

**NURSING WOUNDS: WHY LGBT ELDERS
NEED PROTECTION FROM
DISCRIMINATION AND ABUSE BASED ON
SEXUAL ORIENTATION AND GENDER
IDENTITY**

Jaime E. Hovey

While living in nursing homes can be stressful for any elderly person, aging gay, lesbian, bisexual, and transgender (LGBT) Americans are especially susceptible to abuse, neglect, and discrimination caused by homophobia. LGBT elders are more vulnerable because they are members of a minority group that is often subjected to emotional and physical hostility and they are often the first targets of abuse, neglect, and discrimination in nursing homes. Even though the McCarthy era, during which gay men, lesbians, and transgendered people were characterized as socially immoral, has passed, elderly LGBT Americans still face the persistent homophobia and heterosexism of nursing home staff and fellow residents. The author reviews some possible solutions, ultimately concluding that state and federal antidiscrimination statutes should be updated to protect the sexual orientation and gender identity of LGBT Americans.

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I. Introduction

Most lesbian, gay, bisexual, and transgender elders are terrified of nursing homes. Although there is scant case law concerning discrimination against lesbian, gay, bisexual, and transgendered (LGBT) assisted care residents, stories of abuse abound. Many LGBT seniors are afraid they will be forced into the closet to avoid being shunned by other nursing home residents for being openly lesbian, gay, bisexual, or transgender.¹ Others fear mistreatment by administrative staff, care staff, and peers.² These fears, based on years fighting the abiding legacy of homophobia and heterosexism in U.S. culture, appear well-founded. Old people face a heightened risk of abuse in America simply for being old, regardless of other identity factors. LGBT elders are even more vulnerable to mistreatment because they are also members of a minority group that is often the target of physical and emotional hostility and violence.

Homophobia—the term most often used to signify this type of irrational hostility toward LGBT people—was viewed until recently as a normal attitude reflecting mainstream U.S. cultural and religious values.³ While homophobia in the United States has always strengthened and ebbed with the changing social and political climate, it never seems to go away, and its effects on the medical and legal system have been profound.⁴ After a brief reversal in the 1990s in the wake of the AIDS crisis, openly homophobic attitudes have been giv-

1. See Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, at A1.

2. Michael J. Johnson & Nick C. Jackson, *Gay and Lesbian Perceptions of Discrimination in Retirement Care Facilities*, 49 J. HOMOSEXUALITY 83, 90 (2005).

3. See Sandra S. Butler, *Older Gays, Lesbians, Bisexuals, and Transgender Persons*, in HANDBOOK OF SOCIAL WORK IN HEALTH AND AGING 273, 274–75 (Barbara Berkman ed., 2006) (defining homophobia and heterosexism as hostile attitudes, with homophobia as “the irrational fear of homosexuals and the hatred of [gay, lesbian, and bisexual] individuals based solely on their sexual orientation,” and heterosexism as “an ideological system that denies, denigrates, and stigmatizes any nonheterosexual form of behavior, identity, relationship, or community”); see also Dana Rosenfeld, *Identity Careers of Older Gay Men and Lesbians*, in WAYS OF AGING 160, 161 (Jaber F. Gubrium & James A. Holstein eds., 2003) (discussing how during the 1950s and 1960s, when today’s LGBT elders were coming of age, homosexuality was stigmatized by being widely viewed as an unnatural kind of life without healthy emotional, social, or family ties).

4. See Edward L. Tulin, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 TEX. L. REV. 1587, 1604 (2006) (arguing the persistence of homophobia in U.S. culture makes equal protection under the law difficult to achieve for lesbians and gay men); see also Rosenfeld, *supra* note 3, at 161 (discussing how LGBT elders grew up thinking of homosexuality as a legal, medical, and moral aberration, pointing out that the American Psychiatric Association did not rescind the definition of homosexuality as an illness listed in the Diagnostic and Statistical Manual of diseases until 1973).

en credence in politics and the news. LGBT seniors who lived through the vilification of homosexuals in the McCarthy era and the gay liberation and repudiation of anti-gay bias that followed have had to observe politicians fanning the flames of moral panic more recently, first in the wake of legislation opposing same-sex marriage, such as the Defense of Marriage Act, and then in the 2007 debates surrounding the excision of gender protections in the Employment Non-Discrimination Act.⁵ Evangelists have blamed America's tolerance for homosexuality for events ranging from the September 11 terrorist attacks on the World Trade Center to U.S. combat deaths in Iraq, with some state legislators defending anti-gay violence as justified.⁶ Nearly forty years after Stonewall, just when LGBT elders may have hoped that homophobic attitudes would finally disappear forever from the United States, they find instead, as the title of one law review article quips, "Everything Old is New Again," and anti-gay hostility is in fashion once more.⁷

Recent figures suggest that elder abuse in the United States is widespread, with five million or more elders suffering some form of mistreatment each year.⁸ These numbers do not specifically consider sexual or gender identity as factors contributing to discrimination; rather, they merely show the extent of the abuse and neglect that millions of Americans endure solely because they are old enough to need someone to take care of them.⁹ Elder abuse can comprise several va-

5. See Barry D. Adam, *The Defense of Marriage Act and American Exceptionalism: The "Gay Marriage" Panic in the United States*, 12 J. HIST. SEXUALITY 259, 259 (2003); Nat'l Gay & Lesbian Task Force, *The Issues: Employment Non-Discrimination Act (ENDA)*, http://www.thetaskforce.org/issues/nondiscrimination/ENDA_main_page (last visited Dec. 17, 2008).

6. See Peter Applebome, *Jerry Falwell, Moral Majority Leader, Dies at 73*, N.Y. TIMES, May 16, 2007, at A1 (listing among Falwell's controversial pronouncements one where he declared that the September 11, 2001, terrorist attacks were God's punishment of America for its tolerance of abortion, the ACLU, and gay rights); Stephen Marc Beaudoin, *Shut Your Mouth: State Sen. Gary George Roils Equal Rights Activists with Shocking Comments*, 25 JUST OUT 16 (2008), available at http://www.justout.com/archives/issues/03_21_08/ (interviewing Oregon State Senator Gary George, who defends anti-gay violence as a justified backlash from heterosexuals who feel oppressed by LGBT visibility); Melody Simmons, *Marine's Father Sues Church for Cheering Son's Death*, N.Y. TIMES, Oct. 26, 2007, at A18 (describing the Westboro Baptist Church policy of picketing military funerals of soldiers killed in Iraq and Afghanistan because the church believes God is killing soldiers to punish America for condoning homosexuality).

7. Tulin, *supra* note 4, at 1587.

8. Bryan A. Liang, *Elder Abuse Detection in Nursing Facilities: Using Paid Clinical Competence to Address the Nation's Shame*, 39 J. HEALTH L. 527, 527 (2006).

9. See *id.*

ieties of ill use, such as financial mistreatment, physical abuse and neglect, and psychological abuse.¹⁰ Allegations of elder abuse often involve some form of physical abuse, such as deficient care, physical and sexual assault, and rough treatment indicated by unexplained physical injuries.¹¹ However, infliction of emotional and psychological anguish is also a recognized form of elder abuse and can comprise various kinds of hostility, such as yelling at elderly people, insulting them, intimidating or humiliating them, ignoring them, and disrespecting their privacy rights.¹² Victims of emotional or psychological abuse can become agitated, withdrawn, and unresponsive, which puts them at risk for developing health problems.¹³

Definitions of elder abuse vary slightly from one state to another, but most state statutes employ language that is similar to that found in the Older Americans Act, where abuse means the willful "infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish," or "deprivation by a person, including a caregiver, of goods and services that are necessary to avoid physical harm, mental anguish, or mental illness."¹⁴ Most states consider emotional abuse to be a serious form of elder abuse, and many states view emotional anguish to be on par with physical abuse in posing a grave danger to senior well-being.¹⁵ Emotional abuse can be directed toward elders in a variety of situations, most commonly toward those being cared for by underpaid, overworked staff or by family members with little training and few resources forced to endure poor working conditions.¹⁶ Improper training can engender abuse as a response to stress caused by caregiving under these conditions.¹⁷ In such situations, abuse can be fueled by resentments that come readily to hand, such as conservative atti-

10. Sarah S. Sandusky, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 *ELDER L.J.* 459, 460 (2003).

11. Liang, *supra* note 8, at 531.

12. Kevin P. Kane, *Selecting a Nursing Home: Elder Abuse Detection and Prevention*, *ORANGE COUNTY LAW*, Aug. 2002, at 15.

