

## **“GEN SILENT”: ADVOCATING FOR LGBT ELDERS**

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*At a time when many LGBT individuals enjoy an unprecedented level of social and legal protection, LGBT elders, in contrast, have continued to face significant legal hardships. They have been referred to as “Gen Silent,” reflecting their tendency to embrace the closet and their unwillingness to advocate on their own behalf. This Article addresses the silence that surrounds LGBT aging and examines the complex interplay of social forces that contribute to the invisibility of this underserved and under-studied minority.*

*Professor Knauer proposes both general legal reforms, such as marriage equality and anti-discrimination laws, as well as specific reforms that include narrowly tailored elder law planning tools, such as a properly drafted will and power of attorney. Significant and systemic legal and policy reform is required to ensure dignity and equity in aging, regardless of sexual orientation or gender identity. Aging in the United States is first and foremost a civil rights issue that implicates fundamental issues of justice and fairness. In this regard, the isolation and fear experienced by LGBT elders should strike a universal chord, as should their call for dignity and equity in aging.*

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Today’s LGBT elders came of age at a time when homosexuality was criminalized and classified as a severe sociopathic illness.<sup>1</sup> Medical intervention to treat homosexuality included electroshock therapy, aversion conditioning, and even lobotomy.<sup>2</sup> There was no concept of “coming out” to family and friends because disclosure could risk institutionalization.<sup>3</sup> Homosexuals were disqualified from most employment, and they were considered unfit parents.<sup>4</sup> For the pre-Stonewall generation, concealing one’s sexual orientation—being “closeted”—was simply a way of life and a matter of survival.<sup>5</sup> As one researcher observed, today’s LGBT elders are

1. The classification of homosexuality as a severe sociopathic personality disorder was used to justify a wide range of legal and social disabilities, as was its continued criminalization. See generally RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987) (describing history of controversy relating to declassification of homosexuality and its deletion from the Diagnostic and Statistical Manual III); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 62 (1999) (describing history of criminal sanctions imposed on homosexuality).

2. ESKRIDGE, *supra* note 1, at 62. Homosexuals were “subjected to lobotomies, electrical and pharmacological shock therapy, and . . . castration.” *Id.* (citing John Lastala, *Atascadero: Dachau for Queers?*, *ADVOC.*, Apr. 26, 1972, at 11).

3. KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 45 (1991) (noting possibility of medical intervention).

4. BAYER, *supra* note 1, at 15–40 (discussing homosexuality from abomination to disease).

5. For example, a 2004 report on LGBT elders explained that “‘passing’ as heterosexual has been a lifelong survival strategy.” *FUNDERS FOR LESBIAN & GAY*

“the last generation to have lived their adolescence and young adulthood in hiding.”<sup>6</sup>

Over the years, many members of this pre-Stonewall generation responded to increasing social and legal acceptance by living more openly, but others remained deeply closeted.<sup>7</sup> As they have aged, however, even those LGBT elders who chose to live openly now find themselves returning to the closet to avoid anti-LGBT bias on the part of service providers and non-LGBT peers.<sup>8</sup> They report that the pressure to conceal their identities is especially intense when faced with the prospect of entering a long-term care facility.<sup>9</sup> Reflecting on his future, one openly gay elder explained, “[a]s strong as I am today . . . when I’m at the gate of the nursing home, the closet door is going to slam shut behind me.”<sup>10</sup>

This pre-Stonewall generation has been referred to as “Gen Silent,” reflecting their tendency to embrace the closet and their unwillingness to advocate of their own behalf.<sup>11</sup> Their collective silence makes it difficult for policymakers and elder advocates to advance

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ISSUES, AGING IN EQUITY: LGBT ELDERS IN AMERICA 5 (2004) [hereinafter AGING IN EQUITY], available at <http://www.lgbtfunders.org/files/AgingInEquity.pdf>.

6. SKI HUNTER, *MIDLIFE AND OLDER LGBT ADULTS: KNOWLEDGE AND AFFIRMATIVE PRACTICE FOR THE SOCIAL SERVICES* 14 (2005).

7. See Scott James, *An Unlikely Plaintiff. At Issue? He Dares Not Speak Its Name*, N.Y. TIMES, May 7, 2010, at A19, available at 2010 WLNR 9469110. The term “pre-Stonewall” refers to the 1969 Stonewall riots that are widely cited as the beginning of the Gay Liberation movement. See *infra* text accompanying notes 150–153.

8. The critically acclaimed documentary on LGBT elders, *Gen Silent*, has the following subtitle: “The generation that fought hardest to come out is going back in . . . to survive.” GEN SILENT (Mad Stu Media 2010), available at [http://stumadux.com/GEN\\_SILENT.html](http://stumadux.com/GEN_SILENT.html).

9. A 2000 advocacy study explains the pressure to be closeted in a congregate living facility as follows:

As GLBT old people enter assisted living situations, nursing homes, independent elderly housing or retirement communities, they are often presumed heterosexual and may feel the need to go back into the closet; often their long-term relationships are devalued and not recognized. Even if they have lived openly in the past, they may suddenly find themselves in situations where disclosing their sexual orientation or gender variance makes them vulnerable to discrimination or even abuse. The lack of sensitivity to sexual orientation in housing and supportive care programs for elders often places GLBT elders in vulnerable and uncomfortable circumstances.

SEAN CAHILL ET AL., POL’Y INST. OF THE NAT’L GAY & LESBIAN TASK FORCE FOUND., *OUTING AGE: PUBLIC POLICY ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS* 53 (2000), available at [http://www.thetaskforce.org/reports\\_and\\_research/outing\\_age](http://www.thetaskforce.org/reports_and_research/outing_age).

10. See Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, at A1, available at 2007 WLNR 19751537 (quoting LGBT elder).

11. See *supra* note 8 (describing documentary).

their interests, craft proposals for reform, and engage in much needed educational outreach.<sup>12</sup> Moreover, their silence greatly increases their risk of social isolation and, as a result, decreases their likelihood of successful aging.<sup>13</sup> As Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York explains, closeted LGBT elders face “a faster pathway to depression, failure to thrive and even premature death.”<sup>14</sup> She notes that “[t]here is something special about having to hide this part of your identity at a time when your entire identity is threatened.”<sup>15</sup>

This Article addresses the silence that surrounds LGBT aging and examines the complex interplay of social forces that contribute to the invisibility of this underserved and under-studied minority.<sup>16</sup> At a time when LGBT individuals enjoy an unprecedented level of social and legal protection, it appears that many LGBT elders face the daily challenges of aging estranged from their families, detached from the larger LGBT community, and ignored by mainstream aging initiatives.<sup>17</sup> In addition to the general burdens of aging, LGBT elders are disadvantaged by a number of LGBT-specific concerns, most notably: the legal fragility of their support systems, high levels of financial in-

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12. As one study notes, “The difficulty in undertaking change in an environment in which older gays and lesbians are profoundly silent cannot be underestimated.” William Kanapaux, *Homosexual Seniors Face Stigma*, GERIATRIC TIMES, Nov. 1, 2003, at 3 (quoting report on LGBT seniors in Shari Brotman et al., *The Health and Social Service Needs of Gay and Lesbian Elders and Their Families in Canada*, 43 THE GERONTOLOGIST 192, 199 (2003)).

13. Social isolation is a term of art. It refers to a situation where an individual has no one to call for help or assistance. JAIME M. GRANT ET AL., NAT’L GAY & LESBIAN TASK FORCE POL’Y INST., OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS 91–92 (2010), available at [http://www.thetaskforce.org/downloads/reports/reports/outingage\\_final.pdf](http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf) (explaining that isolation occurs when a person cannot access needed social and medical support services).

14. Gross, *supra* note 10.

15. *Id.*

16. Until recently, academic interest in gay and lesbian aging was sporadic and dispersed across a number of disciplines, including gerontology, psychology, and anthropology. Judith C. Barker, *Lesbian Aging: An Agenda for Social Research*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS 29, 31 (Gilbert Herdt & Brian de Vries eds., 2004). Judith C. Barker reports that prior to 1990, there was no mention of gay men or lesbians in standard gerontology texts and studies on sexuality rarely included people beyond the age of sixty. *Id.* at 29–30.

17. The contemporary movement for LGBT civil rights has largely failed to champion the interests of LGBT elders. Its three signature issues—marriage equality, employment non-discrimination, and the repeal of the military’s Don’t Ask, Don’t Tell policy—do not speak directly to the needs of elders. Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1, 5–6 (2009) (describing “three signature issues” in greater detail).

security compounded by ineligibility for spousal benefits, and the continued prevalence of anti-LGBT bias on the part of their non-LGBT peers and service providers.<sup>18</sup>

Significant and systemic legal and policy reform is required to ensure dignity and equity in aging regardless of sexual orientation or gender identity. This reform includes marriage equality, broad based anti-discrimination protections that reach senior-specific venues, cultural competency training, and anti-bullying measures.<sup>19</sup> On an individual level, however, it is also possible to use traditional elder law planning tools in a proactive manner to help minimize many of the inequities inherent in LGBT aging.<sup>20</sup> Although even the most carefully drafted documents cannot control for the prejudices of third parties or overcome the deep-seated preference for traditional family ties, a properly drafted will, a power of attorney, and a comprehensive elder care plan can provide an LGBT elder with a measure of security.<sup>21</sup> The unique ability of planning documents to acknowledge relationships and memorialize wishes means that elder law practitioners have an important role to play in the current crisis in LGBT aging.<sup>22</sup> When representing LGBT elders or advocating on their behalf, however, it is important to recognize that they differ from their non-LGBT peers in many important respects, and, accordingly, some of the challenges they face as they age are directly related to their sexual orientation and gender identity.

Part I of this Article provides an introduction to LGBT elders, specifically the ways in which LGBT elders differ from their non-LGBT peers in terms of demographics and their reliance on “chosen family.”<sup>23</sup> It also outlines some of the particular issues confronting transgender elders. A number of the points of difference between

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18. Issues of greater concern to LGBT elders include: “the legal fragility of chosen family, financial insecurity,” and anti-LGBT bias and discrimination on the part of service providers and in senior-specific venues. *Id.* at 8.

19. See generally *id.* (proposing cultural competency training, anti-bullying measures, and broad-based anti-discrimination protections). Currently, the laws in some jurisdictions may provide LGBT elders with a degree of protection, but the situation varies greatly from jurisdiction to jurisdiction. *Id.* at 39.

20. See *infra* text accompanying notes 217–81 (discussing estate planning tools).

21. This Article does not address issues related to tax treatment of same-sex partners and surviving partners.

22. See Nina A. Kohn, *The Lawyer’s Role in Fostering an Elder Rights Movement*, 37 WM. MITCHELL L. REV. 49, 64–65 (2011).

23. See *infra* text accompanying notes 82–99 (explaining the concept of “chosen family”).

LGBT elders and non-LGBT elders clearly have roots in pre-Stonewall America, but all of these points decrease the likelihood of successful aging for LGBT elders. For example, LGBT elders are more likely than their non-LGBT peers to be single and to live alone,<sup>24</sup> and they are less likely to have children.<sup>25</sup> They also report higher levels of disability and lag well behind their non-LGBT peers on all economic indicators.<sup>26</sup> Elder female same-sex partnered households, in particular, are nearly twice as likely to live below the poverty level.<sup>27</sup> In addition, LGBT elders frequently rely on single-generational “chosen families” for support and caregiving, and LGBT elders are often estranged from their families of origin.<sup>28</sup>

Part II turns to two issues that loom large in the lives of LGBT elders: the closet and the constant threat of anti-LGBT bias. When representing LGBT elders, it is important to recognize that the enduring stigma attached to homosexuality and gender variance can frame their view of the aging process, especially as they grow older within a society where anti-LGBT bias and violence remain prevalent and LGBT individuals lack formal legal equality.<sup>29</sup> It is also important to understand that pre-Stonewall history continues to inform some of

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24. See Brian de Vries & John A. Blando, *The Study of Gay and Lesbian Aging: Lessons for Social Gerontology*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS, *supra* note 16, at 3, 7 (describing how gay men and lesbians are more likely to be single); see also CAHILL ET AL., *supra* note 9, at 10 (stating gay and lesbian elders are more likely to live alone rather than heterosexual elders). Similar observations can also be made about gender and aging. For example, elder women are more likely to be unmarried and to be living alone without a partner due to the higher life expectancy for women and age at first marriage. See *id.* at 4–5, 10.

25. See CAHILL ET AL., *supra* note 9, at 10. In some studies on gay and lesbian elders, up to ninety percent of the respondents did not have children, compared with only twenty percent of non-gay elders generally. *Id.*; see also de Vries & Blando, *supra* note 24, at 5.

26. RANDY ALBELDA ET AL., WILLIAMS INST., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY, at ii (2009), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf> (detailing economic factors); Amanda K. Baumle & Anthony P. Romero, *Elder Gays, Lesbians, and Bisexuals: New Demographic and Policy Analyses* (2009) (unpublished manuscript) (on file with author) (detailing disability data).

27. See ALBELDA ET AL., *supra* note 26, at ii.

28. See *infra* text accompanying notes 82–99 (explaining the concept of “chosen family”). Chosen families have two major drawbacks in that they have no legal standing and tend to be single-generational, which means that LGBT elders do not have the benefit of an inter-generational support system and are more likely to require supportive services or nursing care. See *infra* text accompanying notes 82–99.

29. See William B. Rubenstein, *The Real Story of U.S. Hate Crimes: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1227–29 (2004) (discussing LGBT hate crimes).

their behavior and beliefs, specifically their tendency to be closeted and their distrust of service providers.<sup>30</sup> This Part begins with a discussion of *Greene v. Sonoma County*, a case that sent shock waves through the LGBT community and seemed to confirm their worst fears about the power of the state to disrupt LGBT lives and separate long-time partners.<sup>31</sup> It then explores the ways in which the closet and anti-LGBT bias work in tandem to reinforce the invisibility of LGBT elders.

Although we all experience anxiety and trepidation over growing older, LGBT elders report a visceral fear that they will experience anti-LGBT bias when they are most vulnerable and least able to fight back.<sup>32</sup> Existing research shows that LGBT elders have already weathered a good deal of anti-LGBT bias during the course of their lifetimes and, unfortunately, they continue to encounter bias well into their golden years.<sup>33</sup> The accounts of LGBT elders suggest that the aging process amplifies their feelings of vulnerability and sense of difference.<sup>34</sup> At the same time, LGBT elders feel less confident in their ability to withstand anti-LGBT bias, especially on the part of medical providers.<sup>35</sup> Anti-LGBT bias can manifest itself in a variety of ways, ranging from simple ignorance about the existence of LGBT elders to outright hostility.<sup>36</sup> For example, service providers may fail to respect

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30. For example, the Gay and Lesbian Medical Association (GLMA) found that "in an effort to avoid . . . bias or because of internalized homophobia, LGBT patients frequently withhold personal information about their sexual orientation, gender identity, practices, and behavioral risks from their health care providers." GAY & LESBIAN MED. ASSOC., HEALTHY PEOPLE 2010: COMPANION DOCUMENT FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) HEALTH 49 (2001) [hereinafter HEALTHY PEOPLE 2010], available at [http://www.glma.org/\\_data/n\\_0001/resources/live/HealthyCompanionDoc3.pdf](http://www.glma.org/_data/n_0001/resources/live/HealthyCompanionDoc3.pdf).

31. *Green v. Cnty. of Sonoma*, No. SPR-81815 (Cal. App. Dep't Super. Ct. filed Mar. 22, 2010) [hereinafter First Amended Complaint], available at [http://www.ncrlrights.org/site/DocServer/Greene\\_v\\_Sonoma\\_County.pdf?docID=7461](http://www.ncrlrights.org/site/DocServer/Greene_v_Sonoma_County.pdf?docID=7461).

32. Jonathan Starkey, *Out of Isolation: Advocacy Group Assists Long Island Gays and Lesbians Who Grew Up in Less Accepting Times*, NEWSDAY, Feb. 1, 2008, at B06, available at 2008 WL 1983781.

33. See *infra* text accompanying notes 171–210 (describing incidence of anti-LGBT bias).

34. See *infra* text accompanying notes 171–210.

35. This is especially true where the bias is on the part of a medical provider. See AGING IN EQUITY, *supra* note 5, at 10. A 2004 report found that seventy-five percent of LGBT elders are not *completely open* about their sexual orientation with health care providers. *Id.*

36. See NAT'L SENIOR CITIZENS L. CTR., LGBT OLDER ADULTS IN LONG-TERM CARE FACILITIES: STORIES FROM THE FIELD 11 (2011) [hereinafter LONG-TERM CARE], available at [http://www.lgbtlongtermcare.org/wp-content/uploads/NSCLC\\_LGBT\\_report.pdf](http://www.lgbtlongtermcare.org/wp-content/uploads/NSCLC_LGBT_report.pdf).

long-term partners or other chosen family by deferring to the wishes of next of kin or by separating partners.<sup>37</sup> Long-term care facilities may require transgender residents to wear inappropriate clothing and staff may address the residents by the wrong name and incorrect pronouns.<sup>38</sup> LGBT elders report that their non-LGBT peers often engage in shunning and bullying.<sup>39</sup> They also complain that they receive inadequate care<sup>40</sup> and experience harsh and abusive treatment by health care workers<sup>41</sup> on account of their sexual orientation or gender identity. Religiously motivated service providers may harangue LGBT elders who are in their care and urge them to repent before it is too late.<sup>42</sup> Finally, there have been reports that long-term care facilities will transfer LGBT residents to secure "memory wards" to placate the prejudices of other residents.<sup>43</sup>

Part III discusses the extent to which LGBT elders can use traditional estate planning tools to safeguard their interests. Recognizing that planning documents present both limitations and opportunities, it provides a brief overview of the current state of same-sex marriage, as well as the impact of the Defense of Marriage Act (DOMA) on federal spousal benefits. This section recommends that LGBT elders prepare a comprehensive elder care plan that maps out a strategy for long-term care and includes non-traditional documents, such as hospital visitation orders. The final section discusses the extent to which LGBT elders are vulnerable to claims of incapacity and the ways in which anti-LGBT bias can fuel such claims.

A brief conclusion summarizes the types of reforms that are necessary to ensure dignity and equity in aging regardless of sexual orientation or gender identity. It argues that the inability of existing planning tools to resolve the concerns of LGBT elders should serve as

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37. *Id.* at 12–13; *see also* CAHILL ET AL., *supra* note 9, at 53 (noting "relationships are devalued and not recognized").

38. LONG-TERM CARE, *supra* note 36, at 12–13.

39. Gross, *supra* note 10 (discussing a case of shunning).

40. LONG-TERM CARE, *supra* note 36, at 14–15.

41. *Id.* at 13–14.

42. *Id.* at 11; Will Broaddus, *When Silence Is Not Golden*, SALEM NEWS, Apr. 1, 2011, <http://www.salemnews.com/lifestyle/x1281098299/When-silence-is-not-golden> ("There have been stories of people having a caregiver come into their home and bring out a Bible and say, 'It's not too late to mend your ways and change.' . . . When you're stuck in bed, there's nothing you can do.") (internal citations omitted).

43. Gross, *supra* note 10 (discussing elderly gay man who was transferred and committed suicide).

a powerful reminder that many elder law issues require a wider lens and that the reach of elder law ultimately extends well beyond the finer points of estate planning and the spousal impoverishment rules. Aging in the United States is first and foremost a civil rights issue that implicates fundamental issues of justice and fairness.<sup>44</sup> In this regard, the isolation and fear experienced by LGBT elders should strike a universal chord, as should their call for dignity and equity in aging.

## I. Gen Silent

Until recently, the concerns of LGBT elders have been largely overlooked and ignored by researchers, policy makers, and advocates.<sup>45</sup> Buffeted on all sides by stereotypes, ageism, and anti-LGBT bias, LGBT elders have remained an invisible minority who are alienated from their natural allies in both the broader LGBT community and the aging community.<sup>46</sup> In terms of advocacy, the contemporary LGBT civil rights movement has not championed the concerns of LGBT elders, focusing instead on issues that speak to relatively young able-bodied persons, such as employment non-discrimination and the military's Don't Ask, Don't Tell policy.<sup>47</sup> Pervasive ageism within the LGBT community further compounds the isolation of LGBT elders and impairs their ability to form cross-generational support networks.<sup>48</sup> On the other hand, anti-LGBT bias within the senior community inhibits full participation by LGBT elders in senior-specific programs and aging services,<sup>49</sup> making them considerably less likely to access senior services.<sup>50</sup>

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44. Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1059 (2009).

