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### After Obergefell: The Next Generation of LGBT Rights Litigation

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# AFTER *OBERGEFELL*: THE NEXT GENERATION OF LGBT RIGHTS LITIGATION

Nancy Levit\*

*“The nature of injustice is that we may not always see it in our own times.”<sup>1</sup>*

Leading up to *Obergefell v. Hodges*,<sup>2</sup> the road to marriage equality was uneven, to say the least. Several state courts in the 1970s rejected claims of the right to same-sex marriage, principally based on definitional circular reasoning—marriage was defined as being between one man and one woman—that avoided the critical constitutional question.<sup>3</sup> In 1993, the Hawaii Supreme Court was the first state high court to hold that a ban on same-sex marriage constituted sex discrimination under the state constitution.<sup>4</sup> This sparked a legislative response with the Hawaii legislature defining marriage as between one man and one woman.<sup>5</sup> This battle would replay itself in various forms in numerous states.<sup>6</sup>

The federal government quickly entered the same-sex marriage debate and enacted the federal Defense of Marriage Act in 1996.<sup>7</sup> DOMA purposefully restricted the definition of marriage to a union between one man and one woman, and it also said that no state was required to recognize the validity of a same-sex marriage performed in another state.<sup>8</sup> State legislatures that had not previously passed statutes to ban same-sex marriage leaped on the bandwagon and enacted mini-DOMAs.<sup>9</sup> And, not content to simply legislate against same-sex marriage, some states also passed constitutional amendments banning same-sex marriage.<sup>10</sup>

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\* © 2015 Nancy Levit, Curators’ and Edward D. Ellison Professor of Law, University of Missouri – Kansas City School of Law. This symposium had its genesis in the ambition and foresight of two student Articles Editors, Megan Galicia and Brynne Krause. They asked good questions about the possible aftermath of the decision long before the Supreme Court issued its opinion.

<sup>1</sup> *Obergefell v. Hodges*, S. Ct. 2584, 2598 (2015).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); see Nancy J. Knauer, *LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality*, 24 TEX. J. WOMEN, GENDER & L. 1, 20 n.105 (2014).

<sup>4</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>5</sup> HAW. REV. STAT. § 572C-6 (1997).

<sup>6</sup> See, e.g., Leslie C. Griffin, *Hobby Lobby: The Crafty Case That Threatens Women’s Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 678 (2015) (“The Vermont legislature, for example, passed a civil unions bill after the Vermont Supreme Court ruled in 1999 that unequal benefits for gays and heterosexuals violated the state’s Common Benefits Clause.”); Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 42 (2015) (detailing the history of California’s voter-enacted Proposition 8, which stated that only marriages between one man and one woman would be valid, through the 2013 U.S. Supreme Court decision in *Hollingsworth v. Perry*, overturning Proposition 8).

<sup>7</sup> 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012), *invalidated by Windsor v. United States*, 133 S. Ct. 2675 (2013).

<sup>8</sup> *Id.*

<sup>9</sup> Steve Sanders, *Mini-DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 14-16 (2014).

<sup>10</sup> Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN’S L. REV. 143, 161 (2015) (“In all,

Within less than two decades the Supreme Court reversed its position on the criminalization of sexual intimacy between consenting homosexuals. In 2003, in *Lawrence v. Texas*,<sup>11</sup> the U.S. Supreme Court reversed its earlier decision in *Bowers v. Hardwick*<sup>12</sup> that had allowed prosecution for consensual sodomy. That same year, the Massachusetts Supreme Judicial Court held that the state's legislative ban on same-sex marriage "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."<sup>13</sup> In 2008, the California Supreme Court followed this lead and held that discrimination on the basis of sexual orientation should be evaluated on the basis of strict scrutiny under the California constitution and found that allowing only opposite-sex couples to marry was unconstitutional.<sup>14</sup> Over the course of the next several years, other states and federal district and appellate courts followed in finding bans on same-sex marriage unconstitutional.<sup>15</sup> In 2013, in *Windsor v. United States*, the U.S. Supreme Court struck the definitional provision of DOMA as an unconstitutional liberty deprivation.<sup>16</sup> As of June 26, 2015, when the U.S. Supreme Court handed down the Obergefell decision, 37 states and the District of Columbia recognized same-sex marriage.<sup>17</sup> While this turnaround was rapid in constitutional time, it was painfully slow in the lived experiences of LGBT couples who were denied the right to marry.

