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GAY RIGHTS IN WYOMING: A REVIEW OF FEDERAL AND STATE LAW

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I. INTRODUCTION

The legal rights of gay and lesbian individuals and groups, as well as those of other sexual minorities, have been the subject of debate, legislation, and litigation

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for several decades.[1] Lesbian, gay, bisexual, and transgender (LGBT) people face legal challenges that non-LGBT citizens do not.[2] Both the LGBT rights movement and groups opposing the inclusion of LGBT persons within legal protections have turned to the courts and legislatures. This article outlines the current status of the law—both state and federal—regarding LGBT individuals.[3] Furthermore, this article offers suggestions for interpreting current legal issues related to the LGBT community in Wyoming.[4] With the limited exceptions noted in this article, little Wyoming case or statutory law has addressed these issues.[5] This article begins with an overview of the LGBT population in the state.[6] Next, relevant federal and state constitutional law is examined.[7] This is followed by a brief overview of LGBT issues, such as those related to marriage, family, employment, and hate crimes.[8]

A. The Gay Population of Wyoming

The prestigious Williams Institute at the University of California, Los Angeles (Institute) publishes regular reports designed to advance sexual orientation law and public policy through rigorous independent research and scholarship.[9] The Institute disseminates its findings to judges, legislators, policymakers, media, and the public. In its memorandum titled *Wyoming–Sexual Orientation and Gender*

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[1] There is no consensus on the most accurate label or definition of "sexual minority." Terms used often include gay, lesbian, bisexual, queer, transgendered, and intersexed, even though these individuals and groups may not share the same characteristics, experiences, or desires for change. In addition, acronyms abound combining initial letters from these groups; common examples include GLBT, LGBT, GLBTQI, etc. Less common, especially in more recent scholarship, is the term "homosexual" used to define a person; instead the term is more acceptably used to define a type of sexual behavior. Throughout this article, LGBT will be used.

[2] This article will address several such issues. *See infra* Part II (discussing the history of regulation of same-sex sexual behavior); *infra* notes 69–84 and accompanying text (noting the limitations in most jurisdictions on same-sex couples to marry and form families); *infra* Part IV (indicating the inability to bring forth claims of employment discrimination based on anti-LGBT animus); *infra* Part V (addressing homophobic violence).

[3] The status of the law regarding issues related to same-sex sexuality is changing rapidly. All cites are current at the time this article goes to press.

[4] *See infra* Part III.C (discussing same-sex marriage in Wyoming); *infra* notes 186–92 and accompanying text (noting potential changes to LGBT employment issues in Wyoming); *infra* notes 215–17 and accompanying text (addressing hate crime laws).

[5] *See infra* Part III.D (discussing the relevance of homosexuality in child custody disputes); *infra* Part IV (discussing employment discrimination); *infra* Part V.B (discussing the inadmissibility of a "gay panic" defense).

[6] *See infra* Part I.A.

[7] *See infra* Part II.

[8] *See infra* Part III (discussing marriage issues); *infra* Part III.D (discussing family issues); *infra* Part IV (discussing employment issues); *infra* Part V (discussing hate crime issues).

[9] WILLIAMS INST., http://www.law.ucla.edu/williamsinstitute/home.html (last visited Nov. 27, 2010).

Identity Law and Documentation of Discrimination, the Institute begins its report with the following overview of the status of gay life and rights in Wyoming:

> According to several press reports, gay and lesbian Wyomingites tend to be extraordinarily private about their sexual orientation, in part, out of fear. As former U.S. Senator Alan Simpson put it, "Wyoming is not the most remarkable place for the tolerance of homosexuality." State representative Mike Massie of Laramie told a reporter that there is a "touch of homophobia in the Wyoming legislature." As one *Time Magazine* article reported, a gay man who recently relocated to Wyoming with his same-sex partner "'didn't expect that people in Wyoming would be as closeted as they are'. . . . One reason is that gay bashings still occur. Not long ago, [the man reported], a gay couple w[as] assaulted in a bar in a rural part of Wyoming. One of the victims had to see a doctor for bruised ribs and cartilage damage. But the men didn't file a police report. 'I suspect it has to do with them not wanting to out themselves to the police . . . . They were embarrassed to say they were gay.'" The author also "met a lesbian couple who have lived in the same Casper home for 21 years and yet have never spoken openly with the neighbors about their love for each other. Instead, they let people think they are just roommates." According to the reporter, "Wyoming has constructed an entire culture around the fraught military concept known as 'Don't ask, don't tell.' Nearly every Wyomingite I met used that phrase, or a version of it, with respect to homosexuality. 'People have an open mind but a closed mouth here,'" said former Senator Simpson.[10]

Conservative estimates report more than 11,000 LGBT people, single and coupled, live in Wyoming.[11] The data presented in this report relies heavily on the 2000 Census information about household relationships; thus, more demographic information about couples, rather than single LGBT individuals, is known and reported.

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[10] WILLIAMS INST., MEMORANDUM: WYOMING—SEXUAL ORIENTATION AND GENDER IDENTITY LAW AND DOCUMENTATION OF DISCRIMINATION 1 (Sept. 2009) (footnotes omitted), *available at* http://www.law.ucla.edu/WilliamsInstitute/programs/ENDA/Wyoming%20Final.pdf.

[11] *See* ADAM P. ROMERO ET AL., WILLIAMS INST., CENSUS SNAPSHOT: WYOMING 1 (2008), *available at* http://www.law.ucla.edu/williamsinstitute/publications/WyomingCensusSnapshot.pdf. While the 2000 Census indicated that there were 807 same-sex couples in Wyoming, estimates from 2005 have increased that number to 1044 same-sex couples and indicate gay couples live in every county. *Id.* However, accurately capturing the numbers of sexual minorities has been and will continue to be a problem. While the 2000 Census asked about same-sex partners living in the same household, such questions did not capture single individuals or partnered couples not living together. In addition, many same-sex respondents might lie about their sexual orientation due to fear of negative reprisals at work, home, or in their communities. Thus, these numbers should

The "open minded, closed mouth" way of living masks a large and diverse portion of Wyoming's population. The available data on same-sex couples helps reveal this significant but quieted population and demonstrates that same-sex couples experience Wyoming differently than married couples. In Wyoming, the number of males and females in same-sex couples is about the same.[12] These couples are slightly younger, on average, than individuals in married couples.[13] Wyoming's same-sex couples also are more racially and ethnically diverse than Wyoming's married couples.[14] In addition, individuals in same-sex couples are less likely to be employed than married couples.[15]

Contrary to a popular stereotype, the annual earnings of individuals in same-sex couples are significantly lower than married individuals.[16] Not surprisingly, the average household income is lower for same-sex households than for married couples.[17] Likewise, the median income of same-sex-couple households in Wyoming is lower than married couples.[18]

In terms of employment, individuals in same-sex couples are more likely to work in the public sector than their married counterparts.[19] Even though the military has had policies excluding gay men and lesbians from service, some individuals in same-sex couples indicated that they are veterans.[20] In comparison with married couples, individuals in same-sex Wyoming couples are more likely

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be considered conservative estimates. A recent study also indicated that similar undercounting is expected with the 2010 Census. *See* Press Release, The Williams Inst., 2010 Census Analysis of Same-Sex Couples: 1 in 7 not identified, 30% in legal relationships (Sept. 7, 2010), *available at* http://www.law.ucla.edu/williamsinstitute/pdf/2010CensusAnalysis_PR_Sept7.pdf.

[12] ROMERO ET AL., *supra* note 11, at 1 (estimating fifty-one percent of same-sex couples consist of male partners and forty-nine percent consist of female partners).

[13] *Id.* (noting individuals in same-sex couples are forty-one years old, on average, while individuals in married couples are forty-eight years old, on average).

[14] *Id.* at 3 (noting eighteen percent of LGBT couples are non-white, compared with eight percent of married couples).

[15] *Id.* at 1 (noting the percentage of employed individuals in same-sex couples is sixty percent, compared with sixty-eight percent of individuals in married couples).

[16] *Id.* at 2 (noting that, on average, men in same-sex couples in Wyoming earn $29,500 annually, while married men earn $40,764; women in same-sex couples earn $11,306 on average, compared with $18,419 for married women).

[17] *Id.* (noting the average household income is $47,322 for same-sex households and $60,746 for married couples).

[18] *Id.* (noting the median income for same-sex households is $33,700, less than that of married couples at $50,720).

[19] *Id.* (noting thirty-seven percent of individuals in same-sex couples work in the public sector, versus twenty-three percent of married individuals).

[20] *Id.* (noting eight percent of those in same-sex couples indicated that they are veterans).

to have at least one partner who is disabled and aged sixty-five or over.[21] Not surprisingly, given that they have fewer economic resources, same-sex couples are less likely than married couples to own their homes.[22]

Same-sex couples also are raising children in Wyoming.[23] Many are raising children under age eighteen.[24] A typical same-sex home with children has, on average, more children than a married household.[25] As of 2005, many Wyoming children were living in households headed by same-sex couples.[26]

The above data illustrate a real and complicated picture of the LGBT population—a portion of the Wyoming population that has fallen under the legal radar. These LGBT individuals and couples, many of whom have children, live and work in the state. How does their LGBT status affect their legal claims?

II. SAME-SEX SEXUALITY AND THE UNITED STATES AND WYOMING CONSTITUTIONS

A. *The United States Constitution*

As with other minorities in the United States, the legal claims of LGBT individuals are often heard under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[27] The first section of the Fourteenth Amendment has two parts and declares, "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[28] Together, these provisions have been the cornerstone of suits regarding equality, opportunity, and access to

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[21] *Id.* (noting fifty-five percent of individuals in same-sex Wyoming couples have at least one partner who is disabled, compared with twenty-seven percent of those in married couples. Twenty-three percent of same-sex couples have one partner who is aged sixty-five or over, compared to seventeen percent of married couples).

[22] *Id.* (noting sixty-three percent of same-sex Wyoming couples are homeowners, while eighty-three percent of married couples are).

[23] *Id.* at 2–3 (noting same-sex couples raising children do so with far fewer resources than married couples).

[24] *Id.* at 2 (noting twenty percent of same-sex couples are raising children under age eighteen).

[25] *Id.* (noting a same-sex couple with children typically has an average of 2.4 children, compared with 2.0 for married parents).

[26] *Id.* (noting an estimated 501 Wyoming children are living in households headed by same-sex couples).

[27] *See infra* note 29 and accompanying text (discussing minority claims under the Fourteenth Amendment).

[28] U.S. CONST. amend. XIV, § 1.

the liberties associated with citizenship and justice.[29] While the constitutional safeguard of due process has both a procedural and substantive element, LGBT rights claims often invoke the unenumerated rights of liberty and privacy, which are protected through substantive due process and considered "implicit in the concept of ordered liberty."[30]

The United States Supreme Court applies several levels of review to substantive due process challenges. First, if a state attempts to limit liberty or privacy by statute, the Court holds the law must be in furtherance of a legitimate governmental objective.[31] The typical test for such a determination is whether the law is rationally related to the purported legitimate state goal. Second, if a court deems the liberty interest at stake a fundamental right, then the court applies a more rigorous test.[32] This level of review, known as strict scrutiny, inquires into whether a compelling state interest is furthered by the violation of the purported right, and whether the law in question was narrowly tailored to address that very particular state interest.[33]

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[29] *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (prohibiting the exclusion of women from juries); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (dismantling racially segregated schools); Strauder v. West Virginia, 100 U.S. 303 (1879) (prohibiting the exclusion of blacks from juries). A right to privacy was articulated by the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[30] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[31] The Court has not been wholly consistent in its formulation of a constitutional standard against which to measure statutes. For example, in *F.S. Royster Guano Co. v. Virginia*, the Court stated, "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. 412, 415 (1920). The Court articulated an even more deferential standard in *McGowan v. Maryland*: "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." 366 U.S. 420, 425–26 (1961). In *New Orleans v. Dukes*, the Court held the Equal Protection Clause is satisfied as long as the classification is "rationally related to a legitimate state interest." 427 U.S. 297, 303 (1976). Of course, this standard begs the questions of what is rational and what is legitimate. These questions have been the subject of debate in subsequent cases invoking equal protection and due process and are often at the heart of many gay rights issues.

