

HISTORICAL CONTINGENCY AND THE LIMITS OF IDENTITY: IMPLICATIONS FOR LAW AND POLICY

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ABSTRACT

This article engages and expands our current concept of identity. Building on the practice of intersectionality, it highlights the evolving and ever-changing nature of socially constructed identities and identifies an inherent limitation at the heart of all identity-based categories, namely, historical contingency. This observation has wide reaching implications regarding the practice of intersectionality and the continued use of identity as an organizing force in politics, law, and society. Historical contingency raises a series of important and difficult questions on the individual, group, and societal levels. How does this new temporal lens change our understanding of the production of identity? How do we organize for common goals in the face of an evolving and ever-changing sense of self and fidelity? How do we craft and implement resilient laws and policies that account for the dynamic nature of identity? This article engages each of these questions in turn, within the context of LGBTQ identities and explores the implication for both identity politics and social movement building. It recommends a politics of articulation where difference is not a point of division, but rather a way to understand our commonality as rooted firmly in the authenticity of our individual lived experiences. It concludes that historical contingency can both enhance and complicate our understanding of identity, subordination, social movements, and the prospect for progressive change.

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I. INTRODUCTION

Identity-based movements and politics have long been a target of conservative commentators.¹ Since the 2016 Presidential Election, however, voices on the Left have increasingly joined in the criticism,² arguing that identity-based politics not only cost Democrats the election,³ but also foretell the end of liberalism.⁴ The related practice of intersectionality has also drawn fire and has been characterized as an illiberal force that threatens our marketplace of ideas.⁵ This article does not wade into the popular political debate over identity politics, intersectionality, and the fate of liberalism.⁶ Suffice it to say that the current debate misapprehends the core insights and goals of transformative anti-oppression strategies and ignores their radical

1. See generally David French, *Conservative Americans Experience Progressive Identity Politics as Hatred*, NAT'L REV. (Sept. 20, 2017, 7:35 PM), <https://www.nationalreview.com/2017/09/identity-politics-democrats-preach-hate-toward-conservatives/> (arguing that “a hostile, illiberal brand of identity politics has seeped into every nook and cranny of American culture”).

2. E.g., Vanessa Williams, *An Identity Crisis for Identity Politics*, WASH. POST (July 27, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/27/an-identity-crisis-for-identity-politics/?utm_term=.083a7a1c2f91 (“Identity politics like McCarthyism [sic] has run its sad and destructive course.”).

3. See, e.g., Mark Penn & Andrew Stein, *Back to Center, Democrats*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/opinion/center-democrats-identity-politics.html> (blaming the Democrats’ “loss of support among working-class voters, who feel abandoned by the party’s shift away from moderate positions on trade and immigration” to “being mired too often in political correctness, transgender bathroom issues and policies offering more help to undocumented immigrants than to the heartland”).

4. See, e.g., Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html> (“[T]he fixation on diversity in our schools and in the press has produced a generation of liberals and progressives narcissistically unaware of conditions outside their self-defined groups, and indifferent to the task of reaching out to Americans in every walk of life.”); MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* 14 (2017) [hereinafter LILLA, *THE ONCE AND FUTURE LIBERAL*] (arguing that the “paradox of identity liberalism is that it paralyzes the capacity to think and act in a way that would actually accomplish the things it professes to want”).

5. See, e.g., David French, *Intersectionality, the Dangerous Faith*, NAT'L REV. (Mar. 6, 2018, 4:45 PM), <https://www.nationalreview.com/2018/03/intersectionality-the-dangerous-faith/> (describing intersectionality as “identity politics on steroids, where virtually every issue in American life can and must be filtered through the prisms of race, gender, sexual orientation, and gender identity”); Andrew Sullivan, *Is Intersectionality a Religion?*, N.Y. MAG., (Mar. 10, 2017), <http://nymag.com/daily/intelligencer/2017/03/is-intersectionality-a-religion.html?mid=twitter-share-di> (asserting that “intersectionality controls language and the very terms of discourse”). *Contra* Conor Friedersdorf, *Intersectionality is Not the Problem*, ATLANTIC (Mar. 8, 2018), <https://www.theatlantic.com/politics/archive/2018/03/intersectionality-is-not-the-enemy-of-free-speech/555014/> (arguing that “when properly understood, intersectionality is not inconsistent with the liberal project”).

6. Sean Illing, *Debating the Liberal Case Against Identity Politics*, VOX (Aug. 15, 2017, 8:30 AM), <https://www.vox.com/2017/8/15/16089286/identity-politics-liberalism-republicans-democrats-trump-clinton> (interview with Mark Lilla).

origins.⁷ Instead, this article goes back to basics and examines an inherent limitation at the heart of all identity-based categories, namely historical contingency. Identity is not stagnant and ahistorical. It emerges and evolves within a particular historical context and across a lifespan. This simple observation has wide reaching implications regarding the practice of intersectionality and the continued use of identity as an organizing force in politics, law, and society.⁸ It is not meant as a criticism of either identity politics or intersectionality per se, but rather as a corrective for the potentially totalizing tendencies of identity-based approaches to social issues.

Today, identity is widely understood to be socially constructed, but we rarely articulate the natural consequence of that observation: if identity is a social construct, then it must also be historically contingent.⁹ If identity is a product of the matrices of oppression and resistance that intersectionality helps us identify and dismantle, then it must also be fleeting and dynamic because it is necessarily shaped by these forces within a particular historical framework. Once we acknowledge the historical contingency of identity, we are faced with a series of important and difficult questions that arise on the individual, group, and societal levels. How does this new temporal lens change our understanding of the production of identity? How do we organize for common goals in the face of an evolving and ever-changing sense of self and fidelity? How do we craft and implement resilient laws and policies that account for the dynamic nature of identity?

This article engages each of these questions, in turn, within the context of LGBTQ identities.¹⁰ The rapid pace of social, political, and legal change in the area of LGBTQ rights provides a compelling example of the effect of historical context on the construction of identity.¹¹ In a matter of decades, individuals whom we would now recognize as LGBTQ have traversed the

7. Mychal Denzel Smith, *What Liberals Get Wrong About Identity Politics*, NEW REPUBLIC (Sept. 11, 2017), <https://newrepublic.com/article/144739/liberals-get-wrong-identity-politics> (explaining that “[i]dentity politics has its roots in an expansive, radical agenda”).

8. See, e.g., Jennifer C. Nash, ‘Home Truths’ in *Intersectionality*, 23 YALE J. L. & FEMINISM 445, 455–57 (2011) (noting that intersectionality itself is sensitive to historical context).

9. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (discussing gender); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 43 (1990) (discussing sexuality); Angela Onwuachi-Willig, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES, (Sept. 6, 2016, 5:28 PM), <https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs> (discussing race). Of course, the fact that identity is socially constructed does not mean that it is not real or experienced as such. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991) [hereinafter Crenshaw, *Mapping*] (“But to say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world.”).

10. Although this article focuses primarily on LGBTQ identities, the key concepts of historical contingency may be equally applicable to other identity categories. For example, some commentators have argued that the #MeToo movement has exposed generational differences among women. Jessica Bennett, *The #MeToo Moment: Parsing the Generational Divide*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/us/the-metoo-moment-parsing-the-generational-divide.html> (describing the “seeming generational divide”). *Contra* Josephine Livingstone, *Time Is a Feminist Issue: Six Writers Discuss the So-called Generational Divide in the #MeToo Movement*, NEW REPUBLIC (Feb. 20, 2018), <https://newrepublic.com/article/147124/myth-metoo-generational-divide> (asserting that “the so-called generational divide in the #MeToo debate is a pernicious fallacy”).

11. LGBTQ identity categories are particularly suited to illustrating the nature of historical contingency because many commentators have claimed that the very concept of the homosexual is an invention of modernity. See *infra* text accompanying notes 30–35 (discussing early sexologists).

boundaries of degeneracy, mental illness, criminality, and religious condemnation.¹² Take for example a man who has sex with men.¹³ Although he may stand at the intersection of multiple and potentially conflicting identities, he also occupies a specific moment in time—what we can conceptualize as the fourth dimension of intersectionality.¹⁴ How he will be seen (or not) by others will vary greatly depending on whether the time-stamp on the intersection reads 1958 or 1978 or 1998 or 2018.

The addition of a temporal component to intersectionality, however, is more complicated than simply being mindful of the date. As identity categories evolve across a lifetime, new advocacy efforts and legal arguments replace earlier stabs at equality, but an individual's world view and sense of self may not evolve at the same rate as social change. Returning to the example of a man who has sex with men, if we encountered him in 2018, we would likely recognize him as LGBTQ or gay, but he may not self-identify in that way for a variety of reasons.¹⁵ For instance, if he is older, he may continue to identify as homosexual, despite the fact that the term now sounds more like a diagnosis than a person to contemporary ears.¹⁶ His failure to self-identify as LGBTQ can have numerous implications, including a feeling of alienation from the LGBTQ community and related advocacy efforts. He may also be reluctant to access legal protections and social services directed toward LGBTQ individuals.

This disconnect between an individual's sense of self and the current iteration of identity occurs for the simple reason that we do not reinvent ourselves anew each day.¹⁷ Our individual identity and worldview are the

12. See *infra* text accompanying notes 36–44 (discussing evolution of scientific classifications).

13. The behavioral category of men who have sex with men, known by its acronym MSM, was created by public health officials during the first wave of the HIV/AIDS epidemic to capture men who were at high risk of contracting HIV based on their behavior, but did not otherwise identify with the social or political identity of gay. Rebecca M. Young & Ilan H. Meyer, *The Trouble with "MSM" and "WSW": Erasure of the Sexual-Minority Person in Public Health Discourse*, 95 AM. J. PUB. HEALTH 1144, 1144 (2005).

14. The notion of time as a fourth dimension exists in both science and philosophy and, of course, everyday lives. For example, Stephen Hawking identified three different arrows of time: psychological, thermodynamic, and cosmological. STEPHEN HAWKING, *THE ILLUSTRATED BRIEF HISTORY OF TIME: UPDATED AND EXPANDED EDITION* 182–195 (1996). Within physics, there have been numerous theories of time. For example, the Newtonian mathematical or linear model of time was conceptualized as a universal clock. The arrow of time is central to the Second Law of Thermodynamics that provides that systems irreversibly progress to greater entropy. Finally, Einstein's special relativity developed "spacetime" which theorizes a single four-dimensional continuum where time is not separate from space. In philosophy, four-dimensionalism, also referred to as temporal parts, is an ontological position that time is analogous to space. It generally adopts a view of eternalism where all points in time are equally real—just as spatially distant objects are no less real than closer objects. With respect to identity, four-dimensionalism is related to the concept of perdurantism where an individual is considered to be the sum of his temporal parts.

15. Even though the external constructions of LGBTQ identity changed, it is not necessarily the case that the individual's sense of self emerged at the same rate and in the same direction. The temporality of identity is a bit more complicated and multi-layered. Studies have shown that some older men who have sex with men prefer the term "homosexual," whereas younger men may reject the term "gay" entirely, in favor of the more expansive term "queer." Todd W. Rawls, *Disclosure and Depression Among Older Gay and Homosexual Men: Findings from the Urban Men's Health Study*, in *GAY AND LESBIAN AGING: RES. AND FUTURE DIRECTIONS* 117, 129 (Gilbert Herdt & Brian de Vries eds., 2004).

16. *Id.*

17. The temporal nature of identity is more than a series of freeze frames that lead sequentially to the present. This is consistent with the theory of perdurantism. See Katherine Hawley, *Temporal Parts*, in *STAN. ENCYCLOPEDIA PHIL.* (2010), <https://plato.stanford.edu/entries/temporal-parts/>.

unique product of our particular historical context.¹⁸ Accordingly, an appreciation for historical contingency requires not only the recognition that any particular intersection of identity bears a time-date stamp, but also that an individual's sense of self may or may not be congruent with that time-stamp. To further complicate matters, outdated modes of subordination also rarely disappear completely. Traces and echoes of historic modes of subordination often can be found securely embedded in new and emerging power structures, such as the continued salience of the stereotype of the sexual predator with respect to LGBTQ people.¹⁹

Historical contingency has the ability to deepen our understanding of identity, make our social movements more inclusive, and inform our law and policy recommendations. Part II discusses the ever-changing nature of identity from the individual perspective and how the rapid pace of legal and social change has affected different generational cohorts of individuals within the LGBTQ communities, with a particular emphasis on the pre-Stonewall generation.²⁰ Part III explores the implications of historical contingency for both identity politics and social movement building. It recommends a politics of articulation where difference is not a point of division, but rather a way to understand our commonality as rooted firmly in the authenticity of our individual lived experiences. Part IV turns to the implications for law and policy by identifying instances where the failure to consider the temporal nature of LGBTQ identity categories results in laws and policies that are inevitably underinclusive. A brief conclusion outlines the ways in which historical contingency can both enhance and complicate our understanding of identity, subordination, social movements, and the prospect for progressive change.

II. LGBTQ INDIVIDUALS AND INTERSECTIONALITY

For nearly thirty years, the prism of intersectionality has enhanced our understanding of identity,²¹ allowing us to visualize and untangle multiple double binds as we began to “map the margins.”²² Intersectionality suggests a compelling three-dimensional metaphor of a traffic intersection that can successfully reduce even the most complex iteration of self to a common

18. A worldview has been described as the “fundamental cognitive, affective, and evaluative presuppositions a group of people make about the nature of things, and which they use to order their lives.” PAUL G. HIEBERT, *TRANSFORMING WORLDVIEWS: AN ANTHROPOLOGICAL UNDERSTANDING OF HOW PEOPLE CHANGE* 15 (2008). Our sense of worldview consists of deeply rooted beliefs that cannot necessarily be changed by the revelation of new facts. *Id.*

19. For a discussion of the development of the sexual predator model, see generally JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* 272 (1999) (discussing sexual psychopath laws enacted in the 1930s).

20. The term “Stonewall” refers to the Stonewall riots that began on June 27, 1969 when police raided a gay bar, the Stonewall Inn, in Greenwich Village, New York. See generally MARTIN DUBERMAN, *STONEWALL* 203–09 (1993) (discussing the history of Stonewall through the lives of six individuals). The disturbances continued sporadically for several days. *Id.* The riots are commonly used as a demarcation for the beginning of the era of the Gay Liberation. See *infra* text accompanying notes 66–74 (discussing the Gay Liberation movement).

21. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, U. CHI. LEGAL F. 139, 149–52 (1989).

22. Crenshaw, *Mapping*, *supra* note 9. Crenshaw saw intersectionality as *augmenting* identity politics, noting that “[t]he problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences.” *Id.* at 1242.

everyday experience. It not only carves out a sense of place for those individuals on the margin, but it makes that location—that sense of place—accessible to others.²³ As the traffic swooshes by us in every direction, the metaphor of the intersection invites us to feel the confusion, fragmentation, and power of contemporary identity categories as they collide and coalesce. Although commentators have proposed different ways to rework and refine the metaphor,²⁴ the core observations of intersectionality regarding the multivalent nature of identity have endured to serve as the basis of our social theory, legal reforms, and progressive agendas for social change.²⁵

This section explores how LGBTQ identity, as lived and experienced, is not only multivalent, but also historically contingent,²⁶ and what that means for our understanding of identity formation and intersectionality. It begins by outlining the stark differences existing between and among certain LGBTQ generational cohorts. It then explains how our present articulation of intersectionality fails to capture the longitudinal component that is essential to both identity formation and the interlocking matrices of subordination and privilege. Whether conceptualized as crossroads, a roundabout, or a cloverleaf, every point of intersection represents a position in space that is also a snapshot of a discrete point in time—past, present, or future.²⁷ By focusing primarily on location and place, the explanatory power of the metaphorical intersection becomes constrained by the very spatial properties that make the image so effective and accessible.²⁸ The traffic in the intersection may seem like it is coming at us from all directions, but it only moves in one direction through time.²⁹ As explained below, however, not all subjects necessarily move through time in the same way or at the same pace.