45. Knauer, *supra* note 17, at 4 (explaining gay and lesbian elders are especially vulnerable because "[t]hey are unable to speak for themselves, and others are unwilling to speak for them.>").

46. Broaddus, *supra* note 42 ("This is such an invisible, under-studied population." (internal citations omitted)).

47. Knauer, *supra* note 17, at 5-6 (describing "three signature issues" of the contemporary LGBT civil rights movement).

48. With respect to the impact of ageism within the gay and lesbian community, Hostetler notes: "The sexualized nature of so much of gay public life, paired with ageism and the fear of becoming (or being seen as) 'old, gay, and alone,' turns out to be a powerful deterrent to community." Andrew J. Hostetler, *Old, Gay, and Alone? The Ecology of Well-Being Among Middle-Aged and Older Single Gay Men*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS, *supra* note 16, at 143, 169 (internal citations omitted).

49. For example, according to a study conducted by the U.S. Department of Health and Human Services (HHS), LGBT elders are only twenty percent as likely

To the general public, the very notion of a gay or lesbian elder can appear to be a bit of an oxymoron given prevailing stereotypes about senior sexuality and the nature of gay and lesbian identity. The conceptual disconnect occurs because seniors are widely held to be asexual, whereas homosexuals are often portrayed as hyper-sexual.<sup>51</sup> It follows that if seniors are not sexual, and gay men and lesbians are only sexual, then seniors cannot also be gay.<sup>52</sup> Indeed, the Family Research Council (FRC), a conservative organization, has argued against providing LGBT-specific senior services precisely on these grounds, contending that there is no such thing as an LGBT senior.<sup>53</sup>

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as their non-gay peers to take advantage of federally funded aging services, as well as other entitlements such as housing assistance and food stamps. Elizabeth Kling & Douglas Kimmel, *SAGE: New York City's Pioneer Organization for LGBT Elders*, in *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES* 265, 266 (Douglas Kimmel et al. eds., 2006).

50. *Id.* at 266.

51. Barker, *supra* note 16, at 53. With respect to the de-sexualized view of seniors, Barker explains:

Huge cultural roadblocks and assumptions abound about the impropriety of sexual activity or desire in old age . . . . This general tendency to de-sex and de-sexualize the elderly as well as to depict them as a bundle of health problems waiting to happen, if not already being manifest, results in a view of old people as androgynous, dependent, and ineffectual. This reticence about sex occurs with respect to all older people, not just sexual minorities, and has been a long-standing issue besetting studies of sexuality.

*Id.* at 53; *see also id.* at 54 (stating that "hypersexuality of the young and male sexual minority person" is assumed).

52. This problem is further compounded for gay and lesbian elders with intersecting identities and those who are otherwise marginalized. *See id.* at 37.

53. In 2009, the FRC, a conservative political organization with an aggressively anti-gay platform, capitalized on the invisibility of LGBT elders when it blasted a decision by HHS to fund the creation of a national clearinghouse on LGBT aging issues by arguing that there were not enough LGBT elders to justify the proposed \$250,000 expenditure. D'Anne Witkowski, *Creep of the Week: Tony Perkins*, *OUT FRONT COLORADO*, available at [http://www.outfrontcolorado.com/cover\\_story.php?itemid=514](http://www.outfrontcolorado.com/cover_story.php?itemid=514) (last visited Oct. 21, 2011) (quoting article posted on FRC website that has since been removed). The FRC's objections demonstrate the identity catch-22 experienced by LGBT elders, namely that seniors are not LGBT and the individuals who identify as LGBT are not seniors. To advance its argument, the FRC first asserted that seniors were less likely to identify as LGBT because "people who are 80- or 90-years-old didn't grow up in a culture where it was acceptable to identify with this lifestyle." *Id.* Second, the FRC stated that LGBT individuals were not seniors because "these people are less likely to live long enough to become senior citizens." *Id.* This last claim is related to a longstanding effort by anti-LGBT conservative groups to characterize homosexuality as inherently dangerous and unhealthy. DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 78, 94 (1997). Anti-LGBT political tracts often draw heavily on HIV/AIDS public health information and speak authoritatively about reduced life expectancy and other health risks encountered by primarily gay men, but also lesbians. *Id.*

Contrary to the assertions of the FRC, it is clear that not only do LGBT seniors exist, but they do so in great number.<sup>54</sup> This section provides a snapshot summary of LGBT elders by using Census data, academic studies, anecdotal accounts, and surveys produced by advocacy and industry groups. It pays particular attention to the ways in which LGBT elders differ from their non-LGBT peers. Many of these disparities reduce the likelihood of successful aging, such as the increased probability that LGBT elders are single and do not have children as well as LGBT elders' reliance on "chosen family."<sup>55</sup> In addition, this section addresses some of the particular concerns that transgender elders face, recognizing that transgender-specific issues are often conflated with gay and lesbian concerns and, therefore, rarely receive the full attention that they deserve.<sup>56</sup>

### A. Demographic Snapshot

In the United States there are an estimated 1.6 million to 2.4 million gay men and lesbians who are sixty-five years of age or older.<sup>57</sup> It

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54. Because LGBT elders are an under-studied population, the available information remains partial. See Barker, *supra* note 16, at 59. Enhanced information regarding LGBT elders would help counter their longstanding social and political invisibility that is reinforced by the closet. *Id.*

55. Hostetler, *supra* note 48, at 162.

56. See Aaron H. Devor & Nicholas Matte, *One Inc. and Reed Erickson: The Uneasy Collaboration of Gay and Trans Activism 1964–2003*, in THE TRANSGENDER STUDIES READER 387, 387–89 (Susan Stryker & Stephen White eds., 2006).

57. There is no definitive estimate of the number of LGBT elders in the United States. The figures quoted in the text represent the number of seniors in the United States multiplied by the percentage of the general population who are thought to be gay or lesbian. In 2010 there were forty million seniors in the United States. ADMIN. ON AGING, PROJECTED FUTURE GROWTH OF THE OLDER POPULATION, DEP'T HEALTH & HUM. SERVS. [hereinafter PROJECTED FUTURE GROWTH ], [http://www.aoa.gov/AoARoot/Aging\\_Statistics/future\\_growth/future\\_growth.aspx](http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx) (last modified June 23, 2010). Estimates of the percentage of the general population who are gay or lesbian range from four to six percent. SERVS. & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS (SAGE) & MOVEMENT ADVANCEMENT PROJECT, IMPROVING THE LIVES OF LGBT OLDER ADULTS 2 (2010) [hereinafter LGBT OLDER ADULTS], available at <http://sageusa.org/uploads/Advancing%20Equality%20for%20LGBT%20Elders%20%5BFINAL%20COM%20PRESSED%5D.pdf> (using estimate of 4.1%). The lower estimate does not take into account transgender individuals. *Id.* The higher six percent ceiling represents figures from state and federal health surveys reporting same-sex behavior. GRANT, *supra* note 13, at 134. The U.S. Administration on Aging (AoA) uses a higher estimate but defines senior status as starting at age sixty and includes transgender elders. ADMIN. ON AGING, *Diversity: Lesbian, Gay, Bisexual and Transgender (LGBT)*, DEP'T HEALTH & HUM. SERVS., [http://www.aoa.gov/AoARoot/AoA\\_Programs/Tools\\_Resources/diversity.aspx](http://www.aoa.gov/AoARoot/AoA_Programs/Tools_Resources/diversity.aspx) (last modified Aug. 22, 2011). The AoA estimates

is not possible to estimate the number of gay, lesbian, bisexual, and transgender elders because there is no reliable estimate of the number of transgender individuals in the United States.<sup>58</sup> In addition, there is also very little information regarding LGBT elders with intersecting identities.<sup>59</sup> Based on existing data, however, it is possible to say that LGBT elders are geographically diverse and broadly distributed across the United States.<sup>60</sup> According to Census data, elder same-sex partnered households reside in ninety-seven percent of the counties in the United States.<sup>61</sup> The largest number of elder same-sex partnered households can be found in the states that also have the largest number of elder different-sex married couples: California, Florida, and New York.<sup>62</sup>

The Census represents a useful national data set for gay and lesbian elders, but it only provides a partial picture of LGBT elders because the Census only collects data on *partnered* same-sex households.<sup>63</sup> Accordingly, the Census data does not include single gay men or lesbians, partnered same-sex couples who do not share a household, or transgender individuals.<sup>64</sup> It also only captures partnered same-sex households who are willing to self-identify on a gov-

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that there are between 1.75 million and four million LGBT elders in the United States who are sixty years of age or older. *Id.*

58. GRANT, *supra* note 13, at 135.

59. See Barker, *supra* note 16, at 37.

60. *Id.*

61. Gary Gates, *Gay and Lesbian Families in the Census: Gay and Lesbian Seniors*, THE URBAN INST. (May 30, 2003), [http://www.urban.org/UploadedPDF/900627\\_Checkpoints\\_Seniors.pdf](http://www.urban.org/UploadedPDF/900627_Checkpoints_Seniors.pdf). Partnered same-sex couples live in 99.3% of the counties in the United States. DAVID M. SMITH & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, *GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 3* (2001), available at [http://www.urban.org/uploadedPDF/1000491\\_gl\\_partner\\_households.pdf](http://www.urban.org/uploadedPDF/1000491_gl_partner_households.pdf).

62. GRANT, *supra* note 13, at 33.

63. Since 1990, the Census Bureau has gathered information on same-sex partnered households. GARY J. GATES, THE WILLIAMS INST., *SAME-SEX COUPLES IN US CENSUS BUREAU DATA: WHO GETS COUNTED AND WHY 1* (2010), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Gates-Who-Gets-Counted-Aug-2010.pdf>. The Census Bureau does not collect information on sexual orientation, but it does allow respondents to designate whether an individual living in the same household is an unmarried partner. *Id.* It is then possible to calculate the number of same-sex partnered households by comparing the sex of the occupants with their status. *Id.* Researchers believe that the number of same-sex partnered households reported by the 2000 Census reflects a significant undercount. *Id.*

64. *Id.* at 3.

ernment form.<sup>65</sup> Given that LGBT elders are more likely than younger LGBT individuals to be closeted, it is possible that the Census data undercounts a higher proportion of elder same-sex partnered households.<sup>66</sup>

Based on other studies, it appears that LGBT elders are more likely to be single than their non-LGBT peers, and they are more likely to live alone.<sup>67</sup> They are also much less likely to have children than their non-LGBT peers.<sup>68</sup> All of these factors increase their risk of social isolation,<sup>69</sup> including the fact that it is common for LGBT elders to be estranged from their family of origin.<sup>70</sup> Partially as a result of this estrangement, LGBT elders overwhelmingly rely on what anthropologists have termed “chosen family” for emotional, physical, and financial support.<sup>71</sup>

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65. *Id.* Researchers believe that any survey inquiring as to sexual orientation will result in an undercount due to the continuing stigma attached to homosexuality. *Id.*; see also GRANT, *supra* note 13, at 136.

66. GRANT, *supra* note 13, at 136.

67. de Vries & Blando, *supra* note 24, at 7. For example, a large national study of older gay men and lesbians found that the majority of respondents lived alone. Anthony R. D’Augelli & Arnold H. Grossman, *Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, and Bisexual Older Adults*, 16 J. INTERPERSONAL VIOLENCE 1008, 1011 (2001). Sixty-three percent of the respondents lived alone, twenty-nine percent lived with a partner, four percent lived with friends or relatives, and four percent were homeless. *Id.* If this study is representative of LGBT elders generally, then the percentage of LGBT elders who live alone is much greater than elders generally. According to the 2000 Census, only twenty-eight percent of people sixty-five years of age or older lived alone, whereas sixty-six percent lived with someone else, and six percent resided in group quarters. YVONNE J. GIST & LISA I. HETZEL, U.S. CENSUS BUREAU, WE THE PEOPLE: AGING IN THE UNITED STATES 3 (2004), available at <http://www.census.gov/prod/2004pubs/censr-19.pdf>. Another study found that fewer than one-fifth of LGBT elders lived with a partner as compared to one-half of non-LGBT seniors. CAHILL ET AL., *supra* note 9, at 10.

68. In some studies, up to ninety percent of LGBT elders did not have children, compared with only twenty percent of elders generally. CAHILL ET AL., *supra* note 9, at 10. For the pre-Stonewall generation, children are most likely the product of prior heterosexual relationships, rather than intentionally conceived within same-sex relationships. Even gay and lesbian elders who do have children from prior heterosexual relationships may be estranged from them and therefore not able to call on them for support as they age. Transgender elders may have similar experiences with respect to children from pre-transition marriages.

69. GRANT, *supra* note 13, at 91 (explaining that isolation occurs when a person cannot access needed social and medical support services).

70. See Barker, *supra* note 16, at 61–62. Estrangement is a natural consequence of the pre-Stonewall views on homosexuality. *Id.*

71. See de Vries & Blando, *supra* note 24, at 8–11 (discussing alternate family structure based on camaraderie and caring); Douglas C. Kimmel, *Issues to Consider in Studies of Midlife and Older Sexual Minorities*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS, *supra* note 16, at 265, 267 (“family of choice”).

According to the Census data, elders in same-sex partnered households are more likely than their peers in different-sex married households to report a disability in each of the categories queried, including hearing, vision, mobility, and memory.<sup>72</sup> In addition, elder same-sex partnered households lag behind their different-sex married peers in terms of all important financial indicators, including income, retirement savings, and home ownership.<sup>73</sup> Elder same-sex partnered households earn less income than their different-sex married peers.<sup>74</sup> In particular, they have 34.7% less income from retirement savings than elder different-sex married couples.<sup>75</sup> Compared with their non-gay peers, elder same-sex partners are less likely to own their home and, when they do, its median value is lower and they are more likely to still be paying a mortgage.<sup>76</sup> The combination of these factors can place a considerable strain on the resources of LGBT elders and make the aging process more difficult.

The economic disparity between the partnered same-sex households and their non-gay peers is most striking at the lower rungs of the economic ladder, where elder same-sex partnered households are more likely to live in poverty and elder female same-sex partnered households are almost twice as likely to live in poverty.<sup>77</sup> Given this level of financial insecurity, it is not surprising that elder same-sex

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See generally Jacqueline S. Weinstock, *Lesbian Friendships at and Beyond Midlife: Patterns and Possibilities for the 21st Century*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS, *supra* note 16, at 177; WESTON, *supra* note 3.

72. Baumle & Romero, *supra* note 26 (manuscript). Older gay men in particular have been disproportionately affected by the HIV epidemic, in terms of both infection and loss, and the prevalence of HIV infection weighs heavily on the population of older gay men and communities of color. E. Michael Gorman & Keith Nelson, *From a Far Place: Social and Cultural Considerations About HIV Among Midlife and Older Gay Men*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS, *supra* note 16, at 73, 77 (noting that older men have been "decimated" by AIDS).

73. The financial insecurity experienced by many LGBT elders contradicts the stereotype of gay affluence that was popularized by anti-gay groups during the Culture Wars of the 1990s. See HERMAN, *supra* note 53, at 116-19.

74. LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN FOUND., THE COST OF MARRIAGE INEQUALITY TO LESBIAN, GAY AND BISEXUAL SENIORS (2004), available at [http://www.taxpolicycenter.org/UploadedPDF/410939\\_cost\\_of\\_marriage\\_inequality.pdf](http://www.taxpolicycenter.org/UploadedPDF/410939_cost_of_marriage_inequality.pdf).

75. *Id.* at 5.

76. *Id.* at 6.

77. ALBELDA ET AL., *supra* note 26, at ii. To some extent, this financial insecurity represents the inevitable effect of a lifetime of discrimination, but it is aggravated by the affirmative legal barriers that prohibit the recognition of same-sex relationships and the reluctance of LGBT elders to utilize available services due to their fear of encountering anti-LGBT bias.

partnered households report that they receive public benefits at rates significantly higher than their non-gay peers.<sup>78</sup> For example, female same-sex partnered households are seventy-two percent more likely to be receiving supplemental social security income and eighty-four percent more likely to be receiving public assistance.<sup>79</sup> Although these findings are disturbing, they may represent only the tip of the proverbial iceberg because the Census data does not include some of the most vulnerable and marginal LGBT elders, namely those who are single or too scared to self-identify on a government form.<sup>80</sup>

## B. Reliance on Chosen Family

“Chosen family” plays a central role in the lives of many LGBT elders.<sup>81</sup> In lieu of a traditional multi-generational family formed through marriage, biology, or adoption, LGBT individuals have historically created alternative family or fictive kinship networks based on affinity rather than biology or marriage.<sup>82</sup> These chosen family structures represent a creative way to form relationships and community in the face of a hostile society and a disapproving family of origin. Chosen families have, however, two major shortcomings: they are legally very fragile and the members of any given chosen family tend to be from the same generation.<sup>83</sup> Both of these factors further complicate LGBT aging due to the myriad of ways in which the law privileges “next of kin” to the exclusion of all others and the depend-

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78. NAOMI G. GOLDBERG, WILLIAMS INST., THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS 7–8 (2009), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf>.

79. *Id.*

80. GRANT, *supra* note 13, at 136. Researchers believe that any survey inquiring as to sexual orientation will result in an undercount due to the continuing stigma attached to homosexuality. *Id.* In addition, marginalized groups have historically been underrepresented in the Census. *See id.*

81. *See de Vries & Blando, supra* note 24, at 9.

82. Douglas Kimmel provides the following explanation for the reliance on chosen family:

It is widely thought that most older lesbians, gay men, bisexuals, and transgendered persons develop groups of friends who function as if they were kin; this has been termed a *family of choice* and is thought to provide more support, in many cases, than the individual's biological or legal “family.”

Kimmel, *supra* note 71, at 268; *see also de Vries & Blando, supra* note 24, at 8–11 (family of caring); Weinstock, *supra* note 71, at 177–210 (“friends like family”).

83. *See Hostetler, supra* note 48, at 159–61. Inter-generational relationships are not common in the gay and lesbian community. *Id.*

ence of contemporary aging policy on an inter-generational support system of informal caregiving.<sup>84</sup>

In light of the demographic information outlined in the prior section, it is easy to see that chosen family can fill an important void in the lives of many LGBT elders. Often estranged from their family of origin,<sup>85</sup> the pre-Stonewall generation was unlikely to have children unless they were from a prior heterosexual relationship.<sup>86</sup> In this way, LGBT elders are uniquely without family in the conventional sense.<sup>87</sup> They are often no longer welcome in their family of origin, but they are unable to form their own family through marriage or parenting.<sup>88</sup> Going forward, it is possible that chosen family will not be as important for the younger LGBT generations because it is much more common for same-sex couples to intentionally parent, and greater societal acceptance of LGBT identities may make it less likely that LGBT individuals will completely estrange from their families of origin.<sup>89</sup> For the current cohort of LGBT elders, however, chosen family remains their primary support system.<sup>90</sup>

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84. See Urvashi Vaid, *Preface* to CAHILL ET AL., *supra* note 9, at iv, v. Caring for older relatives as they age is a strong cultural value. As Barker explains: "The moral obligation of lineal kin to provide care for one another is a taken-for-granted cultural value underpinning much interaction within natal families and is reflected in both social theory distinguishing family from other social groups and through-out social policy." Barker, *supra* note 16, at 59.

85. Barker, *supra* note 16, at 61–62 (discussing estrangement from family of origin).

86. In her 1991 book, *Families We Choose: Lesbians, Gays, Kinship*, anthropologist Kath Weston explained:

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

WESTON, *supra* note 3, at 25.