[32] Fundamental rights are not found in the text of the Constitution. The Court has ruled such rights include the right to vote in *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 625–26 (1969); the right to travel between states in *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); the right to make reproductive choices in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and *Griswold*, 381 U.S. at 485; and the right to access to the judicial process in *Romer v. Evans*, 517 U.S. 620, 625 (1996). *See infra* notes 50–60 and accompanying text (discussing *Romer v. Evans*).

[33] *Compare Shapiro*, 394 U.S. at 634 (triggering strict scrutiny when the statute singles out for special treatment a class of persons the court finds to be a suspect classification), *and Romer*, 517 U.S. at 630 (stating the criteria for suspect classification include a history of discrimination, political powerlessness, and immutable characteristics, which combined "command extraordinary protection from the majoritarian process"), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding such classifications have been found in terms of alienage), Graham v. Dept. of Publ. Welfare, 403 U.S. 365, 372 (1971) (alienage), McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) (race), Oyama v. California, 332 U.S. 633, 644–46 (1948) (nationality), *and* Korematsu v. United States, 323 U.S. 214, 216 (1944) (race).

While early substantive due process cases protected the rights of corporations and employers to be free of governmental regulation, later cases included challenges to laws that infringed upon liberty and privacy in issues related to marriage, family, and procreation. For example, using the notion of substantive due process, the Supreme Court ruled states may not forbid citizens from purchasing or using contraceptives.[34] Nor may states forbid abortions.[35] Statutes forbidding consensual sodomy were among the last bastions of state regulation of sexual behavior between adults.[36]

Until the Supreme Court's ruling in *Lawrence v. Texas*, states were permitted to prohibit sodomy.[37] The facts of the *Lawrence* case are straightforward: The petitioners, who were engaged in consensual sodomy in the privacy of their home, were arrested by a police officer who had entered and witnessed the act.[38] Subsequently, the petitioners were convicted of violating a Texas statute forbidding two persons of the same sex from engaging in certain intimate sexual conduct.[39] On appeal, the conviction was upheld with the court ruling that the Texas statute was not unconstitutional following the Supreme Court's reasoning and ruling in *Bowers v. Hardwick*.[40]

The *Lawrence* Court considered three issues: (1) whether a Texas statute prohibiting sodomy by same-sex but not different-sex couples violated the Equal Protection Clause of the Fourteenth Amendment; (2) whether a criminal conviction for sodomy violated the petitioners' liberty and property interests; and (3) whether *Bowers v. Hardwick*, a case that upheld Georgia's anti-sodomy statute, should be overturned.[41] The Court in *Lawrence* declined to address the equal protection issue presented in the first question, and thus it did not address whether the same-sex plaintiffs as a class of citizens were being treated differently

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Classifications based on gender have not been labeled "suspect" but have been subject to review between rational and strict scrutiny, sometimes referred to as a quasi-suspect classification with an intermediate level of review; that is, gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

[34] *Griswold*, 381 U.S. at 485.

[35] Roe v. Wade, 410 U.S. 113, 166 (1973).

[36] *But see* 1568 Montgomery Highway v. City of Hoover, 45 So. 3d 319 *passim* (Ala. 2010) (upholding a state statute forbidding the sale of "sex toys"). While statutes regarding sodomy have often been considered the last frontier in terms of state regulation of sexual behavior, state statutes forbidding the sale of sex toys have been held constitutional even though the explanation for the ban is the preservation of procreative sex as a state interest.

[37] 539 U.S. 558, 579 (2003).

[38] *Id.* at 562–63.

[39] *Id.* at 563.

[40] *Id.*; *see* Bowers v. Hardwick, 478 U.S. 186 (1986).

[41] 539 U.S. at 563; *see Bowers*, 478 U.S. 186.

from heterosexual couples.[42] While the court did acknowledge that an argument about different treatment could be made, Justice Kennedy, in his opinion for the majority, declined to do so.[43]

In addressing the second question, the *Lawrence* Court found the Texas statute unconstitutional, ruling that it violated the Due Process Clause. The *Lawrence*

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[42] 539 U.S. 558. However, such classifications are wrought with incoherence. EVAN GERSTMAN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED PROTECTION 8 (1999). Gerstman argues while the standard is clear when "a law discriminates against racial minorities . . . the law will be struck down unless it is narrowly tailored to further a compelling governmental interest. If a law discriminates against women, it will be struck down unless it serves important governmental objectives and is substantially related to the achievement of those objectives." *Id.* at 8–9. Gays and lesbians cannot rely on such clear legal standards. *Id.* In making this argument, Gerstman points out that the criterion for a suspect or quasi-suspect class is its lack of political power. *Id.* at 9. While gays and lesbians (and other classes such as the elderly) have been denied enhanced protection, whites and men, two politically powerful classes, have been granted such status in the anti-affirmative action cases. *Id.*; *see, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995); Richmond v. J.A. Croson, 488 U.S. 469, 477 (1989). In these cases, the courts have not asked them to prove political powerlessness, instead interchanging the notion of a suspect class (white or male) with a suspect classification (race or sex). Thus, "[b]y switching between the terms *suspect class* and *suspect classification*, the Supreme Court can require some groups to show that they are politically powerless but allow other, far more politically powerful groups to benefit from strong constitutional protection." GERSTMAN, *supra*, at 9.

[43] *Lawrence*, 539 U.S. at 575. According to Justice Kennedy:

> Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.
>
> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

Id. at 574. In addition, Justice O'Connor's concurrence in *Lawrence* acknowledged that gay rights issues brought before the Court can be evaluated as either substantive due process cases based on conduct or as equal protection cases based on status. *Id.* at 579–85 (O'Connor, J., concurring). Justice O'Connor concurred with the majority but her reasoning was based on the equal protection claim rather than substantive due process. While the prevalence of arrest for violating the Texas "homosexual conduct law" (as well as prosecutions in other jurisdictions with similar statues) were few and far between, the existence of such laws were, as Justice O'Connor pointed out, harbingers of not only negative attitudes toward gays and lesbians but also of state-sanctioned discrimination:

> [The] petitioners convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement.

Id. at 581 (citations omitted). In doing so, O'Connor used a slightly higher level of review than "mere" rational basis, stating that "[w]hen a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Id.* at 579.

Court based its opinion firmly on substantive due process, declaring that to do otherwise would allow Texas to criminalize sodomy if it extended its current law to conduct between different-sex as well as same-sex couples.[44]

The basis for the Court's decision in *Lawrence* was to place liberty interests in intimate sexual conduct beyond the arm of the state.[45] The Court rejected the argument by Texas that it had a "legitimate state interest in legislatively expressing the long-standing moral traditions of the State against homosexual conduct, and in discouraging its citizens—whether they be homosexual, bisexual, or heterosexual—from choosing to engage in what is still perceived to be immoral conduct."[46] The Court ruled the State could not use its power to enforce this view of morality on the whole society through the operation of its criminal law.[47]

Lastly, the Court addressed its decision in *Bowers*:

> The central holding of *Bowers* . . . demeans the lives of homosexual persons.
>
> The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions.[48]

Ultimately, the Court ruled that the historical grounds the *Bowers* Court used in upholding the Georgia statute were overstated; thus the *Bowers* Court incorrectly viewed the liberty interest in sexual privacy too narrowly, and the holding in *Bowers* "should be and now is overruled."[49]

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[44] *Id.* at 575 (majority opinion), 579–85 (O'Connor, J., concurring).

[45] *Id.* at 567 (majority opinion).

[46] Brief of Respondent at 27, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 470184.

[47] *Lawrence*, 539 U.S. at 571.

[48] *Id.* at 575; *see* Bowers v. Hardwick, 478 U.S. 186 (1986).

[49] *Lawrence*, 539 U.S. at 578. Specifically, the Court traced English criminal law in the colonial times and found that "[e]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally . . . ." *Id.* at 559. Similarly, the Court commented that nineteenth-century sodomy indictments addressed the predatory acts of an adult man against a minor, not another adult. *Id.* at 569. Furthermore, it was not until the 1970s that any State singled out same-sex relations for criminal prosecution. *Id.* Ultimately, the Court concluded, "[T]he historical grounds relied upon in *Bowers* are more complex . . . . Their historical premises are not without doubt and, at the very least, are overstated." *Id.* at 571.

In the *Lawrence* decision, both the majority and concurring opinions cited the Court's ruling in *Romer v. Evans*, a 1996 case that invalidated Colorado's passage of Amendment 2 on the basis of equal protection reasoning.[50] In *Romer*, the Court found unconstitutional a voter-approved Colorado constitutional amendment because it identified "persons who were homosexuals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships'" as a solitary class of persons and deprived this class of protection under state and local antidiscrimination laws.[51] In rendering Amendment 2 unconstitutional, the *Romer* Court concluded Amendment 2 was "born of animosity toward the class of persons affected," and that it had no rational relation to a legitimate governmental purpose: "[I]ts sheer breadth is so discontinuous with the reason offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[52]

In the majority opinion, Justice Kennedy rejected the argument by Colorado that LGBT individuals would be granted "special rights," an argument proffered by the state in its defense.[53] Instead, he declared that the protection offered by antidiscrimination laws was not a special right, simply that anti-discrimination laws protected fundamental rights already enjoyed by all other citizens: "To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint."[54] Justice Kennedy concluded, "Amendment 2 . . . is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."[55]

Even though the Colorado Supreme Court's ruling against Amendment 2 applied strict scrutiny based on the notion of preserving a fundamental right of access to the judicial process, Justice Kennedy's opinion side-stepped the issue of constitutional review for LGBT citizens.[56] Thus, neither *Romer* nor *Lawrence*, the two recent Supreme Court cases addressing Fourteenth Amendment "gay rights"

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[50] *Id.* at 574; *see* Romer v. Evans, 517 U.S. 620 (1996).

[51] *Lawrence*, 539 U.S. at 574 (quoting *Romer*, 517 U.S. at 624). Contrasting sharply with the passage of Amendment 2, in 2007 the Colorado legislature and governor approved a measure modifying the Colorado Anti-Discrimination Act to include sexual orientation and gender identity. COLO. REV. STAT. § 24-34-401 (2010).

[52] *Romer*, 517 U.S. at 632.

[53] *Id.* at 631.

[54] *Id.*

[55] *Id.* at 633.

[56] *Id.* at 631–33.

issues, clearly dealt with the standard of review of LGBT citizens' claims.[57] In both cases the Court avoided addressing equal protection claims that would have required it to establish a level of review. Instead, the Court in *Romer* examined the passage of Amendment 2 as a violation of a fundamental right which automatically received strict scrutiny.[58] In *Lawrence*, the Court evaluated the constitutionality of the Texas anti-sodomy statute using substantive due process, concluding that Americans have a liberty interest in private sexual conduct that

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[57] *See* SUSAN MEZEY, QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY 62–65 (2007); JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 481 (2001). However, several recent decisions bear comment. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, an Irish-American LGBT group was legally excluded from the famous St. Patrick's Day parade in Boston because the parade organizers had a discriminatory policy excluding gays from membership. 515 U.S. 557, 572–82 (1995). The Court ruled that public demonstrations by private organizations may legally exclude groups who impart a message the organizers reject even when the event is perceived as public rather than private. *Id.* Similarly, in *Boy Scouts of America v. Dale*, the Court ruled a private organization, including one with a public persona such as the Boy Scouts, could exclude LGBT individuals from participation. 530 U.S. 640, 661 (2000). In contrast to such cases that seem to permit discriminatory animus regarding LGBT individuals and groups, the Supreme Court recently ruled that the University of California's Hastings College of the Law need not fund a campus group, the Christian Legal Society, a campus organization that had membership requirements in violation of the campus non-discrimination policy. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2995 (2010). The Court ruled that the College did not have to fund a group that violated the school policy requiring all recognized student groups to be open to every student. *Id.* at 2973–74.

