

NOTES

QUEERING THE WELFARE STATE: PARADIGMATIC HETERONORMATIVITY AFTER *OBERGEFELL*

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Although lesbian, gay, bisexual, and queer people in the United States of America have experienced significant changes in their legal rights over the previous decade, they are still disproportionately likely to live in poverty. The Supreme Court's 2015 decision in Obergefell v. Hodges granted LGBQ individuals access to the institution of marriage and the attendant social benefits, but the safety net is still full of holes for low-income LGBQ individuals because of deeply rooted heteronormativity in the administration of welfare. Using three facially neutral examples—proof-of-paternity requirements for welfare recipients, work requirements for the Temporary Assistance for Needy Families (TANF) and Medicaid programs, and barriers to state support for low-income LGBQ youth experiencing homelessness—this Note elucidates and indicts enduring paradigms of heteronormativity in the welfare state. This Note also offers prescriptive solutions, advocating for the adoption of the perennial legislative proposal known as the “Equality Act” as well as state and federal executive action to ease the burdens on LGBQ welfare recipients in the near term.

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INTRODUCTION

“It’s not like on TV, where all the gay people are fabulous and live in nice apartments in Manhattan and are white.”¹

The United States entered into an “unconditional war on poverty” in 1964,² but over half a century later, it is immediately apparent that the effort was a failure. The official poverty rate—noted by many to be based on an under-inclusive algorithm³—is currently 12.7%, which means that *at least* 40.6 million Americans live in poverty.⁴ But in its efforts to address poverty in the United States, the government has failed some groups of citizens more than others.

Despite widespread myths of “gay affluence,”⁵ lesbian, gay, bisexual, and queer (LGBQ)⁶ adults in the United States are more

¹ Roni Caryn Rabin, *A Hunger Crisis in the L.G.B.T. Community*, N.Y. TIMES: WELL (July 18, 2016), <https://well.blogs.nytimes.com/2016/07/18/a-hunger-crisis-in-the-l-g-b-t-community/> (quoting Cathy Bowman, LGBT and HIV project director at Brooklyn Legal Services).

² Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964), <http://www.presidency.ucsb.edu/ws/?pid=26787>.

³ See, e.g., M.V. LEE BADGETT ET AL., WILLIAMS INST., *NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 5–6 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> (noting that when the method was developed in the 1960s, the intention was to base the poverty thresholds on the minimum before-tax income that allowed a family to meet their basic needs, and accordingly thresholds are based on estimates of the share of a family’s income spent on food).

⁴ JESSICA L. SEMEGA ET AL., U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2016*, at 12 (2017), <https://www.census.gov/library/publications/2017/demo/p60-259.html>.

⁵ See also *Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) (“[T]hose who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . have high disposable income . . . [and] possess political power much greater than their numbers.”); see generally Amber Hollibaugh & Margot Weiss, *Queer Precarity and the Myth of Gay Affluence*, 24 NEW LAB. F. 18, 23 (2015) (tracing the myth to the notion that, in a society governed by neoliberalism, market participation is a prerequisite to visibility).

⁶ This Note recognizes that sexual orientation exists on a spectrum and that individuals are often fluid across the spectrum. See, e.g., FRITZ KLEIN, *THE BISEXUAL OPTION* 19 (2d ed. 1993) (proposing a seven-dimensional grid to assess sexuality, including such variables as sexual attraction and emotional preference alongside self-identification); Steven E. Mock & Richard P. Eibach, *Stability and Change in Sexual Orientation Identity Over a 10-Year Period in Adulthood*, 41 ARCHIVES SEXUAL BEHAV. 641 (2011) (showing two percent of adult study participants reporting a change in a sexual orientation over a ten-year period). For the purposes of demonstrating how normative beliefs and actions negatively affect LGBQ communities, however, this Note draws a distinction between heterosexuals and those who identify as lesbian, gay, bisexual, and queer. In order to recognize individuals who do not identify as lesbian, gay, or bisexual but who also do not identify as heterosexual, this Note uses the term “queer,” and thus the initialism “LGBQ,” rather than “LGB.” See Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories,”* 4 L. & SEXUALITY 83, 87 (1994) (“‘Queer’ as a political category avoids the essentialist meaning often presumed by the terms ‘lesbian and gay.’”).

likely than heterosexual adults to live in poverty.⁷ Twenty-seven percent of lesbian, gay, bisexual, and transgender (LGBT) adults experience food insecurity, compared with 17% of non-LGBT adults.⁸ Lesbian, gay, and bisexual (LGB) adults⁹ in same-sex couples are 1.58 times more likely than adults in different-sex couples to have received food aid through the Supplemental Nutrition Assistance Program (SNAP) in the last year.¹⁰

The causes of poverty among LGBQ people are complex, but likely reflect a combination of life experiences and employment difficulties. Recent studies indicate that LGBQ students face high rates of bullying,¹¹ and research demonstrates a correlation between student experience with homophobic teasing and likelihood of suffering from depression and suicidal ideation, as well as engagement in recreational drug use.¹² Moreover, lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals have limited interpersonal safety nets: Approximately 39% of LGBT adults report facing rejection by a family member or close friend because of their sexual orientation or gender identity,¹³ and similar rejections among youth contribute to disproportionate representation of LGBT individuals among young people

⁷ See Alyssa Schneebaum & M.V. Lee Badgett, *Poverty in US Lesbian and Gay Couple Households*, FEMINIST ECON. (forthcoming 2018) (manuscript at 1), <https://www.tandfonline.com/doi/full/10.1080/13545701.2018.1441533> (drawing on the American Community Survey to find that, when comparing households with similar characteristics, those headed by same-sex couples are more likely to be in poverty than those headed by different-sex married couples); BADGETT ET AL., *supra* note 3, at 1 (drawing from several datasets to show that LGB people experience higher rates of poverty than non-LGB people).

⁸ TAYLOR N.T. BROWN ET AL., WILLIAMS INST., *FOOD INSECURITY AND SNAP PARTICIPATION IN THE LGBT COMMUNITY 2* (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf>.

⁹ This Note cites to statistics pertaining to LGB and LGBQ people when possible, and where data is only available as pertaining to the LGBT or LGBTQ community as a whole, those figures are cited and labelled accordingly. For explanation, see *infra* notes 28–30 and accompanying text.

¹⁰ BROWN ET AL., *supra* note 8, at 3.

¹¹ See, e.g., Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12 — United States and Selected Sites, 2015*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 12, 2016), <https://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm> (finding, for example, that 18.8% of heterosexual students, compared with 34.2% of gay, lesbian, and bisexual students, were bullied on school property in the twelve months prior to the survey).

¹² Dorothy L. Espelage et al., *Homophobic Teasing, Psychological Outcomes, and Sexual Orientation Among High School Students: What Influence Do Parents and Schools Have?*, 37 SCH. PSYCHOL. REV. 202, 208–09 (2008).

¹³ PEW RESEARCH CTR., *A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 1* (2013), http://assets.pewresearch.org/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf.

experiencing homelessness.¹⁴ Additional evidence suggests part of the problem may be due to an uneven playing field in the working world. Twenty-one percent of LGBT people report unfair treatment by an employer on account of their sexual orientation or gender identity,¹⁵ and that figure represents those able to find work in the first place—one study found that openly gay job applicants were 40% less likely to receive an interview than seemingly straight applicants.¹⁶ These differentials may contribute to income discrepancies: A 2007 analysis of census data from Florida indicated that the median wages of married men are 10% higher than men in same-sex relationships.¹⁷ Critically, intersections with other minority identities can exacerbate the hardships faced by LGBTQ individuals: For example, while 3.1% of white men in same-sex couples live in poverty, 18.8% of Black men in same-sex couples live in poverty.¹⁸

Despite the fact that the economic challenges facing LGBTQ people are well documented,¹⁹ the welfare system marginalizes LGBTQ individuals in many ways. Perhaps the most visible of these was—until the Supreme Court's 2015 decision in *Obergefell v. Hodges*²⁰—the exclusion of LGBTQ people from the institution of marriage, which is a key mechanism by which the federal government seeks to alleviate poverty. Marriage promotion, which functionally privatizes care for the poor by transferring the burden from the government to a spouse,

¹⁴ LES WHITBECK ET AL., ADMIN. FOR CHILDREN & FAMILIES, DATA COLLECTION STUDY FINAL REPORT 45 (2016), https://www.acf.hhs.gov/sites/default/files/fysb/data_collection_study_final_report_street_outreach_program.pdf.

¹⁵ PEW RESEARCH CTR., *supra* note 13, at 1.

¹⁶ András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 614 (2011) (“The results indicate that gay men encounter significant barriers in the hiring process because, at the initial point of contact, employers more readily disqualify openly gay applicants than equally qualified heterosexual applicants.”).

¹⁷ ADAM P. ROMERO ET AL., WILLIAMS INST., CENSUS SNAPSHOT 2 (2007), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/FloridaCensus2000Snapshot.pdf> (“The median income of men in same-sex couples in Florida is \$30,000, or 10% less than that of married men (\$33,200).”).

¹⁸ See BADGETT ET AL., *supra* note 3, at 11.

¹⁹ This body of qualitative and quantitative literature stretches back at least to the 1970s. See, e.g., M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726 (1995) (applying econometric tools to the study of sexual orientation discrimination); Jeffrey Escoffier, *Stigmas, Work Environment, and Economic Discrimination Against Homosexuals*, 2 HOMOSEXUAL COUNSELING J. 8 (1975) (providing qualitative examination of the economic harm caused to gay men and lesbian women by social stigmas); Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in the Work Force*, 9 SIGNS 700 (1984) (presenting empirical research on the workplace experiences of lesbian women).

²⁰ 135 S. Ct. 2584, 2585 (2015) (finding that same-sex couples have a fundamental right to marry based on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution).

did not arise with the intent to exclude LGBQ people.²¹ But because of the many legal benefits attendant to marital status, including welfare benefits,²² exclusion from the “constellation of benefits that the States have linked to marriage”²³ became a powerful rallying cry in the push for same-sex marriage. Advocates framed same-sex marriage as an economic justice issue in advocacy briefs, legal briefs, and everywhere in between.²⁴

With *Obergefell* in the rear-view mirror, this Note explores whether the inclusion of same-sex couples in the institution of marriage has been as successful at equalizing LGBQ access to the welfare state as many advocates hoped. In answering this question, this Note draws on the concept of heteronormativity, which refers to the assumption that all people are heterosexual or that heterosexuality is the default expression of human sexuality.²⁵ While heteronormativity, as an often-unconscious perspective, is distinct from heterosexism, which is generally considered to encompass *intentional* discrimination and prejudice against homosexuals,²⁶ it can still lead to significant harm for LGBQ communities. Individuals who are both LGBQ and low income often experience these identities as overlapping and mutu-

²¹ Several commentators have traced the early development of marriage promotion to systems of control over African American women in particular. For a discussion, see *infra* notes 34–38 and accompanying text.

²² See generally JYL J. JOSEPHSON, *RETHINKING SEXUAL CITIZENSHIP* 69–73, 130 (Cynthia Burack & Jyl J. Josephson eds., 2016) (discussing heteronormativity in welfare policy and how LGBQ people have been harmed by marriage exclusion through denial of federal benefits); DAVID A. SUPER, *PUBLIC WELFARE LAW* 314–17 (Robert C. Clark et al. eds., 2017) (describing ways LGBT people are disadvantaged by past, current, and contemplated welfare policies, including the focus on marriage promotion).

²³ *Obergefell*, 135 S. Ct. at 2590, 2601 (describing the harm same-sex couples experience from marriage exclusion).

²⁴ For an exploration of this framing, see *infra* Part I.

²⁵ See *Heteronormative*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/heteronormative> (last visited Aug. 15, 2018) (defining “heteronormative” as “of, relating to, or based on the attitude that heterosexuality is the only normal and natural expression of sexuality”); see also Michael Warner, *Introduction: Fear of a Queer Planet*, 29 *SOC. TEXT* 3, 3 (1991) (coining the term “heteronormativity” in an article exploring social theory interventions necessitated by “a new style of ‘queer’ politics that, no longer content to carve out a buffer zone for a minoritized and protected subculture, has begun to challenge the pervasive and often invisible heteronormativity of modern societies”).