13. *Id.*; Sandusky, *supra* note 10, at 461.

14. Older Americans Act, 42 U.S.C. § 3002(1) (2006).

15. Nat'l Ctr. on Elder Abuse, *Is Elder Abuse a Crime?*, http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Basics/crime.aspx (last visited Dec. 17, 2008).

16. Liang, *supra* note 8, at 531 (arguing that even good-faith workers are not adequately prepared to address the specialized needs of institutionalized seniors, which require physical, emotional, and psychological care).

17. *Id.*

tudes that view lesbians, gay men, bisexuals, and transgender people as sexually immoral.¹⁸

This Note examines how the pervasiveness of homophobia and transgender bias renders most state statutory prohibitions against elder abuse inadequate to protect LGBT elders and those perceived to be LGBT from discrimination, abuse, and isolation in nursing homes, hospitals, and assisted living facilities; why protection for both sexual orientation and gender expression needs to be added to these state statutes; and why, ultimately, federal protections are necessary to assist the states in protecting LGBT elders and others from abuse. Part II examines invisibility, homophobia, and the historic interchangeability of gender and sexual expression as targets of LGBT discrimination and oppression. Part III examines the types of discrimination that are often directed at LGBT elders in nursing homes, and Part IV examines remedies for LGBT elder discrimination, including addressing homophobia through caregiver sensitivity training, requiring better detection and reporting methods for LGBT elder harassment and abuse, creating private communities catering to LGBT elders, and adopting statutory remedies that prohibit discrimination on the basis of actual or perceived sexual orientation and gender identity. Part V concludes that federal and state statutory provisions prohibiting discrimination on the basis of both sexual orientation and gender identity should follow the intent of older, similar civil rights legislation, such as Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), filling the gaps that remain in such legislation by adding sexual orientation and gender expression to the list of protected categories, thus affording broader protections for vulnerable LGBT elders when they need it the most.

II. Background

A. Invisibility and Gender Norms

Lesbians, gay men, and transgender people comprise a significant body of seniors in the United States, with researchers recently es-

18. Sean Cahill & Ken South, *Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender People in Retirement*, 26 GENERATIONS 49, 50 (2002) (explaining that people acting out anti-gay bias may use derogatory language, engage in discriminatory behavior, or even perpetrate violence against LGBT people, and that such heterosexist and homophobic attitudes and assumptions can interfere with the well-being and happiness of LGBT elders).

timating their numbers at 2.8 million.¹⁹ Exact numbers are difficult to obtain because few surveys ask about sexual orientation or gender identity, and many respondents are cautious about identifying themselves.²⁰ Older lesbians, gay men, and transgender people are often invisible. This invisibility is exacerbated by the ageism of the mainstream media, where youthfulness is idealized and senior citizens are seldom shown; by the heterosexism of mainstream culture, where heterosexuality is presumed and representations of lesbians, gay men, and transgender people are still scarce; and by homophobia, where lesbian, gay, bisexual, and transgender sexual and gender variance is feared and reviled.²¹ The LGBT elder population is thus both unimagined and unimaginable, the “most invisible” of a marginalized—though growing—minority that is doubly hidden and encouraged to remain that way.²²

LGBT elders are invisible because they are marginalized, because they are often fearful of being punished for being gay, because they do not always answer survey questions truthfully, because they are not “out” to their health care providers, and because, as Urvashi Vaid notes, “[a]ge is a dirty word in America.”²³ However, LGBT elders are also invisible because without laws to protect them, they have little recourse in the legal system and there are few remedies that could make them more visible, influential, and protected. Victims of neglect and bad treatment at the hand of homophobic doctors and

19. SEAN CAHILL ET AL., THE POLICY INST. OF THE NAT'L GAY & LESBIAN TASK FORCE, OUTING AGE: PUBLIC POLICY ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS 7 (2000) (arguing that researchers usually undercount LGBT seniors because the few surveys that ask about sexuality ask about sexual behavior, not sexual or gender identity), available at <http://www.lgbthealth.net/downloads/research/NGLTFoutingage.pdf>.

20. *Id.*

21. See John A. Blando, *Twice Hidden: Older Gay and Lesbian Couples, Friends, and Intimacy*, 25 GENERATIONS 87, 87 (2001) (arguing that the invisibility of LGBT seniors stems from lack of knowledge due to problems of definition, differences in self-identification as gay or lesbian among older LGBT people of a certain generation, and a historic lack of institutional support for research on the LGBT elder population); see also Tulin, *supra* note 4, at 1624 (arguing that even as Americans can watch gay-themed television shows such as *Will & Grace* and *Queer Eye for the Straight Guy*, same-sex couples in Massachusetts can legally wed, and *Lawrence v. Texas* has overturned some of the more blatantly discriminatory sodomy laws, most LGBT people remain marginalized under the law as persistent targets of hostility).

22. Blando, *supra* note 21, at 87.

23. CAHILL ET AL., *supra* note 19, at iv (arguing that a new wave of LGBT elders is threatening to overwhelm aging service providers, who are not ready for them, policy makers, who are running away from the issue, and the LGBT community, which has not faced it).

health care workers has few legal protections against discrimination they may experience on the basis of their sexual orientation or gender expression, though this is slowly changing as more states integrate sexual orientation and gender identity into their civil rights laws.²⁴ There is still no federal protection for gays, lesbians, bisexuals, and transgender people in housing and public accommodations or employment.

Lesbians, gay men, and transgender people are often identified for harassment and bullying because of their unacceptable gender expression as well as their sexual orientation.²⁵ This can mean that hostile children may harass a little girl for acting too much like a tomboy, or they may go after a little boy for being too much of a sissy, long before either child expresses any type of sexual orientation. Conversely, even if both children are traditionally feminine or masculine in their gender expression, they may be stereotyped as too butch or too effeminate as adults solely because of perceptions that their sexual orientation is lesbian, gay, or bisexual. As elders, LGBT people will have to hide any traces of sexual or gender variance if they want to avoid discrimination in nursing homes. Because LGBT people of all ages are subject to discrimination on the basis of sexual orientation *and* discrimination on the basis of gender identity, and these two aspects of identity are often perceived to be related in LGBT individuals,²⁶ it follows that LGBT elders are similarly vulnerable to mistreatment on the basis of gender expression, sexual orientation, or both. This is why—as some states have begun to recognize—statutory protections for LGBT people in general, and LGBT elders in particular, need to include both sexual orientation and gender identity expression in their language.²⁷

24. *E.g.*, Press Release, Nat'l Gay & Lesbian Task Force, Task Force Hails Vermont Legislature's Passage of Bill Protecting Transgender People from Discrimination (May 4, 2007), available at http://www.thetaskforce.org/press/releases/prMF_050407.

25. CAHILL ET AL., *supra* note 19, at 17.

26. *Id.* at 51 (discussing a federal bill that addresses discrimination based on sexual orientation and gender identity).

27. See HAW. REV. STAT. ANN. § 489-3 (LexisNexis Supp. 2007) (Hawaii's statute prohibiting discrimination on the basis of sexual orientation and gender identity); IOWA CODE ANN. § 216.7 (West Supp. 2007) (Iowa's statute barring discrimination on the basis of sexual orientation and gender identity); R.I. GEN. LAWS §§ 11-24-2.2, -2.3 (2007) (Rhode Island's statute barring discrimination on the basis of sexual orientation and gender identity).