Until 1991, U.S. law barred all immigration benefits to gay and lesbian individuals, citing "psychopathic inferiority" or "mental defect." 8 U.S.C. § 1182(a)(4) (1990). Congress removed the express bar on U.S. visits and immigration by LGBT foreign nationals in 1990. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990). Moreover, LGBT persecution as a basis for asylum in the United States is possible. For example, *Matter of Toboso-Alfonso* became a precedent for all Immigration Naturalization Service (INS) decision-makers, recognizing homosexuals as members of "a particular social group" under asylum law. 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990). The Ninth Circuit extended this definition to recognize asylum claims by some transgendered individuals in *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000). On March 1, 2003, the INS was disbanded and its functions were transferred to departments within the Department of Homeland Security. The U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcements, and U.S. Customs and Border Protection are currently responsible for the functions formerly held by the INS.

Perhaps no issue is changing as rapidly as this article is going to print as the recent activity regarding the Clinton Administration's "Don't Ask, Don't Tell" (DADT) policy restricting service by gay and lesbian soldiers in the military to those who keep their sexuality a secret. A suit filed in 2004 by the Log Cabin Republicans, a conservative gay organization acting on behalf of gay soldiers, was recently decided in a U.S. District Court by Judge Virginia Phillips who ruled that the policy was unconstitutional. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, at 969 (C.D. Cal. 2010). In a controversial ruling, Judge Phillips then enjoined the Pentagon from enforcing the policy. *Id.* at 916. In addition to the federal district court ruling discussed above, the Military Readiness Enhancement Act of 2009 has been introduced in Congress. H.R. 1283, 111th Cong. (2009). It would replace the DADT policy with one of non-discrimination on the basis of sexual orientation as a means to enhance the military's readiness. *Id.*

[58] *See supra* note 57 and accompanying text.

a state has no rational basis for criminalizing.[59] Neither opinion tackled head on if LGBT citizens were entitled to strict or immediate level review for Fourteenth Amendment claims. While Justice Kennedy's majority opinions in each of these cases discussed the ways in which LGBT individuals were negatively targeted, he did not address sexual orientation or gender identity as a category of analysis deserving of a heightened level of review. As such, the default level of review remains at the lowest level.[60]

B. The Wyoming Constitution

The Wyoming Constitution contains two articles similar to the Fourteenth Amendment of the United States Constitution. First, Article I, Section 6 of the Wyoming Constitution, Due Process of Law, states: "No person shall be deprived of life, liberty or property without due process of law." Article 1, Section 2, Equality of all, states: "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."

Wyoming courts interpret due process as both procedural and substantive under the Wyoming Constitution.[61] In *Moreno v. Department of Revenue & Taxation*, the court commented:

> This court recognizes that the U.S. Const. amends. V and XIV and Wyo. Const. art. 1, § 6, contain procedural and substantive components. Federal substantive due process protections apply indirectly to the states through U.S. Const. amends. V and XIV, and state constitutional protections under Wyo. Const. art. 1, § 6, must guard the minimum due process rights guaranteed by the federal protections. Under the substantive component of those constitutional provisions the exercise of the state police power must promote a legitimate public objective with reasonable means. A due process infringement of an individual's nonfundamental life, liberty, or property entitlement occurs only when it amounts to an arbitrary deprivation of that entitlement.[62]

The substantive component bars certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them.[63] In addition, Wyoming has largely adopted the two-tiered scrutiny employed by the federal

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[59] *See supra* notes 43–44 and accompanying text.

[60] *See supra* notes 31–33 and accompanying text. *But see infra* notes 89–92 and accompanying text.

[61] Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 727 (Wyo. 1985).

[62] 775 P.2d 497, 500 (Wyo. 1989) (citations omitted).

[63] *Cheyenne Airport Bd.*, 707 P.2d at 727.

courts in analyzing substantive due process and equal protection challenges. That is, when a statute affects a fundamental interest or creates an inherently suspect classification, the court must strictly scrutinize the statute to determine if it is necessary to achieve a compelling state interest.[64] However, if the statute affects only ordinary interests in the economic and social welfare area, the court need only determine that the statute is rationally related to a legitimate state objective.[65]

In Wyoming, courts analyze equal protection claims using the following test:

> (1) what class is harmed by the legislation and has that group been subjected to a tradition of disfavor by our laws; (2) what is the public purpose to be served by the law; (3) what is the characteristic of the disadvantaged class that justifies disparate treatment; and (4) how are the characteristics used to distinguish people for disparate treatment relevant to the purpose the challenged law purportedly intends to serve.[66]

Additionally, the Wyoming Supreme Court has noted that "the Wyoming Constitution offers more robust protection against legal discrimination than the federal constitution."[67] While—not surprisingly—no gay rights issues have been heard under either of these provisions of the Wyoming Constitution, plaintiffs also have not used these sections to argue against illegal race or sex discrimination.[68]

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[64] *Id.*

[65] *Id.* The court noted:

> When the legislative enactment lies in the economic and social welfare area, and when there are no suspect criteria or fundamental interests involved, the court will, in testing the enactment, inquire only as to whether the regulation is of debatable reasonableness. In other words, if the court perceives that the legislature had some arguable basis for choosing the end and the means, it will sustain the regulation at least as to compliance with substantive due process. Only when a regulation amounts to an arbitrary deprivation of regulatees' property will it be deemed to violate the dictates of substantive due process. As we said in *Washakie County School District No. One v. Herschler,* Wyo., 606 P.2d 310, 333 (1980), cert. denied 449 U.S. 824, 101 S. Ct. 86, 66 L. Ed. 2d 28: "When an ordinary [nonfundamental constitutional] interest is involved, then a court merely examines to determine whether there is a rational relationship between a classification . . . and a legitimate state objective."

Id.

[66] Allhusen v. State *ex rel.* Wyo. Mental Health Professions Licensing Bd., 898 P.2d 878, 886 (Wyo. 1995) (making a determination prior to the 2001 amendments to the Mental Health Professions Practice Act).

[67] *Id.* at 884.

[68] There are, of course, some exceptions. For example, a case of race discrimination was brought in *Jennings v. State*, 4 P.3d 915, 920 (Wyo. 2000). In this case, Jennings argued unsuccessfully that his criminal conviction should be overturned because no African Americans served on the jury. *Id.* In ruling against the appellant, the court found there was no purposeful rejection of the one African American juror in the pool. *Id.* In the case of *In re Adoption of BGH*, the court rejected a father's claim of illegal sex discrimination for the failure to award him child custody. 930 P.2d 371, 381 (Wyo. 1996).

III. GAY AND LESBIAN RELATIONSHIPS AND FAMILY ISSUES

The most visible and, some would argue, most important LGBT rights issue in the United States (if not globally) during the early part of the twenty-first century is the recognition of same-sex relationships. For many individuals, marriage is a holy and sacred coupling. However, marriage, in this article, is strictly addressed as a civil contract regulated by the state.[69] Laws regarding marriage grant the parties involved a vast number of legal rights and entitlements, as well as impose duties and obligations. No fewer than 1000 federal rights ensue from marriage.[70] In Wyoming, state statutes include more than 235 provisions in which terms such as "marriage" and "spouse" are used.[71] Included in those federal and state statutes are important provisions regarding Social Security benefits, immigration, health insurance, estate taxes, family leave, criminal immunity, and pensions. Moreover, marriage is a necessary and important element of policies pertaining to other family issues, including divorce, child custody, adoption, and foster care.

In *Baker v. Nelson*, one of the earliest cases to address same-sex marriage, the Minnesota Supreme Court ruled that the state did not violate the federal Constitution by denying a civil marriage license to a same-sex couple.[72] The issue remained dormant, at least in the courts, for about two decades, until it was revived in Hawaii.[73] A 1993 Hawaii court decision suggested the Hawaii Constitution gave same-sex as well as different-sex couples a fundamental right to marry.[74] While the Hawaii case was winding its way through the appeal process, no marriage licenses were issued to same-sex couples. In addition, forces opposed to the possible legalization of same-sex marriage pushed Congress in 1996 to pass

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[69] *See infra* note 84 and accompanying text. In *Perry v. Schwarzenegger*, finding of fact number nineteen states:

> Marriage in the United States has always been a civil matter. Civil authorities may permit religious leaders to solemnize marriages but not to determine who may enter or leave a civil marriage. Religious leaders may determine independently whether to recognize a civil marriage or divorce but that recognition or lack thereof has no effect on the relationship under state law.

704 F. Supp. 2d 921, 956 (N.D. Cal. 2010).

[70] *See generally* Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Senate Majority Leader (Jan. 23, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf (updating a 1997 version of the list to include 1138 federal benefits, rights, and privileges associated with marriage).

[71] Memorandum from the Wyo. Legislative Serv. Office Research Staff to the Wyo. Legislative Serv. Office Attorney (Feb. 2, 2007) (on file with author) (listing Wyoming statutes that mention marriage).

[72] 191 N.W.2d 185, 187 (Minn. 1971).

[73] Baehr v. Lewin, 852 P.2d 44, 48–49 (Haw. 1993). However, a state constitutional amendment was passed in November 2008 granting power to the legislature to "reserve marriage to opposite-sex couples." HAW. CONST. art. 1, § 23.

[74] *Baehr*, 852 P.2d at 68.

a bill dubbed the Defense of Marriage Act (DOMA).[75] Under DOMA, marriage is defined for federal purposes as a union between one man and one woman.[76] Further, DOMA explicitly permits states to treat same-sex marriages differently than different-sex marriages.[77] Such a provision directly contradicts typical interpretations of Article IV, Section 1, of the Constitution, the Full Faith and Credit Clause.[78] This clause states, in part, "Full Faith and Credit shall be given in each State to the public Acts, Record, and judicial Proceedings of every other State."[79] Typically, the DOMA section allowing states to bypass the traditional meaning of the Full Faith and Credit Clause, as it relates to marriage, has been implemented through the passage of specific state legislation or constitutional amendments termed mini-DOMAs. These state statutes (or constitutional amendments) typically serve two purposes: first, to restrict marriage in that state to couples of different sexes; and second to permit the state to refuse to recognize lawful same-sex marriages from other jurisdictions.[80] Such a constitutional

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[75] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996). An example of the forces organized against same-sex marriage were the proponents of California's Proposition 8 recognized by the district court in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 954–55 (N.D. Cal. 2010). Finding the coalition was called

> ProtectMarriage.com—Yes on 8, a Project of California Renewal ("Protect Marriage") as a "primarily formed ballot measure committee" under California Law. . . . Protect Marriage is a "broad coalition" of individuals and organizations, including the Church of Jesus Christ of Latter-Day Saints (the "LDS Church"), the California Catholic Conference and a large number of evangelical churches.

Id.

[76] 1 U.S.C. § 7 (2006). This statute states,

> 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 a wife.

Id.

[77] 28 U.S.C. § 1738C. This statute states,

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, or tribe, or a right or claim arising from such relationship.

Id.

[78] U.S. CONST. art. IV, § 1.

[79] *Id.*

[80] For a detailed list of each mini-DOMA statute and amendment passed before 2005, see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2166–94 (2005). For subsequent rulings, the website for the Human Rights Campaign, a gay rights advocacy organization, has links for legal rulings in each state. HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/your_community/index.htm (last visited Nov. 27, 2010).

amendment was passed in Hawaii, thus giving the state legislature the power to negate the court's ruling that same-sex marriages were constitutional.[81]

While Hawaii never granted same-sex couples the ability to marry, five states and the District of Columbia currently issue marriage licenses to same-sex couples.[82] In addition, New York recognizes marriages from other jurisdictions, and New York state courts now recognize Canadian same-sex marriages for the purposes of public benefits, inheritance, and divorce.[83] In sum, twenty percent of the United States population is located in states that offer some type of broad rights and responsibilities to same-sex couples.[84]

Two recent federal district court decisions, *Perry v. Schwarzenegger* and *Massachusetts v. United States Department of Health & Human Services*, could challenge the constitutionality of DOMA and the future of same-sex marriage

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[81] *See supra* note 73 and accompanying text.

