what commanded respect in us was our status as rational agents, capable of directing our lives through principles.”).

<sup>83</sup> Rao, *supra* note 76, at 200.

quality possessed by each person by virtue of their ability to reason and self-legislate, as well as a duty owed to each person in the form of respect.<sup>84</sup>

Because the Kantian view of dignity applies to all people in all cultures, it remains pluralistic and neutral in terms of how individuals choose to live.<sup>85</sup> Unlike evaluative forms of dignity, where one might appraise particular activities or people as being particularly dignified, basing human dignity on intrinsic worth does not depend on any judgement of how people should conduct themselves.<sup>86</sup> This account of dignity benefits LGBTQ people because it supports counter-majoritarian views of a good life. It supports the role of the individual to pursue their own preferences, including sexuality and gender, regardless of whether they align with the sexuality and gender of the majority.

*c. Requires recognition of equal worth*

If each LGBTQ person has the worth equal to that of a non-LGBTQ person, then the state should assign equal value to LGBTQ and non-LGBTQ people. The actions and structures of the state should operate in a way that reflects the equal worth of both groups. This may sound like a claim for equal treatment. However, Philosopher Charles Taylor reminds us that achieving a status of equal worth may require structural reforms that go beyond equal treatment.<sup>87</sup> A demand for the recognition of equal worth, as Taylor calls it, may entail changes in the root structures that have been built up to support preferred groups.<sup>88</sup>

A demand for recognition of equal worth is premised on three assumptions. First is the basic liberal assumption that dignity should protect each person's autonomy to create their own identity and make their own choices in life.<sup>89</sup> Second is the assumption that individual identity is shaped, at least in part, by the relationship of the individual to the broader community.<sup>90</sup> By recognizing others, and by being recognized by others, the individual is able to understand their own identity as well as the level of worth placed on that identity by society.<sup>91</sup> As we will see in subsequent Sections, this is borne out by empirical experience with gender and sexuality. Part of the formation of gender and sexual identities involves observing the identities of others and mirroring, comparing, or rejecting those identities. In addition, the response

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<sup>84</sup> *Id.* at 199.

<sup>85</sup> *Id.* at 187.

<sup>86</sup> *Id.* at 201.

<sup>87</sup> Taylor, *supra* note 82, at 43.

<sup>88</sup> *Id.* at 38–39, 42–44, 67.

<sup>89</sup> *Id.* at 57.

<sup>90</sup> Rao, *supra* note 76, at 188.

<sup>91</sup> *Id.*

of others (such as acceptance or rejection) plays a significant role in the development of LGBTQ identities.

Third, social and political norms evolve to facilitate the development of preferred identities and discourage marginalized identities.<sup>92</sup> With regard to sexuality and gender, social and political institutions have developed around a cisgender and heteronormative model. Thus, while individuals might attempt to make their own choices regarding their identity, they may also confront social bias that inhibits their capability to do so. The result is misrecognition, or the denial of an individual's ability to decide their own identity for themselves. For LGBTQ people, there is empirical evidence that misrecognition, either through the rejection of one's sexual or gender identity, or through a requirement that LGBTQ people pretend to be heterosexual and cisgender, can damage their physical and mental health, as well as prospects for improved socio-economic outcomes.<sup>93</sup> Other examples of harm to minority identities can be found in patriarchal societies, societies with racial stratification, and colonized people.<sup>94</sup>

Given these assumptions, attempting to respect dignity by seeking equality in a difference-blind fashion “negates identity by forcing people into a homogeneous mold that is untrue to them.”<sup>95</sup> A recognition approach would acknowledge different identities and assign equal worth to each of them. Assuming that social structures have developed around preferences for majority identities, then assigning equal worth to minority identities would involve reforming those structures so that they can support the flourishing of each identity. Dignity is respected when the marginalized group has the capability to develop their identity absent constraints that might otherwise steer them toward preferred identities.

The recognition approach to dignity is illustrated by the evolving human rights norms surrounding gender identity documentation. For cisgender people, gender is documented at the time of birth (usually on a certificate of birth) and then promulgated through a myriad of public and private administrative systems that track gender information. The result is that each time a cisgender person encounters a new institution, such as a bank, gym, or frequent flyer club, the cisgender person's gender is almost effortlessly recognized by each one.

For transgender people, the gender assigned at birth is—at some point—changed. In some jurisdictions outside the United States, there is no legal

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<sup>92</sup> Taylor, *supra* note 82, at 25, 32-38.

<sup>93</sup> See *supra* Part III.C.3.

<sup>94</sup> Taylor, *supra* note 82, at 26.

<sup>95</sup> *Id.* at 38.

option to change one's legal gender.<sup>96</sup> In the United States, rules regarding gender change depend on each institution that issues or maintains records regarding gender. It is possible that transgender people may have to re-initiate a gender change process for their driver's license, and again for their passport, and again for their birth certificate, and again for a bank, and so on—each time facing different sets of requirements which may include medical or court documentation.<sup>97</sup> The system of gender recognition has been built for cisgender people. Although transgender people are able to have their gender recognized, they must continually negotiate a complicated system not required for cisgender people. Along the way, many transgender people will lose access to healthcare, voting, public benefits, employment and educational opportunities, and will be incorrectly assigned to sex segregated facilities in medical, criminal justice, and child welfare settings.<sup>98</sup>

The difference between an equality approach and a recognition approach is illustrated by evolving international human rights norms. In March 2007, a group of international human rights experts issued “The Yogyakarta Principles on the Application of International Human Rights Law in Relations to Sexual Orientation and Gender Identity” (The First Principles).<sup>99</sup> That document included twenty-nine principles reflecting the jurisprudence of courts and treaty bodies, as it stood in 2007.<sup>100</sup> One of these principles stated that that each person has a right to have their self-defined gender identity recognized, and that such recognition should not be contingent upon medical treatment or requirements limiting change in gender.<sup>101</sup> Other principles noted prohibitions against discrimination based on gender identity in other important areas, including healthcare, employment, housing, and migration.<sup>102</sup>

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<sup>96</sup> See UNITED NATIONS DEV. PROG. & ASIA PACIFIC TRANSGENDER NETWORK, LEGAL GENDER RECOGNITION: A MULTI-COUNTRY LEGAL AND POLICY REVIEW IN ASIA (2017), [<https://perma.cc/3E29-DXY5>].

<sup>97</sup> NAT'L CTR. FOR TRANSGENDER EQUALITY, REPORT OF THE U.S. TRANSGENDER SURVEY 85 (2015), [<https://perma.cc/N3VP-VHLP>].

<sup>98</sup> *Id.*

<sup>99</sup> INT'L COMM'N OF JURISTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 7 (2007) [hereinafter *First Principles*], [<https://perma.cc/WER9-BNS7>].

<sup>100</sup> See “*Yogyakarta Principles*” a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, HUMAN RIGHTS WATCH (Mar. 26, 2007), [<https://perma.cc/S8BR-J5M7>]; PAULA L. ETTTELBRICK AND ALIA TRABUCCO ZERÁN, ASIA PACIFIC FORUM, IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT 3–4 (2010), [<https://perma.cc/7K7H-CFZN>].

<sup>101</sup> *First Principles*, *supra* note 99, at Principle 3.

<sup>102</sup> A total of twenty-nine principles cover a wide variety of rights derived from the content of the international human rights treaties in force at that time. See *First Principles*, *supra* note 99.

By providing a legal basis to obtain recognition of one's gender and further protect against discrimination, The First Principles detail the right of transgender people to change their legal gender. However, transgender people were left to exercise that right in an unequal system. Ten years later, a new set of principles were issued in order to reflect changes in international human rights norms. "Yogyakarta Plus 10,"<sup>103</sup> as the new document is called, includes provisions on gender identity recognition that closely mirror recent jurisprudence in the Inter-American Court of Human Rights.<sup>104</sup> These new provisions recognize that the right to gender recognition is realized by the implementation of a system to record gender in different registries and databases.<sup>105</sup> The state is obligated to establish a cost-free, accessible, universal, and national gender registration system that can be used without additional burden on transgender people.<sup>106</sup> Additionally, the state must eliminate the use of gender markers where gender is not relevant.<sup>107</sup> These reforms apply to the system of gender recognition used by all people (cisgender and transgender). This elevated standard constitutes identity recognition because it involves a reform of the overall system of gender recognition that was constructed according to the cisgender norm.

*d. Supports sexuality*

Some critics of the Kantian focus on autonomy and self-reasoning of the individual argue that this focus does not sufficiently account for the role of communal attachments.<sup>108</sup> For communitarians, human nature is impacted by the complex web of relationships in which humans exist, beginning with the family and extending all the way to communities, political and economic

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<sup>103</sup> INT'L COMM'N OF JURISTS, THE YOGYAKARTA PRINCIPLES PLUS 10: ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES (2017), [<https://perma.cc/YPX8-TMJQ>] [hereinafter Supplemental Principles].

<sup>104</sup> *Id.* at Principle 31. *See also* Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived From a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18, and 24, In Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017), [<https://perma.cc/KZH5-W2AG>] [hereinafter IAHC Advisory Opinion].

<sup>105</sup> Supplemental Principles, *supra* note 103, at Principle 31.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Simon Caney, *Liberalism and Communitarianism: A Misconceived Debate*, POL. STUD., 273 (1992).

structures, and intersecting identities.<sup>109</sup> For them, the source of human dignity includes the ability and necessity to live in relationship with others.<sup>110</sup>

Martha Nussbaum sees rationality as one aspect (among many) of being a living creature; other aspects include sociability and love, meeting bodily needs (including sensual and reproductive), providing and receiving care from others,<sup>111</sup> and striving to seek a better life.<sup>112</sup> Nussbaum's approach ties dignity to the decisions and functions related to sex and sexuality.<sup>113</sup>

The importance placed on relationships by these critics has resonance for LGBTQ people. As will be discussed in Section V.D.2, interactions with others are critical to LGBTQ identity formation and serve as a central factor in increasing outcomes in a number of human development areas.

### *B. Pride (Self-Respect and Moral Worth)*

The second guiding principle is that each person should have the opportunity to experience and express pride in themselves. I have appropriated the

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<sup>109</sup> MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 152 (2009).

<sup>110</sup> For example, McCrudden, in describing the German Constitutional Court, endorsed a notion of dignity that recognizes that man is not an isolated, self-regarding individual, but is related to and bound by the community in which he lives. McCrudden, *supra* note 51, at 700. While dignity requires that his autonomy must be protected, it also requires a recognition that individuals exist within the community's social life. *Id.*

<sup>111</sup> Nussbaum's view of the human animal is influenced by Aristotle's discussion of the human as being a political animal and Marx's view that human beings need a plurality of life-activities in order to flourish. Martha C. Nussbaum, *Beyond the Social Contract: Capabilities and Global Justice*, 32 *OXFORD DEV. STUD.* 1, 12 (2004) [hereinafter *Beyond the Social Contract*]. Nussbaum's view is consistent with a feminist critique of Rawls and Kant, that the degree to which humans experience emotions, engage all the senses, and provide care are all traits that, like rationality, make humans different than other creatures.

<sup>112</sup> NUSSBAUM, *supra* note 7, at 31. According to Nussbaum, all animals, including human ones, share all these characteristics. *Id.* The specific form of striving, and the mix of rationality and sociability found in human animals, might be different from that of non-human animals and may produce different types of animal dignity, but even so, "all deserve respect and even wonder." *Beyond the Social Contract*, *supra* note 111.

<sup>113</sup> For example, the plurality opinion in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), invoked the connection between dignity and autonomy in a woman's decision to choose an abortion:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

term Pride<sup>114</sup> to refer to the appreciation of one's own worth, including the worth of one's gender and sexuality.<sup>115</sup> The appreciation of one's own worth comes through one's self-perception, as well as the social and cultural messages about one's worth. Thus, if LGBTQ advocacy and policies are to produce pride, they must support the ability of LGBTQ people to appreciate themselves as good and worthy.

In this Section, we will first review why pride is important, both politically and psychologically. Next, we will explore why adopting pride as a guiding principle would require a change in advocacy strategies. Traditionally, LGBTQ advocacy has fit within the bounds of liberal moral neutrality which brackets and avoids arguments about the morality of LGBTQ people. Advocacy has focused instead on supposedly neutral values such as such as privacy, liberty, and equality. Incorporating Pride into LGBTQ advocacy would entail unbracketing and directly addressing moral arguments. Lastly, this Section concludes with some examples of how Pride and moral arguments might be deployed in advocacy situations.

Moral and political philosophers generally agree on the importance of an individual's sense of their own worth, often labeled as self-respect.<sup>116</sup> John

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<sup>114</sup> I have taken a small liberty to appropriate the term Pride for use here, although the extent of its appropriation is minute. The term is often associated with public events commemorating the June 1969 Stonewall riots. Ashley Moore, *Why is it Called Pride?*, BESTLIFE (May 21, 2019), [https://perma.cc/35DG-YCN4]; Tyler Albertario, "Pride" and Prejudice: *The Craig Schoonmaker Story*, MEDIUM (Aug. 16, 2019), [https://perma.cc/Q847-GCCS]. Gay Pride marches and festivals are held in cities around the world as a symbol of identity, culture, and political power. Moore, *supra* note 114; Albertario, *supra* note 114. Initially, these events were called Christopher Street Liberation Marches, named so after the street on which the Stonewall Bar is located. Albertario, *supra* note 114. Christopher Street Liberation Days were held in several major cities in the United States. See Moore, *supra* note 114. In the early 1970s, organizers of the New York event sought to identify a name for the event that was not tied a particular location. Moore, *supra* note 114. Additionally, some felt that the use of the term gay liberation signified a political agenda that could be alienating to some in the community. See Albertario, *supra* note 114. Organizers felt that the word Pride was reflective of the already existing events and was broad enough to appeal to a broad range of LGBTQ people. *Id.* Since then, many commemoration events have used the term pride as a label for cultural events and symbols associated with a positive perspective on people whose gender and sexuality are historically marginalized. Moore, *supra* note 114. Thus, the term was chosen by event organizers as much for its pragmatic convenience as for its meaning. *Id.* The use of the term Pride in this Article helps leverage its already existing usages.

<sup>115</sup> Both of these elements could be considered to be part of dignity, and thus, could have been articulated under the first principle. However, acknowledging dignity as the first principle is aimed at establishing obligations for action by the state or important non-state actors. Pride, as the second principle, relates to how LGBTQ people should be able to view themselves. In other words, the first principle focuses on the relationship of LGBTQ people to the state and takes the existence of dignity as a given. The second principle focuses on the relationship of LGBTQ people to themselves and does not assume Pride to be in existence. Therefore, it is a call to ensure the existence of Pride as a good to be secured.

<sup>116</sup> Robin S. Dillon, *Respect*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 18, 2018), [https://perma.cc/VB6Y-XGBA] ("Self-respect has to do with the structure and attainment

Rawls defined self-respect as a person's sense of their own value, or even more specifically, a person's conviction that their life plan is worth carrying out, accompanied by a confidence in their own ability to effectuate their life plan.<sup>117</sup> Rawls describes it as a primary-good, or something that all rational beings would want. He sees it as vital to a person's ability to engage with others, accomplish personal or collective goals, and do the things necessary to flourish. For Rawls, whether one has self-respect is heavily influenced by messages about the relative worth of citizens, distribution of rights and liberties, access to resources needed to pursue life plans, availability of associations and communities, and norms governing citizen interaction. Due to the importance of self-respect and its sensitivity to social pressures, Rawls argues that social institutions are required by justice to support and not undermine it.<sup>118</sup>

Self-respect has also been described as a form of proper pride (as opposed to undue pride, which is seen more as a vice).<sup>119</sup> Such self-respect comes from knowing that one is the holder of rights. It is this knowledge of one's own rights—not simply the rights themselves—that supports an individual's ability to stand up for themselves and seek support from others.<sup>120</sup> For LGBTQ people (indeed, for everyone) it is important to understand that self-respect must include an acknowledgement of the value of one's gender and sexuality, and not merely an acknowledgement of one's value in spite of their sexuality and gender.<sup>121</sup> Pride in one's sexuality and gender forms the basis for political claims about sexuality and gender.

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of an individual's identity and of her life, and it reverberates throughout the self, affecting the configuration and constitution of the person's thoughts, desires, values, emotions, commitments, dispositions, and actions. As expressing or constituting one's sense of worth, it includes an engaged understanding of one's worth, as well as a desire and disposition to protect and preserve it.”)

<sup>117</sup> RAWLS, *supra* note 13, at 386.

<sup>118</sup> *Id.*

<sup>119</sup> David Sachs, *How to Distinguish Self-Respect from Self-Esteem*, 10 PHIL. & PUB. AFFS. 346, 350 (1981); Dillon, *supra* note 116.

<sup>120</sup> Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 250 (1970).

<sup>121</sup> Amartya Sen has argued that the capability to go without shame is an important component of individual freedoms. David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic*, 20 Pol. Theory 584, 591 (1992). Shame blocks the ability of an individual to participate in fully in society, and it debilitates the individual from action. Diego Zavaleta Reyes, *The Ability to Go About Without Shame: A Proposal for Internationally Comparable Indicators of Shame and Humiliation*, 35 OXFORD DEV. STUD. 405, 406 (2007). However, this capability may not go far enough. One approach to building upon this capability is to remove the trait that causes the shame. In the case of poverty, it would be to take the person out of poverty. The other would be to remediate shame by establishing a basis to respect the person in poverty despite their condition. Both of these approaches are based on a judgment that poverty is undesirable. Neither of these approaches is appropriate for gender and sexuality. From a gender and sexuality perspective, it is like saying you want to eliminate the shame and stigma of homosexuality, but at the same time, maintain public programs to eliminate homosexuality. It's a version of “love the sinner, hate the sin.”