²⁶ See Gregory M. Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 *J. INTERPERSONAL VIOLENCE* 316, 316 (1990) (linking cultural heterosexism to individual prejudice against lesbians and gay men and defining heterosexism as “an ideological system that denies, denigrates, and stigmatizes any nonheterosexual form of behavior, identity, relationship, or community. . . . It operates principally by rendering homosexuality invisible and, when this fails, by trivializing, repressing, or stigmatizing it”); *Heterosexism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/heterosexism> (last visited Aug. 15, 2018) (defining “heterosexism” as “discrimination or prejudice by heterosexuals against homosexuals”).

ally reinforcing,²⁷ and through a phenomenon known as “policy invisibility,” these communities may find themselves outside the protections and policy benefits designed for the normative community of heterosexual people.²⁸

This Note identifies several ways in which the welfare system continues to marginalize LGBQ people and argues that this difference in treatment is a result of deeply entrenched heteronormativity extending far beyond their former exclusion from marriage. This Note proceeds as follows: For historical context, Part I outlines the enshrinement of heteronormativity in the welfare state and the effect of the *Obergefell* decision. Part II then explores three of the most flagrant and pressing examples of extant heteronormativity in the welfare state, in which facially neutral policies result in adverse outcomes for LGBQ program beneficiaries (or would-be beneficiaries): proof-of-paternity requirements for Temporary Assistance for Needy Families (TANF) (a cash benefit program administered by states) recipients with children, work requirements in TANF and Medicaid programs, and roadblocks to government support for low-income LGBQ youth. To begin the process of deconstructing the system’s heteronormative tendencies, Part III advocates for a long-term congressional solution, but recognizing the unlikelihood of such a solution in the foreseeable future, it also advocates for the use of executive action as a short-term solution.

²⁷ See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (coining the term “intersectionality” to address the frequent exclusion of Black women from feminist theory and antiracist policy discourse because they are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender). See also Leah R. Warner & Stephanie A. Shields, *The Intersections of Sexuality, Gender, and Race: Identity Research at the Crossroads*, 68 SEX ROLES 803, 804 (2013) (“At the socio-structural level, the individual’s legal status, resources, or social needs may advantage them or marginalize them, specifically due to the convergence of identity statuses. . . . Intersectionality is the embodiment in theory of the real-world fact that systems of inequality . . . are interdependent.”). For explorations of intersectional identity in the LGBQ community, see, e.g., Judith E. Koons, *Pulse: Finding Meaning in a Massacre Through Gay Latinx Intersectional Justice*, 19 SCHOLAR 1, 6–7 (2017) (“At the intersection of the gay and Latinx communities is the unfinished business of remedying historic subordination and dismantling divisions constructed of fear, hatred, and privilege.”); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1468–69 (2009) (drawing on theories of intersectionality to present a structural challenge to media narratives that blame Black men who have sex with men for the high HIV rates of Black women).

²⁸ See Valerie Purdie-Vaughns & Richard P. Eibach, *Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities*, 59 SEX ROLES 377, 378 (2008) (proposing that androcentric, ethnocentric, and heterocentric ideologies cause people who have multiple subordinate-group identities to experience intersectional invisibility).

A final comment on this Note's methodology: I have chosen not to include transgender, gender nonconforming, and/or intersex (TGNCI) individuals in this analysis because of the distinct, and in some instances much greater, difficulties that TGNCI communities face at the hands of the welfare state. These issues, which range from Medicaid coverage of medically necessary gender affirmation surgery to the challenges of welfare program enrollment without identity documents that accurately reflect the benefit-seeker's gender, are comprehensively explored elsewhere in the social science literature²⁹ and the legal literature.³⁰ The focus on LGBTQ individuals is further warranted because this Note is conceptualized as a follow-up to the same-sex marriage litigation arc, in which litigants generally advocated a notion of sexual orientation distinct from gender identity.³¹ In line with this Note's focus on LGBTQ individuals, this Note cites to statistics pertaining to LGB and LGBTQ people when possible. Where data is only available as pertaining to the LGBT or LGBTQ community as a whole, those figures are cited and labelled accordingly.

²⁹ See, e.g., SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), <https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> (detailing the findings of a survey of 27,715 transgender people in the United States); LEGAL SERVICES NYC, POVERTY IS AN LGBT ISSUE: AN ASSESSMENT OF THE LEGAL NEEDS OF LOW-INCOME LGBT PEOPLE (2016), <http://www.legalservicesnyc.org/storage/PDFs/lgbt%20report.pdf> (reporting on the results of an assessment of the civil legal needs of low-income LGBT New Yorkers and identifying distinct legal needs for transgender individuals).

³⁰ See, e.g., Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1 (2017) (arguing that laws that criminalize conduct inextricably linked to transgender identity, such as laws prohibiting transgender individuals from using bathroom facilities consistent with their gender identities, may be unconstitutional as status crimes); J. Lauren Turner, Note, *From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 FAM. CT. REV. 552, 556–60 (2009) (encouraging states to change their child welfare laws to recognize that hormone treatment and sex reassignment surgery can be medically necessary for transgender youth).

³¹ Many theorists have argued the view that sexual orientation may be understood as a component of sex and gender rather than as a distinct classification. See, e.g., Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188–96 (1988) (arguing that disapproval of homosexual conduct is rooted not in simple scorn for the sexual practices of gay men and lesbian women, but rather in disapproval of deviation from traditional gender norms). Although the *Obergefell* Court did not adopt this logic, several lower courts have adopted the position that discrimination based on sexual orientation is a type of discrimination based on sex. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (finding sexual orientation protected by Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex).

I

HETERONORMATIVITY IN THE WELFARE STATE:
HISTORICAL CONTEXT

The history of welfare law in the United States is long and complex. With such a breadth of state and municipal variations, as well as divergent governing ideologies, it can be difficult to draw unifying conclusions about the history of the American social safety net. One recurring and readily identifiable theme, however, is the use of welfare law to control the behavior of the poor. From the Elizabethan Poor Laws that formed the basis of early American poverty law, which prominently featured workhouses that provided accommodation on condition of labor,³² to the “family caps” first instituted in the 1990s,³³ the history of welfare is replete with examples of implicit and explicit efforts to curtail the autonomy of America’s poor. Fallout from attempts to regulate the sexual behavior of the poor, particularly through the institution of marriage, have had an especially damaging effect on LGBTQ communities.

The linkage of marriage and welfare policy dates back at least one hundred and fifty years, long before LGBTQ identity was a major consideration for policymakers. The modern constellation of marriage-linked benefits sought by advocates in the same-sex marriage litigation is traceable to Reconstruction-era efforts to control recently emancipated African Americans.³⁴ Enslaved peoples, as property, had no right to contract and could not enter into legally

³² See An Acte for the Releife of the Poore 1601, 43 Eliz. c. 2 (Eng. & Wales); see also Workhouse Test Act 1722, 9 Geo. c. 7 (Gr. Brit.) (amending the Elizabethan Poor Law from 1601 but leaving work requirements). For an analysis of the ways that the Elizabethan Poor Laws continue to influence welfare policy in the United States, see Larry Catá Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871 (1995); Amir Paz-Fuchs, *Behind the Contract for Welfare Reform: Antecedent Themes in Welfare to Work Programs*, 29 BERKELEY J. EMP. & LAB. L. 405 (2008).

³³ In 1992, New Jersey was the first state to institute a cap on children for which families would receive welfare. See N.J. STAT. ANN. § 44:10–3.5 (West 1993) (current version at N.J. STAT. ANN. § 44:10–61(a) (Supp. 2018)). Section 44:10–61(a) was upheld under the New Jersey Constitution in *Sojourner A. v. New Jersey Department of Human Services*, 828 A.2d 306, 317 (N.J. 2003). For a survey of family caps currently in place (as of 2011), see Rochelle Finzel, *Welfare Reform: Family Cap Policies*, NAT’L CONF. ST. LEGISLATURES (Jan. 31, 2011), http://www.ncsl.org/research/human-services/welfare-reform-family-cap-policies.aspx#_edn9.

³⁴ See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1679–80 (2005) (tracing the thread of marriage promotion from the Reconstruction era to the Bush administration); see also Dorothy Roberts, *The Welfare Debate: Who Pays for Procreation?*, in *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 202 (1997) (same).

binding marriages. After the Civil War, the Freedmen's Bureau encouraged marriages among the recently emancipated because marriage functioned to assign the care of poor Black women and children to Black men, thereby reducing dependency on the state or on former masters.³⁵ Though marriage promotion was sometimes presented as a way for recently emancipated individuals to avail themselves of their new rights as citizens,³⁶ the function of marriage as a poverty-privatization tool was made clear through both Freedmen's Bureau representatives' policy choices³⁷ and public statements.³⁸

Marriages and families were minor considerations in the safety nets created as part of the New Deal in the 1930s³⁹ and the Great Society-era initiatives of the 1960s,⁴⁰ but they returned to the forefront of antipoverty measures with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).⁴¹ PRWORA replaced the Aid to Families with Dependent Children (AFDC) program created by the Social Security Act in 1935 with the TANF program, which devolved welfare administration to the states and today remains the primary mechanism by which low-income

³⁵ See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 303 (1999) ("At the same time the southern states enacted laws legitimizing African American marriages, they were careful to build into these laws systems of masculine agency and the privatization of dependency.").

³⁶ See *id.* at 276 (describing how the institution of marriage was viewed as one of the primary instruments by which citizenship was both developed and managed in African Americans).

³⁷ For example, one agent of the Freedmen's Bureau stated that "[w]henver a negro appears before me with two or three wives who have equal claim upon him," as a result of slaveholders' separation of families and the man's remarriage, "I marry him to the woman who has the greatest number of helpless children who otherwise would become a charge on the Bureau." LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 242 (1979).

³⁸ As Gen. Clinton B. Fisk, assistant commissioner of the Freedmen's Bureau, announced to freed Black men: "*Husbands* must provide for their families. Your wives will not love you if you do not provide bread and clothes for them. . . . By industry and economy you can soon provide a real good home, and plenty of food and clothing for your family." *WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY* 319–20 (Dorothy Sterling ed., 1984).

³⁹ Retirement, Survivors, and Disability Insurance, for example, which provides for the surviving dependents of Social Security Disability Insurance recipients, was first created in 1935. Social Security Act, Pub. L. No. 271, § 401, 49 Stat. 623 (1935) (codified as amended at 42 U.S.C. § 402 (2012)).

⁴⁰ See, e.g., *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (overturning section 407 of the Social Security Act, which provided benefits to families whose dependent children had been deprived of parental support because of the unemployment of the father, but did not provide such benefits when the mother became unemployed).

⁴¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; see Onwuachi-Willig, *supra* note 34 (exploring the link between marriage, welfare reform, and systems of control).

Americans receive cash benefits. PRWORA came about as the result of welfare-reform efforts driven in part by changes in the demography of welfare recipients and in part by changing perspectives on the moral desert of welfare recipients.⁴² These often-coinciding changes are poignantly encapsulated by, for example, the infamous Moynihan Report, which attributed welfare dependency in the African American community to “the breakdown of the Negro family,”⁴³ and exaggerated claims of the existence of “welfare queens,”⁴⁴ which “tap[] into stereotypes about both women (uncontrolled sexuality) and African-Americans (laziness).”⁴⁵

Passed by President Bill Clinton, PRWORA revolutionized welfare administration by implementing work requirements for welfare

⁴² While the earliest welfare recipients were predominantly white widows, increasing participation rates of minority women in the Aid to Dependent Children program (ADC) (the predecessor to AFDC) and the creation of a standalone widow-specific program radically reshaped the demographics of welfare recipients: the percentage of children receiving ADC benefits living with widowed mothers decreased from 48 percent to 8 percent between 1938 and 1961, while in the same time frame the proportion of children receiving ADC benefits who were African American increased from 13.8 percent to 44 percent. Sarah A. Soule & Yvonne Zylan, *Runaway Train? The Diffusion of State-Level Reform in ADC/AFDC Eligibility Requirements, 1950–1967*, 103 AM. J. SOC. 733, 736 (1997) (examining the causes and effects of state-level welfare reform in the 1950s and 1960s); see also MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 102 (1999) (tracking the role of the news media in the racialization of opposition to welfare spending and noting that the racialization of poverty images “reflected a preexisting stereotype of blacks as lazy”); Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 WELFARE TO WORK 28 (1997) (further examining the demographic history of the welfare system).