[82] *See* N.H. REV. STAT. ANN. § 457:1-a (2009) (legalizing same-sex marriage); VT. STAT. ANN. tit. 15, § 8 (2009) (same); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 2009 D.C. Legis. Serv. 18-110 (West) (same); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008) (same); Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009) (same); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 973 (Mass. 2003) (same).

[83] *See* Martinez v. Cnty. of Monroe, 850 N.Y.S.2d 740, 743 (App. Div. 2008) (recognizing a same-sex marriage and finding it not against the public policy of New York to do so absent legislative prevention).

[84] Press Release, Nat'l Gay & Lesbian Task Force, Unprecedented Series of Gains Coast to Coast for Lesbian, Gay, Bisexual and Transgender People (May 9, 2007), *available at* http://www.thetaskforce.org/node/2334/print. *See, e.g.*, California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified as amended at CAL. FAM. CODE §§ 297–299 (West 2008)) (granting same-sex couples, and heterosexual couples meeting an age requirement, the "same rights, protections, and benefits, and . . . the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses"); HAW. REV. STAT. §§ 572C-1 to -7 (2010) (listing the requirements of and granting legal recognition to "significant personal, emotional, and economic relationships with another individual [that] are prohibited by such legal restrictions from marrying" but not "the same rights and obligations under the law that are conferred through marriage"); N.J. STAT. ANN. §§ 37:1-28 to -36 (West 2008) (recognizing "civil unions between same-sex couples in order to provide these couples with all the rights and benefits that married heterosexual couples enjoy"); Oregon Family Fairness Act, ch. 99, 2007 Or. Laws 607 (creating domestic partnerships in Oregon); Act effective July 22, 2007, ch. 156, 2007 Wash. Legis. Serv. 496 (codified as amended at WASH. REV. CODE §§ 26.60.010 to .090 (2010)) (acknowledging domestic partnerships for same-sex couples and those over the age of sixty-two in order to "provide a legal framework for such mutually supportive relationships"). Of particular interest is Vermont, which passed An Act Relating to Civil Unions. 2000 Vt. Acts & Resolves 72 (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201–1207 (2010)) (granting same-sex couples the "same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage," and then passed a gay marriage law in 2009). *See also, e.g.*, O'Darling v. O'Darling, 188 P.3d 137, 139 (Okla. 2008) (implying in dicta that the fact the plaintiff was attempting to dissolve a same-sex marriage would have been fatal to her action); Chambers v. Ormiston, 935 A.2d 956, 963 (R.I. 2007) (refusing to grant a divorce to a same-sex marriage from Massachusetts because the legislature did not understand marriage to include same-sex marriage when it wrote the divorce statute).

generally. The next two sections of this article focus on these two cases and their implications.

A. Perry v. Schwarzenegger

One of the most recent cases involving conflicts over same-sex marriage and a state mini-DOMA stems from California.[85] In *Perry v. Schwarzenegger*, the federal constitutionality of Proposition 8, a 2008 ballot initiative that amended the California Constitution to prohibit the recognition of same-sex marriage performed on or after November 5, 2008, was challenged.[86] On August 4, 2010, Chief Judge Vaughn Walker ruled Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and ordered same-sex marriages to resume.[87] Later that month, the Ninth Circuit Court of Appeals stayed the judgment pending appeal.[88]

Judge Walker's opinion included a discussion of the constitutional standard of review and an examination of the Fourteenth Amendment claims.[89] In general, Judge Walker concluded California had no rational basis or vested interest in denying same-sex couples marriage licenses.[90] As previously discussed, claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment must be examined under rational basis review or a higher standard of review.[91] While Judge Walker found Proposition 8 unconstitutional using the lower rational basis standard, he stated:

> Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect. . . . The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.[92]

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[85] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[86] *Id.* at 928.

[87] *Id.* at 1003–04.

[88] Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010).

[89] *Perry*, 704 F. Supp. 2d at 981–1004.

[90] *Id.* at 1003.

[91] *See supra* notes 31–33 and accompanying text.

[92] *Perry*, 704 F. Supp. 2d at 997 (citations omitted).

Although the judge did not choose to evaluate the petitioners' claims using strict scrutiny demanded by suspect classification, his reasoning and commentary indicate subsequent cases should use a higher level of review.

In reaching his conclusion, Judge Walker reviewed and rejected each of the arguments Proposition 8 proponents presented.[93] He noted Proposition 8 was based on traditional notions of opposite-sex marriage and on moral disapproval of homosexuality, neither of which forms a legal basis for discrimination.[94] After reviewing the history of marriage and concluding that the state had no interest in maintaining restrictions on an individual's choice of spouse based on gender, the court ruled that tradition alone cannot form a rational basis for law. [95]

Next, the court rejected the argument that the State must proceed with caution when implementing social changes.[96] Judge Walker decided the evidence showed—beyond debate—that "allowing same-sex couples to marry had at least a neutral, if not a positive, effect on the institution of marriage and that same-sex couples' marriages would benefit the state," thus rejecting the argument that same-sex marriage would amount to sweeping social change.[97]

In addition, he found that allowing same-sex couples to marry did not negatively impact the rights of those opposed to same-sex marriage.[98] Here the proponents argued same-sex marriage would impinge upon their First Amendment rights of association, and same-sex marriage could affect their children through exposure to gay and lesbian families in the public schools; for example, if the State permitted same-sex couples to marry, some would choose to have children who would then be enrolled in the public schools. Proponents of Proposition 8 did not want their children exposed to such families. The court summarily rejected this argument, stating, "Proposition 8 does not affect any First Amendment right or responsibility of parents to educate their children."[99] Next, the judge evaluated the claim that the State should prohibit same-sex marriage to promote opposite-sex parenting over same-sex parenting.[100] Relying on expert testimony, the court concluded same-sex parenting and opposite-sex parenting are of equal quality.[101]

In sum, Judge Walker concluded the evidence showed "by every available metric, opposite-sex couples are not better than their same-sex counterparts;

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[93] *Id.* at 930–32.

[94] *Id.*

[95] *Id.* at 998.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 999.

[99] *Id.* at 1000.

[100] *Id.* at 999–1000.

[101] *Id.* at 999.

instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal. Proposition 8 violates the Equal Protection Clause because it does not treat them equally."[102] Judge Walker characterized the right at issue in the case as simply "the right to marry."[103] Concluding animus against LGBT individuals cannot withstand constitutional scrutiny as a legitimate reason to allow differential and discriminatory treatment, Judge Walker relied on the United States Supreme Court's reasoning in two pivotal cases on marriage and sexuality: *Loving v. Virginia* and *Griswold v. Connecticut*.[104] The judge commented marriage "has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household."[105] In discussing these precedential cases, he stated that while "[r]ace and gender restrictions shaped marriage during eras of race and gender inequality, . . . such restrictions were never part of the historical core of the institution of marriage."[106]

Moreover, Judge Walker concluded that "a private moral view that same-sex couples are inferior to opposite-sex couples is not a proper basis for legislation."[107] In coming to this conclusion, Judge Walker recalled the Supreme Court's reasoning in *Lawrence*:

> The arguments surrounding Proposition 8 raise a question similar to that addressed in *Lawrence*, when the Court asked whether a majority of citizens could use the power of the state to enforce "profound and deep convictions accepted as ethical and moral principles" through the criminal code. The question here is whether California voters can enforce those same principles through regulation of marriage licenses. They cannot. California's obligation is to treat its citizens equally, not to "mandate [its] own moral code." "[M]oral disapproval, without any other asserted state interest," has never been a rational basis for legislation. Tradition alone cannot support legislation.
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> Proponents' purported rationales are nothing more than post-hoc justifications. While the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn. Here, the purported state interests fit so

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[102] *Id.* at 1002 (citation omitted).

[103] *See id.* at 991.

[104] *Id.* at 991–92 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

[105] *Perry*, 704 F. Supp. 2d at 993.

[106] *Id.*

[107] *Id.* at 1002.

> poorly with Proposition 8 that they are irrational, as explained above. What is left is evidence that Proposition 8 enacts a moral view that there is something "wrong" with same-sex couples.[108]

The opinion included eighty findings of fact, typically not reviewable upon appeal, including the following:[109]

- Marriage is a civil, nonreligious matter.[110]
- Marriage proffers significant benefits both to the state and to individuals.[111]
- "Individuals do not generally choose their sexual orientation."[112]
- The State "has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California."[113]
- "Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals."[114]
- There are costs and harms to lesbians and gays, which result from the denial of marriage to same-sex couples.[115]
- Gays and lesbians have a long history of being victims of discrimination.[116]

Not surprisingly, Judge Walker concluded that restrictions based on sexual orientation today could no longer be part of the institution of marriage.[117]

B. Massachusetts v. United States Department of Health & Human Services

The Walker court's ruling against Proposition 8 came on the heels of another federal court decision, *Massachusetts v. United States Department of Health &*

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[108] *Id.* (citations omitted).

[109] An appellate court can only set aside a finding of fact made by a trial judge if it determines that the finding is clearly erroneous. FED. R. CIV. P. 52(d).

[110] *Perry*, 704 F. Supp. 2d at 956.

[111] *Id.* at 961–64.

[112] *Id.* at 966.

[113] *Id.* at 967.

[114] *Id.* at 969–70.

[115] *Id.* at 977–80, 986–87.

[116] *Id.* at 981.

[117] *Id.* at 993. The Court also held California's domestic partnership laws do not satisfy California's obligation to provide gays and lesbians with the right to marry for two reasons: (1) domestic partnerships "do not provide the same social meaning as marriage," and (2) "domestic partnerships were created specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples." *Id.* at 994.

Human Services.[118] In this decision, Judge Joseph L. Tauro ruled the federal DOMA was unconstitutional because it denied federal rights and benefits to lawfully married Massachusetts couples thereby offending the notion of states' rights, as enshrined in the Tenth Amendment to the United States Constitution.[119] "The case began . . . when Gay & Lesbian Advocates & Defenders filed a suit against the . . . [federal] Office of Personnel Management on behalf of eight married couples and three surviving spouses from Massachusetts [who were] denied federal spousal rights and benefits because of DOMA . . . ."[120] That case was combined with another, in which Massachusetts sued the federal government for mandating it to treat some of its married citizens differently from others when operating federally funded programs such as Medicaid and veterans' cemeteries.[121] Judge Tauro ruled DOMA violated the United States Constitution "by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with two joint federal-state programs."[122] No decision has been reached yet on whether the Obama Administration's Justice Department will appeal the decision.[123]

Combined, these two lower-level federal decisions significantly challenge the existence of both federal and state DOMAs. Ultimately, the decisions also challenge the prohibitions on same-sex marriage existing in most jurisdictions and establish precedent for other states to follow.

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[118] 698 F. Supp. 2d 234 (D. Mass. 2010).

[119] *Id.* at 253.

[120] Jake Tapper, *Judge Rules Defense of Marriage Act Is Unconstitutional; Will President Obama's Justice Department Appeal?*, POLITICAL PUNCH: POWER, POP, & PROBINGS FROM ABC NEWS SENIOR WHITE HOUSE CORRESPONDENT JAKE TAPPER (July 8, 2010, 10:08 PM), http://blogs.abcnews.com/politicalpunch/2010/07/judge-rules-defense-of-marriage-act-is-unconstitutional-will-president-obamas-justice-department-app.html.