From a psychological perspective, pride is important to the well-being of LGBTQ people. LGBTQ people are exposed to negative stereotypes, prejudice, and moral condemnation about their sexuality and gender. Most LGBTQ people internalize these messages to some extent, accepting as true the claims that LGBTQ people are less worthy due to their sexuality and gender. A significant body of peer-reviewed research shows a causal connection between internalized homophobia, transphobia, and a number of negative outcomes.<sup>122</sup> Thus, from both a political and psychological perspective, pride is an important component of advocacy efforts and one's quest for a better life.

When faced with claims about the low moral value of LGBTQ people, LGBTQ advocates have traditionally adhered to a framework of liberal moral neutrality. Chai Feldblum has identified moral neutrality as part of the "traditional paradigm" of LGBTQ advocacy.<sup>123</sup> The central goal of this paradigm is to secure equal opportunity and nondiscrimination for LGBTQ people (with a strong dose of Millian live-and-let-live liberty) without having to fight the battle on the goodness or badness of minority sexualities and genders. LGBTQ advocates sought to sequester issues related to morality and religion to the realm of the personal and private. Public advocacy for LGBTQ rights was limited to fundamental rights such as privacy, freedom of expression, and liberty.

This traditional paradigm aligns with Rawlsian principles of neutral justice in which governance is established without regard to a particular view of the good life.<sup>124</sup> Rawls recognized that citizens each have their own comprehensive moral doctrines that reflects their personal truths and plans for their life. At the same time, he recognized that individual moral doctrines may be incompatible with others. Rawls was concerned that the stability of political institutions would be weakened if citizens sought to establish rules of justice

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<sup>122</sup> See Bonnie Moradi et al., *LGB of Color and White Individuals' Perceptions of Heterosexist Stigma, Internalized Homophobia, and Outness: Comparisons of Levels and Links*, 38 COUNSELING PSYCHOLOGIST 397 (2010); David M. Frost & Ilan H. Meyer, *Internalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals*, 56 J. COUNSELING PSYCHOL. 97 (2009); Brian A. Rood et al., *Internalized Transphobia: Exploring Perceptions of Social Messages in Transgender and Gender-Nonconforming Adults*, 18 INT'L J. TRANSGENDERISM 411 (2017); Jennifer Phan et al., *Internalized Homophobia, Religious Affiliation, and Substance Use in Sexual Minority Women*, 38 ALCOHOLISM TREATMENT Q. 403 (Dec. 2019); Constance Rubino, Rosalind Case & Alastair Anderson, *Internalized Homophobia and Depression in Lesbian Women: The Protective Role of Pride*, 30 J. GAY & LESBIAN SOC. SERVS. 244 (2018).

<sup>123</sup>Chai Feldblum, *Sexual Orientation, Morality, and the Law*, 57 U. PITT. L. REV. 237, 245 (1996).

<sup>124</sup> Rawls accomplished this in several ways. In creating a system of governance that complies with principles of justice, Rawls places representatives of citizens behind a "veil of ignorance," in a hypothetical original position where they can negotiate a new placement. JOHN RAWLS, *A THEORY OF JUSTICE* 392-94 (Harvard Univ. Belknap Press, rev. ed. 1999). The veil of ignorance means they don't know their identity. *Id.* Secondly, Rawls said that the right is prior to the good—that is, fundamental principles of justice are not tied to a particular theory of a good life. *Id.* at 491. We need to agree on these principles before knowing what constitutes a good life. *Id.*

according to conflicting comprehensive moral doctrines of individuals.<sup>125</sup> To address this concern, Rawls said that laws should be supported by an overlapping consensus about political conception of justice, and arguments about personal comprehensive moral doctrines should be avoided.<sup>126</sup> The value of the moral bracket is that it ensures social cooperation because it brackets those things about which we disagree. One might say that the political values of toleration, fairness, and equality apply to the basic structure of society, whereas the issues that are bracketed only apply to components of it.<sup>127</sup>

In keeping with liberal neutrality, LGBTQ advocates tended to deflect any discussion about morality in public debates and pivot to discussions about neutral values privacy, equality, and political participation. This deflection is often paired, implicitly or explicitly, with an argument about the immutability of sexuality or gender. Opponents would seek to place moral responsibility on LGBTQ people by claiming that gender and sexuality is a choice. LGBTQ advocates would seek to avoid the discussion of morality by arguing that LGBTQ people are born that way.

The debates about marriage equality provide a poignant example of this morally neutral advocacy. Carlos Ball, in his writings about liberal neutrality, paraphrases a morally bracketed claim for same-sex marriage as the following: “[a]ll we . . . are asking is that we be treated equally, and if you enjoy the right to marry so should we. We are not asking that you morally condone our behavior, we are only asking for tolerance and respect.”<sup>128</sup> The campaign to stop Proposition 8 in California, which amended the California Constitution to ban same-sex marriage, was based initially on strategies that avoided images of gay people and the use of the word “gay,” hoping to win without having to engage the argument about the morality of marriage or same-sex

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<sup>125</sup> John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987) (“[A]s a practical political matter, no general and comprehensive view can provide a publicly acceptable basis for a political conception of justice. . . among other things, such a conception must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life (or what I shall call for short ‘conceptions of the good’) affirmed by the citizens of democratic societies.”).

<sup>126</sup> *Id.* at 5 (“[T]he point of the idea of an overlapping consensus on a political conception is to show how, despite a diversity of doctrines, convergence on a political conception of justice may be achieved and social unity sustained in long-run equilibrium, that is, over time from one generation to the next.”).

<sup>127</sup> SANDEL, *supra* note 109, at 225.

<sup>128</sup> CARLOS BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 24 (Routledge 2003). Another example is the Marriage Resolution, circulated by the Marriage Project of the Lambda Legal Defense and Education Fund. It reads as follows: “[b]ecause marriage is a basic human right and an individual personal choice, RESOLVED, the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage.” Chai R. Feldblum, *The Limitation of Liberal Neutrality Arguments in Favour of Same-Sex Marriage*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 55, 56 (Robert Wintemute & Mads Andenaes eds., 2001).

couples.<sup>129</sup> The “No on 8” campaign released a television ad featuring Senator Dianne Feinstein speaking directly to the camera: “[Proposition 8] is about discrimination and we must always say no to that. *No matter how you feel about marriage*, vote against discrimination, and vote NO on 8.”<sup>130</sup> In a Missouri ad against a proposed state constitutional amendment to explicitly ban gay marriage, Navy Veteran Damon Hayward assures listeners that their anti-gay morality will be kept safe; “Amendment 2 isn't about gay marriage. That's already banned in Missouri . . . It's about putting unequal treatment in Missouri's Constitution.”<sup>131</sup> America Ferrera, a star in the hit series “Ugly Betty,” was featured in an ad targeting Latino voters saying, “this is not about being gay or straight, it's about being American.”<sup>132</sup>

These tactics were unsuccessful. Following the loss against Proposition 8 in California in 2008, along with a string of ballot box losses in 30 other states, marriage equality advocates engaged in intense efforts to evaluate the success of advocacy efforts.<sup>133</sup> One evaluation concluded that the lack of direct discussion about same-sex couples allowed “the opposition to define who gay people are and what we're like and allow[ed] their characterization of us as dangerous and untrustworthy to become the dominant understanding in the campaign discourse.”<sup>134</sup> Another evaluation concluded that the focus on equal access to marriage and its benefits led to Americans perceiving LGBTQ people as motivated by greed rather than other values considered more worthy.<sup>135</sup> In general, researchers have found an “unequivocal” connection between disapproval of LGBTQ people's right to marry and disapproval of homosexuality in general, as well as a belief that LGBTQ people are inferior or of lesser worth.<sup>136</sup>

<sup>129</sup> Jonathan Rauch, *Prop 8 Ads' Invisible Gays*, L.A. TIMES (Oct. 26, 2008), [https://perma.cc/P8G2-MHAM].

<sup>130</sup> NoOnProp8dotcom, *Senator Feinstein: No on Prop 8*, YOUTUBE (Oct. 28, 2008), [https://perma.cc/6JJN-UWLS] (emphasis added).

<sup>131</sup> Constitution Defense League (Missouri), *Vote No-Missouri Amendment 2*, GLAAD, [https://perma.cc/F3AN-7JTL] (last visited June 6, 2021).

<sup>132</sup> America Ferrera, *Tony Plana & Ana Ortiz Speak Out Against Prop 8*, VOTE NO ON PROP 8 (Oct. 25, 2008), [https://perma.cc/HMP6-426Q].

<sup>133</sup> Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, THE ATLANTIC (Dec. 11, 2012), [https://perma.cc/Z8GV-ZZC2].

<sup>134</sup> DAVID FLEISCHER, LGBT MENTORING PROJECT, THE PROP 8 REPORT: WHAT DEFEAT IN CALIFORNIA CAN TEACH US ABOUT WINNING FUTURE BALLOT MEASURES ON SAME-SEX MARRIAGE 412 (2010).

<sup>135</sup> Nathaniel Frank, *How Gay Marriage Finally Won at the Polls*, SLATE (Nov. 7, 2012), [https://perma.cc/X68D-ZECC].

<sup>136</sup> Some people have claimed that opposition to same-sex marriage is unrelated to animus or negative judgements about LGBTQ people and is, instead, based on other legitimate concerns over the legalization of same-sex marriage. Brian Powell, et al., *Public Opinion, the Courts, and Same-sex Marriage: Four Lessons Learned*, 2 SOC. CURRENTS 3, 5 (2015). In an analysis of

Based on this assessment, advocates shifted from an equal rights framework to one focused on personal and normative values. Television ads featured gay couples talking about their lives and their desire to be married, couched in value-laden frameworks such as love, commitment, desire for children and family, pride, courage, contribution to community, and the continuation of family legacies.<sup>137</sup> The number of Americans that supported the acceptability of homosexuality increased at a higher rate than ever before.<sup>138</sup> This approach was used in ballot initiatives in Maine, Maryland, Washington, and Minnesota, and in each of those states, the electorate voted to support marriage for same-sex couples in 2012.<sup>139</sup> Freedom to Marry, the central national advocacy group for legalizing marriage for same-sex couples, said “[t]his shift away from a focus on abstract rights and benefits . . . and [has been] crucial to the exponential growth in support for marriage . . .”<sup>140</sup>

The value-based approach to marriage equality serves as an example of how LGBTQ advocates might use moral and normative frames. As moral agents, LGBTQ people form their own beliefs about what is good and valuable about themselves and their lives. By using these frames, LGBTQ people can demonstrate moral aspects of their lives in relation to, rather than in spite of, their gender and sexuality.

Empirical research has identified positive personal strengths that LGBTQ people feel are associated with their sexuality and gender.<sup>141</sup> For LGBTQ people, these strengths arise from positive and affirming experiences, resilience (the development of protective factors that help avoid negative outcomes in the face of negative events), and stress-related growth

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nationwide public opinion data as well as qualitative interview data, researchers concluded that the connection between opposition to the legalization of same-sex marriage and animus and negative moral judgements of LGBTQ people was “unequivocal.” *Id.*

<sup>137</sup> Ball, *supra* note 133.

<sup>138</sup> SCOTT BARCLAY & ANDREW FLORES, PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE 4, 5, 8 (2013); Brian F. Harrison & Melissa R. Michelson, *What’s Love Got To Do With It?: Emotion, Rationality, and Framing LGBT Rights*, 39 NEW POLIT. SCI. 177 (2017).

<sup>139</sup> Ball, *supra* note 133.

<sup>140</sup> *Roadmap to Victory*, FREEDOM TO MARRY, [https://perma.cc/C722-46KL] (last visited June 6, 2021). See also Ball, *supra* note 133; Matt Baume, *Secret Weapon for Repealing Prop 8: Maine*, NBC BAY AREA (Sept. 29, 2010), [https://perma.cc/TV82-B4YM]; Chris Geidner, *How Marriage Equality Supporters Beat The “Princess” Ad*, BUZZFEED NEWS (Nov. 20, 2012), [https://perma.cc/BH7L-LTUB]; Nathaniel Frank, *How Gay Marriage Finally Won at the Polls*, SLATE (Nov. 7, 2012), [https://perma.cc/6CWX-A9TX]; *Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign*, FREEDOM TO MARRY, [https://perma.cc/53JC-S69M] (last visited June 6, 2021); *Messaging, Messengers and Public Support*, FREEDOM TO MARRY, [https://perma.cc/U7CW-FX6P] (last visited June 6, 2021) [hereinafter *Messaging*].

<sup>141</sup> Michelle D Vaughan & Eric M Rodriguez, *LGBT Strengths: Incorporating Positive Psychology Into Theory, Research, Training, and Practice*, 1 PSYCHOL. SEX. ORIENTAT. & GEND. DIVERS. 325, 326 (2014).

(positive change resulting from a stressful experience).<sup>142</sup> Thus, discussion about morals can be based in both individual experience and community-based policy agendas. For example, an academic review of forty years of psychological literature related to LGBTQ people revealed love was the most commonly referenced personality strength.<sup>143</sup> The review concluded that “this focus on valuing, building, and maintaining relationships may be interpreted as evidence of love as a signature strength in the lives of LGBT individuals.”<sup>144</sup> Love was also a central theme of post-2010 marriage advocacy, both as an emotion that has importance to LGBTQ people and as an experience that is considered normatively good in today’s society.<sup>145</sup>

Similar research also revealed that LGBTQ people felt a unique strength in maintaining commitments to chosen family, of which romantic love may only be one part. Lesbians and gay men feel that coming out led to the creation of social support systems and other beneficial life activities, such as belonging to a community, creating families of choice, having strong and empathetic connections with others, and serving as a role model for others.<sup>146</sup> These views also correspond to policy priorities about relationship recognition.

Honesty was also identified as an aspect of LGBTQ identity. Transgender people cited authenticity, arising primarily out of establishing congruency between their inner feelings and outward appearances regarding their own gender.<sup>147</sup> Gay and lesbian individuals strengthened their self-acceptance as well as their commitment to honesty. One lesbian stated, “I am living authentically, which feeds my confidence, my joy and happiness, my relationship with God, [and] my improved health.”<sup>148</sup> A review of peer-reviewed studies about LGBTQ people (from 1974 to the present) showed that evidence of “integrity (being honest, open, genuine to self and others)” was

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<sup>142</sup> *Id.* at 326–28.

<sup>143</sup> Michelle D. Vaughan et al., *A Content Analysis of LGBT-Themed Positive Psychology Articles*, 1 PSYCHOL. SEX. ORIENTAT. GEND. DIVERS. 313, 319–20 (2014).

<sup>144</sup> *Id.* at 320.

<sup>145</sup> Freedom to Marry, the central group coordinating the marriage equality effort, described the shift in messaging strategies: “[i]n perhaps our biggest ‘A ha!’ moment, we learned that many voters thought that gay couples wanted to marry to gain rights and benefits (which is actually what we’d been telling them)—but that voters saw this as a very different motivation from why they themselves would get married, i.e. for love and commitment . . . we discovered the building blocks of a new message strategy: messages had to be in sync with conflicted voters—and most same sex couples—understanding of what was central about marriage. Marriage, for these voters, was about love and commitment.” *Messaging*, *supra* note 140.

<sup>146</sup> Ellen D. B. Riggle et al., *The Positive Aspects of Being a Lesbian or Gay Man*, 39 PROF. PSYCHOL. RES. PRACT. 210, 212–14 (2008) [hereinafter *Being a Lesbian or Gay Man*]; Vaughan et al., *supra* note 143, at 319.

<sup>147</sup> Ellen D. B. Riggle et al., *The Positive Aspects of a Transgender Self-Identification*, 2 PSYCHOL. SEX. 147, 150 (2011) [hereinafter *Transgender Self-Identification*].

<sup>148</sup> *Being a Lesbian or Gay Man*, *supra* note 146, at 213.

one of the most prominent themes.<sup>149</sup> A study of bisexuals found that they felt that their identity was associated with similar attributes of honesty, authenticity, and a broader perspective on gender and sexuality.<sup>150</sup> The value of honesty corresponds with the strategy of coming out, as well as the multiple policy priorities that arise to seek protection for those who do (in the areas of employment, housing, safety and more).

An attachment to justice and fairness has also been tied to LGBTQ identities: “[e]ncompassing both a personal commitment to equality as well as a larger engagement in work and organizations that advocate for and support equality, fairness was a prominent theme in [psychological] literature.”<sup>151</sup> Lesbians, in particular, felt a greater capacity to engage in egalitarian relationships.<sup>152</sup> Transgender people felt the ability to resist unjust aspects of gender norms.<sup>153</sup> Bisexuals felt strongly that they were able to have a freedom from roles and social rules, particularly dealing with sex and gender, which enabled them to explore different relationships and social settings.<sup>154</sup> This corresponds to the emphasis on building advocacy and political capacity.

Asserting normative values such as love, chosen family, honesty, fairness, and justice reinforces the notion that LGBTQ lives have value that arise out of their sexuality and gender experiences.

### *C. Sexuality and Gender Matters*

The third guiding principle is that gender and sexuality play an important role in human flourishing. The question of whether, and to what extent, gender and sexuality impact the lives of LGBTQ people has been an axial issue from the beginning of the LGBTQ movement. This Section highlights how different views on this issue have impacted policy advocacy and sets out the ways in which sexuality and gender impact the lives of LGBTQ people (both positively and negatively).

#### 1. Insiders or Outsiders

When Henry Hay founded the Mattachine Society in the early 1950’s, known as the first LGBTQ group in the United States, he saw homosexuals as more than just a group of people with shared sexual desires. His views were heavily influenced by his past involvement in the Communist party and his grounding in Marxist theory. To him, homosexuals were a class of

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<sup>149</sup> Vaughan et al., *supra* note 143, at 319.

<sup>150</sup> Sharon Scales Rostosky et al., *The Positive Aspects of a Bisexual Self-Identification*, 1 PSYCHOL. SEX. 134, 135-136 (2010).