⁴³ DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION*, OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR 12 (1965). Many scholars have argued that this report, which continues to influence welfare policy, improperly blamed poor African American communities for their situation. See, e.g., SUSAN D. GREENBAUM, *BLAMING THE POOR: THE LONG SHADOW OF THE MOYNIHAN REPORT ON CRUEL IMAGES ABOUT POVERTY* (2015); Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> (tracing mass incarceration to the influence of the Moynihan Report on perceptions of African American families).

⁴⁴ Though President Ronald Reagan did not coin the term “welfare queen,” he is often credited with popularizing it. For an article addressing his use of the term, see *‘Welfare Queen’ Becomes Issue in Reagan Campaign*, N.Y. TIMES (Feb. 15, 1976), <https://www.nytimes.com/1976/02/15/archives/welfare-queen-becomes-issue-in-reagan-campaign-hitting-a-nerve-now.html>.

⁴⁵ Franklin D. Gilliam, Jr., *The “Welfare Queen” Experiment: How Viewers React to Images of African-American Mothers on Welfare*, in 53 NIEMAN REPORTS 49, 50, 52 (1999) (finding that the “welfare queen” narrative reduced white study participants’ support for welfare, increased stereotyping of African Americans, and heightened support for traditional gender roles).

receipt and by imposing a five-year lifetime limit on benefits.⁴⁶ Of critical importance to this Note, PRWORA also revived marriage-centric regulation of the sexual behavior of the poor. The stated purposes of PRWORA include “end[ing] the dependence of needy parents on government benefits by promoting . . . marriage” and “encourag[ing] the formation and maintenance of two-parent families.”⁴⁷ The legislative history of PRWORA does not specifically address same-sex couples,⁴⁸ but the elevation of some kinds of families necessarily comes at the expense of others. But lest there be any uncertainty regarding the types of families the 104th Congress sought to prioritize, it passed the Defense of Marriage Act (DOMA) just one month after PRWORA.⁴⁹

When it was passed in 1996, PRWORA opened the door for state-level marriage initiatives but did not itself encompass concrete steps to further the stated purpose of marriage promotion.⁵⁰ Under the Bush administration, however, federal involvement in marriage promotion began in earnest and reached a fever pitch. Not only did the Bush administration oversee the diversion of TANF funding for marriage programs, but the 2005 Federal Appropriations Act designated over \$100 million for marriage promotion programs for fiscal years 2006–2010, with another \$50 million annually to support “fatherhood” programs.⁵¹ These are programs that encourage men to take a greater role in their families on the theory that fathers are essential to positive child development—a theory which operates at the expense of nontraditional families and disregards research demonstrating that

⁴⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. I, pt. B, §§ 407, 408(a)(1)(B), 110 Stat. 2105, 2129–35 (1996) (codified at 42 U.S.C. §§ 607, 608(a)(7)(A) (2012)).

⁴⁷ 42 U.S.C. § 601 (2012).

⁴⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

⁴⁹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). As others have noted, the language in the House Judiciary Committee report on DOMA evokes the notions of control at the heart of PRWORA: “[A]t bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.” CARLOS A. BALL, *SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW* 48 (2014) (quoting Defense of Marriage Act, H.R. REP. NO. 104-664, at 13).

⁵⁰ “Arizona and Oklahoma were the first states to use TANF money to fund marriage initiatives, followed by Utah and West Virginia. Beginning in 1996, West Virginia . . . provided a \$100 monthly welfare bonus to recipients who marry. . . . [T]he program has since been suspended.” See also JEAN HARDISTY, POLITICAL RESEARCH ASSOCIATES AND WOMEN OF COLOR RESOURCE CENTER, *PUSHED TO THE ALTAR: THE RIGHT WING ROOTS OF MARRIAGE PROMOTION* 19 (2008), <https://www.politicalresearch.org/wp-content/uploads/downloads/2012/12/Pushed-to-the-Altar.pdf> (overviewing faith-based policies promulgated in the wake of PRWORA).

⁵¹ See *id.* (summarizing government expenditures on marriage promotion).

children can be successfully raised in many different types of family structures.⁵² President Bush also appointed Wade Horn, leader of the traditionalist fatherhood movement, as Assistant Secretary for Children and Families at the Department of Health and Human Services.⁵³ There, he used the Department's newly expanded faith-based initiatives to encourage women to marry their way out of poverty.⁵⁴

It was under the Bush administration that federal efforts to promote marriage took on an explicitly anti-LGBQ cast. The administration's early forays into marriage promotion appeared to be rooted in the longstanding conservative effort to privatize poverty,⁵⁵ but the Bush administration began to ramp up explicit support of male-female marriage in response to contemporaneous judicial developments. Executive support for "traditional marriage" became a convenient way for the Bush administration to simultaneously capitalize on resistance to same-sex marriage and interest in welfare reform.⁵⁶ The administration declared a "Marriage Protection Week"⁵⁷ just a few

⁵² See Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339, 389–95 (1996) (surveying the responsible fatherhood movement and finding, among other things, an ideology disinterested in women's agency and desire for independence, ignorant of the structural causes of poverty, and unwilling to reconcile with the problem of violence committed by men against women and children); Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 AM. PSYCHOLOGIST 397 (1999) (using cross-species, cross-cultural, and social science research to argue that "neither mothers nor fathers are essential to child development and that responsible fathering can occur within a variety of family structures").

⁵³ Not only is the very concept of a fatherhood movement necessarily exclusionary to lesbians and bisexual women, but the movement's advocacy for policies potentially harmful to heterosexual women, such as the institution of covenant marriages and the abolition of no-fault divorce, was also recognized by feminists to signify a very limited view of "fatherhood." See, e.g., Sarah Stewart Taylor, *Fatherhood Movement Has Range of Ideology, Agenda*, WOMEN'S ENEWS (June 15, 2001), <https://womensenews.org/2001/06/fatherhood-movement-has-range-ideology-agenda/> (recognizing diverse perspectives within the fatherhood movement but noting the central role played by Horn and other advocates for traditional family structures).

⁵⁴ See HARDISTY, *supra* note 50, at 34 (noting that during Horn's tenure, HHS awarded a capacity-building grant for nearly \$1 million and no-bid contracts of over \$2 million to the National Fatherhood Initiative, the organization Horn had led prior to joining HHS).

⁵⁵ See Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 882 (1994) (asserting that PRWORA sought to privatize solutions to poverty by giving "incentives to poor mothers to seek economic security through men and marriage"); Onwuachi-Willig, *supra* note 34, at 1676.

⁵⁶ See Robert Pear & David D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES (Jan. 14, 2004), <https://www.nytimes.com/2004/01/14/us/bush-plans-1.5-billion-drive-for-promotion-of-marriage.html> (quoting an unnamed adviser for the proposition that "[t]his is a way for the president to address the concerns of conservatives and to solidify his conservative base").

⁵⁷ Marriage Protection Week, Proclamation No. 7714, 68 Fed. Reg. 58,257 (Oct. 3, 2003).

months after the ruling in *Lawrence v. Texas*⁵⁸ and issued a statement promising “to do what is legally necessary to defend the sanctity of marriage”⁵⁹ after a Massachusetts decision that found a right to same-sex marriage in the state constitution.⁶⁰ The administration’s formal endorsement of a constitutional amendment banning same-sex marriage followed shortly thereafter.⁶¹

The takeaway from this history is that the institution of marriage plays a significant role in modern welfare administration, and prior to *Obergefell*, the exclusion of LGBTQ couples from marriage-linked benefits caused concrete financial harm. Shortly after the passage of DOMA in 1996, the U.S. Government Accountability Office determined that there were 1049 federal statutory provisions in the United States Code in which benefits, rights, and privileges were contingent on marital status or in which marital status was a factor,⁶² and when the GAO updated this list in 2004, the number increased to 1138.⁶³ These provisions do not all necessarily represent “benefits,” per se, and state law is often a source of additional benefits,⁶⁴ but these figures were repeated innumerable times during subsequent campaigns for same-sex marriage, appearing everywhere from newspaper columns⁶⁵ and magazine articles⁶⁶ to blogs,⁶⁷ nonprofit issue

⁵⁸ 539 U.S. 558 (2003) (overturning all sodomy laws in the United States).

⁵⁹ EDWARD ASHBEE, *THE BUSH ADMINISTRATION, SEX AND THE MORAL AGENDA* 74–77, 85 (2007) (listing the Bush campaign’s mixed signals regarding sexual orientation).

⁶⁰ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁶¹ Federal Marriage Amendment, S.J. Res. 40, 108th Cong. (2004). See Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage*, WASH. POST (Feb. 25, 2004), <http://www.washingtonpost.com/wp-dyn/content/article/2004/02/25/AR2005032201695.html> (explaining that “President Bush called yesterday for a constitutional amendment restricting marriage to the union of men and women, asserting that gay marriage would weaken society”).

⁶² U.S. Gov’t Accountability Office, GAO/OGC-97-16, Letter on Defense of Marriage Act (Jan. 31, 1997) at 1–2, <https://www.gao.gov/archive/1997/og97016.pdf>.

⁶³ U.S. Gov’t Accountability Office, GAO-04-353R, Letter on Defense of Marriage Act (Jan. 23, 2004) at 1, <https://www.gao.gov/new.items/d04353r.pdf>.

⁶⁴ See M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 *DRAKE L. REV.* 1081, 1082 (2010); see also Hernandez v. Robles, 855 N.E.2d 1, 6 (N.Y. 2006) (“The diligence of counsel has identified 316 such benefits in New York law . . .”).

⁶⁵ See, e.g., Richard H. Thaler, *Gay Marriage Debate Is About Money, Too*, N.Y. TIMES (Feb. 18, 2012), <https://www.nytimes.com/2012/02/19/business/gay-marriage-debate-is-about-money-too.html> (“Federal law bestows a long list of rights—more than 1,000—on legally married couples.”).

⁶⁶ See, e.g., John Cloud, *1,138 Reasons Marriage Is Cool*, TIME (Mar. 1, 2004), <http://content.time.com/time/magazine/article/0,9171,596123,00.html>.

⁶⁷ See, e.g., Bella DePaulo, *Know Your 1,138 Marital Privileges, Courtesy of the Feds*, HUFFPOST: THE BLOG (June 29, 2010, 6:25 PM) https://www.huffingtonpost.com/bella-depaulo/know-your-1138-marital-pr_b_630000.html (surveying the benefits of legal marriage); PROJECT 1138, <http://www.1138project.blogspot.com> (last updated May 6, 2010) (advocating for same-sex marriage by increasing public awareness of the “1,138 federal

briefs,⁶⁸ and handwritten protest signs.⁶⁹

Exclusion from these benefits and rights became a lynchpin of the legal arguments in favor of same sex marriage. For example, while the briefs for petitioners in *Obergefell* and its companion cases did not address welfare benefits specifically, they emphasized the harm caused by exclusion from the “government benefits” attendant to marriage.⁷⁰ Many of the amicus briefs submitted to the Supreme Court regarding *Obergefell* broadly addressed the benefits of marriage, and no fewer than *seven* of the briefs in support of petitioners specifically mention Medicaid or Medicare.⁷¹ And when the Supreme

marital benefits and protections denied to same-sex couples as the result of marriage inequality”).