In Obergefell, the U.S. Supreme Court held, 5-4, that both the Due Process and Equal Protection Clauses of the Fourteenth Amendment require states to issue marriage licenses for same-sex marriages and to recognize same-sex marriages when those marriages have been licensed lawfully in other jurisdictions:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that

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twenty-nine states, most of which already had legislative prohibitions on the books, passed state constitutional amendments limiting relationship recognition for same-sex couples.”)

<sup>11</sup> 539 U.S. 558 (2003).

<sup>12</sup> 478 U.S. 186 (1986).

<sup>13</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (2003).

<sup>14</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>15</sup> See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).

<sup>16</sup> *Windsor*, 133 S. Ct. at 2695.

<sup>17</sup> Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR, June 26, 2015, <http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages>.

they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.<sup>18</sup>

*Obergefell v. Hodges*<sup>19</sup> is essentially this generation's *Loving v. Virginia*.<sup>20</sup> Yet, the sad reality is that the right to same-sex marriage is just the beginning of a conversation. As Vice President Joe Biden pointed out, "LGBT people can get married in the morning and fired in the afternoon because of their sexual orientation or gender identity in 28 states."<sup>21</sup> Since the *Obergefell* decision, the backlash has been swift, with a number of public officials claiming the "right" to ignore the command of the U.S. Supreme Court and refuse to issue marriage licenses because of individual religious objections.<sup>22</sup> Despite public accommodations laws, some service providers are refusing to serve gay couples.<sup>23</sup> These efforts toward nullification are reminiscent of the resistance after *Brown v. Board of Education*.<sup>24</sup>

The aftermath of *Obergefell* is just beginning. The authors in this symposium evaluate the opinion, reflect on it, and forecast for the future the anticipated legal and social consequences of the Court's recognition of the constitutional right to marry a same-sex partner.

The batting line-up<sup>25</sup> for this Symposium is spectacular.

Like many of the contributors to this symposium, **Elvia Arriola** has been at the forefront of writing and theorizing about LGBT rights since a decade before the acronym came into being.<sup>26</sup> Her contribution to this symposium, *Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection*,<sup>27</sup> focuses on a particular sub-group of queer folks: LGBT

<sup>18</sup> *Obergefell*, 135 S. Ct. at 2608.

<sup>19</sup> *Id.*

<sup>20</sup> 388 U.S. 1 (1967); see also Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIRCUIT 107, 113 (2015) (calling *Loving* "the closest analogous case").

<sup>21</sup> *Married in the Morning, Fired in the Afternoon: The State of LGBT Anti-Discrimination Laws in the U.S.*, TOWLEROAD, Aug. 3, 2015, <http://www.towleroad.com/2015/08/married-in-the-morning-fired-in-the-afternoon-the-state-of-lgbt-anti-discrimination-laws-in-the-u-s>.

<sup>22</sup> See Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES, Sept. 3, 2015, [http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?\\_r=0](http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=0).

<sup>23</sup> *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453 (Colo. App. Aug. 13, 2015) (holding that a bakery's refusal to sell a wedding cake to a gay couple violated the state's antidiscrimination statutes).

<sup>24</sup> See, e.g., JACK BASS, UNLIKELY HEROES (1981); MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007).

<sup>25</sup> Forgive me. The Kansas City Royals just won the World Series.

<sup>26</sup> Elvia R. Arriola, *Coming Out and Coming to Terms with Sexual Identity*, 68 TUL. L. REV. 283(1993); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994); Elvia R. Arriola, *Sexual Identity and the Constitution, Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263 (1988).

<sup>27</sup> 84 UMKC L. REV. 615 (2016).

undocumented migrants who are placed in immigration detention. She weaves in narratives of the lived experiences of these people—a technique that contributed powerfully to the recognition of the right to same-sex marriage—to reveal the specific obstacles and humiliations suffered by members of this group. While Arriola’s article spotlights one group of queer rights-seekers, her article explores a much larger theme of how to open doors, both metaphorically and legally, for LGBT outsiders.