Unfortunately, when bills are introduced to protect LGBT people from discrimination, they often either die or are gutted to the point that most LGBT activists cannot support them because legislators cannot agree on how to get around homophobic attitudes on the part of other legislators. Such is the case with the Employee Non-Discrimination Act (ENDA). The fate of ENDA's gender provisions, and of its larger passage, is instructive for thinking about identity and intersectionality with respect to equal protection legislation. ENDA was originally titled "A Bill to prohibit employment discrimination on the basis of sexual orientation or gender identity."²⁸ Its purposes were: "(1) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity; (2) to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation or gender identity; and (3) to invoke Congressional powers . . . in order to prohibit employment discrimination on the basis of sexual orientation or gender identity."²⁹

Because sexual orientation and gender identity are often two sides of the same coin of LGBT discrimination, ENDA's original statutory language covered two slightly different ways that a LGBT person might be targeted for mistreatment. However, sexual orientation and gender identity appeared to be unrelated elements in the bill because the statutory language as drafted employed an "or" rather than an "and" to separate them. This distinction reflected differing views among politicians about the relationship between sexuality and gender, and proved to be the bill's undoing. In the fall of 2007, in a move many LGBT activists saw as a capitulation to institutionalized homophobia, ENDA's provisions prohibiting gender discrimination were taken out by politicians who feared that leaving them in would retard passage of the bill by more conservative legislators.³⁰ As a result of this amputation of the bill's gender protections, many LGBT organizations that had supported the bill in its earlier incarnations felt obliged to oppose it in its amended form, leaving its future—and the future of federal protections for LGBT citizens—uncertain.³¹ To date, less than half the states themselves have adopted sexual orientation antidiscrimi-

28. H.R. Res. 2015, 110th Cong. (2007).

29. *Id.*

30. Nat'l Gay & Lesbian Task Force, *supra* note 5.

31. *Id.*

mination laws, and of these, only about half have protections for gender identity.³²

B. Homophobia

Many health professionals, researchers, and legal scholars characterize the fear elders feel at the prospect of living in a nursing home as a product of both external and internalized homophobia.³³ Irrational fear or hatred of lesbians, gay men, and bisexuals solely because of their sexual orientation is prevalent among the elderly.³⁴ One reason for this is that anti-gay suspicion, fear, and hostility used to be socially acceptable and legally sanctioned, especially in the era before gay liberation when many of today's seniors were coming of age.³⁵ During the McCarthy era of the 1950s and 1960s, Senate reports defined homosexuals as sick and immoral sexual perverts who posed a grave risk to national security because of their susceptibility to being controlled through blackmail.³⁶ Such arguments perpetuated negative stereotypes and justified the exclusion of homosexuals from government service and, it was implied, any civil democratic society. Medical and psychiatric literature on homosexuality similarly characterized LGBT people as isolated, immature, ashamed, unhappy, and antisocial.³⁷ In 1950, only murder, rape, and kidnapping warranted stricter punishment in the United States than sodomy, and all but two states still classify sodomy as a felony.³⁸

Institutionalized homophobia, reflected in the hostility toward homosexual sexual expression enshrined in sodomy laws, had the ef-

32. Jon W. Davidson, *Celebrating Recent LGBT Legislative Advances*, LAMBDA LEGAL, May 30, 2007, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/recent-lgbt-advances.html>.

33. Butler, *supra* note 3, at 274 (defining homophobia, heterosexism, transphobia, and heterosexist liberal humanism, and describing the pervasiveness of these as negative influences in the lives of this generation of LGBT elders).

34. CAHILL ET AL., *supra* note 19, at 17; Butler, *supra* note 3, at 275.

35. Butler, *supra* note 3, at 274.

36. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 42-43 (2d ed. 1998) (showing the government campaign in the 1950s and 1960s to portray homosexuals as diseased and debilitating by calling them "sex perverts" whose moral fiber was weakened by their sexual activity, insisting "[o]ne homosexual can pollute a Government office").

37. See Rosenfeld, *supra* note 3, at 162.

38. D'EMILIO, *supra* note 36, at 14 (arguing that while the enforcement of sodomy statutes seldom resulted in maximum sentences permitted by the law, they nevertheless imposed the stigma of criminality on homosexual behavior).

fect of encouraging sexually diverse people in the 1950s and 1960s to stay closeted in order to avoid harassment. Patrons of gay bars had to pair up with opposite-sex dance partners during police raids to avoid being arrested on public morals charges.³⁹ Because merely being found by police inside a gay bar could result in sexually and gender diverse people being arrested on charges of “frequenting a house of ill repute,” many people of that era learned to remain hidden.⁴⁰ Newspaper editors would often print the names, addresses, and employers of men and women arrested in bar raids.⁴¹ Investigations for lesbianism in the military during this era were capricious and frequent, and these investigations encouraged lesbians who wanted or needed to remain in the service to perfect their hiding skills.⁴²

At the same time that LGBT people were being purged from government and arrested for homosexual sexual activity, the law also directed hostility toward them for violating gender codes. Many butch lesbians went to gay bars because they were one of the few public places where women could wear pants.⁴³ The importance of gender expression in LGBT culture in the 1950s and 1960s was such that bar patrons new to LGBT life sometimes found themselves ostracized because they were not properly attentive to LGBT codes of gendered clothing and were thus perceived by others as undercover police officers.⁴⁴ Prior to 1969, lesbians, gay men, bisexuals, and transgender people could be charged with disorderly conduct for cross-dressing, and it was not uncommon for the police to force LGBT people walking on the street to show that they were wearing at least three articles of clothing considered proper to their “normal” gender.⁴⁵

39. LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 164 (1991) (discussing how the worst police harassment of lesbians in the 1950s took place in the bars, where spies were planted to gather evidence used to revoke liquor licenses on the grounds the existence of the bar was contrary to public morals).

40. *See id.* at 164–65.

41. D’EMILIO, *supra* note 36, at 49.

42. *See* FADERMAN, *supra* note 39, at 152–53 (describing the frequency of military witch-hunts where vulnerable women were targeted, threatened with expulsion, and interrogated until they revealed the names of other women purported to be lesbians, while sophisticated lesbians trained in hiding managed to avoid detection).

43. *Id.* at 162.

44. *Id.* at 165.

45. *Id.* at 185 (documenting the routine and systematic harassment of lesbians by the police in the 1950s, when “[a]ny woman wearing pants” could be stopped and asked if she was a man or a woman and groped by officers pretending to search her person).

The Stonewall rebellion of 1969 resisted such police practices, contested homophobic attitudes, and led to the adoption of local anti-discrimination ordinances in many cities.⁴⁶ However, despite subsequent efforts by LGBT communities to eradicate homophobic laws and cultural attitudes, backlash movements were fueled by employing and circulating the homophobic rhetoric that had never become entirely dormant. Anita Bryant's 1977 campaign to overturn Miami-Dade's antidiscrimination ordinance called itself Save Our Children, resurrecting the homosexual pervert stereotypes of the McCarthy era by implying that LGBT rights were equivalent to the legalization of pedophilia, profoundly damaging the rights of LGBT families in Florida and elsewhere.⁴⁷ A more recent reflection of this homophobic tradition can be seen in the post-1995 adoption by many states of "Defense of Marriage" acts that limit marriage to one man and one woman.⁴⁸ Many studies have shown that widespread discrimination against lesbians, gay men, bisexuals, and transgender people still exists in housing, public accommodation, and employment.⁴⁹ Homophobia also directly affects elder health as part of the provider-patient relationship, determining the quality of care available to LGBT seniors. A 1994 study found that two-thirds of doctors and medical students knew about biased caregiving provided to LGBT patients, half of them had actually seen it occur, and ninety percent had heard disparaging remarks made about LGBT patients.⁵⁰

46. See MARTIN DUBERMAN, *STONEWALL 192* (1993) (recounting the Stonewall riots, which started when police raided the Stonewall Inn, a Greenwich Village gay bar, at 1:20 a.m. on June 28, 1969). Transgender women, drag queens, and butch lesbians fought back when police hit them with clubs, and the crowd ignited, booing, throwing change, and setting fires. *Id.* at 196. The riot lasted three days and is considered to be the single most important event leading to the birth of the modern gay rights movement. *Id.* at 203–08.

