



AFTER “I DO”

BY JACOB R. MCMILLIAN

On Jan. 16, the U.S. Supreme Court granted certiorari to four new cases on same-sex marriage arising out of the U.S. Court of Appeals for the Sixth Circuit, with oral argument in April 2015. Although the circuit split created by the Sixth Circuit's decision made final review seem imminent, the Supreme Court's decision to grant cert was nonetheless celebrated by lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights activists and traditional marriage supporters alike. The Supreme Court, in a surprising move back in October, denied certiorari to seven marriage cases from three circuits (the difference then being, perhaps, the lack of a circuit split among the appellate courts). This time around, the Court agreed to rule on two separate issues: whether states had the power to ban same-sex marriages and whether they could refuse to recognize those marriages performed out of state. Judicial clarity on the issue of marriage equality will thus come in summer 2015.

Without question, the LGBTQ rights community has seen impressive momentum with regard to marriage equality over the past few years, particularly since the Supreme Court's ruling in *United States v. Windsor* in 2013. In fact, even Justice Antonin Scalia—a vocal marriage equality critic—predicted a groundswell in favor of marriage equality in his dissent in *Windsor*:

In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. ... How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. ... In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.¹

True to Justice Scalia's prediction, both federal and state courts began relying on the *Windsor* holding to overturn state bans on same-sex marriage, with more than 60 court victories for the freedom to marry since June 2013 (compared with five cases upholding marriage bans in the same time frame). One Ohio judge mentioned Justice Scalia in a federal district court opinion declaring Ohio's same-sex marriage ban unconstitutional. In *Obergefell v. Wymyslo*, Judge Timothy Black from U.S. District Court for the District of Southern Ohio wrote:

And now it is just as Justice Scalia predicted—the lower courts are applying the Supreme Court's decision, as they must, and the question is presented whether a state can

do what the federal government cannot—i.e., discriminate against same-sex couples ... simply because the majority of the voters don't like homosexuality (or at least didn't in 2004). Under the Constitution of the United States, the answer is no. ...²

Interestingly, *Obergefell* is one of the four cases granted cert in January. It seems as if Justice Scalia's proverbial shoe has arrived; whether his forecast holds true will be seen this month.

The waterfall of legal, legislative, and social victories experienced by LGBTQ people over the past few years is certainly encouraging to those hoping for a Supreme Court decision that affirms the right to marry for same-sex couples. In fact, many media organizations and LGBTQ advocacy groups (as well as some advocacy groups supporting traditional marriage) have already projected a win for LGBTQ people and their supporters. But assuming the Supreme Court rules in favor of marriage equality, what does that mean for the continuing LGBTQ rights movement? Of course, the obvious and immediate answer is celebration: Same-sex couples and other LGBTQ advocates have been fighting for the freedom to marry since the 1970s, and the nation's largest and most influential LGBTQ advocacy organizations have made marriage equality their prime objective ever since.

That such advocacy groups would target marriage equality is unsurprising: Favorable public opinion of gays, lesbians, and bisexuals (and, to a growing extent, transgender men and women) has increased since LGBTQ people have come out of the closet and have become more visible. Framing the marriage equality discussion in terms of allowing the people we know—our friends, family members, colleagues, or neighbors—the freedom to marry who they love has obvious personal and rhetorical appeal. But it is important to remember that marriage equality is a benchmark—not the finish line—in the broader LGBTQ rights movement. Significant issues continue to face LGBTQ Americans (and non-Americans) of all ages, political persuasions, and geographic locations, and it is essential that LGBTQ advocates and their allies tackle these issues with the same fervor and resources that were afforded to the marriage equality movement. Indeed, transgender rights, the continued battle against HIV and AIDS, and LGBTQ discrimination, among other issues, are equally worthy of attention—from the LGBTQ and allied community as well as the nation at large. The momentum for LGBTQ rights is stronger than ever, and while Justice Scalia and others might be "waiting for the other shoe" to drop with regard to marriage equality, the LGBTQ rights movement is already looking ahead to its next frontier.