23. *Id.* (“My objective . . . is to advance the telling of that location by exploring the race and gender dimensions of violence against women of color.”); see also Bim Adewunmi, *Kimberlé Crenshaw on Intersectionality: “I Wanted to Come Up with an Everyday Metaphor That Anyone Could Use,”* NEW STATESMAN (Apr. 2, 2014), <https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could> (quoting Crenshaw, “I wanted to come up with a common everyday metaphor that people could use to say: ‘it’s well and good for me to understand the kind of discriminations that occur along this avenue, along this axis – but what happens when it flows into another axis, another avenue?’”).

24. Emily Grabham et al., *Introduction, in* INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 14 (Emily Grabham, Davina Cooper, Jane Krishnadas & Didi Herman eds., 2009) (explaining “a recent effort within literatures on intersectionality to find more appropriate metaphors”).

25. Leslie McCall, *Introduction, in* THE INTERSECTIONAL APPROACH: TRANSFORMING THE ACADEMY THROUGH RACE, CLASS, AND GENDER 10 (Michele Tracy Berger and Kathleen Guidroz, eds. 2009) (explaining intersectionality “as a conceptual framework, as a methodological approach, and as a lived experience or where individuals “reside” and navigate social relations”).

26. NANCY J. KNAUER, *GAY AND LESBIAN ELDERS: HISTORY, LAW AND IDENTITY POLITICS IN THE UNITED STATES* 5 (2011).

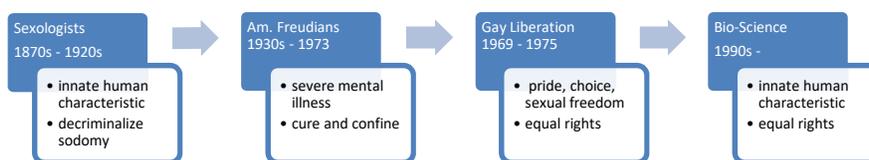
27. See, e.g., Kim Case, *Toward an Intersectional Pedagogy Model: Engaged Learning for Social Justice, in* INTERSECTIONAL PEDAGOGY: COMPLICATING IDENTITY AND SOCIAL JUSTICE 1 (Kim Case ed., 2017) (describing a complex system of concentric circles); Adrienne Dressel & Timothy Corivdae, *Experiential Activities for Engaging Intersectionality in Social Justice Pedagogy, in* INTERSECTIONAL PEDAGOGY 214, 219 (describing a cloverleaf).

28. Grabham et al., *supra* note 24 (noting a limitation of the metaphor in that “the term ‘intersection’ implies stasis rather than movement [and] does not help us visualize the construction of the social in a dynamic sense”).

29. David Layzer, *The Arrow of Time*, 233 *SCIENTIFIC AMERICAN* 56, 56 (Dec. 1975). Discussing the irreversibility of the “arrow of time,” Layzer explains, “The historical and the thermodynamic arrows of time both derive from processes that always have the same direction; they are defined by events that cannot be undone.” *Id.* at 56.

A. OUR EVOLVING UNDERSTANDING OF SEXUALITY AND GENDER

The last twenty-five years have seen a remarkable shift in public opinion regarding LGBTQ rights. There has also been a steady dismantling of the legal disabilities imposed on LGBTQ individuals and growing political empowerment.³⁰ Although the positive advancements have been significant by any measure, they also reflect a larger redefinition that has taken place with regard to our scientific and popular understanding of sexuality and gender identity. This process of redefinition has unfolded over the course of many decades and set the stage for some of the more tangible progress in the areas of political and civil rights. At each juncture, the prevailing medico-scientific explanations have invited and informed legal responses, as well as therapeutic interventions. They have also influenced popular opinion and the subjects of the theories themselves.



Science first turned its attention to LGBTQ people at the end of the nineteenth century when the early sexologists created the theory of inversion or “contrary sexual sensations.”³¹ Prior to that, religion and the common law policed same-sex sexuality and cross-gender behavior, but their focus was on acts and not identity. Sodomy was something a person did, not who they were.³² In contrast, the theory of inversion identified a specific type of individual who experienced the feelings of the opposite sex.³³ It was considered a natural human variation that, although suboptimal, should not be criminalized.³⁴ The sexologists also did not attempt to “cure” inversion.³⁵

By the first half of the twentieth century, Freudian psychoanalytic theory began to displace the naturalism of the sexologists with a very different view

30. Under the Trump administration, progress at least at the federal level has stalled and numerous Obama-era administrative gains have been reversed. See Robin Maril, *Trump’s Administrative Abuse and the LGBTQ Community* (2017), <https://www.hrc.org/resources/trumps-administrative-abuse-and-the-lgbtq-community>. Despite these most recent setbacks at the administrative level, the trajectory of the LGBTQ rights movement has been overwhelmingly positive.

31. See generally FOUCAULT, *supra* note 9 (describing the “naming” of the homosexual).

32. *Id.* at 43.

33. Foucault asserted that under the sexologists’ theories the newly minted homosexual “was characterized . . . less by a type of sexual relations than by a certain way of inverting the masculine and the feminine in oneself.” *Id.*

34. With regard to inverts, Krafft-Ebing argued that the law should “cease to punish them” and that society should not stigmatize them because of the terrible toll it takes on the invert, resulting in “mental despair,—even insanity and suicide,—at the very least, nervous disease” R. VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: A MEDICO-LEGAL STUDY* 410 (Charles Gilbert Chaddock trans., F.A. Davis Co. 7th ed. 1920).

35. *Id.* at 228–30.

of homosexuality.³⁶ The American Freudians³⁷ theorized that homosexuality was an acquired and severe socio-pathic mental illness that warranted containment and therapeutic intervention. Most disturbingly, they believed that homosexuals recruited children through sexual initiation and then those children grew up to be homosexual predators themselves.³⁸ This alarming view of homosexuality led to barbaric efforts to “cure” homosexuality through aversion therapy, electro-shock treatment, and psycho-surgery.³⁹ It also informed restrictive laws designed to both punish homosexuals and keep them away from children.⁴⁰

At the end of the 1960s, gay liberationists directly challenged this view with the slogan “Gay Is Good” and introduced a new discourse of sexual freedom, autonomy, and choice.⁴¹ After the psychiatric community declassified homosexuality as a mental illness in 1973, bio-science started its search for the “gay gene” and proof that sexual orientation and gender identity were innate.⁴² Although the weight of the scientific evidence remains inconclusive,⁴³ public opinion has clearly shifted to accept that sexual orientation and gender identity are innate characteristics.⁴⁴ Presently, a majority of Americans believe that gay men and lesbians were born that way,⁴⁵ whereas in 1977, only thirteen percent of those surveyed thought that sexual orientation was inborn.⁴⁶

It is important to note that transgender individuals have a distinctly different relationship with the medical profession than the LGB communities because many transgender individuals pursue gender confirming medical

36. See TERRY, *supra* note 19, at 56 (describing psychoanalytic model of homosexuality “as perversions of the normal sex drive caused by the stresses and strains of psychosexual development” as opposed to “a hereditary or congenital defect that manifested itself in sexual inversion”).

37. Although Freud’s view of homosexuality was relatively benign, in the United States, a group now referred to as the “American Freudians,” drastically changed the etiology of homosexuality from a perversion of the sex drive that should not be changed to a phobic response to the opposite sex that was susceptible to therapeutic intervention. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 28–29 (1981).

38. TERRY, *supra* note 19, at 272–75 (discussing sexual psychopaths).

39. See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 172 (1997) (reporting 2000 pre-frontal lobotomies performed on sex offenders between 1938–1946).

40. See TERRY, *supra* note 19, at 272.

41. SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 221–23 (1996).

42. See, e.g., Natalie Angier, *Report Suggests Homosexuality Is Linked to Genes*, N.Y. TIMES, July 16, 1993, at A1, <https://www.nytimes.com/1993/07/16/us/report-suggests-homosexuality-is-linked-to-genes.html> (discussing 1993 study by Dean Hamer regarding a potential genetic marker, popularly referred to as the “gay gene”); Malcolm Gladwell, *Genes Tied To Sexual Orientation; Study of Gay Men Bolsters Theory*, WASH. POST, Dec. 17, 1991, at A1, A4 (discussing the 1991 twin study by J. Michael Bailey and Richard Pillard); Christine Gorman, *Are Gay Men Born That Way?*, TIME, Sept. 9, 1991, at 60–61 (describing Simon LeVay’s 1991 study of the hypothalamus of gay men).

43. Published in 2017, a genome-wide association study identified several genes “plausibly relevant to the development of sexual orientation.” Alan R. Sanders et al., *Genome-Wide Association Study of Male Sexual Orientation*, NATURE.COM (Dec. 7, 2017), <https://www.nature.com/articles/s41598-017-15736-4.pdf>; see also Peter Dockill, *We May Have Just Identified Genetic Evidence of Male Sexual Orientation: But That Still Doesn’t Mean There’s a ‘Gay Gene’*, SCIENCE ALERT (Dec. 7, 2017), <https://www.sciencealert.com/we-just-identified-genetic-evidence-male-sexual-orientation-gay-gene>.

44. Jeffrey Jones, *Majority in U.S. Now Say Gays and Lesbians Born, Not Made*, GALLUP (May 20, 2015), <http://news.gallup.com/poll/183332/majority-say-gays-lesbians-born-not-made.aspx> (reporting results of Gallup polls from 1977 to 2015).

45. In 2015, 51% of those surveyed responded that they believed that people are born gay or lesbian. *Id.*

46. *Id.*

intervention.⁴⁷ Rather than the “cure” that the Freudians offered to change homosexuals, this intervention is designed to confirm an individual’s physical being with their gender identity.⁴⁸ In order to access gender confirming care, individuals are required to secure a diagnosis of gender dysphoria.⁴⁹ The diagnosis then acts as a gatekeeper to what can be lifesaving care.⁵⁰ In addition to questions of access and cost, the requirement of diagnosis places transgender individuals in a relationship with the medical profession where the medico-scientific guidelines of diagnosis can dictate their ability to live their authentic lives.⁵¹

B. LGBTQ GENERATIONAL COHORTS

The transition from nature (the sexologists) to nurture (American Freudians) to self-determination (Gay Liberation) and then back again to nature (Bio-Science) represents a series of massive shifts in understanding of the cause, desirability, and potential treatment for issues related to sexual orientation and gender identity.⁵² These shifts had the power to produce differences among cohorts within the LGBTQ community that are deeply ontological in nature and go to the core of an individual’s understanding of self and their right to exist in the world. This section explores the different generational cohorts within the LGBTQ community as an example of historical contingency. The most notable distinction between generations is the difference between those LGBTQ people who came of age before Gay Liberation and the advent of a public pro-gay narrative of pride, referred to here as the pre-Stonewall generations, and those who came of age with access to positive LGBTQ images and messages, referred to here as the Pride Generations.

1. The Pride Generations

The rapid pace of social change in the area of LGBTQ rights has led sociologists to suggest that the LGBTQ communities are comprised of highly compressed age cohorts delimited by relatively narrow social and political periods.⁵³ These cohorts are defined by different milestone political and media events that, in turn, influence the worldview of the individuals in the

47. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 18 (2003) (discussing the “oppressive relationship between the medical establishment and gender transgressive people”).

48. *Id.*

49. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.6, at 452 (5th ed. 2013).

50. Susan A. Speer & Ceri Parsons, *Gatekeeping Gender: Some Features of the Use of Hypothetical Questions in the Psychiatric Assessment of Transsexual Patients*, 3 DISCOURSE & SOC’Y 785, 785–86 (2006).

51. In terms of access, only four states ban insurance exclusions for transgender individuals. See *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN (Mar. 29, 2018), <https://www.hrc.org/state-maps/transgender-healthcare>. Another nine states and the District of Columbia provide transgender-inclusive insurance benefits for state employees in addition to banning insurance exclusions for transgender individuals. *Id.*

52. See *supra* text accompanying notes 31–43 (discussing evolution of medico-scientific theories).

53. Glenda M. Russell & Janis S. Bohan, *The Gay Generation Gap: Communicating Across the LGBT Generational Divide*, 8 POL. J. INST. GAY & LESBIAN STRATEGIC STUD. 2–3 (2005) http://www.iglss.org/media/files/Angles_81.pdf.

cohort and their self-development.⁵⁴ The result is narrow generational bands that may span only several years.⁵⁵

For example, the experience of today's teenager who grew up watching *Glee*, *Modern Family*, and *The Fosters* may seem worlds away from the teenager who waited with much anticipation to see whether Ellen DeGeneres' character would actually dare to come out in 1996 on the *Puppy Episode*.⁵⁶ If we expand our time frame, it is easy to see the potential gaps and differences grow even more pronounced. Consider the teenager who came of age during the early 1980s and the first wave of the HIV/AIDS epidemic when a majority of Americans favored quarantine for people who were HIV positive and politicians openly called gay men "perverts."⁵⁷ What about the teenager in the late 1970s who snuck out of her house to attend a Gay Pride Parade while Anita Bryant tirelessly campaigned to "Save Our Children"?⁵⁸ How does she compare to today's teenager who grew up watching Ru Paul's *Drag Race*, saw the Obama White House don rainbow colors to commemorate *Obergefell v. Hodges*, and lobbied her state legislature with her parents to help defeat a bathroom bill?⁵⁹

No doubt these hypothetical teenagers all would have had very different experiences reconciling their LGBTQ identities, depending not only on when they came of age, but also whether they had an accepting family⁶⁰ and where they grew up.⁶¹ However, one thing these teenagers all have in common is that they came of age at a time when there was a public pro-LGBTQ narrative that began with the advent of the Gay Liberation movement.⁶² These are the Pride Generations who benefited from the new dialogue of openness and pride that was ushered in with the Gay Liberation movement, as well as the expanding legal protections.⁶³ For the first time, LGBTQ people were able to access a positive view of LGBTQ individuals,

54. *Id.*

55. *Id.*

56. John J. O'Connor, *Coming Out Party: The Closet Opens, Finally*, N.Y. TIMES (April 30, 1997), <http://www.nytimes.com/1997/04/30/arts/coming-out-party-the-closet-opens-finally.html>.

57. See Edward I. Koch, *Senator Helms' Callousness Toward AIDS Victim*, N.Y. TIMES (Nov. 7, 1987), <https://www.nytimes.com/1987/11/07/opinion/senator-helms-s-callousness-toward-aids-victims.html> (quoting Senator Helms, R-NC). See generally Lawrence O. Gostin, *The Politics of AIDS: Compulsory State Power, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1019 (1989).

58. The first Gay Pride day was called Christopher Street Liberation Day, and it was celebrated in New York City on June 28, 1970, the first anniversary of the Stonewall Riots. Pride events are held each year in cities across the country, traditionally during the month of June. AMIN GHAZIANI, *DIVIDENDS OF DISSENT: HOW CONFLICT AND CULTURE WORK IN THE LESBIAN AND GAY MARCHES ON WASHINGTON* 32–33 (2008).

59. Juliet Elperin, *For Obama, Rainbow White House Was 'a Moment Worth Savoring'*, WASH. POST (June 30, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/30/for-obama-rainbow-white-house-was-a-moment-worth-savoring/?utm_term=.6c9fc319f054.

60. LGBTQ individuals generally do not grow up in LGBTQ families. Empirical research shows that the level of acceptance in a family can make a world of difference. Even small levels of rejecting behavior can have adverse results for a questioning of LGBTQ child. See, e.g., Caitlyn Ryan, *Generating a Revolution in Prevention, Wellness & Care for LGBT Children & Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 331, 338 (2014).

61. There are vast regional disparities in the United States regarding LGBTQ rights and acceptance levels. Some foreign governments have even issued travel warnings for their citizens visiting certain parts of the United States. See, e.g., Maureen O'Hare, *UK Issues Travel Warning About Anti-LGBT Laws in U.S. States* (Apr. 22, 2016), <https://www.cnn.com/travel/article/uk-lgbt-travel-advice-north-carolina-mississippi/index.html> (singling out Mississippi and North Carolina).

62. ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 30–43 (1996).

63. *Id.*

their communities, and the families they formed.⁶⁴ Although the early messages of pride and community were strongly countered by mainstream anti-LGBTQ beliefs, the fact they existed and were accessible represented tremendous progress over what earlier generations had faced when homosexuality was a point of shame and deemed a severe mental illness that needed to be contained and cured.⁶⁵

Historians routinely point to the 1969 Stonewall Riots as the beginning of the short-lived Gay Liberation movement.⁶⁶ In addition to jumpstarting a movement, that historical moment marked the beginning of a new way of talking and thinking about sexuality and gender.⁶⁷ The wide media coverage of Gay Liberation and some of its more colorful tactics ensured that its message that “Gay Is Good” reached a large audience.⁶⁸ Its slogans of pride would periodically appear in living rooms whenever gay liberationists “zapped” the evening news or other media events.⁶⁹ By the early 1970s, there was a firmly established, albeit contested, pro-LGBTQ narrative that urged gay men and lesbians to come out and declare themselves.⁷⁰ In 1975, *Time Magazine* chose to put the first openly LGBTQ person on its cover—Sergeant Leonard Matlovich, a decorated Vietnam veteran. The headline for the issue was *I am a Homosexual*, and subtitle read: *The Gay Drive for Acceptance*.⁷¹

Gay Liberation correctly identified the continued classification of homosexuality as a mental illness to be a major stumbling block on the road to equality. Gay activists marshalled new scientific studies that showed no difference between homosexual and non-homosexual test subjects to argue that homosexuals were not mentally ill.⁷² They targeted the American Psychiatric Association (APA) and lobbied aggressively for the organization to declassify homosexuality as a mental illness and delete it from the

64. Historian George Chauncey notes that “it was only in the 1990s that lesbian and gay images, often positive and increasingly diverse and complex, permeated the mass media” GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 53 (2005).

65. See *supra* text accompanying notes 37–39 (discussing classification of homosexuality as a mental illness).

66. See generally DUBERMAN, *supra* note 20. The disturbances continued sporadically for several days. *Id.* at 203–09.

67. See LEILA J. RUPP, *A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA* 176–77 (2002).

68. The slogan had actually been adopted by the fledging homophile movement that had started in the 1950s, but it was later appropriated and popularized by Gay Liberation. BAYER, *supra* note 37, at 89–91.

69. See generally MARC STEIN, *THE CITY OF SISTERLY AND BROTHERLY LOVES: LESBIAN AND GAY PHILADELPHIA, 1945–72* (2000).

70. Gay liberationists very consciously constructed a public counter-narrative that “Gay Is Good” and urged gay and lesbian individuals to declare themselves and leave the false security of the closet with slogans such as: “Closets are for Clothes” and “Out of the Closet and Into the Streets.” Stacey D’Erasmus, *Out of the Closets and into the Streets*, N.Y. TIMES, Apr. 4, 1999, at BR8 (reviewing *Tales of the Lavender Menace*); Alice Noble, *Members of the Homosexual Community Marched in Colorful Gay . . .*, UNITED PRESS INT’L (June 28, 1981), <https://www.upi.com/Archives/1981/06/28/Members-of-the-homosexual-community-marched-in-colorful-gay/7350362548800/> (describing gay pride parades across the United States).

71. *I Am a Homosexual*, TIME (Sept. 8, 1975), <http://content.time.com/time/covers/0,16641,19750908,00.html>.

72. LEVAY, *supra* note 41.

Diagnostic Statistical Manual (DSM).⁷³ Under sustained and sometimes fierce pressure from gay activists, the American Psychiatric Association (APA) voted to declassify homosexuality in December 1973, prompting one newspaper to declare, “20 Million Gain Instant Cure.”⁷⁴

The declassification of homosexuality eliminated an important point of stigma and subordination, and it facilitated more tangible gains in the area of legal rights, social acceptance, and political empowerment. By the mid-1970s, the Gay Liberation movement was being replaced by a movement for civil and political equality that took a longer and more pragmatic view of social change that has become our present-day LGBTQ rights movement. Despite the initial optimism, after declassification the United States remained a deeply homophobic and transphobic nation where sodomy was criminalized in the majority of states, and no state-wide antidiscrimination protections were enacted until 1982.⁷⁵ The Gay Liberation Movement, however, had started a public counter-narrative that advocated pride and openness and set the stage for the push for relationship recognition and marriage equality that began in the 1990s.

2. The Pre-Stonewall Generations

The emergence of the pro-LGBTQ narrative that accompanied Gay Liberation serves as a natural dividing line or touchstone when attempting to map LGBTQ generational shifts. The pre-Stonewall generation came of age during a time when LGBTQ individuals were pathologized and stigmatized. Memoirs from the period often report that individuals worried that they “were the only one”⁷⁶ and sometimes they did not even have a word to describe their profound sense of difference.⁷⁷ The Motion Picture Production Code (also known as the Hays Code) that was in place until 1968 prohibited, among a long list of other things, the portrayal of “sex perversion” in movies.⁷⁸ Criminal obscenity laws were used to silence discussions or depictions of homosexuality.⁷⁹ Although paperback titles sometimes broached the subject, and there were coded veiled references to LGBTQ people in movies and literature, the price of visibility was almost uniformly an unhappy ending for the LGBTQ protagonist.⁸⁰

For individuals who came of age during this period, there was no concept of “coming out”⁸¹ to family and friends because such a disclosure could risk

73. First published in 1952, the Diagnostic and Statistical Manual of Mental Disorders (“DSM-I”) included homosexuality as one of the most severe sociopathic personality disorders. BAYER, *supra* note 37, at 39.

74. LEVAY, *supra* note 41, at 224.

75. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 361 (1999).

76. *See generally* MARCIA M. GALLO, *DIFFERENT DAUGHTERS: THE HISTORY OF THE DAUGHTERS OF BILITIS AND THE RISE OF THE LESBIAN RIGHTS MOVEMENT* (2007).

77. *Id.*

78. RICHARD BARRIOS, *SCREENED OUT: PLAYING GAY IN HOLLYWOOD FROM EDISON TO STONEWALL* 125 (2003).

79. *See, e.g.*, *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam) (upholding Frist Amendment rights of homophile magazine).

80. *See generally* LESBIAN PULP FICTION: THE SEXUALLY INTREPID WORLD OF LESBIAN PAPERBACK NOVELS 1950–1965, at ix–xix (Katherine V. Forrest ed., 2005).

81. KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 44 (1997) (explaining possibility of involuntary medical intervention). Instead, Weston reports that the term “coming out” referred to the first time someone went to a gay bar. *Id.*

involuntary commitment to a mental institution where they would be subject to a range of horrific medical intervention designed to cure their illness.⁸² Homosexuals were disqualified from most employment, and they were considered unfit parents.⁸³ Gender variance was strictly policed and “cross-dressing” was a criminal offense.⁸⁴ For this generation, concealing one’s difference—being “closeted”—was simply a way of life, a matter of survival. As one researcher observed, today’s older LGBTQ adults are “the last generation to have lived their adolescence and young adulthood in hiding.”⁸⁵

During the pre-Stonewall era, official accounts largely conflated transgender concerns with homosexuality. The sexologists in particular viewed “contrary sexual feeling” as part of cross-gender identification.⁸⁶ Even today, anti-LGBTQ advocates refuse to distinguish between issues of sexual orientation and gender identity. The history and formation of transgender identity, however, presents a distinct and singular story about gender and embodiment in twentieth-century America. Although homosexuals and transgender individuals shared common cultural space and were subject to similar and inter-related and inter-locking forms of bias and harassment and some transgender individuals were also homosexuals, it is important to remember that the transgender members of the pre-Stonewall generation confronted a distinct set of challenges. Even though anti-LGBTQ bias has long been associated with hostility towards gender variant behavior,⁸⁷ issues related to gender identity are not necessarily congruent with those related to sexual orientation.

Over the years, many members of this pre-Stonewall generation responded to increasing social and legal acceptance by living more openly, but others remained deeply closeted. Some have never identified as homosexual or gay—let alone LGBTQ. For example, one study found a strong correlation between age and self-identification as gay, reporting that that “19.8% of the men in their 60s self-identify as homosexual, and 51.3% of individuals 70 years of age and older think of themselves as homosexual, rather than as gay.”⁸⁸ There is also disturbing evidence that even those older LGBTQ adults who did embrace the new openness have a tendency to “recloset” as they age, especially when faced with entering any form of assisted living.⁸⁹

82. ESKRIDGE, *supra* note 75, at 62.

83. BAYER, *supra* note 37, at 15–40 (1981) (discussing homosexuality from abomination to disease).

84. *See generally* CLARE SEARS, *ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO* (2015).

85. SKI HUNTER, *MIDLIFE AND OLDER LGBT ADULTS: KNOWLEDGE AND AFFIRMATIVE PRACTICES FOR THE SOCIAL SERVICES* 13–14 (2005).

86. *See supra* text accompanying notes 31–43 (discussing medico-scientific theories).

87. Foucault asserted that under the sexologists’ theories the newly minted homosexual “was characterized . . . less by a type of sexual relations than by a . . . certain way of inverting the masculine and the feminine in oneself.” FOUCAULT, *supra* note 9, at 43.

88. Rawls, *supra* note 15, at 129.

89. Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, at A1 (quoting LGBT elder). Gross notes:

The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives, when homosexuality was

Researchers have found that in addition to their failure to identify as LGBTQ and their continued reliance on the closet, some members of the pre-Stonewall generation remain profoundly affected by growing up with a diagnosable mental illness. For example, studies show that pre-Stonewall life experiences continue to inform the way older LGBTQ adults approach their relationships with medical professionals. Many older LGBTQ adults remain fearful of interacting with the medical profession and report difficulty accessing culturally competent care. They will avoid encounters with medical professionals to the extent possible and when they must access care, they are likely to remain closeted.⁹⁰ The reluctance to seek care is especially strong for older transgender individuals who transitioned without the benefit of medical intervention.⁹¹ Another example is the lingering power of the sexual predator stereotype. Researchers have suggested that older LGBTQ adults are often wary about forming inter-generational friendships because they fear being perceived as predatory older homosexuals.⁹²

The life choices and opportunities of the pre-Stonewall generations were also constrained by the historical context in which they grew up. As long-time survivors of homophobia and transphobia, older LGBTQ adults experience significant disparities in terms of income, wealth, and levels of disability.⁹³ They are also more likely to be single⁹⁴ and much less likely to

considered both a crime and a mental illness. A partner is identified as a brother. No pictures or gay-themed books are left around.

Id.; see also Jonathan Starkey, *Out of Isolation*, NEWSDAY, Feb. 1, 2008, at B06, available at 2008 WLNR 1983781.

90. In terms of health care, research suggests pre-Stonewall life experiences continue to inform the way LGBT elders approach their relationships with medical professionals. For example, Barker notes that older lesbians are “especially wary and fearful of health care and other service providers with their power to disrupt everyday life.” Judith C. Barker, *Lesbian Aging: An Agenda for Social Research*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 54 (Gilbert Herdt & Brian de Vries eds., 2004). LGBT elders often fail to disclose their sexual orientation and will avoid encounters with medical professionals to the extent possible. *Id.*

91. Daniel Redman, *Fear, Discrimination and Abuse: Transgender Elders and the Perils of Long-Term Care*, AGING TODAY (June 14, 2011), http://www.asaging.org/at/at-322/PDFs/ATv32n2_Redman.pdf.

92. Intergenerational relationships are not common in the gay and lesbian community. See Andrew J. Hostetler, *Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men*, in GAY AND LESBIAN AGING 143, 159–160 (2003). Researchers also report that gay and lesbian elders are hesitant to pursue intergenerational friendships because they fear being perceived as a predatory older homosexual—a stereotype popularized in the 1940s and 1950s by the American Freudians. Russell and Bohan note that “the homophobic assumption that adults are a risk to youth . . . (however mistaken) has often impeded worthwhile interactions across generations.” Russell & Bohan, *supra* note 53, at 1. For a discussion of the development of the sexual predator model, see generally TERRY, *supra* note 19 (discussing sexual psychopath laws). Not only does this impoverish the inter-generational transfer of knowledge with the community, but it leaves older LGBTQ adults without younger caregivers to assist them as they age. Eighty percent of all long-term care is provided by informal unpaid caregivers who are most often younger relatives or spouses. BARBARA COLEMAN & SHEEL M. PANDYA, AARP PUB. POL’Y INST., FAMILY CAREGIVING AND LONG-TERM CARE 1 (Nov. 2002), http://assets.aarp.org/rgcenter/il/fs91_Itc.pdf. A 2009 national study showed that relatives comprise 89 percent of all unpaid caregivers for individuals 50 years of age and older, and the average age of caregivers for individuals who are age 75 and older is 51 years of age. NAT’L ALLIANCE FOR CAREGIVING, CAREGIVING IN THE U.S.: A FOCUSED LOOK AT THOSE CARING FOR SOMEONE AGE 50 OR OLDER 19, 21 (2009), <http://www.caregiving.org/data/FINALRegularExSum50plus.pdf>.

93. Nancy J. Knauer, “*Gen Silent*”: *Advocating for LGBT Elders*, 19 ELDER L.J. 289, 302 (2010).

94. See Brian de Vries & John A. Blando, *The Study of Gay and Lesbian Aging: Lessons for Social Gerontology*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 3, 7 (Gilbert Herdt & Brian de Vries eds., 2004) (describing how gay men and lesbians are more likely to be single). Similar observations can also be made about gender and aging. For example, elder women are more likely to be unmarried and to be living alone without a partner due to the higher life expectancy for women and lower age at first marriage.

have children than their non-LGBTQ peers or younger LGBTQ cohorts.⁹⁵ They are highly likely to be estranged from their family of origin and often rely heavily on what anthropologists refer to as “chosen families.”⁹⁶ These chosen family structures represented a creative way to build a support system and community in the face of a hostile society and disapproving family,⁹⁷ but they do not enjoy the legal protections afforded to a family of origin, which can become increasingly important as individual family members age.⁹⁸ When taken in combination, these factors place older LGBTQ adults at a high risk of social isolation.⁹⁹ To some extent, this eventuality echoes the cautionary tale told by the American Freudians—that in the end the homosexual would be alone, isolated, and bereft of friends or family.¹⁰⁰

C. THE TEMPORAL ASPECTS OF LGBTQ IDENTITY

Historical contingency—the fourth dimension of intersectionality—makes apparent that every intersection of identity is necessarily located within time, as well as space. Along the axis of time, existing identity

95. *Id.* at 5. For the pre-Stonewall generation, children are most likely the product of prior heterosexual relationships, rather than intentionally conceived within same-sex relationships. Even older LGBTQ adults who do have children from prior heterosexual relationships may be estranged from them and therefore not able to call on them for support as they age. Transgender elders may have similar experiences with respect to children from pre-transition marriages.

96. *See de Vries & Blando, supra* note 94, at 8–11 (alternate family structure based on camaraderie and caring); Jacqueline S. Weinstock, *Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century*, in *GAY AND LESBIAN AGING, supra* note 94, at 177–210 (“friends as family”); *see also* Douglas C. Kimmel, *Issues to Consider in Studies of Midlife and Older Sexual Minorities*, in *GAY AND LESBIAN AGING, supra* note 94, at 267 (“family of choice”). *See generally* WESTON, *supra* note 81.

97. Douglas Kimmel provides the following explanation for the reliance on chosen family: It is widely thought that most older lesbians, gay men, bisexuals, and transgendered persons develop groups of friends who function as if they were kin; this has been termed a family of choice and is thought to provide more support, in many cases, than the individual’s biological or legal ‘family’.

Kimmel, *supra* note 96, at 268.

98. Chosen families are legally very fragile, and they tend to be single-generational. *See* Hostetler, *supra* note 92, at 143, 159–61. Intergenerational relationships are not common in the gay and lesbian community. *Id.* Accordingly, a chosen family or friendship group will age in unison without the protections afforded biological family members, such as inheritance rights and medial decision-making authority.