It is so fitting that **Carlos Ball** is one of the authors of this symposium. He was one of the first law professors in the nation to broach the discussion about same-sex marriage nearly twenty years ago.<sup>28</sup> He has gone on to address, with empirical social science evidence, the impact of LGBT parenting on children.<sup>29</sup> For many years Professor Ball has been at the forefront of gay rights philosophy discourse as well as its constitutional jurisprudence.<sup>30</sup>

His contribution, *Bigotry and Same-Sex Marriage*, evaluates the role of bigotry in the opposition to same-sex marriage.<sup>31</sup> He points out, on the one hand, that not all and probably not even most people who defend the traditional view of marriage as between opposite-sex individuals are bigoted. Yet, on the other hand, Ball critiques the argument that those who make constitutional claims about marriage equality are implicitly accusing opponents of bigotry. Ball points out a serious omission in the Court’s decision in *Obergefell*: while it addressed the consequences of same-sex marriage bans, it ignored the motivations behind those bans. It is important to understand this “sanitized” version of the history of the same-sex marriage debate because, going forward into the future of LGBT rights, it will be necessary to evaluate which arguments are “judgments about the attributes, characteristics, and values of same-sex relationships.”<sup>32</sup>

**Naomi Cahn** and **June Carbone** are the preeminent theorists in this country on various states’ legal rules regarding marriage and the social meaning

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<sup>28</sup> Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997).

<sup>29</sup> Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253. In case you were wondering, the punch line is that children raised by gay and lesbian parents are no more likely to become LGBT than the children of straight/heterosexual parents, and show no appreciable differences along dimensions of psychosocial development, but do seem to display less sex stereotyping, and were seen by parents and teachers as “more affectionate, more responsive, and more protective toward younger children.” *Id.* at 294.

<sup>30</sup> Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443 (2000); Carlos A. Ball, *Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory*, 26 LAW & SOC. INQUIRY 271 (2001); Carlos A. Ball, *The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men*, 38 LOY. U. CHI. L.J. 379 (2007); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371 (2002); Carlos A. Ball, *Why Liberty Judicial Review Is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1 (2011).

<sup>31</sup> Carlos Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 637 (2016).

<sup>32</sup> *Id.* at 658.

of empirical data about family formation.<sup>33</sup> Cahn and Carbone observe that in *Obergefell*, the Supreme Court upheld same-sex marriage rights, but left open another important determinant of family formation—parenthood. The marital presumption, that children born during a marriage are children of the marital partners, still exists, and presumably will apply to a same-sex married couple as well. However, same-sex and opposite sex couples are not situated similarly in relation to the presumption. Cahn and Carbone explore the complexities of the continued existence of the marital presumption, particularly in light of the states' differential approaches to the regulation of surrogacy and when states confer parental status on intended parents. They conclude:

As *Obergefell* prompts a larger cultural conversation about the meaning of marriage, this leads to increased examination of the link between marriage and parenthood, to further analysis and, perhaps, broader acceptance of surrogacy, and, potentially, to wider acknowledgement of the role of three parents in a child's life.<sup>34</sup>

Professor **Mary Anne Case's** scholarship is a panoramic sweep of theorizing about the laws regarding sexual orientation, from constitutional history,<sup>35</sup> to contemporary statutory frameworks and proposed legislation,<sup>36</sup> from constitutional theory to jurisprudence.<sup>37</sup> Her article for this Symposium, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, centers on what the Supreme Court left out of *Obergefell* and *Windsor*. What is missing from these same-sex marriage opinion is the sex, in two ways: the Court omitted analysis about prohibitions on same-sex marriage as sex discrimination and also elides any discussion of sexual expression or sexuality.<sup>38</sup>

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<sup>33</sup> See NAOMI CAHN & JUNE CARBONE, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2011); Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459 (2007); Naomi Cahn & June Carbone, *Growing Inequality and Children*, 23 AM. U. J. GENDER SOC. POL'Y & L. 283 (2015); June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871 (2013).

<sup>34</sup> June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 661 (2016).

<sup>35</sup> Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993).

<sup>36</sup> Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333 (2014).

<sup>37</sup> Mary Anne Case, *A Lot to Ask: Review Essay of Martha Nussbaum's From Disgust to Humanity: Sexual Orientation and Constitutional Law*, 19 COLUM. J. GENDER & L. 89 (2010); Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015).

<sup>38</sup> Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 UMKC L. REV. 673 (2016).

