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ARTICLES

QUEERING REPRODUCTIVE JUSTICE

Marie-Amélie George *

INTRODUCTION

Debates over reproductive rights tend to center on abortion, with the line dividing pro-choice and pro-life creating what often seems to be an impenetrable political barrier between blue and red. In the past several years, high profile abortion bans have further entrenched this popular conception of reproductive rights as a matter of abortion access.¹ However, this conversation's narrow scope ignores the diverse set of issues and rights that fall within the scope of reproductive decision-making. It additionally overlooks the reproductive issues specific to queer individuals, meaning sexual and gender minorities.² These two omissions obscure a potentially transformative path for securing reproductive rights for everyone: queer reproductive justice.

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1. Anna North & Catherine Kim, *The "Heartbeat" Bills That Could Ban Almost All Abortions, Explained*, VOX (June 28, 2019, 9:50 AM EDT), <https://www.vox.com/policy-and-politics/2019/4/19/18412384/abortion-heartbeat-bill-georgia-louisiana-ohio-2019> [https://perma.cc/9D32-2L28].

2. Alanna Vagianos, *Women Aren't the Only People Who Get Abortions*, HUFFPOST (June 6, 2019, 10:37 AM ET), https://www.huffpost.com/entry/women-arent-the-only-people-who-get-abortions_n_5cf55540e4b0e346ce8286d3/ [https://perma.cc/9XJK-5LDY].

Queer reproductive justice applies the reproductive justice movement's principles to queer needs and interests. The reproductive justice movement differs from the reproductive rights struggle by emphasizing that reproductive rights are about much more than whether and how to terminate a pregnancy.³ Founded in the mid-1990s by feminists of color, this movement adopted a holistic approach to reproductive rights.⁴ As advocates argued, people's ability to exercise personal bodily autonomy, decide to have or not have children, and raise any children they had were also reproductive rights concerns.⁵ Reproductive justice work thus encompasses a range of topics, including accessing sex education and healthcare, as well as ensuring living wages, since all of these subjects influence reproductive decision-making.⁶

Even within the reproductive justice movement's expanded conception of reproductive rights, advocates tend to ignore the queer community's specific reproductive issues.⁷ Among LGBTQ and other sexual minority rights advocates, queer reproductive justice receives little attention.⁸ Although LGBTQ rights groups have increasingly recognized that reproductive rights are essential to queer individuals, these conversations have tended to be circumscribed, centering on queer people's access to contraception and

3. Justin Murray et al., *Introduction to IN SEARCH OF COMMON GROUND ON ABORTION: FROM CULTURE WAR TO REPRODUCTIVE JUSTICE* 1, 4 (Robin West et al. eds., 2014); LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 1 (2017); Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73, 79–80 (2013).

4. See ROSS & SOLINGER, *supra* note 3, at 56; Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER, RACE & JUST. 187, 192–93 (2013).

5. *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/ZQG7-2RHS>].

6. *Id.*

7. *But see* ROSS & SOLINGER, *supra* note 3, at 196–201 (discussing reproductive justice issues with respect to transgender people).

8. Although this Article uses “LGBTQ” and “queer” interchangeably because the legal issues are similar, the two terms are not interchangeable. Queer is an expansive term that denotes any nonheterosexual or noncisgender individual. This Article includes intersex, as well as Bondage, Dominance, and Sadomasochism practitioners, within the ambit of queer, although LGBTQ rights advocates may not represent these identity groups. T.J. Jourian, *Evolving Nature of Sexual Orientation and Gender Identity*, in GENDER AND SEXUAL DIVERSITY IN U.S. HIGHER EDUCATION: CONTEXTS AND OPPORTUNITIES FOR LGBTQ COLLEGE STUDENTS 11, 18 (Dafina-Lazarus Stewart et al. eds., 2015); Marie-Amélie George, *Expanding LGBT* (forthcoming 2020) (unpublished manuscript) (on file with author).

abortion.⁹ Absent are discussions of other queer reproductive justice concerns, such as sex education and insurance coverage, as well as assisted reproductive technologies and child custody.

Queer people's exclusion from reproductive justice advocacy is not just harmful for sexual and gender minorities—it is counterproductive for nonqueer individuals. Queer reproductive rights may sometimes be different in form from their nonqueer counterparts, but they nevertheless implicate the same fundamental concerns as other reproductive rights—dignity, autonomy, privacy, liberty, and equality. What may mask their similarities is the vast jurisprudential disconnect between them. The Supreme Court has been more receptive to LGBTQ rights cases that implicate these fundamental rights than reproductive rights litigation that makes similar claims. These gaps, however, provide an opportunity for the reproductive justice movement. Focusing on queer reproductive rights may allow advocates to bridge the doctrines, thereby taking advantage of the LGBTQ movement's legal success to promote reproductive justice.

The Supreme Court has retreated from its once-protective stance towards reproductive rights. In *Roe v. Wade*, the Supreme Court recognized the right to personal privacy as an inherent part of individuals' liberty interests,¹⁰ and later framed abortion as a choice “central to personal dignity and autonomy.”¹¹ Justice Stevens, in his concurrence to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, argued that “*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.”¹² Recently, however, the Court has moved away from this conception of abortion and its role in promoting fundamental constitutional values. In the 2007 *Gonzales v. Carhart* opinion, only the dissent mentioned autonomy, privacy, or equality.¹³ The Court reinforced how marginal these rights had become in *Burwell v. Hobby Lobby Stores, Inc.*, a case on access to

9. See, e.g., NAT'L LGBTQ TASK FORCE, QUEERING REPRODUCTIVE JUSTICE: A MINI TOOLKIT 6 (2019), <https://www.thetaskforce.org/wp-content/uploads/2019/06/Queering-Rep-productive-Justice-Mini-Toolkit.pdf> [<https://perma.cc/BJ4U-M6T9>]; Julianna S. Gonen, *Our Common Quest for Autonomy and Dignity: Reproductive Rights and LGBTQ Equality*, ALLIANCE FOR JUST. (June 27, 2019), <https://www.afj.org/blog/our-common-quest-for-autonomy-and-dignity-reproductive-rights-and-lgbtq-equality> [<https://perma.cc/W7JM-CPGW>].

10. 410 U.S. 113, 152 (1973).

11. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

12. *Id.* at 912 (Stevens, J., concurring in part and dissenting in part).

13. 550 U.S. 124, 170, 172 (2007) (Ginsburg, J., dissenting); see also *Whole Woman's*

contraception, when it framed autonomy as a right of religious objectors and dismissed the government's argument that contraception access promoted gender equality.¹⁴

In contrast to abortion and contraception cases, the Court has repeatedly underscored equality in LGBTQ rights decisions, framing equality as a matter of dignity, autonomy, privacy, and liberty.¹⁵ Even in its most recent LGBTQ-related case, in which the Court ruled in favor of a baker who objected to same-sex marriage on religious grounds, the decision emphasized that “gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”¹⁶ The Court's commitment to LGBTQ rights may wane in the wake of Justice Kennedy's retirement, but LGBTQ issues are currently a more robust area for rights recognition and preservation than abortion or contraception. Advocates consequently may be able to forge useful precedent in the LGBTQ rights space to then apply to other issues, rather than focusing directly on abortion or contraception.¹⁷

Given the doctrinal divergence, this Article argues that queer reproductive justice issues may be the most effective areas in which to build precedent that supports all reproductive justice rights, including abortion and contraception. Queer reproductive gains, in addition to their precedential value, also offer strategies that the reproductive justice movement may find useful to apply.