HIV/AIDS Advocacy

On June 5, 1981, the Centers for Disease Control (CDC) published a Morbidity and Mortality Weekly Report describing a rare

lung infection occurring in five young, previously healthy men in Los Angeles.³ Each of the men also presented other unusual infections that indicated severely depressed immune systems. That same day, the *Los Angeles Times* and the Associated Press covered the bizarre health story, and within a week doctors from across the country flooded the CDC with reports of similar cases of young, otherwise healthy men being diagnosed with infections indicative of severe immunodeficiency.⁴

In addition to opportunistic infections like pneumonia caused by a diminished immune system, the CDC also received reports of young, white men in New York and California being diagnosed with Kaposi's sarcoma, an unusually aggressive form of cancer that normally only affected elderly men of Mediterranean or Jewish heritage and young African men.⁵ On July 3, 1981, less than a month after the CDC released its initial report, *The New York Times* reported 41 cases of Kaposi's sarcoma among young men in New York and California, eight of whom had died less than 24 hours after diagnosis.⁶ Only one characteristic connected each of the men: They were all gay. By the end of 1981, roughly five new diagnoses of severe immunodeficiency and Kaposi's sarcoma in gay men were being reported each week.⁷ Years later, people would look back on those initial reports from the summer of 1981 and realize that this was the beginnings of the AIDS epidemic.

Over the course of the next two-and-a-half decades, AIDS claimed more than 530,000 lives in the United States, with the overwhelming majority of victims being gay men.⁸ In 1995 alone, 48,979 Americans died of the disease.⁹ To be sure, the responses (or complete lack thereof) from the federal government, the medical community, the media, and the gay male community during the early days of the crisis could have shown more urgency. Given that the disease, at first, seemed only to affect gay men (indeed, the disease was originally termed Gay-Related Immunodeficiency, or GRID), intense stigma and bias affected the way the country confronted the crisis. Federal funding for research was hard to come by, many health professionals were reluctant to attend to the dying men in their hospitals, and many gay men (most of whom had spent significant portions of their lives accepting their sexuality) were unwilling to abandon their own sexual liberation in favor of safer sex practices. Additionally, President Ronald Reagan, although credited as being the first sitting president to even say the word "AIDS" in a press conference, refused to even publicly acknowledge the existence of the disease until 1985—more than four years after the initial diagnoses.¹⁰ In the now-famous anthology on the AIDS crisis, *And the Band Played On*, journalist and author Randy Shilts comes to this conclusion:

Later, everybody agreed that the baths should have been closed sooner; they agreed health education should have been more direct and timely. And everybody also agreed blood banks should have tested blood sooner, and that a search for the AIDS virus should have been started sooner, and that scientists should have laid aside their petty intrigues. Everybody subsequently agreed that the news media should have offered better coverage of the epidemic much earlier, and that the federal government should have done much, much more. By the time everybody agreed to all this, however, it was too late. Instead, people died. Tens of thousands of them.¹¹

It is through this important historical lens that the LGBTQ community and the nation at large view and confront the current state of HIV/AIDS advocacy. Remarkable progress has been made with regard to HIV/AIDS awareness, education, research, prevention, and ultimate health outcomes: With early and effective medical treatment, people diagnosed with HIV (the virus that causes AIDS) can often expect to live as long as their HIV-negative peers, and new drugs (called pre-exposure prophylactics) are on the market that help prevent HIV transmission.¹² But while an HIV diagnosis is no longer necessarily a death sentence, and while we have come to understand that HIV and AIDS can affect people from all walks of life, the epidemic continues to disproportionately affect gay and bisexual men, transgender women, and communities of color, particularly in the South. New HIV infection rates, while dramatically lower than in decades past, have remained constant over the past few years at roughly 50,000 per year, with men who sleep with men accounting for roughly two-thirds of those new infections.¹³ Causing even more alarm, despite the fact that infection rates among the *general public* remained constant between 2008 and 2010, infections among men who sleep with men increased by 22 percent in that same time frame.¹⁴

One of the primary barriers to effective HIV/AIDS prevention is the continued stigma and discrimination directed at people diagnosed with HIV or AIDS. Much of this stigma is rooted in misunderstandings of how HIV is spread and sex-negative attitudes that continue to associate HIV and AIDS with behaviors that society disapproves of, such as homosexuality (particularly for people who remain in the closet and in communities of color), injection drug use, sex work, and infidelity. In particular, the World Health Organization cites fear of stigma and discrimination as the main reason that people are reluctant to even be tested for HIV, let alone disclose their HIV status to medical personnel or seek medical help.¹⁵ This reluctance leads to delayed diagnoses, which in turn lead to greater spread of HIV and more severe health complications, especially when HIV develops into AIDS.