<sup>151</sup> Vaughan et al., *supra* note 143, at 320.

<sup>152</sup> *Being a Lesbian or Gay Man*, *supra* note 146, at 214.

<sup>153</sup> *Transgender Self-Identification*, *supra* note 147, at 150.

<sup>154</sup> Rostosky et al., *supra* note 150, at 134.

oppressed people with a distinct culture and the ability to combat their oppression with education and claims of dignity.<sup>155</sup>

For Hay and others, their sexuality rendered them outsiders. At a 1953 meeting of the Society, member Charles Roland advocated for this perspective: “[w]e must disentrall ourselves of the idea . . . that we differ only in our sexual directions and that all we want or need in life is to be free to seek the expression of our sexual desires.”<sup>156</sup> He advocated for the task of consciously creating “an ethical homosexual culture.”<sup>157</sup>

At the same meeting, Marilyn Riegera—leader of a discussion group of people who were also members of the Mattachine Society—was critical of the minority class concept: “[w]e know we are the same . . . no different than anyone else. Our only difference is an unimportant one to the heterosexual society, unless we make it important.”<sup>158</sup> She advised, “declaring ourselves, by integrating . . . not as homosexuals, but as people . . . whose homosexuality is irrelevant to our ideals, our principle, our hopes and aspirations.”<sup>159</sup> The view she represented saw homosexuality as an isolated, negligible part of human nature.

Both views were concerned about others using sexuality as a basis for exclusion and different treatment, and thus, they both support a demand for nondiscrimination policies. However, Hay’s view saw a connection between sexuality and culture, family structure, economics, and political power, which rendered homosexuals as outcasts, requiring policy reform across many areas of law. Historian Michael Bronski concludes that the question of whether homosexuals are outsiders seeking reform or insiders seeking acceptance remains “the defining division in the LGBT movement.”<sup>160</sup> Other scholars have called it a tension between sameness and difference,<sup>161</sup> separatism and assimilation,<sup>162</sup> boundary-defending and boundary-stripping,<sup>163</sup> or opposition

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<sup>155</sup> BRONSKI, *supra* note 20, at 179.

<sup>156</sup> D’EMILIO, *supra* note 14, at 77 (quoting Charles Rowland, Opening Speech at the Mattachine Society Democratic Convention (Apr. 11, 1953) (transcript available in the Donald S. Lucas Papers collection)).

<sup>157</sup> *Id.* at 77.

<sup>158</sup> *Id.* at 79 (quoting Marilyn Rieger, Address to Delegates of the Convention (May 23, 1953) (transcript available in the Jim Kepner Papers collection)).

<sup>159</sup> *Id.*

<sup>160</sup> See BRONSKI, *supra* note 20, at 181.

<sup>161</sup> Amin Ghaziani, Verta Taylor & Amy Stone, *Cycles of Sameness and Difference in LGBT Social Movements*, 42 ANN. REV. SOC. 165, 166 (2016).

<sup>162</sup> Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in 6 FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 111-135 (Michael Warner ed., Univ. of Minnesota Press 1993).

<sup>163</sup> Joshua Gamson, *Must Identity Movements Self-Destruct? A Queer Dilemma*, 42 SOC. PROBS. 390, 400 (1995).

and similarity.<sup>164</sup> A recent Pew survey shows this tension extending to LGBTQ people themselves.<sup>165</sup> When asked whether LGBTQ people “should ‘be able to achieve equality while maintaining a distinct culture and way of life’ or whether ‘the best way to achieve equality is to become part of mainstream culture and institutions like marriage’”, the response was evenly split between the two views.<sup>166</sup>

The current focus on equality continues to provoke this tension between people who hold different views of sexuality. Most people (at least those who are supportive of LGBTQ rights) will probably agree that LGBTQ people should have legal equality regardless of one’s view on the role of gender and sexuality in one’s life. Thus, the claim for equality itself is not a source of tension. The tension arises when, in the course of arguing for equality, advocates embrace a particular view of sexuality and gender for strategic purposes. More specifically, equality claims are strengthened by showing that LGBTQ people are insiders and similar to non-LGBTQ people. Depicting LGBTQ people as outsiders, however, risks highlighting their differences, which may rationalize disparate treatment of them and thereby weaken the claim to equality. Thus, while the advocate for highly visible and diverse sexualities may have a just cause, the advocate for a sexuality that is minimally divergent from social norms probably has a more winnable cause.

For example, in litigation against sodomy laws, the difference between LGBTQ people and non-LGBTQ people was minimized as much as possible. In *Lawrence v. Texas*, the facts centered on the arrest of John Lawrence and Tyrone Garner for violating a Texas statute that prohibited sodomy.<sup>167</sup> Lawrence and Garner were having a moment of sexual tryst in Lawrence’s apartment while Garner’s boyfriend, Robert Eubanks, was outside having a drunk tirade.<sup>168</sup> It was Eubanks who brought the police to the scene when he called to report a disturbance, possibly out of jealousy.<sup>169</sup>

The sex act in question was not exactly set in the context of an intimate, committed, white-picket fence relationship. Paul Smith, who argued the case in the Supreme Court, said “[w]e had these lines of cases [dealing with family,

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<sup>164</sup> Dawne Moon, *Who Am I and Who Are We? Conflicting Narratives of Collective Selfhood in Stigmatized Groups*, 117 AM. J. SOC. 1336, 1371 (2012).

<sup>165</sup> PEW RES. CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 88 (2013) [hereinafter SURVEY OF LGBT AMERICANS], [<https://perma.cc/76EX-YH4V>].

<sup>166</sup> *Id.* There were significant differences between gay men and lesbians. 53% of gay men expressed support for maintaining their own culture and lifestyle while only 42% of lesbians expressed the same preference. *Id.*

<sup>167</sup> *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

<sup>168</sup> DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS 62–63 (2012).

<sup>169</sup> *Id.*

procreation, the home, and bodily integrity] and we tried to make our best story out of it.”<sup>170</sup> “[T]he advocates distanced themselves from the actual circumstances,”<sup>171</sup> according to Professor Dale Carpenter in his detailed book about the case, emphasizing the sameness of same-sex relationships and avoiding their differences.<sup>172</sup> Paul Smith said “we came down to focusing . . . on relationships and family on the theory that that was a more appealing way to talk about these things.”<sup>173</sup> In the brief filed in the Supreme Court on behalf of Lawrence, lawyers wrote that “[a] gay or lesbian sexual orientation is a normal and natural manifestation of human sexuality. A difference in sexual orientation means a difference only in that one personal characteristic.”<sup>174</sup>

As a consequence, Justice Kennedy’s majority opinion was written in a way that protected the right to same-sex intimacy, but not necessarily same-sex sexual activity.<sup>175</sup> Since *Lawrence*, courts have mostly upheld regulations of sexual activity that takes place outside of a romantic relationship.<sup>176</sup> Examples include prohibitions of the distribution and possession of sex toys,<sup>177</sup> public or quasi-public sexual conduct,<sup>178</sup> sex in the military,<sup>179</sup> and criminal

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<sup>170</sup> *Id.* at 194.

<sup>171</sup> *Id.* at 193.

<sup>172</sup> *Id.* at 189. Carpenter describes the strategic choices faced by the team of attorneys representing Lawrence and Gardner in the Supreme Court when having to address the Court’s prior opinion in *Bowers v. Hardwick*, where the Court upheld Georgia’s sodomy law: “[t]o the extent that the member of the Court believed that what they were being asked to protect in *Bowers* was *difference*, they were less likely to grant it constitutional protection. To the extent that the Justices now believed what they were being asked to protect in *Lawrence* was *sameness*, they could perhaps be persuaded to extend it constitutional protection.” (emphasis in original). *Id.* See also *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>173</sup> CARPENTER, *supra* note 168, at 194. (quoting interview with Paul Smith).

<sup>174</sup> Brief for Petitioner at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

<sup>175</sup> See Katherine M. Franke, Comment, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407-1411 (2004).

<sup>176</sup> See generally Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010).

<sup>177</sup> *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001), *aff’d after remand and appeal sub nom.* *Williams v. Att’y Gen. of Alabama*, 378 F.3d 1232, 1234-38 (11th Cir. 2004) (holding that *Lawrence* did not establish a fundamental right to engage in sex).

<sup>178</sup> *Tjan v. Commonwealth*, 621 S.E.2d 669, 675-76 (Va. Ct. App. 2005) (upholding felony charges for oral sex in public even though public vaginal intercourse is only a misdemeanor).

<sup>179</sup> See, e.g., *United States v. Marcum*, 60 M.J. 198, 212-13 (C.A.A.F. 2004) (Crawford, J., concurring) (distinguishing the “romantic relationship” in *Lawrence* from a situation which “occurred after a night of drinking when Senior Airman H ‘crashed’ on Appellant’s couch, wearing only boxer shorts and a T-shirt, and awoke to find Appellant performing oral sex on him.”).

prosecutions for sodomy where the punishment is more severe than for vaginal intercourse<sup>180</sup>.

The strategic pull to portray LGBTQ people as similar to cisgender heterosexuals can also result in a distorted portrayal of preferences held by LGBTQ people. Again, the issue is not the demand for equality (although some commentators will say it is).<sup>181</sup> Evan Wolfson, who spearheaded many of the efforts for marriage equality, was clear that “we don’t want ‘gay marriage,’ we want marriage—the same freedom to marry, with the same duties, dignity, security, and expression of love and equality as our non-gay brothers and sisters have.”<sup>182</sup> Ted Olson, who represented same-sex couples against California’s ban on same-sex marriage (along with David Boies), said in his closing statement that “[m]arriage is the most important relation in life. . . . It is the foundation of society. It is essential to the orderly pursuit of happiness. . . . [T]he Plaintiffs have no interest in changing marriage or deinstitutionalizing marriage. They desire to marry because they cherish the institution.”<sup>183</sup>

Such advocacy belied the fact that there had been significant discussion in the LGBTQ community recognizing the negative aspects of marriage, including calls to abolish or reform the institution and evidence showing that LGBTQ people have different reasons for wanting marriage than non-LGBTQ people.<sup>184</sup> A poll taken three years after Olson’s argument shows that forty-eight percent of LGBTQ people were either not sure or against the idea of getting married themselves. Further, nearly forty percent of LGBTQ people thought the push for same-sex marriage was taking away too much from other issues important to LGBTQ people.<sup>185</sup>

Olson and Boies’ case was strengthened if they could show that same-sex couples highly desired marriage and that the denial of marriage to same-

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<sup>180</sup> *In re R.L.C.*, 643 S.E.2d 920, 921-25 (upholding, as to minors, a “crime against nature statute” that

criminalized oral sex, a form of sodomy, but not vaginal intercourse).

<sup>181</sup> Catherine McKinnon has critiqued equality as an assimilationist ideal: “[u]nquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself.” CATHERINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 119 (2007). The concern is that equality means assimilation into the dominant standard, the same standard on which laws and institutions are built and by which equality is judged. *Id.* Equality is a promise from the dominant group to the marginalized group that “if you can be like us and we will treat you like we treat each other.” *Id.* at 120.

<sup>182</sup> EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY* 17 (2004).

<sup>183</sup> Transcript of Closing Argument at 2971, 2982, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) (No. 09-2292).

<sup>184</sup> CARPENTER, *supra* note 168, at 130–31. *See, e.g.*, Ruth Colker, *Marriage*, 3 *YALE J. L. FEMINISM* 321, 322–26 (1991).

<sup>185</sup> *SURVEY OF LGBT AMERICANS*, *supra* note 165, at 67, 71.

sex couples constituted a grave injury. The pressure to conform advocacy to the standards of equality creates a distorted view of the nature of LGBTQ people because it privileges aspects of LGBTQ lives that are the same as non-LGBTQ people, while narrowing the space to discuss differences. It also forecloses discussion about whether other forms of relationship recognition might be, for some people, superior to marriage.

## 2. Differences

Most people can probably agree on the minimal claim that LGBTQ people differ from non-LGBTQ people with regard to their sexuality and gender. Until recently, the lack of data about LGBTQ populations has limited our ability to make broader empirical claims about LGBTQ people at all, much less how they differ from non-LGBTQ people. However, in recent years, due in part to increased efforts to include LGBTQ people in large scale research efforts, we have gained a greater understanding of how sexuality and gender impact many parts of the lives of LGBTQ people.<sup>186</sup> Sixty-three percent of LGBTQ people say that being LGBTQ is at least somewhat important to their overall identity; for lesbians, this number rises to seventy-nine percent.<sup>187</sup> As discussed above, LGBTQ people see themselves as having personal strengths such as love, commitment, honesty, and others that arise from their sexuality and gender. These differences extend to multiple social roles.

In their role as consumers, forty-nine percent say they have made consumer decisions because of support for LGBTQ rights, which jumps to sixty-one percent for gay men.<sup>188</sup> Regarding religion, LGBTQ folks are twice as likely to describe themselves as atheist, agnostic, or not particularly religious, as compared to the general population. Forty-two percent of LGBTQ people have a Christian religious affiliation, compared to seventy-three percent of the general public.<sup>189</sup> LGBTQ people are three times less likely to attend church weekly, and nearly three times less likely to say that religion is very important.<sup>190</sup> As citizens, LGBTQ people are nearly twice as likely to be Democrats, three times less likely to be Republicans than non-LGBTQ people,<sup>191</sup> and more likely to be sympathetic to the poor and supportive of immigration reform and gun control.<sup>192</sup>

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<sup>186</sup> See generally Stephen Cox & Cynthia Gallois, *Gay and Lesbian Identity Development: A Social Identity Perspective*, 30 J. HOMOSEXUALITY 1 (1996) (advocating for social identity theory in application to understanding homosexual identity).

<sup>187</sup> SURVEY OF LGBT AMERICANS, *supra* note 165, at 75.

<sup>188</sup> *Id.* at 86–87.

<sup>189</sup> *Id.* at 91.

<sup>190</sup> *Id.* at 95.

<sup>191</sup> *Id.* at 22.

<sup>192</sup> *Id.* at 110.

Gay neighborhoods exist because a large proportion of LGBTQ people connect their sexuality to preferences about housing options and neighborhoods.<sup>193</sup> Fifty-six percent of all LGBTQ people say that LGBTQ neighborhoods and bars are still important,<sup>194</sup> and LGBTQ people are supporting a burgeoning industry of LGBTQ-specific housing and services for elders.<sup>195</sup> Forty-eight percent of LGBTQ people between eighteen and forty-four years old include social acceptance as a consideration when choosing where they live.<sup>196</sup> These neighborhoods form the daily socioeconomic structure for large numbers of LGBTQ people. LGBTQ people also form their own institutions. A network of 220 LGBTQ Community Centers around the country, of which 128 had a combined staff of 1,940 people, serve 40,550 people each week with programming focused on low-income LGBTQ people, transgender people, and youth.<sup>197</sup> LGBTQ people have also established large international networks devoted to recreational and competitive sports.<sup>198</sup> Other examples include LGBTQ associations for attorneys,<sup>199</sup> churches<sup>200</sup> and schools as well.<sup>201</sup> These institutions contribute to the formation of social support networks that deviate from family-centered models established by non-LGBTQ people.

These differences are the product of LGBTQ people's vision of the good life. They arise out of the exercise of agency and self-determination. These differences should be recognized and supported because they are a product of self-determined decisions to improve LGBTQ lives.

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<sup>193</sup> Andrew H. Whittemore & Michael J. Smart, *Mapping Gay and Lesbian Neighborhoods Using Home Advertisements: Change and Continuity in the Dallas-Fort Worth Metropolitan Statistical Area Over Three Decades*, 48 ENV'T & PLAN. A: ECON. & SPACE 192, 193-94 (2016).

<sup>194</sup> SURVEY OF LGBT AMERICANS, *supra* note 165.

<sup>195</sup> See, e.g., *National LGBT Housing Initiative*, SAGE, <https://www.sageusa.org/what-we-do/national-lgbt-housing-initiative/> (last visited Apr. 11, 2021).

<sup>196</sup> SURVEY OF LGBT AMERICANS, *supra* note 165.

<sup>197</sup> CENTERLINK & MOVEMENT ADVANCEMENT PROJECT, 2018 LGBT COMMUNITY CENTER SURVEY REPORT 1-2 (2018), [<https://perma.cc/VB2R-9Z7D>].

<sup>198</sup> The Federation of Gay Games hosts competitions by athletes from over 100 countries in over thirty sports. *What We Do*, GAY GAMES, [<https://perma.cc/PU6P-YH3H>] (last visited June 6, 2021). In the United States, for example, more than 17,000 LGBTQ people from 46 cities play softball in the North American Gay Amateur Athletic Alliance. *Member Cities*, NAGAAA, [<https://perma.cc/2PG8-RWS2>] (last visited June 6, 2021).

<sup>199</sup> The National LGBT Bar Association, an affiliate of the American Bar Association, lists 39 local LGBT bar associations in cities in 26 states. *LGBT Bar's State & Local Affiliate Organizations*, NATIONAL LGBT BAR ASSOC., [<https://perma.cc/46C6-P8F9>] (last visited June 6, 2021).

<sup>200</sup> The Metropolitan Community Church lists over 170 congregations in 38 states. *MCC Churches in the United States*, METRO. CMTY. CHURCH, [<https://perma.cc/9WLK-L2AD>] (last visited June 6, 2021).

<sup>201</sup> See Max A. Hope & Joseph J. Hall, *This Feels Like a Whole New Thing: A Case Study of a New LGBTQ-Affirming School and its Role in Developing 'Inclusions'*, 22 INT'L J. INCLUSIVE EDUC. 1320 (2018) (discussing LGBTQ schools in New York, Milwaukee, and Atlanta).