In making the claim that reproductive rights may be best preserved through LGBTQ rights advocacy, this Article builds upon the work of scholars who have remarked on the different fates of reproductive and queer rights.¹⁸ It also draws on the arguments of

Health v. Hellerstedt, 136 S. Ct. 2292, 2323 (2016) (Thomas, J., dissenting) (omitting the language of autonomy, dignity, and equality).

14. 573 U.S. 682, 688–90, 709, 726, 728 (2014).

15. Obergefell v. Hodges, 135 S. Ct. 2584, 2597–99, 2603–04 (2015); United States v. Windsor, 570 U.S. 744, 769 (2013).

16. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723, 1727 (2018).

17. Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 340 (2010) (discussing the merits of an equality-based argument for abortion rights).

18. Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 COLUM. J. GENDER & L. 1, 1–3 (2015) (analyzing the reasons for the disparate trajectories of marriage equality and abortion rights); Scott Skinner-Thompson et al., *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 126–27 (2016) (identifying the jurisprudential disconnect between LGBTQ rights and abortion).

reproductive rights scholars, who have theorized that equality principles may serve as a revolutionary formulation for reproductive rights.¹⁹ The Supreme Court has yet to analyze reproductive rights as an equality issue, instead framing reproductive autonomy as a substantive Due Process right.²⁰ Presenting reproductive rights as an issue of equality may thus provide advocates with “a fresh start” from which to pursue their claims.²¹ These equality arguments tend to emphasize “the bodily imposition of forced pregnancy or the disproportionate social burdens of motherhood,” issues that parallel queer reproductive rights claims.²² Given that LGBTQ rights claims have turned on equality arguments, queer reproductive justice provides a platform for building equality-based reproductive rights precedent.

Although reproductive justice advocates have tended to avoid queer reproductive issues, the movement has already benefited from adapting queer legal strategies, indicating a potential willingness to adopt this new approach. Online campaigns to “shout your abortion,” aimed at making abortion more visible and less stigmatized, derive from the gay liberation movement’s tactic of “coming out.”²³ In *Whole Woman’s Health*, over 100 lawyers joined in an amicus brief detailing how “meaningful access to reproductive choice allowed them to become, remain, or thrive as lawyers,” thereby personalizing a politicized issue.²⁴ Of course, queer tactics are one thing; queer legal issues are another. Yet queer reproductive justice is also reproductive justice tout court, with mobilization on queer individuals’ behalf serving both a strategic and substantive purpose that may convince advocates.²⁵

This Article’s claim that LGBTQ rights advances inure to the benefit of reproductive rights is more than a practical claim about developing legal doctrine—it implicitly challenges conventional wisdom around effective social movement mobilization. Social

19. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 352–54 (1992).

20. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375–76 (1985).

21. Hendricks, *supra* note 17, at 339.

22. *Id.* at 340.

23. Skinner-Thompson et al., *supra* note 18, at 144–46.

24. Brief of Janice Macavoy et al. as Amici Curiae in Support of Petitioners at 4, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

25. There are likely areas in which the goals of LGBTQ and reproductive justice advocates diverge, but detailing these are beyond the scope of this Article.

movement scholarship has repeatedly suggested that advocates tend to promote the interests of more privileged community members, since these are easier to secure and because incremental gains serve as a stepping stone for additional rights work.²⁶ As a result, they tend to focus less on the needs of more marginalized individuals, and indeed, those at the bottom of the social ladder have been accused of benefiting unduly from their association with those higher up.²⁷

Given that the reproductive rights movement is larger and holds more social capital than the LGBTQ movement, promoting queer reproductive claims would invert this traditional mobilization framework. Rather than a trickle-down approach, advocacy on behalf of LGBTQ individuals may produce rights gains that “trickle up” to a broader population.²⁸ Queer reproductive claims thus recast the helpers and the helped, instantiating a different framework of social justice advocacy. A main reason for this trickle-up effect is that the LGBTQ movement’s fortunes are waxing, while reproductive rights are waning.²⁹ For that reason, the LGBTQ movement is a useful strategic partner, despite its more marginal status.

To present these arguments, this Article proceeds in three Parts, with each Part taking up a different set of queer reproductive issues to illustrate how LGBTQ rights advocacy may promote reproductive justice writ large. The first examines family formation debates around LGBTQ assisted reproductive technologies and custody of children. These victories provided the factual and legal support for the Supreme Court’s marriage equality decisions, which emphasized equality, dignity, and autonomy principles—that reproductive justice advocates may be able to apply more broadly.

26. Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 615–19 (2019) [hereinafter George, *Framing Trans Rights*]; Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 558–61 [hereinafter George, *The LGBT Disconnect*].

27. George, *The LGBT Disconnect*, *supra* note 26, at 561.

28. Barnard Ctr. for Research on Women, *Dean Spade: Trickle-Up Social Justice*, YOUTUBE (May 7, 2009), <https://www.youtube.com/watch?v=0i1fREeZXPI> [<https://perma.cc/VX33-HN4K>]. Notably, transgender men may also become pregnant, but the trickle-up effect extends from the rights of transgender individuals to cisgender women.

29. The trickle-up effect this Article describes therefore may be circumscribed to similar situations.

Parts II and III—on sex education curricula and medical decision-making, respectively—also offer avenues for reproductive rights advocates’ intervention. Sex education tends to exclude, and sometimes discriminates against, queer youth. Challenging the curricula’s antiqueer formulation may provide an avenue for changing the materials more generally. As for medical decision-making, Part III takes up intersex infant normalization surgery, insurance coverage for transition-related care, and religious refusals to provide gender transition treatment. All of these tie directly to concerns about abortion and contraception access. The issues in Part III may thus provide the most direct path to developing abortion and contraception rights precedent.

I. FAMILY FORMATION

Reproductive justice, at its core, concerns people’s ability to decide whether, how, and when to have children, as well as their capacity to raise the children they have. Queer rights groups, through legislation and litigation on behalf of LGBTQ individuals, have advanced everyone’s ability to beget and raise children. This Part details two areas of LGBTQ family related law reform: the first examines nonbiological parenthood, and the other child custody. These legal rights underpinned the marriage equality victories, which emphasized same-sex couples’ equality, dignity, and autonomy. In addition to demonstrating how queer reproductive advocacy can promote broader legal principles, these areas of law provide strategic insights for reproductive justice advocacy.