Adding to the personal fear that people feel when being diagnosed with HIV is the legitimate concern that the legal infrastructure in the United States is not equipped to protect (and sometimes specifically targets) HIV-positive Americans. To a large extent, Americans diagnosed with HIV or AIDS are protected in their employment by the Americans with Disabilities Act and the Rehabilitation Act of 1973.^{16,17} Both of these federal statutes protect individuals with disabilities (of which HIV and AIDS are now considered) in a broad variety of employer and workplace contexts. For example, the Title I of the ADA prohibits private and public entities from discriminating against people diagnosed with HIV or AIDS in recruitment, the application process, hiring, advancement, firing, and other terms, conditions, and privileges of employment.¹⁸ The Rehabilitation Act also applies some protections to HIV-positive people, although the protections are narrower and apply mostly to federal contractors.¹⁹

Despite these federal employment protections, it is important to note that some important limitations in employment protection remain, specifically with regard to the size of the employer's business or organization. The Americans with Disabilities Act applies only to those entities with 15 or more employees, which constitute a significant number of possible employers.²⁰ State-level and local anti-discrimination laws are thus necessary for HIV-positive employees to be fully protected in their workplaces, so it is necessary for LGBTQ advocates and community health officials to lobby for state and local laws that ban discrimination in employment based on HIV or AIDS status.

The workplace is not the only area where people diagnosed with HIV and AIDS are vulnerable. In fact, as of 2012, at least 34 states have laws on their books that criminalize certain behaviors among HIV-positive Americans.²¹ The laws vary in what behaviors are made criminal and in the penalties assigned if a defendant is found guilty, but many of the laws were enacted when little was known about the transmission of HIV and include behaviors like biting or spitting that have no chance of transmitting the virus.²² Other laws criminalize consensual sexual behavior between adults on the basis that one of the partners was HIV-positive and failed to disclose his or her status prior to intercourse.²³ However, CDC data and other studies indicate that intentional HIV transmission is atypical and uncommon, and current sexual assault statutes are likely sufficient to protect against such crimes.²⁴

Although the intent behind such laws is not necessarily malicious, it is often true that the laws run counter to scientific evidence about HIV transmission and fail to serve public health goals of robust and consistent testing and treatment for HIV-positive Americans. In fact, in 2010, President Barack Obama's administration released its national HIV/AIDS strategy and called for state legislatures to revisit HIV-specific criminal laws "to ensure that they are consistent with current knowledge of HIV transmission and support public health goals of preventing and treating HIV."²⁵ Additionally, the Positive Justice Project, a national coalition of individuals and organizations involved in health and policy, released in 2012 a consensus statement on the criminalization of HIV and AIDS and the effect that such laws have on the continued stigma associated with HIV/AIDS and the public health crisis that continues to exist.²⁶ In the statement, the Positive Justice Project found that HIV-specific criminal laws were unjustly targeting HIV-positive Americans; laws were based on outdated and inaccurate assumptions about HIV and AIDS; and punishments imposed for nondisclosure of HIV status, exposure, or transmission of the virus are "grossly out of proportion to the actual harm inflicted and reinforce the fear and stigma associated with HIV."²⁷ The Positive Justice Project statement was signed by hundreds of health care providers, attorneys, community advocates, public health officials, law enforcement officers, and others committed preventing the use of criminal law against HIV-positive people.

As is clearly evident, lawmakers, legal practitioners, and the judiciary as a whole have a role to play in HIV/AIDS advocacy. In large part, that role is fulfilled simply by being knowledgeable about HIV transmission routes: Understanding how HIV is (and is not) transmitted will help lawmakers, prosecutors, and judges make wiser and fairer decisions with regard to HIV-specific legislation and HIV-positive defendants. In turn, fairer application of the law will help eradicate the stigma associated with being HIV-positive, ultimately reducing (at least in part) some of the barriers to effective HIV and AIDS prevention.

LGBTQ Discrimination in Employment and Services

The workplace has historically been fraught territory for discrimination of all types, causing states and the federal government to enact legislation (the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and all

of their state counterparts, most notably) that provides protections against employment discrimination and harassment for a number of protected classes, including race, color, religion, sex, national origin, disability, and age. Often excluded from these legislative enactments, however, are protections for sexual orientation and gender identity. "Sexual orientation" refers to a person's physical or emotional attraction to another, whether to a person of the same or opposite sex. Thus, terms like lesbian, gay, and bisexual (among others) are examples of one's sexual orientation. Gender identity is distinct from sexual orientation and refers to one's innate, personal and psychological identification as a man, woman, or some other gender.

The threat of losing a job or of workplace harassment because of sexual orientation or gender identity is not a benign one: A recent study from the Williams Institute at the University of California Los Angeles School of Law²⁸ found that 27 percent of lesbian, gay, or bisexual respondents had experienced at least one form of workplace discrimination because of their sexual orientation in the past five

The overall percentage of openly lesbian, gay, bisexual, and transgender (LGBT) lawyers increased to 2.19% (2,085 total) in 2013 compared with 2.07% in 2012. This number is double that of 10 years ago. About half the offices surveyed reported at least one LGBT lawyer.