⁶⁸ See, e.g., NAT’L GAY & LESBIAN TASK FORCE, HOW UNEQUAL ARE CIVIL UNIONS? (2004), http://www.thetaskforce.org/static_html/downloads/reports/reports/CivilUnionsHowUnequal.pdf (criticizing civil unions as a legal alternative to marriage); Nat’l Org. for Women, *Civil Marriage v. Civil Unions*, NOW.ORG, <https://now.org/resource/civil-marriage-v-civil-unions/> (last visited Aug. 17, 2018) (listing differences between civil marriage and civil unions).

⁶⁹ See, e.g., *Sea Turtle*, FLICKR (Nov. 15, 2008), <https://www.flickr.com/photos/seaturtle/3039218559> (showing a photo of a protest sign comparing the 1049 benefits of civil marriage to the 171 benefits of domestic partnership under the words “SEPARATE IS NOT EQUAL”) (emphasis in original).

⁷⁰ Brief for Petitioners at 37–38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556). The petitioners’ reply brief emphasizes the Supreme Court’s own language: “[M]arriage is a . . . ‘pre-condition to receipt of government benefits,’ many of which can be accessed only through state recognition of the marriage.” Reply Brief for Petitioners at 14, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (quoting Turner v. Safley, 482 U.S. 78, 95–96 (1987)). The petitioners’ brief in one of the cases consolidated with *Obergefell* made the same point: “[D]enying the material benefits and responsibilities that accompany marriage compromises the security of these couples.” Brief for Petitioners at 24, *Deboer v. Snyder*, 135 S. Ct. 2584 (2015) (No. 14-571).

⁷¹ See Brief of 167 Members of the U.S. House of Representatives and 44 U.S. Senators as Amici Curiae in Support of Petitioners at 33 n.82, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (describing Department of Health and Human Services regulations for Medicaid and Medicare participating hospitals for treatment of same-sex couples); Brief of Amicus Curiae of the American Federation of Labor and Congress of Industrial Organizations et al. in Support of Petitioners at 8 n.19, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (“States that deny same-sex couples the right to marry generally are not obligated to recognize lawful same-sex marriages performed in other states when assessing eligibility for federal health benefits, such as Medicaid”); Brief of Amici Curiae The Donaldson Adoption Institute et al. in Support of Petitioners at 12 & n.9, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (explaining the barriers to insurance coverage that adopted children of same-sex couples face); Brief of Amicus Curiae Garden State Equality in Support of Petitioners at 13, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (discussing the Centers for Medicare & Medicaid Services’ response to *United States v. Windsor*); Brief of Ninety-Two Plaintiffs in Marriage Cases in Alabama et al. as Amici Curiae in Support of Petitioners at 31, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (emphasizing that Medicare benefits “remain out of reach for same-sex couples”); Brief of Amici Curiae Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders et al. in Support of Petitioners at 16–17, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (describing the difficulties elderly same-sex couples face in accessing Medicaid benefits); Brief of the State of Minnesota as Amicus

Court found in favor of the *Obergefell* petitioners, it based its ruling on the exclusion of same-sex couples from “the constellation of benefits that the States have linked to marriage.”⁷²

Now that marriage is a right accessible to same-sex couples and male-female couples alike, it is worth exploring the degree to which heteronormativity still pervades the welfare state. The following sections of this Note update and expand upon pre-*Obergefell* literature on the topic, much of which focused on the harm caused by exclusion from the institution of marriage,⁷³ by exploring three ways in which the welfare system continues to marginalize LGBQ individuals. Through these, this Note demonstrates that the system’s heteronormativity problem is related to, but runs far deeper than, the institution of marriage.

II

EXTANT HETERONORMATIVITY IN THE WELFARE STATE

This Part describes three disparate areas of welfare law in which heteronormative paradigms worsen outcomes for LGBQ individuals. The first, proof-of-paternity requirements in TANF, is closely linked to the deification of two-parent male-female marriage. That the second and third—the workfare model and youth homelessness services, respectively—are not immediately related to traditional notions of families demonstrates the pervasiveness of state heteronormativity.

Curiae in Support of Petitioners at 7, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (describing the 1997 U.S. General Accounting Report, which concluded that the Defense of Marriage Act would affect Medicaid and Medicare).

⁷² 135 S. Ct. at 2601.

⁷³ See, e.g., Katherine Anne Paddock Betcher, *Revisiting the Personal Responsibility and Work Opportunity Reconciliation Act and Calling for Equality: Problematic Moral Regulations and the Changing Legal Status of LGBT Families in a New Obama Administration*, 31 WOMEN’S RTS. L. REP. 104, 105 (2009) (analyzing PRWORA with special reference to how “the Christian right’s heteronormative vision of American society leads to a welfare regime that infringes on gay, lesbian, bisexual, and transgender families’ rights of privacy and freedom of association”); Amy Lind, *Legislating the Family: Heterosexist Bias in Social Welfare Policy Frameworks*, 31 J. SOC. & SOC. WELFARE 21, 22, 25–26 (2004) (identifying the role that “institutionalized heterosexuality” plays in shaping social welfare agendas and highlighting three ways that heterosexist biases operate in social welfare policy: explicit targeting of LGBT individuals as deviant, federal definitions that assume all families are heterosexual, and policies that overlook LGBT poverty due to stereotypes of LGBT affluence); Joseph N. DeFilippis, *Common Ground: The Queerness of Welfare Policy*, SCHOLAR & FEMINIST ONLINE (Fall 2011–Spring 2012), <http://sfonline.barnard.edu/a-new-queer-agenda/common-ground-the-queerness-of-welfare-policy/0/> (arguing that welfare policy is a “queer issue” because of the “many similarities between the language and tactics of those fighting against LGBT rights and of those who advocate for the complete end of the social safety net”).

A. *Proof-of-Paternity Requirements*

An example of the harm caused by the heteronormative assumption that all families consist of two parents, one of which is a man and one of which is a woman, can be found in proof-of-paternity requirements for benefits. Though *Obergefell* guaranteed same-sex couples a legal right to marriage, the aftermath in the field of family law has been far from a honeymoon. The *Obergefell* Court said the decision would help to address the “slower, case-by-case determination of the required availability of specific public benefits to same-sex couples,”⁷⁴ but for many LGBTQ families, state laws that are out of step with technology and modern parenting trends are still creating difficulties.⁷⁵ Confusion over the parental rights of separated and divorced same-sex partnerships and spouses, along with the increasing use of surrogate pregnancies, in vitro fertilization, and anonymous sperm donors, has created a situation one family law practitioner analogized to “the wild, wild West.”⁷⁶ At the intersection of this developing area of law and the welfare state is an issue particularly troublesome for lesbian and bisexual women: proof-of-paternity requirements for benefit access.

An anecdote from Topeka, Kansas, illustrates the problem. In 2009, Angela Bauer and Jennifer Schreiner, an unmarried lesbian couple, posted an advertisement on the Internet seeking a donation of sperm in order to have a child. A local man named William Marotta responded to the solicitation, and the women had one daughter using his sperm. Only Schreiner’s name is listed on the birth certificate. The women separated the following year but continued to co-parent their child. In 2012, Bauer was diagnosed with a serious illness and found herself unable to work, and Schreiner had to apply for Medicaid for their daughter’s health insurance.⁷⁷ But because Medicaid—as well as TANF⁷⁸—requires parents to cooperate in establishing the paternity

⁷⁴ 135 S. Ct. at 2606.

⁷⁵ Only a handful of states have kept up with the Uniform Parentage Act, a regularly updated template for a uniform legal framework for paternity establishment. For additional discussion, see *infra* note 175 and accompanying text.

⁷⁶ Tresa Baldas, *Same-Sex Custody Battle: When Law Doesn’t Call You Mom*, DET. FREE PRESS (Mar. 19, 2016, 11:26 PM), <https://www.freep.com/story/news/local/michigan/2016/03/19/when-kids-call-you-mom-but-law-doesnt/81865484/> (quoting Dana Nessel, attorney for the non-biological mother in a case where, as a result of a lesbian couple having children but breaking up before the legalization of same-sex marriage, the non-biological mother was not recognized as a parent by law).

⁷⁷ Aly Van Dyke, *Former Partners ‘Forever Grateful’ to Topeka Sperm Donor*, TOPEKA CAP.-J. (Dec. 30, 2012, 2:42 PM), <http://www.cjonline.com/news/2012-12-30/former-partners-forever-grateful-topeka-sperm-donor>.

⁷⁸ See PAULA ROBERTS, CHILD SUPPORT COOPERATION REQUIREMENTS AND PUBLIC BENEFITS PROGRAMS: AN OVERVIEW OF ISSUES AND RECOMMENDATIONS FOR CHANGE,

of children born out of wedlock in order to obtain child support payments,⁷⁹ the Kansas Department of Children and Families required Schreiner to provide the sperm donor's information. Schreiner gave the agency Marotta's name, and the state promptly sued him for \$6000 in medical expenses. A judge initially ruled against Marotta, saying that Marotta and the couple failed to conform to the requirements of the Kansas Parentage Act in not enlisting a licensed physician in the artificial insemination process,⁸⁰ but in 2016 the same judge reversed and found for Marotta.⁸¹

The state intrusion faced by Bauer and Schreiner isn't an isolated incident: Similar cases have occurred in California and Michigan, according to attorneys at the National Center for Lesbian Rights.⁸² In one high-profile example, a mother filed a child support action against her sperm donor at the behest of welfare officials who refused to recognize the mother's oral agreement not to seek child support from the donor.⁸³ The Pennsylvania Supreme Court reversed the trial court's ruling against the donor in that instance,⁸⁴ but such suits come with great risk for mothers who do not want to admit a father figure into their family: When sperm donors are involved in these types of cases, they occasionally win paternity status.⁸⁵

The extent to which this is a problem for lesbian and bisexual women varies between states. Parents who live in states with laws that say sperm donors are not parents⁸⁶ do not have to identify donors as the child's father, though in practice, advocates note, parents may

CTR. FOR L. & SOC. POL'Y 3 (Nov. 2005), <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/0252.pdf>.

⁷⁹ 42 U.S.C.A. § 1396k(a)(1)(B) (2012).

⁸⁰ Steve Fry, *Court: Marotta Is a Father, Not Merely a Sperm Donor*, TOPEKA CAP.-J. (Jan. 22, 2014, 2:56 PM), <http://www.cjonline.com/news/2014-01-22/court-marotta-father-not-merely-sperm-donor>.

⁸¹ Luke Ranker, *Shawnee County Judge: Topeka Sperm Donor William Marotta Not Legally Child's Father*, TOPEKA CAP.-J. (Nov. 28, 2016, 11:11 AM), <http://www.cjonline.com/news/2016-11-28/shawnee-county-judge-topeka-sperm-donor-william-marotta-not-legally-child-s-father>.

⁸² Email from Itir Yakar, Legal Fellow, Nat'l Center for Lesbian Rights, to Matthew Barnett, Note Author (Mar. 2, 2018, 04:46 PST) (on file with author).

⁸³ *Ferguson v. McKiernan*, 940 A.2d 1236, 1240 n.8 (Pa. 2007).

⁸⁴ *Id.* at 1248.

⁸⁵ *See, e.g., In re P.S.*, 505 S.W.3d 106, 111 (Tex. App. 2016) (affirming an order establishing the paternity of a sperm donor, after single lesbian mother used his sperm to conceive); *Bruce v. Boardwine*, 770 S.E.2d 774, 778 (Va. Ct. App. 2015) (affirming grant of visitation rights to a sperm donor over objections of the child's mother).