47. See Tulin, *supra* note 4, at 1624 (arguing that Anita Bryant's 1977 anti-gay crusade attempting to overturn the Miami-Dade homosexual antidiscrimination ordinance helped shape the Florida legislature's enactment of prohibitions against gay adoption and gay marriage, and as a result has had profound repercussions decades later in court adoption and foster care cases involving gay parents).

48. Adam, *supra* note 5, at 262 (arguing that defense-of-marriage laws in the United States are consistent with the U.S. tendency to criminalize LGBT behavior and expression even as the rest of the world moves forward to guarantee LGBT people greater human rights protections).

49. CAHILL ET AL., *supra* note 19, at 17 (arguing that LGBT people face discrimination in all aspects of life such as health care, housing, employment, education, social services, credit, law enforcement, union practices, and public accommodation).

50. Cahill & South, *supra* note 18, at 52.

C. Heterosexism

While homophobia directs hostility and censure toward LGBT people, heterosexism is the related belief that heterosexuals are more normal, healthy, and moral than homosexuals.⁵¹ Heterosexism functions as a default set of assumptions; it is a bias where the heterosexuality of most people is presumed.⁵² The heterosexist presumption that people are automatically heterosexual until proved otherwise forces LGBT people to have to “come out” in order to make clear to others their diverse lesbian, gay, bisexual, and transgender sexual and gender identities.⁵³ Heterosexist bias on the part of the federal government means that members of same-sex couples are not legally perceived as similar in any way to members of heterosexual couples in their legal right to leave benefits to their life partner, their financial and emotional commitment to each other, their establishment of a shared domicile, their family structure, or their need for stability and security in old age.⁵⁴ Heterosexism operates at the federal level through unequal treatment by the government of same-sex couples in administering Social Security benefits, in allowing IRA rollovers and 401(k) tax breaks, and in Medicaid “spend down” provisions that allow heterosexual spouses to retain the couple’s home if one of them enters a nursing home, while homosexual couples are forced to sell.⁵⁵

At the local level, heterosexism, while not as overtly hostile as homophobia, can cause administrators, social workers, or health care providers to assume a resident is heterosexual unless proven other-

51. COUNCIL ON SOC. WORK EDUC., NAT’L CTR. FOR GERONTOLOGICAL SOC. WORK EDUC., MODULE FOR HUMAN BEHAVIOR AND SOCIAL ENVIRONMENT SEQUENCE, DIVERSITY AND OLDER ADULTS: GAY MEN AND LESBIANS, CALIFORNIA STATE UNIVERSITY, LONG BEACH 2, http://depts.washington.edu/geroctr/Curriculum3/TeachingModule/HBSE_DiversityModule.doc (last visited Dec. 16, 2008) [hereinafter MODULE FOR HUMAN BEHAVIOR] (demonstrating that not all stereotypes of older gay men and lesbians are true, such as the notion that older lesbians and gay men are not sexually active, or that they are mostly isolated, have few friends, and possess poor coping skills and mental health).

52. Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611, 617–18 (2001).

53. DIANE HELENE MILLER, FREEDOM TO DIFFER: THE SHAPING OF THE GAY AND LESBIAN STRUGGLE FOR CIVIL RIGHTS 14 (1998); Hirschfeld, *supra* note 52, at 617.

54. Cahill & South, *supra* note 18, at 50.

55. *Id.* at 50, 53 (arguing that the Medicaid Community Attendant Services and Supports Act could give LGBT elders the option of staying home with caregiving assistance instead of entering expensive institutions, as well as helping prevent separation from a life partner).

wise.⁵⁶ This makes LGBT elders invisible, which is stressful for them. Not being acknowledged can also lead to depression and isolation.⁵⁷ Elderly gays are extremely isolated, and isolation is one of the biggest factors putting the health of elderly people at risk.⁵⁸

III. Analysis

A. Homophobia, Discrimination, Abuse, and Neglect

Definitions of elder abuse vary slightly from one state to another, but most state statutes employ language that is similar to that found in the Older Americans Act, where abuse means the “willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish” or “deprivation by a person, including a caregiver, of goods and services that are necessary to avoid physical harm, mental anguish, or mental illness.”⁵⁹ The language of the Act emphasizes the “willful” nature of the abuse, which suggests that intent has to be considered when charging someone with abuse. This idea of intent is potentially confusing. If you are a social conservative and you think homosexuality is wrong, is it abusive to subject LGBT people to your repeated exhortations that they give up their sinful lifestyle? What if they find this distressing, but you think you are helping them make their lives better? Some states have sidestepped this confusing issue of intent as it pertains to emotional abuse by either reserving intent for physical abuse only, as Alabama does, or by doing away with intent and making all forms of abuse equally reprehensible, as California does.⁶⁰ Cal-

56. Butler, *supra* note 3, at 275 (arguing that older LGBT adults are invisible because of “heterosexual assumption,” which is the act of the dominant heterosexual culture wanting to ignore the fact that older LGBT adults exist).

57. *Id.* (arguing that the sometimes extraordinary measures that LGBT elders take to protect their privacy means that they will not allow health aides into their homes, thus affecting their quality of care).

58. Mary Ambrose, *Retiring Back into the Closet*, GLOBE & MAIL, Jan. 21, 2006, at F7 (arguing that “isolation is the single biggest factor that puts the health of elderly people at risk”); see also Anissa Rogers, *Factors Associated with Depression and Low Life Satisfaction in the Low-Income, Frail Elderly*, 31 J. GERONTOLOGICAL SOC. WORK 167, 188 (1999) (showing that social support is associated with depression and life satisfaction among the elderly).

59. Older Americans Act, 42 U.S.C. § 3002(13) (2006).

60. See ALA. CODE § 38-9-7 (2007) (intentional abuse that “causes serious physical injury” is a Class B felony, while emotional abuse, whether intentional or not, is a Class A misdemeanor); CAL. WELF. & INST. CODE § 15610.07 (2007) (paraphrasing the language of the Older Americans Act, but excising language pertaining to intent and defining physical and mental abuse together without distin-

ifornia's language defining abuse as "[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" puts mental suffering on a par with physical abuse and abandonment.⁶¹ This may seem extreme, but it actually recognizes the not inconsiderable physical toll that mental suffering can have on vulnerable and dependent seniors.⁶²

LGBT elders may encounter several kinds of discrimination in nursing home settings. Ageism, heterosexism, and homophobia contribute to LGBT elder invisibility, isolation, and discrimination in admissions, payment, treatment and care, recognition of family, and peer support in nursing homes.⁶³ Admissions workers and staff at nursing and medical facilities often assume that most old people are predominantly heterosexual, if sexual at all.⁶⁴ Heterosexism is shown in nursing home admissions questions that ask about opposite-sex spouses, when administrators make visits by same-sex partners difficult or impossible, or when facilities employ care staff with no exposure to or training about sexual- or gender-variant residents.⁶⁵ Such attitudes not only overlook the needs of LGBT seniors, but make LGBT identities seem odd and exceptional and can drive LGBT seniors into the closet, make them feel ignored and invisible, and affect their quality of care.⁶⁶

A survey done by Howard University students of Washington, D.C., area nursing homes found that many nursing homes "do not have sexual orientation nondiscrimination policies in their staff ma-

guishing between them: "Abuse of an elder or a dependent adult means . . . physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.").

61. CAL. WELF. & INST. CODE § 15610.07.

62. *E.g.*, Joan Arehart-Treichel, *Emotional Abuse Takes Toll on Elderly Women*, PSYCHIATRIC NEWS, June 16, 2006, <http://pn.psychiatryonline.org/cgi/content/full/41/12/20>.

63. *See* Butler, *supra* note 3, at 277.

64. *Id.* at 278 (warning practitioners against mere toleration of LGBT clients as a liberal humanist approach that fails to understand the life context of LGBT elders).

65. Douglas J. Edwards, *Outing the Issue*, NURSING HOMES: LONG TERM CARE MANAGEMENT, Aug. 2001, at 40, 40 (arguing that even when a facility is not openly homophobic, most of the things you see when you go into a nursing home reflect heterosexual bias).