SOURCE: NALPorg, January 2014 NALP Bulletin, based on the National Association for Law Placement, Directory of Employers, 2013

years—7 percent of which reported having lost a job. Of the lesbian, gay, and bisexual people who reported being "out" (i.e., openly LGBTQ) at work, 38 percent said they experienced at least one form of discrimination or harassment in the five years prior to the study, and another third of respondents refused to be open about their sexuality at work for fear of harassment. Most alarmingly, the overwhelming majority—78 percent—of transgender men and women reported experiencing workplace harassment and discrimination on a regular basis.

Statistics aside, the need for comprehensive workplace protections that include sexual orientation and gender identity are demonstrated by recent policy enactments (and rescissions) by some states' legislatures and highest executives. For example, in February, Kansas Gov. Sam Brownback rescinded an executive order put in place by his predecessor, Kathleen Sebelius, that protected state workers from being fired, harassed, or discriminated against based on their sexual orientation or gender identity. Brownback's decision quickly made national headlines, with specific attention given to how Sebelius's executive order protecting sexual orientation and gender identity had been in place since 2007—well before Brownback assumed office *and* throughout the duration of his first term as governor. Brownback's policy decision was not particularly surprising given Kansas's recent history with LGBTQ rights: Exactly one year prior, the Kansas House of Representatives passed a controversial "religious freedom" bill that would have allowed individuals, whether employed by a private entity or by the state, to deny LGBTQ people and their families any services, accommodations, or goods if doing so violated the individual's subjective religious beliefs about marriage.

But Kansas certainly is not anomalous with regard to its treatment of LGBTQ citizens. In February, the Arkansas legislature passed a bill (which Gov. Asa Hutchinson neither signed nor vetoed, effectively allowing it to become law on its own) that not only takes away state protections for sexual orientation and gender identity but actively *prohibits* cities and municipalities from passing local ordinances to protect LGBTQ workers. States like Arizona, Idaho, Tennessee, Mississippi, and Missouri each have considered (and some have passed) “religious freedom” bills similar to the one considered in Kansas in 2014. And, as of this writing, sexual orientation and gender identity are protected classes in only 21 states. This means that workers in the remaining 29 states can be fired (and will have no legal redress) simply for being LGBTQ or for having a gender-identity offensive to an employer.

To be sure, the anti-LGBTQ executive and legislative decisions in states such as Kansas, Arkansas, and others exacerbate feelings of fear, anxiety, and discomfort for LGBTQ workers who simply want to exist openly while on the job. To combat these fears and help eliminate the potential for adverse employment actions against LGBTQ workers, Congress has considered legislation that would prohibit discrimination in employment based on sexual orientation and gender identity. The Employment Non-Discrimination Act (ENDA) has been introduced in every Congress since 1994 except the 109th Congress. In the 113th Congress, a version of ENDA complete with transgender and gender identity protections passed the U.S. Senate with bipartisan support. However, the bill was never voted upon in the House. ENDA is expected to be reintroduced in the 114th Congress.

If enacted, the most recent version of ENDA would prohibit employers with 15 or more employees from discriminating against employees based on their sexual orientation or gender identity, with some exemptions for religiously affiliated institutions. But following the Supreme Court decision in *Burwell v. Hobby Lobby*, which ruled that closely held for-profit corporations could not be forced by the Department of Health and Human Services to provide certain contraceptives to employees if doing so would violate the employer’s religious beliefs, many prominent LGBTQ rights organizations withdrew their support for ENDA. In large part, the advocacy organizations feared that the Court’s *Burwell* decision would grant for-profit businesses permission to circumvent ENDA’s provisions by invoking religious beliefs. In a joint statement, the American Civil Liberties Union, the Gay & Lesbian Advocates & Defenders, Lambda Legal, the National Center for Lesbian Rights, and the Transgender Law Center reasoned that the “[inclusion of the religious exemption] would prevent ENDA from providing protections that LGBTQ people desperately need and would make very bad law with potential further negative effects. Therefore, we are announcing our withdrawal of support for the current version of ENDA.”²⁹

Congress’s perennial inability to pass ENDA—with or without over-broad religious exemptions—leaves LGBTQ employees unprotected in the majority of states in the country. But this is not to say that LGBTQ employees in those 29 states have no protections whatsoever. Ninety percent of Fortune 500 companies, nearly all of the country’s elite academic institutions, and at least 225 cities and municipalities have chosen to afford employment protections to LGBTQ workers.³⁰ But even if ENDA were to pass through Congress and be signed into law, it would still only apply to entities employing 15 or more people, leaving a substantial number LGBTQ employees

working in America’s small businesses at risk. State-level and local anti-discrimination laws are thus necessary to create open, affirming workplaces for all employees.