⁸⁶ *E.g., N.H. REV. STAT. ANN.* § 168-B:2.III (LexisNexis 2017) ("A donor is not a parent of a child conceived through assisted reproduction.").

need to push welfare agencies to recognize this.⁸⁷ Unfortunately, several states appear to be moving backward, not forward, on the rights of same-sex parents.⁸⁸

Scholars have long called on courts to presume that a sperm donor is not a father and to specifically enforce agreements made by biological fathers to forego parental status.⁸⁹ In the welfare context, insofar as legislatures and courts have not heeded this call, they cause direct harm to lesbian couples. For *all* mothers on welfare, conditioning receipt of benefits on government involvement with respect to paternity robs them of the power to decide whether and how to make support arrangements and whether to discontinue existing relations of dependency.⁹⁰ But compliance with paternity requirements imposes a unique burden on lesbian couples. If a sperm donor's anonymity is protected by a sperm bank, the mother may not be able to provide the state with the required paternity information and, as a result, may have a difficult time accessing benefits.

Beyond the logistical difficulties though, paternity requirements inflict severe psychic harm by elevating a specific, heteronormative family paradigm.⁹¹ Even the implication that lesbian and bisexual women may need the donor in their life risks undermining family cohesion.⁹² TANF guidelines exempt women from this requirement in

⁸⁷ ACLU et al., *LGBT Organizations Fact Sheet Series: After DOMA: What it Means for You: Temporary Assistance for Needy Families (TANF)* 2, https://www.aclu.org/files/pdf/lgbt/legal-guidance/Post-DOMA_TANF_v3.pdf (last visited Aug. 18, 2018).

⁸⁸ See, e.g., S.B. 375, 154th Gen. Assemb., Reg. Sess. (Ga. 2018) (showing a bill, currently pending in the Georgia legislature, that allows adoption agencies to discriminate against LGBTQ parents on the basis of "sincerely held religious beliefs"); Stacey Barchenger & Jake Lowary, *Lawsuit Challenges Tennessee's Days-Old 'Natural Meaning' Law*, TENNESSEAN (May 8, 2017, 9:32 PM), <https://www.tennessean.com/story/news/politics/2017/05/08/lawsuit-challenges-bill-haslam-tennessee-days-old-natural-meaning-law/312951001/> (discussing a challenge to Tennessee's "Natural Meaning" law, which makes it harder for both lesbian mothers to be recognized as the parent of their child).

⁸⁹ See, e.g., Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57, 58 (2000); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 599–600 (2002).

⁹⁰ See Anna Marie Smith, *Reproductive Technology, Family Law, and the Postwelfare State: The California Same-Sex Parents' Rights "Victories" of 2005*, 34 SIGNS 827, 833 (2009) (criticizing paternity requirements). For this reason, the wisdom of the rule is questionable even in states where the law recognizes the same-sex spouse as responsible for support for TANF purposes. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005).

⁹¹ See generally Smith, *supra* note 90, at 833 ("This [paternity requirement] presses [a woman] to turn to a patriarchal figure . . . for support. This conservative family-values effect is compatible with the neoliberal interest in downsizing redistributive rights and ramping up the obligation of the familial patriarch to care for 'his own.'").

⁹² See SEAN CAHILL & KENNETH T. JONES, *LEAVING OUR CHILDREN BEHIND: WELFARE REFORM AND THE GAY, LESBIAN, BISEXUAL, AND TRANSGENDER COMMUNITY*,

certain cases, such as when caseworkers identify a recipient to be a victim of domestic violence,⁹³ but TANF caseworkers generally have great discretion in determining whether the would-be recipient has made a good-faith effort to cooperate with paternity determinations. Notably, a significantly greater portion of TANF cases are closed due to failure to cooperate with paternity identification and child support enforcement procedures than due to failure to comply with work requirements.⁹⁴ An additional consideration is that uncertainty regarding possible legal complications for well-meaning donors risks reducing the overall availability of sperm donors.

The proof-of-paternity requirements in TANF and Medicaid are a striking example of how LGBQ individuals and couples involved with the welfare state are being harmed by normative assumptions based on traditional marriage which echo through the system even in an era of marriage equality. This Part now shifts its attention to two areas of welfare law where the heteronormative paradigms are further removed from the institution of marriage.

B. *The Workfare Model*

A prime example of heteronormativity in the welfare state *unrelated* to marriage can be found in the work requirements ushered in by PRWORA. In their effort to “end welfare as we know it” and recast aid to the poor as “a second chance, not a way of life,”⁹⁵ President Clinton and the 104th Congress transformed the welfare state into the “workfare” state. But because of the many barriers facing LGBQ people seeking to enter and remain in the workforce, the workfare model has a disparate impact on LGBQ Americans.

NAT'L GAY & LESBIAN TASK FORCE POLICY INST. 9 (2001), http://www.thetaskforce.org/static_html/downloads/reports/reports/LeavingOurChildrenBehind.pdf (“For lesbians with children, the enforcement of this provision serves only to distort the family structures that they have created.”); *see also* Smith, *supra* note 90, at 833 (“Disputed paternity cases are particularly demanding; the mother on welfare must disclose her sexual history at the probable moment of conception in a sworn affidavit, provide DNA evidence, and make her child available for DNA testing as well.”).

⁹³ *See, e.g.*, 55 PA. CODE § 187.23(b) (2010) (waiving cooperation requirements for child support upon establishment of “good cause”).

⁹⁴ STAFF OF H. COMM. ON WAYS & MEANS, 108TH CONG., 2004 GREEN BOOK 7-85 (Comm. Print 2004) (“During fiscal year 2001, the TANF cases of almost 2 million families were closed. Of these closures, 4.5% (89,506 families) were attributed to work sanctions and 22.2% (441,563 families) to noncooperation with child support eligibility rules.”).

⁹⁵ Richard L. Berke, *The 1992 Campaign: The Ad Campaign; Clinton: Getting People Off Welfare*, N.Y. TIMES (Sept. 10, 1992), <https://www.nytimes.com/1992/09/10/us/the-1992-campaign-the-ad-campaign-clinton-getting-people-off-welfare.html> (examining the rhetoric related to welfare in the Clinton campaign).

PRWORA changed welfare from a needs-based entitlement program to a short-term aid program by ending AFDC and instituting TANF, through which the federal government distributes block grants that states then distribute to citizens.⁹⁶ Regulations promulgated under PRWORA place several conditions on states' use of these funds, with the main change being that recipients are required to work in order to receive benefits after two years.⁹⁷ Additionally, to receive full grant allocations from the federal government, states must achieve certain work participation rates: These rates were designed to increase over time, from 25% of all TANF families in fiscal year 1997 to 50% of all families by fiscal year 2002.⁹⁸ Significantly, PRWORA also fixed funding to 1994 levels, regardless of economic conditions, breaking "the link between assistance and economic conditions."⁹⁹ TANF was formally reauthorized in 2005 by the Deficit Reduction Act,¹⁰⁰ which further "raised the effective work participation rates required for full state funding, increased the share of [welfare recipients] subject to work requirements, and limited the activities that could be counted as work."¹⁰¹

The limits of PRWORA became apparent as the availability of jobs decreased in the recession of the late 2000s,¹⁰² but TANF's blurring of the welfare state and the working poor disproportionately impacts LGBTQ people regardless of the background economic conditions. An underlying assumption of PRWORA is that those who seek to find work can find it. But for many people who do not identify as heterosexual, workfare compliance is not as easy as simply finding a job.

⁹⁶ See STAFF OF H. COMM. ON WAYS & MEANS, 104TH CONG., SUMMARY OF WELFARE REFORMS MADE BY PUBLIC LAW 104-193 THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGIS. 3, 5 (Comm. Print 1996) [hereinafter SUMMARY OF PUBLIC LAW 104-193].

⁹⁷ 45 C.F.R. § 261.10(a)(1) (2017). States define what it means to engage in work, under section 261.10(a)(2), but PRWORA narrows the range of activities that can be considered sufficient. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 100 Stat. 2105, 2133.

⁹⁸ SUMMARY OF PUBLIC LAW 104-193, *supra* note 96, at 15–16.

⁹⁹ EVA BERTRAM, THE WORKFARE STATE: PUBLIC ASSISTANCE POLITICS FROM THE NEW DEAL TO THE NEW DEMOCRATS 206 (2015) (tracking the rollout of PRWORA and subsequent legislation).

¹⁰⁰ Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7101, 120 Stat. 4, 135 (2006).

¹⁰¹ *Id.*; see also SHEILA ZEDLEWSKI & OLIVIA GOLDEN, THE URBAN INST., NEXT STEPS FOR TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (2011), <https://www.urban.org/sites/default/files/publication/32901/412047-next-steps-for-temporary-assistance-for-needy-families-tanf-.pdf> (analyzing and contextualizing the Deficit Reduction Act).

¹⁰² See BERTRAM, *supra* note 99, at 236 ("[T]he work-based safety net frayed as work disappeared.").

The labor market experiences of LGBQ people are affected by a multitude of factors, including geographical context, health, poverty, social exclusion, and homophobic attitudes in the workplace.¹⁰³ Despite commendable advancements in LGBQ representation in many sectors of the labor market, particularly in metropolitan and professional contexts,¹⁰⁴ enormous challenges face LGBQ Americans in low-wage positions, blue-collar industries, and some geographic areas.¹⁰⁵ Indeed, both quantitative evidence and qualitative accounts indicate the steep challenges faced by many LGBQ workers. According to one survey, one in four LGBT people experienced discrimination because of their sexual orientation or gender identity in 2016, and of these, almost 53% reported that the discrimination negatively affected their work environment.¹⁰⁶ Employees who are not out at work also suffer, as a result of keeping their sexual orientation a secret: Closeted LGBQ employees report exercising constant vigilance in the workplace out of fear that being outed as LGBQ will result in harassment, termination, or physical violence.¹⁰⁷ Perhaps it is thus unsurprising that research indicates that as many as one in three LGBQ employees are not out at work at all, and just one in four are out to all of their coworkers.¹⁰⁸

Some of these experiences may be attributed to a lack of legal protections. Federal law does not explicitly protect workers from discrimination based on sexual orientation. At the time of publication of this Note, two circuit courts of the United States Courts of Appeals

¹⁰³ Anne Bellis et al., *Out of the Picture? Sexual Orientation and Labour Market Discrimination*, in *BEYOND THE WELFARE STATE* 73 (Mick Carpenter et al. eds., 2007) (discussing findings from a British research project on the topic).

¹⁰⁴ See, e.g., NAT'L ASS'N FOR LAW PLACEMENT, 2017 REPORT ON DIVERSITY IN U.S. LAW FIRMS 7 (2017), <https://www.nalp.org/uploads/2017NALPReportonDiversityinUSLawFirms.pdf> (“[T]he number [of LGBT attorneys] now is almost 2.5 times larger than 15 years ago.”); *Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies (last visited Aug. 18, 2018) (listing cities and counties with nondiscrimination ordinances).

¹⁰⁵ See, e.g., ANNE BALAY, *STEEL CLOSETS: VOICES OF GAY, LESBIAN, AND TRANSGENDER STEELWORKERS* 6 (2014).

¹⁰⁶ Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017, 8:10 AM), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

¹⁰⁷ See BALAY, *supra* note 105, at 57–74 (dedicating a chapter to “Secrecy—Its Logic and Consequences”); see also George Alan Appleby, *Ethnographic Study of Gay and Bisexual Working-Class Men in the United States*, 12 J. GAY & LESBIAN SOC. SERVS. 51, 52, 62 (2001).