A. *Nonbiological Parenthood*

Many parents are not biologically related to their children, either because they conceived those children through alternative reproductive technologies (“ART”) or because they are adoptive parents, stepparents, or nonlegal partners. Nonbiological parenthood asks courts to recognize the social dimension of parenting, as well as the parties’ intent and consent. When gay and lesbian couples were unable to marry, nonbiological parenthood rights were a key means of protecting parents and children—and these rights in turn served as the foundation for marriage equality.³⁰

30. NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES*

Nonbiological parenthood is not solely an LGBTQ rights issue. In addition to heterosexual couples who have nonbiological relationships to children, women's rights advocates have long acknowledged the role of surrogacy in maintaining abortion rights, as both turn on people's legal ability to exercise agency over their bodies.³¹ Advocacy on behalf of nonbiological parents has produced decisions emphasizing these individuals' equality, dignity, and autonomy, principles central to reproductive justice more broadly.

LGBTQ rights advocates focused on nonbiological parenthood rights because parentage assumptions that linked reproduction with biology and marriage left intended parents without a legal relationship to their children. To remedy courts' focus on biology, lesbian couples sometimes had one partner conceive a child with the other's egg, thereby creating a biological link between the child and both mothers. Doing so, however, did not guarantee that the gestational mother would qualify as a legal parent. The biological requirement also imposed barriers for heterosexual women; the law did not necessarily recognize as a legal parent the woman who engaged the services of an egg donor and gestational surrogate.³²

The net effect of the parentage assumptions was often to divide families. In *Russell v. Pasik*, for example, each woman in a lesbian couple had two children by the same sperm donor.³³ Although they had raised their four children together for years, the court limited their constitutionally protected parental rights to the children they bore.³⁴ The court explained that "it is the *biological connection between parent and child* that 'gives rise to an inchoate right to be a parent that may develop into a protected fundamental constitutional right based on the actions of the parent.'"³⁵ This case was not

(2013); Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 619–20 (2016); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017). For a discussion of the history of queer kinship, as well as a critique of biogeneticism, which favors biological and genetic kinship, see Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065.

31. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 144 (2009) ("In contrast to abortion, surrogacy was not a core issue for feminists; ultimately it became clear that support for restrictions on surrogacy undermined pro-choice advocacy.")

32. NeJaime, *supra* note 30, at 2311.

33. 178 So. 3d 55, 57 (Fla. Dist. Ct. App. 2015).

34. *Id.* at 57, 60.

35. *Id.* at 60 (quoting *D.M.T. v. T.M.H.*, 129 So. 3d 320, 338 (Fla. 2013)).

an outlier, as at least eleven states required intended mothers to adopt their children.³⁶

Before marriage equality, advocates secured various types of doctrinal remedies to promote nonbiological parent rights, including second parent adoption and de facto parenthood recognition. Second parent adoption permits a parent to adopt a child without the other parent losing their rights, while de facto parenthood recognizes psychological and intended parents. Although the doctrines are different, both provided custodial rights to same-sex co-parents upon the dissolution of their relationships.³⁷ Since the Supreme Court's decision recognizing same-sex couples' fundamental right to marry, courts have continued to apply these doctrines, although they have sometimes limited their applicability to couples who had children before they could legally marry.³⁸

Marriage equality has become a crucial means of protecting the rights of nonbiological parents, but nonbiological parenthood helped convince courts to overturn same-sex marriage bans in the first place. Same-sex marriage litigation featured gay and lesbian couples to emphasize the legal, financial, and social harms the state imposed on their children by denying the parents access to marriage—including by rendering one parent a legal stranger to their child.³⁹ Over the course of more than two decades, states defended their bans on same-sex marriage by claiming that limiting marriage promoted “responsible procreation” and “optimal family” structures.⁴⁰ The former encompassed both promoting childbirth

36. NeJaime, *supra* note 30, at 2309 n.239.

37. Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI. KENT L. REV. 55, 61–62 (2017); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1253–54 (2016).

38. See, e.g., *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 490, 494 (N.Y. 2016); *Ramey v. Sutton*, 362 P.3d 217, 221 (Okla. 2015).

39. That so many same-sex marriage litigants were parents was a deliberate choice on the part of lawyers bringing the cases. Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 31–32 (2005). As Cynthia Godsoe has documented, two-thirds of the *Obergefell* plaintiffs had children, significantly more than the eighteen percent national average for LGBTQ couples. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 149 (2015).

40. Between 1993 and 2015, federal circuit and state supreme courts adjudicated the constitutionality of same-sex marriage bans in twenty different cases; the state invoked responsible procreation or optimal childrearing justifications in seventeen of those cases. The cases in which the state invoked child protection as a justification were: *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1079–80 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 381, 383 (4th Cir. 2014); *DeBoer v. Snyder*, 772 F.3d 388, 404–05 (6th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1219 (10th Cir. 2014); *Latta v. Otter*, 771 F.3d 456, 468–69 (9th Cir. 2014); *Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir.

within heterosexual marriage and encouraging family formation after unintended pregnancies, while the latter indicated a preference for children to be raised by their dual-gender, biological parents.⁴¹ Ultimately, most courts concluded that the state harmed the very children it claimed to be trying to protect with same-sex marriage bans. By denying the children of same-sex couples the benefits and advantages associated with having married parents, including protecting the relationship between the nonbiological parent and their child, the state effectively penalized children to express its disapproval of their parents' sexual orientation.⁴²

The Supreme Court's marriage equality decisions emphasized same-sex couples' equality and dignity, as well as citizens' autonomy over their intimate lives. In making this last point, the Court placed marriage equality in the larger reproductive decision-making context, noting: "Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."⁴³

The opinions on same-sex marriage thus reinforced reproductive rights as a constitutional matter, serving in stark contrast to how the Court has framed its decisions on traditional reproductive rights issues like abortion and contraception. That the high-water mark for LGBTQ advocacy framed reproductive rights in a more positive manner than many reproductive rights decisions indicates just how much reproductive justice advocates may benefit by focusing on queer reproductive issues.

2012); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Ex parte State ex rel. Ala. Pol'y Inst.*, 200 So. 3d 495, 546 (Ala. 2015) (per curiam); *In re Marriage Cases*, 183 P.3d 384, 431–33 (Cal. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 873 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003); *Griego v. Oliver*, 316 P.3d 865, 877 (N.M. 2013); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999); *Andersen v. King Cty.*, 138 P.3d 963, 982–83 (Wash. 2006). The three in which child protection was not a feature were: *Kerrigan v. Comm'n of Pub. Health*, 957 A.2d 407, 477–78 (Conn. 2008); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). Note that in *Baehr v. Lewin*, the court did not reach the justifications for limiting marriage; on remand, the state proffered optimal childrearing as one of its reasons for its statutory ban. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996).

41. CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW 48–54, 69 (2014).

42. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015); *Goodridge*, 798 N.E.2d at 964; *Griego*, 316 P.3d at 888.

43. *Obergefell*, 135 S. Ct. at 2599.

B. *Child Custody*

Much like nonbiological parenthood, custody rights have been a means through which LGBTQ advocates have entrenched queer rights into the Constitution. Custody rights are a quintessential reproductive justice issue, since families, once formed, often fall apart. However, the connection between queer custody rights and reproductive rights is as much strategic as it is substantive. These queer legal victories depended significantly on changes within the medical profession, much like abortion rights once did.⁴⁴ Doctors and public health workers were the ones who initiated efforts to legalize abortion; their later alliance with feminist reformers gave rise to *Roe v. Wade*'s medicalized abortion framework.⁴⁵ Physicians likewise successfully challenged laws limiting their patients' right to contraception.⁴⁶ Medical providers were thus essential allies in battles over queer and nonqueer reproductive justice.