State-level and local anti-discrimination laws, when enacted by legislative bodies or by executive order from state governors, can be crafted to apply to public workers only or to all employees within a jurisdiction’s boundaries. Anti-discrimination laws that include sexual orientation and gender identity are most effective when they define “employer” to be inclusive of all organizations, governmental bodies, contractors, and partnerships, regardless of the number of employees performing services. *See, e.g.*, V.S.A., § 302(1). Additionally, religious exemptions should be narrowly drawn, applying only to entities directly related to a religious institution in order to prevent further LGBTQ discrimination—framed as religious liberties—by for-profit businesses otherwise open to the general public.

In addition to discrimination in the workplace, it is also important for advocates to be aware of the growing trend among for-profit businesses and service providers to deny goods and services to same-sex couples and to claim a religious-liberties defense in doing so. As a legal matter, the next major frontier for LGBTQ equality might be the question of whether a state statute or local ordinance can require a business or service provider to provide goods and services to a same-sex couple, even if doing so would violate their deeply held religious beliefs. In cities and states across the country, same-sex couples are being denied equal treatment and basic services that their opposite-sex counterparts are afforded, simply because the same-sex couples are gay. Some states and cities have taken proactive steps to pass laws that prohibit businesses from discriminating against same-sex couples or LGBTQ people, and courts across the country have held the equal-access statutes and ordinances to be constitutional.

But this is not simply a question about wedding cakes and bouquets of flowers (although having a business in your community refuse to provide goods for your wedding—even if you pay for them—is certainly degrading). Recently, a pediatrician in Michigan refused to provide care to a newborn because the child’s parents were lesbian.³¹ Additionally, the religious liberty and religious freedom bills considered across the nation also give license to *any* person—including state staffs who are funded in part by tax dollars and whose job responsibilities might include, among other things, granting a marriage license—to deny services to same-sex couples on the basis of their sexual orientation. For example, same-sex couples denied a marriage license by the county clerk in their home jurisdiction will then be made to wait until a clerk from a neighboring jurisdiction comes to complete the necessary services. Such waits are unnecessary and humiliating.

It is undoubtedly true that some jurisdictions will be significantly less likely than others to entertain the idea of enacting legislation that includes sexual orientation and gender identity or to ensure that LGBTQ people have access to goods and services available to their heterosexual counterparts. In response to this reality, the National Gay and Lesbian Chamber of Commerce convened the Open for Business Coalition, an advocacy movement that brings together some of the nation’s largest and most diverse business organizations, corporate partners, and local businesses to oppose legislation permitting discrimination against LGBTQ people. Indeed, the Open for Business Coalition and its partners believe that

these laws are unnecessary and unfair, and it is often helpful for business and corporate partners to help legislators understand that religious liberties laws are ultimately bad for business.

Transgender Rights

As with the rest of the LGBTQ community, transgender people have experienced major gains in the last few years. Positive representation of transgender people in the workforce and in the media has increased dramatically, and thoughtful lawmakers and inclusive legislation have made it easier for transgender men and women to openly exist and transition as they see fit. Provisions in the Affordable Care Act remove some major barriers for transgender men and women. For example, insurance companies are no longer allowed to consider “gender identity disorder” a pre-existing condition, opening up many more insurance opportunities for transgender-identified people. Additionally, as mentioned above, anti-discrimination clauses inclusive of gender identity are slowly becoming the norm as employers come to recognize the value that transgender and gender-nonconforming workers bring to an organization.

Despite these gains, the transgender community remains vulnerable, particularly with regard to violence against transgender people of color, as will be discussed below. Harassment and violence against transgender people is disproportionately high. As a prerequisite to gaining access to public accommodations, emergency services, and public safety-net programs, transgender people are routinely asked to provide identity documents that are both complicated and often unaffordable. As noted above, transgender men and women are the most likely of all LGBTQ people to be harassed and discriminated against in the workplace, and despite new provisions in the Affordable Care Act, finding adequate medical care and support, particularly with regard to transition-related care, remains an obstacle. As such, LGBTQ advocates must consciously expend significant energy to support transgender men and women.