¹⁰⁸ BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., *DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE* 2 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf> (analyzing workplace discrimination in the public and private sectors).

recognize sexual orientation as protected by the ban on discrimination “based on sex” codified in Title VII of the Civil Rights Act of 1964.¹⁰⁹ Federal bills to ban such discrimination in employment have been introduced in one form or another almost every year since 1994, but none have succeeded.¹¹⁰ And only twenty-two states prohibit sexual orientation discrimination under state law.¹¹¹ Many county and municipal governments have acted to protect LGBQ workers,¹¹² but even these protections are often restricted by state laws that entirely preempt the local action on the subject¹¹³ or qualify them through carve-outs for objections ostensibly based in religious freedom.¹¹⁴

PRWORA itself does not insulate LGBQ welfare recipients from the challenges they face in the workplace. The law specifically incorporates the Age Discrimination Act of 1975,¹¹⁵ section 504 of the Rehabilitation Act of 1973,¹¹⁶ the Americans with Disabilities Act of 1990,¹¹⁷ and Title VI of the Civil Rights Act of 1964,¹¹⁸ but contains no language pertaining to discrimination on the basis of sexual orientation.¹¹⁹ Nor do most state TANF programs take affirmative steps to address LGBQ discrimination.¹²⁰ Texas provides a concerning

¹⁰⁹ See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 339 (7th Cir. 2017) (finding sexual orientation discrimination is sex discrimination under Title VII); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 100 (2d Cir. 2018) (same). Notably, however, Indiana is the only state in these circuits which does not already prohibit sexual orientation employment discrimination under state law. See *State Maps of Laws and Policies*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/employment> (last visited Sept. 5, 2018).

¹¹⁰ See *History of Nondiscrimination Bills in Congress*, NAT’L GAY AND LESBIAN TASK FORCE FOUND., <https://web.archive.org/web/20140524062405/http://www.thetaskforce.org/issues/nondiscrimination/timeline> (last visited Sept. 14, 2018).

¹¹¹ See *State Maps of Laws and Policies*, *supra* note 109.

¹¹² See *Local Non-Discrimination Ordinances*, *supra* note 104 (listing cities and counties with nondiscrimination ordinances).

¹¹³ See, e.g., S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (amending the Arkansas Code to prohibit cities and counties from creating employment nondiscrimination protections that go beyond state law).

¹¹⁴ See S. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015) (amending the Indiana Code to create provisions regarding “religious freedom restoration,” which allow individuals and companies to defend against discrimination claims using a defense that their exercise of religion has been substantially burdened).

¹¹⁵ 42 U.S.C. §§ 6101–6107 (2012).

¹¹⁶ 29 U.S.C. § 794 (2012 & Supp. II 2015).

¹¹⁷ 42 U.S.C. §§ 12101–12103 (2012).

¹¹⁸ 42 U.S.C. §§ 2000d–2000d-7 (2012).

¹¹⁹ 42 U.S.C. § 608(d) (2012). Welfare beneficiaries are also protected by the Federal Constitution. See, e.g., *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (barring sex discrimination under AFDC, the predecessor of the TANF program, based on the Due Process Clause).

¹²⁰ New Jersey is an example of a state that does, noting in its statewide TANF plan that the NJ Law Against Discrimination, N.J.S.A. §§ 10:5-1–10:5-49, prohibits sexual orientation discrimination against beneficiaries. N.J. DEP’T OF HUMAN SERVS., NEW JERSEY STATE PLAN FOR TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (FFY 2018–FFY

example. In Texas, like in many other states, individuals seeking TANF benefits but unable to find work within a reasonable amount of time are assigned employment or on-the-job training through the state agency responsible for TANF block grant distribution.¹²¹ In Texas, the “Choices” program run by the Texas Workforce Commission can assign would-be beneficiaries to worksites in either the public or private sector, through either staffing agencies or actual employers.¹²² A person enrolled in the Choices program who refuses to report to their worksites after experiencing orientation-based harassment or discrimination would likely have a difficult time convincing their Local Workforce Development Board that their refusal was based on a valid ground for noncooperation. Discrimination based on sexual orientation is not expressly prohibited under Texas law,¹²³ and the “good cause” standards that pertain to program noncooperation do not address workplace harassment or discrimination.¹²⁴ Those who fail to comply risk sanctions ranging from termination from the program to removal from Medicaid benefits.¹²⁵

The developing effort to require employment as a condition of Medicaid enrollment creates a similarly dangerous situation for LGBTQ people. Medicaid is a means-tested program jointly administered by states and the federal government that provides free or subsidized medical care to 74 million Americans.¹²⁶ Medicaid historically had no work requirement, but in early 2018, the Trump administration issued a guidance letter encouraging states to impose employment restrictions on program enrollees,¹²⁷ framing the work requirement as

2020) 51–52 (2017), <http://www.state.nj.us/humanservices/providers/grants/public/publicnoticefiles/FINAL%20Draft%20NJ%20TANF%20State%20Plan%20FFY2018-2020.pdf>.

¹²¹ The Texas Workforce Commission is the state agency tasked with distributing TANF money to Texas residents. See 40 TEX. ADMIN. CODE §§ 811.1–.5 (2013) (establishing the “Choices” program).

¹²² See 40 TEX. ADMIN. CODE §§ 811.41–.44 (2013) (specifying the types of “Choices Work Activities” considered work under Texas law).

¹²³ 40 TEX. ADMIN. CODE § 819.12 (2016) (listing prohibited types of employment discrimination under Texas law).

¹²⁴ 40 TEX. ADMIN. CODE § 811.16(c) (2008) (listing reasons that constitute good cause for noncooperation).

¹²⁵ TEX. HUM. RES. CODE ANN. § 31.0032 (West Supp. 2017) (outlining sanctions for noncooperation with the Choices program); 40 TEX. ADMIN. CODE § 811.14 (2013) (same).

¹²⁶ See Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of U.S.C.) (creating Medicaid); CTRS. FOR MEDICARE & MEDICAID SERVS., *May 2018 Medicaid & CHIP Enrollment Data Highlights*, <https://www.medicare.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html>.

¹²⁷ Letter from Brian Neale, Dir., Ctrs. for Medicare & Medicaid Servs., to State Medicaid Dir. (Jan. 11, 2018), <https://www.medicare.gov/federal-policy-guidance/downloads/smd18002.pdf>. For in-depth analysis, see MaryBeth Musumeci et al., *Medicaid*

a form of “[t]rue compassion”¹²⁸ that creates a “pathway out of poverty”¹²⁹ for Medicaid recipients. The Department of Health and Human Services (HHS) quickly approved the requests of Kentucky and Indiana to institute work requirements.¹³⁰ At the time of this Note’s publication, ten other states have applications pending before HHS.¹³¹ Advocates are challenging the work requirements in court,¹³² but in the meantime, Medicaid workfare poses a grave public health threat to LGBTQ individuals because of the disparities the community faces in the labor force and in health outcomes. Approximately 1,171,000 LGBT adults rely on Medicaid as their primary source of health insurance.¹³³ The majority of LGBT adults with Medicaid are already employed¹³⁴—an individual working full time at the national minimum wage earns a salary low enough to qualify for Medicaid in many states¹³⁵—but that still leaves approximately 542,000 at risk of losing coverage under new work requirements.¹³⁶

The LGBTQ community faces distinct health concerns, from disproportionate risk of HIV/AIDS among gay and bisexual men¹³⁷ and increased incidence of obesity among women who identify as lesbian

and Work Requirements: New Guidance, State Waiver Details and Key Issues, KAISER FAM. FOUND. (2018), <https://www.kff.org/medicaid/issue-brief/medicaid-and-work-requirements-new-guidance-state-waiver-details-and-key-issues/>.

¹²⁸ Nathaniel Weixel, *Trump Official: Medicaid Work Requirements a Form of ‘True Compassion.’* HILL (Feb. 5, 2018, 12:39 PM), <http://www.thehill.com/policy/healthcare/372351-trump-official-medicaid-work-requirements-a-form-of-true-compassion>.

¹²⁹ Adam Cancryn, *Trump Administration Approves Second Medicaid Work Requirement, for Indiana*, POLITICO (Feb. 2, 2018, 3:42 PM), <https://www.politico.com/story/2018/02/02/medicaid-work-requirement-indiana-323279>.

¹³⁰ *Id.*

¹³¹ All currently pending state Medicaid waivers are listed online. See *State Waivers List*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/index.html> (last visited Mar. 20, 2018).

¹³² Complaint at ¶¶ 1, 8, *Stewart v. U.S. Dep’t of Health and Human Servs.*, No. 1:18-cv-00152 (D.C.C. Jan. 24, 2018), https://www.splcenter.org/sites/default/files/complaint_redacted.pdf.

¹³³ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., *OVER HALF A MILLION LGBT ADULTS FACE UNCERTAINTY ABOUT HEALTH INSURANCE COVERAGE DUE TO HHS GUIDANCE ON MEDICAID REQUIREMENTS 1* (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Medicaid.pdf>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ In 2014, gay and bisexual men accounted for an estimated 70% (26,200) of new HIV infections in the United States. See *HIV Among Gay and Bisexual Men*, CTR. FOR DISEASE CONTROL & PREVENTION (2018), <https://www.cdc.gov/hiv/group/msm/index.html>; see also Tim Murphy, *What Medicaid Work Requirements Might Mean for People with HIV*, THE BODY (2018), <http://www.thebody.com/content/80810/what-medicaid-work-requirements-might-mean-for-peo.html> (explaining the impact of workfare on HIV-positive populations and that Utah’s narrow Medicaid expansion does not even apply to gay men, the group with the highest HIV rates).

and bisexual women¹³⁸ to the general health risks of family rejection and bias-based physical violence.¹³⁹ Further, Medicaid workfare compounds challenges LGBQ people already face in healthcare access, such as lower rates of insurance than for non-LGBT populations¹⁴⁰ and legal discrimination in healthcare provision.¹⁴¹

Conditioning the receipt of TANF benefits and Medicaid coverage on employment is a facially neutral policy decision that has a disparate impact on LGBQ people. The workfare model is predicated on the assumption that benefit-seekers are able to obtain and maintain employment, but considering the well-documented labor market experiences of LGBQ people, this assumption may be fairly conceptualized as heteronormative. Accordingly, maintaining or expanding work requirements without instituting safeguards against the well-documented challenges LGBQ people face in the labor market relies on heteronormative assumptions and may be considered constructive heterosexism.

C. Challenges Facing LGBQ Youth

Heteronormative paradigms in the welfare state are not limited to the TANF and Medicaid programs—they also pervade the safety nets designed to serve young people experiencing homelessness. LGBQ youth homelessness is an urgent problem: One estimate indicates that there are approximately 320,000 to 400,000 LGBT youth experiencing homelessness in the United States.¹⁴² Driven by factors including family rejection and physical, emotional, or sexual abuse in

¹³⁸ Ulrike Boehmer, *Overweight and Obesity in Sexual-Minority Women: Evidence From Population-Based Data*, 97 AM. J. PUB. HEALTH 1134, 1137 (2007).

¹³⁹ See Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346, 348–50 (2009) (finding that rates of family rejection were significantly associated with poorer health outcomes); Andrea L. Roberts et al., *Pervasive Trauma Exposure Among U.S. Sexual Orientation Minority Adults and Risk of Posttraumatic Stress Disorder*, 100 AM. J. PUB. HEALTH 2433 (2010) (finding risk of PTSD onset was higher among LGB people and heterosexuals with same-sex partners than it was among a heterosexual reference group).

¹⁴⁰ See Gary J. Gates, *In U.S., LGBT More Likely Than Non-LGBT to Be Uninsured*, GALLUP (Aug. 26, 2014), <http://news.gallup.com/poll/175445/lgbt-likely-non-lgbt-uninsured.aspx>; see also Kellan Baker et al., *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations*, CTR. FOR AM. PROGRESS (Aug. 9, 2016, 9:02 AM), <https://www.americanprogress.org/issues/lgbt/reports/2016/08/09/142424/the-medicaid-program-and-lgbt-communities-overview-and-policy-recommendations/>.

¹⁴¹ See Emma Green, *When Doctors Refuse to Treat LGBT Patients*, ATLANTIC (Apr. 19, 2016), <https://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapists-mississippi-tennessee/478797/>.