Like many of the other authors in this Symposium, **David Cruz** has been writing about LGBT issues for the better part of two decades.<sup>39</sup> Many of his previous articles address changing cultural views about sexuality, sexual orientation, and gender and the evaluation of identity issues in constitutional doctrine. In his contribution to this Symposium, *Transgender Rights After Obergefell*,<sup>40</sup> Cruz points out that the decision assists transgender people in attaining recognition for their marriages no matter their pre- or post-transition sex. But *Obergefell* recognizes only a small slice of identity rights as deserving of constitutional protection. Many battles remain that, as Cruz notes, are “critical to trans persons’ safety and security,” such as passports, driver’s licenses, and school records.<sup>41</sup> And, unlike *Obergefell*, which accepted “a right to marry that was already repeatedly recognized as fundamental in Supreme Court precedents,”<sup>42</sup> other rights may be more difficult to secure because they lack the foundational precedent.

**Suzanne Goldberg**, now Columbia’s Executive Vice President for University Life and Director of the Law School’s Center for Gender and Sexuality Law, has been on the front lines of litigating LGBT rights cases. Before she entered the academy, she was a senior attorney with the Lambda Legal Defense and Education Fund, where she served as co-counsel on two groundbreaking U.S. Supreme Court cases, *Romer v. Evans* and *Lawrence v. Texas*.<sup>43</sup> For two decades now, she has written about the global politics of LGBT persecution,<sup>44</sup> anti-gay initiatives,<sup>45</sup> how to litigate political inequalities,<sup>46</sup> and, of particular relevance to the present sea change in LGBT rights, constitutional tipping points.<sup>47</sup>

In her article for this Symposium, Goldberg begins with the stories of people she used to represent in practice—stories of love and loss experienced by LGBT parents, partners, and children, who suffered from the absence of legal

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<sup>39</sup> See, e.g., David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999); David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805 (2011); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002); David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001); David B. Cruz, *United States v. Windsor, Marriage, and the Dangers of Discernment*, 48 U.C. DAVIS L. REV. 505 (2014).

<sup>40</sup> 84 UMKC L. REV. 693 (2016).

<sup>41</sup> *Id.* at 696.

<sup>42</sup> *Id.* at 700.

<sup>43</sup> Joy Y. Wang, *Suzanne B. Goldberg: Liberty and Justice*, COLUM. L. SCH. MAG., Summer 2011, <http://www.law.columbia.edu/magazine/60105/suzanne-b-goldberg>.

<sup>44</sup> Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT’L L.J. 605 (1993).

<sup>45</sup> Suzanne B. Goldberg, *Facing the Challenge: A Lawyer’s Response to Anti-Gay Initiatives*, 55 OHIO ST. L.J. 665 (1994).

<sup>46</sup> Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002).

<sup>47</sup> Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006).

recognition of their family relationships.<sup>48</sup> She points out that while the *Obergefell* decision is an important cultural signifier, some companies are withdrawing partner benefits because of the availability of same-sex marriage. She urges family recognition as an independent and more robust theory of rights which would provide more comprehensive health care coverage as well as the right to be free from antigay discrimination.

Dean **Tiffany Graham** has written about same-sex marriage and the theory of the liberal state,<sup>49</sup> the prospects of domestic partner benefits in a world of mini-DOMAs,<sup>50</sup> and concepts of immutability in the early gay rights cases.<sup>51</sup> Graham has been a scholar who draws on history, jurisprudence, and large-scale arguments about constitutional structure in the quest for marriage equality. Her contribution to this Symposium, *Obergefell and Resistance*, traces the types of resistance leading up to the decision, and documents the new patterns of delays and requests for religious accommodation that have followed the decision in very short order.<sup>52</sup>

**Aaron House**, formerly a professor at UMKC School of Law, is now a partner at House Packard, a law firm that specializes in LGBT rights law. Aaron left the academy especially to protect people who identify as lesbian, gay, bisexual, or transgendered.<sup>53</sup> A co-founder and member of the Board of Directors of KC Legal (Kansas City LEsbian, Gay, and Allied Lawyers), Aaron has been recognized as a Rising Star in Missouri and Kansas by Super Lawyers. In his article, *Obergefell's Impact on Wrongful Death in Missouri and Kansas*, House spins *Obergefell* into the future, where he sees a number of “relatively unexplored and certainly untried” benefits stemming from the decision.<sup>54</sup> Among these claims are suits by same-sex spouses and non-genetically related children of same-sex parents, under presumptive parentage statutes, for loss of consortium and wrongful death.