Custody disputes long served as a crucial battleground for queer rights. In the 1970s and 1980s, courts often denied lesbian mothers and gay fathers custody because of their sexual orientation, expressing fears that children would suffer harm by being exposed to same-sex sexual intimacy.⁴⁷ When courts relented, these queer parents created the families that eventually undergirded the Supreme Court's marriage equality decisions. Both *United States v. Windsor* and *Obergefell v. Hodges* emphasized how marriage promoted the interests of gay couples' children, who were otherwise stigmatized by their parents' unmarried status.⁴⁸

Advocates were able to attain lesbian mother and gay father custody rights by first securing a diagnostic change to the American

44. LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITY, AND ABORTION IN MODERN AMERICA (2010); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 (1997) [hereinafter REAGAN, WHEN ABORTION WAS A CRIME].

45. REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 44, at 217–19; see *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

46. *Roe*, 410 U.S. at 152; *Eisenstadt v. Baird*, 405 U.S. 438, 440, 443 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 480, 486 (1965).

47. Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 34 LAW & HIST. REV. 487, 488–90 (2016).

48. *Obergefell*, 135 S. Ct. at 2600–01 (“Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”); *United States v. Windsor*, 570 U.S. 744, 772 (2013) (describing marriage equality as “humiliat[ing] tens of thousands of children now being raised by same-sex couples”).

Psychiatric Association's ("APA") Diagnostic and Statistical Manual ("DSM"). Since, until 1973, the APA defined same-sex sexual attraction as a mental illness, courts refused to grant gays or lesbians custody when they had children in heterosexual relationships.⁴⁹ The diagnostic change, which came after years of lobbying by gay and lesbian rights advocates, eliminated that barrier.⁵⁰

Similarly, parents who engaged in Bondage, Dominance, and Sadomasochism ("BDSM") often lost custody and visitation rights as a result of their sexual relationships and practices,⁵¹ but they too were able to reverse this legal trend by working with the APA to alter its diagnostic codes.⁵² Between 1997 and 2010, eighty percent of parents who sought legal assistance from the National Coalition for Sexual Freedom ("NCSF"), a group that advocates for consenting adults in the BDSM, fetish, leather, swing, and polyamory communities, lost their custody battles.⁵³ After 2010, when the APA changed its diagnostic definitions to clarify that engaging in atypical sex practices did not indicate a mental illness, that percentage dropped to ten.⁵⁴ The new DSM categorization has reduced the number of custody disputes involving BDSM practitioners. In 2008, 157 people contacted the NCSF for help with divorce and child custody issues that arose because of their sexual practices.⁵⁵

49. George, *supra* note 47, at 487–88.

50. Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. 83, 111–16 (2018).

51. Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 116 (2014). Whether to include BDSM within the definition of queer is a matter of debate; however, gay male leather groups are undoubtedly part of the LGBTQ movement. Richard A. Sprott & Bren Benoit Hadcock, *Bisexuality, Pansexuality, Queer Identity, and Kink Identity*, 33 SEXUAL & RELATIONSHIP THERAPY 214, 214–16 (2018).

52. Merissa Nathan Gerson, *BDSM Versus the DSM*, ATLANTIC (Jan. 13, 2015), <https://www.theatlantic.com/health/archive/2015/01/bdsm-versus-the-dsm/384138/> [<https://perma.cc/YQ5D-WFDB>]. Medical professionals have remarked on the similarity between the situation of BDSM practitioners and their gay and lesbian predecessors, with one article noting that "[t]he situation of the Paraphilias at present parallels that of homosexuality in the early 1970s." Charles Moser & Peggy J. Kleinplatz, *DSM-IV-TR and the Paraphilias: An Argument for Removal*, 17 J. PSYCHOL. & HUM. SEXUALITY 91, 94 (2006).

53. Gerson, *supra* note 52.

54. *Id.*; see also AM. PSYCHIATRIC ASS'N, PARAPHILIC DISORDERS (2013); Mark Moran, *DSM to Distinguish Paraphilias from Paraphilic Disorders*, PSYCHIATRIC NEWS (May 3, 2013), <https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2013.5a19> [<https://perma.cc/8K25-GLKC>].

55. Susan Wright, *Depathologizing Consensual Sexual Sadism, Sexual Masochism, Transvestic Fetishism, and Fetishism*, 39 ARCHIVES SEXUAL BEHAV. 1229, 1230 (2010).

In 2018, that number was only thirty-one.⁵⁶ Reports of discrimination against BDSM practitioners also decreased after the diagnostic change, from more than 600 in 2002 to 200 in 2015.⁵⁷

Discrimination in custody disputes involving transgender parents has likewise waned.⁵⁸ Where courts once restricted custody and visitation after describing gender transition as inherently harmful to the children,⁵⁹ some now refuse to apply such categorical rules.⁶⁰ In an Arizona case, the trial court noted that the transgender father was “free to be who he or she wishes to be,” although the judge ultimately denied the father’s custody claim.⁶¹ Courts have distinguished between parents’ gender transition and whether the children have responded negatively to the transition, with only the latter serving as a basis for denying custody.⁶²

Medical authority has served as a linchpin for these custody rights, much like it once did to secure access to contraception and abortion. However, the reproductive rights doctrinal framework has shifted away from abortion as a medical issue, turning instead to its moral dimension. Recent Supreme Court cases on contraception and abortion have all centered on religious objections, rather than approaching the topic from a medical paradigm. Queer reproductive justice work that reinforces medical authority therefore may be a means of reframing the reproductive rights conversation.

56. SUSAN WRIGHT, NCSF, INCIDENT REPORTING & RESPONSE—2018 REPORT (2018), <https://ncsfreedom.org/2019/01/09/incident-reporting-response-2018-report/> [<https://perma.cc/CF5E-HBZA>]; Wright, *supra* note 55, at 1229–30 (providing response rates from earlier years).

57. Gerson, *supra* note 52.

58. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 98 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [<https://perma.cc/W4MH-GHBS>]; Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1621, 1624 (2019).

59. *Daly v. Daly*, 715 P.2d 56, 71 (Nev. 1986); *Magnuson v. Magnuson*, 170 P.3d 65, 67 (Wash. Ct. App. 2007).

60. *Pierre v. Pierre*, 898 So. 2d 419, 425 (La. Ct. App. 2004) (vacating the trial court order that terminated transgender parent’s parental rights).

61. *Tipsword v. Tipsword*, No. 1 CA-CV 12-0066, 2013 Ariz. App. Unpub. LEXIS 364, at *6, *9 (Apr. 2, 2013).