66. *Id.* (arguing that many administrators do not know they have gay and lesbian clients in their facilities because those residents can pass as heterosexual and are proud of it, having learned how to do it to survive).

nuals," or have staff unaware that those policies exist.⁶⁷ Many facilities were hostile to the students doing the survey, and many refused to cooperate at all.⁶⁸ While some indicated that same-sex sexual relationships would be acceptable, their answers were evasive and contradictory, and have been interpreted by those in the field as more indicative of attempts by respondents to evade lawsuits than an honest reflection of institutional policy.⁶⁹ A survey of New York nursing homes found only one facility out of all those questioned that had any training for staff in sensitivity to LGBT issues.⁷⁰

Homophobia and neglect seem to be widespread in nursing homes, with one survey of nursing home social workers reporting more than half of their coworkers as either intolerant of homosexuality among the residents they served, or openly negative and condemnatory.⁷¹ A random survey of LGBT people in Spokane, Washington, who were not living in nursing homes still found that more than half of respondents feared administrative staff as potential sources of homophobic discrimination, with even more fearing mistreatment by care staff.⁷² Almost all of the respondents were openly gay, lesbian, bisexual, or transgender, which is indicative of fairly resilient and adaptable personalities.⁷³ However, 73% of the LGBT respondents believed that discrimination exists in care facilities, 60% believed that older lesbians, gay men, bisexuals, and transgender people do not have equal access to social and health care services, and 74% did not believe that sexual orientation was included in most facilities' nondiscrimination policy.⁷⁴

According to geriatric doctors, psychiatrists, and social workers, the fear of being dependent on strangers for personal care alone can cause physical and emotional damage.⁷⁵ Unfortunately, this fear of

67. Laurel Faust, D.C. *Nursing Homes Clueless on Gay Issues: Report*, WASH. BLADE, Oct. 3, 2003, <http://www.washblade.com/2003/10-3/news/localnews/sengay.cfm>.

68. *Id.*

69. *Id.*

70. *Id.* (offering that while nursing home staff may have little understanding of gay issues and may also try to discriminate against domestic partner visitation, the threat of court orders and lawsuits is usually very effective).

71. Cahill & South, *supra* note 18, at 52 (demonstrating that in a society that desexualizes old people, the influence of homophobia compounded with that desexualization makes an environment that is very hostile for LGBT elders).

72. Johnson & Jackson, *supra* note 2, at 90.

73. *Id.* at 92.

74. *Id.*

75. Gross, *supra* note 1.

discrimination has a rational basis in fact. Staff in nursing homes have refused to bathe LGBT residents because they do not want to touch them.⁷⁶ Home care personnel have blackmailed patients into not reporting negligent care by threatening to “out” them if they do.⁷⁷ Homophobic health aides have to be reminded not to wear gloves when opening doors or making the beds of LGBT elders when there is no evidence of HIV present.⁷⁸ Social workers at one facility who were willing to discuss staff homophobia admitted that staff considered homosexuality “gross” and got angry with residents if they found out they were LGBT.⁷⁹

One result of LGBT discrimination is that sexual expression while in residential care is not an option for many LGBT seniors. One social worker said her nursing home completely banned same-sex partners from the home as part of the admission requirements.⁸⁰ Many homes refuse to make available any private space for conjugal visits for the LGBT partners of residents.⁸¹ In one particularly infamous incident, reported in 1999, a nursing assistant discovered two elderly men having oral sex, separated them from each other and transferred one to a psychiatric ward where he was put in restraints.⁸² The fact that a community health board ruled that this transfer made sense because of “deviant behavior” only underscores that the desexualization of older adults is particularly harsh and punishing for lesbians and gay men in institutional settings.⁸³ Elsewhere, two women who had been partners for more than twenty-five years were unable to find

76. Cahill & South, *supra* note 18, at 52.

77. *Id.*

78. Gross, *supra* note 1.

79. CAHILL ET AL., *supra* note 19, at 54 (interviewing social workers who admitted that LGBT residents were in the closet at their facility because it was located in a rural area, and because staff members were homophobic and would be horrified to learn that any of the residents were LGBT).

80. *Id.*

81. MODULE FOR HUMAN BEHAVIOR, *supra* note 51, at 10; *see also* Faust, *supra* note 67 (quoting Larry Stansbury, executive director of Brother, Help Thyself, a gay and lesbian fund for health and social service organizations, about incidences he has witnessed where gay people are not allowed to visit their partners in nursing homes: “Forget about touching or holding or anything like that. They’re [the nursing home staff] rigid that they have to be a family member by their definition.”).

82. Cahill & South, *supra* note 18, at 52.

83. *Id.*

a retirement home that would let them even live together in one apartment, let alone share a bed.⁸⁴

While most LGBT people are highly averse to the idea of ever living in a nursing home,⁸⁵ the decision may not be theirs to make. While every admission to a nursing home is supposed to be voluntary and there is no extant statutory authority to commit someone against their will, people are often admitted to nursing homes when they may lack the mental capacity to make a voluntary decision or are admitted at the behest of family members who are not legally appointed guardians or surrogates.⁸⁶ This practice continues because there have been no negative legal consequences for admitting people who may not understand what is happening to them, suggesting the powerlessness of nursing home residents being cared for and controlled by these facilities with respect to the legal system.⁸⁷

Elderly peers with whom LGBT seniors may have to share living space may retain homophobic prejudices and heterosexist assumptions from their own pre-sexual-revolution, pre-gay-liberation upbringing. These negative attitudes can cause shame, fear, and withdrawal, affecting the quality of life of LGBT nursing home and assisted living facility residents.⁸⁸ A woman in a Los Angeles nursing home, an “out” lesbian since the age of twelve, was forced into silence about the truth of her life when she entered the home, closeted and hating it.⁸⁹ An openly gay man who was transferred off his floor and forced to live among the demented and severely disabled because of the intolerance of other residents and their families became depressed and hanged himself.⁹⁰ This last example in particular shows how tolerance of homophobic bullying of lesbians, gay men, and transgender people by other residents and their families in nursing homes is the

84. T.P. Gallanis, *Aging and the Nontraditional Family*, 32 U. MEM. L. REV. 607, 625 (2002).

85. See Johnson & Jackson, *supra* note 2, at 92 (showing 95% of LGBT subjects in one survey answered “no” to a question asking if they were considering a retirement or care facility).

86. Marshall B. Kapp, *Where Will I Live? How Do Housing Choices Get Made for Older Persons?*, NAELA Q., Summer 2002, at 2, 4 (arguing that the validity and enforceability of some assisted living admissions contracts may be questionable on grounds of incapacity of one of the parties because family members who are not formal legal surrogates “voluntarily” commit mentally impaired residents to nursing homes).

87. *Id.*

88. See Gallanis, *supra* note 84, at 624.

89. *Id.*

90. Gross, *supra* note 1.

equivalent of physical abuse and neglect, and can result in isolation, depression, serious health problems, and even death for vulnerable seniors.

B. Remedies

1. EDUCATION AND TRAINING

The most obvious solution to the problem of homophobic abuse of LGBT elders in nursing homes is to address homophobia among health care providers. Social workers agree that the entire organization or facility needs to back efforts to train staff and make them sensitive to the rights of LGBT elders.⁹¹ LGBT people considering the issue of bias in nursing homes responded to one survey by reporting that they perceived the greatest threat of homophobia in nursing homes coming from care staff, followed closely by administrative staff and other residents.⁹² Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders (SAGE) suggests that health care facilities develop statements of nondiscrimination that include sexual orientation and gender, and insists that staff be trained to be culturally aware and sensitive to the needs of LGBT seniors.⁹³ Another strategy entails communicating to residents and staff that it is possible to rethink traditional conceptions of family to include LGBT couples and their friends.⁹⁴ These measures have the added appeal of addressing homophobic attitudes in nursing homes before they express themselves through abusive behaviors toward LGBT residents that reinforce so-

91. Faust, *supra* note 67 (citing Joe Resch, executive director of Episcopal Senior Ministries in Washington, D.C., pointing out that there is no law preventing gay people from living with their partners in nursing facilities and that there needs to be more training and sensitizing for staff).