[121] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010). This case explored areas of administrative concern to Massachusetts: the operation of veterans' cemeteries, the impact on MassHealth, and Medicare tax. Of particular concern to the State was a June 2008 directive from the National Cemetery Administration, an arm of the Veteran's Administration, stating "individuals in a same-sex civil union or marriage are not eligible for burial in a national cemetery or State veterans cemetery that receives federal grant funding based on being the spouse or surviving spouse of a same-sex veteran." *Massachusetts*, 698 F. Supp. 2d at 240 (quoting William Walls Aff.; Ex. 2; NAT'L CEMETERY ADMIN., DIRECTIVE 3210/1 (June 4, 2008)).

[122] *Massachusetts*, 698 F. Supp. 2d at 236.

[123] Tapper, *supra* note 120. According to Tapper, "A Justice Department spokesperson said that [the] Obama administration was 'reviewing the decision,' and had not yet decided whether to appeal to defend a law against same sex marriage that President Obama says he opposes." *Id.*

C. Wyoming and Same-Sex Marriage

Two Wyoming statutes specifically address marriage.[124] First, Wyoming Statute section 20-1-101 states, "Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential." Second, Wyoming Statute section 20-1-111 states: "All marriage contracts which are valid by the laws of the country in which contracted are valid in this state." Thus, unless these statutes are found unconstitutional, Wyoming has explicit statutory language that marriage must include opposite-sex partners and a statement about full faith and credit regarding marriages performed elsewhere. Section 20-1-101 would need modification before same-sex marriages could be performed in the state in accordance with Wyoming law. However, section 20-1-111 does not specifically address the state's stance on marriages between same-sex couples performed in other jurisdictions.

Certainly the arguments in favor of Wyoming's recognition of same-sex marriages performed in other jurisdictions are straightforward under section 20-1-111: Any valid marriage in State X is considered a valid marriage in Wyoming. Consequently, a valid same-sex marriage in State X should be considered a valid marriage in Wyoming. Those opposing such recognition argue, however, that the logical implication of section 20-1-101 is state public policy requires a valid marriage to be between a man and a woman. This latter argument leads to a discussion of what constitutes an acceptable interpretation of unarticulated public policy; that is, what is public policy as it relates to the lack of explicit constitutional or statutory language in the state's marriage laws? Persuasive precedent exists on this question.

While common-law marriages are not valid in Wyoming, the Wyoming Supreme Court has recognized common-law marriages from other states in the context of survivor death benefits. In *Bowers v. Wyoming State Treasurer ex rel. Workmen's Compensation Division*, the court stated: "[N]o legitimate state interest is served by discrimination between [illegitimate and legitimate] children[;] it appears equally certain that no such interest is served by discrimination between legally married spouses."[125] The court concluded that "[a]s has been the law of this state since 1876, marriages outside the state which are valid therein are valid in this state."[126]

A corollary exists between the *Bowers* court reasoning on common-law marriage and recognition of same-sex marriages performed in other states. Preceding the *Bowers* ruling, the Wyoming Supreme Court in *In re Roberts'*

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[124] WYO. STAT. ANN. §§ 20-1-101, -111 (2010).

[125] 593 P.2d 182, 184 (Wyo. 1979).

[126] *Id.* at 184 (citing WYO. STAT. ANN. § 20-1-111 (1977)).

Estate declared common-law marriages were not valid and violated the state's marriage code.[127] While no such ruling on same-sex marriages has occurred in the state, it would follow that although same-sex marriages may be considered against Wyoming public policy, such an interpretation does not necessarily mean recognition of same-sex marriages performed in other states is against Wyoming public policy. However, Wyoming law is not clear on this point.

This lack of clarity concerns those opposed to same-sex marriages and the recognition of same-sex marriages from other jurisdictions.[128] It also has resulted in unsuccessful attempts to clarify the law through passage of a mini-DOMA. Wyoming is one of a handful of states that does not grant same-sex marriage or have a mini-DOMA law.[129] While such bills have been introduced in several legislative sessions, none have passed. The last of these bills was introduced in the 2009 legislative session.[130] Wyoming House Joint Resolution 17 would have called for a statewide vote on a constitutional amendment providing that "a marriage between a man and a woman shall be the only legal union that shall be valid or recognized in this state."[131] The resolution was soundly defeated by a vote of twenty-five in favor to thirty-five opposed.[132]

While the sponsors and speakers in favor of the resolution argued against gay marriage generally, they also argued that the ambiguity in state law regarding same-sex marriages performed in other jurisdictions should be resolved against recognition before the courts were asked to make a determination.[133] However,

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[127] *In re* Roberts' Estate, 133 P.2d 492, 503 (Wyo. 1943); *see Bowers*, 593 P.2d 182.

[128] As this article is under review, Wyoming Attorney General Bruce Salzburg signed onto an amicus curiae brief with twelve other states in support of the reversal of the district court holding in *Perry*. Brief for States of Indiana, et al. as Amici Curiae Supporting Appellants, Perry v. Schwarzenegger, No. 10-16696 (9th Cir. Sept. 24, 2010), 2010 WL 4075743. The signatories argue five points against gay marriage: (1) "states have sovereign primacy over marriage," *id.* at 2–5; (2) "*Baker v. Nelson* compels reversal," *id.* at 6–7; (3) there is no fundamental right to same-sex marriage nor are suspect classes implicated, *id.* at 8–12; (4) "the concept of traditional marriage . . . satisfies rational basis review," *id.* at 12–29; and (5) that "the district court's new definition of marriage contains no principle limiting the types of relationship that can make claims on the state," *id.* at 29–36.

[129] NAT'L GAY & LESBIAN TASK FORCE, STATE LAWS PROHIBITING RECOGNITION OF SAME-SEX RELATIONSHIPS 1 (June 30, 2009), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/samesex_relationships_7_09.pdf.

[130] Defense of Marriage, H.R.J. Res. 17, 60th Leg., 2009 Gen. Sess. (Wyo. 2009), *available at* http://legisweb.state.wy.us/2009/Introduced/HJ0017.pdf.

[131] *Id.*

[132] Roll Call, H.R. 60-0017, 60th Leg., 2009 Gen. Sess. (Wyo. 2009), *available at* http://legisweb.state.wy.us/2009/Digest/HJ0017.htm. Ultimately, the measure would have needed forty-one votes out of sixty in the House of Representatives to pass from the House to the Senate. In the Senate, it would have needed twenty-one out of thirty votes. Finally, it would have required the Governor's signature before becoming a ballot measure.

[133] Audio: House Floor Debate, Wyoming Legislature (Feb. 6, 2009, AM), http://legisweb.state.wy.us/2009/audio/house/h0206am1.mp3.

opponents of the resolution prevailed.[134] The opponents argued from a variety of viewpoints. One called the resolution "state sponsored bigotry."[135] Others maintained the issue had the potential to engage the state in a fight that would pit neighbor against neighbor to the detriment of all, and in times of economic crisis, the legislature and state's eyes should be on assuring economic security.[136] Finally, other arguments invoked the state's motto, the "Equality State," with a reading of portions of the Wyoming Constitution including:

> *Sec. 2. Equality of all.* In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.
>
> *Sec. 3. Equal political rights.* Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.[137]

Speakers citing these provisions asserted their beliefs that Wyoming's LGBT citizens must be treated equally.

As the legislature has failed to act, it may be up to the courts to interpret the federal and state constitutions as they relate to Wyoming's LGBT citizens and their claims for equal treatment.[138] Some of these citizens would like to

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[134] Roll Call, *supra* note 132.

[135] Jared Miller, *Gay Marriage Ban Falls in House*, CASPER STAR TRIB., Feb. 7, 2009, http://trib.com/news/state-and-regional/article_20db2a5b-5d02-562a-8369-16663af0d5d9.html.

[136] *Id.*

[137] WYO. CONST. art. 1, §§ 2, 3.

[138] On August 13, 2010, Gerald Shupe-Roderick and Ryan Dupree filed a complaint in the United States District Court for the District of Wyoming, which was withdrawn a month later. Complaint, Shupe-Roderick v. Freudenthal, No. 2:10-cv-00166-ABJ (D. Wyo. Aug. 13, 2010). In their complaint the plaintiffs, both of Cheyenne, alleged sections 20-1-101 to -113 of the Wyoming Statutes were unconstitutional under the "laws that are guaranteed by the Fourteenth Amendment to the United States Constitution." *Id.* at 2. As a remedy, the complaint requested that the court "enjoin, preliminarily and permanently, all enforcement of Wyoming Statute § 20-1-101 and any other Wyoming statutes, ordinances or laws that seek to exclude gays and lesbians from access to civil marriage." *Id.* In their complaint, the plaintiffs argued "[m]arriage is a supremely important social institution. . . ." *Id.* at 7. Furthermore, they argued that the

> "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Each day that Plaintiffs are denied the freedom to marry, they suffer irreparable harm as a direct result of Defendant's violation of their constitutional rights.

Id.; *see* Jeremy Pelzer, *Gay Couple Drops Lawsuit*, CASPER STAR TRIB., Sept. 16, 2010, at 1.

marry their same-sex partner in Wyoming and some have married legally in other jurisdictions and would like the same federal and state benefits that are associated with marriage. In addition, many would like to enjoy the societal recognition that the institution of marriage confers generally that is now denied to them.

D. Same-Sex Families with Children and Other Reproductive Issues

Recognition of same-sex relationships is also relevant in terms of same-sex individuals and families with children. Adoption and foster-parenting policies vary from state to state.[139] Some state policies explicitly permit gay and lesbian parents or couples to adopt children or become foster parents; others ban all "unmarried couples" from adoption.[140] While Mississippi bans adoptions by two people of the same sex, prior to a 2010 case, Florida was the only state that prohibited a single lesbian or gay person from adopting children in need of a home.[141]

Wyoming law permits any adult person who has resided in the state for sixty days to adopt.[142] The law is silent on LGBT couples jointly adopting a child and on LGBT individuals adopting a child of their same-sex partner (a situation often referred to as a second-parent adoption).[143] Two reproductive methods that LGBT families utilize for family formation are surrogacy and donor insemination. No state statutory provisions or case law exist on surrogacy; consequently it is not clear how Wyoming will treat a surrogacy agreement involving LGBT individuals. While both heterosexual and LGBT individuals may make use of donor sperm, the Wyoming Donor Insemination Law states a donor is not a legal parent of a

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[139] *See infra* notes 140–41 and accompanying text.

[140] California, Connecticut, the District of Columbia, and Vermont permit adoptions by those who are not married. CAL. FAM. CODE § 9000 (West 2009); CONN. GEN. STAT. § 45a-724(a)(3) (2010); D.C. CODE § 16-302 (2010); VT. STAT. ANN. tit. 15A, § 1-102(b) (2010). Mississippi and Utah expressly prohibit adoptions by couples who are unmarried. MISS. CODE ANN. § 93-17-3(5) (2010) (prohibiting couples of the same gender from adopting); UTAH CODE ANN. § 78B-6-117(3) (West 2010) (prohibiting adoption "by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state"). *See generally Parenting*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/parenting/parenting_laws.asp (last visited Nov. 26, 2010) (providing a state by state summary of adoption laws).

[141] MISS. CODE ANN. § 93-17-3(5); FLA. STAT. § 63.042(3) (2010). *But see,* Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (granting a petition for adoption was proper because Florida Statute section 63.042(3), which prohibited a homosexual person from adopting, was unconstitutional as a violation of equal protection under the Florida Constitution Article I, Section 2).

[142] WYO. STAT. ANN. § 1-22-103 (2010).