62. *See, e.g., M.B. v. D.W.*, 236 S.W.3d 31, 35 (Ky. Ct. App. 2007) (terminating a transgender father’s parental rights because of the negative psychological effect the transition had on the child). Such a distinction does not prevent bias against transgender parents in custody and visitation disputes, where courts may mask their objections to the parent’s gender transition by focusing on the children’s response. Katyal & Turner, *supra* note 58, at 1632–37.

Child custody and nonbiological parent rights illustrate two different ways in which queer reproductive issues may promote reproductive justice more broadly. The former presents a strategic path, namely reinforcing the role of medical providers in reproductive justice debates. The latter demonstrates the trans-substantive nature of advocacy, given that queer custody rights helped bring marriage equality into being. Both indicate that reproductive justice advocates may be able to promote their goals through queer rights work.

II. SEX EDUCATION

LGBTQ rights advocates have enjoyed the most success around family formation rights, but their agenda has also begun to gain traction in the sex education context. Reproductive justice advocates have commented on the importance of sex education for individuals to exercise their reproductive rights. However, the sex education that youth receive varies significantly across the country, with all fifty states imposing different requirements and limitations.⁶³ Legislatures have imposed restrictions on “controversial” subjects, a label that subsumes contraception, abortion, sexually transmitted infections, and human sexuality, including queer sexual intimacy.⁶⁴ Courts have heard a series of challenges to laws requiring sex education, but few have questioned the limitations the state imposes on controversial issues. Additionally, the programs’ emphasis on abstinence as the only form of acceptable contraception, which remains prevalent throughout the country, is a central reproductive justice concern.⁶⁵ Since sex education curricular statutes are often facially discriminatory against queer youth, challenging that aspect of the laws may serve as the first step to reframing sex education more generally.

63. Melody Alemansour et al., *Sex Education in Schools*, 20 GEO. J. GENDER & L. 467, 468 (2019).

64. *Id.* at 468–77.

65. *Id.* at 484–88; *see also* JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES 121–22 (2002) (describing lawsuits in the 1990s).

A. *Discriminatory Curricula*

America's curricular patchwork implicitly and explicitly excludes LGBTQ students, creating unequal and discriminatory educational programs. LGBTQ students are often ignored in sex education because of the pervasiveness of abstinence-only-until-marriage requirements, which typically present marriage as between opposite sexes. Nineteen states currently mandate abstinence-only curricula; seventeen of those states continue to define "marriage" as heterosexual and apply that definition to their educational policies.⁶⁶ For that reason, abstinence-only education remains exclusionary in more than a third of the country. The federal government began earmarking funds for abstinence-only education in 1981,⁶⁷ and as of 2018 had spent more than \$2.2 billion on the programs.⁶⁸ These curricula definitionally excluded same-sex couples until 2003, when Massachusetts became the first state to legalize marriage equality.⁶⁹

Sex education laws proliferated in the late 1980s due to the AIDS epidemic, with legislators taking the opportunity to incorporate anti-LGBTQ principles into their education codes.⁷⁰ In 1987,

66. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1472 (2017). Compare the states' abstinence-only education laws, ALA. CODE § 16-40A-2(a)(2); ARK. CODE ANN. § 6-18-703(d)(3); FLA. STAT. § 1003.46(2)(a); IND. CODE §§ 20-30-5-13, 20-34-3-17(a); LA. STAT. ANN. § 17:281(A)(4); MICH. COMP. LAWS § 380.1507; MISS. CODE ANN. § 37-13-171(2)(f)(1); MO. REV. STAT. § 170.015(1); N.C. GEN. STAT. § 115C-81.30(a); N.D. CENT. CODE § 15.1-21-24; OHIO REV. CODE ANN. § 3313.6011(C)(1); S.C. CODE ANN. § 59-32-10(2); TENN. CODE ANN. § 49-6-1304(a); TEX. HEALTH & SAFETY CODE ANN. §§ 85.007, 163.002; UTAH CODE ANN. § 53G-10-402(2); VA. CODE ANN. § 22.1-207.1 (Cum. Supp. 2019); WIS. STAT. § 118.019, with their legal definitions of marriage, ALA. CONST. art. I, § 36.03; ARK. CONST. amend. 83 § 1-2; FLA. CONST. art. I, § 27; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; S.C. CONST. art. XVII, § 15; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; ALA. CODE § 30-1-19(b); ARK. CODE ANN. § 9-11-109; FLA. STAT. § 741.212; IND. CODE § 31-11-1-1; LA. STAT. ANN. § 86; MICH. COMP. LAWS § 551.1; MISS. CODE ANN. § 93-1-1(2); MO. REV. STAT. § 451.022; N.C. GEN. STAT. § 51-1.2; N.D. CENT. CODE § 14-03-01; OHIO REV. CODE ANN. § 3101.01; S.C. CODE ANN. § 20-1-15; TENN. CODE ANN. § 36-3-113; TEX. FAM. CODE ANN. § 2.001(b); UTAH CODE ANN. § 30-1-4.1; VA. CODE ANN. § 20-45.2 (Repl. Vol. 2016); WIS. STAT. § 765.01.

67. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 578-80, 582 (codified as amended at 42 U.S.C. §§ 300z to z-10).

68. *Dedicated Federal Abstinence-Only-Until-Marriage Programs: Funding by Fiscal Year (FY), 1982-2019*, SEXUALITY INFO. & EDUC. COUNCIL U.S. (Oct. 2018), <https://siecus.org/wp-content/uploads/2018/10/AOUM-Funding-Table-FY19-Oct-2018-FINAL.pdf> [<https://perma.cc/X89Z-J8RC>].

69. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

70. In 1980, only six states mandated sex education; by 1989, that number had reached

Oklahoma amended its sex education law to require students to learn that same-sex intimacy was “primarily responsible for contact with the AIDS virus.”⁷¹ Six other states—Arizona, Alabama, Texas, Missouri, South Carolina, and Utah—also enacted anti-LGBTQ curriculum laws, which ranged from prohibitions on “[p]ortray[ing] homosexuality as a positive alternative lifestyle” to requirements that courses emphasize “that homosexuality is not a lifestyle acceptable to the general public.”⁷²

Other anti-LGBTQ curricular laws require teachers to exclude discussions of same-sex sexuality or mandate its denigration.⁷³ Public schoolteachers have been disciplined, terminated, and forced to resign for engaging in “pro-LGBT activities,”⁷⁴ such as reading a children’s book about a prince marrying another prince,⁷⁵ teaching students about the harassment that LGBTQ students face,⁷⁶ advocating for LGBTQ-inclusive antidiscrimination policies,⁷⁷ permitting the student newspaper to run a pro-LGBTQ editorial,⁷⁸ and putting up displays for LGBTQ History Month.⁷⁹

One of the reasons that challenges to antiqueer curricular laws may be effective is that these policies have especially pernicious

seventeen. Valerie J. Huber & Michael W. Firmin, *A History of Sex Education in the United States Since 1900*, 23 INT’L J. EDUC. REFORM 25, 40 (2014).

71. 1987 Okla. Sess. Laws 190, 191 (codified at OKLA. STAT. tit. 70, § 11-103.3(D)(1)).