92. See Johnson & Jackson, *supra* note 2, at 93 tbl.4 (showing that 59% of LGBT people surveyed reported care staff as a suspected source of discrimination, followed by 52% suspecting discrimination from other residents, and 50% from administrative staff).

93. Edwards, *supra* note 65, at 44 (outlining suggestions that could be adopted by long-term care facilities to counter homophobic attitudes by staff and other residents and help make their LGBT residents feel welcome, such as hanging pictures showing same-sex couples or groups of all men or all women together, having staff include questions in the intake interview that do not assume a person is heterosexual or in a heterosexual family, providing private rooms for gay and lesbian couples if private rooms are provided to heterosexual couples, and incorporating gay pride activities into facility events).

94. See Gallanis, *supra* note 84, at 626.

cial isolation, place residents at a higher risk for self-neglect, decrease their quality of life, and increase their risk of mortality.⁹⁵

2. GAY NURSING HOMES AND RETIREMENT COMMUNITIES

One solution to the problem of homophobic nursing homes and retirement communities has been a separatist route. Most retirement homes in the United States are faith-based, which means they can discriminate for any reason because they are exempt from most nondiscrimination statutes.⁹⁶ As an alternative to faith-based homes, several retirement communities catering to the LGBT community have opened around the country.⁹⁷ The most well-known of these is called RainbowVision, the first U.S. retirement village designed specifically for gay men and lesbians.⁹⁸ RainbowVision opened in Sante Fe, New Mexico, in 2006 with 146 condos and rental units on thirteen acres, with three-bedroom condos going for about \$325,000.⁹⁹ RainbowVision quickly sold out and now has a waiting list for units, with other locations planned for Palm Springs, the Bay Area, and Vancouver.¹⁰⁰ The Palm Springs community promises residents homes where home health care and custom design modifications allow members to live independently in the community, as the Web site promises, "for years to come."¹⁰¹

Another community that welcomes LGBT residents is the Palms of Manasota, Florida, which had twenty-one single-family homes priced between \$130,000 and \$200,000 completed before August 2001, with plans to add villas and town homes similarly equipped for independent living priced around \$150,000.¹⁰² Other retirement alternatives that cater to LGBT seniors include subdivisions in Pecos, New Mexico, and Zionville, North Carolina; a Santa Rosa, California, community with cottages, town houses, and nursing units; and Arbours

95. CAHILL ET AL., *supra* note 19, at 17 (explaining how struggling with heterosexism and homophobia can seriously threaten the health and well-being of LGBT elders and how fear of discrimination can reinforce social isolation and put them at higher risk for illness and mortality).

96. Ambrose, *supra* note 58.

97. John Ritter, *Gay Seniors Settle into a Niche*, USA TODAY, July 5, 2006, http://www.usatoday.com/life/lifestyle/2006-07-02-gay-seniors_x.htm.

98. *Id.*

99. *Id.*

100. *Id.*; RainbowVision, Communities, <http://www.rainbowvisionprop.com/communities.html> (last visited Dec. 16, 2008).

101. RainbowVision, Palm Springs Care Options, <http://www.rainbowvisionprop.com/ps-care.html> (last visited Dec. 16, 2008).

102. Edwards, *supra* note 65, at 40.

Cathedral City in California, designed to include commercial and office space, independent- and assisted-living units, units for the infirm, and time-share units for all age groups.¹⁰³

In Los Angeles, the Gay and Lesbian Elder Housing Corporation is building “the first U.S. non-profit housing [center] for gay and lesbian elders,” and similar facilities are being proposed in San Francisco, Boston, and Portland, Oregon.¹⁰⁴ The Los Angeles center includes a proposed “104-unit building with a public community [center], health facilities[,] and a meal program.”¹⁰⁵ The grand scale of these future developments stands in sharp contrast with a present scarcity of homes where LGBT seniors can live without fear of harassment. Despite its reputation as a gay mecca, the first—and only—private nursing home for gay elders in San Francisco is a small home in the suburbs, started by a man who witnessed an elderly gay friend in a nursing home making up stories about the tragic automobile deaths of an imaginary wife and child in order to avoid being ostracized by other residents.¹⁰⁶

While developments such as these offer some hope for LGBT seniors wishing to avoid discrimination in their later years, these housing options are often too expensive for many of the older gay men, lesbians, and transgender people who are, on average, less affluent than their heterosexual counterparts.¹⁰⁷ Gay men earn 15% to 25% less than heterosexual men, while lesbians earn the same as heterosexual women, but are generally poorer than heterosexual women because a lesbian’s partner is also a lower-paid woman.¹⁰⁸ Transgender people are usually economically disadvantaged.¹⁰⁹ Long-term care insurance,

103. *Id.* at 42; Ritter, *supra* note 97.

104. Ambrose, *supra* note 58.

105. *Id.*

106. *Id.*

107. Cahill & South, *supra* note 18, at 50–51.

108. *Id.* at 50.

109. *Id.*; see also Amber Hollibaugh, *OutSpoken Blog: ENDA Important for LGBT Elders Too*, THE NAT’L GAY & LESBIAN TASK FORCE, <http://www.thetaskforce.org/blog/20071102-amber-hollibaugh-enda-and-lgbt-elders> (last visited Dec. 16, 2008). LGBT elders often suffer financial hardship as well as homophobia:

And usually, they are people who have suffered this abuse throughout their working histories, their working lives. I know the myth that we are all wealthy, but the truth is that the majority of us come from circumstances shaped by our queerness, our color, our class and our gender. We come from poor, working- and middle-class families and communities. And we have often had to work jobs that paid little in exchange for being hired at all, precisely because of the explicitness of our gender differences. It means that we often have lower benefits

which can assist LGBT elders in covering the cost of nursing homes and care facilities, is not designed to pay for houses, condos, and apartments in specialty retirement villages.¹¹⁰ Thus, creating private alternative housing for LGBT seniors, while a nice idea, is clearly not going to solve the problem of discrimination for many older members of the gay community who cannot afford it.

3. STATUTORY PROTECTION FOR BOTH SEXUAL ORIENTATION AND GENDER IDENTITY EXPRESSION

a. Why Protection of Both Sexual Orientation and Gender Identity Expression Is Needed Federal law does not protect LGBT people from discrimination in housing and public accommodations.¹¹¹ However, more than twenty states have adopted legislation that explicitly prohibits discrimination on the basis of sexual orientation,¹¹² ten have laws prohibiting discrimination against gays and lesbians in licensed nursing homes and assisted living facilities,¹¹³ and several now explicitly protect people from discrimination in housing on the basis of gender.¹¹⁴ No state has a statute that combines all of these measures to protect nursing home residents from discrimination on the basis of sexual orientation and gender identity.

Protecting gender identity and expression is crucial to protecting vulnerable LGBT people in homophobic environments who would otherwise have to try to hide who they are by trying to appear normative and heterosexual in their gender as well as in their sexual orienta-

and resources in our aging lives—few pensions, lower Social Security benefits, no partner recognition that might then add to what we have as a senior.

Id.

110. See Richard L. Kaplan, *Retirement Planning's Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 432 (2007) (explaining how, although most insurance companies now offer coverage outside of nursing homes, the typical benefit for home health care is only half of the policy's nursing home benefit, and because most policyholders purchase coverage decades before needing it and fail to take inflation into account, what once seemed like full coverage may cover only 50% or less of care costs once benefits are claimed).

111. Human Rights Campaign, *Discrimination in Housing*, <http://www.hrc.org/issues/5497.htm> (last visited Dec. 16, 2008).

112. Barbara Osborne, *No Drinking, No Drugs, No Lesbians: Sexual Orientation in Intercollegiate Athletics*, 17 MARQ. SPORTS L.J. 481, 489–90 (2007).