99. Social isolation refers to a situation where an individual has no one to call for help or assistance. JAIME M. GRANT ET AL., NAT’L GAY AND LESBIAN TASK FORCE POL’Y INST., *OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS* 89–92 (2010), http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf (explaining that isolation occurs when a person cannot access needed social and medical support services).

100. In her 1991 book, *Families We Choose: Lesbians*, anthropologist Kath Weston explained how gay men and lesbians faced the prospect of being uniquely without family in the traditional sense:

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

WESTON, *supra* note 81, at 24. Raymond Berger in his early book *Gay and Gray* described the fate that awaited aging homosexuals, according to the American Freudians, as follows:

The older homosexual . . . becomes increasingly effeminate with age, he is alienated from friends and family alike, and he lives alone, not by choice but by necessity. At thirty he is old. Since he is no longer sexually attractive to other homosexuals, he is forced to prey on children and to pursue anonymous sexual contacts in public places such as restrooms and parks. He is desperately unhappy.

RAYMOND M. BERGER, *GAY AND GRAY: THE OLDER HOMOSEXUAL MAN* 25 (1982).

categories change and evolve, as do modes of bias, subordination, and recognition. The frame of historical contingency also allows us to see more clearly how the echoes of past modes of bias and subordination are preserved by current practices. On the individual level, things get little more complicated because, as an individual moves through time, her identity may not evolve at the same rate as prevailing identity categories. As a result, some individuals may find themselves out of sync with the current iteration of identity. Accordingly, in order to fully grasp the temporal nature of identity, it is necessary to consider a two-force model that accounts for both present and past historical contexts while recognizing that individuals arrive at the present with the sum of their life experiences. In this way, the model must provide both an objective or outward measure of time and place, as well as a subjective or interior understanding of self.

Although it may be obvious that every intersection of identity has a fixed temporal location within a particular historical context, the exact coordinates of this location may seem frustratingly fleeting because the present quickly becomes the past, as does the future. Attempting to capture a particular intersection at a particular moment brings to mind the exploding calendar trope used in movies to show the passage of time as the pages of the calendar fly off the wall. But each page of that calendar bears an indelible “time stamp” that carries significant explanatory value. For example, a seventy-five-year-old woman in a long-term relationship with another woman stands at a complex intersection of race, gender, age, and sexual orientation. It goes without saying that our analysis (as well as her experience) would differ considerably if the snapshot captured the intersection of her identities in 1958, 1978, 1998, or 2018. Over each of those twenty-year snapshots, the status of women who have sex with other women changed drastically. In 1958, they were pathologized and considered mentally ill.¹⁰¹ By 1978 they had been cured and liberated.¹⁰² The Culture Wars of the 1990s vilified them as threatening the very foundations of society.¹⁰³ And by 2018 they had been granted the right to marry.¹⁰⁴

101. *See supra* text accompanying notes 36–39 (discussing classification of homosexuality as mental illness).

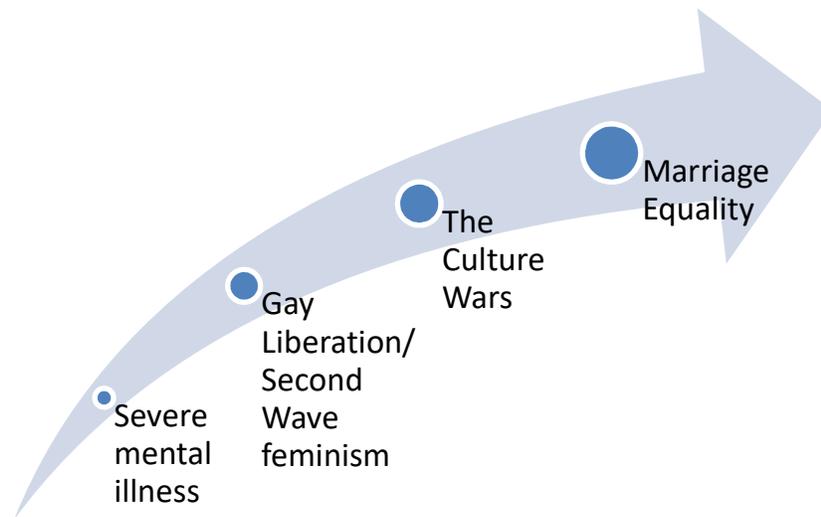
102. *See supra* text accompanying notes 41–42 (discussing Gay Liberation).

103. The traditional values movement began using the term “culture war” as a “catch-phrase” for the debate over homosexuality in 1992. DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 55 (1997) (defining “culture wars” as “struggles over ideas and values, rights and responsibilities”). A particularly heated example was the debate in 1996 over the federal Defense of Marriage Act. Members of Congress gave impassioned speeches about how homosexuality would bring about the fall of our culture. As Senator Robert Byrd R-NC stated:

[A]s history teaches us too often in the past, when cultures waxed casual about the uniqueness and sanctity of the marriage commitment between men and women, those cultures have been shown to be in decline. This was particularly true in the ancient world in Greece and, more particularly, in Rome.

142 CONG. REC. 10,100-02, S10,109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

104. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).



Across this timeline, the identity categories continued to evolve and change, along with political alliances. Our subject's sense of self and worldview may have also changed, although not necessarily in a manner that was congruent with these broader social and political developments. Even though our identity will continue to be read and reinterpreted in ever evolving contexts under ever evolving circumstances, we do not continually reconstitute ourselves anew with each approaching moment. Instead, we bring to any intersection the sum of our experience—our temporal parts—a series of snapshots of identity.¹⁰⁵ We may exist currently in what William James referred to as the “specious present,”¹⁰⁶ but we all arrive at this moment with baggage, trailing our temporal parts.¹⁰⁷ Some of us might be “ahead of our time,” whereas others might be decidedly “old school.”

Returning to our example of a woman with a longtime female partner who celebrates her 75th birthday in 2018, an appreciation for historical contingency allows us to see how her worldview is potentially a product of a different time. Of course, this is not to suggest that all older LGBTQ people are out of sync, but simply that they came of age in a different time and under dramatically different circumstances than today's generation of LGBTQ people. At the time of the Stonewall Riots in 1969, she would have been twenty-six years old.¹⁰⁸ By the time her severe sociopathic personality disorder was miraculously cured in 1973, she was turning thirty.¹⁰⁹ Her young adulthood would have been spent without the benefit of a public pro-LGBTQ narrative, as she labored under the weight of diagnosis and stigma.

105. Hawley, *supra* note 17.

106. 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 609 (1890).

107. ERIC T. OLSON, *WHAT ARE WE? A STUDY IN PERSONAL ONTOLOGY* 102 (2007).

108. See DUBERMAN, *supra* note 20 (discussing Stonewall Riots).

109. See *supra* text accompanying notes 72–74 (discussing declassification of homosexuality as a mental illness).

What passed as scientific knowledge during that period would now be understood as homophobic, as well as potentially misogynist and racist.

Like many individuals of her age, she might have sought professional help to control her “homosexual tendencies”¹¹⁰ or perhaps she was involuntarily committed by her parents when they grew concerned over her refusal to stay within the well-defined gender roles.¹¹¹ She may have been disowned by her family or self-estranged because of the weight of the closet. Given that the average age of first marriage was younger than the average age when people came out, she may have entered a heterosexual marriage.¹¹² Or she may have married to escape her difference. If she had children, her homosexuality would have rendered her a per se unfit parent, and she would have been denied custody and perhaps visitation.¹¹³

Coming of age before the promise of Title VII and Second Wave feminism, she would have encountered limited opportunities in terms of her education and career at a time when sex roles were much more rigid than they are today.¹¹⁴ Even the Help Wanted Ads were segregated by sex and all employment opportunities were expressly gendered—“Help Wanted Male” and “Help Wanted Female.”¹¹⁵ Lesbian stereotypes emphasized cross-gender performance, and the notion of the “mannish” or “butch” lesbian would have posed a direct challenge to the mid-century dictates of gender, as well as those of sexuality.¹¹⁶ Her potentially limited education and career opportunities could have translated into a lifetime of depressed earnings and other economic disparities.

110. MARTIN DUBERMAN, CURES: A GAY MAN’S ODYSSEY 27 (2002).

111. WESTON, *supra* note 81.

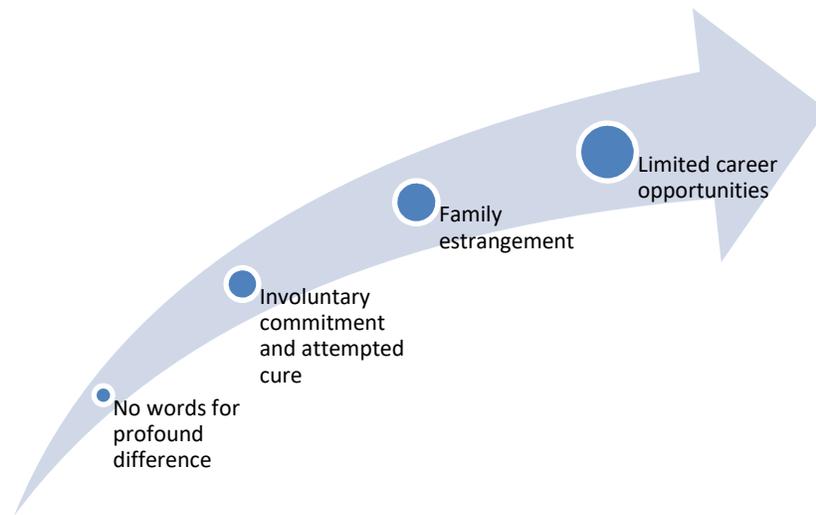
112. For example, in 1950 the median age of first marriage was 20.3 years of age for women and 22.8 years of age for men, as compared with a median age of first marriage in 2003 of 25.3 for women and 27.1 for men. U.S. BUREAU OF THE CENSUS, TABLE MS-2. ESTIMATED MEDIAN AGE AT FIRST MARRIAGE, BY SEX: 1890 TO PRESENT (2004), <http://www.census.gov/population/socdemo/hh-fam/tabMS-2.pdf>. By way of comparison, a 2001 study of older gay men and lesbians found that, for gay men and lesbians 60 and older, the average age of coming out was 23 years of age. Anthony R. D’Augelli & Arnold H. Grossman, *Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, Bisexual Older Adults*, 16 J. OF INTERPERSONAL VIOLENCE 1008, 1015 (2001). As a result, it is possible that many gay and lesbian elders came to terms with their homosexuality while in a heterosexual marriage. By way of contrast, a 2009 study reported that the average age of coming out was 13.4 years of age, making it less likely that an individual would come out after they were already in a different-sex marriage. Caitlin Ryan, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino, Lesbian, Gay and Bisexual Young Adults*, 123 PEDIATRICS 346 (2009).

113. BAYER, *supra* note 37, at 15–40 (discussing homosexuality from abomination to disease).

114. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

115. Laura Tanenbaum & Mark Engler, *Help Wanted—Female*, NEW REPUBLIC (Aug. 30, 2017), <https://newrepublic.com/article/144614/help-wantedfemale>.

116. See ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY 13 (1993).



If our 75-year-old subject were a lesbian of color, she would have encountered multiple vectors of oppression and discrimination throughout her lifetime. Her identity would have been formed not only during a time of officially mandated homophobia, but also during a period of government-imposed segregation and openly acknowledged white supremacy. Experiencing her homosexuality within the larger context of race and ethnicity, she would have spent her formative years in a climate that sanctioned extra-legal violence against persons of color, prescribed very narrow gender roles, and classified her unnamed difference as a mental illness.¹¹⁷

Today, our subject may not identify as homosexual, lesbian, gay, or LGBTQ for a variety of historical, personal, or political reasons.¹¹⁸ Of course, the persistent irony of identity is that this nuance will be lost on the traffic gunning for her in the intersection. Despite her internal (dis)identifications, she may nonetheless be read as LGBTQ and vulnerable to anti-LGBTQ bias, thereby revealing the conceit of presentism.¹¹⁹ To continue the metaphor, it is also not the case that all of the traffic in the intersection will be late model cars. Given the overlapping and mutually reinforcing nature of the historical regulation of sexual orientation and gender identity, every once in a while a classic car or two may zoom by, fueled by the American Freudians' belief in therapeutic intervention or their conviction that homosexuals prey on children.¹²⁰ As explained more fully in the next section, it is often possible to hear echoes of past forms of subordination in current law and policy.¹²¹

117. BAYER, *supra* note 37.

118. See *supra* note 112 (explaining that older LGBTQ people are less likely to identify as such). LGBTQ identities can also change across an individual's lifecourse.

119. See *supra* note 14 (explaining presentism).

120. See *supra* text accompanying notes 19, 92 (discussing sexual predator stereotype).

121. See *supra* text accompanying note 92 (discussing lingering, but outmoded forms of subordination).

III. IDENTITY POLITICS AND SOCIAL MOVEMENTS

In the last section, we explored the consequences of historical contingency for individual identity formation. Here, we move to the social and political level and ask what the temporal nature of identity means for the future of identity politics and social movement building. In the context of individual identity formation, we saw how historical contingency directs us to look both forward and backward while simultaneously underscoring the transitory nature of the present. We must look forward because identity is necessarily in the act of becoming. The personal narratives of identity, authenticity, and authority that form the basis of identity politics are ever-changing and evolving, as they reveal themselves in real time.¹²² But we must also be conscious of the past because individuals do not always evolve at the same pace as broader social change.¹²³ As a result, their voices may not be heard, and their needs may not be addressed. Moreover, we must be aware of our history because outmoded forms of bias and subordination often linger and find expression in present practices. The ability to recognize an old foe in new garb is an important skill to have when strategizing a movement for social change.

The term identity politics has been in circulation since the 1970s.¹²⁴ In many ways, it represents the embodiment of a core insight of Second Wave Feminism, namely “the personal is political.”¹²⁵ It does not simply refer to instances where an individual’s political positions on issues align with the interests of their particular social group. Rather, identity politics is an anti-oppression strategy that recognizes the power of identity and lived experience to shape and inform one’s politics. It is used primarily to refer to marginalized communities and progressive political issues, such as criminal justice reform, reproductive justice, and LGBTQ rights.¹²⁶ To be effective, identity politics requires the different interest or affinity groups to work in coalition across their differences, which requires a mobilization of resources and social movement building. Accordingly, identity politics must practice a politics of articulation where difference is not a point of division, but rather

122. The Combahee River Collective is often credited with coining the term identity politics. [A]s children we realized that we were different from boys and that we were treated differently. For example, we were told in the same breath to be quiet both for the sake of being “ladylike” and to make us less objectionable in the eyes of white people. The fact that racial politics and indeed racism are pervasive factors in our lives did not allow us, and still does not allow most Black women, to look more deeply into our own experiences and, from the sharing and growing consciousness, to build a politics that will change our lives and inevitably end our oppression We realize that the only people who care enough about us to work consistently for our liberation are us. Our politics evolve from a healthy love for ourselves, our sisters and our community which allows us to continue our struggle and work. This focusing upon our own oppression is embodied in the concept of identity politics. We believe that the most profound and potentially most radical politics come directly out of our own identity, as opposed to working to end somebody else’s oppression.

THE COMBAHEE RIVER COLLECTIVE, THE COMBAHEE RIVER COLLECTIVE STATEMENT (1978).

123. See *supra* text accompanying notes 15–18 (discussing individuals who do not evolve at the same rate as social change).

124. See *supra* note 122.

125. Carol Hanish, *The Personal Is Political*, in *RADICAL FEMINISM: A DOCUMENTARY READER* 113 (Barbara A. Crow ed., 2000).

126. Although it is most often used to refer to progressive causes, it is equally possible to apply the term to conservative issues or movements. For example, the alt-right could also be said to practice identity politics of white supremacy.

a way to understand our commonality as rooted firmly in our individual lived experiences.