**Nancy Knauer**'s many years of scholarship on LGBT issues have often focused on groups that are in the shadows (within an already at times closeted population). Her earlier scholarship focused on victims of same-sex domestic violence, LGBT youths, LGBT elders, and people harmed by the

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<sup>48</sup> Suzanne B. Goldberg, *Reflections on Obergefell and the Family Recognition Framework's Continuing Value*, 84 UMKC L. REV. 707 (2016).

<sup>49</sup> Tiffany C. Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA WOMEN'S L.J. 53 (2008).

<sup>50</sup> Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?*, 17 VA. J. SOC. POL'Y & L. 83 (2009).

<sup>51</sup> Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169 (2011).

<sup>52</sup> Tiffany C. Graham, *Obergefell and Resistance*, 84 UMKC L. REV. 715 (2016).

<sup>53</sup> Aaron M. House, HousePackard, LLC, <http://www.housepackard.com/aaron/>.

<sup>54</sup> Aaron M. House, *Obergefell's Impact on Wrongful Death in Missouri and Kansas*, 84 UMKC L. REV. 733, 734 (2016).



heteronormative tax code.<sup>55</sup> In this Symposium, she writes about the push toward religious exemptions, which began before the *Obergefell* decision and have skyrocketed since. These range from bills in state legislatures that are particularized “Religious Freedom Restoration Acts” to sweeping state enactments that allow private businesses as well as clergy members to refuse services to LGBT individuals and couples based on religious objections. Knauer makes it clear that when anti-gay religious beliefs, fully protected under the Free Exercise Clause, “translate into public action they traditionally step over the line and become subject to state regulation.”<sup>56</sup> Permitting religious exemptions to undermine civil rights has no theoretical limitation—it would not end with marriage rights, but instead would reach vaccinations, gun control, and environmental standards. Knauer concludes that religious exemptions should not “function as trumps and hold objectors harmless from laws of general applicability.”<sup>57</sup>

**Zachary Kramer**’s scholarship centers on discrimination based on sexual orientation and possible remedies for it.<sup>58</sup> While his focus is on LGBT rights in the employment arena, he often—as he does with his contribution to this Symposium—looks both backward and forward in time. In his article, *Before and After Obergefell*, Kramer writes that before the decision, the issue of marriage equality already seemed “stale because it is an idea who time should have come by now.”<sup>59</sup> After the decision, Kramer worries about the “paradox” that approval of same-sex marriage may shut the door on other “options for formal coupling,” such as domestic partnerships.<sup>60</sup> It is an important reminder that while *Obergefell* was essential to marriage equality, people will stand in various different relations to the decision, and it is vital to recognize that.

**Kim Pearson**’s scholarship explores the ways in which race and sexual orientation factor in adoption and custody decisions.<sup>61</sup> Her larger project over

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<sup>55</sup> Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998); Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1 (2009); Nancy J. Knauer, *LGBT Youth: Reconciling Pride, Family, and Community*, 23 TEMP. POL. & CIV. RTS. L. REV. 297 (2014); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999).

<sup>56</sup> Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749, 782 (2016).

<sup>57</sup> *Id.* at 795.

<sup>58</sup> Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651 (2009); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U.L. REV. 205 (2009); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891 (2014); Zachary A. Kramer, *Some Preliminary Thoughts on Title VII’s Intersexions*, 7 GEO. J. GENDER & L. 31 (2006).

<sup>59</sup> Zachary A. Kramer, *Before and After Obergefell*, 84 UMKC L. REV. 797, 798 (2016).

<sup>60</sup> *Id.* at 801.

<sup>61</sup> See Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 MICH. J. GENDER & L. 149 (2012); Kim H. Pearson, *Legal Solutions for APA Transracial Adoptees*, 3 UC IRVINE L. REV. 1179 (2013); Kim H. Pearson, *Mimetic Reproduction of Sexuality in Child Custody Decisions*, 22 YALE J.L. & FEMINISM 53 (2010); Kim H. Pearson, *Sexuality in Child Custody Decisions*, 50 FAM. CT. REV. 280 (2012).

time has been to evaluate the roles of discourse and social behavior shape norms regarding sexual orientation.<sup>62</sup>

In the aftermath of *Obergefell*, religious individuals and groups are making claims that expansion of LGBT rights intrudes on their free exercise rights. Pearson anticipates an argument that religionists may make—“by analogizing religiosity to other identity traits that are considered innate and receive legal protection.”<sup>63</sup> She then explores the science of religiosity, concluding that brains are not hard wired to be religious, let alone any particular type of religion. She distinguishes the extension of legal protection to parents in custody situations to raise their children in a religious environment from the claims that religious objectors to LGBT rights somehow deserve protection because their religious beliefs are innate.