113. Ralph Randazzo, *Elder Law and Estate Planning for Gay and Lesbian Individuals and Couples*, 6 MARQ. ELDER'S ADVISOR 1, 8 (2004).

114. See HAW. REV. STAT. ANN. § 489-3 (LexisNexis Supp. 2007); IOWA CODE ANN. § 216.7 (West Supp. 2007); R.I. GEN. LAWS § 11-24-2.3 (2007) (showing that Hawaii, Iowa, and Rhode Island all protect gender identity or gender expression alongside sexual orientation).

tion. In one instance of homophobic bias in a medical facility, a lesbian entering her room was harassed by a roommate who shouted at her, "Get the man out of here!"¹¹⁵ This instance of nursing facility homophobia is worth noting because it perfectly illustrates the conflation of perceived homosexuality and perceived gender abnormality that is characteristic of anti-LGBT bias. It is highly unlikely that the woman harassing the entering resident in this instance actually thought her new roommate was a man. If she did, she would no doubt have inquired whether "he" was lost or looking for someone. Instead, her comment accused her new roommate of not being a woman *because* she was a lesbian. To the angry homophobic resident, gender and sexual deviance were interchangeable in this case. Her comment said, "If you are a lesbian, you are not a woman, and I don't want you here." Similarly, it indicated the belief that if you do not look or seem properly feminine enough, you must be a lesbian, and you are not wanted here. An expression of homophobia, gender discrimination specifically targets lesbians, gay men, and transgender people, but it can hurt anyone. Because gender discrimination is all about the perception of what "normal" gender should be, everyone—regardless of their sexuality—needs protection from the threat of harassment and violence, especially when they live in settings where they have little control over their environment.

b. How States Fill Fair Housing Act Gaps If vulnerable LGBT elders are going to be exposed to the risk of unfair discrimination because of one or more aspects of their identity, such as gender, sexuality, or age, then these categories should be legally protected. This is precisely what Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA), does for "race, color, religion, sex, handicap, familial status, [and] national origin" with respect to access to housing.¹¹⁶ Title VIII makes it illegal for housing providers to discriminate on the basis of these aspects of identity,¹¹⁷ but it does not explicitly protect the aged, the lesbian, gay, bisexual, or transgendered person, or the person perceived to belong to one of these categories (whether he or she is actually LGBT or not). Fortunately for older people with handicaps, and those with HIV-AIDS, Title VIII's "handicap" provi-

115. Gross, *supra* note 1.

116. 42 U.S.C. § 3604 (2007).

117. *See id.*

sion protects them against discrimination on the basis of handicap.¹¹⁸ However, the number of states that have added sexual orientation to their housing and public accommodations protections—not to mention the hundreds of similar city ordinances in states that do not have state statutes¹¹⁹—suggests that at least half the population of the United States believes that the FHA does not go far enough to guarantee LGBT people fair access to housing.

Because nursing homes usually qualify as housing and public accommodation for LGBT elders, LGBT elders need statutory protections that ensure that they will not be discriminated against in a nursing home or be refused admission because they are LGBT. In addition to elder abuse statutes that prohibit mental and physical harm directed toward someone because of their gender and sexual orientation, LGBT elders need federal and state statutory protections that fill in the gaps left by Title VIII, and they need these provisions to address gender identity and expression as well as sexual orientation. It is instructive to see how the few states that have sought to remedy this gap have done so. As of 2007, twenty states and the District of Columbia had adopted sexual orientation antidiscrimination laws, with twelve of these also covering gender identity discrimination as well.¹²⁰ Some states have only added sexual orientation to their statutory protections in employment; others have added sexual orientation protections in housing, and some states, such as Minnesota, have both.¹²¹ In 1993, Minnesota added “sexual orientation” to the Minnesota Human Rights Act as a protected category.¹²² Rather than only protecting sexual orientation, the Act conflated sexual orientation and gender identity into one statutory section.¹²³ Under this provision, “[s]exual orientation” means having or being perceived as having an emotional,

118. *See id.*

119. Human Rights Campaign, *supra* note 111.

120. Davidson, *supra* note 32 (using the most recent legislative advances to show the gains LGBT people have made in a relatively short amount of time, while also pointing out that LGBT people cannot marry in forty-nine states and also lack protection in many parts of the country against housing and employment discrimination).

121. Compare MINN. STAT. ANN. § 363A.2, subd. 1 (West 2004), with NEV. REV. STAT. ANN. §§ 118.020, 613.330 (LexisNexis 2007) (showing that Nevada has sexual orientation protections against employment discrimination but not housing discrimination).

122. *Sexual Orientation and the Minnesota Human Rights Act*, THE RTS. STUFF (Minn. Dep’t of Human Rights, St. Paul, Minn.), Mar. 2004, http://www.humanrights.state.mn.us/rsonline3/so_overview.html.

123. *See* MINN. STAT. ANN. § 363A.03, subd. 44.

physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."¹²⁴

Minnesota's definition of sexual orientation is strange on several counts. First, rather than signify what its language would seem to indicate—that is, a sexual *orientation* toward one particular sex rather than another—this provision specifies that sexual orientation means that one has no particular orientation at all, or is perceived as having no particular orientation at all. Technically, it would seem—again, according to the language of the statute—that a person who does demonstrate an affectional preference for one sex over another would not be protected under the Act, whereas some pansexual sort of person of indiscriminate tastes would. Additionally, this same free-floating desire is also indicated by having a gender identity “not . . . associated” with one's biological sex.¹²⁵ Sexual orientation under the statute thus seems to be about free association. Finally, oddly, sexual orientation is vaguely about both desire and gender all at once. It is laudable that Minnesota has statutory language protecting both sexuality and gender expression; however, the statute's emphasis on lack of specificity rather than specific orientation, and its additional lumping of gender expression onto an already vague notion of sexual orientation, leaves open the possibility that some LGBT people, such as those with sexual attachments that do seem “to regard . . . the sex of [a] person,” would not be protected under its language.¹²⁶

Hawaii has added a discriminatory practices prohibition that defines both what discriminatory practices are and who precisely is protected from them:

Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.¹²⁷

Here Hawaii legislators cleverly chose to insert “gender identity and expression” into “sex,” a category that was long established and by

124. *Id.*

125. *Id.*

126. *Id.*

127. HAW. REV. STAT. ANN. § 489-3 (LexisNexis Supp. 2007).

now fairly noncontroversial in terms of civil rights protections, as an elaboration of the category “sex.” Sex usually refers to biological sex in legal language, often to protect women from discrimination, and becomes a shorthand or euphemism for women, though technically men can and do sue for sex discrimination.¹²⁸ Sex is also used to effect what is commonly known as the “sex-gender” distinction, where sex is understood as biological, fixed, and innate, and gender is considered to be fluid and performative.¹²⁹ This distinction has been criticized by many feminists for supporting the validity of biological difference and the accompanying representational and symbolic hierarchical values that accompany notions of immutable biological differences between men and women.¹³⁰

While distinguishing between sex, sexual orientation, and gender expression, Hawaii’s inclusion of “gender identity” into “sex,” which makes gender identity a part of sex rather than its opposite, does not maintain a sex-gender distinction, but rather undoes it by collapsing the concepts. Yet sex and gender identity remains different from sexual orientation, allowing protections for both gender expression and affectional orientation. There is no protection for age under Hawaii’s statute, though “disability” may apply, as it often does in the FHA.

Iowa’s statutory protections are much simpler, placing “gender identity” next to “sexual orientation” in its list of protected categories as just another protected class:

It shall be an unfair or discriminatory practice . . . to refuse or deny to any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability the accommodations, advantages, facilities, services, or privileges thereof, or otherwise discriminate against any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in the furnishing of such accommodations, advantages, facilities, services, or privileges.¹³¹

128. See Robert A. Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 HOFSTRA LAB. & EMP. L.J. 185, 213 (2003).

129. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 279 (2005) (explaining how the separation of gender from sex is part of a social apparatus whose purpose is to determine, track, and maintain the fixity and permanence of sex and sex-based epistemological distinctions, thus denying the validity of transgender experience).

130. *Id.* at 290–91.