This section examines three core insights of historical contingency in the context of identity politics and social movement theory: 1) identities are constantly evolving and changing, 2) individuals may not evolve at the same pace as social change, and 3) outmoded forms of bias and subordination rarely die, but instead are remastered and repackaged for new generations.

A. TOWARDS A POLITICS OF ARTICULATION

At first glance, the recognition that identities evolve and change over time would seem to make the very notion of identity politics unstable and fraught—a moving and unpredictable target. However, the fact that identity is dynamic does not diminish the power of personal narrative and life experiences to shape and inform political beliefs. The personal can remain political across a life course that involves multiple and changing identities. Identity politics describes how individuals process the political implications of their personal identities. It is generally agnostic with respect to political goals, although, as noted above, it is most commonly associated with progressive causes. Social movement theory fills in the necessary gaps by studying how these individuals mobilize around particular causes and platforms for social change.¹²⁷ Accordingly, the challenge presented by historical contingency lies in how to engage in effective coalition building and resource mobilization around dynamic difference.¹²⁸

A common critique of identity-based social movements is that they can exhibit strong essentializing tendencies that conflate differences in favor of a uniform movement identity.¹²⁹ For example, the LGBTQ rights movement has struggled with the full incorporation of transgender rights,¹³⁰ as well as the erasure of bisexual identities.¹³¹ Within the umbrella of transgender rights, there is now an increasing number of individuals who identify as non-binary or gender nonconforming who present new questions of inclusion.¹³² A recognition of the temporality of identity would encourage social movements to accommodate and welcome new iterations of related identities, rather than cling to an official, and most likely outmoded, rendition of identity that only serves to marginalize and exclude.

By embracing dynamic difference, a social movement can begin to practice a politics of articulation where commonality is forged across differences, not in spite of them. With respect to LGBTQ identity and

127. See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001) (describing development of social movement theory and social movement scholarship).

128. *Id.* at 28–34 (describing resource mobilization theory).

129. Crenshaw, *supra* note 9, at 1242 (“The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences.”).

130. Nick Duffy, *Transphobia and Homophobia are Inextricably Linked*, *ECONOMIST* (July 13, 2018), <https://www.economist.com/open-future/2018/07/13/transphobia-and-homophobia-are-inextricably-linked>.

131. JULIE A. GREENBERG, *INTERSEXUALITY AND THE LAW: WHY SEX MATTERS* 104–06 (2012).

132. Suzannah Weiss, *9 Things People Get Wrong About Being Non-Binary*, *TEEN VOGUE* (Feb. 15, 2018, 4:56 PM), <https://www.teenvogue.com/story/9-things-people-get-wrong-about-being-non-binary>.

advocacy, this calls for a new approach that no longer prioritizes sameness and acknowledges that LGBTQ people are not only different from one another, but also different in many ways from their non-LGBTQ peers. Like many movements that are built around equality claims, the LGBTQ rights movement has quite effectively pursued a two-part equality strategy that is based on claims of shared identity and equivalence. The first step is to establish that LGBTQ individuals are a distinct and deserving minority on account of their immutable, unchosen, and benign characteristics of sexual orientation or gender identity.¹³³ In this way, the claim of shared identity is consistent with the emerging bio-science consensus and popular understandings of sexual orientation and gender identity that are discussed in Part II.A.¹³⁴ When sexual orientation and gender identity are understood from this perspective, it is possible to advance equality measures by asserting that LGBTQ people are *the same as* their non-LGBTQ peers because everyone is born with an unchangeable sexual orientation and gender identity. The moral force behind such equality assertions is an implied claim of equivalence—given that LGBTQ people are *the same as* everyone else, they deserve equality of treatment and opportunity. The LGBTQ rights movement has successfully deployed this argument around a number of issues that have all stressed the element of sameness, such as the right to marry, serve in the military, and be free of workplace discrimination.¹³⁵

Although there is nothing necessarily untrue with this rendering of identity, it is always going to be underinclusive and result in an advocacy platform that is ill-equipped to meet the needs of anyone who does not mirror the heteronormative, cisgender American ideal. Moreover, sexual orientation and gender identity continue to carry great social meaning that can constrain opportunities and life choices and expose individuals to bias, discrimination, and violence.¹³⁶ The social meaning attached to these immutable, unchosen, and benign characteristics results in a range of disparities related to family formation, financial stability, and health outcomes.¹³⁷ It is difficult to shine the spotlight on these areas of disparities while trying to prove that LGBTQ people are just the same as everyone else. The continued emphasis on sameness leaves these issues unaddressed and further marginalizes non-conforming members of the community. A greater appreciation for difference would move beyond the exclusionary claims of shared identity and

133. See JAGOSE, *supra* note 62. Jagose refers to this as the “ethnic model of identity.” She explains that the ethnic model is “committed to establishing gay identity as a legitimate minority group, whose official recognition would secure citizenship rights for lesbian and gay subjects.” *Id.* at 60–61.

134. See *supra* text accompanying notes 43–46 (discussing bio-science)

135. All three have been successful campaigns. The push for marriage resulted in nationwide marriage equality after *Obergefell*, 135 S. Ct. at 2604–05. The focus on military service resulted in the repeal of “Don’t Ask, Don’t Tell” and a lift on the ban on transgender people serving in the military. The Trump administration attempted to reinstate the ban but was blocked by a federal court. Dave Phillips, *Ban Was Lifted, but Transgender Recruits Still Can’t Join Up*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/military-transgender-recruits.html>. Although there are not yet any federal workplace non-discrimination protections, they are in place in many states and municipalities. *State Maps of Laws & Policies, Employment*, HUM. RTS. CAMPAIGN (June 11, 2018), <https://www.hrc.org/state-maps/employment>.

136. See DOUG MEYER, VIOLENCE AGAINST QUEER PEOPLE: RACE, CLASS, GENDER AND THE PERSISTENCE OF ANTI-LGBT DISCRIMINATION (2015).

137. U.S. OFF. DISEASE PREVENTION AND HEALTH PROMOTION, *Lesbian, Gay, Bisexual, Transgender Health*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (noting “LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights”).

equivalence to target existing disparities while affirming the multiplicity of LGBTQ lives and experiences.

The notion that the identity-based social movements should embrace change and difference will not satisfy the liberal critics who bemoan the fractionalization of the Left and urge us to unite instead behind certain transcendent democratic values.¹³⁸ This critique argues that, in order to move forward with a coherent platform of progressive change, we must leave our differences unspoken and unexamined—quite literally for the good of the country.¹³⁹ However, a politics of articulation offers a stronger version of coalition politics that draws on the power of our differences and ability to find commonality through shared values. It may be messier and involve more words, but a politics of articulation allows us to anchor those transcendent democratic ideals in the lived experience and authenticity of individuals, who can then speak with authority about their own identities.¹⁴⁰

B. IDENTITY ACROSS THE LIFE COURSE

Historical contingency shows that as identity categories continue to emerge and evolve, there will be individuals who may in some way be out of sync with existing categories. We saw that this was potentially the case with members of the pre-Stonewall generations, some of whom have remained deeply closeted and may not identify as LGBTQ.¹⁴¹ Regardless of their self-identification, their sexual orientation and/or gender identity continues to carry social meaning that can expose them to anti-LGBTQ bias and has most likely constrained their opportunities and life choices.¹⁴² These non-identified group members pose a challenge for a politics of articulation and raise the questions about how to include and advocate on behalf of individuals who are not group members. It thus places a responsibility on present group members to not only include these individuals and their potential unique interests, but also to be aware that they exist in the first place.

In the case of the pre-Stonewall generations, the LGBTQ movement has not done an especially good job at advocating for their interests until

138. See, e.g., Lilla, *supra* note 4.

139. LILLA, *THE ONCE AND FUTURE LIBERAL*, *supra* note 4, at 9 (“Liberals . . . threw themselves into the movement politics of identity, losing a sense of what we share as citizens and what binds us as a nation.”)

140. Audre Lorde believed that lived experience is what gives us authority to speak. AUDRE LORDE, *SISTER OUTSIDER* 45 (1984) (“[I]f I didn’t define myself, for myself, I would be crunched into other people’s fantasies for me and eaten alive.”)

You do not have to be me in order for us to fight alongside each other. I do not have to be you to recognize that our wars are the same. What we must do is commit ourselves to some future that can include each other and to work toward that future with the particular strengths of our individual identities. And in order to do this, we must allow each other our differences at the same time as we recognize our sameness.

Audre Lorde, *Learning from the 60s*, Speech at Harvard University’s Malcolm X Weekend (Feb. 1982) (transcribed at BLACKPAST.ORG), <http://www.blackpast.org/1982-audre-lorde-learning-60s>.

141. See *supra* text accompanying notes 76–85 (discussing pre-Stonewall generations).

142. See *supra* text accompanying notes 85–89 (discussing disparities experienced by pre-Stonewall generations).

recently.¹⁴³ Many of its signature issues, such as marriage equality, the right to serve in the military, and protection from workplace discrimination, only have limited applicability to the needs of older LGBTQ people.¹⁴⁴ Instead, older LGBTQ people are worried about protections for their wider chosen family, economic insecurity, and health disparities.¹⁴⁵ Their concerns about discrimination involve venues other than the workplace, such as assisted living facilities and the doctor's office.¹⁴⁶ Given the emphasis on shared identity and equivalence discussed in the last section, it is easy to see how these points of difference have been overlooked because they did not advance the narrative that LGBTQ people are the same as everyone else.

To the contrary, in a politics of articulation our commonality—our sameness—is directly informed by individual lived experience, which is what, in turn, gives our politics authenticity and authority. It acknowledges our points of difference, including the continued salience of sexual orientation and gender identity and their ability to complicate and compromise lives. As such, it should be well-equipped to identify disparities that arise on account of difference. Without relying on claims of sameness, it would be possible to construct an advocacy narrative that establishes older LGBTQ people as a deserving minority precisely because their life choices and opportunities were and are constrained by the social meaning attached to a characteristic that does not otherwise impair their ability to contribute to society or experience love or loss or rejection. They are long-time survivors of homophobia and transphobia and their experiences set them apart from the post-Stonewall generations with respect to their family relationships, financial opportunities, and coping stratagems, but they are none the less deserving because they are different.

Before constructing an advocacy platform, of course, it is essential to be able to identify that the non-self-identified group members are part of the family, so to speak. In other words, it is incumbent on group members to strive to see commonality through their difference. It is also essential to be willing to commit resources and energy to address their particular needs. The LGBTQ movement has struggled with ageism and other exclusionary behavior,¹⁴⁷ but the perspective of historical contingency should help bring

143. One long-time exception to this was Services & Advocacy for LGBT Elders, known as SAGE. Founded in 1978, SAGE is a national organization that provides supportive services for LGBT older people and their caregivers. *About, SAGE*, <https://www.sageusa.org/about-us/>.

144. LGBTQ older adults are more likely to be single, making marriage equality less applicable. They are over the age of active military service, although they may benefit from improved culturally competency at veterans' facilities. Given their age, they are also more likely to be leaving the workforce, rather than actively building a career. *See supra* text accompanying notes 94–99.

145. *See supra* text accompanying notes 90–100 (discussing particular interests of LGBTQ older adults).

146. LGBT older adults report feeling especially vulnerable in health care settings and congregate living facilities. The fear of experiencing bias behavior from a medical professional may relate back to their strained relationship with the medical profession more generally. With respect to assisted living facilities, LGBT older adults have experienced bullying and other forms of discrimination, which is why many report that they “recloset” when entering assisted living. *See Gross, supra* note 89.

147. Kimberly F. Balsam et al., *Measuring Multiple Minority Stress: The LGBT People of Color Microaggressions Scale*, 17 *CULTURAL DIVERSITY ETHNIC MINORITY PSYCHOL.* 163, 164 (2011) (measuring racism within the LGBTQ community); Nancy A. Orel, *Investigating the Needs and Concerns of Lesbian, Gay, Bisexual, and Transgender Older Adults: The Use of Qualitative and Quantitative Methodology*, 61 *J. HOMOSEXUALITY* 53, 58–60 (2014) (focus group reports ageism within the LGBTQ community); *see also* Jane Ward, *Queer Sexism: Rethinking Gay Men and Masculinity*, in *GAY MASCUINITIES* (Peter Nardi ed., 2000).

into sharper relief the connection between the history of the subordination of LGBTQ people and how some people experience identity across their life course.¹⁴⁸ The recent emphasis on the issues facing LGBTQ and questioning youth already represents an awareness of life course issues and a willingness to champion the interests of people who are not able to speak for themselves or necessarily self-identified members of the group.¹⁴⁹

On a more fundamental level, it must be acknowledged that deeply closeted LGBTQ identified individuals present an uncomfortable truth. Their existence challenges the basic premise of all progressive programs for change, namely that conditions and opportunities will improve. What should we make of individuals who do not benefit from the changed conditions and expanded opportunities? If the promise of reform invites us to engage in continual reinterpretation to keep pace with social change and other developments, what does it say about individuals who do not exist in a continual state of renewal? Is it possible to say that they suffer from false consciousness? Indeed, identity politics are the product of the consciousness raising techniques employed by the women's movement in the late 1960s and early 1970s.¹⁵⁰ Or would historical contingency suggest that any claim of false consciousness is merely an error of presentism—a form of temporal chauvinism?¹⁵¹ How then do progressive movements speak to and for individuals like the members of the pre-Stonewall generations who thus span time?

C. EVER-CHANGING MODES OF SUBORDINATION

Historical contingency invites us to examine the trajectory of not only identity categories, but also modes of bias and subordination. It is often possible to identify vestiges of discredited stereotypes and outmoded forms of subordination in present practices and policy.¹⁵² Anti-LGBTQ arguments take different forms over the years, but they are driven by the same values and goals. For example, the exact same objections to LGBTQ people that were once based on traditional morality are now presented as questions of religious liberty.¹⁵³

148. See *supra* text accompanying notes 100–121 (discussing individual identity formation across the lifespan).

149. See Julie Strupp, *Nearly Half of DC's Homeless Youth are LGBTQ, and They are not Getting the Support They Need*, WASHINGTONIAN (June 29, 2017), <https://www.washingtonian.com/2017/06/29/bigotry-poverty-keeping-washingtons-lgbtq-youth-homeless/>.

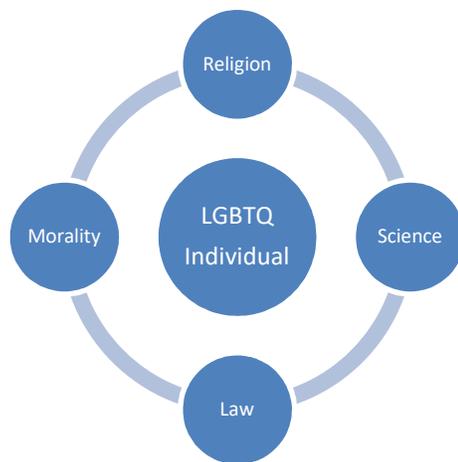
150. The Combahee River Collective Statement explains, “In the process of consciousness-raising, actually life-sharing, we began to recognize the commonality of our experiences and, from the sharing and growing consciousness, to build a politics that will change our lives and inevitably end our oppression.” See COMBAHEE RIVER COLLECTIVE, *supra* note 122 (referencing the Combahee River Collective Statement).

151. In the case of historical and literary analysis, the term presentism would typically refer to a past event, but it seems appropriate to use it in reference to members of the pre-Stonewall generation because they are living examples of the historical contingency of identity. See *supra* note 14 (explaining presentism).

152. For example, the stereotype of homosexuals as sexual predators who molest children has stubbornly continued to inform our current law and policy despite being discredited scientifically and falling out of public opinion. See *supra* note 92.

153. After the U.S. Supreme Court decision in *Obergefell* mandated nationwide equality, anti-LGBTQ advocates pressed for broad religious and moral exemptions that if granted would allow people to disregard same-sex marriages and refuse to participate in any way that might make them feel complicit. See, e.g., *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 138 S.Ct. 1719 (2018).