**Ruthann Robson** is acknowledged as one of the founders and contemporary leading figures of lesbian legal theory, a pioneer of the storytelling or narrative movement in legal philosophy, and one who, through her energy and intellectual courage, has helped transform lesbian jurisprudence into a powerful social movement.<sup>64</sup> The other half of Professor Robson’s writings are in the humanities: she is an exceedingly accomplished author of fiction, poetry, and creative nonfiction.<sup>65</sup>

Robson’s contribution to this Symposium engages in a fascinating trope: she answers the question of what the *Obergefell* decision would look like if Justice Ruth Bader Ginsburg, instead of Justice Anthony Kennedy, had authored the Court’s opinion.<sup>66</sup> The short answer, according to Robson, is that “it would have been more doctrinally rigorous; it would have been less sentimental; and it would have jurisprudential integrity.”<sup>67</sup>

**David Schraub** has recently burst onto the national scene as an accomplished and inspiring scholar.<sup>68</sup> In earlier works, he has addressed the dark side of social movement victories—which can create, as he terms it, “sticky,”

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<sup>62</sup> Kim H. Pearson, *Patriotic Homosocial Discourse*, 12 WM. & MARY J. WOMEN & L. 627, 629 (2006); Kim Hai Pearson, *The Sacra of LGBT Childhood*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 55 (2014).

<sup>63</sup> Kim H. Pearson, *Innate Religious Identity*, 84 UMKC L. REV. 803, 834 (2016).

<sup>64</sup> See *Symposium to Honor the Work of Professor Ruthann Robson*, 8 N.Y. CITY L. REV. 313 (2005). See also RUTHANN ROBSON, *LESBIAN OUTLAW: SURVIVAL UNDER THE RULE OF LAW* (1992); RUTHANN ROBSON & MARTIN DUBERMAN, *GAY MEN, LESBIANS, AND THE LAW (ISSUES IN GAY & LESBIAN LIFE)* (1995); Ruthann Robson, *Thirteen False Blackbirds*, 37 N.Y.U. REV. L. & SOC. CHANGE 315 (2013).

<sup>65</sup> See, e.g., RUTHANN ROBSON, *A/K/A* (1997); RUTHANN ROBSON, *ANOTHER MOTHER* (1995); RUTHANN ROBSON, *CECILE: STORIES* (1991); Ruthann Robson, *Footnotes: A Story of Seduction*, 75 UMKC L. REV. 1181 (2007).

<sup>66</sup> *Justice Ginsburg’s Obergefell v. Hodges*, 84 UMKC L. REV. 837 (2016).

<sup>67</sup> *Id.* at 838.

<sup>68</sup> See, e.g., David Schraub, *The Perils and Promise of the Holder Memo*, 2012 CARDOZO L. REV. DE NOVO 187 (2012); David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437 (2010).

instead of slippery slopes that slow down progress toward equality.<sup>69</sup> In his contribution to this Symposium, *The Siren Song of Strict Scrutiny*, Schraub argues that part of the power in the *Obergefell* holding is that it reached the conclusion of marriage equality through rational basis review.<sup>70</sup> Looking backward, he notes that efforts to make sexual orientation into a suspect classification guided some litigation efforts. The benefit of heightened scrutiny is that it targets overt and purposeful discrimination; the bane of it is that it can reinforce marginalization. Going forward, Schraub urges steers away from strict scrutiny “as a means of directly addressing ongoing inequalities.”<sup>71</sup>