### 3. Disparities

In addition to the differences set out above, LGBTQ people face disparities in a number of important human development outcomes. The concept of disparities developed in the public health field. For some people, poor health conditions can be attributed to individual factors such as age, genetics, or behavioral factors. These are considered differences. For others, health conditions are a result of a socially determined factor such as limited access to health, nutrition, or education. These negative differences, which disadvantaged groups experience, are referred to as disparities.<sup>202</sup> While positive differences should be supported, negative disparities should be eliminated.

Public health researchers have formulated a framework, called the minority stress model, to help understand the relationship between stigma and health outcomes.<sup>203</sup> The framework includes a recognition that all people encounter stressful events in life. However, marginalized people face an additional set of stressors as a result of stigma, repeated discrimination, the need to conceal identity to avoid discrimination, and the burden of hypervigilance that results from fear and expectation of continued discrimination. Stigma manifests in events of prejudice, such as rejection by family members or coworkers, harassment or ill-treatment, or other events which express cultural meanings of worthlessness assigned to LGBTQ people. Large scale studies have shown that those who experience these events also experience elevated rates of physical and mental health, as well as higher rates of suicide.<sup>204</sup>

LGBTQ people also face socio-economic disparities. Economists have theorized several pathways that lead to higher rates of poverty. First, LGBTQ

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<sup>202</sup> Paula Braveman, *What are Health Disparities and Health Equity? We Need to Be Clear*, 129 PUB. HEALTH REP. 5–8 (2014), [<https://perma.cc/87DY-CQW4>]. In general, the term “disparity” refers to outcomes that are unfair. See *Disparity*, CAMBRIDGE DICTIONARY, [<https://perma.cc/9G5W-6HMN>].

<sup>203</sup> This model has succeeded the disease model, which characterized homosexuality as a cause of illness and disorder. Gregory M. Herek & Garnets D. Linda, *Sexual Orientation and Mental Health*, ANNU. REV. CLIN. PSYCHOL., 359-60 (2007). The growing empirical support for the minority stress theory within literature has resulted in it becoming the dominant conceptual framework for understanding mental health disparities among LGBTQ individuals. *Id.*

<sup>204</sup> The minority stress model accounts for a variety of connections between experiences of prejudice and health outcomes. After encountering prejudice, LGBTQ people can develop an expectation that more events of prejudice will occur, causing the individual to be constantly hypervigilant for what will occur next. In response to anxiety about future events, LGBTQ people may seek to conceal their identity. Lastly, the individual can begin to internalize the negative stereotypes that they hear, forming negative beliefs about themselves. Hypervigilance, identity concealment, and internalized stigma each contribute to increased anxiety and stress. See Ilhan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities*, in HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION 252-266 (C.J. Patterson & A.R. D’Augelli eds., 2013). Identity concealment can interfere with the individual’s ability to maintain supportive relationships, thus decreasing the health benefits that accompany social support structures. *Id.* For a comprehensive review of literature regarding LGBTQ health, see *id.*

people may face direct discrimination in the workplace.<sup>205</sup> Second, the ability of LGBTQ people to accumulate human capital (education, skills, and experience that can be used to produce economic gain) is limited by their exclusion from educational and workplace experiences.<sup>206</sup> Third, family rejection may limit the extent to which LGBTQ people can benefit from economic support and intergenerational transfers of wealth from their family.<sup>207</sup>

Empirical evidence supports these theories.<sup>208</sup> Studies based on nationally representative samples show that LGBTQ people had a poverty rate of 21.6 percent, as compared to 15.7 percent for cisgender straight people, while transgender people and bisexual cisgender women had the highest rates of poverty (approximately thirty percent).<sup>209</sup> Sexual minority women were three and a half times more likely to not have completed high school, twice as likely to not have completed some college, twice as likely to be unemployed, twice as likely to be evicted, fifty percent more likely to be unable to pay utilities, and sixty percent more likely to have no phone service.<sup>210</sup> An analysis of data from the Supplemental Nutrition Assistance Program shows that twenty-seven percent of LGBTQ adults experienced a time in the last year when they did not have enough money for the food that they or their families needed, as compared to seventeen percent of non-LGBTQ adults.<sup>211</sup> In all of these studies, LGBTQ people living at the intersection of minority identities fared worse than others.<sup>212</sup> For nearly all SOGIE<sup>213</sup> subgroups, people of color had

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<sup>205</sup> Emir Ozeren, *Sexual Orientation Discrimination in the Workplace: A Systematic Review of Literature*, 109 *PROCEDIA-SOC. BEHAV. SCI.* 1203 (2014).

<sup>206</sup> M. V. Lee Badgett et al., *The Relationship Between LGBT Inclusion and Economic Development: Macro-Level Evidence*, 120 *WORLD DEV.* 1, 2-3 (2019).

<sup>207</sup> The economic impact of rejection from biological family can last a lifetime, causing problems for when LGBTQ elders needing care themselves. Alfred J. Chiplin Jr. et al., *Older Lesbian, Gay, Bisexual, and Transgender Individuals Face Special Challenges in Economic Security and Health Care*, 44 *CLEARINGHOUSE REV.* 564 (2011).

<sup>208</sup> See M.V. Lee Badgett et al., *LGBT Poverty in the United States: A Study of Differences Between Sexual Orientation and Gender Identity Groups*, WILLIAMS INST. (2019), [<https://perma.cc/BXW7-4SHH>]; Kerith J. Conron et al., *Sexual Orientation and Sex Differences in Socioeconomic Status: a Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health*, 72 *J. EPIDEMIOLOGY CMTY. HEALTH* 1016 (2018); see also *Same-Sex Couple Data & Demographics*, WILLIAMS INST., [<https://perma.cc/LAH3-HCST>] (last visited June 6, 2021); see also TAYLOR N. T. BROWN ET AL., WILLIAMS INST., *FOOD INSECURITY AND SNAP PARTICIPATION IN THE LGBT COMMUNITY* 2-3 (2016), [<https://perma.cc/8Q2K-VZER>].

<sup>209</sup> Badgett et al., *supra* note 208.

<sup>210</sup> Conron et al., *supra* note 208, at 1016-26; *Same-Sex Couple Data & Demographics*, *supra* note 208.

<sup>211</sup> Brown et al., *supra* note 208.

<sup>212</sup> See Badgett et al., *supra* note 208; Conron et al., *supra* note 208; *Same-Sex Couple Data & Demographics*, *supra* note 208.

<sup>213</sup> See *infra* note 230 and accompanying text.

significantly higher poverty rates than white people.<sup>214</sup> Within the LGBTQ population, certain racial and ethnic minorities experienced higher rates of food insecurity.<sup>215</sup>

In contrast to the differences discussed in the previous Section, these disparities are unwanted consequences of stigma and discrimination experienced by LGBTQ people. The goal of community advocacy and state action should be to eliminate them by addressing the underlying causes.

*D. Improving the Lives of LGBTQ People Is the Goal of Advocacy and Policy*

The fourth principle states that improving the lives of LGBTQ people is the goal of advocacy and policy. While formal legal advancements are necessary for improving the lives of LGBTQ people, they are clearly inadequate by themselves. This hard lesson is illustrated by other civil rights movements; decades after the passage of civil rights legislation, African Americans continue to experience poor outcomes in the workplace, education, safety, and health, as do women, Latinos, and other groups protected under civil rights laws.<sup>216</sup> We can also look to LGBTQ people in countries whose legal protections are considered superlative. The legal equality protections for LGBTQ people in South Africa, Serbia, Albania, and Argentina are among the world's best, exceeding those in the United States and Europe in many respects.<sup>217</sup> Still, LGBTQ people in those countries continue to face high levels of disparities and discrimination.<sup>218</sup>

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<sup>214</sup> Badgett et al., *supra* note 208, at 3.

<sup>215</sup> Brown et al., *supra* note 208, at 3.

<sup>216</sup> WORLD ECON. F., THE GLOBAL GENDER GAP REPORT 2018 7-10 (2018), [<https://perma.cc/T9XL-22DU>] (demonstrating that the United States ranks fifty first on the global gender gap, which examines the disparity between men and women in several dozen outcome areas, categorized into four groups: economic participation, educational attainment, health and survival, and political empowerment); José M. Causadias & Kevin M. Korous, *Racial Discrimination in the United States: A National Health Crisis That Demands a National Health Solution*, 64 J. ADOLESCENT HEALTH 147 (2019), [<https://perma.cc/6M5M-F7JJ>] (reviewing evidence showing that racial discrimination is a national health crisis); *Ethnic and Racial Minorities and Socioeconomic Status*, AM. PSYCH. ASSOC., [<https://perma.cc/FU6X-YXNL>] (last visited June 6, 2021) (demonstrating that minority racial and ethnic groups face inequalities in the areas of income and wealth, educational attainment, physical and psychological health); Danyelle Solomon et al., *Systematic Inequality and Economic Opportunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), [<https://perma.cc/9N69-QGWT>] (demonstrating that persistent racial disparities exist in jobs, wages, benefits, and almost every measure of economic well-being).

<sup>217</sup> LUCAS RAMÓN MENDOS, ILGA WORLD, STATE-SPONSORED HOMOPHOBIA 2019: GLOBAL LEGISLATION OVERVIEW UPDATE 169 (2019).

<sup>218</sup> ALIZA LUFT ET AL., ASTRAEA, WESTERN BALKANS LGBTI: LANDSCAPE ANALYSIS OF POLITICAL, ECONOMIC AND SOCIAL CONDITIONS (2015), [<https://perma.cc/6AH8-G2MU>]; TAMARA LEA SPIRA ET AL., ASTRAEA, SOUTH AFRICA LGBTI: LANDSCAPE ANALYSIS OF POLITICAL, ECONOMIC & SOCIAL CONDITIONS (2015), [<https://perma.cc/VPU9-8MSW>].

In the United States, the limited impact of equality laws can be attributed to a number of factors. First, legal equality in the United States has come to mean equal access to political and civil rights, not economic and social rights.<sup>219</sup> Many important needs—earning enough to have a secure living, having decent housing and sufficient nourishment, being educated and healthy—are not reflected in the American view of rights and entitlements. Secondly, the analytical structure of equality laws often creates a blind spot to the harm incurred by those facing unfair treatment. Nondiscrimination laws, by virtue of evidentiary standards and burdens of proof used to determine liability, focus on the behavior and decisions of institutions rather than on the harm done to individuals making claims under such laws. An early and well-known example of this is the case of Jamie Nabozny,<sup>220</sup> a gay high school student in Ashland, Wisconsin, who faced years of harassment by fellow students. He had been urinated on, mock raped in front of others, and kicked hard enough to require surgery.<sup>221</sup> After attempting suicide twice, he ran away from home in order to avoid school.<sup>222</sup>

His lawsuit against the school was considered a major success because it produced the first holding from a federal court that a school could be held accountable for not stopping anti-gay abuse.<sup>223</sup> However, in the same opinion, the court made it clear that the level abuse faced by Nabozny, and its impact on his well-being and educational outcomes, was not the central issue; rather, the issue was whether the school “singled-out a particular group for disparate treatment” and did so “for the purpose of causing adverse effects on the identifiable group.”<sup>224</sup> Nabozny had the right to be treated equally well or equally as bad as other students.

Some courts have recognized that liability in discrimination cases often depends on the existence of a comparator who has not been treated as

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<sup>219</sup> The equality ideal, as was adopted in the post-Civil War Reconstruction era, was limited in order to avoid granting social equality to African Americans. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (2006). During that time, a tripartite theory developed, dividing equality into three categories: civil, political, and social. *Id.* This tripartite model was more of a framework for debate rather than an explicit legal doctrine. *Id.* Nonetheless, the view that federal equality jurisprudence did not include social equality continued throughout the nineteenth and early twentieth centuries as jurisprudence under the Fourteenth Amendment began to develop. Nirej S. Sekhon, *Equality and Identity Hierarchy*, 3 N.Y.U. J.L. & LIB. 358-9 (2008).

<sup>220</sup> *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

<sup>221</sup> *Gay Man Wins \$900,000 Settlement in School Harassment Case*, ASSOCIATED PRESS (Nov. 20, 1996), [<https://perma.cc/T5TM-C7U4>].

<sup>222</sup> *Nabozny*, 92 F.3d at 451-52.

<sup>223</sup> *Id.* at 460 (upholding Nabozny’s equal protection claims based on gender and sexual orientation).

<sup>224</sup> *Id.* at 454 (quoting *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982)).

badly.<sup>225</sup> The Ninth Circuit has noted, for example, “that evidence may be difficult, if not impossible, to obtain when the plaintiff and his harasser work in [a] . . . single-sex work environment.”<sup>226</sup> The D.C. Circuit posited that “in the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.”<sup>227</sup>

In some cases, institutions found liable for engaging in discriminatory activity will seek a remedy that takes advantage of the equality blind spot. Knowing that they can comply with equality standards by leveling off treatment of LGBTQ and non-LGBTQ people, some institutions have sought to level down, or withdraw a benefit from an advantaged class of people, so that they are no longer better off than a disadvantaged group of people. Such a result has been seen when school districts ban extracurricular student clubs.<sup>228</sup>

Ensuring that institutions are free from bias is an important, but inadequate goal. Though the doors of government, employers, and schools must be open to LGBTQ people, we also need to make sure LGBTQ people actually walk in. Institutions are the means, but people are the ends. For the unemployed or under-employed LGBTQ person, having the right to equal job opportunity is not as important as having an actual job. The value of a welcoming school climate is sharply limited if students are not receiving a good education. Focusing on the outcomes of LGBTQ people is a better route to ensuring that LGBTQ people have what they need to live the way they choose. Adopting a people-centered approach to LGBTQ policymaking ensures that the work to improve institutions will have an impact.

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<sup>225</sup> See *Shepherd v. Slater Steels Corp.*, 168 F. 3d 998 (7th Cir 1999) (standing for the proposition that harassment would not be illegal unless it was proved that others were not harassed as much). The court wrote, “[t]he critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Id.* at 1008 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). See also *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).

<sup>226</sup> *Shepherd*, 168 F.3d at 1009. See also *Henson v. City of Dundee*, 682 F. 2d 897 (11th Cir. 1982); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996).

<sup>227</sup> *Barnes v. Costle*, 562 F.2d. 983, 990 n.55 (D.C. Cir. 1977). For an extensive analysis of this issue, see Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, SEX. EQUAL. L. 329–352 (2017).

<sup>228</sup> For example, when faced with a requirement that a pregnant student be admitted to an honor society on an equal basis as other students with her grades, the school chose to admit no one and eliminate the honor society, thus treating all students equally. Jean Marie Doherty, *Law in an Elevator: When Leveling Down Remedies Let Equality Off in the Basement*, 81 S. CAL. L. REV. 1017, 1018-19 (2008) (discussing the case of *Cazares v. Barber*, 959 F.2d 753, 755 (9th Cir. 1992)). See Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality*, 46 WM. & MARY L. REV. 513 (2004) for a more extensive discussion of leveling down.

This principle places a greater emphasis on supporting LGBTQ people simply because they are LGBTQ. Such an emphasis brings us closer to a communitarian perspective. First, it buys into the communitarian belief that it is impossible to consider people as being separate from their social identity (as compared to the Rawlsian assumption that individuals can reason behind a veil of ignorance about their possible social conditions).<sup>229</sup> For LGBTQ people, all aspects of life are impacted, directly or indirectly, by their sexual orientation, gender identity, and gender expression (SOGIE).<sup>230</sup> Thus, concern for issues of SOGIE must include concern for LGBTQ people in all aspects of their life. Second, this principle is linked to the communitarian belief that citizens have obligations of solidarity to each other (as opposed to the Rawlsian view that, beyond the universal obligation not to commit injustice, individuals' obligations to each other are quite thin). Thus, part of the role of LGBTQ advocacy is to express solidarity with LGBTQ people by virtue of their common social positions.

#### IV. THE CAPABILITY APPROACH

The capability approach is a people-centered framework premised on the belief that the state can secure dignity for its citizens by providing them with real opportunities to live the way they choose. According to this approach, the goal of human development is the expansion of freedoms to achieve the kind of lives that individuals have reason to value. These opportunities and freedoms are called capabilities.<sup>231</sup> Government action is therefore evaluated according to whether it enlarges or limits people's capabilities.<sup>232</sup>

This Part first reviews the background of the approach and the context in which it was first developed. Following that, the next Section sets out a general description of the features of the approach. Next, this Part will walk through the steps of applying the capability approach to LGBTQ people in the United States. One of the first issues we will encounter is choosing which capabilities are important. The goal is to enlarge capabilities, but capabilities to do what? How do we arrive at a list of capabilities that should be prioritized? The question of this list permeates many discussions of the capability approach, and it is the central question for the remainder of this Article.

At a very abstract level, we are trying to define the capability to have dignity in all aspects of life as an LGBTQ person, or as someone whose

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<sup>229</sup> Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 443–45, 473 (2000).

<sup>230</sup> Jacqueline Arias, *Understanding What SOGIE Means and Why it Matters*, PREEN (Aug. 30, 2019), [<https://perma.cc/HBE8-NJ2X>].

<sup>231</sup> Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 J. HUM. DEV. 93, 95 (2005).

<sup>232</sup> NUSSBAUM, *supra* note 7, at 113 (“The early versions of the Capabilities Approach focused on the nation state, asking how well nations were doing in promoting the human capabilities of their citizens.”).

sexuality and gender does not conform to social preferences. What specific sets of freedoms are necessary to provide all people with the possibility of living according to their sexuality and gender? In order to construct a list of capabilities, we will first look at capabilities from the perspective of the general population to see whether, and to what extent, they can be applied to LGBTQ populations.