¹⁴² Nico Sifra Quintana et al., *On the Streets: The Federal Response to Gay and Transgender Homeless Youth*, CTR. FOR AM. PROGRESS (June 21, 2010), <http://www.americanprogress.org/issues/lgbt/report/2010/06/21/7983/on-the-streets/>.

the home.¹⁴³ 26% of clients served by youth housing programs identify as LGBTQ.¹⁴⁴ One estimate indicated that there are approximately 320,000 to 400,000 LGBT youth experiencing homelessness in the United States.¹⁴⁵ The plight of LGBTQ youth in the child welfare system has been thoroughly analyzed in both legal¹⁴⁶ and non-legal literature.¹⁴⁷ This Note contributes to the topic by situating the outcomes of LGBTQ youth in government care in the context of welfare system heteronormativity. This Section does so primarily by focusing on the limitations of outsourcing welfare services to faith-based service providers, but it also addresses TANF rules that may have a disparate impact on LGBTQ minors seeking benefits.

Assigning care for the young and homeless to faith-based organizations is not *inherently* harmful to LGBTQ individuals, but such assignment has a disparate impact when those organizations subject LGBTQ individuals to hostile treatment or discrimination. An illustrative example comes from Florida: In 2015, in response to pressure from advocates, the state promulgated new regulations to prohibit discrimination on the basis of sexual orientation and gender identity in Florida's 287 state-licensed but privately operated group homes.¹⁴⁸ Soon after, however, the state backtracked in response to complaints from the Florida Conference of Catholic Bishops and Baptist Children's Home, two of the many religious organizations that operate group homes in Florida.¹⁴⁹ Only after fierce backlash from

¹⁴³ LAURA E. DURSO & GARY J. GATES, *SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 9* (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf> (compiling results of a nationwide survey of 354 agencies which provide youth with homelessness-related services).

¹⁴⁴ *Id.* at 3.

¹⁴⁵ Quintana et al., *supra* note 142.

¹⁴⁶ See, e.g., Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 418 (2006); Miriam Aviva Friedland, *Too Close to the Edge: Lesbian, Gay, Bisexual and Transgender Youth in the Child Welfare System*, 3 GEO. J. GENDER & L. 777 (2002).

¹⁴⁷ See, e.g., ANNE E. CASEY FOUND., *LGBTQ IN CHILD WELFARE: A SYSTEMATIC REVIEW OF THE LITERATURE 1-5* (2016), <http://www.aecf.org/m/resourcedoc/aecf-LGBTQinChildWelfare-2016.pdf> (compiling and analyzing applicable literature).

¹⁴⁸ See News Service of Florida, *New Rules Bring Focus to LGBT Youth in Foster Care in Florida*, FLA. TIMES-UNION (July 13, 2015), <http://www.jacksonville.com/news/2015-07-13/story/new-rules-bring-focus-lgbt-youth-foster-care-florida>.

¹⁴⁹ See Michael Auslen, *Florida Backtracks on New Guidelines for LGBT Foster Children*, MIAMI HERALD (Apr. 11, 2016), <https://www.miamiherald.com/news/local/community/gay-south-florida/article71201087.html>.

advocates did the state government reinstitute the regulations.¹⁵⁰ Some states have taken affirmative steps to protect LGBQ youth in group homes from discrimination based on sexual orientation,¹⁵¹ but others have not.¹⁵² Title VI of the Civil Rights Act of 1964, which prohibits certain types of discrimination in programs and activities receiving federal funding, does not address sex or sexual orientation.¹⁵³ This leaves a large proportion of LGBQ foster youth vulnerable to mistreatment at the hands of those designated by the state to protect them.

The risk of harm caused to Florida's homeless LGBQ youth by the devolution of social services must be situated within broader efforts of welfare reformers to replace state-run programs with religious entities. "Charitable Choice" provisions, which appeared for the first time in PRWORA but are also found in the anti-poverty Community Services Block Grant Program¹⁵⁴ and in federal substance abuse and mental health programs,¹⁵⁵ require states to allow religious organizations to compete for government grants and contracts "on the same basis as any other nongovernmental provider without impairing the religious character of such [religious] organizations."¹⁵⁶ These provisions prohibit grantees from discriminating against beneficiaries on the basis of religion or "refusal to actively participate in a religious practice."¹⁵⁷ Defenders say such partnerships have the potential to make welfare administration more effective and cost efficient,¹⁵⁸ while

¹⁵⁰ See Kate Santich, *DCF Reinstates Protections for LGBT Youth*, ORLANDO SENTINEL (July 6, 2016), <http://www.orlandosentinel.com/news/breaking-news/os-dcf-gay-conversion-therapy-ban-20160706-story.html>. Under Fla. Admin. Code 65C-14.021(3)(h), facility staff are now forbidden from engaging in discriminatory treatment or harassment on the basis of gender expression or sexual orientation, and under subsection (3)(j), staff are forbidden from attempting to change or discourage a child's sexual orientation, gender identity, or gender expression.

¹⁵¹ See, e.g., *Services Delivered by the Department*, ILL. DEP'T OF CHILD. & FAM. SERVS. (Sept. 8, 2006), https://www2.illinois.gov/dcf/aboutus/notices/documents/procedures_302_appendices.pdf (explaining treatment services provided by Illinois's Child Welfare Integrated Services Program).

¹⁵² See, e.g., ALA. ADMIN. CODE r. 660-5-37-.02 (2017).

¹⁵³ 42 U.S.C. § 2000d-7 (2012) (enumerating only race, color, and national origin as protected classes).

¹⁵⁴ 42 U.S.C. § 9920 (2000).

¹⁵⁵ 42 U.S.C. §§ 290kk-290kk-2, 300x-65 (2000).

¹⁵⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. I, pt. A, § 104(b), 110 Stat. 2105, 2162 (codified at 42 U.S.C. § 604a(b)(2012)).

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., John J. DiIulio, Jr., *Response: Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271 (2003) (advocating the expansion of faith-based programs).

others have linked them to behavior-modification efforts rooted in the racist and sexist ideologies undergirding the rest of welfare reform.¹⁵⁹

The Bush administration increased the pace of the devolution in 2001 by creating the White House Office of Faith-Based and Community Initiatives,¹⁶⁰ and in a 2002 appropriations bill, Congress created the HHS-administered Compassion Capital Fund and tasked it with distributing an additional \$30 million to local faith-based groups.¹⁶¹ By 2004, the Bush administration was disbursing \$1.17 billion of federal funding to faith-based organizations and programs.¹⁶² Critically, there were no statutory safeguards to prevent organizations receiving funding from discriminating against LGBTQ individuals.¹⁶³ Furthermore, a significant portion of the funding was used for purposes harmful to LGBTQ people, such as promotion of traditional marriage and abstinence education.¹⁶⁴

¹⁵⁹ See, e.g., Richard Hardack, *Bad Faith: Race, Religion and the Reformation of Welfare Law*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 648 (2006) (criticizing the use of faith-based programs).

¹⁶⁰ Exec. Order No. 13,199, 66 C.F.R. § 8499 (2001), <https://www.gpo.gov/fdsys/pkg/WCPD-2001-02-05/pdf/WCPD-2001-02-05-Pg235.pdf>; see also Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1757–58 (2002) (arguing that President Bush's Faith-Based Initiative illustrates that privatization is not a neutral shift in techniques of public management but is instead closely linked to normative views about the particular clients the program serves and the problems they face).

¹⁶¹ Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-116, 115 Stat. 2177.

¹⁶² ANNE FARRIS ET AL., THE ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE 18 (2004), http://rockinst.org/wp-content/uploads/2018/02/2004-08-the_expanding_administrative_presidency_george_w_bush_and_the_faith-based_initiative.pdf.

¹⁶³ Indeed, discrimination was only addressed in the context of the administration's framing of the change as a way to end government discrimination *against* faith-based organizations, which actually required rolling back a bar on federal funding to providers with discriminatory hiring practices. See Martha A. Boden, *Compassion Inaction: Why President Bush's Faith-Based Initiatives Violate the Establishment Clause*, 29 SEATTLE U. L. REV. 991, 998 (2006) (criticizing the implementation of President Bush's faith-based initiatives).

¹⁶⁴ See FARRIS ET AL., *supra* note 162, at 23–24 (demonstrating that funding was being used for abstinence education and marriage promotion); Christopher Michael Fisher, *Queer Youth Experiences with Abstinence-Only-Until-Marriage Sexuality Education: "I Can't Get Married so Where Does That Leave Me?"*, 6 J. LGBT YOUTH 61 (2009) (exploring in a qualitative study the silence, risk, and hostility experienced by gay and bisexual male youth in abstinence-only curricula); Sean Cahill, *Scared Chaste, Scared Straight: Abstinence-Only-Until-Marriage Education in U.S. Schools*, POL. RES. ASSOCIATES (Oct. 1, 2002), <https://www.politicalresearch.org/2002/10/01/scared-chaste-scared-straight-abstinence-only-until-marriage-education-in-u-s-schools/> (arguing that abstinence education harms LGBTQ persons).

The Office of Faith-Based and Community Initiatives was rebranded as the “Office on Faith-Based and Neighborhood Partnerships” by the administration of President Obama,¹⁶⁵ who added an outspoken LGBT-advocacy organization representative to the office’s advisory council over the objections of conservative critics.¹⁶⁶ Though initially unclear if the Trump administration would continue the program,¹⁶⁷ President Trump recently signed an executive order to reestablish a White House Faith and Opportunity Initiative.¹⁶⁸

Even before this order, however, the Trump administration appeared to be scaling back the Obama administration’s efforts to support LGBQ youth experiencing homelessness.¹⁶⁹ And as protections for homeless LGBQ youth have changed in subsequent administrations, the laws and regulations pertaining to LGBQ youth in child welfare systems also vary dramatically by state.¹⁷⁰ While some states have no protections and actively permit providers to refuse affirming services if they have a moral or religious objection, such as Alabama and Kansas,¹⁷¹ others, such as Minnesota, have comprehensive non-discrimination provisions *and* require competency training for providers.¹⁷² The expansion—and vigilant enforcement—of these protections is critical for LGBQ youth.

¹⁶⁵ Exec. Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 5, 2009).

¹⁶⁶ *White House ‘Comfortable’ with Controversial Faith-Based Council Appointee*, CATH. NEWS AGENCY (June 4, 2009, 6:15 AM), https://www.catholicnewsagency.com/news/white_house_comfortable_with_controversial_faithbased_council_appointee (expressing concern with the appointment of Harry Knox).

¹⁶⁷ See Adelle M. Banks, *Still No Sign of Leader for White House Faith Partnership Office*, RELIGION NEWS SERV. (Mar. 31, 2017), <https://www.religionnews.com/2017/03/31/still-no-sign-of-leader-for-white-house-faith-partnership-office/>.

¹⁶⁸ *President Donald J. Trump Stands up for Religious Freedom in the United States*, WHITE HOUSE (May 3, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-stands-religious-freedom-united-states/>.

¹⁶⁹ See Ben Protess et al., *Where Trump’s Hands-Off Approach to Governing Does Not Apply*, N.Y. TIMES (Sept. 10, 2017), <https://www.nytimes.com/2017/09/10/business/trump-regulations-religious-conservatives.html> (noting the removal of references to LGBTQ youth from online resources provided by the Department of Justice and the Department of Health and Human Services).

¹⁷⁰ See *Laws or State Agency Regulations Related to LGBTQ Youth in the Child Welfare System*, MOVEMENT ADVANCEMENT PROJECT (Aug. 16, 2017), <https://www.lgbtmap.org/img/maps/citations-adoption-youth-in-child-welfare.pdf> (providing a survey of applicable laws and regulations in each of the fifty states and the District of Columbia).

¹⁷¹ H.B. 24, 2017 Leg., Reg. Sess. § 5 (Ala. 2017); S.B. 284, 2018 Leg., Reg. Sess. (Kan. 2018). See also Katherine Burgess, *Adoption Law Spurs Fears of Discrimination Against LGBT Kids in Foster Care*, WICHITA EAGLE (July 24, 2018), <https://www.kansas.com/news/politics-government/prairie-politics/article215116760.html> (quoting advocates concerned that the law will sanction discrimination and may force children to “hide their orientation or identity in order to stay in religious group homes”).

¹⁷² MINN. R. 2960.0150 (2018).