87. *Id.*

88. *Id.*

89. For a discussion of the increasing trend among gay men and lesbians to form recognized families, see Weinstock, *supra* note 71, at 194–200. Some commentators have referred to the increase in intentional parenting within same-sex couples as the "gayby boom." See Erica Goode, *A Rainbow of Differences in Gays' Children*, N.Y. TIMES, July 17, 2001, at F7 (stating that the trend is known as the "gayby boom").

90. In one study, ninety percent of LGBT elders reported that their primary support group consisted of close friends. Arnold H. Grossman et al., *Social Support Networks of Lesbian, Gay, and Bisexual Adults 60 Years of Age and Older*, 55 J. GERONTOLOGY: PSYCHOL. SCI. 171, 174 (2000). This same study found that friendship groups provided seventy-two percent of the social support, sixty-two percent of the emotional support, fifty-four percent of the practical support, and thirteen percent of the financial support for LGBT elders. *Id.* at 175 (arguing that elderly

From a legal standpoint, chosen family ties are especially tenuous because their members are not recognized as next of kin under the law; therefore, they have no legal standing in terms of property rights or decision making.<sup>91</sup> The current push for marriage equality will not address the broader legal fragility of chosen families. Short of adult adoption, marriage represents the only way to make a chosen family member legally recognized next of kin.<sup>92</sup> In the absence of marriage (or a marriage equivalent, such as civil unions), a same-sex partner is a legal stranger.<sup>93</sup> For LGBT elders with a chosen family, this legal disability extends beyond their partners and includes all of their potential caregivers, beneficiaries, and substituted decision makers. Under current law, a same-sex partner can be considered “next of kin” to some extent in nineteen states, but the other members of a chosen family will remain legal strangers in every state.<sup>94</sup>

From a caregiving standpoint, chosen family networks are at a significant disadvantage because they tend to be comprised of individuals who are in the same age cohort, thereby creating reciprocal and overlapping caregiving responsibilities.<sup>95</sup> As a result, LGBT el-

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gay men and lesbians surveyed received more social support from friends, whereas heterosexual elderly individuals received more social support from family).

91. See *infra* text accompanying notes 217–20.

92. It remains to be seen whether partnered gay and lesbian elders will take advantage of same-sex marriage or other forms of legal recognition at the same rate as younger gay men and lesbians. There are a number of reasons why gay and lesbian elders might fail to take advantage of relationship recognition. For example, they might not feel comfortable going to the courthouse to apply for a marriage license or register as domestic partners, or they might question why they should bother to get married after twenty, thirty, or forty years together. Some elders might be financially better off without marriage, or one of the partners might suffer from diminished capacity, such that marriage or registration is no longer an option.

93. The state has priority over legal strangers—no matter how well the “strangers” might know the elder. UNIF. PROBATE CODE § 2-105 (1993). For example, if a decedent is not survived by any relatives within the prescribed degrees of relationship, the decedent’s probate property will escheat to the state. *Id.*

94. See *infra* text accompanying notes 221–24.

95. Inter-generational relationships are not common in the gay and lesbian community. See Hostetler, *supra* note 48, at 159. Researchers also report that gay and lesbian elders are hesitant to pursue inter-generational friendships because they fear being perceived as a predatory older homosexual—a stereotype popularized in the 1940s and 1950s by the American Freudians. Glenda M. Russell & Junis S. Bohan, *The Gay Generation Gap: Communicating across the LGBT Generation Divide*, 8 POL’Y J. INST. FOR GAY & LESBIAN STRATEGIC STUD. 1, 1 (2005), available at [http://www.bouldersafeschools.org/PDFs/article\\_angles.pdf](http://www.bouldersafeschools.org/PDFs/article_angles.pdf). Russell and Bohan note that “the homophobic assumption that adults are a risk to youth . . . (however mistaken) has often impeded worthwhile interactions across generations.” *Id.* For a discussion of the development of the sexual predator model, see generally

ders are at a high risk for social isolation, as their chosen family members age in unison and become increasingly infirm. In the United States, approximately eighty percent of long-term care is provided by informal unpaid caregivers, and that care is overwhelmingly provided by younger relatives.<sup>96</sup> For reasons discussed more fully in Part II, LGBT elders report a strong preference to “age in place” (i.e., age within the community rather than in some form of senior facility),<sup>97</sup> but the majority of individuals who are aging in place rely on informal caregiving as their sole source of support.<sup>98</sup> The absence of younger informal caregivers impairs the ability of LGBT elders to age in place, as does their lack of financial resources and their reluctance to access supportive services.<sup>99</sup>

### C. Transgender Elders

In any discussion of LGBT elders, it is important to realize that transgender elders confront a distinct set of challenges because issues of gender identity are not necessarily congruent with those related to sexual orientation. It is also important to recognize that the two groups are not mutually exclusive because some transgender elders may also identify as gay or lesbian. Moreover, anti-gay bias has long

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JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* 272 (1999).

96. Eighty percent of all long-term care is provided by informal unpaid caregivers who are most often younger relatives or spouses. BARBARA COLEMAN & SHEEL M. PANDYA, AARP PUB. POL’Y INST., *FAMILY CAREGIVING AND LONG-TERM CARE 1* (2002), available at [http://assets.aarp.org/rgcenter/il/fs91\\_ltc.pdf](http://assets.aarp.org/rgcenter/il/fs91_ltc.pdf). A 2009 national study showed that relatives comprise eighty-nine percent of all unpaid caregivers for individuals fifty years of age and older, and the average age of caregivers for individuals who are age seventy-five and older is fifty-one years of age. NAT’L ALLIANCE FOR CAREGIVING & AARP, *CAREGIVING IN THE U.S.: A FOCUSED LOOK AT THOSE CARING FOR SOMEONE AGE 50 OR OLDER 14–15* (Nov. 2009) [hereinafter *CAREGIVING*], available at <http://www.caregiving.org/data/FINALRegularExSum50plus.pdf>.

97. LGBT elders, like the majority of Americans, also desire to “age in place,” and this preference is reinforced by intense fear that they will experience discrimination and anti-LGBT bias in mainstream senior housing options. Nancy Orel, *Community Needs Assessment: Documenting the Need for Affirmative Services for LGB Older Adults*, in *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES*, *supra* note 49, at 227, 233.

98. The majority of individuals who are “aging in place” rely primarily on informal (i.e., unpaid) caregiving. *CAREGIVING*, *supra* note 96, at 24.

99. The absence of inter-generational support or caregiving works against their desire to age in place because approximately one-third of those individuals receiving care in the national NAC study lived with their caregivers. *Id.* at 42.

been associated with hostility toward gender variant behavior.<sup>100</sup> In terms of commonality, policy proposals designed to improve the lives of LGBT elders, such as broad-based anti-discrimination protections, cultural competency training programs, and anti-bullying measures, are equally applicable to both sexual orientation *and* gender identity.

That being said, the history and identity formation of transgender elders presents a distinct and singular story about gender and embodiment in twentieth century America.<sup>101</sup> Although the story of today's transgender elders overlaps with the gay and lesbian experience and intersects at many points, it deserves its own telling and should be more than an aside in a larger discussion about gay and lesbian elders.<sup>102</sup> The barriers to successful aging faced by transgender elders are a product of their unique history, identity formation, and complex relationship with the medical profession—unlike homosexuality, gender identity disorder remains classified as a mental disorder that is subject to medical intervention.<sup>103</sup>

Indeed, it is this medical intervention that raises some very specific health concerns, but relatively little is known about the health needs of LGBT elders,<sup>104</sup> such as the long-term effects of hormone

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100. Foucault associated this tendency with the inversion theories that were expounded by the early sexologists in the late nineteenth century. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Pantheon Books 1st ed. 1978) (1976). He observed that this theory of inversion “was characterized . . . less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself.” *Id.*

101. In its broadest sense, the term *transgender* refers “to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.” PAISLEY CURRAH, *Introduction to TRANSGENDER RIGHTS*, at xiv (Paisley Currah et al. eds., 2006). Within the term transgender there are numerous and continually evolving identity formations, such that “[t]ransgender is an expansive and complicated social category.” *Id.* at xv.

102. See Devor & Matte, *supra* note 56, at 387.

103. The *DSM-IV* classifies gender identity disorder (GID) as a mental disorder. Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 *BERKELEY WOMEN'S L.J.* 15, 24–25 (2003) (discussing the oppressive relationship between medicine and gender transgressive people). GID is the diagnosis given to transgender and other gender-variant individuals. *Id.* GID replaced the prior term of “gender dysphoria.” *Id.* at 18 n.12. Because GID is classified as a mental disorder, some transgender individuals consider it offensive. *Id.* at 29. However, the diagnosis is often necessary to secure medical intervention to further bodily modification. *Id.* at 18. In addition, there has been considerable criticism of the use of a GID diagnosis to label gender non-conforming children. JUDITH BUTLER, *UNDOING GENDER* 97 (2004).

104. See Elroi Waszkiewicz, *Aging in Transgender People: An Annotated Bibliography*, TRANS-HEALTH.COM (2002), <http://www.trans-health.com/displayarticle.php?aid=74>.

therapy.<sup>105</sup> In addition, those individuals who transitioned without medical intervention may be reluctant to seek medical help and may be unwilling to accept assistance from caregivers.<sup>106</sup> This was the case with celebrated jazz musician, Billy Tipton, who died from a bleeding ulcer in 1989.<sup>107</sup> Tipton was unwilling to seek medical assistance, presumably because examination would have revealed his biological sex as female.<sup>108</sup> When Tipton died, it was reported that he had not seen a doctor in fifty years.<sup>109</sup>

Transgender elders express a deep concern over encountering transphobic medical service providers and an extreme fear of congregate living facilities.<sup>110</sup> For a variety of reasons, many transgender individuals who transition with medical assistance do not elect "bottom surgery."<sup>111</sup> As a result, a transgender elder's genitals may not conform to his or her gender identity and performance, making the elder vulnerable to the prejudice and hostility of personal health aides.<sup>112</sup> Transgender elders may also have difficulty navigating sex-segregated senior facilities.<sup>113</sup> Transgender elders in long-term care facilities have been forced to wear the "wrong" clothes and to room with members of the opposite sex because the facility refused to honor the elder's gender identity.<sup>114</sup> In addition, members of the staff may intentionally use inappropriate pronouns and refer to the transgender elder by the wrong name.<sup>115</sup>

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105. See Justin Cascio, *Cancer Risks in the Trans Community*, TRANS-HEALTH.COM, <http://www.trans-health.com/displayarticle.php?aid=26> (last visited Oct. 21, 2011).

106. See CAHILLE ET AL., *supra* note 9, at 17.

107. *Musician's Death at 74 Reveals He Was a Woman*, N.Y. TIMES, Feb. 2, 1989, at A18.

108. See *id.*

109. SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL AND PUBLIC POLICY ISSUES FOR TRANSGENDER ELDERS 3 (2003), available at <http://www.nclrights.org/site/DocServer/transelder.pdf?docID=1121>.

110. Daniel Redman, *Fear, Discrimination and Abuse: Transgender Elders and the Perils of Long-Term Care*, AGING TODAY (2011), available at <http://www.asaging.org/blog/fear-discrimination-and-abuse-transgender-elders-and-perils-long-term-care>.

111. See John Eligon, *Suits Dispute City's Rule on Recording Sex Changes*, N.Y. TIMES, Mar. 22, 2011, at A24 (reporting eighty percent of transgender women and ninety-five percent of transgender men have not had surgery to conform their genitals to their gender identity).

112. Redman, *supra* note 110.

113. LONG-TERM CARE, *supra* note 36, at 4.

114. *Id.* at 15.

115. *Id.* at 13.

## II. A “Profoundly Silent” Minority<sup>116</sup>

When representing LGBT elders, it is important to understand the central role played by both the closet and the continuing threat of anti-LGBT bias.<sup>117</sup> LGBT elders are a vulnerable population with respect to their family structure, reported level of disability, and financial resources.<sup>118</sup> The prevalence of anti-LGBT bias adds to these already considerable challenges because LGBT elders will conceal their identities and underutilize supportive services to avoid encountering bias on the part of medical personnel, social service providers, and their non-LGBT peers.<sup>119</sup> The desire of LGBT elders to conceal their identities reinforces the silence that surrounds LGBT aging and decreases the likelihood that incidents of abuse or harassment will be reported or remedied. In this way, the closet and anti-LGBT bias are mutually reinforcing. The closet helps to facilitate the very bias that prompts elders to withdraw to the closet in the first place.

In the recent case *Greene v. Sonoma County*, a surviving same-sex partner alleged that Sonoma County confined him in a secure facility without medical justification and separated him from his long-time partner.<sup>120</sup> The case underscores the familiar themes of isolation and vulnerability and illustrates many of the worst fears of LGBT elders. After discussing *Greene v. Sonoma County*, this section then examines the costs of the closet, followed by a discussion of the range of anti-LGBT bias that confronts today’s LGBT elders.

### A. The Case of Clay and Harold

In 2010, a case brought by an LGBT elder in Sonoma County, California struck a powerful chord in the LGBT community because it seemed to confirm some of their deepest-seated fears about LGBT ag-

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116. Kanapaux, *supra* note 12, at 3.

117. In terms of health care, research suggests pre-Stonewall life experiences continue to inform the way LGBT elders approach their relationships with medical professionals. Barker, *supra* note 16, at 54. For example, Barker notes that older lesbians are “especially wary and fearful of health care and other service providers with their power to disrupt everyday life.” *Id.* LGBT elders often fail to disclose their sexual orientation and will avoid encounters with medical professionals to the extent possible. See HEALTHY PEOPLE 2010, *supra* note 30 and accompanying text (discussing GLMA study). As discussed above, some transgender elders may avoid doctors at all costs. Barker, *supra* note 16, at 54.

118. HEALTHY PEOPLE 2010, *supra* note 30, at 51.

119. See Kling & Kimmel, *supra* note 49, at 266 and accompanying text (discussing HHS study revealing underutilization of services).

120. First Amended Complaint, *supra* note 31, at 8–9.

ing.<sup>121</sup> Clay Greene and the estate of his long-time partner, Harold Scull, sued Sonoma County and related defendants alleging that state actors forcibly separated the long-time partners, disregarded powers of attorney, failed to follow the proper procedures for the grant of a conservatorship, confined Clay to a secure dementia ward without medical justification, confiscated their beloved cats, and liquidated their belongings all without clear legal authorization.<sup>122</sup> The petition also alleged that the defendants' actions were motivated by anti-gay bias and the desire for financial gain.<sup>123</sup> Clay alleged that he was verbally harassed and demeaned, and the defendants "expressed displeasure at dealing with expressions of grief by a gay man who had lost his partner."<sup>124</sup> Shortly before the trial was scheduled to begin, the defendants settled the claims against them for an amount in excess of \$600,000.<sup>125</sup> Although Sonoma County denied any discrimination or breach of fiduciary duty, it agreed to modify its conservatorship procedures to prevent similar incidents in the future.<sup>126</sup>

When the events that led to the lawsuit unfolded, Clay was seventy-six years of age and Harold was eighty-eight.<sup>127</sup> They had been committed partners for over twenty-five years and had lived together for the last twenty years.<sup>128</sup> They shared a small house with their cats Sassy and Tiger that they had filled with treasures from their travels and Hollywood memorabilia from their days in the entertainment industry.<sup>129</sup> In his petition filed with the Superior Court of Sonoma

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121. Gerry Shih, *Suit Charges Elderly Gay Partners Were Forced Apart*, N.Y. TIMES, Apr. 20, 2010, <http://bayarea.blogs.nytimes.com/2010/04/20/suit-charges-elderly-gay-couple-was-forced-apart/> ("For gay men and lesbians, the series of events outlined in the complaint hits very close to home.").

122. See generally First Amended Complaint, *supra* note 31.

123. See generally *id.*

124. *Id.* at 9.

125. Bob Egelko, *County Settles Suit by Elderly Gay Couple*, S.F. CHRON., July 25, 2010, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/07/25/BAFH1EJA0S.DTL>.

126. Press Release, County of Sonoma, Sonoma Cnty. Lawsuit Resolved: Clay Greene, Harold Scull Settlement Announced (July 22, 2010), available at <http://press.sonoma-county.org/content.aspx?sid=1018&id=1367>.

127. First Amended Complaint, *supra* note 31, at 2.

128. Paul Payne, *Lawsuit Ignites Firestorm in Gay Community Against Sonoma County*, PRESS DEMOCRAT, Apr. 20, 2010, <http://www.pressdemocrat.com/article/20100420/ARTICLES/100429976/1350> (reporting the couple had spent twenty-five years together).

129. Lois Pearlman, *No Reason to Separate Gay Couple, Friend Says*, BAY AREA REP., Apr. 29, 2010, <http://www.ebar.com/news/article.php?sec=news&article=4748>.

County, Clay averred that “Plaintiff and Decedent enjoyed a quiet, retired life, which they planned to continue until their deaths.”<sup>130</sup>

That “quiet, retired life,” however, was upended in April 2008 when Harold fell on the front porch steps of their home and Clay called 911, over Harold’s objections.<sup>131</sup> According to Clay, Harold was taking medication that made him unsteady on his feet and was still bruised from an earlier fall.<sup>132</sup> Suspecting domestic violence, however, the County took both men into care and separated them.<sup>133</sup> Against his will, Clay was placed in a secure facility for individuals suffering from dementia without the necessary medical screening.<sup>134</sup> Four months later, Harold died alone in a “board and care” facility<sup>135</sup> and Clay was not told until “several days after the fact.”<sup>136</sup>

By the time Harold died in August 2008, the County had removed Sassy and Tiger to an uncertain fate, sold all of the couple’s possessions, and assumed control of their finances.<sup>137</sup> Clay continued to be held in the secure facility until early 2009 when his court-appointed attorney was finally able to get him released.<sup>138</sup> Now living in a small studio apartment,<sup>139</sup> Clay’s lawyer describes him as “a

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130. First Amended Complaint, *supra* note 31, at 2. The executor of Harold’s estate and a long-time friend of the couple described their relationship as follows: “They lived a fabulous life surrounded by beautiful things . . . They went to museums and traveled through Europe. They entertained and had a lot of friends.” Pearlman, *supra* note 129 (quoting Jannette Biggerstaff).

131. Kate Kendell, *Defending the Indefensible*, NAT’L CENTER FOR LESBIAN RTS. (Apr. 29, 2010), [http://www.nclrights.org/site/PageServer?pagename=blog\\_katesBlog042910](http://www.nclrights.org/site/PageServer?pagename=blog_katesBlog042910) (stating Harold “did not want Clay to call an ambulance”); *see also* Pearlman, *supra* note 129 (reporting Harold was “upset about leaving in an ambulance”).

132. Kendell, *supra* note 131.

133. Paul Payne, *Gay Rights Lawsuit Includes Evidence of Domestic Abuse*, PRESS DEMOCRAT, Apr. 21, 2010, <http://www.pressdemocrat.com/article/20100421/ARTICLES/100429900/1350>. The district attorney declined to prosecute, but the county stands by its decision. *Id.*

134. Mac McClelland, *Plot Thickens in Sonoma Discrimination Case*, MOTHER JONES (Apr. 29, 2010, 9:14 AM), <http://motherjones.com/rights-stuff/2010/04/plot-thickens-sonoma-discrimination-case>.

135. Pearlman, *supra* note 129 (Harold died in August 2008).

136. According to allegations made by Clay in court documents, defendants “failed to inform him of the death until several days later.” First Amended Complaint, *supra* note 31, at 10.