Following this, we will look more deeply at LGBTQ people themselves. First, we will look at the phenomenon of being LGBTQ from an ontological perspective. Simply put, who are LGBTQ people? What exactly makes a person LGBTQ? Then we will look at current thinking on factors that support the development of sexuality and gender in a positive, healthy manner. From a capabilities perspective, these factors might be viewed as inputs to one's ability to be LGBTQ. Lastly, we will look at how LGBTQ people experience social and legal norms that limit the ability of LGBTQ people to fully live their life. This three-part examination—the question of who LGBTQ people are, the supportive factors, and the limiting factors—will help inform the choice of capabilities that are vital to the freedom and dignity of LGBTQ people. The next Section on choosing capabilities concludes with a listing of these vital capabilities.<sup>233</sup>

#### *A. Background*

The capability approach was introduced in the field of international development.<sup>234</sup> The term development, used in this sense, refers to the process that societies and nations experience as they move closer or further away from particular international standards.<sup>235</sup> These standards might include those relating to economic development; human development, such as health, education, and housing; environmental sustainability; and good

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<sup>233</sup> A skeletal version of the analysis related to vital capabilities was initially developed at the 2016 Conference of the Association of Human Development and Capabilities in Tokyo, Japan, and is reflected in Andrew S. Park, *Vital Capabilities: A Development Framework for Sexual and Gender Minorities*, OXFORD DEV. STUDIES 18 (2019).

<sup>234</sup> NUSSBAUM, *supra* note 7, at 113. The Capability Approach was introduced in the first human development report issued by the United Nations Development Programme. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1990, CONCEPT AND MEASUREMENT OF HUMAN DEVELOPMENT (1990) [hereinafter HUMAN DEVELOPMENT REPORT 1990], [<https://perma.cc/X32E-PCRC>].

<sup>235</sup> There is neither a single, agreed-upon definition of development, nor is there a single entity that is seen as the authority for formulating such a definition. The definition has evolved since the creation of development institutions such as the World Bank and the U.N. Development Programme, driven in part by the evolution of the mission of major development agencies. A brief history of global development priorities can be found on the World Bank website. *Explore History*, THE WORLD BANK, [<https://perma.cc/3ALV-ZUG6>] (last visited June 6, 2021).

governance.<sup>236</sup> International development policy is meant to hasten the transition toward improved conditions. Some use the term to refer primarily to economic development, though it is also used to refer to human development.

The international development field finds its own historic roots in the post-WWII international financial institutions created by the Allied Powers at the 1944 Bretton-Woods Conference, including what is now known as the World Bank. A year after the Bretton-Woods Conference, fifty nations signed the United Nations Charter<sup>237</sup>—the foundational treaty that established the United Nations. The Charter articulated a priority of promoting “social progress and better standards of living . . . economic and social advancement of all peoples”<sup>238</sup> and “solutions of international economic, social health and related problems.”<sup>239</sup> The World Bank and the United Nations have been the two primary drivers of international development activity and policy.

Over the decades, the goals of international development have shifted from focusing on the economic infrastructure of poor countries, to modernization and economic productivity, and finally to providing basic needs (food, shelter, clothing).<sup>240</sup> Throughout all these shifts, economic growth has been considered key to a country’s ability in increasing the well-being and standard of living of its population. Thus, economic growth became central to the development framework, either as a goal in and of itself, or as an indicator of whether the needs of those in poverty were being met. Economists used a country’s gross domestic product, or the total value of goods and services produced within a country, as an indicator of the standard of living in that country.<sup>241</sup>

Amartya Sen, a prominent welfare economist, expressed frustration with economic measurements. He felt that economic measures like the Gross National Product (GNP), serving both as indicators of standard of living and as goals for international development policy, failed to provide sufficient insight

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<sup>236</sup> Each year, the U.N. Development Programme issues a report on human development, with each report highlighting a different development priority. See *Human Development Reports 1990-2020*, U.N. Dev. Programme, [https://perma.cc/8LMB-44AY] (last visited June 8, 2021).

<sup>237</sup> U.N. Charter art. 102-105.

<sup>238</sup> *Id.* at Preamble.

<sup>239</sup> *Id.* at art. 55.

<sup>240</sup> The efforts to define and meet basic human needs gained global attention, embodied in *Employment, Growth and Basic Needs: A One World Problem*, a synthesis document submitted to the 1976 ILO World Employment Conference. INT’L LAB. OFF., EMPLOYMENT, GROWTH, AND BASIC NEEDS: A ONE-WORLD PROBLEM, REPORT OF THE DIRECTOR-GENERAL OF THE INTERNATIONAL LABOUR OFFICE (1976).

<sup>241</sup> NUSSBAUM, *supra* note 7, at 47.

into how individuals were faring within their economies.<sup>242</sup> While changes in GNP can be a very rough proxy for changes in standard of living, the measure tells us nothing about other factors that drive economic growth, such as literacy rates, the health of children, household prosperity, and economic inequality.<sup>243</sup>

Sen felt that economic measures instrumentalized individual lives, treating people as means and economic growth as ends. Sen sought to flip this equation and acknowledge that money was only valuable insofar as it was able to increase health, education, and other human development outcomes.<sup>244</sup> He also believed that personal freedom, choice, and autonomy were the most important goods achieved by development, and indeed, were the ends of justice.<sup>245</sup>

Sen developed the capability approach as a people-centered framework to measure well-being and standard of living (terms that have evolved). The new approach defined development as “a process of enlarging people's choices. The most critical of these wide-ranging choices are to live a long and healthy life, to be educated, and to have access to resources needed for a decent standard of living. Additional choices include political freedom, guaranteed human rights, and personal self-respect.”<sup>246</sup>

Since the capability approach constituted a jump in conceptual complexity compared to economic indicators, it needed a way to reduce the concepts of human development down to a simple number (in the same way that GDP was expressed in a single number): the Human Development Index, arguably the most well-known component of international human development efforts.<sup>247</sup> The index is based on data from each country in the world, related to health, education, and income, reflecting the notion that being healthy, educated, and able to earn a living are vitally important to being capable of other opportunities. Underlying the index is a wealth of data tracking multiple aspects of development in each country, although there is no international system to track the development of LGBTQ people.<sup>248</sup>

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<sup>242</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 5–6 (1999).

<sup>243</sup> *Id.* at 14.

<sup>244</sup> *Id.* at 35–53.

<sup>245</sup> *Id.* at 35–86.

<sup>246</sup> HUMAN DEVELOPMENT REPORT 1990, *supra* note 234, at 1.

<sup>247</sup> U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2010, THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT vi (2010), [<https://perma.cc/X725-P8WN>].

<sup>248</sup> *See* U.N. DEV. PROGRAMME, STATISTICAL UPDATE 2018, HUMAN DEVELOPMENT INDICES AND INDICATORS (2018), [<https://perma.cc/YR6M-N576>].

*B. Features of the Approach*

According to the approach, each person has a capability set made up of all their capabilities at a particular point in time.<sup>249</sup> Capabilities, which are real opportunities to be or do things that are of value, are distinguished from functionings, or the beings and doings that someone has actually achieved.<sup>250</sup> Say, for example, we know that two people have not eaten today. One of them is starving because they cannot find food, while the other is fasting in observance of a religious holiday. They both have equivalent functionings because they are both not eating. However, the person who is starving has fewer capabilities than the person who is fasting, who will presumably resume eating soon.

A functioning can be a realization of a capability, referred to as an achievement or an achieved capability, or it may result from a deprivation of capabilities. In the above example, the fasting person has the capability to eat which they have achieved by freely choosing to fast. The starving person simply has no capability to eat to begin with. His functioning is not an achieved capability; it is the result of a deprivation. Similarly, a woman who has many full-time employment options is achieving her employment capabilities by choosing to work part-time. A woman who works part-time because she is unable to find full-time work has fewer capabilities to work from the onset. Her functioning is a result of a deprivation. In both of these examples, understanding the individual's capabilities tells us more than understanding their functioning. Thus, the capabilities approach evaluates policy primarily according to how it impacts capabilities.

A number of factors can limit or expand capabilities, including innate skill, legal and social norms, available goods and services, physical abilities, and the environment. Capability approach theorists have conceptualized the relationship between capabilities and these factors in various ways. Sen identifies some factors as capability inputs.<sup>251</sup> Others are considered as individual conversion factors. For example, an elderly person will have the metabolism to convert 2000 calories of food into a full day's meals, whereas a pregnant woman will need many more calories to satisfy the same need. The existence of a capability can also depend on the existence of another capability. For example, the capability to earn a living might depend on whether the individual has the capability to read and write. Thus, the path to developing a capability may involve several successive capabilities.<sup>252</sup>

Philosopher Martha Nussbaum, considered a co-creator of the capabilities approach, has proposed a list of ten capabilities that are central to any

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<sup>249</sup> Robeyns, *supra* note 231, at 98.

<sup>250</sup> *Id.* at 90-93.

<sup>251</sup> *Id.* at 96-99.

<sup>252</sup> *Id.*

person's life, however they may choose to live it.<sup>253</sup> It includes the following dimensions of human development: (1) life;<sup>254</sup> (2) bodily health;<sup>255</sup> (3) bodily integrity;<sup>256</sup> (4) senses, imagination and thought;<sup>257</sup> (5) emotions;<sup>258</sup> (6) practical reason;<sup>259</sup> (7) affiliation;<sup>260</sup> (8) other species;<sup>261</sup> (9) play;<sup>262</sup> and (10) control over one's environment, including political control and control of

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<sup>253</sup> MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 78 (2000) [hereinafter *WOMEN AND HUMAN DEVELOPMENT*].

<sup>254</sup> *Id.* ("Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.").

<sup>255</sup> *Id.* ("Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.").

<sup>256</sup> *Id.* ("Bodily Integrity. Being able to move freely from place to place; . . . to be secure against assault, including sexual assault . . . and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.").

<sup>257</sup> *Id.* at 78-79 ("Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason—and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise . . . Being able to have pleasurable experiences, and to avoid non-necessary pain.").

<sup>258</sup> *Id.* at 79 ("Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by overwhelming fear and anxiety, or by traumatic events of abuse or neglect. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.").

<sup>259</sup> *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 253, at 79 ("Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience.").

<sup>260</sup> *Id.* at 79-80 ("Affiliation. . . . Being able to live with and toward others, to recognize and show concern for other humans, to engage in various forms of social interaction; to be able to imagine the situation of another . . . (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.) . . . Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. In work, being able to work as a human, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.").

<sup>261</sup> *Id.* at 80 ("Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.").

<sup>262</sup> *Id.* ("Play. Being able to laugh, to play, to enjoy recreational activities.").

materials and resources to support one's life.<sup>263</sup> Nussbaum created this list to capture the core principles of international human rights treaties as well as common human development goals. For Nussbaum, an individual must have a minimum level of each of the central capabilities in order for life to be "not so impoverished that it is not worthy of the dignity of a human being."<sup>264</sup> In this way, it is a partial theory of justice, which can be used to evaluate whether state actions are minimally adequate.<sup>265</sup> Her list is articulated at an abstract level so that it can be adapted to particular contexts.<sup>266</sup>

## V. CHOOSING CAPABILITIES

The capability approach can be used to construct a set of policy priorities by which to evaluate government policy. The first step in applying this approach to LGBTQ issues is to identify which capabilities should be of primary concern, although one will not find literature about how to choose capabilities. However, Sen emphasizes that individuals impacted by this choice should play a heavy role and possibly be the only decisionmakers on this issue.<sup>267</sup> If we are to respect the dignity of LGBTQ people, then respecting their preferences in identifying capabilities would be key.<sup>268</sup> Indeed, it would be enormously useful to engage in a public reasoning process among LGBTQ people in the United States to find out what kind of life is considered valuable. In lieu of such a process, we can look to the advocacy priorities of social movements that are made up of, and seek to represent the interests of, LGBTQ people.<sup>269</sup> I will refer to these priorities broadly as the LGBTQ

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<sup>263</sup> *Id.* ("Control over One's Environment . . . Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association . . . Material. Being able to hold property (both land and movable goods) . . . and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.").

<sup>264</sup> *Id.* at 72.

<sup>265</sup> WOMEN AND HUMAN DEVELOPMENT, *supra* note 253, at 6, 75.

<sup>266</sup> *Id.* at 10-11.

<sup>267</sup> Amartya Sen has purposefully avoided identifying which capabilities are important. Robeyns, *supra* note 231 at 106. According to his view, the community itself should engage in some form of public reasoning in order to make that choice themselves. *Id.* In this way, Sen is fiercely respectful of the preferences of the individuals themselves, even to the point that the result might be a list of capabilities that are themselves inconsistent with human rights. We should take this as an indication that even if a public reasoning process produces capabilities, the implementation of which would seem radical in contrast to prevailing norms, those choices should still be respected.

<sup>268</sup> *Id.*

<sup>269</sup> Social movements give voice to those who are voiceless, and they can provide a local perspective on the desires of those in the movement. Amrita Basu, *Who Secures Women's Capabilities in Martha Nussbaum's Quest for Social Justice?*, 19 COLUM. J. GENDER & L. 201, 5 (2010).

agenda. A review of the issue areas listed by LGBTQ advocacy organizations reveals that most groups focus on one or more issues drawn from a fairly common list: relationship recognition and parenting, criminal justice, workplace and economic security, education, violence and safety (including hate crimes), health (including HIV/AIDS), housing, nondiscrimination laws, gender recognition, civic participation, and immigration.<sup>270</sup> These priorities can serve as a basis for determining which capabilities might be important to LGBTQ people.

Additionally, there is a growing body of empirical data that can inform us about the lived experience of LGBTQ people in the United States. In the past few years, federal and state governments, as well as survey research firms, have begun to collect quantitative data related to the sexual orientation—and to a much lesser extent, the gender identity—of individuals who participate in the American Community Survey (the national census), the US General Social Survey, Gallup polls, and a number of other sources of quantitative and qualitative research. Consequently, we have both normative and empirical information about the current situation and the goals of LGBTQ people, which we can look to in lieu of directly consulting with the American LGBTQ community. In the following Sections, we explore a number of approaches to the task of creating a list of capabilities for LGBTQ people.

#### *A. Concerns of the General Population*

Given that LGBTQ people live their lives alongside non-LGBTQ people, an obvious starting point to look for capabilities that are important to LGBTQ people would be to look at the human development priorities that have been articulated for the general population. Right from the beginning of the LGBTQ movement, advocates have made the point that LGBTQ people are still people. In 1955, the *Mattachine Review* included the following essay:

First of all, let us remember that man is not classified as heterosexual, homosexual, or bisexual by the biological scientist. He is classified in the animal kingdom, as a primate, homo sapiens. In other words, he is a human being before he is anything else. . . . [H]e belongs to this or that culture or subculture, he lives in such and such a time, he belongs to one economic class or another, he is young or middle-aged or old, and he is motivated by certain instincts or

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<sup>270</sup> This list captures the issue areas listed by the Movement Advancement Project, an organization that (among other things) conducts research about the capacity of the LGBTQ movement. *Our Work & Mission*, MOVEMENT ADVANCEMENT PROJECT, [https://perma.cc/6HZS-QSFE]. Additionally, this list captures common issue areas listed on the website of Lambda Legal Defense Fund, the National Center for Lesbian Rights, and the Human Rights Campaign—three of the largest LGBTQ organizations in the US.

drives. . . . He is only a creature who bleeds when he is cut, and who must breathe oxygen in order to live.<sup>271</sup>

The important point here is that LGBTQ people live among the general population and face many of the same challenges. Based on this, it might make sense to simply look to the concerns of the general population and essentially piggy-back off of those. In order to develop a more focused advocacy agenda, one could overlay a list of LGBTQ concerns on to a list of priorities of the general population and formulate a set of capabilities based on the overlap. Under such an approach, the key to understanding the situation of LGBTQ people would be to track outcomes of LGBTQ people in a way that enables a comparison between LGBTQ people (and its various sub-groups) and non-LGBTQ people.<sup>272</sup> Such tracking would identify the differences and disparities that could be addressed by additional programs and policy changes.

Nussbaum's list of central capabilities provides an example of a list of capabilities crafted for the general population.<sup>273</sup> Given the breadth of Nussbaum's list, one could identify which capabilities are particularly important to LGBTQ people. This was my approach in *A Development Agenda for Sexual and Gender Minorities*, where I identified eight capabilities—heavily inspired by Nussbaum's list—relevant to sexual and gender minorities in the context of international development programs.<sup>274</sup> Another list of development goals crafted for the general population is the Sustainable Development Goals (SDGs).<sup>275</sup> This set of seventeen goals, along with hundreds of sub goals and targets, was adopted by the UN General Assembly in 2015 to guide international development activities for the next fifteen years.<sup>276</sup> These goals relate to issues such as hunger, education, the environment, health, and equality.<sup>277</sup>

In the U.S., policy priorities are rarely articulated in lists as neat and tidy as Nussbaum's ten capabilities or the UN's 17 SDGs. Nonetheless, one can usually discern how policies impact capabilities. For example, the federal Healthy People initiative is a multi-agency program that seeks to improve the

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<sup>271</sup> Ward Summer, *On the Bisexuality of Man*, 4 MATTACHINE REVIEW 16 (July 1955), [https://perma.cc/V752-BHKN].

<sup>272</sup> This approach is exemplified by the provisions of the LGBT Data Inclusion Act, H.R. 3273, 115th Congress (July 17, 2017), which would require collection of disaggregated data.

<sup>273</sup> See WOMEN AND HUMAN DEVELOPMENT, *supra* note 253.

<sup>274</sup> Andrew Park, *A Development Agenda for Sexual and Gender Minorities*, WILLIAMS INST. (July 2016), [https://perma.cc/CB2K-BRW3].

<sup>275</sup> UN GENERAL ASSEMBLY, G.A. Res. 70/1, Transforming our World: the 2030 Agenda for Sustainable Development (Oct. 20, 2015), [https://perma.cc/5LLL-X7N3].

<sup>276</sup> *Id.* at 1.