131. IOWA CODE ANN. § 216.7 (West Supp. 2007).

This placement has the effect of broadening protections by allowing any category of identity or perceived identity to apply, thus extending the most protections or combination of protections to the most people. In this case, there is no protection on the basis of age, though again, disability may apply, as it does in the FHA.

Rhode Island does one of the best jobs of remedying the gap left by the inadequate provisions of the FHA with a short, efficient job of substituting new legislation for old. Unlike either Hawaii or Iowa, Rhode Island has not covered over the work it has done in introducing new protected categories to fill the gaps left by outdated civil rights laws and the FHA. The relevant statute reads: “[w]henver in this chapter the terms ‘race or color, religion, country of ancestral origin, handicap, age, sex, or sexual orientation’ shall appear, there shall be inserted immediately thereafter the words ‘gender identity or expression.’”¹³² This statute clearly presupposes the original legislative intent of earlier acts creating protected categories as one of explicitly discouraging discrimination on the basis of a stigmatized or misunderstood quality of personhood. It reads the list of “race, color, religion” as an attempt at a complete remedy, and adds “gender identity or expression” as a furtherance of that legislative purpose. Such protections offer more explicit protections, and thus better recourse, to those people seeking remedy for discrimination than is available when a category of identity, such as “sex,” has to be interpreted broadly by the courts.

However, one problem that the Rhode Island statute does not address is the problem of perception, which so often shapes the homophobic social attitudes toward LGBT people that lead to discrimination and abuse in the first place. What if an abuser attacks someone they think is LGBT and it turns out their victim is heterosexual? Is that victim protected, or does protection only extend to actual LGBT victims? One of the most recent measures to add state nondiscrimination protections for sexual orientation and gender identity is Oregon’s Equality Act, known before its passage as Senate Bill 2 (SB2).¹³³ SB2 revised state law to make it illegal to discriminate on the basis of sexual orientation in housing, employment, and public accommodations, and defined sexual orientation as “an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regard-

132. R.I. GEN. LAWS § 11-24-2.3 (2007).

133. OR. REV. STAT. § 659A.030 (West, Westlaw through 2008 legislation).

less of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."¹³⁴

SB2 was a popular bill with many supporters. It was endorsed by Oregon business organizations, sailed through the state Senate with a nineteen to seven vote, passed the House with a thirty-five to twenty-five vote, and was signed into law by a governor who had pledged to support it.¹³⁵ The Act bridges gaps left uncovered by traditional FHA categories by protecting gender identity as well as sexual orientation, and also goes a step further by protecting individuals against homophobia and "perceived" sexuality or gender identity.¹³⁶ It protects individuals against social attitudes, because as the statutory language makes clear, it does not matter whether a person is "really" LGBT or not.¹³⁷ The Act's broad protection offers a much-needed remedy for discrimination against LGBT elders in care facilities, and models the kinds of protections other states and the federal government would do well to adopt. Yet on March 3, 2008, Oregon State Senator Gary George and Representative Kim Thatcher introduced an initiative to repeal it, underscoring the vulnerability of such state laws to challenges by anti-gay legislators, lobbyists, and political groups.¹³⁸ Without the overriding precedent of federal statutory protection, these laws can be subject to years of referendums and ballot initiatives, with the future of similar comprehensive state antidiscrimination protections for LGBT people left uncertain.

IV. Resolution and Recommendation

Vulnerable LGBT elders are statistically likely to be exposed to the risk of unfair discrimination because of one or more aspects of their identity, such as gender, sexuality, or age, when they enter nursing homes or long-term care facilities. LGBT elders face an intensified

134. *Id.*; see also *id.* § 174.100 (defining sexual orientation).

135. See Jason N. Reed, *Senate Passes Oregon Equality Act, Granting Rights, Outlawing Discrimination*, OR. DAILY EMERALD, Apr. 23, 2007, <http://media.www.dailyemerald.com/media/storage/paper859/news/2007/04/23/News/Senate.Passes.Oregon.Equality.Act.Granting.Rights.Outlawing.Discrimination-2874154.shtml>; Ted Kulongoski, Governor, State of Or., Remarks at the HB 2007 and SB 2 signing ceremony (May 9, 2007) (transcript available at http://governor.oregon.gov/GOV/speech/speech_050907.shtml).

136. Compare OR. REV. STAT. § 659A.030, with 42 U.S.C. § 3604 (2007).

137. See OR. REV. STAT. § 659A.030.

138. Beaudoin, *supra* note 6, at 16.

risk of abuse because they are subject to the homophobic attitudes of other residents and staff. Education, training, and an emphasis on residents' rights can help address some of these issues, but the pervasiveness and longevity of homophobia in America, combined with its formative role as part of the ideological makeup of many seniors, means that it is difficult to completely root out the risk of abuse among elderly populations and their caregivers.

LGBT-friendly retirement communities are a step in the right direction toward creating positive communities with strong social networks for LGBT elders otherwise vulnerable to social isolation and hostility. However, these communities, while growing in popularity and affordability, remain relatively rare, fairly expensive, and more separated from the general population than many LGBT people would prefer. While some LGBT people are perfectly happy being surrounded by people who share their sexuality, socioeconomic background, and (most likely) race, others want a more diverse community.

Given that homophobia is difficult to eradicate and that LGBT elders are particularly vulnerable to homophobic abuse in institutional settings, it makes the best sense to ensure that the identities that make LGBT elders vulnerable to abuse should be statutorily protected classifications, where both sexual orientation and gender expression are included and where discrimination based on the perception that someone is LGBT is treated the same as discrimination based on someone's actual identity as an LGBT person. Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, does this for the most part for "race, color, religion, sex, handicap, familial status, [and] national origin" with respect to access to housing.¹³⁹ The FHA makes it illegal for housing providers to discriminate on the basis of these aspects of identity, but it does not explicitly protect the aged, the lesbian, gay, bisexual, or transgendered person, nor does it protect the person perceived to belong to one of these categories (whether he or she is actually LGBT or not). State and federal civil rights laws, on the other hand, should explicitly protect LGBT people, especially elders, following Rhode Island's model of bridging the gaps in FHA protections while also instituting the "perception" protections of the Oregon Equality Act, thus providing the broadest possible protections for the most people.

139. 42 U.S.C. § 3604.

V. Conclusion

Cultural prejudices often flourish in elder communities, and LGBT elders are often the first ones targeted in senior housing and health care settings.¹⁴⁰ The most vulnerable members among LGBT elders are typically seniors who cannot or will not pass for heterosexual and gender normative. Homophobia and transphobia in elder communities are pervasive, and, in the words of queer elder advocate Amber Hollibaugh, “brutal and difficult to fight.”¹⁴¹ Such attitudes mean that LGBT seniors need facilities where staff are trained in the needs of LGBT elders and aware of the likelihood that they might suffer ostracism from other residents and mistreatment by staff and health care providers, and that such treatment can lead to isolation, depression, and ill health. Private retirement communities will not help ensure that less affluent LGBT seniors can live free from abuse, mistreatment, or isolation, and the ill health that follows from these. Because there are no federal protections against discrimination directed at LGBT seniors on the basis of gender and sexual orientation, and because Title VIII does not secure these protections for all seniors, regardless of their actual sexuality, gender identity, or perceptions by others of what these are or should be, Americans need federal and state statutory protections to insure that mistreatment is prohibited and remedies are available for those who have been made to suffer at the hands of others solely because they are lesbian, gay, bisexual, or transgender, and old.

140. Hollibaugh, *supra* note 109. Hollibaugh argues that homophobic discrimination never ends, thus necessitating support for gender identity and expression protections and well as those for sexual orientation:

The impact of discrimination never ends. That’s why it’s critical to remember that when we say ENDA is for everyone in our community, that means transgender and gender-variant LGBT elders as well. Our elders matter; they too will be targets and victims if a non-inclusive ENDA is enacted. No one wants to live a history of workplace discrimination that follows them into their senior years. We must stand together as a community and demand that all of us are protected throughout our lifetimes.

Id.

141. *Id.*