137. Payne, *supra* note 128. Clay’s lawyer has reported that “the cats are dead.” *Id.*

138. First Amended Complaint, *supra* note 31, at 8.

139. Pearlman, *supra* note 129.

scared little rabbit,"<sup>140</sup> and Clay remains fearful that county workers will come to his home and harm him.<sup>141</sup>

Clay and Harold had not registered as domestic partners under California law, but they had taken steps to secure their relationship by executing reciprocal wills and durable powers of attorney.<sup>142</sup> As discussed in Part III, their experience illustrates that sometimes even the most carefully executed estate plan can prove inadequate to protect LGBT elders and their chosen families. In an interview with the *New York Times*, Clay articulated the fear of many LGBT elders when he said "I was trash [to them]. I'm going to end up in the Dumpster."<sup>143</sup>

## B. The Closet

For LGBT elders, the closet has been "a lifelong survival strategy."<sup>144</sup> The youngest of today's elders, those who turned sixty-five in 2011, were born in 1946. When they turned twenty-one in 1967 homosexuality was classified as a severe form of mental illness that disqualified its sufferers from most employment, military service, and parenting responsibilities.<sup>145</sup> The pre-Stonewall generation did not grapple with the weighty question of when or on what terms to come out to friends and family because being exposed as homosexual could cost them their jobs and their families.<sup>146</sup> It could also prompt medical intervention in the form of civil commitment, electroshock therapy, and even a lobotomy.<sup>147</sup> In addition, the authorities used a host of criminal sanctions to police expressions of homosexuality, suppress sympathetic discussions of homosexuality, and inhibit the ability of homo-

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140. James, *supra* note 7.

141. *Id.*

142. Paul Payne, *Guerneville Man Settles Suit against Sonoma County for \$600,000*, PRESS DEMOCRAT, July 22, 2010, <http://www.pressdemocrat.com/article/20100722/ARTICLES/100729795?p=1&tc=pg>.

143. James, *supra* note 7.

144. *Id.* For example, a 2004 report on LGBT elders explained that "'passing' as heterosexual has been a lifelong survival strategy" for the pre-Stonewall generation. AGING IN EQUITY, *supra* note 5, at 5.

145. See generally BAYER, *supra* note 1, at 38–40 (describing history of controversy relating to declassification of homosexuality and its deletion from the *Diagnostic and Statistical Manual III*). The classification of homosexuality as a severe sociopathic personality disorder was used to justify a wide range of legal and social disabilities. *Id.*

146. See Barker, *supra* note 16, at 61 (describing shame experienced by family members); see also WESTON, *supra* note 3, at 45 (noting possibility of medical intervention).

147. See ESKRIDGE, *supra* note 1, at 62.

sexuals to socialize.<sup>148</sup> Cross-dressing laws meant that transgender individuals who ventured outside the confines of their homes were subject to arrest.<sup>149</sup>

Two years after the youngest of today's LGBT elders turned twenty-one, the Gay Liberation movement began in New York City when LGBT patrons of the Stonewall Inn in Greenwich Village fought back during a police raid.<sup>150</sup> The resulting disturbances continued for several nights and are now referred to as the Stonewall riots.<sup>151</sup> The political organizing and movement building that took place after the riots advocated a new way of thinking and talking about sexuality and, for the first time, urged individuals to come out of the closet and declare themselves.<sup>152</sup>

The stigma of mental illness was lifted four years later in 1973 when, under pressure from gay liberationists, the American Psychiatric Association declassified homosexuality as a mental illness.<sup>153</sup> By that time, however, the youngest of today's LGBT elders were twenty-seven years of age and the oldest were approaching retirement. Indeed, both Clay and Harold were well into middle age. Harold would have been fifty-four years of age, and Clay was forty-two years old.

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148. Jeremy Quittner, *Are You Breaking the Law? Where Does Your State Stand on Sodomy Laws?*, *ADVOC.*, Aug. 20, 2002, at 52. Adult consensual sodomy was criminalized in all states until Illinois repealed its sodomy law in 1962 when it adopted the Model Penal Code. *See id.* Illinois remained an outlier for a decade. *Id.* When the American Psychiatric Association declassified homosexuality as a mental illness in 1973, only five other states had repealed their sodomy laws: Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), and North Dakota (1973). *Id.* In 1986 the U.S. Supreme Court ruled in *Bowers v. Hardwick* that the criminalization of adult consensual sodomy did not violate the U.S. Constitution. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). *Bowers* was not overruled until 2003 when the U.S. Supreme Court declared the Texas homosexual sodomy law unconstitutional. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

149. *See* ESKRIDGE, *supra* note 1, at 27–29.

150. For a discussion of the history of the Gay Liberation movement, see ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 30–43 (1996). The Stonewall riots began on June 27, 1969 when police raided a gay bar, the Stonewall Inn, in Greenwich Village. *See generally* MARTIN DUBERMAN, *STONEWALL* (1993) (discussing history of Stonewall through the lives of six individuals). The disturbances continued sporadically for several days. *Id.* at 203–09.

151. *Id.*

152. Jagose explains, "Stonewall functions in a symbolic register as a convenient if somewhat spurious marker of an important cultural shift away from assimilationist policies and quietist tactics, a significant if mythological date for the origin of the gay liberation movement." JAGOSE, *supra* note 150, at 30.

153. *See* BAYER, *supra* note 1, at 40 (describing circumstances surrounding declassification).

Even after declassification, many LGBT individuals never ventured far from the closet.<sup>154</sup> Despite the apparent appeal of gay liberation, not all LGBT individuals embraced the new message of pride and openness. In one large study of older gay men and lesbians, only thirty-eight percent reported that they were out to more than three-quarters of their acquaintances.<sup>155</sup> Many elders who are in same-sex relationships or who are primarily attracted to members of the same sex never adopted the new vocabulary of gay liberation and do not even identify as “gay.”<sup>156</sup> Clay provides an interesting case in point. In interviews, Clay refers to Harold, his partner of twenty-five years, as simply his “friend” and describes their relationship as that of “roommates.”<sup>157</sup> It is unclear whether Clay’s choice of words is due to an individual worldview where he and Harold were “best friends” or whether he is simply using a euphemism to maintain the open secret of the closet.<sup>158</sup> In either case, the resulting silence on the part of LGBT elders makes it very difficult to develop a needs assessment strategy, engage in outreach efforts, or advocate on their behalf.<sup>159</sup>

Many members of the pre-Stonewall generation who did embrace the new discourse of “gay pride” have become more closeted with age.<sup>160</sup> These elders fall back on the familiar construct of the

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154. Some seniors who have had same-sex relationships or who are primarily attracted to individuals of the same sex do not identify as gay or lesbian, or even as homosexual, making it very difficult to assess their needs. D’Augelli & Grossman, *supra* note 67, at 1021–22. Indeed, this may be the case with Clay. See James, *supra* note 7.

155. A 2004 report found that seventy-five percent of LGBT elders are not *completely open* about their sexual orientation with health care providers. AGING IN EQUITY, *supra* note 5, at 10.

156. For example, one study found, “21 percent of the older gay men think of themselves as homosexual rather than as gay queer or something else.” Todd W. Rawls, *Disclosure and Depression among Older Gay and Homosexual Men: Findings from the Urban Men’s Health Study*, in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS, *supra* note 16, at 117, 126. The same study also showed a strong correlation between age and self-identification as gay, reporting that “19.8% of the men in their 60s self-identify as homosexual, and 51.3% 70 years of age and older think of themselves as homosexual, rather than as gay.” *Id.*

157. James, *supra* note 7. In an interview with the *New York Times*, Clay seemed disinterested in the prospect of legalized same-sex marriage. *Id.* Far from a proponent of gay rights, Clay referred to Harold as his “friend,” and told the interviewer, “We weren’t a married couple. Why are you making a big deal out of this? We were just roommates.” *Id.*

158. See generally EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990).

159. See Kanapaux, *supra* note 12 and accompanying text.

160. Gross, *supra* note 10. Gross notes:

closet and use it as an adaptive strategy to avoid anti-LGBT bias and discrimination.<sup>161</sup> Of course, the perceived safety of the closet comes with its own set of costs because closeted LGBT elders face “a faster pathway to depression, failure to thrive and even premature death.”<sup>162</sup>

For non-LGBT individuals, it is not always easy to comprehend the demands of the closet and its accompanying emotional toll—the daily pressure of pretending to be someone you are not. To successfully manage the closet, LGBT elders have to redact many important details of their lives; choose their memories carefully; and hide all tangible evidence that might give away their secret, such as photographs and books.<sup>163</sup> Some LGBT elders report that they create an alternate set of memories to share with others, such that a same-sex partner might become a brother or simply a “best friend.”<sup>164</sup> Denied the opportunity to retell stories and revisit past events, it is not a stretch to conclude that the resulting isolation can literally leave LGBT elders alone with their memories.

One common misperception holds that the closet is simply a natural subset of the broader denial of senior sexuality.<sup>165</sup> Under this view, there is nothing exceptional about what LGBT seniors experience because the myth of the asexual senior works to deny all seniors their sexual autonomy.<sup>166</sup> This characterization of the closet misses

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The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives, when homosexuality was considered both a crime and a mental illness. A partner is identified as a brother. No pictures or gay-themed books are left around.

*Id.*; see also Starkey, *supra* note 32.

161. Gross, *supra* note 10 (explaining LGBT elders retreat to the closet “rather than face slurs and whispers”).

162. *Id.* (internal citations omitted).

163. The closet requires its occupants to practice an intense process of information management and retrieval. Knauer, *supra* note 17, at 28 n.185. LGBT elders must forswear their chosen families and abdicate their memories. See *id.*

164. *Id.*

165. NANCY J. KNAUER, GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS IN THE UNITED STATES 59–60 (2011).

166. See Barker, *supra* note 16, at 53–54. With respect to the desexualized view of seniors, Barker explains:

Huge cultural roadblocks and assumptions abound about the impropriety of sexual activity or desire in old age. This general tendency to de-sex and de-sexualize the elderly as well as to depict them as a bundle of health problems waiting to happen, if not already being manifest, results in a view of old people as androgenous [sic], dependent, and ineffectual. This reticence about sex occurs with respect to all older people, not just sexual minorities, and has been a long-standing issue besetting studies of sexuality.

the mark because it fails to take into account the complexity of LGBT identities and completely ignores the question of gender identity by focusing exclusively on sexuality. More importantly, it underestimates the intensity of anti-LGBT bias while overestimating the role of sexuality in the performance of LGBT identity.<sup>167</sup> Sexuality is an essential feature of gay and lesbian identity, and its denial can work to silence identity.<sup>168</sup> However, sexuality alone is not sufficient to express the depth and complexity of gay and lesbian lives. Simply revealing the fallacy of the de-sexualized senior and affirming the right of seniors to express their sexuality would not fully address the concerns of LGBT elders, because sexuality is only one aspect of LGBT identity.<sup>169</sup> When LGBT elders retreat to the closet, they are not necessarily giving up sex. They are giving up the ability to be open and honest about any number of details about their lives and relationships because the social meaning attached to sexual orientation and gender identity permeates even the most mundane aspects of an individual's life.<sup>170</sup> In other words, the closet does not demand celibacy—it demands silence.

### C. Fear of Anti-LGBT Bias

To some extent, fears surrounding aging are universal. We all experience anxiety and trepidation at the prospect of growing older and becoming dependent on others. Elders overwhelmingly want to “age in place” regardless of their sexual orientation and gender identi-

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*Id.* at 53 (citation omitted).

167. Although gay men and lesbians are more than the sum of their sex acts, sexual orientation necessarily does raise issues of sexuality. See Nancy J. Knauer, “Simply So Different”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1043 (2001).

168. See Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 343 (2003).

169. Senior sexuality also raises issues of competency and public/private space in the case of seniors in institutional settings. See Andrew Casta-Kaufteil, *The Old & The Restless: Mediating Rights to Intimacy for Nursing Home Residents with Cognitive Impairments*, 8 J. MED. & L. 69, 71–75 (2004) (arguing in favor of sexual rights for nursing home residents with limited cognitive function); see also Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 522–28 (1993–94) (discussing issues and questions concerning sexual activities of institutionalized patients with mental disabilities).

170. See generally EDWARD STEIN, *MISMEASURE OF DESIRE* (2001).

ty.<sup>171</sup> The general concerns associated with aging, however, are compounded for LGBT elders by a visceral fear that they will encounter anti-LGBT bias when they are at their most vulnerable and the least able to fight back.<sup>172</sup> The distinct concerns presented by LGBT elders illustrate how the aging process can accentuate preexisting vulnerabilities and amplify points of difference. Bias that LGBT individuals could have weathered in middle age may appear much more threatening to someone whose capabilities and resources have been diminished with age.<sup>173</sup>

Although the fears expressed by LGBT elders may be based in pre-Stonewall America, they also reflect the fact that anti-LGBT bias and violence stubbornly remain part of the fabric of daily life. Claims and charges that would be considered hate speech if directed against any other minority group are still considered acceptable civil discourse when directed at LGBT individuals.<sup>174</sup> Sincere religious beliefs can compel believers to direct targeted, insulting, and threatening language to LGBT individuals.<sup>175</sup> In many quarters, the inherent dignity and worth of LGBT lives remains subject to debate.<sup>176</sup> Anti-LGBT violence, especially against the transgender community, continues to

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171. CAHILL ET AL., *supra* note 9, at 51. "Aging in place" means staying in one's apartment or home. *Id.*

172. See Starkey, *supra* note 32.

173. According to a 2006 Metlife survey of 1000 LGBT individuals age forty to sixty-one, a high percentage reported a deep concern that they would be discriminated against as they get older on account of their sexual orientation. METLIFE MATURE MARKET INST., LESBIAN & GAY AGING ISSUES NETWORK OF THE ANN. SOC'Y ON AGING & ZOGBY INT'L, OUT AND AGING: THE METLIFE STUDY OF LESBIAN AND GAY BABY BOOMERS 5 (2006), available at <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-out-aging-lesbian-gay-retirement.pdf>.

174. See, e.g., Snyder v. Phelps, 131 S. Ct. 1207 (2011).

175. See, e.g., Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).

176. For example, a conservative group in Iowa has asked presidential candidates to sign a pledge titled "The Marriage Vow: A Declaration of Dependence Upon Marriage and Family." Peter Catapano, *Just Sign Here*, N.Y. TIMES, July 8, 2011, <http://opinionator.blogs.nytimes.com/2011/07/08/just-sign-here/?scp=1&sq=the%20marriage%20vow&st=cse>. Michele Bachmann, who is running for President on the GOP ticket, was the first to sign the pledge. *Id.* In addition to calling for an amendment to the U.S. Constitution to prohibit same-sex marriage, the document catalogues a host of negative externalities that it asserts are associated with homosexuality. Press Release, The Family Leader, The Family Leader Unveils Presidential Candidate Pledge Document (July 7, 2011), available at <http://thinkprogress.org/wp-content/uploads/2011/07/The-Family-Leader-Presidential-Pledge.pdf>. These negative externalities include threats to the public health, the well being of children, and religious liberty. *Id.*

be widespread.<sup>177</sup> Discrimination against LGBT individuals remains legal in the majority of states,<sup>178</sup> and the laws of the vast majority of states mandate discrimination in the case of marriage.<sup>179</sup>

As a cohort, many LGBT elders have experienced anti-LGBT bias firsthand.<sup>180</sup> Older gay men and lesbians report high levels of victimization over their lifetimes, meaning that a significant percentage of LGBT elders have personally encountered anti-LGBT bias ranging in severity from verbal slurs to physical violence.<sup>181</sup> In terms of the prevalence of this bias, existing studies, supported by ample anecdotal evidence, suggest problems that extend from simple ignorance about the existence of LGBT elders to outright hostility.<sup>182</sup> The more common recurring complaints include: the refusal to recognize long-term partners,<sup>183</sup> separation from long-term partners, deferring to the wish-

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177. See generally NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER COMMUNITIES IN THE UNITED STATES IN 2009 (2010), available at <http://www.avp.org/documents/NCAVP2009HateViolenceReportforWeb.pdf>. The major findings of this report indicate that there remains a significant and urgent need for LGBT-focused anti-violence services in the United States. *Id.*

178. See *infra* note 276 (describing anti-discrimination laws).

179. See *infra* note 228 (describing anti-same-sex marriage laws).

180. A large nationwide study of gay men and lesbians sixty years of age and older found historically high levels of victimization, with one in five respondents reporting that they had experienced harassment or discrimination. D'Augelli & Grossman, *supra* note 67, at 1021. It is also clear that seniors are the age cohort with the strongest anti-gay attitudes. A national survey by the Kaiser Family Foundation highlighted the differences in attitude between young people and individuals age sixty-five and older. See generally HENRY J. KAISER FOUND., INSIDE-OUT: A REPORT OF THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION (2001), available at <http://www.kff.org/kaiserpolls/upload/National-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Publics-Views-Related-to-Sexual-Orientation.pdf>. A much higher percentage of the sixty-five and older age cohort considered homosexuality to be morally wrong. *Id.* Not surprisingly, a high percentage in that age cohort also disapproved of LGBT-positive policy reform, such as same-sex marriage and parenting rights. *Id.*

181. See, e.g., D'Augelli & Grossman, *supra* note 67, at 1021.

182. The existing research regarding homophobia, transphobia, and discrimination by senior organizations, aging agencies, and elder care providers is far from complete, but anecdotal evidence confirmed by some limited survey data points to widespread discriminatory attitudes and practices. GRANT, *supra* note 13, at 47. As Grant concludes, "Although formal survey data in this area is scarce, the anecdotal evidence is overwhelming." *Id.* Existing studies show that medical care and elder care providers can be, at best, ignorant of the needs of LGBT elders and, at worst, openly hostile to them. Kimmel et al., *Historical Context for Research on Lesbian, Gay, Bisexual, and Transgender Aging*, in LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES, *supra* note 49, at 1, 12.

183. LONG-TERM CARE, *supra* note 36, at 9.

es of next of kin,<sup>184</sup> forcing transgender nursing home residents to wear inappropriate clothing and addressing them by incorrect pronouns,<sup>185</sup> shunning and bullying by other residents,<sup>186</sup> inadequate medical care,<sup>187</sup> harsh and abusive treatment by health care workers,<sup>188</sup> harangues from religious service providers who urge LGBT elders in their care to repent before it is too late,<sup>189</sup> and the transfer of LGBT residents to secure “memory wards.”<sup>190</sup>

To avoid expressions of anti-LGBT bias, some elders will refuse to access supportive senior services.<sup>191</sup> For those elders attempting to age in place, this presents a serious problem because LGBT elders often lack the type of informal caregiving system that facilitates aging in place.<sup>192</sup> Their reluctance to take advantage of available supportive services increases their risk of isolation and self-neglect. Elders who have no choice and must rely on home health aides or enter a long-term care facility report an even greater pressure to edit their lives and conceal their identities.<sup>193</sup> In these settings, the stakes are higher because the LGBT elders must either invite strangers into their homes or must live with others in close quarters.

A recent study of the treatment of LGBT elders in long-term care facilities documents the fears of LGBT elders, as well as the experienc-

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184. *Id.* at 11.

185. *Id.* at 13–14.

186. Gross, *supra* note 10 (discussing case of shunning).

187. LONG-TERM CARE, *supra* note 36, at 14–15.

188. *Id.* at 10–11.

189. Broaddus, *supra* note 42.

190. Gross, *supra* note 10 (discussing elderly gay man who was transferred and committed suicide).

191. *See supra* note 48 and accompanying text (discussing HHS study).

192. *See supra* text accompanying notes 82–99.

193. *See CAHILL ET AL.*, *supra* note 9, at 53. Cahill explains this phenomenon as follows:

As GLBT old people enter assisted living situations, nursing homes, independent elderly housing or retirement communities, they are often presumed heterosexual and may feel the need to go back into the closet; often their long-term relationships are devalued and not recognized. Even if they have lived openly in the past, they may suddenly find themselves in situations where disclosing their sexual orientation or gender variance makes them vulnerable to discrimination or even abuse. The lack of sensitivity to sexual orientation in housing and supportive care programs for elders often places GLBT elders in vulnerable and uncomfortable circumstances.