72. 1992 Ala. Laws 1216, 1219 (codified at ALA. CODE § 16-40A-2(c)(8)); 1991 Ariz. Sess. Laws 1392, *repealed in pertinent part by* 2019 Ariz. Legis. Serv. Ch. 86; 1998 Miss. Laws 609, 610 (codified at MISS. CODE ANN. § 37-13-171(2)(e)); 1988 S.C. Acts 2911, 2914–16 (codified at S.C. CODE ANN. § 59-32-30(A)(5)); 1989 Tex. Gen. Laws 4854, 4856, 4874 (codified at TEX. HEALTH & SAFETY CODE ANN. § 85.007(b)(2)); 2001 Utah Laws 442, *repealed in pertinent part by* 2017 Utah Laws 644.

73. Rosky, *supra* note 66, at 1465–66.

74. *Id.* at 1509–10.

75. Michael Schaub, *Teacher Who Read Gay-Themed Fairy Tale in Class Resigns After Protest*, L.A. TIMES (June 16, 2015, 10:22 AM), <https://www.latimes.com/books/jacketcopy/la-et-jc-teacher-who-read-gay-fairy-tale-resigns-20150616-story.html> [<https://perma.cc/Q4FC-UWRE>].

76. *Beall v. London City Sch. Dist. Bd. of Educ.*, No. 2:04-CV-290, 2006 U.S. Dist. LEXIS 37657, at *3 (S.D. Ohio 2006).

77. Charles Bassett, *Teacher Backs Gay Policies, Fired by School Board*, NEWS 9 (May 12, 2009, 4:10 PM CDT), <https://www.news9.com/story/10349549/teacher-backs-gay-policies-fired-by-school-board> [<https://perma.cc/5QW4-CDXL>].

78. Associated Press, *Teacher’s Job on Line Over “Tolerance” Column*, NBC NEWS (Apr. 23, 2007, 5:54:30 PM ET), https://www.nbcnews.com/id/18268259/ns/us_news-education/t/teachers-job-line-over-tolerance-column/#.WxpmSojytEY [<https://perma.cc/SM3U-2TJC>].

79. Complaint and Jury Request at 3, 6, *Johnson v. Corunna Pub. Schs.*, No. 2:13-CV-10468, 2013 WL 501424 (E.D. Mich. dismissed Dec. 27, 2013).

effects on queer youth.⁸⁰ The instruction they receive is often irrelevant or inaccurate, such that sex education tends to be less useful for LGBTQ students than their cisgender and heterosexual peers.⁸¹ This may explain why LGBTQ youth are “five times as likely to have searched online for information on sexuality” as non-LGBTQ youth.⁸² The lack of education can have significant consequences: LGBTQ youth have higher rates of STIs and experience intimate partner violence at higher levels than their non-LGBTQ counterparts.⁸³ Discriminatory curricula also contribute to the disproportionately high rates of harassment and physical violence that sexual and gender minority students experience at school.⁸⁴ Bullying and isolation likewise contribute to LGBTQ youth’s extremely low levels of self-esteem and high rates of depression.⁸⁵ Gay, lesbian, and bisexual youth are three times more likely to attempt suicide than their heterosexual peers.⁸⁶ This minority stress impacts LGBTQ students’ academic performance, as students who are victimized and discriminated against have “lower educational aspirations, lower grades, and higher absenteeism.”⁸⁷

Recent reform efforts demonstrate the potential of challenging the curricular laws by focusing on queer rights. In 2017, to settle a lawsuit filed under Title IX and the Equal Protection Clause, Utah amended its law, which “prohibit[ed] instruction in . . . the advocacy of homosexuality.”⁸⁸ The legislature removed the reference to

80. *Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12-CEG-02608, 2015 WL 2298565, at *10 (Cal. Super. Ct. Apr. 28, 2015).

81. JOSEPH G. KOSCIW ET AL., GLSEN, THE 2017 NATIONAL SCHOOL CLIMATE SURVEY 57 (2018), https://www.glsen.org/sites/default/files/2019-12/Full_NSCS_Report_English_2017.pdf [<https://perma.cc/4ZM3-NYZS>].

82. NEAL A. PALMER ET AL., GLSEN, OUT ONLINE: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH ON THE INTERNET 12 (2013), <https://www.unh.edu/ccrc/pdf/Out%20Online.pdf> [<https://perma.cc/9MBW-N6AC>].

83. KOSCIW ET AL., *supra* note 81, at 57.

84. *Id.* at 14, 24–25.

85. *Id.* at 50; Allison S. Bohm et al., *Challenges Facing LGBT Youth*, 17 *GEO. J. GENDER & L.* 125, 154 (2016).

86. U.S. DEPT OF HEALTH & HUMAN SERVS. OFFICE OF THE SURGEON GEN. & NAT’L ACTION ALL. FOR SUICIDE PREVENTION, 2012 NATIONAL STRATEGY FOR SUICIDE PREVENTION: GOALS AND OBJECTIVES FOR ACTION 121 (2012), https://www.ncbi.nlm.nih.gov/books/NBK109917/pdf/Bookshelf_NBK109917.pdf [<https://perma.cc/4AAY-K6XJ>].

87. KOSCIW ET AL., *supra* note 81, at 51.

88. Act of Mar. 20, 2017, ch. 162, 2017 Utah Laws 644 (codified at UTAH CODE ANN. § 53A-13-101); Amended Complaint for Declaratory and Injunctive Relief at 2, *Equal. Utah v. Utah State Bd. of Educ.*, No. 2:16-cv-01081-BCW (D. Utah Nov. 15, 2016); see Benjamin Wood, *Senate Approves Lifting Ban on “Advocacy of Homosexuality” in Utah Schools*, SALT LAKE TRIB. (Mar. 1, 2017, 7:50 PM), <https://archive.sltrib.com/article.php?id=5000707&itype=CMSID> [<https://perma.cc/NLA6-CDPR>].

homosexuality, but replaced it with a prohibition on “the advocacy of premarital or extramarital sexual activity.”⁸⁹ Utah had been particularly diligent about enforcing its curriculum law, warning teachers against sex education publishers’ “advocacy of homosexuality” and requiring every district to establish a “curriculum materials review committee” to ensure their instructional materials complied with the state standard.⁹⁰ As a result, in 2014, one school district shelved 315 new textbooks—on which it had spent \$24,000—because they included references to prohibited topics like gay and lesbian partnerships.⁹¹

Although the Utah example indicates that litigation on behalf of queer youth does not necessarily instantiate broader reproductive justice principles, it can have such effects. In Anoka-Hennepin, Minnesota, for example, a challenge to an anti-LGBTQ curricular policy led the school district to revise its position on all “controversial” subjects. The origins of the case date back to 1995, when the school district adopted a measure prohibiting schools from teaching or addressing homosexuality “as a normal, valid lifestyle.”⁹² In 2009, the board enacted a “Sexual Orientation Curriculum Policy” that required staff to “remain neutral on matters regarding sexual orientation.”⁹³ However, school officials applied the facially neutral policy in a discriminatory fashion, leading a group of students to sue the district in 2011.⁹⁴ The board consequently replaced its policy with one that addressed more than sexual orientation discrimination; it also promoted broader reproductive justice principles.⁹⁵

89. Health Education Amendments, S.B. 196, 62d Leg., Gen. Sess. (Utah 2017).

90. Rosky, *supra* note 66, at 1511 (internal quotation marks omitted).

91. Paul Rolly, *Utah School District Shelves Health Books Because of Sex Talk*, SALT LAKE TRIB. (Feb. 7, 2014, 12:21 PM), <https://archive.sltrib.com/story.php?ref=/sltrib/politics/57506243-90/district-books-sexual-policy.html.csp> [<https://perma.cc/C7AU-7VKA>].