One of the most hotly debated transgender rights issues is equal access to public restroom facilities. For transgender people, one of the most routine daily tasks is also one of the most dangerous and anxiety-inducing. Although transgender men and women report harassment in almost all areas of daily life, public restrooms tend to invite particular scrutiny, especially when a person’s gender identity does not match their assigned or presumed sex. The consensus among the medical community (and among many courts, school districts, and corporations) is that the health and well-being of transgender people requires that they be able to live in accordance with their gender identity at all times. Being forced to deny one’s gender identity each time he or she enters a restroom is detrimental to a transgender person’s psychological welfare.

States, municipalities, and businesses have begun responding to the needs of transgender people by enacting laws and policies specific to the transgender community. For example, a Washington, D.C., ordinance requires that all single-occupancy restrooms be designated as gender-neutral, allowing for a safe, private space for transgender people. The Iowa Civil Rights Commission has con-

strued its state law even more directly, saying “just as non-transgender individuals are entitled to use a restroom appropriate to their gender identity without having to provide documentation or respond to invasive requests, transgender individuals must also be allowed to use a gender-identity appropriate restroom without being harassed or questioned.”³² A lack of safe and convenient restroom options can prevent transgender people from accessing public accommodations. Being forced to use a restroom inconsistent with one’s gender identity is an affront to transgender dignity and personhood.

Although equal access to public restrooms is vital and receives a substantial amount of media attention, it is important to remember that transgender rights far exceed bathroom politics. In fact, the national attention given to gender-inclusive restroom facilities often ignores the fundamental issue at play for transgender men and women: basic physical, emotional, and psychic security. At the root of bathroom-related hostilities toward transgender bodies is the same animus that fuels the shockingly disproportionate amount of violence against transgender people, particularly transgender women of color. In the first two months of 2015 alone, at least six transgender women have been murdered in the United States.³³ In 2014, 13

“This is not simply a question about wedding cakes and bouquets of flowers (although having a business in your community refuse to provide goods for your wedding—even if you pay for them—is certainly degrading). Recently, a pediatrician in Michigan refused to provide care to a newborn because the child’s parents were lesbian.”

transgender women were murdered, and all but one were black or Latina.³⁴ A 2013 report from the National Coalition of Anti-Violence Programs found that 72 percent of all LGBTQ- or HIV-motivated crimes were committed against transgender women, and 67 percent of those same crimes were committed against transgender women of color. The same study also found that, when compared to nontransgender lesbian, gay, bisexual, queer, or HIV-positive peers, transgender people were six times more likely to experience physical violence from police, 1.5 times more likely to face sexual violence, and 1.8 times more likely to experience violence in shelters.³⁵ Given these realities, transgender people are more likely than others to be skeptical of law enforcement or feel unable to effectively pursue legal actions against their attackers, ultimately making transgender people that much more vulnerable.

Advocates must call upon lawmakers, law enforcement personnel, and the judiciary to carefully craft and execute policies that address the safety crisis experienced by transgender people in America. This includes law enforcement policies, like the District of Columbia’s Metropolitan Police Department’s General Order on Handling Interactions with Transgender Individuals, which directs police officers to refer to transgender people by their preferred names

and pronouns, instructs officers to never search a person solely for the purpose of determining their sex, and requires that police officers respond to calls in a manner consistent with department policy, regardless of the caller's sexual orientation or gender identity.³⁶ In addition to law enforcement personnel, it is incumbent upon prosecutors to swiftly and aggressively investigate all open homicide cases perpetrated against transgender individuals.

Outside of harassment and physical violence disproportionately experienced by the transgender community, an even greater proportion of transgender men and women will withstand a range of other discriminatory experiences because their identification documents (such as driver's licenses and birth certificates) no longer accurately identify them for who they really are. To understand the negative impacts of having gender incongruent identification, one need only think of the variety of services and institutions that require identification for entry: enrolling for state benefits, registering for school, traveling outside the country, sometimes even applying for employment. Given that members of the transgender community are twice as likely as the general population to be unemployed and are four times more likely than the general population to live in severe poverty,³⁷ the cost of altering these identification forms (including hiring an attorney and paying all processing fees) is often prohibitively expensive. Moreover, many state and federal agencies require proof of gender-reassignment surgery in order to alter identification documents—an additional burden that is impossible (and in some cases undesirable) for a large percentage of the transgender community. According to the National Transgender Discrimination Survey, 33 percent of transgender people who had already transitioned reported not being able to change their identity documents to match their affirmed gender.³⁸ Of those transgender people who were asked to present identification for a certain service, 44 percent reported harassment, were asked to leave, or were assaulted.³⁹ In many cases, intrusive identification requirements pose hostile and needless barriers for transgender individuals, and the necessity of such regulations should be continually examined.