*Id.*

es of friends and family of LGBT elders and social service providers.<sup>194</sup> Released in 2011, the study reports a widespread fear on the part of LGBT elders regarding the treatment they will receive in a long-term care facility.<sup>195</sup> A majority of the LGBT respondents believed that both the staff and the other residents of long-term care facilities would discriminate against an LGBT elder, and only twenty-two percent thought that it would be safe to be open about one's identity.<sup>196</sup> In terms of the mistreatment that they had experienced, respondents complained that service providers had refused to provide basic services, such as bathing, toileting, and feeding because they objected to touching an LGBT individual.<sup>197</sup> A number of respondents also reported that long-term care facilities attempted to discharge or refused to admit patients based on their sexual orientation or gender identity.<sup>198</sup> Additional problems included the restriction of medical care and the refusal to honor health care powers of attorney.<sup>199</sup>

Although many of the respondents reported that they experienced negative treatment from the staff, the most frequently reported problem was actually verbal and physical harassment by the other residents.<sup>200</sup> The high level of anti-LGBT sentiment among the non-LGBT seniors is not surprising given that they are also products of pre-Stonewall America, and public opinion polls consistently show that negative views of LGBT individuals are widely held by those who are sixty-five and older.<sup>201</sup> These negative views can also lead to bullying and concerted shunning. For example, Gloria Donadello, age eighty-one, experienced painful shunning at her assisted living facility when she came out to the other residents whom she had considered

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194. Moreover, there is some indication that elder care service providers may actually be "more intolerant" of gay men and lesbians and "more heterosexist" than the general medical profession. Kimmel, *supra* note 71, at 265–66.

195. See generally LONG-TERM CARE, *supra* note 36.

196. *Id.* at 6.

197. *Id.* at 14–15.

198. *Id.* at 16.

199. *Id.* at 9, 11–13.

200. *Id.* at 10.

201. It is not surprising that LGBT elders would face the disapproval of their peers because older Americans are also members of the pre-Stonewall generation and came of age and developed their views on homosexuality when it was pathologized and criminalized. A national survey by the Kaiser Family Foundation revealed stark differences between the attitudes toward homosexuality held by young people and those held by individuals age sixty-five and older. See generally HENRY J. KAISER FOUND., *supra* note 180.

her friends.<sup>202</sup> As a result of the shunning, Gloria went into a deep depression and eventually had to move.<sup>203</sup> She later told the *New York Times* that “it was a choice between life and death.”<sup>204</sup>

Gloria was fortunate because she had the resources and the ability to move. Obviously, not all LGBT elders will have that option, and those who are less able may have no one to advocate on their behalf. Clay and Harold, for example, were sufficiently isolated that it took eight months and a court-appointed attorney to get Clay released from the secure long-term care facility.<sup>205</sup> A lack of financial resources and the absence of a strong multi-generational support system can leave some LGBT elders trapped in situations where they face bullying and harassment on a daily basis.

In some instances, it has been reported that long-term care facilities will transfer residents who are perceived to be LGBT to secure “memory wards” to placate the prejudices of the other residents.<sup>206</sup> The “memory wards” are considered the perfect place to stash an LGBT elder because the other residents suffer from cognitive impairments and are less likely to complain about having to live in close proximity to a homosexual or gender variant resident.<sup>207</sup> In 2007, *The New York Times* reported an instance where a nursing home transferred a seventy-nine year old gay man to a dementia ward after other residents and their families had complained.<sup>208</sup> The gay elder was not suffering from dementia but had no family or friends to advocate on his behalf.<sup>209</sup> Confined with residents who had Alzheimer’s Disease and other related ailments, he eventually hanged himself.<sup>210</sup>

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202. Gross, *supra* note 10 (“Elderly gay people . . . living in nursing homes or assisted-living centers or receiving home care, increasingly report that they have been disrespected, shunned or mistreated in ways that range from hurtful to deadly, even leading some to commit suicide.”).

203. *Id.*

204. *Id.*

205. First Amended Complaint, *supra* note 31, at 8. Only then was Clay able to reconnect with a long-time friend, who was also Harold’s executor. *Id.*

206. Gross, *supra* note 10.

207. This practice brings to mind Clay’s allegation that he was confined to a secure dementia ward against his will. First Amended Complaint, *supra* note 31, at 8; see Gross, *supra* note 10 (reporting that facilities move LGBT residents to placate bigoted residents).

208. Gross, *supra* note 10.

209. *Id.*

210. *Id.*

### III. Proactive Planning for the LGBT Elder

In addition to the normal demands of aging, LGBT elders must grapple with the legal fragility of their chosen family, widespread financial insecurity, and anti-LGBT bias. These issues demand significant legal and policy reforms, such as marriage equality, broad based anti-discrimination protections, cultural competency training, and anti-bullying policies.<sup>211</sup> In the absence of fundamental reform, however, it is possible to use existing planning tools to help mitigate at least some of the inequities encountered by LGBT elders. Estate planning has long been considered an essential component of relationship formation for same-sex couples, but its importance is magnified several times over in the case of an LGBT elder who relies solely on chosen family for support.<sup>212</sup> It offers LGBT elders the opportunity to define their family and memorialize their wishes with respect to such weighty issues as end-of-life care and burial instructions.<sup>213</sup>

Wills, powers of attorney, and advance health care directives can go a long way to provide LGBT elders with a measure of security, but they are ultimately not sufficient to transform chosen family into "next of kin."<sup>214</sup> LGBT elders require a comprehensive elder care plan that is consciously designed to withstand the contrary wishes and preferences of next of kin who may have been estranged from the elder and know little of his or her life or personality. The comprehensive plan should also consider a strategy to allow the elder to age in place or, if necessary, access LGBT-friendly housing.

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211. See Knauer, *supra* note 17, at 49–57 (proposing cultural competency training, anti-bullying measures, and broad-based anti-discrimination protections).

212. See, e.g., Aimee Bouchard & Kim Zadworny, *Growing Old Together: Estate Planning Concerns for the Aging Same-Sex Couple*, 30 W. NEW ENG. L. REV. 713, 713 (2008).

213. For elders who rely on chosen family, all of their potential caregivers and beneficiaries and substituted decision makers are considered mere legal strangers and, to further complicate matters, they may all be in the same age cohort. See *supra* text accompanying notes 82–99.

214. A testator's next of kin have standing to challenge a will provided they have a pecuniary interest in it—that is, provided they would gain financially if the will were set aside. See *In re Estate of Getty*, 149 Cal. Rptr. 656, 658 (Cal. Ct. App. 1978) (holding contingent trustee lacked standing to challenge the will of J.P. Getty because she did not have a *pecuniary interest* in the outcome). As a result, disappointed heirs will have legal standing to challenge any non-normative testamentary disposition. *Id.* In the absence of marriage or its statutory equivalent, when a surviving same-sex partner is the primary beneficiary under the will, the decedent's intestate heirs will have standing to challenge the will because they would take under the rules of intestacy if the will were disregarded. See UNIF. PROBATE CODE § 2-103 (1993) (shares among heirs other than spouse).

This section outlines the benefits and limitations of estate planning for LGBT elders with a specific emphasis on the ways in which estate planning for LGBT elders differs from estate planning generally. It begins with a summary of the current state of marriage equality and moves on to the preferences for next of kin more generally. It then discusses the factors that should be covered in a comprehensive elder care plan, including additional documentation to supplement conventional estate planning documents and a strategy for aging in place. The section also outlines some of the issues that arise with respect to federal spousal benefits, including Social Security, Medicaid, and pension benefits.<sup>215</sup> Finally, it concludes with a reminder that LGBT elders may be especially susceptible to claims of incapacity both during their lifetimes and at death. Even the most meticulous planning can be subverted by unstated assumptions, anti-LGBT bias, and the favored status enjoyed by traditional relationships that are defined by marriage, blood, and adoption.<sup>216</sup>

#### A. Estate Planning

The natural objects of an LGBT elder's bequests may bear little resemblance to those outlined under the default setting of the rules of intestate succession.<sup>217</sup> The order of priority established by the law of intestacy privileges next of kin to the exclusion of all others.<sup>218</sup> Although approximately two-thirds of all decedents in the United States die without a valid will, intestacy is not a luxury that LGBT elders can

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215. This Article does not address the tax treatment of LGBT elders or same-sex couples.

216. As explained above, next of kin will always have standing to challenge dispositions that favor non-family members, and estate planning documents are not able to reach every instance where law and custom defer to the wishes of the next of kin. See *In re Estate of Getty*, 149 Cal. Rptr. at 658. Moreover, estate planning documents alone cannot force third parties to recognize an elder's chosen relationships. See Bouchard & Zadworny, *supra* note 212, at 713.

217. See UNIF. PROBATE CODE § 2-103 (1993).

218. In the vast majority of states where the decedent is not survived by a spouse, the rules of intestate succession distribute the decedent's property to his or her closest relatives in the following priority: children, parents, siblings, nieces and nephews, grandparents, aunts and uncles, first cousins, and so on. See *id.* The Uniform Probate Code does not include intestate heirs beyond descendants of grandparents. *Id.* Although a surviving spouse will generally receive the bulk of the estate, the share is reduced in certain circumstances if the decedent is survived by parents, children who are not also the children of the surviving spouse, or step-children who are the children of the surviving spouse. *Id.* § 2-102. If a decedent is not survived by any relatives within the prescribed degrees of relationship, all property will escheat to the state. *Id.* § 2-105.

afford.<sup>219</sup> This strong preference for next of kin is ubiquitous throughout the law and extends far beyond the distribution of a decedent's probate estate. It is replicated across the board in situations involving substituted decision making and other benefits, ranging from the right to receive crime victim compensation to the power to authorize organ donation.<sup>220</sup> As a result of this wide-reaching preference, LGBT elders cannot leave anything to chance because the default settings established by the law do not reflect the composition of their families.

By far the most significant development in the area of LGBT estate planning has been the advent of same-sex marriage and marriage equivalence. The legal landscape of marriage equality is evolving so rapidly that any attempt to describe the patchwork of relationship recognition laws that exist across the United States is quickly outdated. With that caveat, when this article went to press at the close of 2011, six states and the District of Columbia had legalized same-sex marriage,<sup>221</sup> one state recognized same-sex marriages performed in

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219. Bina Brown, *Estate Planning: Make a Will*, CNN (June 26, 2006), <http://edition.cnn.com/2006/BUSINESS/06/12/btn.will/index.html> (reporting that sixty-six percent of Americans die without wills).

220. For example, all states have crime victim compensation boards which provide modest monetary awards to the victims of crime and their survivors. *State Compensation Web Sites*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?sid=6> (last visited Oct. 21, 2011). The National Association of Crime Victim Compensation Boards provides links to each of the state programs. *Id.* The awards are designed to meet emergency expenses but not to compensate for amounts that would otherwise be recoverable in tort. *E.g.*, *Helping Crime Victims: Crime Victim Compensation Program*, ILL. ATT'Y GEN., <http://www.ag.state.il.us/victims/cvc.html>. Survivors are generally eligible to receive compensation if they are either related to the victim or economically dependent on the victim for their principal support. *Id.*

221. The states are: Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. In 2008, the Connecticut Supreme Court ruled in favor of same-sex marriage. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (holding that the state statutory prohibition against same-sex marriage violated substantive due process and equal protection rights guaranteed under the state constitution). The D.C. City Council passed the Religious Freedom and Marriage Equality Amendment Act in 2009. D.C. CODE § 46-401 (2010). In 2009, the Iowa Supreme Court unanimously ruled in favor of same-sex marriage. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009). Applying intermediate scrutiny, the court held that the state law violated the Equal Protection Clause of the Iowa Constitution because the law did not promote any substantial state interests. *Id.* at 904-06. In 2003, the Massachusetts Supreme Court ruled 4-3 in *Goodridge v. Department of Public Health* that the right to marry was protected under the state constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). In 2009, the Vermont legislature overrode the Governor's veto and passed a marriage equality law. VT. STAT. ANN. tit. 15, § 8 (2009). In 2011, the New York legislature

other states,<sup>222</sup> another nine states offered a parallel status that grants same-sex partners all the rights and responsibilities of spouses,<sup>223</sup> and three states provided a lesser quantum of rights.<sup>224</sup>

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passed the Marriage Equality Act, legalizing same-sex marriage. N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

222. In February 2010, the Attorney General of Maryland issued an advisory opinion stating that Maryland would recognize out-of-state same-sex marriages. Aaron C. Davis & John Wagner, *Maryland to Recognize Gay Marriages from Other Places*, WASH. POST, Feb. 25, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/24/AR2010022405686.html>.

223. These states are: California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington. Same-sex marriages were mandated by the California State Supreme Court in 2008. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (holding that an individual's homosexual orientation is not sufficient basis for withholding or restricting the fundamental right to marry guaranteed under the California state constitution). Marriages began taking place in June of 2008. *Wedding Bells Chime for California Same-Sex Couples*, CNN (June 16, 2008), [http://articles.cnn.com/2008-06-16/us/samesex.marriage\\_1\\_lesbian-couples-marriage-license-gay-marriage?\\_s=PM:US](http://articles.cnn.com/2008-06-16/us/samesex.marriage_1_lesbian-couples-marriage-license-gay-marriage?_s=PM:US). In November 2008, voters approved Proposition 8, a ballot proposition that amended the California state constitution to restrict marriage to a union between a man and a woman. Jessica Garrison et al., *Nation Watches as State Weighs Ban*, L.A. TIMES, Nov. 5, 2008, <http://articles.latimes.com/2008/nov/05/local/me-gaymarriage5>. In 2009, the California State Supreme Court ruled that the approximately 18,000 marriages that took place before Proposition 8 remained valid. *Strauss v. Horton*, 46 Cal. 4th 364, 385 (Cal. 2009). California currently has the marriage equivalent status of "registered domestic partners." CAL. FAM. CODE § 297 (2005). In 2006, the Supreme Court of New Jersey held that limiting access to the protections and benefits of civil marriage to opposite-sex couples violated the state constitution, but it did not require the state to permit same-sex couples to marry. *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006). In response, the New Jersey state legislature enacted the Civil Union Act. N.J. STAT. ANN. § 37:1-29. Prior to that, in 2004, New Jersey had extended limited rights to same-sex partners and different-sex partners over sixty-two years of age who registered as "domestic partners." N.J. ADMIN. CODE § 17:1-5.6 (2004). Nevada enacted a comprehensive domestic partnership law in 2009. NEV. REV. STAT. ANN. § 122A *et seq.* In 2007, Oregon enacted its domestic partnership law, the Oregon Family Fairness Act. OR. REV. STAT. § 106.300 (2007). The law took effect on February 4, 2008. *Id.* Washington state first enacted relationship recognition in 2007. WASH. REV. CODE § 26.60.010 (2008). On April 17, 2009, the Washington state legislature passed a bill extending full marriage rights to domestic partners. Press Release, Governor Chris Gregoire, Gov. Gregoire Signs Legislation to Expand Rights to Domestic Partners (May 18, 2009), *available at* <http://www.governor.wa.gov/news/news-view.asp?pressRelease=1236&newsType=1>. In 2009, the law withstood an attempt to repeal it through a citizens' referendum. Rachel La Corte, *Gay Partnership Referendum Makes Ballot*, SEATTLE TIMES, Aug. 31, 2009, [http://seattletimes.newsource.com/html/localnews/2009781794\\_apusdomesticpartnerships4thldwritethru.html](http://seattletimes.newsource.com/html/localnews/2009781794_apusdomesticpartnerships4thldwritethru.html). The Illinois Religious Freedom and Protection Act was enacted in 2011. 750 ILL. COMP. STAT. 75/10 (2011). Hawaii enacted a similar law later that year, as did Delaware. *Hawaii Legislature Passes Civil Unions Bill; Governor Will Sign It*, CNN (Feb. 17, 2011), [http://articles.cnn.com/2011-02-17/politics/hawaii.civil.unions\\_1\\_civil-unions-marriages-from-other-states-protections-and-responsibilities?\\_s=PM:POLITICS](http://articles.cnn.com/2011-02-17/politics/hawaii.civil.unions_1_civil-unions-marriages-from-other-states-protections-and-responsibilities?_s=PM:POLITICS); *Delaware Lawmakers Approves Civil Unions Bill*, CNN (Apr. 14, 2011), [http://articles.cnn.com/2011-04-14/politics/delaware.civil.unions\\_1\\_civil-unions-](http://articles.cnn.com/2011-04-14/politics/delaware.civil.unions_1_civil-unions-)

In states with marriage or marriage equivalence, surviving same-sex spouses will be entitled to the full panoply of spousal rights, including community property, generous intestate shares, the right to elect against the will, the benefit of pretermitted spouse rules, and homestead allowances.<sup>225</sup> Even those same-sex couples who live in jurisdictions with relationship recognition, however, should continue to view a comprehensive estate plan as an essential component of relationship formation because relationship recognition is largely not portable and their marriage (or other equivalent status) will not be respected in states that do not have an analogous status.<sup>226</sup>

Through marriage, an LGBT elder can make his partner his next of kin who takes priority over all other relatives.<sup>227</sup> Marriage, however, remains a limited option because the vast majority of states still have laws prohibiting same-sex marriage.<sup>228</sup> In addition, DOMA

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delaware-lawmakers-delaware-general-assembly?\_s=PM:POLITICS. The Rhode Island legislature has passed the most recent bill allowing civil unions. Abby Goodnough, *Rhode Island Lawmakers Approve Civil Unions*, N.Y. TIMES, June 29, 2011, <http://www.nytimes.com/2011/06/30/us/30unions.html>.

224. These states are: Colorado, Maine, and Wisconsin. In 2009, Colorado enacted the Designated Beneficiary Agreement Act that grants limited rights to "designated beneficiaries." COLO. REV. STAT. ANN. § 15-22-101 (2009). In 2009, the Maine legislature passed marriage equality legislation. *Maine Voters Repeal Marriage-Equality Bill*, N.Y. MAG., Nov. 4, 2009, [http://nymag.com/daily/intel/2009/11/maine\\_voters\\_repeal\\_marriage\\_e.html](http://nymag.com/daily/intel/2009/11/maine_voters_repeal_marriage_e.html). The legislation was repealed before it took effect by a voter referendum in November 2009. *Id.* Five years earlier, Maine had enacted legislation establishing a state-wide domestic partner registry and extending to same-sex couples certain health care decision making authority and inheritance rights equivalent to spouses. ME. REV. STAT. tit. 22, § 2710 (2004). This law remains in effect. *Id.* In 2009, the Wisconsin legislature passed domestic partner legislation that grants same-sex couples forty-three rights and protections, including inheritance rights and health care decision making authority. WIS. STAT. ANN. § 770.001 (West 2010).

225. For example, all separate property states, with the exception of Georgia, grant a surviving spouse a right to claim an elective of a deceased spouse's estate where the deceased spouse left the surviving spouse less than the prescribed statutory share. See UNIF. PROBATE CODE § 2-202 (1993). The amount of the elective share was traditionally one-third of the decedent's estate. *Id.* § 2-202 cmt.

226. The American Psychological Association identified the lack of portability as a significant source of minority stress. American Psychological Association, Resolution on Sexual Orientation and Marriage (July 2004), available at <http://www.apa.org/about/governance/council/policy/gay-marriage.pdf>. The current state of marriage laws in the United States is further complicated because laws recognizing same-sex relationships often remain under attack through citizen initiatives and court challenges.

227. See UNIF. PROBATE CODE § 2-102(a) (1993) (spousal share in separate property states).

228. Forty-four states prohibit same-sex marriage. HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS 1 (2008), available at [http://www.hrc.org/files/assets/resources/marriage\\_prohibitions\\_2009%281%29.pdf](http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009%281%29.pdf). Eighteen states

mandates that same-sex marriages are not recognized for federal purposes.<sup>229</sup> As explained in greater detail in Section B, this means that same-sex spouses do not qualify for federal spousal benefits, such as social security or joint filing for tax purposes.<sup>230</sup>

The appeal of marriage from a planning standpoint seems obvious, but it also bears mentioning that marriage should not be entered into lightly even at an advanced age.<sup>231</sup> LGBT elders who are considering marriage need to consider a number of factors before getting married, including the effect the marriage may have on any benefits they are receiving.<sup>232</sup> One major consideration is that, under the present state of the law, it is considerably easier for a same-sex couple to

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have laws that could also prohibit civil unions and domestic partnerships, as well as same-sex marriages. *Id.* These states are: Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Id.*

229. DOMA was enacted in 1996 in response to the Hawaii Supreme Court decision in *Baehr v. Lewin*. See generally *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). DOMA adds a definition of “marriage” and “spouse” to Title 1 of the United States Code, also known as the Dictionary Act. 1 U.S.C. § 7 (2006). DOMA provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.