A related issue is the ability of LGBQ minors to access TANF benefits. State TANF programs require minor parents to be living with their parent, legal guardian, or other adult relative in order to receive benefits.¹⁷³ For minor parents who have been rejected by their own parents on the basis of their sexual orientation, this requirement adds an additional barrier to benefit access. States have provisions permitting exemptions in cases where a parent refuses to allow the minor parent to live in the common residence, where the safety of the minor parent might be compromised, where the parent has subjected the minor parent to abuse, and so on, but qualification for one of these exemptions requires documentation and is at the discretion of local TANF administrators.¹⁷⁴

III

RECKONING WITH ENDURING HETERONORMATIVITY IN THE WELFARE STATE

As illustrated, each of the problems described above stems from heteronormative assumptions about the needs and characteristics of welfare recipients. While each of the three problems explored here—work requirements, proof-of-paternity requirements, and shortcomings in services for young LGBQ individuals experiencing homelessness—could hypothetically be addressed with a narrowly tailored change in law or policy, the pervasiveness of the underlying issue—paradigmatic state homophobia—calls for broader solutions. This Note contemplates legislative solutions for the long term and executive solutions for the near term.

A. *Legislative Solutions*

The welfare system is largely a creature of statute, and problems created by legislative action can generally be fixed by legislative action. For example, with regard to the intrusiveness and impracticability of proof-of-paternity requirements, states could adopt the most recent version of the Universal Parentage Act, which explicitly and succinctly states that “[a] donor is not a parent of a child conceived by assisted reproduction.”¹⁷⁵ With regard to the difficult choices faced by LGBQ individuals subject to work requirements, for example, states

¹⁷³ See, e.g., 55 PA. CODE § 141.21(p) (2018) (requiring minor parents to live with a parent in order to receive TANF benefits).

¹⁷⁴ See, e.g., *id.* § 141.21(q) (2018) (listing situations in which a minor parent may claim exception to the requirement of living with a parent).

¹⁷⁵ UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM’N 2017). The prior version of the Uniform Parentage Act, published in 2002, had substantially similar language. Neither has been adopted in a majority of states.

and municipalities could reduce the burden by creating a mechanism for recourse against employers who discriminate on the basis of sexual orientation.¹⁷⁶ With regard to LGBTQ youth homelessness, the extensive literature proposes a broad array of solutions, such as creating enforceable nondiscrimination provisions and training for group homes and foster care providers,¹⁷⁷ preventing discrimination in both emergency homeless shelters and permanent housing,¹⁷⁸ and creating legal mechanisms to allow youth experiencing homelessness to declare constructive or actual emancipation, which would allow them to petition their parents for child support.¹⁷⁹

While they would certainly be helpful to LGBTQ individuals seeking and currently receiving government assistance, statutory tweaks and piecemeal fixes run the risk of under-inclusivity, and they can create other problems. A broader solution is warranted. This Note joins the growing chorus of supporters of the legislative proposal known as the “Equality Act.”¹⁸⁰ In addition to prohibiting discrimination based on sexual orientation or gender identity in employment and public accommodations, it would also expand Title VI’s discrimination protections in federally funded and federally assisted programs to include sexual orientation.¹⁸¹

Notably, some of the need for the Equality Act could have been forestalled had the Supreme Court chosen to designate LGBTQ iden-

¹⁷⁶ In 1982, Wisconsin was the first state to ban discrimination in public and private employment. See WIS. STAT. ANN. § 111.321 (West 1982); see also *State Maps of Laws and Policies*, supra note 109. Municipality-based approaches may also serve an important function, but their long-term value is qualified by the ability of states to preempt them at will. See, for example, North Carolina’s H.B. 2, which preempted all local nondiscrimination ordinances. Michael Gordon et al., *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> (following H.B. 2 from its passage on March 23, 2016 to its partial repeal on March 30, 2017). A municipality-based approach would also likely leave rural LGBTQ individuals vulnerable. For a discussion of urban bias in the fight to combat sexual orientation discrimination, see Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562 (2013).

¹⁷⁷ See Shannan Wilber et al., *CWLA Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care*, CHILD WELFARE LEAGUE OF AM. (2006), <http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf> (advocating for the adoption of written nondiscrimination policies in order to reduce the incidence of harassment of LGBTQ youth in group homes).

¹⁷⁸ See Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 521–22 (2017).

¹⁷⁹ See Deborah Lolai, “You’re Going to Be Straight or You’re Not Going to Live Here”: *Child Support for LGBT Homeless Youth*, 24 TUL. J.L. & SEXUALITY 35, 78 (2015).

¹⁸⁰ H.R. 2282, 115th Cong. (2017).

¹⁸¹ *Id.* For the official bill summary from the Congressional Research Service, see *H.R. 2282 Equality Act, Summary*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/2282> (last visited Aug. 11, 2018).

tity as a protected class under the Fourteenth Amendment of the Federal Constitution.¹⁸² Under the tiered scrutiny framework of Equal Protection Clause jurisprudence, laws pertaining to “suspect classifications” such as race and national origin are held to varying degrees of scrutiny. By bringing the same-sex marriage litigation arc to a close with a freestanding right to same-sex marriage, the Supreme Court declined to address the inequalities at the heart of the movement.¹⁸³

The *Obergefell* Court’s tepid ruling and the current makeup of the Court suggest that advocates should seek progress in the other branches of government. Recognizing both the inherent limitations of antidiscrimination laws¹⁸⁴ and the fact that the prior iteration of the Equality Act—the Employment Nondiscrimination Act—has been proposed and passed over almost every year since 1994, this Note also advocates the use of state and federal executive action to curb the worst injustices suffered by LGBTQ people at the hands of the welfare state.

B. Executive Solutions

The welfare system was created by legislative action, but its administration is largely the function of state and federal executive branches. Executive actors are endowed with significant discretion in the system’s administration, and accordingly they have significant latitude to reform it in ways that improve outcomes for LGBTQ Americans.¹⁸⁵

¹⁸² See Peter Nicolas, *Obergefell’s Squandered Potential*, 6 CALIF. L. REV. CIR. 137, 142 (2015) (arguing that the Court’s failure to designate sexual orientation as a protected class continues to expose LGBTQ people to discrimination on the basis of sexual orientation and criticizing Justice Kennedy for not declaring gays and lesbians to be a constitutionally protected class in his *Obergefell* opinion).

¹⁸³ Suspect classification status would not have been a panacea, however, considering the limitations on civil rights actions brought under the Fourteenth Amendment, such as a ban on disparate impact claims. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (requiring Fourteenth Amendment plaintiffs to demonstrate invidious discriminatory purpose in addition to disparate impact).

¹⁸⁴ See, e.g., Richard Blum, *Equality with Power: Fighting for Economic Justice at Work*, SCHOLAR & FEMINIST ONLINE (2011), <http://sfonline.barnard.edu/a-new-queer-agenda/equality-with-power-fighting-for-economic-justice-at-work/> (arguing that the fundamental unfairness of the labor market renders antidiscrimination laws insufficient as means to attain substantive economic justice).

¹⁸⁵ For an extensive analysis of opportunities for executive-led reform, see Laura E. Durso et al., *Advancing LGBTQ Equality Through Local Executive Action*, CTR. FOR AM. PROGRESS (Aug. 25, 2017, 9:02 AM), <https://www.americanprogress.org/issues/lgbt/reports/2017/08/25/437280/advancing-lgbtq-equality-local-executive-action/>.

A ready example comes from President Obama's presidential memorandum on hospital visitation.¹⁸⁶ The memorandum directed the Secretary of Health and Human Services to initiate a rulemaking to ensure that hospitals that participate in Medicare and Medicaid respect the rights of patients to designate visitors, remedying limitations on the ability of LGBTQ patients to have their partners at their bedsides in times of emergency.¹⁸⁷

Another example comes from the Atlanta suburb of Decatur, Georgia. While the city does not have a legislatively passed nondiscrimination ordinance, the city has a policy barring sexual orientation and gender identity discrimination in the administration of city services, programs, and activities.¹⁸⁸

Presidents and governors wishing to improve the situation facing LGBTQ welfare recipients could act unilaterally to address some of the individual problems explored in Part II. For example, to use the Texas workfare example outlined in Section II.B, a governor seeking to improve LGBTQ peoples' experience with the Texas Workforce Commission could prohibit sexual orientation discrimination in work assignments and on-the-job training assignments that receive state funds. To protect LGBTQ people at worksites that do not receive state funds, the governor could order the creation of a grievance procedure specific to sexual orientation to permit LGBTQ TANF recipients greater flexibility in changing their assignments to escape discriminatory treatment. In many states, including Texas, such a change would need to be made by initiation of a formal rulemaking process pursuant to the state administrative procedure act.¹⁸⁹ As another example, states could do as Florida eventually did and alleviate some of the difficulties facing LGBTQ youth in out-of-home care facilities by initiating rulemakings to create enforceable bans on discriminatory treatment.

Executive orders are a limited solution, however. While they provide executive actors with a means to sidestep unfriendly legislatures, they are readily reversible by subsequent administrations. For example, in 2017, President Trump rescinded Obama-era protections

¹⁸⁶ Memorandum from Barack Obama, *Presidential Memorandum - Hospital Visitation*, WHITE HOUSE: OFFICE OF THE PRESS SEC'Y (Apr. 15, 2010), <https://obamawhitehouse.archives.gov/the-press-office/presidential-memorandum-hospital-visitacion>.

¹⁸⁷ *Id.*

¹⁸⁸ *Nondiscrimination Policy*, CITY OF DECATUR, <http://www.decaturga.com/about/nondiscrimination-policy> (last visited Aug. 11, 2018).

¹⁸⁹ Formal rulemaking pursuant to Texas's APA is required for any "agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of a state agency." TEX. GOV'T CODE ANN. § 2001.003(6)(A) (West 2017).

requiring prospective federal contractors to demonstrate their compliance with federal laws and executive orders pertaining to employment, some of which covered sexual orientation.¹⁹⁰ And inclusivity-minded executive actions can even be revoked by the same administration, as demonstrated by Florida's experience with sexual orientation and gender identity protections for youth in group homes.

But because of the urgent need to address the problems created by heteronormative paradigms in the welfare system, executive actors unable to find legislative support for necessary longer-term changes should not hesitate to initiate rulemakings that would improve LGBO employees' experience within the system. Considering the significant number of states with Democratic governors and Republican-controlled or split legislatures—nine as of the time of the 2018 midterm elections¹⁹¹—the reform potential of executive orders is significant.

CONCLUSION

Access to the institution of marriage has granted LGBO individuals a degree of economic justice through access to the “constellation of benefits” attendant to marriage. But LGBO individuals remain unable to fully avail themselves of the benefits of the modern welfare state because of the welfare system's deep roots in heteronormative ideologies of citizenship and control. In an era of welfare reform characterized by workfare and “compassion” through various forms of coercion, it appears likely that heteronormative paradigms are likely to persist until the system moves away from notions of hierarchical desert. In the same way that the workhouses of the eighteenth century welfare system are now generally perceived as punitive and moralistic, it is hoped that the modern welfare state can move away from the contemporary individualistic understanding of poverty and toward the structural conception of poverty that characterized welfare models of the early and mid-1900s. And it is hoped that the eradication of

¹⁹⁰ Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (Mar. 27, 2017) (rescinding Obama-era protection requiring that contracted businesses prove compliance with federal laws and executive orders, some of which covered sexual orientation); see also Yezmin Villarreal, *Trump Covertly Dismantles Obama-Era LGBT Protections*, ADVOCATE (Mar. 29, 2017, 12:58 PM), <https://www.advocate.com/politics/2017/3/29/trump-covertly-dismantles-obama-era-lgbt-protections> (providing additional context and analysis on the effect of the executive order).

¹⁹¹ *Post Election 2018 State & Legislative Partisan Composition*, Nat'l Conf. St. Legislatures (Nov. 21, 2018), http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_112118_26973.pdf.

lingering heteronormativity and further incorporation of LGBTQ people into the system can play a part in that shift.