Even when transgender individuals are not obstructed by identification requirements, they are often denied access to vital public services and social safety-net programs simply because of their gender identity. In addition to being significantly more likely than the general population to live in poverty, transgender people often experience discrimination in housing and rejection from family, making transgender men and women vulnerable to chronic and long-term homelessness. In fact, one in five transgender Americans has reported being homeless in his or her lifetime, and many report being denied safety-net services (like homeless shelters and battered-women shelters) due to their gender identity. A report from the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that 55 percent of transgender men and women who attempted to access a homeless shelter were accosted by shelter staff and other residents; 29 percent reported being turned away altogether. In addition to those transgender individuals who were denied access to emergency shelters outright, 25 percent reported being evicted from emergency housing after their transgender status was disclosed, and 47 percent reported leaving a shelter due to poor treatment.⁴⁰

Homeless transgender men and women are regularly forced to make a decision when considering emergency housing: to live as the wrong gender to maintain access to the shelter, or to live according to their gender identity and return to the streets. The troubling reality is

that transgender homelessness results in large part because the individual's inability to secure steady employment or stable housing—creating a debilitating cycle of discrimination.

Thankfully, however, the U.S. Department of Housing and Urban Development released new guidance in February advising equal treatment for all transgender men and women in homeless shelters and transitional housing. In particular, the guidance suggests that shelters should be prepared to respect a client's stated gender identity when making placements in single-sex facilities. Clients also may not be denied shelter just because their identity documents (driver's license, birth certificate, school identification card, etc.) indicate a different gender than how the client identifies, nor should clients be asked questions about their anatomy, whether they have or planned to transition, or anything else about medical history. Finally, facilities are advised to reasonably establish a layout that allows for individual privacy, such as toilet stalls with doors and locks and separate showers, without segregating clients based upon gender identity (i.e., putting transgender clients in isolated areas of the facility).

Despite tremendous and rapid gains over the past few years, the transgender community remains in crisis, and meeting the needs of transgender people—especially those who are particularly at risk—requires participation not only of LGBTQ rights advocates but also of all social service, medical, judicial, and public-policy professionals. Transgender equality requires immediate attention and must be pursued so that transgender men and women can access necessary institutions and facilities and exist in the public as their consciences demand.

Conclusion

The LGBTQ community and its allies have much to be proud of, and this summer's Supreme Court decision could possibly become the community's biggest accomplishment to date. To the extent that marriage matters—no doubt it does—also important are those things that make families strong: health and wellness, financially supporting those people you love the most (and having security in knowing that such support will have longevity), and being able to live and love authentically and with dignity. The future of the LGBTQ rights movement seems to be, in many ways, borne out of the freedom to marry (or not marry, as the case may be). Challenges facing the LGBTQ community remain numerous and complex, and it will take the continued collaboration, investment, and—indeed—pride of all LGBTQ people and their allies to create a world where identifying as LGBTQ is safe, valued, protected, and celebrated. ☉



Jake McMillian is a third-year law student at the University of Kansas School of Law and is a proud fourth generation Kansan. He is currently the vice-president of KU Law Outlaws and Allies, is the diversity and outreach coordinator for KU Law Student Ambassadors, and is an intern at Hodges Law Group, the only law firm in Kansas City that focuses specifically on LGBT legal issues.

This article is dedicated to the courageous men and women who laid the groundwork; who embraced themselves and all of their queer beauty when nobody else would; who fearlessly fell in love and gave hope to LGBTQ youth everywhere; whose blood stained the pavement in an act of protest outside a small tavern

on Christopher Street; who lost jobs and families and faith communities simply for loving who and how they saw fit in hopes that future generations might do the same more easily; who marched in solidarity and claimed “freedom” as their rallying cry; who opened closet doors everywhere; whose names we will never know. It is because of work started long ago that an openly gay student would be given a platform like *The Federal Lawyer* to discuss the next frontiers in the gay rights movement. That truth does not escape me for a single moment. The struggle continues, and I am proud and humbled to be a part of it.

Endnotes

¹*United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013).

²*Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973-74 (S.D. Ohio 2013) rev’d sub nom.

³Centers for Disease Control, *Pneumocystis Pneumonia—Los Angeles*, Mortality and Morbidity Weekly Report, June 5, 1981, www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm.

⁴AIDS.gov, *A Timeline of AIDS*, www.aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/.

⁵*Id.*

⁶Altman, Lawrence K., *Rare Cancer Seen in 41 Homosexuals*, THE NEW YORK TIMES (July 3, 1981), www.nytimes.com/1981/07/03/us/rare-cancer-seen-in-41-homosexuals.html.