*Id.*

230. There are 1138 federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.” Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Honorable Bill Frist, Majority Leader, United U.S. Sen. (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

231. Reports indicate the rate of divorce among older individuals is increasing, a trend that is not surprising given gains in life expectancy and the diminished stigma attached to divorce. See Deirdre Bair, *The 40 Year Itch*, N.Y. TIMES, June 3, 2010, <http://www.nytimes.com/2010/06/04/opinion/04bair.html>.

232. It remains to be seen whether older same-sex couples will take advantage of same-sex marriage laws or other forms of legal recognition at the same rate as younger couples. In addition, as same-sex marriage and marriage equivalence become more common, it is unclear what meaning will attach when couples fail to marry or register. In this regard, Clay and Harold provide an interesting example. When Harold fell outside his Sonoma County home in April 2008, California had not yet begun issuing marriage licenses to same-sex couples, but it did offer full marriage equivalence in the form of “registered domestic partnerships.” Nancy J. Knauer, *Gay and Lesbian Elders: Estate Planning and End-of-Life Decision Making*, 12 FLA. COASTAL L. REV. 164, 186 (2010). Clay and Harold had not registered as domestic partners. *Id.* at 166. Clay and Harold did have reciprocal estate planning documents, but the documents could be executed in the privacy of a lawyer’s office and did not require Clay or Harold to disclose the nature of their relationship to county officials or other third parties. *Id.*

get married than it is to get divorced.<sup>233</sup> States do not impose residency requirements on marriage (or marriage equivalence), whereas they do impose residency restrictions on divorce.<sup>234</sup> This difference creates a problem because a significant number of same-sex couples who live in non-marriage jurisdictions have traveled out-of-state to get married.<sup>235</sup> Given the current state of divorce laws, these couples may end up making a much stronger commitment than they anticipated. When they return home, they might not be legally married, but they also cannot get divorced.<sup>236</sup>

Adult adoption represents another way to transform chosen family into legally recognized next of kin, but it has its drawbacks.<sup>237</sup> Used instrumentally, adult adoption allows an individual to add a member of her chosen family (including her partner) to her legally recognized family tree, thereby qualifying the chosen family member as a child who stands in priority above all other next of kin, with the exception of a spouse.<sup>238</sup> This priority applies for intestacy purposes, as well as all other instances where the law preferences next of kin,

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233. Colleen McNichols Ramais, *Til Death Do You Part . . . And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1025 (2010).

234. Marcelle S. Fischler, *The Right to Divorce*, N.Y. TIMES, June 7, 2009, at ST13, available at 2009 WLNR 10905435 (stating that out-of-state married couples must satisfy the residency requirement in New York before qualifying for a divorce).

235. *Id.*

236. The fact that a same-sex couple cannot divorce in their home state may have little practical effect provided they do not venture to a marriage jurisdiction, but the separated couple will find themselves suddenly married if their state of residence recognizes same-sex marriage or they travel to a state that does. They cannot simply travel back to the state where they were married and file for divorce because they would have to first satisfy the residency requirements.

237. In the 1898 case of *Collamore v. Learned*, the Massachusetts Supreme Court declared that it was "perfectly proper" to use adult adoption to secure inheritance rights. *Collamore v. Learned*, 171 Mass. 96, 100 (Mass. 1898). At least one court, however, has disallowed adult adoption in the context of a same-sex relationship on public policy grounds. In 1984, New York's highest court disallowed the application of a fifty-seven-year old gay man to adopt his fifty-year-old male partner. *In re Robert Paul P.*, 63 N.Y.2d 233, 239 (N.Y. 1985) (holding that a sexual relationship was inconsistent with a parent-child relationship). The court held that the proposed adoption was "a patently incongruous application of our adoption laws," and the sexual nature of the relationship between the parties was "repugnant" to the parent-child dynamic. *Id.* at 236. In addition, parties considering this step must also investigate the applicability of state criminal incest laws.

238. Individuals who are qualified to take by intestate succession are also restricted by marriage, biology, or adoption. See UNIF. PROBATE CODE § 2-102(a) (1993) (spouses share in separate property states); *id.* § 2-103 (shares among heirs other than spouse); *id.* § 2-114 (status of adopted children and effect of the marital status of the parents with respect to the child).

such as the right to be appointed as an administrator or guardian.<sup>239</sup> Adult adoption can also forestall will challenges from collateral kin that are discussed in greater detail in Section C below.<sup>240</sup> Unlike marriage, however, adoption is forever, and an adoptive parent can never divorce his or her adopted child.<sup>241</sup> Accordingly, this option should be used with caution.

Health care powers of attorney and advance directives have particular relevance for LGBT elders,<sup>242</sup> but they typically do not address a number of important decisions that are customarily left to “family,” such as hospital visitation orders and funeral or burial instructions.<sup>243</sup> For this reason, LGBT elders should supplement the traditional trio of estate planning documents—will, durable power of attorney, and advance directive—with clear written instructions delineating their wishes with respect to hospital visitation, burial, and anything else they feel strongly about, such as the care of their pets or organ donation. In many instances, the actual legal force of these documents may

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239. See John G. Culhane, *A “Clanging Silence”: Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 953–54 (2001) (outlining history and statutory origin of wrongful death actions). If a decedent dies intestate, the law prescribes the order of priority for appointment of an administrator of the decedent's estate. See UNIF. PROBATE CODE § 3-203(a)(1) (listing surviving spouse as first priority). There may be limitations on the ability of an adult adoptee to inherit through his or her adopted parent. *In re Robert Paul P.*, 63 N.Y.2d at 233.

240. See *infra* text accompanying notes 308–17.

241. Even a same-sex spouse living in a non-marriage state with an out-of-state marriage can theoretically move, establish residency, and then sue for divorce. This option is not available to an adoptive parent.

242. Advances in medical technology have greatly increased the likelihood that individuals will experience a period of incapacity prior to death, such that durable powers of attorney and advance directives are now essential elements of any estate plan. See, e.g., Joseph T. Monahan & Elizabeth A. Lawhorn, *Life-Sustaining Treatment and the Law: The Evolution of Informed Consent, Advance Directives and Surrogate Decision Making*, 19 ANNALS HEALTH L. 107 (2010); see also UNIF. PROBATE CODE §§ 5-501–5-505 (governing durable powers of attorney). These documents have obvious importance in the case of LGBT elders. When an individual is incapable of expressing his or her desires regarding medical care, these documents help ensure that the individual's wishes are respected by service providers. Monahan & Lawhorn, *supra*, at 110. In addition, an individual can appoint a surrogate to act on his or her behalf in the event of incapacity, designate a guardian, or direct the terms of end-of-life care. *Id.* at 109. If an individual fails to execute these documents, the law looks to next of kin to make the necessary decisions and provides another series of default settings that generally follow the rules of intestate succession and rank next of kin in descending order of priority. *Id.* at 112.

243. For example, it is not entirely clear whether the personal representative has authority to direct the disposition of remains and to make funeral and cemetery arrangements. In many instances, these very personal decisions must be made before the will has been submitted for probate or before an administrator has been appointed. See generally UNIF. PROBATE CODE §§ 5-501–5-505.

be unclear, but, at the very least, they provide some indicia of what the elder would have wanted had the elder been able to express his or her wishes. These supplemental documents also provide some protection against the potentially conflicting wishes and values of next of kin who may not have been close to the elder and who may disapprove of the elder's chosen family.

Burial and funeral instructions present an instance where the wishes of next of kin and chosen family can collide. Given the importance of this issue and the strong emotions it can provoke, LGBT elders should execute a separate document that sets forth their directions and not rely on general powers granted to their personal representative. A federal lawsuit filed in the Eastern District of Pennsylvania involved a situation in which a cemetery refused to honor the instructions of the surviving partner despite the fact that the surviving partner was also the executor of the decedent's will and expressly authorized to make funeral arrangements.<sup>244</sup> The next of kin objected to the proposed inscription for the deceased partner's headstone because it included the term "beloved life partner."<sup>245</sup> It took nearly three years to settle the case.<sup>246</sup>

In the absence of legislation, it may not be clear whether an individual has the authority to direct the terms of his or her funeral and burial arrangements.<sup>247</sup> Although states have recently begun to enact enabling legislation, the approach has been far from uniform.<sup>248</sup> Some states provide that a decedent's written instructions concerning burial

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244. Cynthia Friedman left a will naming her partner of thirteen years, Sherry Barone, executor. See Debbie Woodell, *Gay Partner Battles for Rights Even at the Grave*, AUSTIN AM.-STATESMAN, May 31, 1997, at C8. The will expressly authorized Barone to "arrange for the disposition" of Friedman's remains. See Murray Dubin, *Dispute Involving Headstone Epitaph Now a Federal Case*, PHILA. INQUIRER, June 26, 1997, at C01. The cemetery where Friedman was buried refused to inscribe her headstone with the epitaph directed by Barone because Friedman's parents objected to the use of the term "beloved life partner." See Claudia N. Ginanni, *Cemetery to Inscribe Headstone, Pay \$ 15,000*, LEGAL INTELLIGENCER, Sept. 8, 1997. Shortly before the third anniversary of Friedman's death, the cemetery acceded to Barone's wishes as part of a settlement agreement reached in the federal lawsuit Barone brought against the cemetery. See *id.*

245. Ginanni, *supra* note 244.

246. See *id.*

247. See *supra* note 243.

248. For example, Alabama generally restricts authority to next of kin with the exception of individuals designated in a "pre-need" funeral contract or the executor of the decedent's will. ALA. CODE § 34-13-11 (2010). See generally *Who Has the Right to Make Decisions About Your Funeral*, FUNERAL CONSUMERS ALLIANCE, <http://www.funerals.org/your-legal-rights/funeral-decision-rights> (last visited Oct. 22, 2011).

must be honored.<sup>249</sup> Other states allow the appointment of a funeral planning agent who has decision making authority,<sup>250</sup> and other states have adopted some combination of the two.<sup>251</sup> In some instances, state law requires individuals to execute a separate document,<sup>252</sup> but other states, such as Vermont, have incorporated the power in their advance directive forms.<sup>253</sup> Even individuals who reside in states that have not yet adopted legislation should execute a generic form expressing their wishes to serve as indicia of intent in case that intent is later challenged by next of kin.

The failure to leave express directions can place a surviving partner or chosen family member at odds with next of kin or, in some instances, the state.<sup>254</sup> A 2008 case in Rhode Island provides a stark illustration of what it means to be considered a legal stranger. When Mark Goldberg's partner of seventeen years, Ron Hanby, committed suicide, the Medical Examiner's office refused to release Ron's remains despite the fact that Ron and Mark had been married in Connecticut and had the full complement of reciprocal estate planning documents.<sup>255</sup> Under Rhode Island law at the time, only certain relatives were authorized to claim remains, and Ron was not survived by any legally recognized next of kin.<sup>256</sup> It took Mark thirty-two days to convince the authorities to release Ron's body, rather than bury him in a pauper's grave.<sup>257</sup> Rhode Island has since enacted legislation that

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249. See, e.g., WASH. REV. CODE § 68.50.160 (2011) (personal preference law).

250. See, e.g., N.H. REV. STAT. ANN. § 290:17 (2011) (authorizing a designated agent).

251. See, e.g., OKLA. STAT. tit. 21, § 1151 (2011) (combined personal preference and agent law).

252. See, e.g., R.I. GEN. LAWS § 5-33.3-4 (2011) (form prescribed by statute).

253. See, e.g., VT. STAT. ANN. tit. 18, § 9700 (West 2005) (advance directives for health care and disposition of remains).

254. See UNIF. PROBATE CODE § 2-105 (1993) (directing distribution to state where no surviving relative within prescribed degree of relationship). The Uniform Probate Code stops the order of succession with the descendants of grandparents. *Id.* § 2-103(a)(5).

255. Roger Edgar, *Lack of Funeral Rights Turns Mourner into Gay Activist*, PROVIDENCE J., Nov. 15, 2009.

256. Limited to relatives, the list did not include executors or other fiduciaries nor did it include same-sex partners. *Id.* Rhode Island law at the time authorized the designation of a "funeral agent," but it required the use of a specific form prescribed by statute. R.I. GEN. LAWS § 5-33.3-4 (2010).

257. Edgar, *supra* note 255. The state would have been obligated to pay for the funeral. See Mark Friesen, *Disposition of Unclaimed Bodies in U.S. Varies by State, Jurisdiction*, THE OREGONIAN, June 14, 2009, [http://www.oregonlive.com/special/index.ssf/2009/06/disposition\\_of\\_unclaimed\\_bodie.html](http://www.oregonlive.com/special/index.ssf/2009/06/disposition_of_unclaimed_bodie.html).

specifically includes “domestic partners” in the list of individuals authorized to claim remains.<sup>258</sup>

A hospital visitation authorization form is another type of document that has become a common feature of gay and lesbian estate planning.<sup>259</sup> Necessitated by hospital policies that restrict visitors to “family members,” it had long been unclear whether these documents carry any legal force.<sup>260</sup> In response to a 2010 Presidential Memorandum, the Department of Health and Human Services (HHS) issued regulations “to ensure that hospitals that participate in Medicare or Medicaid respect the rights of patients to designate visitors.”<sup>261</sup> The Memorandum was prompted by a heartbreaking case in Florida where a same-sex partner was denied access to her dying partner despite the fact that she held her partner’s power of attorney.<sup>262</sup> It directs that “participating hospitals may not deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability.”<sup>263</sup> The new regulatory measures were later extended to apply to long-term care facilities, but much remains to be seen regarding implementation and the extent to which facilities can impose restrictions based on medical necessity.<sup>264</sup>

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258. The new law extends the right to make burial decisions to “domestic partners” who satisfy two out of four relationship indicators, all of which require a level of economic interdependence (e.g., partnership agreement, joint ownership, beneficiary designations). Katherine Gregg, *Update: R.I. Governor Vetoes ‘Domestic Partners’ Burial Bill*, Nov. 10, 2009, <http://news.providencejournal.com/breaking-news/2009/11/ri-gov-carciere-vetoes-domesti.html#.TrWvK3LQv4s>. The law adds the category of “domestic partner” to the traditional list of next of kin who are authorized to make burial arrangements and gives them equal priority with spouses. *Id.* In 2009, the Governor of Rhode Island vetoed the burial legislation because he saw it as part of “a disturbing trend” that furthers the “erosion of the principles surrounding traditional marriage.” *Id.* The legislature overrode the Governor’s veto by an overwhelming margin. Katherine Gregg, *R.I. Lawmakers Override Governor’s Vetoes*, PROVIDENCE J. (Jan. 5, 2010, 5:05 PM), [http://news.providencejournal.com/breaking-news/2010/01/lawmakers-override-governors.html#.TrWy\\_3LQv4s](http://news.providencejournal.com/breaking-news/2010/01/lawmakers-override-governors.html#.TrWy_3LQv4s).

259. See generally *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326 (S.D. Fla. 2009).

260. *Id.* at 1331–32. In *Langbehn v. Memorial Hospital*, a federal district court dismissed a claim brought by a surviving partner who was denied access to her dying partner despite the fact that she was her partner’s attorney-in-fact and authorized to make all medical decisions. *Id.* at 1347.

261. Memorandum from Barack Obama, Pres. of the U.S., to Kathleen Sebelius, Sec’y of Health & Human Servs. (Apr. 15, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>.

262. *Id.*

263. *Id.*

264. 42 C.F.R. § 482.13(h) (2011); 42 C.F.R. §§ 485, 635(j) (2011).

In addition to including these supplemental documents, estate planning for LGBT elders should address the issue of housing and long-term care. As explained in Part II, LGBT elders overwhelmingly report that they would prefer to “age in place,”<sup>265</sup> and they express extreme trepidation over the prospect of moving to any form of congregate living facility, such as a nursing home or assisted living facility.<sup>266</sup> Accordingly, LGBT elders should develop an integrated elder care plan that may require the assistance of financial advisers and medical service providers, as well as the coordination of both formal and informal caregivers. Assuming the LGBT elder desires to age in place, the goal of the plan should be to maximize the elder’s autonomy and ability to live independently for as long as possible.

As explained earlier, the prospect of aging in place presents obvious difficulties for LGBT elders because it often requires assistance from informal caregivers, and LGBT elders are much more likely than their non-LGBT peers to be estranged from their next of kin.<sup>267</sup> Chosen families may also be limited in how much support they can provide as their members age together and require increasing amounts of support.<sup>268</sup> As a result, LGBT elders may be more likely than their non-LGBT peers to require home health care assistance, but they are less likely to use supportive services.<sup>269</sup> If they are unable to age in

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265. In terms of housing, LGBT elders overwhelmingly report a preference for options that cater to the needs of LGBT elders. In one study, sixty-seven percent of the participants stated that they would prefer to live in a “LGBT-only retirement community[.]” Orel, *supra* note 97, at 233. Orel explains that “the primary reason [for their preference] was the belief that if their sexual orientation were known, they would not be welcomed in existing retirement communities.” *Id.* The market has recently begun to respond to this demand by offering gay-friendly senior housing developments. Rona Marech, *Retirement Homes, Without the Closets*, S.F. CHRON., Jan. 14, 2005, at A1. Although these proposed projects have garnered considerable press coverage, relatively few of them have actually opened and are serving clients, and demand far outstrips supply. See, e.g., *id.*; Judy Richter, *Bay Area Gay Senior Housing Closer to Reality*, S.F. CHRON., Mar. 30, 2008, at K8.

266. See Gross, *supra* note 10.

267. CAREGIVING, *supra* note 96, at 24.

268. Knauer, *supra* note 17, at 55.

269. Only 7.4% of all seniors age seventy-five and older live in nursing homes. Haya El Nasser, *Fewer Seniors Live in Nursing Homes*, USA TODAY, Sept. 27, 2007, [http://www.usatoday.com/news/nation/census/2007-09-27-nursing-homes\\_N.htm](http://www.usatoday.com/news/nation/census/2007-09-27-nursing-homes_N.htm). Aging in place often requires assistance from family, and this presents obvious problems for LGBT elders who are much more likely not to have children or who may be estranged from their children and other relatives. Knauer, *supra* note 17, at 29. Single generational chosen families may also be limited in how much support they can provide as their members age together and require increasing amounts of support. *Id.* at 55. As a result, LGBT elders may be more likely than their non-LGBT peers to require home health care assistance or residen-

place, LGBT elders are also less likely to have the financial wherewithal to pay for long-term care, leaving them with Medicaid as their only option.<sup>270</sup>

In terms of housing and other long-term care, the market has recently begun to respond to the concerns of LGBT elders by creating LGBT-centered senior housing developments.<sup>271</sup> Although these proposed projects have garnered considerable press coverage,<sup>272</sup> relatively few of them have actually opened and are serving clients,<sup>273</sup> and demand far outstrips supply.<sup>274</sup> For LGBT elders who can no longer live independently and do not have access to LGBT-centered housing, it is important to identify a facility that is at least LGBT-friendly.<sup>275</sup> At a minimum, this would require a facility to have an anti-discrimination policy that includes sexual orientation or gender identity.<sup>276</sup> Ideally, a facility should have a non-discrimination policy, cul-

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tural care in a senior living facility. That being said, LGBT elders are extremely fearful of encountering anti-gay bias and tend to underutilize the very services that can help enable them to remain independent. *See supra* note 49 (discussing HHS study).

270. The harsh reality of aging in the United States is that many elders require intensive long-term care for an extended period before death. *See* Ezra Klein, *The Economics of Dying in One Graph*, WASH. POST, July 19, 2010, [http://voices.washingtonpost.com/ezra-klein/2010/07/the\\_economics\\_of\\_dying\\_in\\_one.html](http://voices.washingtonpost.com/ezra-klein/2010/07/the_economics_of_dying_in_one.html) (illustrating out-of-pocket health care spending in last year of life). The cost of such care is considerable, and it is not covered by Medicare. *See* METLIFE, *supra* note 173, at 12. The study reports that "in planning for their own future care needs, LGBT baby boomers' most serious worries are financial, with one-third reporting that how to pay for care is of most concern." *Id.*

271. Marech, *supra* note 265.

272. *See, e.g., id.*; Richter, *supra* note 265; AJ Burton, *Gay Senior Housing on the Rise, While Straights Cry Foul*, GFN.COM (Dec. 19, 2006), [www.thetaskforce.org/TF\\_in\\_news/06\\_1221/stories/13\\_gfn\\_gayseniorhousing.pdf](http://www.thetaskforce.org/TF_in_news/06_1221/stories/13_gfn_gayseniorhousing.pdf) (discussing complaints of reverse discrimination).