92. Elizabeth Dunbar, *Anoka-Hennepin Sexual Orientation Policy Has Roots in 1995 School Board Action*, MPR NEWS (June 20, 2011, 8:35 AM), <https://www.mprnews.org/story/2011/06/20/anoka-hennepin-sexual-orientation-policy-school-board-action> [<https://perma.cc/BXD7-TMJ6>].

93. ANOKA-HENNEPIN DIST. NO. 11, SEXUAL ORIENTATION CURRICULUM POLICY 604.11 (2009), https://www.edweek.org/media/720_sexorientation-blog.pdf [<https://perma.cc/872K-VBES>].

94. Complaint, *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 11-cv-01999-JNE-SER (D. Minn. July 21, 2011).

95. ANOKA-HENNEPIN DIST. NO. 11, RESPECTFUL LEARNING ENVIRONMENT—CURRICULUM POLICY 604.40 (2012), <https://www.ahschools.us/cms/lib/MN01909485/Centri-city/Domain/82/604.40%20Respectful%20Learning%20Environment.pdf> [<https://perma.cc/PS9L-KY7S>]; Zack Ford, *Minnesota’s Anoka-Hennepin School District Finally Replaces Its Anti-Gay Policy*, THINK PROGRESS (Feb. 14, 2012, 3:46 PM), <https://thinkprogress.org/minnesotas-anoka-hennepin-school-district-finally-replaces-its-anti-gay-policy-ad4d84704902/>

The new regulation provided that discussions of controversial issues were to “be presented in an impartial, balanced and objective manner” that “affirm[ed] the dignity and self-worth of all students.”⁹⁶ The challenge to one part of the policy thus effectuated change to all of it.

Opportunities for law reform abound in this area. Precedent that prohibits curricula “enacted and/or enforced with discriminatory intent” offers the possibility of Equal Protection challenges.⁹⁷ Since same-sex sexuality is often grouped with abortion and contraception in a category of “controversial” subjects, challenging a policy as to one element may provide inroads to the others.

In addition to challenging the constitutionality of state policies, advocates may seek to tackle local school district guidelines.⁹⁸ Given that there are over 13,500 school districts in the country, a district-by-district approach is inefficient; indeed, one of the reasons the civil rights movement sought to strike down separate but equal, rather than equalize school funding, was the impracticability of filing enforcement actions against each school district, as every lawsuit was extremely time intensive and fact specific.⁹⁹ However, the local nature of school board policies also provides opportunities, insofar as it may allow advocates to challenge both the anti-LGBTQ provisions and the abstinence-only policies without engendering the level of opposition that state level reform would produce.

[<https://perma.cc/X39N-8UCK>]; see also Consent Decree at 8, *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 6, 2012) (agreeing to review any policy that “impact[ed] harassment”).

96. ANOKA-HENNEPIN DIST. NO. 11, *supra* note 95; Zack Ford, *Anoka-Hennepin Might Finally Pass a Policy That Respects Its LGBT Students*, THINK PROGRESS (Jan. 25, 2012, 9:01 PM), <https://thinkprogress.org/anoka-hennepin-might-finally-pass-a-policy-that-respects-its-lgbt-students-60d991946cf7/> [<https://perma.cc/68DR-ZJDW>].

97. *Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015). For a discussion of how advocates could challenge the laws under the Equal Protection clause, see Rosky, *supra* note 66, at 1517–34.

98. Richard Briffault, *The Local School District in American Law*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 24, 24–26, 39–40 (William G. Howell ed., 2005); Nat’l Ctr. for Educ. Stat., *Number of Public School Districts and Public and Private Elementary and Secondary Schools: Selected Years, 1869–70 Through 2016–17*, DIG. EDUC. STAT. (Apr. 2019), https://nces.ed.gov/programs/digest/d18/tables/dt18_214.10.asp [<https://perma.cc/C2JU-JYR5>].

99. MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 108–11 (1987).

B. *Inclusive Policies*

The same arguments that have led courts to strike down anti-LGBTQ curricula support the legislative enactment of inclusive policies. Positive rights are harder to secure than negative ones, but legal decision-makers are increasingly responsive to queer curricular claims. For that reason, queer curricular reform may provide an entry point for other sex education reform efforts.

LGBTQ-inclusive curricular policies derive support from recent Supreme Court precedent. Exclusionary curricula simultaneously demean queer youth and stamp them as unequal, an effect the Supreme Court decried in *Windsor* and *Obergefell*.¹⁰⁰ In those decisions, the Court emphasized that bans on same-sex marriage were unconstitutional because of their dignitary harms, which stigmatized same-sex couples.¹⁰¹ Discriminatory curricula inflict similar injuries.¹⁰² Indeed, research has shown that inclusive racial representation improves students of color's academic performance, self-confidence, and educational aspirations.¹⁰³ Additionally, survey data indicates that LGBTQ students attending schools with positive portrayals of LGBTQ-related topics report greater levels of acceptance among their peers, as well as lower levels of harassment.¹⁰⁴

The shifting perspective on LGBTQ rights has allowed advocates to make headway in their curricular reform projects. Such efforts met significant resistance when they first began. In 1989, advocates convinced the New York City Board of Education to include sexual orientation in its new multicultural curriculum, but discord

100. See Complaint for Injunctive and Declaratory Relief at 5–6, Equal. Ariz. v. Hoffman, No. 419-cv-00192 (D. Ariz. Mar. 28, 2019); Courtney Crowell, Comment, *Anti-Gay Sex Education: A Lasting Tool for Discrimination?*, 28 TUL. J.L. & SEXUALITY 45, 49–51 (2019). This dignitary harm is a cognizable claim that courts have recognized, particularly in the realm of LGBTQ rights. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601–05, 2608 (2015); *United States v. Windsor*, 570 U.S. 744, 775 (2013). See generally Jasmine J. Haddad, Note, *The Evolution of Marriage: The Role of Dignity Jurisprudence and Marriage Equality*, 96 B.U. L. REV. 1489 (2016) (evaluating the role of dignity-based rationales historically and in modern judicial opinions).

101. *Obergefell*, 135 S. Ct. at 2601–02; *Windsor*, 570 U.S. at 770, 772.

102. Rosky, *supra* note 66, at 1531–35.

103. Chan Tov McNamara, Note, *On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School with Title IX*, 104 CORNELL L. REV. 745, 791 (2019). LGBTQ students who attend schools with inclusive curricula are less likely to miss classes. KOSCIW ET AL., *supra* note 81, at 70–71.