⁷UPI, *Homosexuals Found Particularly Liable to Common Diseases*, THE NEW YORK TIMES (Dec. 10, 1981), www.nytimes.com/1981/12/10/us/homosexuals-found-particularly-liable-to-common-viruses.html.

⁸amFAR, *30 Years of HIV/AIDS: Snapshots of an Epidemic*, www.amfar.org/thirty-years-of-hiv/aids-snapshots-of-an-epidemic/, (2011).

⁹*Id.*

¹⁰Carl M. Cannon, *Ronald Reagan and AIDS: Correcting the Record*, REALCLEARPOLITICS, June 1, 2014, www.realclearpolitics.com/articles/2014/06/01/ronald_reagan_and_aids_correcting_the_record_122806.html.

¹¹Shilts, Randy, *And the Band Played On*, 491 (St. Martin Press, 1987).

¹²AIDSMap, *How Long Will I Live*, www.aidsmap.com/How-long-will-i-live/page/2622625/, (last visited Feb. 26, 2015).

¹³Centers for Disease Control, *HIV in the United States: At a Glance*, www.cdc.gov/hiv/statistics/basics/ata glance.html, (last visited Feb. 26, 2015).

¹⁴Centers for Disease Control, *HIV Among Gay and Bisexual Men*, www.cdc.gov/hiv/risk/gender/msm/facts/, (last visited Feb. 12, 2015).

¹⁵AVERT, *HIV & AIDS Stigma and Discrimination*, www.avert.org/hiv-aids-stigma-and-discrimination.htm, (last visited Feb. 26, 2015).

¹⁶42 U.S.C. §§ 12101 et seq. (2009).

¹⁷29 U.S.C. §§ 701 et seq. (2009).

¹⁸42 U.S.C. § 12111(5)(A).

¹⁹29 U.S.C. §§ 793, 794(a)-(b).

²⁰42 U.S.C. 12101 § 12111(5)(A).

²¹Positive Justice Project, *Consensus Statement on the Criminalization of HIV in the United States*, CENTER FOR HIV LAW AND POLICY, 2 (2012).

²²Centers for Disease Control, *HIV-Specific Criminal Laws*, www.cdc.gov/hiv/policies/law/states/exposure.html, (last visited Feb.

16, 2015).

²³*Id.*

²⁴HIV Law and Policy, *When Sex is a Crime and Spit is a Dangerous Weapon: A Snapshot of HIV Criminalization in the United States*, www.cdc.gov/hiv/policies/law/states/exposure.html, (last visited Feb. 26, 2015).

²⁵White House National HIV/AIDS Strategy Implementation Plan, 25, www.whitehouse.gov/files/.

documents/nhas-implementation.pdf, (last visited Feb. 26, 2015).

²⁶Positive Justice Project, *Consensus Statement on the Criminalization of HIV in the United States*, Center for HIV Law and Policy, www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/PJP%20Consensus%20Statement%20w%20Endorsers%2010-14.pdf, (last visited Feb. 13, 2015).

²⁷*Id.* at 3.

²⁸Sears, Brad & Mallory, Christy, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, The Williams Institute, University of California-Los Angeles, williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf, (last visited March 18, 2015).

²⁹Transgender Law Center, *Joint Statement on the Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People*, transgenderlawcenter.org/archives/10702, (last visited March 18, 2015).

³⁰Human Rights Campaign, *LGBT Equality at the Fortune 500*, www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500, (last visited Feb. 26, 2015).

³¹myFOXDetroit, *Doctor refuses treatment of same-sex couple's baby*, www.myfoxdetroit.com/story/28142401/doctor-refuses-treatment-of-same-sex-couples-baby.

³²Iowa Civil Rights Commission, *Sexual Orientation and Gender Identity: A Public Accommodations Provider's Guide to Iowa Law*, www.iowa.gov/government/crc/docs/sogiPublicAccommodation_july08.pdf, (last visited Feb. 16, 2015).

³³Trans People of Color Coalition & Human Rights Campaign, *A National Crisis: Anti-Transgender Violence*, hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HRC_Anti-TransgenderViolence.pdf, (last visited Feb. 17, 2015).

³⁴*Id.*

³⁵National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence*, www.equalitymi.org/files/2013-ncavp-hv.pdf.

³⁶District of Columbia Metropolitan Police Department, *General Order on Handling Interactions with Transgender Individuals*, go.mpdconline.com/GO/GO_501_02.pdf, (last visited Feb. 16, 2015).

³⁷National Center for Transgender Equality and National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf, (last visited Feb. 16, 2015).

³⁸*Id.*

³⁹*Id.*

⁴⁰National Center for Transgender Equality and National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf, (last visited Feb. 16, 2015).