<sup>277</sup> *Id.* at 14.

capability of all Americans to be healthy.<sup>278</sup> Though the initiative is designed for the general population, it includes efforts to track health outcomes of LGBTQ people by incorporating questions about sexual orientation and gender identity on health surveys and medical data systems.<sup>279</sup> These surveys and data systems have provided a rich source of documentation on the frequency and impact of hate-crimes, disparities in disease outcomes, risk behaviors, rates of insurance coverage, access to preventive care, and availability of culturally competent care.<sup>280</sup>

Similarly, the Supplemental Nutrition Assistance Program seeks to provide the capability to be adequately nourished by providing supplements to family food budgets. Efforts to track participation rates by LGBTQ people in this program have shown that 27% of LGBTQ adults have experienced periods of food insecurity compared to only 17% of non-LGBTQ adults.<sup>281</sup> Such a finding could form the basis for advocacy and policies targeting food insecurity among LGBTQ people.

This piggy-back approach has significant pragmatic advantages. It leverages the administrative infrastructure, political momentum, and data collection mechanisms already in place. In doing so, it would reveal instances where the treatment or outcomes of LGBTQ people are different than those of non-LGBTQ people. Once revealed, decisionmakers could formulate plans to decrease such disparities. Nussbaum optimistically notes that with regard to sexual orientation, this would lead to policies that directly confront hierarchies and stigma that cause such disparities.<sup>282</sup>

On the other hand, such an approach raises questions. First, it may sideline priorities of LGBTQ people. LGBTQ concerns would be assimilated into programs and priorities that were most likely created in a cis-hetero normative context. It is reasonable to suspect that LGBTQ concerns were neither considered, nor were LGBTQ people involved, during the development of many programs and priorities designed for the general population. Bypassing possible concerns unique to LGBTQ people also carries a risk to dignity as it fails to recognize what the choices of LGBTQ people are.

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<sup>278</sup> The Healthy People 2020 initiative includes objectives regarding data collection about health outcomes for LGBT people. *Lesbian, Gay, Bisexual, and Transgender Health*, HEALTHYPEOPLE.GOV, [https://perma.cc/UF3G-URRE] (last visited June 8, 2021).

<sup>279</sup> *Id.*

<sup>280</sup> Sean R. Cahill & Harvey J. Makadon, *If They Don't Count Us, We Don't Count: Trump Administration Rolls Back Sexual Orientation and Gender Identity Data Collection*, 4 *LGBT HEALTH* 171, 171-172 (June 2017).

<sup>281</sup> TAYLOR N. T. BROWN, ET AL., WILLIAMS INST., *FOOD INSECURITY AND SNAP PARTICIPATION IN THE LGBT COMMUNITY 2* (2016), [https://perma.cc/B34A-ZSCG].

<sup>282</sup> NUSSBAUM, *supra* note 7, at 149.

Second, a set of priorities developed in a context of cis-hetero normative preferences could constrain the capabilities of people to develop sexualities and gender that do not conform to such preferences. For centuries, social structures have been built around the goal of encouraging people to comply with sexual and gender norms.<sup>283</sup> Accepting goals applicable to the general population might perpetuate structures that burden non-normative sexualities and genders.

Third, such an approach may obscure the negative impact of stigma on the lives of LGBTQ people. Parity in outcomes may signify the elimination of the stigma that caused disparities, or it may signify the ability of LGBTQ people to achieve higher outcomes in spite of the existence of stigma. For example, a government program might support the capability to earn a living by providing job training or educational scholarships. Though a transgender person might achieve fantastic success in the program, increasing her job prospects and earnings, the program might make her deeply unwell if she is forced to continue to identify herself with a gender she is not. Stigma produces high levels of resilience among LGBTQ people. This, combined with the fact that LGBTQ people can sometimes hide their stigmatized identity, often results in LGBTQ people being able to do as well as non-LGBTQ people in some aspects of their life even though they continue to face deprivations in other parts of their lives. The world is full of examples of LGBTQ people who have achieved success and yet were miserable at the same time because they did not have the capability to live as they wish.<sup>284</sup>

Thus, such an approach may miss the point of LGBTQ equality and liberation efforts entirely. Having recognized that sexuality and gender is important to human flourishing, we need to ensure the capability of individuals to live according to their sexuality and gender. As such, the list of capabilities must explicitly protect and support the development of all sexual orientations and genders of all people. In fact, the capabilities we choose must be based on the recognition that anyone—at any point in their lives—may experience aspects of sexuality and gender that do not align with heterosexuality or cis-genderism. Thus, all people should have the capability to have non-conforming sexualities and genders.

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<sup>283</sup> For an extensive and seminal work on how social and cultural structures serve to maintain supremacy of the dominant class, see MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY* (1978).

<sup>284</sup> For example, Ryan O'Callaghan, despite having a successful football career that included being drafted by the New England Patriots, planned to complete his career and then commit suicide, rather than come out as gay. RYAN O'CALLAGHAN, *MY LIFE ON THE LINE: HOW THE NFL DAMN NEAR KILLED ME AND ENDED UP SAVING MY LIFE* vi (2019). Research shows O'Callaghan's experience is widely shared. *See supra* note 204 and accompanying text (standing for the proposition that concealing identity can interfere with supportive relationships and decrease health outcomes).

For those people whose sexuality or gender does not conform to social preferences, a group we are referring to as LGBTQ, capabilities are not as valuable unless they can be achieved without any limitation on sexual orientation or gender. Having to leave behind sexuality and gender, and all the aspects of personhood related to those traits, may simply perpetuate the oppression that LGBTQ people face. Such a result would be counter to our goal of human flourishing. For example, if we decide the capability to earn a living is one that should be adopted as a priority for LGBTQ people, then we must supplement how we define that capability to explicitly include the capability of earning a living while being LGBTQ. In fact, every capability must include the option of achieving it without limiting capabilities regarding sexuality and gender.

Given the arguments set out above, it is reasonable to expect that some of the capabilities applicable to the general population are also applicable to the LGBTQ population. At the same time, it is reasonable to suspect that adopting a list of capabilities for the general population could cause us to overlook real concerns and priorities of LGBTQ people. Consequently, the correct approach might be to adopt capabilities for LGBTQ people that are shared with the general population, but to also supplement them to ensure they protect and support diverse sexualities and genders.

At this point in the analysis, we are faced with a critical question: what does it mean to have the capability to *be* someone with a sexual orientation and/or gender identity that does not conform with accepted norms, while at the same time being able to *do* things that all people do to flourish in their life? What is *being* and *doing*—not just for a worker, student, or family member—for an LGBTQ worker, an LGBTQ student, or an LGBTQ family member? In the next Section, we will look more deeply at these issues.

### *B. LGBTQ-Specific Capabilities*

We now arrive at the task of explicating capabilities specifically related to being LGBTQ. First, we will look at the properties of non-conforming sexual orientations and genders to understand, ontologically, what makes up their existence. Basically, we will answer the question of what it means to be LGBTQ. Second, we will look to empirical evidence on the factors that support the development of sexuality and gender in a positive and healthy way. Last, we will look at how LGBTQ people are impacted by laws and society in ways that limit the ability of LGBTQ people to be themselves. This analysis—first, what is LGBTQ, second, what supports its development, and third, what limits its development—will then give us the ability to identify capabilities.

#### 1. Ontological Inquiry

To understand the capability to be LGBTQ, we can look at what it means to be and do LGBTQ. A common approach to defining sexual orientation is

a three-part classification system developed in the social sciences.<sup>285</sup> This approach is used to classify people into a majority group, those who are heterosexual in every respect, and a minority group, those whose sexuality does not conform to heterosexual standards.<sup>286</sup> The three characteristics used to assess sexual orientation are as follows:<sup>287</sup>

1. *Identity*. How does the individual identify their own sexual orientation? Identity is manifested by a disclosure of that identity and is entirely self-determined according to the term used by the person whose identity is referenced.<sup>288</sup> Thus, if someone says they are queer, then their identity is queer.<sup>289</sup> Identity can be referenced by common terms, like gay, lesbian, bisexual, or queer, or they may be indigenous or foreign language terms such as two spirit (Native-American), Dii (Thai), or Kuchu (Lugandan).<sup>290</sup> An individual may have a different identity at different times, such as when someone might disclose to their friends they are gay, but tell coworkers they are straight.<sup>291</sup> A sexual minority would be anyone who has an identity that does not conform to cultural norms.<sup>292</sup>

2. *Behavior with others*. What gender(s) is/are the sexual and/or romantic partners of that individual? A sexual minority is one whose partners are of the same sex.<sup>293</sup>

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<sup>285</sup> Margaret Wolff, et al., *Measuring Sexual Orientation: A Review and Critique of U.S. Data Collection Efforts and Implications for Health Policy*, 54 J. SEX RES. 507, 510 (2017) (“Within the public health and social science literature, sexual orientation is typically composed of three components—sexual identity, sexual attraction, and sexual behavior—with ‘sexual minorities’ defined, respectively, in terms of sexual identity labels such as ‘lesbian,’ ‘gay,’ or ‘bisexual’ (LGB), those who express attraction to individuals of the same sex or gender, or those who have had any sexual experiences with same-sex partners regardless of their sexual identity label.”).

<sup>286</sup> *Id.*

<sup>287</sup> SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009) [hereinafter SMART].

<sup>288</sup> *Id.* at 6-9.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> SMART, *supra* note 287, at 9-11. The standard framework for sexual orientation is often expressed in terms of whether the behavior and attraction are oriented toward the same or the opposite sex. This reflects the assumption that there are two gender options, male and female. The recognition of multiple genders invalidates this assumption. I have proposed that, with regard to behavior, sexual minorities should

3. *Attraction relating to others.* What gender(s) is the person attracted to? A sexual minority is one whose attractions are not of the opposite sex.<sup>294</sup>

Sexual minorities include those who fall outside the sexual majority according to any one of these three criteria. For most populations, there is no correspondence between the three criteria.<sup>295</sup> These three groups intersect, resulting in seven possible categories within the overall classification of sexual minority, as illustrated in Figure 1.<sup>296</sup>

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include those whose sexual behavior and/or attraction is with people of the same sex/gender, as well as with people of a minority gender. Park, *supra* note 274, at 32.

<sup>294</sup> SMART, *supra* note 287, at 11-12.

<sup>295</sup> One study of male sexuality in Senegal, Uganda, and South Africa found an absence of systematic links between practice and identity. Joseph Larmarange et al., *Homosexuality and Bisexuality in Senegal: A Multiform Reality*, 64 *Population* 635, 641 (2009). In China, only three percent of men choosing a gay response to one of the three dimensions fit into all three. Nicole Farris et al., *Sexuality in China*, in 5 *INT'L HANDBOOK ON THE DEMOGRAPHY OF SEXUALITY* 107, 114-15 (Amanda K. Baumber ed., 2013).

<sup>296</sup> EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 298-301 (Univ. of Chicago Press 1994). These categories include many permutations of sexual orientation. For instance, a male might identify as heterosexual but still feel attraction to other men. Thus, his sexual orientation would be depicted as being in part of the circle corresponding to attraction, but would not occupy the space intersecting attraction and identity. If that same man has had sex with another man, his sexual orientation would be plotted to occupy the space intersecting behavior. If he has not had sex with another man, his sexual orientation would not be plotted to occupy that space. Someone might engage in sexual behavior but not feel attraction, such as someone in a relationship devoid of emotional attachment. Someone engaging in experimental sex (sex for the purpose of human companionship rather than out of desire) or someone having transactional sex (such as a sex worker) may not feel general attraction to others of the same sex, or may not identify as a sexual minority.

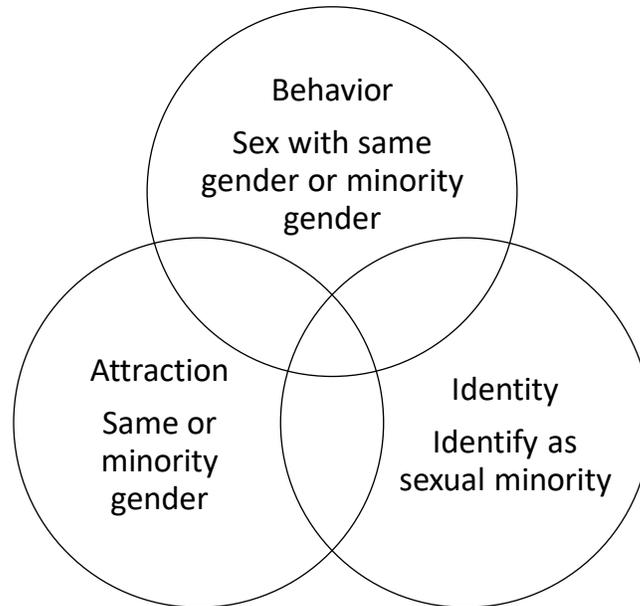


Figure 1: Sexual Minorities

An individual's gender can be assessed based on the following three data points:<sup>297</sup>

1. *Birth assignment.* What gender was the individual assigned at birth? Usually this is indicated on the birth certificate.<sup>298</sup>
2. *Inner Identity.* What is the person's gender according to their own inner awareness of their gender?<sup>299</sup>

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<sup>297</sup> According to standards considered to be best practices for asking about gender identity on a survey, the smallest number of data points used is: sex assigned at birth and current sex/gender. Sari L. Reisner et al., "Counting" Transgender and Gender-Nonconforming Adults in Health Research: Recommendations from the Gender Identity in US Surveillance Group, 2 *TRANSGENER STUD.* Q. 34, 44 (2015). However, there has been increased recognition in recent years that one's inner sense of gender may differ significantly from how one expresses gender. Therefore, I have proposed that an assessment of a person's gender should incorporate the three data points listed herein. Andrew Park, *Yogyakarta Plus 10: A Demand for Recognition of SOGIESC*, 44 *N. C. J. INT'L L.* 222, 260 (2019).

<sup>298</sup> *Id.* at 34 (indicating that gender minorities include people whose sex assigned at birth is different from their current gender).

<sup>299</sup> *Id.* at 37 (indicating that gender identity refers to a person's internal sense of their own gender).

3. *Expression*. What is the person's gender according to how they express themselves and identify to others?<sup>300</sup>

Using these measurements, populations can be divided into a gender majority and a gender minority. The gender majority comprises those people whose gender is female according to all three data points, or male according to all three data points. Thus, if an individual's gender at birth is concordant with their current gender identity and gender expression, then they are considered cisgender (the prefix *cis-* meaning same). Conversely, the gender minority includes all other people. The gender minority can be further divided into three sub-categories:

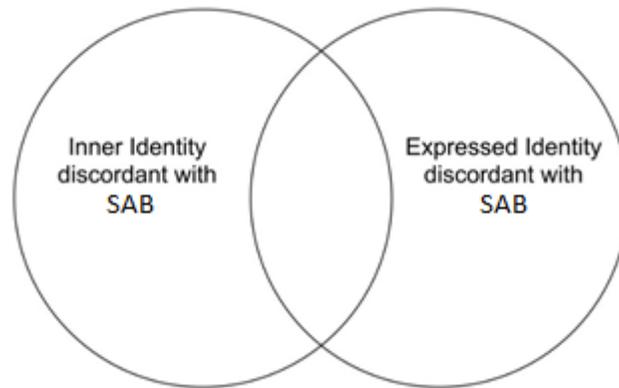
1. *Current inner identity is discordant with sex assigned at birth (SAB)*. This category includes those who were assigned one gender at birth but who have an inner, self-identified gender that is different. In the Venn diagram in Figure 2, this group is represented by the circle on the left, labeled 'inner identity discordant with SAB.'

2. *Gender expression is discordant with SAB*. This category includes those whose gender assigned at birth is different than their expressed gender. In the Venn diagram in Figure 3, this group is represented by the circle on the right, labeled 'expressed identity discordant with SAB.'

3. *Both inner identity and expression are discordant with SAB*. Some individuals fall into Group 1, Group 2, or both. See Figure 3. For example, consider Chris, who was assigned male at birth. If Chris has an inner identity of being a female, but outwardly expresses a male identity, Chris would fall into Group 1. After Chris transitioned and began to express a female gender, she would fall into the intersecting area in the middle. Consider Tilda, who was assigned female at birth and who still feels she is female, but her expression is masculine. Tilda would be part of the group on the far right.

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<sup>300</sup> *Id.* at 49-50.



*Figure 2: Gender Minorities*

These definitions provide a clearer understanding of the functionings that comprise being LGBTQ. First, we can observe that, for both sexual orientation and gender identities, there is a component that is largely internal, or at least takes place within the space of self-awareness and not necessarily expressed or communicated externally. For sexual orientation, it is the experience of attraction to a particular gender. For gender, it is an inner awareness of one's own gender or gender identity.

At this point, is it important to take a pause and track the different meanings of the word *identity*, which may cause some confusion. With regard to gender, identity refers to something that one is self-aware of, but does not necessarily express. With regard to sexual orientation, identity is something that is disclosed and expressed to others.

Having clarified the meanings of identity, we can make a second observation: in addition to its internal component, there is also an external, or expressive, component. For sexual orientation, it is the labeling and disclosure of one's own orientation (referred to as identity). For gender, it is the expression of a gender through appearance, mannerisms, dress, one's body (including modifications), name, and legally documented gender.

Additionally, sexual orientation has a third component: the gender of the sexual partners with whom one engages in sexual behavior. This is necessarily an interpersonal component, since it requires both the participation of another person and the knowledge of their gender, in order to make a determination about the behavioral element of sexual orientation.

Thus, as in Table 1, we can see that there are three aspects involved in the functioning of sexual orientation and gender: an internal aspect, and external aspect, and an interpersonal aspect. In order to have the capability to be an LGBTQ person, one must be able to be and do all of the things listed in the internal, external, and interpersonal spaces.