[143] *See generally* Elizabeth A. Delaney, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and her Child*, 43 HASTINGS L.J. 177 (1991) (discussing second-parent adoptions); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459 (1990).

child conceived via assisted reproduction, and only a man who provides semen for assisted reproduction with the intention of being a parent of the child is, in fact, the parent.[144]

Furthermore, Wyoming law allows a partner to make medical decisions for an incapacitated same-sex partner as someone who "has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as a surrogate."[145] However, a spouse, adult child, parent, adult sibling, grandparent, or grandchild all could have priority ahead of the same-sex partner. In order to have the partner move ahead of these others, adults may designate that same-sex partners have the authority to make medical decisions on their behalf through a power of attorney.[146]

E. Hertzler v. Hertzler

The only Wyoming Supreme Court case to address the relevance of same-sex sexuality under state laws is a child custody dispute.[147] As such, it deserves careful review. Dean and Pamela Hertzler divorced shortly after they adopted their second child.[148] The mother agreed to disavow lesbianism and became the custodial parent.[149] When the mother entered into an open and ongoing lesbian relationship with Peggy, she transferred primary custody of the children to the father and was granted liberal visitation rights.[150] Soon thereafter, Dean Hertzler remarried a woman, Christine, who had strict religious views condemning homosexuality.[151] The children's father then sought a modification of the custody order to greatly restrict the mother's visitation rights.[152]

In ruling for the father, the district court held that it was likely that the children would be negatively impacted because of societal disapproval of their mother's homosexuality, and that the state had an interest in supporting conventional marriages and families.[153] The court reduced the visitation rights of the children's mother based on its belief that the children would be confused by

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[144] WYO. STAT. ANN. §§ 14-2-902 to -903.

[145] *Id.* § 35-22-406(c).

[146] *Id.* § 35-22-403(b).

[147] Hertzler v. Hertzler, 908 P.2d 946 (Wyo. 1995).

[148] *Id.* at 948.

[149] *Id.*

[150] *Id.* at 948–49.

[151] *Id.* at 949.

[152] *Id.*

[153] *See id.* at 950.

their mother's sexuality and that their moral development would be negatively impacted.[154] Pamela Hertzler appealed the district court's ruling to the Wyoming Supreme Court.[155]

In a three-to-two ruling, the Wyoming Supreme Court affirmed the trial court, ruling the lower court did not abuse its discretion.[156] However, the Supreme Court explicitly rejected the trial court's negative commentary on the mother's sexuality.[157] In particular, the court found bias in the lower court's acceptance of the father's expert witness and rejection of the mother's.[158] Further, in its review of the father's allegation that the mother's lesbianism was a significant change of circumstance dictating the need for a revised visitation order, the court rejected the district court's commentary on homosexuality and gay and lesbian families.[159] The court stated,

> [W]e must address a fundamental flaw in the analysis articulated by the district court in its decision letter: "The state has an interest in perpetuating the values associated with conventional marriage, as the family is the basic cornerstone of our society. Homosexuality is inherently inconsistent with families, and with the relationship and values which perpetuate families." The position of the family as the cornerstone of our society is a proper subject of judicial notice. We are not, however, inclined towards exclusion in defining the family unit, particularly where the care and nurturing of children is at issue.[160]

Further, the Supreme Court commented, "[T]he district court indulged an essentially personal viewpoint in derogation of Pamela's lifestyle."[161]

Regardless of this analysis disparaging the district court's negative dicta on the mother's lesbianism, the Wyoming Supreme Court found the trial court did not abuse its discretion to the point of failing to rule in the children's best interests. It

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[154] *See id.* at 952.

[155] *Id.* at 949.

[156] *Id.* at 952.

[157] *Id.* at 951–52.

[158] *Id.* at 950. The lower court allowed the expert witness for the father, a former minister with a recent Master's degree in counseling who admitted to a deep-seated anti-gay bias, while rejecting the mother's experts which included an experienced psychologist with a Ph.D. and years of experience. *Id.*

[159] *Id.* at 951–52.

[160] *Id.* (citations omitted).

[161] *Id.* at 951.

upheld the district court's ruling in favor of the father's motion.[162] The Supreme Court closed with the following salvo:

> The district court's judgment is not affirmed *because* of Dean and Christine's insistence upon their "values" so much as it *is in spite of* that behavior. The damage their contest with Pamela has done to these children may already be irreparable. If Dean, Christine, and Pamela cannot fully subordinate promotion of their respective lifestyles to the natural innocence and love of their children for both parents, they will quickly extinguish whatever remaining chances these children have for happy and productive lives. With that somber caveat, the judgment of the district court is affirmed.[163]

The dissent in the case reiterated the majority's condemnation of the district court ruling for custody based on its personal condemnation of the mother's lesbianism and found such animus rose to the level of abuse of discretion.[164] Moreover, the dissent disagreed with the majority that both the father and mother engaged the children equally in detrimental lifestyle clashes, instead finding that "the father and Christine worked long and hard at alienating these children from their mother. They should have been held in contempt for what they have done."[165] The dissent concluded by citing the testimony of Dr. Moriarity, a licensed psychologist, who concluded the children would be impacted detrimentally by a ruling limiting the mother's visitation and that the mother and her partner were loving, caring parents whose relationship with the children should be encouraged rather than curtailed.[166]

In sum, while a deeply divided court deferred to a lower court's decision, the court unanimously disagreed with that lower court's negative determinations about same-sex sexuality and families.[167] With no other reported rulings on gay and lesbian families with children, Wyoming is one of the few states in which the status of same-sex families with children remains murky. While the polar star for all determinations of child custody is the "best interests of the children," the *Hertzler* ruling implies future litigants may not argue a parent's homosexuality is a per-se negative factor in determining custody or visitation.

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[162] *Id.* at 952. However, in so ruling the appellate court also commented favorably on the trial court's easing its restriction of Pamela's visitation rights "[s]ince its initial decision, the district court has wisely eased restrictions on Pamela's visitation rights." *Id.*

[163] *Id.*

[164] *Id.* at 953 (Golden, C.J., dissenting).

[165] *Id.* at 954.

[166] *Id.* at 954–56.

[167] *Id.* at 950–51 (majority opinion), 953 (Golden, C.J., dissenting).

IV. EMPLOYMENT ISSUES

Title VII of the Civil Rights Act of 1964 (Title VII) protects individuals from being fired, harassed, or denied a promotion or a raise based on race, religion, sex, or national origin.[168] The Age Discrimination Employment Act (ADEA) prohibits age discrimination, and the Americans with Disabilities Act (ADA) prohibits discrimination based on disability.[169] Under these laws, aggrieved parties, both individuals and groups, may bring causes of action under theories of disparate treatment and/or disparate impact.[170] Remedies vary, and the Civil Rights Act of 1991 modified them to include punitive damages for findings of intentional discrimination.[171] Title VII explicitly forbids the use of quotas or preferential treatment to listed-group members as a remedy or as a business practice to assure that equal opportunities exist.[172] The law prohibits public and private employers, employment agencies, and labor unions from basing employment decisions on any of the protected categories.[173] It exempts small businesses, religious organizations, and the military.[174]

Currently, no federal law specifically protects LGBT individuals from employment discrimination, and the reach of Title VII does not include protections based on sexual orientation or gender identity.[175] According to studies by the American Psychological Association and the Williams Institute of University of California, Los Angeles School of Law, such protections are necessary for at least two distinct reasons. First, to protect LGBT individuals from irrational

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[168] 42 U.S.C. § 2000e-2(a) (2006).

[169] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12117; *see* 29 U.S.C. § 631(a) (forbidding employment discrimination against anyone over the age of forty years in the United States).

[170] For an overview of Title VII, see *Tenth Annual Review of Gender and Sexuality Law: Employment Law Chapter: Title VII of the Civil Rights Act of 1964*, 10 GEO. J. GENDER & L. 639 (Laura C. Bornstein ed. 2009). In a disparate treatment case, a plaintiff must establish that because of membership in a listed category, she or he was treated differently than others. Although a disparate treatment claim requires a showing that the employer acted intentionally, the intent need not be malicious in order for a plaintiff to meet his or her burden. *Id.* at 646–47. In a disparate impact case, a plaintiff must show how an employer's policies negatively impacted his or her protected class; i.e., that facially neutral employment practices resulted in a significant pattern of discrimination. *Id.* at 665.

[171] 42 U.S.C. § 1981a.

[172] *Id.* § 2000e-2(j).

[173] *Id.* § 2000e-2(a)–(d).

[174] *Id.* § 2000e-2(e)–(i).

[175] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998) (holding Title VII applies when both parties are of the same sex). However, lower courts are split about whether this ruling applies to anti-gay animus. *See* Clare Diefenbach, *Same-Sex Sexual Harassment After* Oncale*: Meeting the "Because of . . . Sex" Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42, 76–92 (2007) (providing an excellent overview of all post-*Oncale* rulings).

discrimination, and second, the protections are simply good business practices.[176] Data recorded by the Human Rights Campaign, a gay-rights organization, indicate that "[a]s of September 2009, 434 (87%) of the Fortune 500 companies had implemented non-discrimination polices that include sexual orientation, and 207 (41%) had policies that include gender identity."[177]

For several years, Congress has debated a version of a bill called the Employment Non-Discrimination Act (ENDA).[178] This act, like the ADA and the ADEA, would extend anti-employment-discrimination provisions to include sexual orientation or gender identity.[179] Like Title VII, if the current version of ENDA were to become law, it would explicitly prohibit preferential treatment and quotas based on sexual orientation or gender identity; however, it would exempt small businesses, religious organizations, and the military.[180] The act only allows disparate treatment suits and not disparate impact claims, and thus plaintiffs could not argue that an employer's facially neutral policy has a disparate impact on individuals because of their sexual orientation or gender identity.[181]

While Wyoming has no law covering sexual orientation or gender identity, numerous states have passed laws to protect LGBT individuals from discrimination.[182] Currently, more than half the United States population lives in

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[176] *Examining the Employment Nondiscrimination Act (ENDA): The Scientists Perspective*, AM. PSYCHOL. ASS'N, http://www.apa.org/pi/lgbt/resources/employment-nondiscrimination.aspx (last visited Nov. 27, 2010); *see also* William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65 (2001).

[177] These figures represent eighty-seven and forty-one percent of the companies, respectively. *Employment Non-Discrimination Act*, HUM. RTS. CAMPAIGN, http://www.hrc.org/laws_and_elections/enda.asp (last updated Feb. 26, 2010).

[178] *See* Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s111-1584; Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h111-3017. Representatives Barney Frank (D-MA) and Ileana Ros-Lehtinen (R-FL), and Senators Jeff Merkley (D-OR) and Susan Collins (R-ME) introduced the most recent bills in the 111th Congress. Hearings took place in both houses, but the bill has again not come forward for full debate. *See also* Brad Sears, Christy Mallory & Nan D. Hunter, Williams Inst., *Congressional Record of Employment Discrimination Against LGBT Public Employees. 1994–2007*, *in* DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 9-1 (2009), *available at* http://escholarship.org/uc/item/8vv8v8gk (providing a history of ENDA).

[179] S. 1584 § 2; H.R. 3017 § 2.

[180] S. 1584 §§ 4(f), 3(a)(4)(A), 6, 7; H.R. 3017 §§ 4(f), 3(a)(4)(A), 6, 7.

[181] S. 1584 § 4(g); H.R. 3017 § 4(g).

[182] *See, e.g.*, CONN. GEN. STAT. § 46a-81c (2010); HAW. REV. STAT. § 368-1 (2010); MASS. GEN. LAWS ch. 151B, § 4(1) (2010); N.J. STAT. ANN. § 10:5-12 (West 2010); WIS. STAT. § 111.36 (2010).

jurisdictions that outlaw discrimination based on sexual orientation.[183] However, Wyoming is among the twenty-nine states allowing discrimination based on sexual orientation and the thirty-eight states allowing discrimination based on gender identity or expressions.[184] During the 2010 Wyoming legislative session, Wyoming House Bill 087, *Discrimination*, was introduced with bi-partisan co-sponsorship.[185] If it had passed, the bill would have modified Wyoming statutes with anti-discrimination language to include "sexual orientation and gender identity."[186] House Bill 087 would have updated Wyoming's fair employment law, as well as anti-discrimination provisions in other laws such as jury selection and public accommodations.[187] Re-introduction is expected in future legislative sessions.