The reason expressions of LGBTQ subordination seem to be continually recycled and repackaged is that the regulation of sexual orientation and gender identity has historically been accomplished through mutually reinforcing and overlapping prohibitions originating from morality, religion,



science, and law. Recall that the sexologists attempted to wrest the jurisdiction of sexual orientation and gender identity from religion by shifting the focus from acts to identity.¹⁵⁴ Once LGBTQ people were pathologized, the law imposed conforming legal disabilities that the later declassification of homosexuality did not automatically dismantle.¹⁵⁵ Instead, laws that had once been justified by a psychoanalytic model of deviance found new support in an appeal to traditional moral values.¹⁵⁶ More recently, courts have made it clear that they would no longer use morality as a rationale to impose legal disabilities on LGBTQ people,¹⁵⁷ but the exact same arguments have now been repackaged as questions of religious liberty.¹⁵⁸ With the present turning back to religion, the cycle of subordination has come full circle.

From an advocacy perspective it is extremely important to be able to recognize the roots of an argument in order to counter it effectively. Historical contingency helps advocates connect the dots and chart the relationships between and among arguments. Take for example that pernicious stereotype of the sexual predator. As explained in Part II, its genesis stemmed from the discredited theories of the American Freudians where homosexuals preyed on young children, who then became homosexuals themselves and repeated the pattern.¹⁵⁹ Prior to

154. See *supra* text accompanying notes 31–35 (discussing views of the early sexologists).

155. See *supra* text accompanying notes 42–46 (discussing declassification of homosexuality as a mental illness).

156. The traditional values movement is often characterized as a backlash against the successes of the LGBTQ rights. Didi Herman, who has conducted a comprehensive study of the anti-gay policies and activities of pro-family organizations, rejects that these activities represent a “backlash.” HERMAN, *supra* note 103, at 195. Instead, Herman describes the traditional values movement as a “paradigmatic movement for social change.” *Id.*

157. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down sodomy laws in Texas).

158. See generally *Masterpiece Cakeshop*, 138 S.Ct. at 1723–24.

159. TERRY, *supra* note 19, at 144.

declassification, the overwhelming majority of Americans indeed believed that homosexuals were child molesters.¹⁶⁰ In 1970, over 70% of respondents to a national poll agreed with the statements that “[h]omosexuals are dangerous as teachers or youth leaders because they try to get sexually involved with children” and “[h]omosexuals try to play sexually with children if they cannot get an adult partner.”¹⁶¹

By 1999 only 19% of non-LGB men and 10% of non-LGB women believed that gay men molested children, and the number was even lower when the question turned to lesbians.¹⁶² But despite the change in public opinion, declassification did not result in the automatic repeal of law and policies that were informed by this destructive stereotype. In fact, there are numerous instances where the stereotype of the homosexual as a sexual predator continues to inform our law and public policy and fuel anti-LGBTQ bias. For example, it lived on in the Boy Scouts’ policy prohibiting openly gay Scout Masters until 2013.¹⁶³ It also informs much of the anxiety over same-sex parenting that surfaced in the context of the debate over marriage equality.¹⁶⁴ This sexual predator stereotype still appears, from time to time, in family court decisions when children are involved,¹⁶⁵ and it is reflected in the laws of seven states that restrict the inclusion of LGBTQ topics in the classroom.¹⁶⁶ In 2018, one of these “no promo homo” laws cost an elementary school art teacher her job when she spoke to her students about her family, including her wife.¹⁶⁷

The stated rationale for these laws and policies have been softened and reinterpreted for a post-declassification age. No longer is the concern that

160. Gregory Herek, *Facts About Homosexuality and Child Molestation, Sexual Orientation: Science, Education, and Policy*, UC DAVIS, http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html#note1.

161. *Id.*

162. *Id.* Only 9% of non-LGBT men and 6% of non-LGBT women believed that lesbians sexually abused children. *Id.*; see also Gregory Herek, *Gender Gaps in Public Opinion About Lesbians and Gay Men*, 66 PUB. OP. Q. 40, 51 (2002).

163. Erik Eckholm, *Boy Scouts End Longtime Ban on Openly Gay Scouts*, N.Y. TIMES (May 23, 2013), <http://www.nytimes.com/2013/05/24/us/boy-scouts-to-admit-openly-gay-youths-as-members.html>.

164. See generally Carlos A. Ball, *Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective*, 21 WM. & MARY BILL RTS. J. 691 (2013).

165. Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 291–92 (2009).

166. Human Rights Campaign, *State Maps of Laws & Policies: School Anti-Bullying* (Dec. 11, 2017), <https://www.hrc.org/state-maps/anti-bullying>. In addition, six states have statutes that expressly require homosexuality to be taught in the public schools in a negative light. ALA. CODE § 16-40A-2(c)(8) (2018); ARIZ. REV. STAT. ANN. § 15-716(c) (2018); LA. STAT. ANN. § 17:281(A)(3) (2018); MISS. CODE ANN. § 37-13-171(2)(e) (2018); S.C. CODE ANN. § 59-32-30(A)(5) (2018); TEX. HEALTH & SAFETY CODE § 163.002(8) (West 2018). Alabama and Texas require an emphasis that “homosexuality is not a lifestyle acceptable to the general public,” and Arizona bans any promotion of “a homosexual life-style.” ALA. CODE § 16-40A-2(c)(8) (2018); ARIZ. REV. STAT. ANN. § 15-716(c) (2018); TEX. HEALTH & SAFETY CODE § 163.002(8) (West 2018). In addition, North Carolina attempted to enact a law providing that the basic education program must promote heterosexual marriage. N.C. GEN. STAT. § 115C-81 (repealed 2017). The South Carolina statute provides: “The program of instruction . . . may not include a discussion of alternate sexual lifestyles from heterosexual relationships, including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.” S.C. CODE ANN. § 59-32-30(A)(5) (2018).

167. Nicole Rojas, *Texas Elementary Teacher Suspended After Discussing Sexual Orientation with Students*, NEWSWEEK (Mar. 28, 2018, 6:42 PM), <http://www.newsweek.com/texas-elementary-teacher-suspended-after-discussing-her-sexual-orientation-865003>.

homosexuals will physically assault children.¹⁶⁸ Instead, the concern is expressed as the corrupting influence an authority figure can have over a child's sexual orientation or gender identity, leading them into a depraved lifestyle.¹⁶⁹ This feared Pied Piper effect is often expressed in relatively benign terms, such as when parents and school districts object to openly LGBTQ teachers because they are not "the type of example we want to set for the children." When these arguments are deployed, it is important to understand the root of the objection and to be able to reveal its ugly history.

Just as the declassification of homosexuality as a mental illness in 1973 did not put an end to the sexual predator stereotype, it also did not end the practice of trying to "cure" LGBTQ people. This is partly due to the fact that the APA added the category of "ego-dystonic homosexuality" to the DSM when it removed homosexuality as a mental illness.¹⁷⁰ Ego-dystonic homosexuality referred to when individuals felt bad about their homosexuality,¹⁷¹ making such individuals prime candidates for an attempted "cure." Over thirty years after the deletion of ego-dystonic homosexuality in 1987, the practice of conversion therapy continues today.¹⁷² The discredited theories of the American Freudians remain an integral part of the lexicon of conversion therapists, who comprise the medical wing of the anti-LGBTQ movement.¹⁷³

Jurisdictions are increasingly taking steps to prohibit conversion therapy, particularly where minors are involved,¹⁷⁴ and conversion therapy bans currently exist in fifteen states and the District of Columbia.¹⁷⁵ Many

168. Advocates on the extreme fringe of the anti-LGBT movement will still deploy these arguments, but the voices are fewer and farther between.

169. Cleve R. Wootson Jr. & Moriah Balingit, *'Not the Right Kind of Catholic': Private Schoolteacher Fired Days After Same-Sex Wedding*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/education/wp/2018/02/11/not-the-right-kind-of-catholic-private-school-teacher-fired-days-after-same-sex-wedding/?utm_term=.19ae8fed9b6f.

170. LEVAY, *supra* note 41, at 229.

171. Ego-dystonic homosexuality was defined as "[a] desire to acquire or increase heterosexual arousal so that heterosexual relations can be initiated or maintained and a sustained pattern of overt homosexual arousal that the individual explicitly complains is unwanted as a source of distress." BAYER, *supra* note 37, at 176.

172. LEVAY, *supra* note 41, at 229.

173. Reparative therapists such as Joseph Nicolosi, who died in 2017, claimed that they only seek to treat individuals who are distressed by their homosexuality and who otherwise would be denied the opportunity to seek treatment. *See* JOSEPH NICOLOSI, *REPARATIVE THERAPY OF MALE HOMOSEXUALITY* 3 (1991). Nicolosi refers to these individuals as "non-gay" gays because they desire the trappings of a heterosexual lifestyle. *Id.* at 3–6. According to this post-1973 psychoanalytic model, same-sex desire is a "defensive detachment" from members of the same sex, as opposed to a phobic reaction to members of the opposite sex. *See generally* ELIZABETH MOBERLY, *PSYCHOGENESIS: THE EARLY DEVELOPMENT OF GENDER IDENTITY* (1983); NICOLOSI, *supra*, at 3. The "defensive detachment" typically stems from a hurtful experience with the parent of the same sex. MOBERLY, *supra*, at 53. As a result, the individual stops identifying with members of the same sex and "needs for love, dependency and identification which are normally met through the medium of such an attachment, remain unmet." *Id.* at 67. Under this theory, individuals suffering from this defensive detachment turn to homosexuality as a "reparative device." *Id.* It operates as an "attempt to fulfill a deficit in wholeness of one's original gender." NICOLOSI, *supra*, at 109. So-called "reparative therapy," such as that advocated by Joseph Nicolosi and his National Association of Reparative Therapists (NARTH), is designed to address this gender deficit and lead eventually to "good heterosexual functioning." *Id.* at 165.

174. Brooke Sopelsa, *Maryland Becomes 11th State to Ban 'Gay Conversion Therapy' for Minors*, NBC NEWS (May 15, 2018, 12:05 PM), <https://www.nbcnews.com/feature/nbc-out/maryland-becomes-11th-state-ban-gay-conversion-therapy-minors-n874381>.

175. HUM. RTS. CAMPAIGN, *State Maps of Laws & Policies: Conversion Therapy* (Aug. 3, 2018), <https://www.hrc.org/state-maps/conversion%20therapy>. Many ex-gay ministries also base their counseling programs on the gender deficit theory of homosexuality, although some eschew any psychological explanations as "unbiblical" and prefer to rely solely on Scripture for therapeutic guidance.

religious denominations, however, offer a form of conversion therapy that may be more difficult to ban because of First Amendment concerns.¹⁷⁶ Arguments in favor of conversion therapy are now framed in terms of choice and personal autonomy or, in the case of religiously affiliated therapies, religious liberty.¹⁷⁷ These characterizations are very different from labeling the individual as mentally ill and a threat to children, but again they share the same root belief that LGBTQ individuals are disordered and that they can, and should, be fixed. These continuing attempts to convince LGBTQ people that they should not be LGBTQ rest on the belief that sexual orientation and gender identity are subject to change, chosen, and degenerate. These beliefs are no longer reflected in bio-science or popular opinion, but continue to find expression in these harmful practices to change LGBTQ people.

This pattern of repackaging discarded and discredited objections against LGBTQ people is most obviously at work today in the context of marriage equality and claims for religious exemptions from laws protecting LGBTQ people from discrimination or otherwise recognizing their families.¹⁷⁸ As public opinion regarding LGBTQ individuals and the families they form has evolved, religious and moral beliefs that once served as the basis for law and policy targeting LGBTQ individuals have been increasingly marginalized.¹⁷⁹ In *Lawrence v. Texas*, the U.S. Supreme Court held that profound moral beliefs were not sufficient to justify criminal sodomy laws.¹⁸⁰ Twelve years later, the Court decided *Obergefell v. Hodges* and mandated marriage equality despite strong appeals to traditional morality by opponents to marriage equality.¹⁸¹

Post-*Obergefell*, opponents of marriage equality have argued vigorously for broad religious exemptions, saying that they are necessary to preserve religious liberties.¹⁸² They have attempted to reframe the now settled legal

When Spitzer recruited subjects for his 2001 study, he relied heavily on referrals from NARTH and Exodus International, the highest profile ex-gay ministry, because he wanted to study individuals who were highly motivated to change their sexual orientation. See Rawls, *supra* note 15. Both the APA and the American Psychological Association have taken negative positions regarding attempts at reparative therapy. See generally David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. Cal. L. Rev. 1297, 1311–12 (1999); JEFFREY SATINOVER, *HOMOSEXUALITY AND THE POLITICS OF TRUTH* 36 (1996) (claiming they ignore “professional standards . . . that psychiatrists need to accept a patient’s own goals in treatment”); David Tuller, *Psychologists Oppose ‘Conversion’ Therapy for Gays/Approach Could Cause Real Harm*, *They Say*, S.F. CHRON., Aug. 15, 1997, at A3.

176. The claim is that religious counseling is protected by the Free Exercise Clause of the First Amendment.

177. See generally The Times Editorial Board, *Target ‘Gay Conversion Therapy,’ Not Religion*, L.A. TIMES (May 7, 2018, 4:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-gay-conversion-20180507-story.html>.

178. Leslie Griffin, *Marriage Rights and Religious Exemptions in the United States*, OXFORD HANDBOOKS ONLINE (May 2017), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-19>.

179. See *Changing Attitudes on Gay Marriage*, PEW RES. CTR., (July 29, 2015) <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/> (reporting that a clear majority of Americans supported same-sex marriage in 2015, whereas only thirty-five percent supported same-sex marriage in 2001).

180. *Lawrence*, 539 U.S. at 582–83.

181. *Obergefell*, 135 S. Ct. 2584.

182. David Bossie, *Religious Liberty Is a Sacred Right*, BREITBART (Aug. 14, 2015), <http://www.breitbart.com/big-government/2015/08/14/religious-liberty-is-a-sacred-right/> (arguing that “religious liberties are under attack”).

debate over marriage equality as a question of “competing rights” by pitting Free Exercise rights against LGBTQ rights.¹⁸³ Asserting that two wrongs do not make a right, they argue that marriage equality should not come at the expense of sincerely held religious beliefs.¹⁸⁴ In language that is deceptively evenhanded, they explain that a religious accommodation is necessary when rights conflict in a pluralistic society that values both religious liberties and equality.¹⁸⁵

Historical contingency should help us see that the current demands for religious exemptions do not represent a newly emerged paradigm of conflicting rights, but rather an artful retrenchment of anti-LGBTQ beliefs. Now that the opponents to marriage equality no longer write the laws, they no longer want to follow them. Religious marriage exemptions are designed to make sure that LGBTQ rights end where a religious objection begins. Far from representing a clear-cut question of competing rights, these desired exemptions would actually represent a radical expansion of our understanding of religious liberty.¹⁸⁶ They insulate religious objectors from the increased legal and social acceptance of LGBTQ individuals and their families. They also signal that there is something different about LGBTQ rights from other type of civil rights that merits caution.¹⁸⁷ Finally, the exemptions seek state sanction to cover public acts that in other contexts would clearly be recognized as discriminatory regardless of their religious motivation.¹⁸⁸

IV. IMPLICATIONS FOR LAW AND POLICY

The historical contingency of identity suggests, at least on the macro level, a process of identity formation that involves constant reinterpretation and reinvention. The law, however, is one area that is resistant to continual renewal, especially given the constraint of *stare decisis* and the longstanding respect for “settled law.”¹⁸⁹ The last section illustrated the challenges in mobilizing around a commonality based in dynamic difference. This section

183. See Ryan Anderson & Leslie Ford, *Protecting Religious Liberty in the State Marriage Debate*, HERITAGE FOUND. (Apr. 10, 2014), <http://www.heritage.org/research/reports/2014/04/protecting-religious-liberty-in-the-state-marriage-debate> (“State laws that create special privileges based on sexual orientation and gender identity are being used to trump fundamental civil liberties such as freedom of speech and the free exercise of religion.”).