*Table 1: Internal, External, and Interpersonal Aspects of Sexual Orientation and Gender Identity*

	<b>Sexual Orientation</b>	<b>Gender Identity</b>
<b>Internal aspect</b>	Be aware of attraction	Have an internal awareness of one's gender as discordant with gender assigned at birth
<b>External aspect</b>	Self-identify using a sexual minority identity	Express gender discordant with gender assigned at birth
<b>Interpersonal aspect</b>	Engage in sexual behavior with someone of the same gender	

## 2. Supportive Factors

Researchers in the field of psychosocial development<sup>301</sup> have devised models to describe the process of positive sexual and gender identity development and understand how the process can lead to improved outcomes and good health. Having a positive identity means that an LGBTQ person sees their own identity as a valid, natural, normal, and essential identity, or a state of being rather than simply a behavior or sexual trait. The first generation of these models<sup>302</sup> are referred to as stage theories because they identify several stages through which an individual may cycle through, non-sequentially, within their life. One of the first stage theories was developed by Australian psychologist Vivienne Cass who identified six stages in the development of homosexuality among men.<sup>303</sup> These stages include periods of identity confusion, comparison, tolerance, acceptance, pride, and synthesis.<sup>304</sup>

<sup>301</sup> Contemporary theories in the field of psychosocial development can be traced to the seminal work of Erik Erikson. *See generally* ERIK ERIKSON, *CHILDHOOD AND SOCIETY* (1st ed. 1950); ERIK ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1st ed. 1968). Although there is a significant body of research on the link between stigma and negative outcomes, there is very little research that looks at the factors and interventions that might lead to positive outcomes. The field of public health and psychology are deficit oriented. That is, the focus is on identifying disparities and explaining illness and disease.

<sup>302</sup> The starting point for understanding minority identities is Erving Goffman's seminal work. *See generally* ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SOCIAL IDENTITY* (1963). Denis Altman and Ken Plummer were among the first to theorize the development of a stable homosexual identity. DENNIS ALTMAN, *HOMOSEXUAL: OPPRESSION AND LIBERATION* (1993).

<sup>303</sup> Vivienne C. Cass, *Homosexual Identity Formation: Testing a Theoretical Model*, 20 J. SEX RES. 143-167 (1984).

<sup>304</sup> *Id.*

Psychologist Aaron Devor proposed a stage theory for gender identity formation.<sup>305</sup> A number of other models have been suggested; some focus on specific milestone events or multicultural aspects of identity development, while others focus on one aspect, such as behavior or desire, or focus on interaction with groups.<sup>306</sup>

A review of academic literature counted eighteen such models, with half including some level of empirical validation, while the rest are based on theoretical grounds.<sup>307</sup> Several common themes emerge in the review. First, all of the models describe a phase in an individual's life when they start to have an inner awareness of their sexual orientation or gender, which may initially be accompanied by an awareness of being different than heterosexual or cis-gender peers.<sup>308</sup> This inner awareness continues to contribute to the process of identity formation in the form of self-labeling and the formation of personal preferences.<sup>309</sup>

Secondly, all of the models include outward expression of one's sexual orientation and gender identity through disclosure or symbolic expression of sexuality and gender to others.<sup>310</sup> The difference between an internal

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<sup>305</sup> Aaron H. Devor, *Witnessing And Mirroring: A Fourteen Stage Model of Transsexual Identity Formation*, 8 J. GAY LESBIAN PSYCHOTHERAPY 41-67 (2004).

<sup>306</sup> Ritch Savin-Williams and Kenneth Cohen identified feeling different, experiencing same-sex attraction, questioning assumed heterosexuality, onset of sexual behavior, self-identification, disclosure, romantic relationship, self-acceptance, and synthesis as developmental milestones. Ritch C. Savin-Williams & Kenneth M. Cohen, *Developmental Trajectories and Milestones of Lesbian, Gay, and Bisexual Young People*, 27 INT'L REV. PSYCHIATRY 357, 360-61 (2015). Lifespan models seek to take social context into account by identifying social processes that may occur over a lifetime, such as: 1) exiting heterosexual identity, 2) developing a personal LGB identity, 3) developing social LGB identity, 4) becoming an LGB offspring, 5) developing an LGB intimacy status, 6) entering a LGBT community. Brent L. Bilodeau & Kristen A. Renn, *Analysis of LGBT Identity Development Models and Implications for Practice*, 111 NEW DIR. STUDENT SERV. 25, 28-29 (2005).

<sup>307</sup> Michele J. Eliason & Robert Schope, *Shifting Sands or Solid Foundation? Lesbian, Gay, Bisexual, And Transgender Identity Formation*, in THE HEALTH OF SEXUAL MINORITIES 3-26 (Ilan. H. Meyer & M.E Northridge eds., 2007).

<sup>308</sup> *Id.* at 6, 20. All models reviewed identified the feeling of difference as the beginning point in the process of identity development. *See id.* Becoming aware of the nature of that difference and seeking to understand one's own identity are also common elements of developmental models, although each model defined and labeled this phase differently, such as Ponce's subjective feelings of difference, Drevor, McCarn, Fassinger and Miller's identity confusion, Nuttbrosk's identity awareness, Eliason's pre-identity, Siegal and Lowe's the turning point, Troiden's sensitization, Cass' identity confusion, comparison, tolerance and acceptance, Identity diffusion, Issacs and McKendrick's challenge and exploration. *Id.* at 7-11.

<sup>309</sup> *Id.* at 15, 21, 23.

<sup>310</sup> *Id.* at 13. Disclosure to others is a common element of all identity models, as well as identity exploration through changes in clothing, hair, social venues, and groups.

awareness of identity and an expressed identity is more than just two manifestations of the same thing. Psychologist Richard Troiden notes they can develop incongruously; homosexuality “is a self-identity when people see themselves as a homosexual in relation to romantic and sexual settings. . . . It is a presented identity when people present or announce themselves as homosexual in concrete social settings.”<sup>311</sup> The identity is more fully realized when self-identity and presented identity coincide.<sup>312</sup>

Lastly, all of the models describe processes that involve other people in at least one of four ways. First, other people serve as passive actors who contribute to the identity development process by being the subjects of observation, comparison, and possibly sources of identity mirroring by the LGBTQ person.<sup>313</sup> Second, other people, when they find out about the LGBTQ person’s sexuality or gender, are sources of acceptance or rejection.<sup>314</sup> All of the models recognize the important influence that both acceptance and rejection can have on psychological development.<sup>315</sup> Third, these other people include those in the LGBTQ community that the LGBTQ person may interact with as identity develops. Many models note the need for engagement with LGBTQ community or culture.<sup>316</sup> Fourth, with regard to sexual orientation, other people are objects of same-sex attraction and/or partners in same-sex sexual activity.<sup>317</sup>

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*Id.* at 13, 20. Other models included outward expression of identity as well, though each model labeled and defined this element differently, such as Drevor’s gender transition, Eliason’s emerging identity, Nutbrock’s performance, McCarn; and Fassinger and Miller’s exploration, Fox; Chapman and Brannock’s Identification, Siegal and Lowe’s Coming-out, and Cass’ identity pride and self-disclosure. *Id.* at 7-21.

<sup>311</sup> Richard R. Troiden, *The Formation of Homosexual Identities*, 17 J. HOMOSEXUALITY 46 (1989).

<sup>312</sup> *Id.*

<sup>313</sup> For all identity development theories, feelings of difference are motivated by comparison to others and social norms. Eliason and Schope, *supra* note 307, at 13. This has also been called witnessing and mirroring, sensitization to differences between self and others, and identity comparison. *Id.* at 9-12.

<sup>314</sup> *Id.*

<sup>315</sup> Identity development models note the significance of social rejection and social acceptance. *Id.* at 6. One model notes the need to be accepted by others in order to build self-worth and self-acceptance. *Id.* Acceptance helps build support for the individual. *Id.* at 7. Rejection may result in a desire to conceal identity. *Id.* at 18.

<sup>316</sup> *Id.* at 13. Some theorists refer to this as commitment (Troiden), Integration of public and private (Coleman), and choice of lifestyle (Chappman and Brannock). *Id.* at 7.

<sup>317</sup> Sexual orientation is an inherently dyadic concept in that it involves at least two people, the first of which is the person experiencing same-sex attraction or same-sex behavior, and the second who is the object of same-sex attraction or the partner in same-sex sexual activity. The probable existence of the second person underlies all other discussions of identity development. The identity development literature recognizes that a person’s first relationship is a critical point in a person’s identity

Based on these models, we can identify three factors, or inputs, that are necessary for functioning as an LGBTQ person: (1) an understanding and acceptance of their own identity, often through exposure to other sexual and gender minorities; (2) an expression of that identity to others, including simple disclosure; and (3) engaging in relationships consistent with this identity, such as having individual relationships or general interactions with community. These inputs do not guarantee the development of a positive identity, but each is necessary. These three inputs align with the three aspects of the ontological discussion above, where one aspect is internal (understanding and acceptance of identity), one is external (expression and disclosure), and one is interactive (relationships).

### 3. Limiting Factors

The last line of inquiry seeks to identify the limitations experienced by an LGBTQ person that deprives them of their ability to live the way they choose. Having an understanding of limitations will help identify the capabilities that guard against such factors. Commonly, such an examination might begin with an assessment of relevant legal and social norms that negatively target LGBTQ people, followed by an appraisal of how these norms impact individuals. However, in keeping with the people-centered approach, this sequence is flipped. We will first look at how individuals experience these factors and then, secondarily, look at the norms and institutions that perpetuate them.

Most LGBTQ people live in communities where the general expectation is that everyone is straight and cisgender. LGBTQ people can often avoid some negative consequences of stigma by declining to disclose, or actively concealing, their sexuality and/or gender, thereby reaffirming the assumption that they are straight and cisgender.<sup>318</sup> Stated bluntly, LGBTQ people can be themselves, or be someone they are not. With each social interaction, the LGBTQ person must make a decision about how to manage their identity.

The workplace—about which there is growing empirical evidence of this dynamic (more so regarding sexual orientation than gender)—serves as an illustrative example.<sup>319</sup> The decision whether to disclose has been identified as one of the most difficult career challenges faced by lesbian, gay, and bisexual employees.<sup>320</sup> Disclosure at work carries the risk of social avoidance,

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development and can contribute to the formation of gender differences as well. *Id.* at 10, 12.

<sup>318</sup>James M. Croteau et al., *Models of Workplace Sexual Identity Disclosure and Management Reviewing and Extending Concepts*, 33 *GROUP & ORG. MGMT.* 532, 533-535 (2015) (reviewing different conceptual frameworks used to understand why and how LGB workers decide to conceal or reveal their identity).

<sup>319</sup>*Id.*

<sup>320</sup>Belle Rose Ragins et al., *Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work*, 92 *J. APPL. PSYCHOL.* 1103 (2007).

harassment, and job loss.<sup>321</sup> However, individuals who work in jurisdictions with non-discrimination laws may be more likely to disclose compared to those who do not have such protections.<sup>322</sup> Still, even in these jurisdictions, many LGBTQ workers realize that while such legal protections provide the opportunity for a lawsuit, they do not provide a stable paycheck. LGBTQ people develop a range of strategies to avoid negative consequences of disclosure. These include avoiding all homosexual activity and feelings, adopting false identities, avoiding questions and discussions related to sexuality and gender, signaling one's identity in ways that would only be recognized by other LGBTQ people and allies, and downplaying disclosure in ways that portray the identity as an incidental or unspoken part of a person.<sup>323</sup>

LGBTQ people experience a variety of social and legal demands that require employing these strategies in all parts of their life. Each of these strategies requires the LGBTQ person to forego options they may otherwise have, thereby limiting their capabilities to live as they choose. Kenji Yoshino has proposed that we can analyze these demands by grouping them according to the type of limitation they place on the LGBTQ person.<sup>324</sup> Inspired by his work, this Section describes three sets of demands, although their configuration differs from the configuration proposed by Yoshino.

Convert completely. The most stringent demand is to completely convert one's identity, desires, behavior, and expression to assimilate to culturally accepted and legally permissible norms, converting one from gay to straight or from gender non-conforming to gender conforming. This demand requires the internal and external obliteration of sexual and gender minority traits from an individual's life, experienced any time the law, an institutional rule, or another person says, "be straight and cisgender."

Laws meant to punish same-sex sexual acts, blasphemy, unnatural and immoral acts are one source of this demand, particularly when the purpose and/or application of such laws is to manipulate individuals into being straight and cisgender. Although other sources of this demand may not carry jail time or the death penalty, they can still ruin lives and families. Conversion therapy, in both religious and clinical settings, continues to be used to convert people's sexual and gender identity.<sup>325</sup> This demand is also manifested by a

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<sup>321</sup> *Id.* at 105.

<sup>322</sup> Belle Rose Ragins & John M. Cornwell, *Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination Against Gay and Lesbian Employees*, 86 J. APPLIED PSYCHOL. 1244, 1252-1254 (2001).

<sup>323</sup> See generally Joshua C. Collins & Jamie L. Callahan, *Risky Business: Gay Identity Disclosure In a Masculinized Industry*, 15 HUM. RESOUR. DEV. INT'L 455 (2012).

<sup>324</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 773-74 (2002).

<sup>325</sup> The Williams Institute at the UCLA School of Law estimates that 57,000 LGBT youth will receive conversion therapy from a religious institution by the time they

parent disowning a child for being LGBTQ, or a college requiring students to affirm that they are cisgender and heterosexual. For many transgender people, this demand is experienced in childhood when family and peers pressure the transgender person to conform to expectations associated with their gender assigned at birth. This demand deprives the LGBTQ person of any capability which involves a manifestation of LGBTQ status.

Conceal and pass. The demand to conceal one's SOGIE requires an individual to pass as a cisgender, heterosexual person. While this demand permits an individual to experience an internal awareness of their own identity and sexual desires, it prohibits any disclosure or expressive manifestations of their status. This demand forces LGBTQ people to construct and live in their own personal closet. The LGBTQ person might meet this demand by creating a false identity or remaining silent and unexpressive in situations where the cultural presumption of heterosexuality and cisgender status are strong.

The evolving policy on the service of homosexuals in the military provides an example of the distinction between these first two demands. Prior to 1994, the general rule regarding homosexuality was that it was incompatible with military service. Soldiers could be discharged on the basis of homosexual status alone.<sup>326</sup> This represents a demand to convert. After 1994, Department of Defense directives declared that a person's sexual orientation was a personal matter that should not be the subject of official inquiry, and that one could only be discharged based on actual homosexual conduct that came to the attention of superior officers.<sup>327</sup> This represents a demand to conceal.

In the workplace, the demand to conceal requires transgender people to maintain a cisgender identity. Seventy-seven percent of transgender people interviewed in the 2015 U.S. Transgender Survey said they took steps to avoid mistreatment in the workplace such as: hiding their gender identity (fifty-three percent), delaying their transition (twenty-six percent), or delaying job moves (twenty-six percent).<sup>328</sup>

Many transgender people experience this demand when using a bathroom. Unless they pass as the gender corresponding to the bathroom they are using, they potentially face violence and hostility from others. Fifty-nine

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reach age 18, and 16,000 youth living in states that do not currently ban conversion therapy will receive it from a licensed healthcare professional before they reach age 18. CHRISTY MALLORY, ET AL., CONVERSION THERAPY AND LGBT YOUTH EXECUTIVE SUMMARY 1 (2019).

<sup>326</sup> U.S. DEP'T OF DEF., DIR. 1332.14, Enlisted Administrative Separations enclosure 4 (Dec. 21, 1993).

<sup>327</sup> The "Don't Ask, Don't Tell" policy was codified through enactment of the National Defense Authorization Act of 1994, Pub. L. No. 103-160, 107 Stat. 1547 (1993). *See also* 10 U.S.C. § 654 (1993).

<sup>328</sup> S.E. JAMES ET AL., NAT'L CTR. TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 154 (2016).

percent of transgender respondents to the U.S. Transgender Survey (the largest of its kind) said that they have avoided using restrooms because of this risk, and thirty-two percent have limited their eating and drinking in order to avoid restroom use.<sup>329</sup>

Downplay. The last demand is to *downplay* the identity enough so that it can be disregarded by others. A demand to downplay is reflected in the instruction: “I don’t mind if you are gay or transgender, just don’t be obvious about it.” By this demand, LGBTQ people can inform others of their identity, although they must limit their expression and behavior associated with that identity so as not to trigger the anxieties of others. Non-conforming traits, such as the use of differently gendered names or indications of the existence of same-sex sexual activity or desire, must be minimized so that onlookers are able to disregard them. Even talking about where one lives, one’s political positions, or one’s social activities may violate this demand.

Absent the existence of these three categories of demands, LGBTQ people would have, at least, the negative freedom to be themselves. Table 2 illustrates how each of these demands targets specific aspects of sexuality and gender. The vertical axis lists the aspects of sexuality and gender that we have developed in the first two sections (i.e., identity, expression, and interpersonal behavior). The three types of demands are listed along the horizontal axes.

The first demand (to convert) seeks elimination of all internal, external, and interpersonal aspects of sexual and gender minority status. The second demand (to conceal and pretend) permits an individual to formulate an inner sense of self as long as the individual eliminates any external manifestation of it, including expression and interpersonal behavior. The third demand (to downplay and disregard) permits formulation of inner, private identities. Although expression is allowed, it is constrained to avoid upsetting others. Explicit engagement in relationships, especially sexual or romantic relationships with others, must be concealed.

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<sup>329</sup> *Id.* at 17.

*Table 2: Demands to Downplay, Conceal, and Convert*

<b>Demands</b>		
<b>1. Downplay/ Disregard</b>	<b>2. Conceal/Pass</b>	<b>3. Convert Completely</b>
Permitted	Concealed	Prohibited
Constrained	Prohibited	Prohibited
Concealed	Prohibited/concealed	Prohibited

*C. Vital Capabilities to be an LGBTQ Person in All Aspects of Life*

As a result of the three inquiries above—the meaning of sexual orientation and gender, the factors that contribute to positive development, and the factors that restrict choices and opportunities for LGBTQ people—we can make some conclusions about LGBTQ people. Table 3 summarizes three distinct aspects of sexuality and gender that have emerged in each of these inquiries: an internal aspect, and external aspect, and an interpersonal aspect, in that it depends on the existence of a relationship with other people. In order to have the capability of being LGBTQ, all of these aspects must be possible. Internally, one must be able to conceive their own inner awareness of themselves as having a valid identity. If someone was never given sufficient information about gender or sexuality, was trained to believe that sexual and gender nonconformity was an unnatural disease not shared with anyone else, and was made to undergo conversion efforts, they would be unable to engage in the internal processes necessary to develop in a healthy and free manner. Cutting off expressive and interpersonal manifestations of sexuality and gender would have the same impact.