273. GRANT, *supra* note 13, at 96–99; *see also* Catherine Trevison, *Gay Retirement Homes Still Difficult to Market*, ST. PAUL PIONEER PRESS, Mar. 23, 2008, at 7E (noting some developments have "difficulty filling").

274. *See* Marech, *supra* note 265. LGBT elders report a strong preference for options that cater to the needs of LGBT elders; *see* Orel, *supra* note 97 (discussing study regarding housing preferences).

275. Larger metropolitan areas increasingly have resources specifically for LGBT seniors that are provided by LGBT organizations, but LGBT elders may be unable or unwilling to access the services because many members of the pre-Stonewall generation have little contact with LGBT organizations and may be reluctant to initiate such contact.

276. Although close to one-half of the states now provide anti-discrimination protections in employment, not all of the laws extend to housing or public accommodations. HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAW & POLICIES (2011), available at [http://www.hrc.org/files/assets/resources/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf). Fifteen states and the District of Columbia have laws prohibiting discrimination on account of sexual orientation and gender identity. *Id.*

tural competency training for staff, and anti-bullying policies to control the homophobic and transphobic behavior of other residents.<sup>277</sup>

Finally, it is important to recognize that in the absence of a multi-generational family, many traditional estate planning techniques (and goals) will not apply where all the potential beneficiaries are in the same generation.<sup>278</sup> For example, in some instances, the threat of a will challenge may make it advisable for LGBT elders to try to avoid probate entirely.<sup>279</sup> However, the type of lifetime giving that is necessary to avoid or minimize probate may be impracticable where the potential beneficiaries are all of the same generation.<sup>280</sup> The fact that in-

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These states are: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. *Id.* Six additional states prohibit discrimination solely on account of sexual orientation. *Id.* These states are: Delaware, Maryland, Massachusetts, New Hampshire, New York, and Wisconsin. *Id.* For example, anti-discrimination protections must be expanded to include senior-specific venues and housing. Some of the anti-discrimination laws only apply to employment, whereas other laws, such as the New Jersey Law Against Discrimination (LAD), are very broad. *See, e.g.,* N.J. STAT. ANN. §§ 10:5-1-10:5-49 (West 2011) (codification of New Jersey's laws against discrimination).

277. For a discussion of anti-bullying principles, see Knauer, *supra* note 17, at 55-56.

278. For LGBT elders whose intended beneficiaries are in the same age cohort, lifetime giving would work at cross purposes as everyone tried to divest their property at the same time. More importantly, any lifetime giving between elders would have to be evaluated carefully in light of the Medicaid impoverishment rules. For example, if a grantor/elder adds a friend to the deed of his or her house as a joint tenant with right of survivorship, and the elder dies first, the friend receives the property by operation of law and the property is protected from any claims from the grantor's next of kin. 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 22 (2006). However, there could be dire consequences if the friend's health were to fail and he or she needed to qualify for Medicaid to get long-term care. Under the Medicaid impoverishment rules, a Medicaid lien would attach to the property and would have to be satisfied at the friend's death. *See infra* text accompanying notes 291-94.

279. Another reason to avoid probate is that in certain jurisdictions there can be considerable fees and delay associated with probate. For a discussion of the urge to avoid probate more generally, see John H. Langbein, *The Nonprobate Revolution and the Future Law of Succession*, 97 HARV. L. REV. 1108 (1984).

280. One way to accomplish the necessary divestment is through the use of an inter vivos trust where an individual transfers title to his or her property, in trust, to a trustee who then holds the property for the settlor's lifetime benefit. UNIF. PROBATE CODE § 2-511 (1993). The settlor can serve as the trustee, although the designation of a co-trustee or an alternate trustee allows for continuity in the event the settlor experiences diminished capacity. UNIF. PROBATE CODE § 603 (amended 2004). For a discussion of the use of inter vivos trusts in the context of privacy concerns, see Frances H. Foster, *Trust Privacy*, 93 CORNELL L.R. 555 (2008). At the settlor's death, the remaining property is distributed under the terms of the trust and passes to the intended beneficiaries outside of probate. UNIF. PROBATE CODE § 2-511 cmt. In this situation, the settlor of the trust would also execute a will that would "pour over" any property held by the settlor at the time of death into the

dividuals in a chosen family tend to be in the same age cohort also complicates fiduciary designations. In a traditional estate plan, an individual would usually appoint his or her spouse and then a child or perhaps even a grandchild to serve as the alternate fiduciary. When the grantor of the power of attorney, the attorney-in-fact, and the alternate attorney-in-fact are all in the same generation, it is important to name more than one alternate to guard against the possibility that the attorneys-in-fact may not be able to serve due to death or incapacity.<sup>281</sup>

## B. DOMA and Federal Spousal Benefits

As a result of the legal barriers erected by DOMA, LGBT elders are disqualified from the entire array of federal spousal benefits, including Social Security benefits, veterans survivor benefits, favorable tax treatment, and pension benefits.<sup>282</sup> In addition, transgender elders sometimes face additional hurdles because federal agencies apply different standards to determine when an individual has legally transitioned.<sup>283</sup> As with marriage equality more generally, this area is fast

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trust. *Id.* Short of establishing an inter vivos trust, it is also possible to title property such that it transfers automatically by operation of law when the grantor dies. *Id.* With real estate, this result can be accomplished through the use of a joint tenancy with right of survivorship. See Langbein, *supra* note 279, at 1114 (discussing joint tenancy as will substitute). Securities can be registered with “transfer on death” instructions, as can bank accounts. UNIF. PROBATE CODE § 6-301, *et seq.* (describing rules governing “transfer on death” designations); *id.* § 6-201, *et seq.* (describing rules governing multi-party bank accounts).

281. When the named attorneys-in-fact are unable to serve and the grantor does not have the capacity to appoint another, the law calls for the appointment of a guardian in accordance with a prescribed order of priority that favors relatives. *But see* UNIF. PROBATE CODE § 5-304(b)(2)(A) (now including “an adult with whom the respondent has resided for more than six months before the filing of the petition” as the last named person).

282. BENNETT & GATES, *supra* note 74. There are estimated to be 1138 federal statutory provisions under “which benefits, rights, and privileges are contingent on marital status or in which marital status is a factor.” Letter from Dayna K. Shah, *supra* note 230. Recent regulatory reform, however, suggests that same-sex spouses may be recognized for the purposes of the Medicaid spousal impoverishment rules in those jurisdictions that recognize same-sex marriage. Sam Baker, *CMS Outlines Medicaid Protections for Same-Sex Couples*, THE HILL, June 10, 2011, <http://thehill.com/blogs/healthwatch/Medicaid/165805-cms-outlines-medicaid-protections-for-same-sex-couples>.

283. See generally Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 732 (2008).

evolving and several high profile cases are pending that could change the application of DOMA or invalidate it entirely.<sup>284</sup>

Currently, DOMA mandates that same-sex spouses do not qualify for Social Security spousal benefits regardless of whether they are legally married in their state of domicile.<sup>285</sup> Social Security benefits represent a significant source of retirement income in the United States, and constitute the only source of income for over one-quarter of all seniors.<sup>286</sup> According to the Census data, elder female partnered households rely more heavily on Social Security income as a percentage of their overall income than different-sex married couples.<sup>287</sup> They also receive, on average, fifteen percent less in Social Security benefits than their peers in different-sex marriages.<sup>288</sup> The Social Security spousal survivor benefit qualifies a surviving spouse to receive the benefit that had been paid to the deceased spouse if that amount is greater than what the survivor would be entitled to in his or her own right.<sup>289</sup> The application of DOMA to Social Security benefits is currently being challenged in federal lawsuits brought by legally married

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284. See generally *Perry et al. v. Schwarzenegger et al.*, 590 F.3d 724 (9th Cir. 2009); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

285. See *supra* note 229 (discussing DOMA). The amount of an individual's Social Security benefit is a function of how long he or she worked and how much he or she was paid. SOC. SEC. ADMIN., YOUR RETIREMENT BENEFIT: HOW IT IS FIGURED 1 (2011), available at <http://ssa.gov/pubs/10070.pdf>. To be considered "fully insured" for Social Security purposes, an individual must have worked a specified number of quarters. 42 U.S.C. § 414(a) (2010). The amounts of an individual's Social Security payments are then determined by the individual's reported wages and self-employment income. *Id.* § 403(a). As a result, individuals who experienced long periods of unemployment or underemployment will receive smaller benefit payments. This consideration is particularly important in the case of LGBT elders whose earning potential and employment options could have been affected in the past by anti-LGBT bias and discrimination.

286. See GARY SIDOR, CONG. RESEARCH SERV., SOCIAL SECURITY: BRIEF FACTS AND STATISTICS 22 (2005), available at [http://usa.usembassy.de/etexts/soc/crs\\_socsecurity2005.pdf](http://usa.usembassy.de/etexts/soc/crs_socsecurity2005.pdf). As of 2005, seventy-one percent of seniors relied on Social Security payments for at least half of their income, whereas forty percent of elders relied on Social Security for ninety percent of their income or more. *Id.*

287. GOLDBERG, *supra* note 78, at 7–9.

288. *Id.* at 7.

289. A different-sex surviving spouse qualifies for Social Security death benefits. 42 U.S.C. § 402(i) (2010). The different-sex surviving spouse of a deceased retired worker receives one hundred percent of the deceased spouse's benefits. *Id.* § 402(e)–(f). A divorced different-sex spouse also qualifies for Social Security death benefits. *Id.* § 402.

same-sex couples in Massachusetts who are being denied federal spousal benefits.<sup>290</sup>

Another federal benefit of significant importance to LGBT elders is the Medicaid spousal impoverishment rules. The spousal impoverishment rules are an important exception to the Medicaid "spend down rules" and are designed to ensure that a healthy spouse is not left destitute in order to qualify the other spouse for Medicaid.<sup>291</sup> These provisions include exempting the marital home, prohibiting a Medicaid lien from attaching to the marital home until after the death of the non-institutionalized spouse, and allowing the non-institutionalized spouse to keep one-half (or more) of the couple's joint assets.<sup>292</sup> Although DOMA would seem to bar same-sex partners

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290. *E.g.*, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 274 (D. Mass. 2010). In *Gill v. Office of Personnel Management*, the federal district court held that DOMA violated the equal protection clause and the due process clause of the U.S. Constitution. *Id.* at 376-77. The disparity in treatment between same-sex couples and different-sex married couples raises obvious questions of equity and uniformity because the spousal benefits are determined by the amount the worker paid into the program. A worker in a same-sex marriage who pays the same amount as a similarly situated worker in a different-sex marriage is entitled to fewer benefits because his or her partner is not eligible for survivor benefits. A Congressional Budget Office (CBO) report estimated that thirty percent of same-sex couples would receive higher benefits if federal law recognized same-sex marriage and all partnered same-sex couples chose to marry. CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 7 (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

291. See 42 U.S.C. § 1396r-5 (2006) (exempting certain resources including residence, car, qualifying irrevocable trusts, limited burial expenses, and life insurance policies). For same-sex couples, the result of the disallowance will depend on how their assets are titled and which partner requires long-term care. See LGBT OLDER ADULTS, *supra* note 57, at 17 (discussing different scenarios for same-sex and different-sex couples). Unlike married different-sex couples, same-sex couples may not be able to exclude their home, and, if they are able to exclude their home, a Medicaid lien will attach at the death of the institutionalized spouse. *Id.* at 16. The non-institutionalized partner will also not be entitled to one-half of their joint assets. *Id.*

292. See generally CTRS. FOR MEDICARE & MEDICAID SERVS., 2010 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS (2010), available at <http://www.cms.gov/MedicaidEligibility/Downloads/1998-2010SSIFBR122909.pdf>. States are required to attempt to recover expenses paid for Medicaid benefits. CTRS. FOR MEDICARE & MEDICAID SERVS., DEFICIT REDUCTION ACT IMPORTANT FACTS FOR STATE POLICYMAKERS 1 (2007), available at <http://www.cms.gov/DeficitReductionAct/Downloads/TPL.pdf>. A Medicaid lien attaches to the estate of the Medicaid recipient at his or her death, but does not apply to property owned by the surviving spouse. 42 U.S.C. § 1396p(a)(2) (2010). Most importantly, a Medicaid lien cannot be recovered during the lifetime of the recipient or surviving spouse. *Id.* ("Any adjustment or recovery . . . may be made only after the death of the individual's surviving spouse, if any . . . and only at a time . . . when he has no surviving child who is under age 21, or . . . is blind or permanently and totally disabled . . ."). In

from qualifying for the spousal impoverishment rules, even if they were legally married in their state of domicile,<sup>293</sup> HHS recently announced that it would notify states that they have discretion to treat same-sex “domestic partners” the same as “opposite-sex spouses.”<sup>294</sup>

A final area that bears mentioning is the federal regulation of pension benefits. In addition to Social Security, pension and retirement fund benefits provide a significant source of financial support for survivors.<sup>295</sup> As non-probate assets, these employee death benefits do not pass under the employee’s will and, therefore, are immune from will challenges brought by next of kin.<sup>296</sup> An indispensable part of any estate plan is to ensure that all beneficiary designations have been properly filled out and recorded, and this is especially true of LGBT elders who cannot rely on any of the default settings that prescribe the order of distribution in the absence of a valid designation.<sup>297</sup>

The problem for LGBT elders arises because defined benefit plans do not necessarily grant the covered employee the power to designate a beneficiary of his or her own choosing.<sup>298</sup> Defined benefit

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addition, no lien may be attached to the residence if a qualified sibling, son, or daughter of the decedent resides in the home. *Id.* § 1396p(b)(2)(B). See generally Diane Lourdes Dick, *The Impact of Medicaid Estate Recovery on Nontraditional Families*, 15 U. FLA. J.L. & PUB. POL’Y 525 (discussing liens in the context of non-traditional families).

293. See *supra* note 229 (discussing DOMA).

294. The announcement provides:

The Centers for Medicare & Medicaid Services will also notify states of their ability to provide same-sex domestic partners of long-term care Medicaid beneficiaries the same treatment as opposite-sex spouses in the contexts of estate recovery, imposition of liens, and transfer of assets. This includes not seizing or imposing a lien on the home of a deceased beneficiary if the same-sex domestic partner still resides in the home. It also includes allowing Medicaid beneficiaries needing long-term care to transfer the title of a home to a same-sex domestic partner, allowing the partner to remain in the home.

*U.S. Department of Health and Human Services Recommended Actions to Improve the Health and Well-Being of Lesbian, Gay, Bisexual, and Transgender Communities*, U.S. DEP’T HEALTH & HUM. SERVS., <http://www.hhs.gov/secretary/about/lgbthealth.html> (last visited Oct. 26, 2011).

295. *Senior Income Statistics*, NAT’L COMM. TO PRESERVE SOC. SEC. & MEDICARE (Mar. 2010), [http://www.ncpssm.org/ss\\_senior\\_income/](http://www.ncpssm.org/ss_senior_income/). Surviving spouses are also entitled to favorable tax treatment for amounts received from a spouse’s retirement fund, and, until recently, the rules governing hardship withdrawals did not take into account hardships encountered by non-relatives. KNAUER, *supra* note 165, at 122.

296. Knauer, *supra* note 232, at 202–03.

297. See UNIF. PROBATE CODE §§ 2-102–2-103 (1993).

298.

Defined benefit plans are the classic type of pension plan under which an employee is guaranteed a certain payment for life upon working

plans are the traditional type of pension plan that provide a guaranteed payment in exchange for a stated number of years of service.<sup>299</sup> These plans can limit permissible beneficiaries to spouses or next of kin, thereby making it impossible for a surviving same-sex partner or other member of the employee's chosen family to receive the retirement benefit.<sup>300</sup> DOMA requires that a same-sex spouse could not be considered a "spouse" for purposes of the plan.<sup>301</sup> This application of DOMA is also being challenged in *Gill v. Office of Personnel Management*, where one of the plaintiffs is the surviving same-sex spouse of Representative Gerry Studds.<sup>302</sup>

Short of the repeal of DOMA, the only alternative for an LGBT elder covered by a restrictive pension plan is to advocate for a change in the plan document itself.<sup>303</sup> This approach proved ultimately successful in the case of Bill Swensor and Marvin Burrows, who had been partners for fifty-one years when Bill died unexpectedly at the age of sixty-six in 2005.<sup>304</sup> Bill and Marvin started dating when they were just fifteen and seventeen, respectively.<sup>305</sup> Bill was a long-time mem-

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for a set number of years. They are typically offered by large public employers and employers with unionized workforces. In recent years, defined benefit plans have declined in popularity in favor of more flexible defined contribution plans where employees can direct their own investment accounts that are funded with a mix of employer and employee contributions. Notwithstanding their declining popularity, defined benefit plans continue to provide a significant source of retirement funds.

KNAUER, *supra* note 165, at 120.

299. See generally DEBORAH S. NICHOLS, A.L.I. & A.B.A., BASIC LAW OF PENSIONS, WELFARE PLANS, AND DEFERRED COMPENSATION: WALK-THROUGH OF QUALIFIED PLANS (1995).

300. *Id.*

301. See *supra* note 229 (discussing DOMA).

302. When Rep. Gerry Studds (D-MA) died in 2006, he was survived by his husband, Dean Hara, whom he had legally married in Massachusetts. Damien Cave, *Gerry Studds Dies at 69; First Openly Gay Congressman*, N.Y. TIMES, Oct. 15, 2006, <http://www.nytimes.com/2006/10/15/us/15studds.html>. Rep. Studds served twelve terms in Congress and was the first openly gay member of Congress. *Id.* Dean did not qualify for any federal spousal benefits because, according to DOMA, he did not qualify as a spouse. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396-97 (D. Mass. 2010).

303. See, e.g., Damien Cave, *Dying Officer Again Turned Down on Benefits for Companion*, N.Y. TIMES, Jan. 19, 2005, <http://www.nytimes.com/2006/01/19/nyregion/19benefits.html>.

304. GRANT, *supra* note 13, at 56.

305. *Id.* As a teenager, Bill was kicked out of his home when his father found out about his relationship with Marvin, and Bill moved in with Marvin and his mother. Kelly Griffith, *40+ Years of Valentine's Days*, ADVOCATE.COM (Jan. 30, 2006), [http://www.columbia.org/pdf\\_files/freedomtommarr3.pdf](http://www.columbia.org/pdf_files/freedomtommarr3.pdf).

ber of the International Longshore and Warehouse Union (ILWU), but when Marvin applied to receive Bill's health and pension benefits, his request was denied.<sup>306</sup> Two years after Bill's death, the ILWU was able to renegotiate the terms of the contract to provide pension benefits for domestic partners and made the coverage retroactive to Bill's date of death.<sup>307</sup>

### C. Capacity Issues

As noted earlier, many LGBT elders are estranged from their next of kin and rely instead on chosen family.<sup>308</sup> This can present a potential point of conflict because the law privileges next of kin over chosen family, with the exception of same-sex partners who reside in marriage states.<sup>309</sup> Regardless of the strength or quality of their relationship with the LGBT elder, next of kin have broad rights to make significant decisions on the elder's behalf, and they have the sole right to the elder's estate.<sup>310</sup> After the death of an LGBT elder, disappointed and incredulous heirs can challenge wills and burial instructions,<sup>311</sup> leaving a surviving partner and chosen family out in the cold.<sup>312</sup>

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306. Bill and Marvin were registered domestic partners and were married in San Francisco in 2004 during a brief period of civil disobedience when the city issued marriage licenses to same-sex couples. *Id.*

307. *Id.* By the time the plan was changed, Marvin had lost the house that he had shared with Bill for thirty-five years. *Id.*

308. See *supra* text accompanying notes 82–99.

309. See *supra* note 217–24.

310. See *supra* note 218 (discussing intestacy).

311. The legal standard for testamentary capacity requires a three-fold finding that the testator understood the nature of his action, the extent of his property, and his intended disposition. UNIF. PROBATE CODE § 2-501 (1993). To execute a valid will, an individual must be “of sound mind,” that is, he or she must possess testamentary capacity. *Id.* For example, the Uniform Probate Code provides: “An individual 18 or more years of age who is of sound mind may make a will.” *Id.* In *Estate of Reichel*, the Pennsylvania Supreme Court articulated the standard for testamentary capacity as follows:

Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of his or her bounty, the general composition of the estate, and what he or she wants done with it, even if memory is impaired by age or disease, and the testator need not have the ability to conduct business affairs.