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[183] Matt Foreman, *Unprecedented Series of Gains Coast to Coast for Lesbian, Gay, Bisexual and Transgender People*, NAT'L GAY & LESBIAN TASK FORCE (May 9, 2007), http://www.thetaskforce.org/node/2334/print. Wisconsin was the first state to ban employment discrimination based on sexual orientation in 1982. WIS. STAT. §§ 36.12, 106.50, 106.52, 111.31, 230.18, 224.77. Minnesota was the first state to ban employment discrimination based on both sexual orientation and gender identity when it passed the Human Rights Act in 1993. MINN. STAT. §§ 363A.01 to .41 (2010).

Currently, twelve states and the District of Columbia have policies that protect against both sexual orientation and gender identity discrimination in employment. CAL. GOV'T CODE § 12920 (Deering 2010); CAL. CIV. CODE § 51 (Deering 2010); COLO. REV. STAT. §§ 24-34-401 to -402 (2010); 775 ILL. COMP. STAT. 5/1-102 (2010); IOWA CODE § 216.2 (2010); ME. REV. STAT. tit. 5, §§ 4571–4576 (2010); MINN. STAT. §§ 363A.01 to .41; N.J. STAT. ANN. §§ 10:2-1, :5-1 to -49; N.M. STAT. ANN. § 28-1-7 (2010); OR. REV. STAT. § 659A.004 (2010); R.I. GEN. LAWS §§ 28-5-3, -7, 34-37-4, -4.3, 11-24-2 (2010); VT. STAT. ANN. tit. 21, § 495 (2010); *id.* tit. 9, § 4503; *id.* tit. 8, §§ 4724, 10403; *id.* tit. 3, § 963; WASH. REV. CODE §§ 49.60.130-175 to -176, -178, -180, -190, -200, -215, -222 to -225, -300 (2010); WASH. ADMIN. CODE § 356-09-020 (2010); Wash. Exec. Order No. 85-09 (1985) (protecting public employees from sexual orientation discrimination).

An additional nine states have laws protecting against discrimination based on sexual orientation only. CONN. GEN. STAT. § 46a–81c; DEL. CODE ANN. tit. 19, §§ 710, 711, 719 (2010); HAW. REV. STAT. §§ 515-2 to -7, 378-1 to -3, 489-2 to -3; MD. CODE ANN., STATE GOV'T § 20-606 (West 2010); MASS. GEN. LAWS ch. 151, § 1; NEV. REV. STAT. §§ 233.010(2), 613.330 (2010); N.H. REV. STAT. ANN. §§ 21-I:42, 354-A:2, :6 (2010); N.Y. EXEC. LAW §§ 296, 296-a (McKinney 2010); WIS. STAT. §§ 36.12, 106.50, .52, 111.31, 230.18, 224.70.

[184] The following states have no explicit anti-discrimination language regarding sexual orientation and gender identity: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. The following states have language regarding sexual orientation but not gender identity: Connecticut, Delaware, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin. *See State Nondiscrimination Laws in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE (July 1, 2009), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf (providing updates to state nondiscrimination laws); *supra* note 176.

[185] H.B. 87, 60th Leg., 2010 Budget Sess. (Wyo. 2010), *available at* http://legisweb.state.wy.us/2010/Introduced/HB0087.pdf. The bill passed the House Judiciary Committee, but it was not heard for full debate on the House floor before the cut-off date.

[186] *Id.*

[187] *Id.*

Without explicit protection in the Wyoming statutes, it is not surprising no reported cases of anti-gay employment discrimination by private employers exist. Currently, such animus is not forbidden by law. There have been two documented cases of employment discrimination by government employers, both of which found against the LGBT plaintiffs.[188] In *Milligan-Hitt v. Board of Trustees of Sheridan County School District No. 2*, two lesbian school administrators from Sheridan County successfully sued the Sheridan County School District and superintendent.[189] Following a trial on the merits, the jury awarded the two plaintiffs $160,515 for employment discrimination in violation of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.[190] On appeal, the United States Court of Appeals for the Tenth Circuit reversed the decision based on its interpretation that the superintendent was not the final policymaker for the District and could not be liable for his actions.[191] Citing the currency at the time of *Bowers v. Hardwick*, the court also declared the status of the law regarding discrimination based on sexual orientation was not clearly unconstitutional, and therefore qualified immunity protected the superintendent from personal liability.[192]

In *Brockman v. Wyoming Department of Family Services*, a state employee alleged gender discrimination based on comments made by a supervisor about the employee's perceived lesbianism.[193] Ms. Brockman argued, first, that her supervisor incorrectly believed that she was lesbian and then subjected her to a hostile work environment, and second, that she was discriminated against for failing to meet the personal characteristics that her supervisor believed to be appropriate for a woman. The district court granted summary judgment to the defendants holding that,

> "[s]exual orientation is conspicuously and intentionally absent from the list of protected categories under Title VII," and that "[r]ecasting allegations of homophobia as 'sex stereotyping' does not of itself bring the action under the purview of the Civil Rights Act." The Tenth Circuit affirmed the decision, and the U.S. Supreme Court denied the employee's writ of *certiorari*.[194]

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[188] Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2, 523 F.3d 1219 (10th Cir. 2008); Brockman v. Wyo. Dep't of Family Servs., No. 00-cv-0087-B (D. Wyo. May 9, 2001).

[189] *Milligan-Hitt*, 523 F.3d at 1221.

[190] *Id.* at 1223.

[191] *Id.* at 1221.

[192] *Id.* at 1233.

[193] *Brockman*, No. 00-cv-0087-B (D. Wyo. May 9, 2001). Ms. Brockman denied the allegations. *Id.*

[194] *See* WILLIAMS INST., *supra* note 10, at 6.

While these cases indicate there has been little recourse in the courts for those alleging employment discrimination based on sexual orientation or gender identity, the University of Wyoming (UW), a publicly funded state university has an equal employment opportunity clause which states:

> The University's policy has been, and will continue to be, one of nondiscrimination, offering equal opportunity to all employees and applicants for employment on the basis of their demonstrated ability and competence without regard to such matters as race, color, religion, sex, national origin, disability, age, veteran status, sexual orientation or political belief.[195]

The UW College of Law further prohibits "[a]ny employer that discriminates for the purposes of hiring on the basis of race, color, religion, national origin, gender, sexual orientation, marital status, age or disability" from using the facilities and services of the law school's Career Services Office.[196]

Finally, the UW Board of Trustees passed a resolution permitting the University President to implement domestic partner benefits for same-sex and different-sex employees when he deems it to be fiscally viable.[197] However, there has been no official domestic policy implemented at UW.

V. THE MURDER OF MATTHEW SHEPARD: HATE CRIME LEGISLATION AND THE GAY PANIC DEFENSE

In the fall of 1998, Matthew Shepard, a twenty-one-year-old UW student and Casper native, was bludgeoned to near death with the butt end of a pistol

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[195] University of Wyoming, Laramie, Univ. Reg. 3, Rev. 2 (June 17, 2007), *available at* http://www.uwyo.edu/generalcounselsupport/clean%20uw%20regulations/UW%20Reg%201-3.pdf.

[196] Career Servs. Office, *Equal Opportunity Statement/Non Discrimination Policy*, U. OF WYO. C. OF L. (2007), *available at* http://www.uwyo.edu/lawcsosupport/docs/EqualEmploymentOpportunityStatement.pdf. This policy was suspended with respect to the military in response to the Solomon Amendment, which allows the Secretary of Defense to deny federal grants to institutions of higher education if they prohibit or prevent military recruitment on campus. *Id.*

[197] The University of Wyoming Board of Trustees' Minutes (May 29–31, 2009), http://www.uwyo.edu/trusteessupport/Meetings/2009/May/2009_May%2029-31_BOT%20Business%20Meeting%20_Retreat__FINAL.pdf. Trustee Davis stated the following motion regarding domestic partner benefits:

> I move that the Board of Trustees approve, as a matter of principle, a policy that would allow the university administration to implement a voucher system to provide domestic partner benefits, with the understanding that implementation of such a system shall not occur now but must wait until such time as the President of the University determines that it is fiscally viable in light of the current budget reductions.

Id. at 3.

and lashed to a fence on the outskirts of town.[198] Shepard, discovered by a passing cyclist eighteen hours after being abandoned by his attackers, regrettably died five days later from the massive injuries he sustained from the attack. Soon after, Matthew Shepard became the face of hate crimes against LGBT individuals.

Two Laramie residents, Russell Henderson and Aaron McKinney, committed the crime.[199] While Russell Henderson pled guilty to felony murder and kidnapping, the case against Aaron McKinney went to trial. McKinney's trial brought forth the "gay panic" defense, alleging past negative homosexual experiences caused McKinney to react violently to Shepard's alleged advances.[200] Judge Barton R. Voigt ruled the defense inadmissible.[201] This section addresses both the issue of hate crimes and the gay panic defense.

A. Hate Crimes

Statutes against crimes motivated by animus toward a protected class are called hate crime or bias crime laws. Until the inclusion of sexual orientation and gender identity in 2009, protected classes under federal anti-hate crime legislation included those delineated by race, color, religion, or national origin.[202] In general, hate crime acts have one or more of the following purposes: (1) to define specific bias-motivated acts as distinct crimes; (2) to increase penalties for bias-motivated criminal acts; (3) to create a distinct civil cause of action for hate crimes; and/or (4) to require administrative agencies to collect hate crime statistics.[203]

Harsher punishments for hate crimes are often justified based on the idea that hate crimes result in greater individual and societal harm. While enacting the Hate Crimes Act of 2000, the New York State Legislature found the following:

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[198] *See* BETH LOFFREDA, LOSING MATT SHEPARD: LIFE AND POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER (2000).

[199] State v. McKinney, Crim. Action No. 6381 (2d Jud. Dist. Ct., Albany Cnty., Wyo. 1999).

[200] *See infra* Part V.B.

[201] *See infra* notes 220–31 and accompanying text.

[202] 18 U.S.C. § 245 (2006).

[203] *See generally* Jana C. Romaine, *Hate Crimes*, 4 GEO. J. GENDER & L. 115 (2002). For examples of defining acts, see, e.g., CAL. PENAL CODE § 422.7 (West 2010); CONN. GEN. STAT. § 46a-58 (2010); IOWA CODE § 729A.2 (2010). For enhancing penalties, see, e.g., ALASKA STAT. § 12.55.155 (2010); ARIZ. REV. STAT. ANN. § 13-702 (2010); CAL. PENAL CODE § 422.7. For establishing a civil cause of action, see, e.g., CAL. CIV. CODE §§ 51.7, 52.1; D.C. CODE § 22-3704 (2010); 720 ILL. COMP. STAT. 5/12-7.1 (2010); IOWA CODE § 729A.5; MICH. COMP. LAWS § 750.147b (2010). For data collection statutes, see ARIZ. REV. STAT. ANN. § 41-1750; IOWA CODE § 692.15; MASS. GEN. LAWS ch. 22, § 33 (2010); NEB. REV. STAT. § 28-114 (2010); N.J. STAT. ANN. § 2A:53A-21 (West 2010). *See State Hate Crimes Statutory Provisions*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html (last visited Nov. 27, 2010).

> Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes. In a democratic society, citizens cannot be required to approve of the beliefs and practices of others, but must never commit criminal acts on account of them. Current law does not adequately recognize the harm to public order and individual safety that hate crimes cause. Therefore, our laws must be strengthened to provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence. Accordingly, the legislature finds and declares that hate crimes should be prosecuted and punished with appropriate severity.[204]

The United States Supreme Court has ruled that statutes with enhanced penalties for hate crimes do not conflict with free speech rights and do not punish an individual for exercising freedom of expression.[205] Rather, they allow courts to consider the motives of criminals for conduct that is not protected by the First Amendment.[206]

In 2009, Congress passed an expansion of the federal hate crimes law, which has been called the Shepard/Byrd Act (Act).[207] The Act expands the 1969 federal anti-crime law and expressly grants the Federal Bureau of Investigation (FBI) authority to investigate violent hate crimes when "the crime was committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability, of any person, and the crime affected

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[204] *See* N.Y. PENAL LAW § 485.00 (McKinney 2002) (finding that biased and prejudicial "criminal acts involving violence, intimidation, and destruction of property" have recently become more widespread throughout the state of New York).