184. *Id.* (arguing that individuals with religious objection to same-sex marriage “are facing a new wave of government coercion and discrimination”).

185. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014) (“We could still create a society in which both sides can live their own values, if we care enough about liberty to protect it for both sides.”).

186. Under current Constitutional jurisprudence, laws of general applicability do not infringe on Free Exercise rights unless they target religion specifically. *Emp’t Div. v. Smith*, 494 U.S. 872, 882 (1990).

187. The Civil Rights Act of 1964 does not have comparable religious exemptions; however, when it was enacted, there was a clearly defined and widely held religious justification for segregation.

188. For example, if a business owner in a jurisdiction with a non-discrimination law refused to provide goods or services to a same-sex couple, the business owner would be subject to a claim of discrimination. Laycock argues that the claim of “discrimination” is too strong. Laycock, *supra* note 185, at 850, 869. He writes: “Discrimination is a powerful charge [that] still retains some of the moral imperative associated with the civil rights movement of the 1960s, when the discrimination at issue was utterly indefensible by any measure.” *Id.* at 869.

189. Questions regarding precedent and “settled law” always figure prominently in Supreme Court nominee confirmation hearings. See, e.g., Charlie Savage, *Respecting Precedent, or Settled Law, Unless It’s Not Settled*, N.Y. TIMES (July 14, 2009), <https://www.nytimes.com/2009/07/15/us/politics/15abortion.html> (reporting on Justice Sotomayor’s confirmation hearing).

tackles the question of how to craft resilient laws and policies that account for the dynamic nature of identity and the ever-acclimatizing modes of subordination, but it does so with an important caveat regarding the power of law to effect social change. Although social movements traditionally include calls for legal reform as an instrumental means to achieve their goals and implement their values, a singular focus on law can risk collapsing an entire social movement into a platform for legal reform.¹⁹⁰ Moreover, legal reform by itself will never be sufficient to achieve equality and opportunity for marginalized groups because the law is not the source of the oppression; it is merely an expression of it.

As part of its larger platform for social change, the LGBTQ rights movement has prioritized securing legal remedies for the disabilities imposed on account of sexual orientation and gender identity.¹⁹¹ This effort has primarily involved dismantling specific legal proscriptions imposed on LGBTQ people (e.g., sodomy laws, Don't Ask, Don't Tell, marriage prohibitions) and arguing on behalf of positive protections from anti-LGBTQ bias and discrimination. In order to secure positive *legal* protections for LGBTQ people, the LGBTQ rights movement must first be able to describe the class that deserves protection. As discussed in the prior section, defining this class has historically involved a two-part strategy of shared identity and equivalence claims, but the nitty gritty of legal reform also requires the movement to provide a clear delineation of the group in language that can be easily incorporated into a statute or recognized under the Constitution.¹⁹²

The ever-evolving nature of identity means that any attempt to name and define a protected class will always be partial. By the time the law recognizes an identity category, it is entirely possible that its parameters have already changed. The speed with which communication within and across communities can be facilitated by social media and the internet guarantees that identity categories will continue to evolve and change independent of the fits and starts of the law or medico-scientific understandings.¹⁹³ In the time that it takes to wage a successful political and legal fight for recognition, the individuals within the protected group may have reinterpreted their identities and forged new and more nuanced identities, such that the initial label to their struggle no longer fits. This insight also has implications for

190. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1489 (2005). Brown-Nagin notes that “[t]hose who champion the centrality of law to social movements or advance the concept of legal mobilization wrongly conflate politicized legal campaigns with ‘social movements.’” *Id.* at 1501. Nagin attributes the tendency to view campaigns for legal reform as interchangeable with social movements to the wide acceptance of Joel Handler's influential book, *Social Movements and the Legal System*, which discusses cause lawyering and the efficacy of litigation to achieve social change. *See generally* JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978). Handler, on the other hand, believed that the use of cause-directed litigation to secure change constituted a “movement.” *Id.*

191. As noted in Section II.B.1, gay activists first focused on psychiatry in order to secure the declassification of homosexuality. *See supra* text accompanying notes 72–75.

192. Of course, throughout the struggle for marriage equality, state constitutional law was of the utmost importance because the cases that were brought invoked states' constitutions. *See e.g.* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates the Commonwealth's constitution).

193. *See supra* text accompanying notes 8–9 (discussing evolution of identities over the lifespan).

protections under the U.S. Constitution where courts still look to the footnote of a 1938 U.S. Supreme Court decision when deciding whether a group qualifies as a “discrete and insular” minority and, therefore, warrants the highest level of protection under our Equal Protection guarantees.¹⁹⁴

The historical contingency of identity should sound a cautionary note when attempting to secure class-based legal protections. Identity categories in the twenty-first century will necessarily provide an unstable foundation for civil-rights claims and protections because they are always in a state of flux. The shifting sands of identity have the potential to render any law or policy based on an existing identity model both obsolete and incomplete before it is ever enacted or even proposed. Positive gains will be met with new modes of subordination with old roots. Finally, once enacted, positive protections for LGBTQ people must be implemented and applied broadly to include as many members of the protected class as possible—even those who do not self-identify.

A. STATUTORY CLASS-BASED NON-DISCRIMINATION PROTECTIONS

The first non-discrimination protections aimed at the LGBTQ community were enacted in the late 1970s at the local and county levels.¹⁹⁵ The first state level protection for sexual orientation was not enacted until 1982 in Wisconsin.¹⁹⁶ There are currently twenty-two states with non-discrimination protections for sexual orientation and twenty of those states also extend protection on account of gender identity.¹⁹⁷ There are no federal protections except in the area of hate crimes and domestic violence.¹⁹⁸ Currently, popular opinion is firmly in favor of workplace protections for LGBTQ people, with 89% of Americans saying that LGBTQ people should not face discrimination at work.¹⁹⁹ These workplace non-discrimination laws, however, have not been without controversy. And as noted in Part II.B, laws that focus solely on employment will fail to address bias and discrimination experienced in other venues that may be more relevant to particular subgroups, such as older LGBTQ people who need protections in areas of public accommodations and health care.²⁰⁰

The adoption of a non-discrimination ordinance in Dade County, Florida in 1977 prompted the first organized anti-LGBT political coalition, Save Our Children; the coalition was successful in orchestrating the repeal of a number of non-discrimination laws that included sexual orientation.²⁰¹ As is clear from its name, the coalition relied on the repudiated sexual predator stereotype to argue gay men and lesbians were depraved and unworthy of

194. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

195. ESKRIDGE, *supra* note 75, at 356 (listing early ordinances from 1972–1998).

196. Hannah Woulfe, *LGBT History: The Country's First LGBT Anti-Discrimination Bill*, NAT'L LGBTQ CHAMBER COM. (Oct. 17, 2017, 9:59 AM), <http://www.nglcc.org/blog/lgbt-history-countrys-first-lgbt-anti-discrimination-bill>.

197. For an up-to-date discussion of state-level anti-discrimination protections in employment see *State Maps of Laws and Policies, Employment*, *supra* note 135.

198. At the federal level, there are no anti-discrimination protections in the employment context. However, sexual orientation is included under the Violence Against Women's Act and the Mathew-Shepard-James Byrd Hate Crimes Act.

199. Jones, *supra* note 44 (reporting results of Gallup polls from 1977 to 2015).

200. See *supra* text accompanying notes 90–100 (discussing needs of older LGBTQ adults).

201. ESKRIDGE, *supra* note 75, at 131.

protection.²⁰² As these non-discrimination laws began to proliferate on the state level, a second round of attempts to repeal non-discrimination laws occurred in the 1990s using ballot questions and citizens' initiatives. This time, the argument was that non-discrimination protections gave LGBTQ people "special rights."²⁰³ Although this argument was rejected by the U.S. Supreme Court in *Romer v. Evans*, this characterization continues to inform many of the conservative objections to identity-based politics and movements, especially LGBTQ rights.²⁰⁴

1. The Evolution of Non-Discrimination Protections

The evolving nature of our understanding of sexual orientation and gender identity is reflected in the terminology of state and local anti-discrimination laws. As noted above, the earliest anti-discrimination laws were enacted at the local and county levels. They extended protections to LGBTQ people based on "sexual or affectional preference."²⁰⁵ These terms captured the liberation politics of Gay Liberation that were based on self-determination and autonomy.²⁰⁶ They also satisfied lesbian feminist theory that focused on questions of choice.²⁰⁷ Later, protections were then extended on the basis of "sexual orientation," a term which reflected an identity or nature, rather than a choice.²⁰⁸

As noted above, Wisconsin was the first state, in 1982, to extend anti-discrimination protections on account of sexual orientation.²⁰⁹ It would take another nine years before the next state would extend state-wide protections.²¹⁰ These early non-discrimination laws had a significant shortcoming in that they did not include express protections on account of gender identity. They had to be later amended as the LGBTQ rights movement expanded its tent to include specific advocacy on behalf of transgender people. Attempts to amend the early laws have not always been successful. For example, despite its position as a first mover with respect to sexual orientation, Wisconsin remains one of only two states with protections for sexual orientation that do not also include gender identity.²¹¹

202. Save Our Children was led by Anita Bryant, a former recording star, beauty queen, and orange juice spokesperson. *Id.* Bryant explained, "As a mother, I know that homosexuals cannot biologically reproduce children; therefore, they must recruit our children." Ghaziani, *supra* note 58, at 33.

203. The "special rights" argument was used very effectively in the Amendment 2 citizens' initiative in Colorado. Organized by the group Colorado for Family Values, the initiative sought, by amendment to the state constitution, to repeal local gay rights ordinances and prohibit the enactment of any future state or local gay civil rights laws. The campaign slogan of Colorado for Family Values was "Equal Rights - Not Special Rights." Robert F. Nagel, *Playing Defense*, 6 *Wm. & Mary Bill Rts. J.* 167, 172 (1997).

204. See, e.g., S.A. Miller, Ben Carson Vows No 'Extra Rights' for LGBT Community in Public Housing, *Wash. Times* (Jan. 12, 2017), <https://www.washingtontimes.com/news/2017/jan/12/ben-carson-no-extra-rights-lgbts-public-housing/>.

205. ESKRIDGE, *supra* note 75, at 354–71.

206. JAGOSE, *supra* note 62, at 30–43 (describing gay liberation).

207. See generally JULIE BINDEL, *STRAIGHT EXPECTATIONS* (2014) (arguing lesbianism is a choice).

208. Although federal law has not yet caught up, some twenty-two states and the District of Columbia offer workplace protection based on sexual orientation. See, e.g., Employment Non-Discrimination Act (ENDA) of 2013, S. 815, 113th Cong. (2013) (Senate bill which failed to pass in the House despite bipartisan support); HUM. RTS. CAMPAIGN, *supra* note 135.

209. Woulfe, *supra* note 196.

210. HUM. RTS. CAMPAIGN, *supra* note 135.

211. *Id.*

At the federal level, a non-discrimination bill was introduced in Congress in 1974.²¹² In 2007, it appeared that the stars had finally aligned and there was a reasonable likelihood that Congress would pass what was then called the Employment Non-Discrimination Act or ENDA.²¹³ The problem, however, was that the legislation was only expected to pass if it did not include gender identity.²¹⁴ As some national LGBTQ organizations and politicians weighed striking a devil's bargain, transgender advocates and their allies cried foul and argued forcefully that no one should move forward unless everyone moved forward.²¹⁵ This controversy killed ENDA and represented a signal moment in the evolution of the LGBTQ rights movement when it had to state its commitment to transgender inclusion.

The current proposed federal legislation to protect LGBTQ people from discrimination is called the Equality Act. It would amend the Civil Rights Act of 1964 to include protections for sexual orientation and gender identity in the areas of employment, housing, public accommodations, education, federal funding, lending, and the jury system.²¹⁶ In this way, the bill is much more inclusive than ENDA because it would provide protections in venues beyond the workplace.

The movement's commitment that no one should move forward unless everyone moves forward underscores the need to consider historical contingency and the evolving nature of identity categories when enacting legal reform. As demonstrated by the evolution of proposed federal legislation, the successful enactment of non-discrimination statutory protections is often the result of lengthy and hard-fought civil rights battles.²¹⁷ Any attempt to name or describe a particular category necessarily runs the risk of capturing no more than a singular temporal snapshot.

2. Title VII and Federal Non-Discrimination Protections

Until the passage of the Equality Act, there are no express federal protections for LGBTQ people in housing, public accommodations, education, federal funding, lending, and the jury system. The only statutory protections for LGBTQ people at the federal level are the Mathew Shepard and James Byrd Jr. Hate Crimes Prevention Act²¹⁸ and the Violence Against

212. Trevor G. Gates & Margery C. Saunders, *Bella Abzug, Queer Rights, and Disrupting the Status Quo*, 7 J. SOC. CHANGE 69, 70 (2015).

213. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011, 9:00 AM), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>.

214. *Id.*

215. Rebecca Juro, *Even After All These Years, HRC Still Doesn't Get It*, HUFFINGTON POST (last updated Feb. 2, 2016, 7:55 PM), https://www.huffingtonpost.com/rebecca-juro/even-after-all-these-years-hrc-still-doesnt-get-it_b_2989826.html.

216. Equality Act, H.R. 2282, 115th Cong. (2017).

217. Gates & Saunders, *supra* note 212.

218. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249, was enacted as Division E of the National Defense Authorization Act for Fiscal Year 2010. Section 249 of Title 18 provides funding and technical assistance to state, local, and tribal jurisdictions to help them to more effectively investigate and prosecute hate crimes. It also creates a new federal criminal law which criminalizes willfully causing bodily injury (or attempting to do so with fire, firearm, or other dangerous weapon) when: (1) the crime was committed because of the actual or perceived race, color, religion, national origin of any person or (2) the crime was committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person and the crime affected interstate or foreign commerce or occurred within federal special maritime and territorial jurisdiction.

Women Act.²¹⁹ Rather than wait for statutory relief, LGBTQ advocates have advanced the argument that both sexual orientation and gender identity are covered by the language “because of . . . sex” that appears in Title VII and other federal non-discrimination statutes.²²⁰ Title VII prohibits private employers from taking discriminatory action because of an individual’s sex.²²¹ In *Price Waterhouse v. Hopkins*, the U.S. Supreme Court held that adverse employment actions based on sex stereotypes could constitute discrimination because of sex.²²² The decision has been interpreted to provide some protection on the basis of sexual orientation where there is also gender nonconforming behavior, but there is currently a circuit split with regard to whether the protection applies to sexual orientation in the absence of gender nonconforming behavior.²²³ The argument that discrimination based on sexual orientation is really discrimination based on sex harkens back to the understanding of contrary sexual feeling set forth by the early sexologists where same-sex attraction in and of itself constituted cross-gender behavior.²²⁴

Currently, the Second and Seventh Circuits have held that discrimination based on sexual orientation is prohibited by Title VII.²²⁵ The decisions conflict with the 2017 decision of the Eleventh Circuit, which the Supreme Court declined to review.²²⁶ There is also a split of opinion within the executive branch. Since 2015, the Equal Employment Opportunity Commission (EEOC), which is charged with enforcing Title VII, has taken the position that Title VII covers discrimination on account of sexual orientation.²²⁷ In the most recent case before the Second Circuit, *Zarda v. Altitude Express, Inc.*, the EEOC filed an amicus brief in support of the employee who alleged discrimination based on sexual orientation.²²⁸ However, the U.S. Department of Justice filed an amicus brief asserting that Title VII does not cover sexual orientation and any such expansion is the purview of Congress, not the courts.²²⁹ Sitting en banc, the Second Circuit in

219. The Violence Against Women Act of 1994 (VAWA) was enacted as Title IV, sec. 40001–40703 of the Violent Crime Control and Law Enforcement Act, H.R. 3355 and is codified in part at 42 U.S.C. §§ 13701–14040. Originally signed into law by President Clinton in 1994, it was most recently reauthorized in 2013. The Act provides federal funding for the investigation and prosecution of violent crimes against women, and established the Office on Violence Against Women within the Department of Justice.

220. Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII) is codified in 42 U.S.C., beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

221. *Id.*

222. *See generally* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a female accountant who was discriminated against because she didn’t comport herself in a traditionally feminine way could state a valid Title VII claim).

223. *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1254–55 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017). The court allowed the claim for discrimination based on gender nonconforming behavior to continue, but not the sexual orientation claim.

224. *See supra* note 31 (contrary sexual feeling).

225. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018); *see* *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017).

226. *See generally* *Evans v. Georgia Reg’l Hosp.*, 138 S. Ct. 557 (2017).

227. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).

228. Brief for EEOC as Amicus Curiae Supporting Appellants, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), <https://www.eeoc.gov/eeoc/litigation/briefs/zarda.html>.

229. Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), <https://www.documentcloud.org/documents/3901658-Zarda-v-Altitude-Express-2nd-Circuit-Justice.html>.

Zarda ruled in a 10 to 3 decision that “because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”²³⁰ Citing *Price Waterhouse v. Hopkins*, the court also held that sexual-discrimination constitutes sex discrimination because “sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.”²³¹

LGBTQ advocates have had greater success arguing that discrimination based on gender identity constitutes discrimination because of sex under Title VII and other federal non-discrimination statutes.²³² Given the controversy that occurred in 2007 regarding ENDA and the threatened exclusion of gender identity, it may seem ironic that non-discrimination protections for gender identity would be found in existing law, whereas the extension of those protections on account of sexual orientation remains an open question. The willingness with which courts have extended protection for gender identity under the mantle of sex, however, may have created a secondary area of conflict. The reliance on the term “sex” presupposes a static and binary view of sex or gender. The emergence of individuals within the transgender umbrella who identify as non-binary potentially complicates this construction, which based on the 2007 rendering of the identity category would have seemed so promising.

Take, for example, the recent school bathroom controversies.²³³ The typical case involves a transgender student who rightfully wants to be able to use the bathroom that corresponds with his or her gender identity. In such cases, it is relatively easy to see how the failure to allow the student to use the appropriate bathroom constitutes discrimination because of sex under Title IX.²³⁴ However, what happens when the student identifies as non-binary or gender fluid? As litigated, bathroom controversies involve a binary choice that the student affirmatively wants to make, but is prohibited from making by the school district.²³⁵ For students who identify as neither gender, the ability choose between the boys’ room and the girls’ room is not a meaningful choice. Most likely, the school district would segregate them in a single-stall bathroom or restrict them to the bathroom of the sex that they were assigned at birth. If that occurs, how then does the student frame their claim of discrimination? The discrimination is not necessarily because of their sex, but rather because of the absence of gender identification. In this way, the seemingly promising development ends up providing partial relief for some but not all individuals within the transgender umbrella.

230. *Zarda*, 883 F.3d at 113.

231. *Id.* at 119.

232. *See, e.g.*, Glenn v. Brumby, 724 F. Supp. 2d 1284 (11th Cir. 2011); Schroer v. Billington, 854 F.2d 1379 (D.C. Cir. 2008); Smith v. City of Salem, 378 F. 3d 566 (6th Cir. 2004).

233. J.Y. Chua, *Bathing in Controversy: For a Century, School Showers Have Anticipated the Current Debate About Bathrooms*, ATLANTIC (June 2, 2017), <https://www.theatlantic.com/health/archive/2017/06/school-bathrooms-history/528978/>.

234. Title IX was passed as part of the Education Amendments of 1972. (P.L. No. 92-318). It is codified as 20 U.S.C. §§ 1681–1688. Title IX prohibits discrimination on account of sex in any educational program that receives federal funding.

235. *See* Matt Stevens, *Transgender Student in Bathroom Dispute Wins Court Ruling*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/us/gavin-grimm-transgender-bathrooms.html>.

B. EQUAL PROTECTION

The Equal Protection Clause of the U.S. Constitution offers protection from adverse state action for certain classes of individuals.²³⁶ It provides that whenever a state actor draws lines between and among individuals, there must be an appropriate state interest and a sufficient nexus between the line drawing and the state interest. The degree of scrutiny with which courts will review the classification depends upon the group involved, thereby resulting in different standards of review for different groups. The highest standard of review, referred to as strict scrutiny, is reserved for “discrete and insular minorities” when the non-majoritarian role of the courts is most urgent.²³⁷ A second level of review, known as intermediate scrutiny, applies in the case of gender and requires that the state show an important state interest, and that the classification is substantially related to the state interest.²³⁸ The lowest level of scrutiny simply requires that the state show a legitimate state interest that is rationally related to the classification.²³⁹

Not surprisingly, strict scrutiny has long represented the Holy Grail of legal reform and the shortest distance to equality. Traditionally, it has been very difficult, if not impossible, for the state to satisfy the burden imposed under strict scrutiny. Accordingly, if LGBTQ people were considered a “suspect category,” it would be likely that all remaining laws that differentiate between LGBTQ people and non-LGBTQ would be invalidated. Although in the past LGBTQ advocates have attempted to litigate the question of whether LGBTQ people constituted a suspect category, it is now more likely that advocates will ask for some form of “heightened scrutiny.”²⁴⁰ Obviously, efforts to secure heightened scrutiny involve defining a class, which is tricky business given the historical contingency of identity. As discussed below, however, the pitfalls in trying to define a class in the face of ever-evolving and changing identity categories can be avoided, if advocates instead focus on the required state interest.

The contours of what constitutes a “suspect category” and triggers strict scrutiny is controlled by the most famous footnote in Supreme Court jurisprudence—footnote 4 of the 1938 decision *United States v. Carolene Products*.²⁴¹ The case sets forth the rational basis test, stating that laws within the proper legislative discretion of Congress are presumptively constitutional,²⁴² but the Court carved out an important exception. It warned that this presumption would not extend to laws aimed at “discrete and insular minorities” because “prejudice” against them could undermine normal political processes.²⁴³ It further provided three defining characteristics of these discrete and insular minorities: they must be historically disadvantaged, politically powerless, and share an immutable trait.²⁴⁴ Historical contingency would suggest that these characteristics described

236. U.S. CONST. amend. XIV, § 1 (Equal Protection Clause).

237. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying strict scrutiny).

238. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny for gender).

239. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (applying rational basis review).

240. Davis Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859 (2016).

241. *Carolene Prods.*, 304 U.S. at 152 n.4.

242. *Id.*

243. *Id.*

244. *Id.*

identifiable minorities in 1938 and, therefore, it would be folly to try to apply this description as a working definition 80 years later.

In the 1990s, LGBTQ advocates attempted to litigate whether gay men and lesbians qualified as a suspect category under the parameters of footnote 4.²⁴⁵ Indeed, the two-part strategy of establishing a shared identity and then making claims of equivalence seemed tailor made for Equal Protection claims. When the citizens of Colorado approved Amendment 2 to the state constitution, LGBTQ advocates argued that LGB people constituted a suspect category and Amendment 2 did not satisfy strict scrutiny.²⁴⁶ Amendment 2 prevented the enactment of any laws or regulations at any level of government that recognized sexual orientation as a protected class.²⁴⁷ After they were granted a preliminary injunction, LGBTQ advocates vigorously argued that LGB people were historically disadvantaged, politically powerless, and share an immutable trait.²⁴⁸ The burgeoning gay bio-science provided the suggestions of immutability²⁴⁹ and the sustained interest in the history of LGBTQ lives provided the evidence that LGBTQ people were historically disadvantaged.²⁵⁰ But, the argument in favor of recognizing LGBTQ people as a suspect category stalled over the requirement that the group must also be “politically powerless.”²⁵¹ Unlike racial minorities in 1938, gay men and lesbians in the 1990s were not subject to state-mandated segregation and the brutality of the Jim Crow laws. In fact, the anti-LGBTQ litigants successfully argued that the mere fact that LGBTQ people had secured non-discrimination protections in a handful of jurisdictions proved that LGBTQ people as a class were not “politically powerless” within the meaning of footnote 4.²⁵² Although seemingly rational, this conclusion is really quite stunning and has serious disabling consequences. Under this reasoning, any group that has been able to mobilize and secure even the most modest legal gains would fail to qualify as a suspect category, thereby representing an inherent catch-22 for all identity-based social movements.

Despite numerous other attempts, the federal courts have been decidedly lukewarm to the idea that classifications based on sexual orientation warrant a heightened level of scrutiny.²⁵³ Perhaps surprisingly, many equality gains have been made without the assistance of enhanced judicial scrutiny, and

245. Schraub, *supra* note 240.

246. LISA KEEN & SUZANNE GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* 35 (2000).

247. The text of Amendment 2 provided as follows:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting COLO. CONST. art. II, § 30(b)) (internal quotation marks omitted).

248. KEEN AND GOLDBERG, *supra* note 246 at 36–37.

249. *Id.* at 37.

250. *Id.* at 38.

251. *Id.*

252. *Id.* at 184.

253. See Schraub, *supra* note 240.

instead were based on a rational-basis standard—the lowest level of review. Although these decisions have fallen short of establishing that LGBTQ people are worthy of added judicial protection, they have invalidated measures directed against LGBTQ people on the basis that anti-gay laws and policies lack a rational relationship to a legitimate state interest. Arguably, such rulings send the stronger message that discriminatory treatment of LGBTQ people fails any standard of review, not merely the heightened level of review necessary to protect a vulnerable minority.

For instance, in *Romer v. Evans* the Supreme Court decided 6-3 that Amendment 2 of the Colorado state constitution violated the Equal Protection Clause because its adoption was motivated by animus, which was not a legitimate state interest.²⁵⁴ Ruling that a “[s]tate cannot so deem a class of persons a stranger to its laws,”²⁵⁵ *Romer* signaled the end to the spate of citizens’ initiatives designed to disenfranchise LGBTQ people from the political system by prohibiting the enactment of non-discrimination protections for LGBTQ people or what anti-LGBTQ advocates characterized as “special rights.”²⁵⁶ As noted in part III.C, the Court rejected the notion that basic civil rights were “special rights,” but this characterization continues to inform many of the conservative objections to identity based politics and movements, especially LGBTQ rights.²⁵⁷ Although some advocates bemoaned the fact that the Court failed to apply heightened scrutiny, the holding that animus toward an unpopular group is not a legitimate state interest offers a new litigation strategy, one that does not require a group definition that can quickly become strained and inadequate to account for the evolving difference within a group.

Take, for example, the immutability question. Given that immutability is based on science and genetics, it would seem to be a trait that would not evolve or change. Yet it represents another instance where attempts to define a class may unwittingly end up marginalizing individuals who identify with that class or who would be seen by others as belonging to that class. In Part II, we discussed the inconclusive, but suggestive, findings regarding a genetic component to sexual orientation and gender identity.²⁵⁸ Given the uncertain nature of the science, it could clearly be a mistake to base legal arguments on immutability, especially since the self-determination messages of both Gay Liberation and lesbian feminism continue to resonate strongly with some people who identify as LGBTQ. What if scientists eventually debunked and discarded the notion of a genetic case? On the other hand, what if scientists successfully isolated the elusive gay gene or one for gender identity and developed a test to determine whether someone indeed had the gene? Would the protections that have been extended to same-sex couples not apply if one of the partners failed to test positive for the gene, but instead had been moved by choice? Would individuals be denied access to gender confirming medical care unless they possessed the gene?

254. *Romer*, 517 U.S. at 632.

255. *Id.* at 635.

256. See discussion and source cited *supra* note 203 and accompanying text.

257. See, e.g., Miller, *supra* note 204.

258. See *supra* text accompanying notes 43–46 (discussing bio-science). However, the science remains uncertain. Even Pillard, the lead author of a famous twin study, acknowledged that he could not rule out the importance of environment. LEVAY, *supra* note 41.

The immutability requirement has been increasingly read, not as something necessarily impervious to change, but something that one should not have to change.²⁵⁹ In this regard, it has become more akin to religion, that although not an immutable trait, it can still trigger strict scrutiny because one should not be compelled to change one's religion.²⁶⁰ This nuance softens the eventuality of the discovery of a clear genetic link, but it remains based on a static vision of identity as something you should not have to change. Accordingly, it does not adequately express the perspectives of people for whom identity itself is fluid and ever-changing. The challenge is to find new and creative ways to advocate for the freedom from coerced change, while maintaining the freedom to reinvent ourselves anew each day if we so choose.

V. CONCLUSION

Over the past several decades, LGBTQ individuals have experienced a world where their visibility has increased, and their opportunities have greatly expanded. As legal disabilities and the stigma of mental illness have gradually receded, LGBTQ people now enjoy increased social acceptance, political empowerment, and anti-discrimination protections. During this period, there has also been a tremendous shift in our understanding of sexual orientation and gender identity. The continuing re-evaluation of sexual orientation and gender identity provides a dynamic example of historical contingency and the temporal locality of identity. Historical contingency may require us to take stock of the past, but it also informs our understanding of the present and our plans for the future. Although this article has focused primarily on the construction of LGBTQ identities, the temporal locality of identity has broader applicability beyond this particularized retelling of the history of sexual orientation and gender identity. The important insight that identity is multivalent *and* historically contingent has potentially wide-reaching implications for social theory, movement building, and legal reforms.

Within the context of LGBTQ identities, this article examined the implications of historical contingency on the individual, group, and political levels. On the individual level, the present articulation of intersectionality fails to capture the two-force longitudinal component of identity formation: identities are constantly evolving and changing, but not all individuals evolve at the same pace as social change. The disparities existing between and among certain LGBTQ generational cohorts provide an example of the role of historical context in identity formation. Individuals who came out at different times and under different circumstances may have radically different views of themselves and their place in the world. Modes of subordination also do not necessarily change at the same rate of social change. The persistence of conversion therapy and the stereotype of the sexual predator demonstrate the intransigence of certain forms of subordination and bias.

259. Jessica A. Clarke, *Against Immutability*, 125 *YALE L.J.* 2, 101–02 (2015).

260. *Id.*

On the group or macro level, the recognition that identities are historically contingent leads to a politics of articulation that seeks commonality across dynamic difference and finds authenticity in lived experience. It argues that we should embrace difference rather than demand sameness. LGBTQ people are not only different from each other, they are different in many respects from their non-LGBTQ peers due to the history of homophobia and transphobia and the continued salience of sexual orientation and gender identity. These important differences are often overshadowed by strong equality claims that rest on a two-part strategy of shared identity and equivalence. Central to these equality claims is the assertion that LGBTQ people are a distinct and identifiable group, and they are the same as their non-LGBTQ peers. LGBTQ people, on the other hand, require legal protections because of their difference – not their sameness.

With respect to legal reforms, the historical contingency of identity presents challenges for class-based protections. The continued production of new iterations of LGBTQ identities means that class-based protections could potentially be obsolete before they are even enacted. Accordingly, positive protections for LGBTQ people must be drafted and applied broadly to include as many members of the protected class as possible. This net should cover even those people who do not self-identify as a member of the class, but may none the less be subject to bias and discrimination because they are perceived as belonging to the class. The dynamic nature of modes of subordination also cautions against placing too much stock in a single law or reform because discredited modes of subordination rarely just go away after a civil rights triumph, but instead they morph into new adaptive practices.

There is no question that trying to come to terms with historical contingency complicates matters. It raises a host of questions about how we construct our identities, social movements, and legal reforms. Looking past the complexity of attempting to map identity formation across time, historical contingency enriches our understanding of intersectionality and patterns of subordination. A politics of articulation may be difficult to practice and fraught with potential missteps, but it gives us the tools necessary to address a number of existing inequities and disconnects within the LGBTQ community. When combined with the insights of historical contingency, a politics of articulation can lead to greater understanding within the LGBTQ community, especially in the case of generational divisions. It can also help build a more inclusive movement and avoid the essentializing tendencies associated with strong identity-based equality claims. Moreover, it enables us to construct resilient laws and policies that are not based on a static view of identity, but rather one that evolves over time and at its own pace.