From early writings on the prospects for same-sex marriage and on making sex discrimination arguments for LGBT rights,<sup>72</sup> to work the social and legal conditions for LGBT individuals in cyberspace,<sup>73</sup> to work on immutability arguments in sexual orientation rights debates,<sup>74</sup> to his book, *The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation*,<sup>75</sup> Edward Stein’s pathbreaking scholarship is at the intersection of sexual orientation, bioethics, and philosophy. In his contribution for this Symposium, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, Stein takes on the “polygamy challenge” to same-sex marriage rights.<sup>76</sup> During oral argument in *Obergefell*, Justice Alito questioned whether a ruling that upheld same-sex marriage would open the door to bigamous or polygamous marriages. Stein makes several important distinctions between same-sex and multiple marriages, centering on the idea that “in contrast to the ‘immutable’ desire of people who want to marry people of the same sex, the desire of people who want to marry more than one person at the same time is ‘mutable,’ and thus, the latter desire need not be accommodated by the state.”<sup>77</sup>

### MARC POIRIER

The *UMKC Law Review* dedicates this symposium to the memory of Marc Poirier. Marc was a Professor of Law and the Martha Traylor Research

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<sup>69</sup> David Schraub, *Sticky Slopes*, 101 CAL. L. REV. 1249 (2013).

<sup>70</sup> David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859 (2016).

<sup>71</sup> *Id.* at 865.

<sup>72</sup> Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001); Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611 (2004); Edward Stein, *Symposium on Abolishing Civil Marriage: An Introduction*, 27 CARDOZO L. REV. 1155 (2006).

<sup>73</sup> Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159 (2003).

<sup>74</sup> Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597 (2014).

<sup>75</sup> EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* (2001).

<sup>76</sup> 84 UMKC L. REV. 871, 872 (2016).

<sup>77</sup> Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*. 84 UMKC L. REV. 871, 872 (2016).

Scholar at Seton Hall School of Law. From his early work on gender stereotypes,<sup>78</sup> to articles about the intersection of property and LGBT theory,<sup>79</sup> Marc was a brilliant scholar, and one who never shied from having difficult conversations.<sup>80</sup>

Marc was writing a contribution for this symposium, with a tentative title of “When *Obergefell* met *Hobby Lobby*,” when we received word that he would be unable to complete the piece. Below is the precis of the article he was planning to write, sent in an email:

I have wanted the opportunity to articulate my peculiar place/space/identity view of the exception claimed under the federal RFRA in *Hobby Lobby* and that will be claimed under mini-RFRAs in many states. Indiana appears to be leading the way. I see this as a continued localism fight between on the one hand same-sex couples who wish their legal recognition to carry over into privately owned public accommodations and other businesses, so that they have a uniform playing field in which to undertake their microperformances as a married couple; and businesses and other institutions (e.g., Wheaton College) which wish to define the local territory they own in terms of a religiously-based definition of marriage that allows them to perform their religious identity by excluding or making invisible same-sex couples and marriages. I suppose one question here is whether *Hobby Lobby* (RFRA protects against a statutory requirement in the Affordable Care Act) still applies when the protection being resisted on religion grounds comes from a constitutional guarantee, which you anticipate *Obergefell* will declare. Which might get us to the constitutional issue not reached in *Hobby Lobby*, but lurking in *Hosanna-Tabor*.<sup>81</sup>

I include this description of his topic in the hopes of provoking thought regarding his interesting take on the issue—which, frankly, was a talent of Marc’s. A brief Westlaw search of his name shows more than four hundred citations to the influence of his work, and numerous additional footnotes thanking Marc for his generosity of time and talent in reviewing drafts of other people’s work and providing helpful advice.

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<sup>78</sup> Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOK. L. REV. 1073 (1999); Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271 (2003).

<sup>79</sup> Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343 (2008).

<sup>80</sup> Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3 (2008); Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425 (2009); Marc R. Poirier, *Place, Space, and Territory as Frontiers for LGBTQ Scholarship*, 19 LAW & SEXUALITY 188 (2010).

<sup>81</sup> Email from Marc Poirier to Nancy Levit, Mar. 28, 2015, on file with author. Oh, I wish we could have read the article.

A tribute to Marc appeared on *The Faculty Lounge* blog after his passing.<sup>82</sup> Commenters remarked on Marc's brilliance, his kindness, and his other-directedness. Mark Wojcik capsulized it well when he said: "Marc was a model for the best in academia: he shared ideas and applied them to make the world a better place."<sup>83</sup> We hope to carry on Marc's tradition in this symposium.

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<sup>82</sup> Alfred Brophy, *Marc Poirier (1952-2015)*, THE FACULTY LOUNGE, Aug. 3, 2015, <http://www.thefacultylounge.org/2015/08/marc-poirier.html>.

<sup>83</sup> *Id.*