*Estate of Reichel*, 400 A.2d 1268, 1271 (Pa. 1979) (internal citation omitted). For obvious reasons, testamentary capacity is measured at the time the testator executes the will, as opposed to when the will speaks at the death of the testator. In re Ziel's Estate, 359 A.2d 728, 734 (Pa. 1976).

312. See Starkey, *supra* note 32 (quoting a fifty-nine-year-old lesbian discussing her concern that she could be mistreated by her partner's family after her partner's death, who said: “you can't know how people are”).

The story of Harold and Clay illustrates that LGBT elders may have more immediate concerns than a potential will challenge.<sup>313</sup> LGBT elders are also susceptible to claims that they lack capacity during their lifetimes.<sup>314</sup> Next of kin, or even the State, can move to appoint a guardian against the wishes of the elder.<sup>315</sup> This vulnerability underscores the importance of durable powers of attorney and advance directives where the elder can appoint surrogate decision makers and nominate an individual to serve as a guardian if that becomes necessary.<sup>316</sup>

A variety of factors may cause next of kin to challenge and disregard the choices and preferences of an LGBT elder. In some instances next of kin may be hostile due to ideological or religious objections.<sup>317</sup> They may also be motivated by a sincere belief that family knows best, or they may simply be opportunistic and desire to secure a share of the elder's assets. In the case where LGBT elders were closeted and distant from their next of kin, it is possible that the clueless relatives could be concerned by what might legitimately appear to them to be aberrant behavior.<sup>318</sup> In any event, embedded anti-LGBT bias, in conjunction with the closet, can facilitate claims that LGBT elders lack capacity, whatever the motivation.

In the case of LGBT elders, a finding of incapacity, accompanied by the appointment of a guardian who does not respect the elder's sexual orientation or gender identity, has the unique power to silence the elder's identity and erase the elder's past.<sup>319</sup> Embedded anti-LGBT

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313. See *supra* text accompanying notes 121–43.

314. Knauer, *supra* note 168, at 343.

315. See *supra* text accompanying notes 217–24.

316. Contemporary guardianship law is an exercise of *parens patriae* authority that is typically within the jurisdiction of county probate judges. See UNIF. PROBATE CODE § 5-301 *et seq.* (Guardianship of Incapacitated Person); *id.* § 5-401 *et seq.* (Protection of Property of Protected Person). There are two general types of guardianships: a guardian of the estate who is responsible for handling the management of the ward's assets and financial concerns and a guardian of the person who is responsible for making personal life decisions on behalf of the ward regarding his or her physical well being. See *id.* § 5-309 *et seq.* The powers of a guardian of the estate are generally the same as those extended to trustees and personal representatives. See, e.g., *id.* § 5-401 *et seq.* The powers of a guardian of the person extend to basic decisions regarding the care, maintenance, and custody of the incapacitated person. See, e.g., *id.* § 5-301 *et seq.*

317. LONG-TERM CARE, *supra* note 36.

318. It is also possible that the family of a same-sex partner could point to the couple's failure to marry or register as domestic partners as proof that they were not actually partners or that perhaps the relationship was not serious.

319. Knauer, *supra* note 168, at 341–47 (discussing outsider critique of the capacity doctrine). For example, under the protective authoritative care of the court-

bias can give extra weight to claims that an LGBT elder lacks capacity because determinations of capacity typically take into account an individual's ability to engage in deliberative decision making and, in some instances, the perceived reasonableness of the individual's actions.<sup>320</sup> Thus, the relative value assigned to a particular decision or action may ultimately determine whether an individual has the requisite capacity to engage in the activity.<sup>321</sup> In the case of a closeted LGBT elder, the elder's family of origin might see their LGBT identity or behavior as such a complete departure from the norm that it could only be the result of diminished capacity.<sup>322</sup> Under this reasoning, the mere sex of a partner or the choice of a pronoun can serve as proof of incapacity.<sup>323</sup>

After an LGBT elder has died, his or her will may be subject to challenge by the next of kin on a number of grounds, each of which asserts that the will, as drafted, does not reflect the actual intent of the testator.<sup>324</sup> Disappointed heirs who would take under intestacy have legal standing to challenge any non-normative testamentary disposition.<sup>325</sup> When that non-normative disposition is to a same-sex partner

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appointed guardian, Clay and Harold really were just "friends"—former roommates. Their experience points out that LGBT elders who are aging in place with a partner or otherwise relying on a relatively small support system should identify potential individuals to act as a "lifeline"—someone who will check in with them from time to time and notice if they are suddenly transported to a secure long-term care facility. Perhaps if Harold and Clay had a designated lifeline, it would not have taken months for Clay to secure his release and perhaps Harold would not have died alone.

320. *Id.* at 342.

321. For a discussion of capacity questions with respect to senior sexuality, see Casta-Kaufteil, *supra* note 169, at 71–75, and Perlin, *supra* note 169, at 517.

322. In other words, the myth of the asexual senior could become the standard against which choices and behavior are evaluated. Although seniors may be currently asexual or non-sexual, they are assumed to have been previously *heterosexual*. This blanket assumption can operate to invalidate the choice of a same-sex partner. If senior sexuality is viewed as unusual, then senior *homosexuality* could be seen as deviant or abnormal.

323. Gay and lesbian elders are working against strong stereotypes regarding senior sexuality and homosexuality that consider any expression of sexuality to be abnormal, let alone the choice of a same-sex partner. Transgender elders, on the other hand, have to contend with deeply ingrained views of appropriate gender roles and gender expression.

324. The potential perils of probate is one of the reasons that LGBT elders may wish to minimize the amount of their property that is subject to probate.

325. See *In re Getty Estate*, 149 Cal. Rptr. 656, 660 (Cal. App. Ct. 1978). In the absence of marriage or its statutory equivalent, when a surviving same-sex partner is the primary beneficiary under the will, the decedent's intestate heirs will have standing to challenge the will because they would take under the rules of intestacy if the will were disregarded. *Id.* at 658.

or LGBT chosen family member, embedded bias can fuel claims of lack of capacity and undue influence and even lend credibility to charges of fraud and duress.<sup>326</sup>

Given the widespread incidence of dementia among the senior population, the estates of all elders are potentially vulnerable to claims of lack of capacity brought by disappointed heirs.<sup>327</sup> For this reason, estate planners dealing with elderly clients will often go to great lengths to memorialize and substantiate their clients' capacity,<sup>328</sup> including monitoring medication to make sure a client is functioning at peak when the documents are signed,<sup>329</sup> securing the equivalent of a doctor's note,<sup>330</sup> and videotaping the execution of the documents.<sup>331</sup> Special care should be taken with LGBT elders because a non-normative disposition to a surviving partner or a chosen family member can provide added proof that the elder lacked capacity. Although courts traditionally deny that mere eccentricity or foibles are necessarily indicative of lack of capacity,<sup>332</sup> in some instances, the simple fact of a non-traditional disposition may be sufficient to bring into question the capacity of the testator.<sup>333</sup> In other words, a non-traditional disposition may be perceived as so outside the realm of the plausible that the nature of the disposition itself may suggest that the

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326. Knauer, *supra* note 168, at 343.

327. One recent study found that the prevalence of dementia among individuals age seventy-one and older was 13.9%. Brenda L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 *NEUROEPIDEMIOLOGY* 125, 128 (2007). The percentage increased to 37.4% for individuals age ninety and older. *Id.*

328. See generally A.B.A. COMM'N ON L. & AGING & AM. PSYCHOLOGICAL ASS'N, *ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS* (2005), available at <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

329. *Id.* at 17 (noting "signs of disorientation and confusion could be due to a host of medical conditions and medication factors that are reversible").

330. *Id.* at 20 (noting "the attorney may want to consider referring the client for a *geriatric medical evaluation* to ensure there are no medical problems which may be transiently affecting capacity").

331. *Id.* (discussing "videotaping as documentation").

332. In *Estate of Wright*, the court upheld the testamentary disposition of an individual known for objectively bizarre behavior. *Estate of Wright*, 60 P.2d 434, 438 (Cal. 1936). The court explained: "testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act." *Id.*

333. As noted earlier, when a will names a surviving same-sex partner as a beneficiary, the testator's surviving heirs automatically have standing to contest the will because they would stand to take from the testator's estate if the will were set aside. See *supra* note 214 and accompanying text.

testator was not of "sound mind"<sup>334</sup> or was the victim of undue influence.<sup>335</sup>

#### IV. Conclusion

LGBT elders remain an underserved and under-studied population.<sup>336</sup> Until recently, they have been largely ignored by both the LGBT community and the broader community of seniors. For many members of this pre-Stonewall generation, self-acceptance was a long and difficult process.<sup>337</sup> Even those elders who later embraced the post-Stonewall discourse of pride and openness report that they have retreated to the closet in their later years in search of safety and security.<sup>338</sup> As a result, many LGBT elders are spending their final years fearful and closeted.

Older LGBT individuals who came of age post-Stonewall also express deep concern that they will encounter anti-LGBT bias as they

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334. See UNIF. PROBATE CODE § 2-501 (1993) (stating who may make a will). Next of kin used claims of lack of capacity during the first wave of the HIV/AIDS epidemic to challenge the wills of gay men who died from HIV/AIDS because, at the time, a high percentage of persons with HIV/AIDS developed dementia or other neurological conditions. Thomas J. Maier, *AIDS Victims' Bitter Legacy*, NEWSDAY, Oct. 2, 1988, at 4.

335. The doctrine of undue influence, in particular, seems tailor-made to invalidate wills that favor same-sex partners or even chosen family. Undue influence exists where a beneficiary induces the testator to favor that beneficiary over the testator's heirs, whom the law considers the natural objects of the testator's bounty. See generally Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997) (critiquing traditional undue influence doctrine). Madoff describes undue influence as "the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, causing him to make an instrument that he otherwise would not have made." *Id.* at 575. In some jurisdictions, undue influence is easier to prove where the beneficiary and the testator were in a "confidential relationship," as would be the case with a same-sex partner. *Id.* at 582-83. A confidential relationship can include an attorney-client or other fiduciary relationship, as well as any non-marital sexual or romantic relationship. *Id.* at 583-84. Upon a showing of a confidential relationship, the burden can shift to the proponent of the will to prove the absence of undue influence. See, e.g., *Estate of Reichel*, 400 A.2d 1268, 1270 (Pa. 1979) (after a clear and convincing showing of a confidential relationship, the burden shifts to the proponent of the will to disprove undue influence, provided certain other requirements are satisfied). The surviving same-sex partner is then faced with the task of proving that he or she did not influence the testator's disposition. See *id.*

336. See Broaddus, *supra* note 42.

337. See generally DUBERMAN, *CURES: A GAY MAN'S ODYSSEY* (2002) (describing pressure to submit to psychoanalysis to "cure" homosexuality).

338. See *supra* text accompanying notes 8-10 (discussing pressure to be closeted).

age.<sup>339</sup> Accordingly, the current crisis in LGBT aging has the potential to increase exponentially as the members of the baby boom generation turn sixty-five.<sup>340</sup> Today, there are an estimated 1.6 to 2.4 million LGBT elders, but by 2030 it is estimated that there will be between 2.88 and 4.32 million LGBT elders.<sup>341</sup>

Significant legal and policy reform will be required to address the concerns of LGBT elders. On a daily basis, LGBT elders struggle with the legal fragility of their chosen families,<sup>342</sup> financial insecurity,<sup>343</sup> and the fear of encountering anti-LGBT bias in a number of intimate venues, including their homes and doctors' offices.<sup>344</sup> Homo-

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339. The fear of gay and lesbian elders appeared to be shared by gay and lesbian baby boomers—the first post-Stonewall generation to benefit from increased openness and acceptance. See METLIFE, *supra* note 173. A 2006 national survey of baby boomers ages forty to sixty-one revealed that gay and lesbian baby boomers were more fearful of growing older than their non-gay peers. *Id.* at 13. Forty-one percent of gay and lesbian boomers reported that they were worried about growing older, whereas, in an earlier study, only thirty-three percent of non-gay boomers reported concern over aging. *Id.* In particular, the gay and lesbian boomers expressed a deep concern that they will be subject to discrimination on account of their sexual orientation or gender identity as they age. *Id.* at 14. Thirty-two percent of the gay men and twenty-six percent of the lesbians cited “discrimination due to their sexual orientation” as their “greatest concerns about aging.” *Id.* Eighteen percent indicated that anti-gay discrimination or prejudice was their number one fear. *Id.* For individuals who were in relationships, the fear of discrimination increased considerably. *Id.* A full thirty-three percent of the respondents who were in relationships listed fear of discrimination as their primary concern, suggesting they are worried about the legal fragility of their partnerships. *Id.* Nineteen percent reported that they have “little or no confidence that medical personnel will treat them with dignity and respect as LGBT people in old age.” *Id.* Lack of confidence in the medical profession was most pronounced among lesbians, with twelve percent of the lesbians surveyed responding that they have *absolutely no* confidence in the medical profession. *Id.*

340. The first members of the baby boomer generation began turning sixty-five in 2011. Dan Barry, *Boomers Hit New Self-Absorption Milestone: Age 65*, N.Y. TIMES, Dec. 31, 2010, <http://www.nytimes.com/2011/01/01/us/01boomers.html?pagewanted=all>.

341. As explained earlier, there is no clear estimate of the number of LGBT elders. See *supra* text accompanying notes 51–62. To estimate the number of LGBT elders, researchers multiply the number of seniors by the percentage of the population presumed to identify as LGBT. See *supra* note 57. By the year 2030, there will be an estimated seventy-two million seniors, representing close to twenty percent of the general population. PROJECTED FUTURE GROWTH, *supra* note 57. Using a range of between four and six percent, this projected growth in the senior population will translate to a corresponding increase in the number of gay and lesbian elders, raising their number by 2030 to between 2.88 million and 4.32 million.

342. For a discussion of “chosen family,” see *supra* text accompanying notes 81–99.

343. For a discussion of the financial condition of some LGBT elders, see *supra* text accompanying notes 73–80.

344. For a discussion of the threat of anti-LGBT bias, see *supra* text accompanying notes 171–210.

sexuality and gender variance remain stigmatized and politicized while anti-LGBT bias, harassment, and violence persist as part of the social fabric.<sup>345</sup> Some of the concerns of LGBT elders require systemic change, such as the increased recognition of chosen family or the enactment of broad anti-discrimination protections that extend beyond the workplace.<sup>346</sup> Other types of reforms do not have to wait for legislative action and can be instituted by private actors as a form of “best practices” for LGBT elders.<sup>347</sup> For example, private senior facilities could institute cultural competency training and anti-bullying policies.<sup>348</sup>

Advocacy groups are working to secure these reforms at the federal, state, and local levels.<sup>349</sup> In the meantime, estate planning documents can serve as the first line of defense for LGBT elders, and, as a result, elder law practitioners have a unique role to play in protecting the interests of LGBT elders.<sup>350</sup> When representing LGBT elders, how-

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345. See *supra* text accompanying notes 173–80 (discussing prevalence of anti-LGBT violence).

346. For example, the Employment Non-Discrimination Act (ENDA) would provide non-discrimination protection on the federal level for sexual orientation and gender identity, but only in the workplace. H.R. 1397, 112th Cong. (1st Sess. 2011); S. 811, 112th Cong. (1st Sess. 2011).

347. For example, the D.C. Office of Gay, Lesbian, Bisexual, and Transgender Affairs has published *Best Practices for Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Clients* that is geared toward service providers. D.C. OFFICE OF GAY, LESBIAN, BISEXUAL, AND TRANSGENDER AFFAIRS, *Best Practices for Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Clients*, <http://dslbd.dc.gov/DC/GLBT/Resources+and+Publications/Brochures+Report+s+and+Fact+Sheets/Best+Practices+for+Working+with+LGBT+Elders> (last visited Oct. 26, 2011).

348. For example, the Mautner Project offers a cultural competency training program for health care providers. MAUTNER PROJECT, *Removing the Barriers*, [http://www.mautnerproject.org/education/removing\\_barriers.cfm](http://www.mautnerproject.org/education/removing_barriers.cfm) (last visited Oct. 26, 2011).

349. On the federal level, Services, Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders (SAGE) is the oldest organization dedicated solely to advancing the interests of LGBT elders. *About Us*, SAGE, <http://www.sageusa.org/about/index.cfm> (last visited Nov. 5, 2011). SAGE partners with a variety of organizations on the state and local level. *Partnerships*, SAGE, <http://www.sageusa.org/programs/partnerships.cfm> (last visited Oct. 26, 2011).

350. See generally Kohn, *supra* note 22 (discussing cause-related lawyering and the elder rights movement). Of course, estate planning documents are ultimately insufficient to protect LGBT elders and ensure that their wishes are respected. The preference for traditional next of kin remains strong and estate planning documents are largely ineffective to make third parties respect certain choices. The insufficiency of estate planning documents reveals the fallacy of the argument that marriage equality is unnecessary because same-sex couples can use contract to secure their relationships.

ever, it is important to recognize that they often differ from their non-LGBT peers in significant ways and many of the specific challenges that they face are directly related to their sexual orientation or gender identity. In other words, lawyers who represent LGBT elders should exercise the same type of cultural competency that is urged of other service providers.<sup>351</sup> Such competency begins with an understanding and acknowledgment of these points of difference, including the wide demographic disparities, the continuing influence of pre-Stonewall history, the importance of the closet, the ever-present threat of anti-LGBT bias, and the lack of formal equality for LGBT individuals generally. These factors not only impair the ability of LGBT elders to age successfully, but they can greatly complicate the planning process.<sup>352</sup>

LGBT elders are disadvantaged relative to their non-LGBT peers because of their sexual orientation and gender identity. Their struggles, however, touch on many areas that are also of concern to elders more generally. For example, elders of all stripes overwhelmingly want to age in place.<sup>353</sup> Advancing years can amplify perceived vulnerabilities due to any number of characteristics or conditions, such as race, religion, gender, or disability.<sup>354</sup> The myth of the non-sexual senior infringes on the sexual autonomy of all elders regardless of sexual orientation.<sup>355</sup> Widespread ageism within the community at large limits opportunities and marginalizes the entire class of seniors.<sup>356</sup> All of these issues raise fundamental questions of justice, liberty, and equality.<sup>357</sup> They remind us that aging in the United States is first and foremost a civil rights issue.<sup>358</sup> In this way, the crisis in LGBT aging represents just one particular iteration of a much broader set of concerns

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351. These other service providers include home health aids, nurses, doctors, social workers, and staff at long-term care facilities.

352. See *supra* text accompanying notes 14–15 (discussing “risk of premature death”).

353. See Orel, *supra* note 97, at 233 (discussing desire to “age in place”).

354. See METLIFE, *supra* note 173 (discussing fears of the baby boomers regarding aging).

355. Evelyn M. Tennebaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 IND. L. REV. 676, 683 (2009).

356. Kohn, *supra* note 22, at 50–56 (discussing “myriad of civil rights concerns” that are pertinent to elders).

357. *Id.*

358. Kohn, *supra* note 44, at 1055. Kohn concludes that “the language of ‘rights’ and especially of ‘constitutional rights’ has very significant rhetorical power. It is time to use this power to generate the momentum needed to reform elder protection systems.” *Id.* at 1115.

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that ultimately will affect each and every one of us. Regardless of sexual orientation or gender identity, we all hope that one day we will be afforded the opportunity to age safely and without fear.