[205] Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993).

[206] *Id.* at 489.

[207] *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111–84, §§ 4701–4713, 123 Stat. 2835–44 (2009). The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, also known as the Matthew Shepard Act, was passed on October 22, 2009, and signed into law by President Barack Obama on October 28, 2009, as a rider to the National Defense Authorization Act for 2010 (H.R. 2647). This bill was vigorously supported by the family of Matthew Shepard and the foundation it founded to address hate crimes. Among the foundation's goals are to increase knowledge and understanding regarding LGBT individuals and to address the negative impact of anti-LGBT discrimination. *See* MATTHEW SHEPARD FOUND., http://www.matthewshepard.org (last visited Nov. 27, 2010).

interstate or foreign commerce, or occurred on federal property."[208] The Act gives federal authorities greater ability to engage in hate crime investigations that local authorities choose not to pursue.[209] Further, it provides $5 million in annual funding for fiscal years 2010 through 2012 to help state and local agencies pay for investigating and prosecuting hate crimes.[210] Additionally, it requires the FBI to track statistics on hate crimes against transgender people.[211] Statistics for the other above-listed groups are already tracked.[212]

On the state level, the Shepard/Byrd Act allows local Wyoming law enforcement agencies to receive assistance from the federal government in the wake of increased costs associated with the investigation and prosecution of a hate crime.[213] Such a provision would have helped enormously in Albany County, Wyoming, where the murder of Matthew Shepard and subsequent trial of Aaron McKinney occurred. According to one report, the costs associated with the Matthew Shepard murder exceeded $150,000 for local agencies and caused the Albany County sheriff's department to furlough five deputies.[214]

Ironically, Wyoming is one of only five states without hate crime laws.[215] While legislators have introduced several bills in the Wyoming legislature to

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[208] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, §§ 4701–4713.

[209] *Id.* § 4706.

[210] *Id.* § 4704(b)(7).

[211] *Id.* § 4708.

[212] *Id.*

[213] *Id.* § 4704.

[214] *See* Michael Janofsky, *Public Lives; Gay Man's Death Led to Epiphany for Wyoming Officer*, N.Y. TIMES, Sept. 30, 2000.

[215] The others are Arkansas, Georgia, Michigan, and South Carolina. There are twelve states and the District of Columbia with hate crime laws that include crimes based on sexual orientation and gender identity. *E.g.*, CAL. PENAL CODE §§ 422.75, .76 (West 2009); COLO. REV. STAT. § 18-9-121 (2010); CONN. GEN. STAT. §§ 53a-181j to -181l (2010); D.C. CODE §§ 22-3701 to -3702, -3704, 2-1401.02 (2010); HAW. REV. STAT. §§ 846-51 to -52, -54, 706-662 (2010); MD. CODE ANN., CRIM. LAW §§ 10-301 to -306 (2010); MINN. STAT. §§ 363A.03(44), 609.2231(4) (definition of sexual orientation), .595(1a), .748, 611A.79 (2009); MO. REV. STAT. § 557.035 (2010); N.J. STAT. ANN. § 2C:16-1 (West 2010); OR. REV. STAT. §§ 166.155, .165, 181.550 (2010).

Eighteen states have passed hate crime laws that include crimes based on sexual orientation. ARIZ. REV. STAT. ANN. §§ 41-1750, 13-701(D)(15) (2010); DEL. CODE ANN. tit 11, § 1304 (2010); FLA. STAT. § 775.085 (2010); 720 ILL. COMP. STAT. 5/12-7.1 (2010); IOWA CODE § 729A.1-2 (2010); KAN. STAT. ANN. § 21-4716 (2009); KY. REV. STAT. ANN. § 532.031 (West 2010); LA. REV. STAT. ANN. §§ 14:107.2, 15:1204.4 (2010); ME. REV. STAT. tit 17, § 1151 (2010); MASS. GEN. LAWS ch. 265, § 39 (2010), *id.* ch. 22C, §§ 32–35; NEB. REV. STAT. §§ 28-111, -113 (2010); NEV. REV. STAT. § 41.690 (2010); N.H. REV. STAT. ANN. §§ 651:6, 21:49 (2010); N.Y. PENAL LAW §§ 485.00-05, 240.30-31 (McKinney 2010); N.Y. C.P.L.R. 200.50 (MCKINNEY 2010); R.I. GEN. LAWS § 12-19-38 (2010); TENN. CODE ANN. § 40-35-114 (2010); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2010); TEX. PENAL CODE ANN. § 12.47 (West 2010); WIS. STAT. § 939.645 (2010).

establish a bias-crime law, none has passed. Of concern was the inclusion of sexual orientation as one of the protected classes.[216]

B. Gay Panic Defense

In Aaron McKinney's trial for the murder of Matthew Shepard, the defense team attempted to use a version of the "gay panic" defense.[217] As in every state, Wyoming's criminal law is very specific about acceptable defense strategies.[218] The defense counsel argued the defendant was unable to form the specific intent to commit first-degree murder. Instead, his actions and state of mind at the time of the crime indicated he had committed voluntary manslaughter. The defense therefore asked the court to allow lay witnesses to attest to the defendant's "homosexual abuse at the age of five years, and again at the age of seven years, and that he had homosexual experiences in his teenage years."[219]

In his ruling against the defense motion, Judge Voigt addressed several aspects of the motion. First, Judge Voigt stated that the admission of witnesses would be inconsequential because they were lay rather than expert witnesses: "At least with expert testimony and a recognized syndrome, such as the battered woman syndrome, there might be something to make the testimony relevant."[220] He also emphasized the legal elements of "provocation" and "specific intent" in relation

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Sixteen states have passed hate crime laws or have anti-hate crime rulings that do not include crimes based on sexual orientation or gender identity. ALA. CODE § 13A-5-13 (2010); ALASKA STAT. § 12.55.155 (2010); IDAHO CODE ANN. § 18-7902 (2010); IND. CODE §§ 5-2-5-1, 5-3-5-14.3 (2010); MISS CODE ANN. §§ 99-19-301, -303, -305, -307 (2010); MONT. CODE ANN. §§ 45-5-221 to -222 (2010); N.C. GEN. STAT. § 14-3 (2010); N.D. CENT. CODE §§ 12.1-14-05, -04 (2010); OHIO REV. CODE ANN. § 2927.12 (West 2010); OKLA. STAT. tit. 25, § 1506.9 (2010); 71 PA. CONS. STAT. § 250 (2010); 42 PA. CONS. STAT. §§ 8309, 9720; 18 PA. CONS. STAT. §§ 2710, 3307, 5509; S.D. CODIFIED LAWS § 22-19B-1 (2010); UTAH CODE ANN. § 76-3-203.3 (West 2010); VA. CODE ANN. § 18.2-57 (2010); W. VA. CODE § 61-6-21 (2010); *see* People v. Diaz, 727 N.Y.S.2d 298 (Sup. Ct. 2001).

[216] Jared Miller, *State Avoids Hate Crime Legislation*, CASPER STAR TRIB., Oct. 11, 2008, http://trib.com/news/state-and-regional/article_d636eb76-665b-5593-b186-f69a96d32a37.html.

[217] Decision Letter from Judge Barton Voigt, Eighth Judicial Dist. of Wyo., to Cal Rerucha, Albany Cnty. Attorney, Dion James Custis, Assistant Pub. Defender, Jason M. Tangeman, Attorney at Law (Oct. 30, 1999) [hereinafter Decision Letter] (on file with author). Judge Voigt titled this section "homosexual panic." *Id.* at 4 n.5.

[218] Examples in Wyoming include "not guilty by reason of mental illness or deficiency" as defined under Rule 11(a) of the Wyoming Rules of Procedure and sections 7-11-301 to -307 of the Wyoming Statutes. Self defense can be used to justify a homicide. Nunez v. State, 383 P.2d 726 (Wyo. 1963). Battered women syndrome is also recognized as an affirmative defense of self-defense. WYO. STAT. ANN. § 6-1-203 (2010). Voluntary intoxication may negate the specific intent element of a particular crime, leaving the defendant guilty of a lesser included offense. *Id.* § 6-1-202(a).

[219] Decision Letter, *supra* note 217, at 1.

[220] *Id.* at 4 n.5.

to the defense request.[221] Specifically, he reiterated the Wyoming standard of an objective rather than subjective test for provocation.[222] Further, he explained that the defense team's alternate subjective test would have allowed any

> stimulus that happened to "set off" a defendant [to] be a defense to the malice element of both first and second degree murder. If a defendant has a low tolerance for letting his wife stay late at the bar, killing her would just be manslaughter. That cannot be the law.[223]

Next, in relation to the requirements for "specific intent," the court looked to the Wyoming Rules of Evidence 401 and 402. These allow a defendant to produce any relevant evidence on an issue.[224] Such relevant evidence is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."[225] The defense argued that the defendant's youthful homosexual experiences made more probable his formation of the specific intent to kill, and therefore the evidence was relevant and should be admitted.[226] However, citing Wyoming Rule of Evidence 403, which permits the disallowance of relevant "evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," Judge Voigt rejected the defendant's motion, stating:

> [T]here is nothing from which the jury could conclude that these homosexual experiences had any negating effect upon the formation of a specific intent. If anything, the proffered evidence may suggest to the jury that the Defendant had a motive to kill Matthew Shepard. Of greater concern is the probability that this evidence will confuse the issues and mislead the jury. Provocation, which is what the evidence is really submitted to prove goes to malice, not specific intent, and is an objective, rather than a subjective test. . . . [W]hat the Defendant is trying to do is raise a mental status defense that is not recognized by Wyoming law, and of which there has been no notice and no opportunity for the Court or opposing counsel to consider before trial.[227]

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[221] *Id.* at 4–5.

[222] *Id.* at 5.

[223] *Id.* at 4.

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.* at 5.

Finally, to emphasize this point, Judge Voigt ended his decision letter by quoting Dressler, *When Heterosexual Men Kill*:

> The Court is not yet convinced that a manslaughter instruction will even be given in this case. Such an instruction is not appropriate in a case that turns out to be a premeditated gay bashing or robbery disguised as homosexual rage.[228]

Ultimately, however, the court allowed the defense to argue the jury should find the defendant guilty of only manslaughter by allowing two witnesses to speak of their own negative reactions to Shepard's sexual advances.[229] The implication was that red-blooded American men like McKinney could reasonably be expected to react to such overtures with violence.[230] While the jury dismissed these arguments by finding McKinney guilty of second-degree and felony murder, "a less sagacious jury may have been swayed by the gay panic defense, to the extent that it was successfully smuggled into the case, and come to a different conclusion."[231]

VI. CONCLUSION

Virtually every day brings a new twist to the law or debates about gay rights in the United States. The questions abound: Should we abandon or strengthen prohibitions on gay marriage and gay and lesbian soldiers' participation in the military? Should we expand our federal anti-discrimination language to include sexual orientation and gender identity? Should same-sex families be afforded the same rights as different-sex families to adopt and foster children? As this article illustrates, Wyoming is part of the conversation happening around the nation. We have many LGBT citizens in the state, most of whom live and work in our communities, and many of whom are raising children. However, currently they are not afforded the same rights under the law as are heterosexual citizens. While this article has shown that little case or statutory law exists on these issues, it has also demonstrated that the Wyoming Constitution is expansive in its equal protection language. The time has come for the "Equality State" to step up and show its historical true colors by granting its LGBT citizens the equality and protections proclaimed by its Constitution.

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[228] *Id.* at 6 (citations omitted).

[229] Catherine Connolly, *Matthew's Murderers' Defense*, GAY & LESBIAN REV., Jan.–Feb. 2001, at 25.

[230] *Id.* at 26; *see also* LOFFREDA, *supra* note 198, at ch. 5. *See generally* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008).

[231] Connolly, *supra* note 229, at 26.