*Table 3: Aspects of Sexuality and Gender*

		Aspects of sexuality and gender		
		Internal	External	Interpersonal
<b>Inquiries</b>	<b>Ontological</b>	Experience of attraction (sexual orientation) Inner awareness of one's gender (gender)	Disclosure/self-identification to others (sexual orientation). Expression, e.g., dress, mannerisms, body modification, and use of names (gender)	Sexual/romantic behavior with others (sexual orientation)
	<b>Supportive factors</b>	Identity development includes inner awareness, questioning, comparing, and acceptance of one's own identity.	Expressive behaviors and activities (self-labeling, mirroring, experimentation) are part of the process of identity development.	Interactions/relationships with others are necessary to positive identity development.
	<b>Limiting factors</b>	Internal manifestations of non-conforming sexualities and genders are prohibited by the demand to convert to a preferred sexual orientation and gender identity	External manifestations of sexuality and gender are prohibited by the demand to convert and the demand to conceal, and are constrained by the demand to downplay	Interactions/relationships with others are prohibited by the demands to convert and conceal, and heavily constrained by the demand to downplay.

Because each of these aspects are vital to being and doing LGBTQ, we can formulate a capability that corresponds to each one. These capabilities are referred to as vital capabilities. The vital capabilities are best understood in relation to other capabilities in an individual's capability set. Recall that Section V.A concluded that capabilities formulated for the general public may also be relevant to LGBTQ people. However, simply adopting them wholesale might not ensure the capabilities necessary to be LGBTQ. These vital capabilities can be combined with others to ensure the capability to be LGBTQ. One example is the capability to earn a decent living, or to be adequately educated and trained; it is possible for an LGBTQ person to engage in functionings, such as being a successful worker or good student, and still be closeted, experience internalized stigma, and be cut off from productive relationships. More likely, the limitations on gender and sexuality faced by the LGBTQ person would impact their capability to function as a good worker or student.

Understood in this way, the vital capabilities represent casual powers rather than specific options from which an individual can choose. That is, these capabilities represent the power of an individual to formulate an authentic sexuality and gender while also engaging in functionings as an LGBTQ person.<sup>330</sup> By the same token, a lack of vital capabilities is a corrosive disadvantage. A corrosive disadvantage is a deprivation that not only lacks the missing capability, but also the other capabilities that spring from it.<sup>331</sup> Not being able to express one's sexual orientation or gender to others means that one cannot achieve the functioning of working as an openly LGBTQ person. Not only is their capability to be an LGBTQ person limited, their ability to be a worker may be limited as well given the evidence that closeted workers may be less productive and have lower workplace satisfaction. What follows is a discussion of the three vital capabilities, which can each be combined with other capabilities.

1. Vital Capability One: Internally Understand and Accept One's Own Sexual Orientation and Gender

This capability focuses on the internal understanding and acceptance of one's sexuality and gender. Society makes great efforts to help cisgender and heterosexual people achieve such an understanding and acceptance of their sexuality and gender. Children are given a constant and diverse flow of information regarding their gender and sexuality, how to express themselves, and

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<sup>330</sup> Such a construction of capabilities resembles Nussbaum's list, in which the capability itself encompasses conversion factors which, if achieved, provide the potential to realize multiple different functionings. For example, the capability to read, if achieved, makes possible the capability to be educated. Nussbaum has also referred to these capability as "fertile capabilities." NUSSBAUM, *supra* note 7, at 44. See also Jonathan Wolff & Avner de-Shalit, *On Fertile Functionings: A Response to Martha Nussbaum*, 14 J. HUM. DEV. & CAPAB. 161, 161–65 (2013).

<sup>331</sup> Wolff & de-Shalit, *supra* note 330, at 161.

how to engage in opposite-sex relationships. This support for heterosexual cisgender people continues throughout their life. The first vital capability recognizes the importance of creating similar opportunities for LGBTQ people. This capability is achieved when one has formed, internally, a positive sexual orientation or gender identity.

This capability is vital to LGBTQ people for several reasons. First, the inability to form a positive sexual or gender identity can adversely impact one's human development outcomes.<sup>332</sup> Second, the capability to understand and accept one's own sexuality and gender is necessary for dignity. In his opinion in *Lawrence v. Texas*, Kennedy repeats his "mystery of life passage," which first appeared in *Planned Parenthood v. Casey*, which dealt with personal decisions to use contraception in a marriage.

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.<sup>333</sup>

Crucially, this passage focuses on the capability of a person to understand themselves, rather than on a particular self-understanding. It is the process, not a particular outcome, that is at issue. By depriving a person of this capability, the state violates their dignity. The concept of pride includes the Rawlsian view of dignity, which begins with the individual's ability to formulate their life plan and have confidence in achieving it. An LGBTQ person needs to be able to envision themselves living according to the truth of their gender and sexuality. Thus, achieving an understanding and acceptance of one's own worth constitutes the experience of pride. Third, the achievement of this capability is also a predicate to claims for equality. Without the belief that one has equal worth, making an equality claim is challenging. Based on such an authentic understanding, one can then make claims for equality.<sup>334</sup>

Inputs to this capability include all the things that help one in understanding one's sexuality and gender. This would involve mental health,

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<sup>332</sup> See *supra* Section V.C.3.

<sup>333</sup> *Lawrence v. Texas*, 539 US 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 US 833, 851 (1992)).

<sup>334</sup> See Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014) (arguing that the law has evolved to recognize that the state no longer has a legitimate interest in channeling men and women into heterosexual family structures, and that such a recognition is a basis for LGB people to seek equality).

sufficient information provided through comprehensive sexuality education, increased levels of acceptance, and the presence of other LGBTQ people. Although this capability is experienced at the individual level, interpersonal and social elements contribute to its achievement.<sup>335</sup>

## 2. Vital Capability Two: Externally Express One's Sexuality and Gender to Others

This capability encompasses a wide range of expressive activities, including direct and symbolic disclosure; behavior; appearance, including body modification; social interactions; legal identity; and political claims. Identity, which is only one component of sexuality and gender, is entirely self-determined. This capability is achieved when an individual freely expresses their sexuality and gender.

This capability is necessary for dignity. Limitations on expression impair the individual from exercising their own self-determination to choose their own course in life. Thus, it is not sufficient to permit an LGBTQ person to formulate their own identity yet, at the same time, limit the capability of an LGBTQ person to act consistent with such an identity. Courts have considered, and rejected, the argument that a state may limit expressions of sexuality and gender as long as it does not require an individual to give up their sexuality or gender. In an early case against California by same-sex couples seeking the right to marry, California argued that LGBTQ people could retain their identity even if they were married to opposite sex partners.<sup>336</sup> The Court rejected the argument, noting that such a choice requires a person to negate their own sexual orientation.<sup>337</sup> Adjudicators of immigration claims in a number of countries have denied claims for refugee and asylum status on the basis that the applicant could return safely to their home country if they remained discreet about their sexuality.<sup>338</sup> The United Nations, as well as appellate courts in several countries, have begun to reject this reasoning based on a recognition of sexuality and gender as fundamental to a person's identity.<sup>339</sup>

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<sup>335</sup> See Nicole Legate et al., *Daily Autonomy Support and Sexual Identity Disclosure Predicts Daily Mental and Physical Health Outcomes*, 43 PERSONALITY & SOC. PSYCH. BULL. 860, 870 (2017).

<sup>336</sup> *In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008).

<sup>337</sup> *Id.*

<sup>338</sup> Heather Kolinsky, *The Shibboleth of Discretion: The Discretion, Identity, and Persecution Paradigm in American and Australian LGBT Asylum Claims*, 31 BERKELEY J. GENDER, L. & JUST. 206, 217 (2016); INT'L COMM'N OF JURISTS, REFUGEE STATUS CLAIMS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: A PRACTITIONERS' GUIDE 11, 84 (2016); Nicole LaViolette, *Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada*, 4 J. OF RSCH. IN GENDER STUD. 68 (2014).

<sup>339</sup> See, e.g., U.N. High Comm'r for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention*

This capability is also vital to human development outcomes. Studies show that being out may yield health benefits, including better well-being and mental health, decreased use of illicit drugs, lower cortisol levels, decreased incidence of cancer and infectious disease, and more relationship satisfaction.<sup>340</sup> A report by the World Health Organization states that “[t]he possibility for people to live in accordance with their self-identified gender, in law and in fact, has a beneficial effect on their overall well-being, including being able to access health, social, and other services.”<sup>341</sup>

### 3. Vital Capability Three: Relate, Interpersonally and Socially, to Others as Someone With a Nonconforming Sexual Orientation or Gender

The capability to relate is construed broadly to include a variety of interactions with other individuals and groups. These interactions include those that involve sex, love and/or intimate affection, family relationships (chosen or assigned), friends, and social/community support networks. This capability is achieved when an individual can engage in relationships of his/her choosing. This includes structuring features of the relationships, such as legal and financial rights, duties, and social supports.

The capability to engage in relationships is important regardless of whether the individual chooses to actually engage in relationships. Legal scholar Kees Waaldijk proposes that all legal issues concerning sexual orientation can be viewed through the capability to relate.<sup>342</sup> Under this framework, a sexual minority individual is, at an essential level, a person with the socially recognized potential to engage in same-sex relations. Because such relations are heaped with stigma, exclusion of sexual minorities is, in actuality, exclusion of the potential of same-sex relationships. According to this analysis, government policies could be viewed as either supporting the right to relate, say, through granting equal marriage rights or protecting the right to parent, or denying the right to relate through discrimination against LGBTQ people and the criminalization of same-sex sexual acts.<sup>343</sup>

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and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/12/01, ¶ 31 (Oct. 23, 2012), [<https://perma.cc/WC5P-NHKU>]; *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity . . . are so fundamental to one’s identity that a person should not be required to abandon them.”). *See also* *Egan v. Canada*, [1995] 2 S.C.R. 513, 528 (Can.) (“[W]hether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs . . .”).

<sup>340</sup> Larissa A. McGarrity & David M. Huebner, *Is Being Out About Sexual Orientation Uniformly Healthy? The Moderating Role of Socioeconomic Status in a Prospective Study of Gay and Bisexual Men*, 47 ANNALS BEHAV. MED. 28, 28 (2014).

<sup>341</sup> WORLD HEALTH ORG. DEP’T OF REPROD. HEALTH & RES., SEXUAL HEALTH, HUMAN RIGHTS AND THE LAW 3 (2015), [<https://perma.cc/M2N4-WF5L>].

<sup>342</sup> *See* Kees Waaldijk, *The Right To Relate: A Lecture on the Importance of “Orientation” in Comparative Sexual Orientation Law*, 24 DUKE J. COMP. & INT’L L. 161 (2013).

<sup>343</sup> *Id.*

The capability to relate helps respect dignity. As stated above, Justice Kennedy's decision in *Lawrence v. Texas* connected dignity to same-sex intimacy. This opinion disestablished the principle that the state has a legitimate interest in promoting heterosexuality. Thus, for those whose sexuality does not conform to the majority, dignity obligates the state to support same-sex relationships.<sup>344</sup> Although Kennedy's opinion focused on family-like aspects of the relationship rather than on sex,<sup>345</sup> there is strong reason to include the protection of sexual acts in respecting dignity. Indeed, based on the empirical work on identity development theory mentioned previously, we know that sexual activity is a component of the process of understanding one's own identity.<sup>346</sup> To this extent, this capability recognizes that social and sexual interaction can benefit the solitary individual as well as the intimate couple.

Psychologist Aaron Devor, one of the world's leading gender identity researchers, recognizes the universality of the need to live in a connected, interdependent manner:

Each of us are social beings and as such we live in a sea of other humans with whom we interact during most of the waking hours of our lives. Even when we are not in contact with others, we devote a tremendous amount of our psychic energies to being psychologically engaged with others. Each of us has a deep need to be witnessed by others for who we are. Each of us wants to see ourselves mirrored in others' eyes as we see ourselves. These interactive processes, witnessing and mirroring, are part of everyone's lives. When they work well, we feel validated and confirmed—our sense of self is reinforced.<sup>347</sup>

Devor's statement eloquently articulates why relating to others is an important factor in human development for LGBT people.

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<sup>344</sup> Franklin, *supra* note 334, at 827-29.

<sup>345</sup> *Lawrence v. Texas*, 539 U.S. 565, 567 (2003) ("To say that the issue [is] simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."). See, e.g., Franke, *supra* note 175, at 1400; Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER. & L. 21, 30 (2010).

<sup>346</sup> Savin-Williams & Cohen, *supra* note 306. Identity confusion, a stage of identity development, can occur in the realm of the sexual experience itself, beginning with sexual arousal. *Id.* Self-definition, particularly for men, can occur in sociosexual context. *Id.*

<sup>347</sup> Devor, *supra* note 305, at 4.

## VI. CONCLUSION

Having identified the three vital capabilities, the final question is how these might be used to shape policy and advocacy efforts on behalf of LGBTQ people. A dignity-based approach to LGBTQ policy and advocacy would entail at least three sets of activities. First, advocates and policy makers would need to monitor whether LGBTQ people actually have, or are deprived of, the three vital capabilities. Second, advocates should pursue a policy agenda to expand the vital capabilities. Third, advocates should expand the mission and messaging of the LGBTQ movement to encompass capabilities.

Understanding whether LGBTQ people have, or are deprived of, vital capabilities will provide a baseline for advocacy and policymaking. The question here is whether LGBTQ people are able to form their identity, engage in expression, and enter into relationships. An obvious step in gathering data is to ask LGBTQ people themselves. Such data would include surveys of subjective experiences of discrimination, which can identify areas of concern. Additionally, it is possible to measure levels of stigma through public opinion surveys of the general public. Recent improvements in data gathering also permit us to look at rates of employment, income, education, and other important areas to identify disparities between LGBTQ and non-LGBTQ people. These disparities are indicators that LGBTQ people face limitations in the capability to be LGBTQ.

A policy agenda to expand the vital capabilities would start with current priorities regarding the passage of non-discrimination laws. Knowing the limitations of such laws, advocates should also seek other measures to eliminate disparities. Stigma reduction programs might include public education efforts and training. Programs to increase employment rates might include supplemental training or educational opportunities for those seeking work. Employment programs might include training or educational opportunities. Programs to decrease health disparities might include training of healthcare providers or insurance programs focused on excluded LGBTQ populations. Advocacy efforts would also include seeking more programs to gather data to identify disparities.

Policies specifically targeting each of the three vital capabilities would also form part of the LGBTQ agenda. Supporting the formation of identity requires information, possibly provided by comprehensive sexuality education and training of counselors, therapists, teachers, and parents. The capability to express one's identity might involve the prohibition of gender-specific appearance standards, establishment of gender documentation and name change systems, and general stigma reduction programs via public education. The capability to enter into relationships might involve adding to the menu of possible relationships, such as time-limited contract marriages, co-parenting arrangements, and legally recognized companionate or compersion partnerships.

This agenda would expand the mission and messaging of the movement; respecting and protecting the dignity of LGBTQ people would become its central mission. One consequence of this would be that the movement would shift from a pure trait-centered framework to a people-centered framework (many parts of the movement have already made this shift). Under a trait-centered framework, LGBTQ equality is achieved by focusing on issues where the cause of inequality can be attributed to the trait of being a sexual or gender minority, often to the exclusion of deprivations caused by related traits. For instance, if Black LGBTQ people face deprivations because of race, then those deprivations are considered a race issue, not an LGBTQ issue. A people-centered framework would seek to improve the lives of all LGBTQ people in all respects, regardless of whether the deprivations are attributed to racial characteristics or sexuality and/or gender. This approach is necessitated by the view that the purpose of advocacy and policy is to respect the dignity of each LGBTQ person. Any violation of dignity to any LGBTQ person should be a concern to advocates. Additionally, the communitarian belief that each person is a product of their social context prevents us from conceptually chopping people up into their trait-based pieces. A people-centered approach obligates us to seek to improve the lives of LGBTQ people, full stop, and not just the part of the people that is LGBTQ.

The messages used by the movement would also shift to include dignity and worth. Rather than focusing on similarities, the movement would articulate the valuable differences that sexuality and gender can bring to people and society, thereby amplifying the moral and normative values held by LGBTQ people. Beyond deserving equality, dignity speaks to the value of human potential. As Charles Taylor has noted of the Kantian view:

[W]hat is . . . of worth here is a *universal human potential*, a capacity that all humans share. This potential, rather than anything a person may have made of it, is what ensures that each person deserves respect. . . . [W]e might also say that a universal potential is at its basis, namely, the potential for forming and defining one's own identity, as an individual, and also as a culture. This potentiality must be respected equally in everyone.<sup>348</sup>

The capability approach is, at its core, about human potential.<sup>349</sup> Ensuring the vital capabilities of LGBTQ people means that they have the potential to choose higher levels of achievement. The value of advocacy and policies lies not just in a quest to be equal, but a quest to be dignified in all our choices about sexuality and gender.

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<sup>348</sup> Taylor, *supra* note 82, at 41-42.

<sup>349</sup> Carlos A. Ball, *Martha Nussbaum, Essentialism, and Human Sexuality*, 19 COLUM. J. GENDER & L. 3, 4 (2010) (suggesting the source of human dignity is located in a person's ability to live with and through others, as well as their aspirations to live and thrive).