104. KOSCIW ET AL., *supra* note 81, at 70–72.

and defiance torpedoed the project.¹⁰⁵ Five of the city's thirty-two school boards rejected the Department of Education-designed materials, which referenced gays and lesbians on 3 of its 443 pages, as an effort to "proselytiz[e]" homosexuality.¹⁰⁶ The curriculum also spurred public protests, shoving matches at school board hearings, and death threats against the head of the Department of Education.¹⁰⁷ The New York City Board of Education ultimately abandoned the sexual orientation portion of the guide by limiting multicultural education to "ethnic, racial and linguistic groups."¹⁰⁸

Since that failed effort, perceptions of same-sex sexuality have changed, and its acceptance has led one state—California—to mandate LGBTQ-inclusive curricula. In 2011, California began requiring its schools to teach "the role and contributions of . . . lesbian, gay, bisexual, and transgender Americans."¹⁰⁹ Senator Leno, who authored the law, explained that "historically inaccurate exclusion [of] LGBT Americans in social sciences instruction," combined with "the spreading of negative stereotypes in school activities," sustained "an environment of discrimination and bias" in schools.¹¹⁰ Without reform, he argued, the state could not address "California's bullying epidemic that continues to plague a majority of LGBT youth."¹¹¹

Opponents' arguments in the California curricular battle demonstrate why it is that queer curricular advocacy may promote

105. See *Dear Paul*, GAY TEACHERS ASS'N NEWSL. (Lesbian Gay Teachers Association Records, NYC LGBT Community Center, New York, N.Y. ("LGTA Collection"), Box 1, Folder 35), Sept. 1989, at 1; *The Coalition for Lesbian and Gay Rights Speaks Out vs. "Woeful" AIDS Education in New York City Schools*, GAY TEACHERS ASS'N NEWSL. (LGTA Collection, Box 1, Folder 38), Apr. 1987, at 1.

106. Steven Lee Myers, *How a 'Rainbow Curriculum' Turned into Fighting Words*, N.Y. TIMES, Dec. 13, 1992, at E6 [hereinafter Myers, *Rainbow Curriculum*]; Steven Lee Myers, *Values in Conflict: Schools Diversify the Golden Rule*, N.Y. TIMES, Oct. 6, 1992, at B1; School Board District 31 (LGTA Collection, Box 4, Folder 217), Sept. 30, 1992, at 3–4.

107. Chris Bull, *N.Y. Curriculum Fight Gets Physical*, ADVOCATE, Jan. 26, 1993, at 21; Peg Byron, *NYC Parents Protest "Children of the Rainbow"*, BAY AREA REP. (Jesse Greenman/PERSON Project Records, S.F. Public Library, San Francisco, Cal. ("PERSON Project"), Box 6, Folder labeled Rainbow Curriculum), Sept. 10, 1992, at 23; Editorial, *In N.Y., Educrats vs. Parents*, BOS. HERALD, Dec. 12, 1992, at 16; Donna Minkowitz, *The Religious Right Hits N.Y.C.: Wrong Side of the Rainbow*, NATION, June 28, 1993, at 901–02; Myers, *Rainbow Curriculum*, *supra* note 106, at E6.

108. *Rainbow Curriculum Abandoned by Board of Ed*, S.F. BAY TIMES (PERSON Project, Box 6, Folder labeled Rainbow Curriculum), Feb. 23, 1995.

109. CAL. EDUC. CODE § 51204.5.

110. *Hearing on S.B. 48 Before the S. Comm. on Educ.*, 2011–2012 Leg., Reg. Sess. (Cal. 2011) (statement of Sen. Leno, author of S.B. 48).

111. *Id.*

broader reproductive justice principles. Rather than deploying explicit anti-LGBTQ rhetoric, as they did in the New York City debates of the late 1980s, conservative groups and religious organizations focused on parents' rights. They argued the law "turn[ed] teachers into state-sanctioned propagandists," and that parents did not want their children taught about these "sexual lifestyles."¹¹² These claims mirrored those made by opponents of same-sex marriage, who had argued marriage equality would require students to learn about same-sex sexuality against their parents' wishes.¹¹³

Opponents of comprehensive sex education curricula have similarly claimed that schools should not usurp parents' rights.¹¹⁴ Countering parents' rights arguments in the queer curricular context—where scientific evidence has established the stark harms that LGBTQ youth suffer—may therefore render advocacy efforts to introduce comprehensive sex education curricula more persuasive.

Queer and nonqueer students alike would benefit from more inclusive curricula. The discriminatory framework of existing policies and regulations, which marginalize and stigmatize LGBTQ youth, provide an opportunity to promote broader curricular changes. Likewise, LGBTQ-inclusive curricular efforts may allow advocates to make inroads on comprehensive curricular reform. Like the family formation context, LGBTQ curricular reform offers both substantive and strategic avenues for reproductive justice advocacy.

III. MEDICAL DECISION-MAKING

Reproductive justice advocates may find that a third area of queer law reform—medical decision-making—provides a key opening for advancing abortion and contraception access. Queer reform efforts in this space include the prohibition of "gender normaliza-

112. *Hearing on S.B. 48 Before the Cal. S.*, 2011–2012 Leg., Reg. Sess. (Cal. 2011) (statement of the Cavalry Christian Church).

113. Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 359 (2009).

114. SETH DOWLAND, FAMILY VALUES AND THE RISE OF THE CHRISTIAN RIGHT 60–64 (2015).

tion” surgeries on intersex infants—individuals born with discordant sex characteristics.¹¹⁵ Transgender individuals face a related problem, access to medical treatments, as insurance companies may deny “gender-specific” care—treatments typically associated with one gender, such as ovarian cancer screenings or prostate exams—to transgender individuals with nondimorphic bodies.¹¹⁶ Because insurance companies categorize patients as either “male” or “female,” those designations become significant impediments for accessing reproductive healthcare. At the same time, hospitals and healthcare professionals may refuse transition-related care for transgender individuals because of their religious beliefs. To promote these medical decision-making claims, advocates have emphasized equality, dignity, and privacy arguments that reproductive justice groups may be able to apply to the abortion and contraception contexts, particularly since the parallels between the queer and nonqueer issues are so striking.

A. *Gender Normalization Surgeries*

Autonomy, bodily integrity, equality, and consent are the principles that drive advocacy around abortion access—and intersex advocates’ efforts to prohibit infant gender normalization surgeries. This law reform project may be the one that has the closest doctrinal connection to abortion rights advocacy, with precedent for one directly implicating the other because of their shared status as medical procedures.

Medical providers have been surgically altering intersex infants’ ambiguous genitalia since the 1950s.¹¹⁷ Doctors originally focused on cosmetic appearance, not functionality, to promote gender iden-

115. Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement’s Path to De-Medicalization*, 41 HARV. J.L. & GENDER 1, 6 (2018). Intersex is an umbrella term for individuals with discordant sex characteristics, such that their genitals, gonads, or chromosomes do not clearly establish them as male or female. *Id.* Since intersex is a broad category that groups together different conditions, intersexuality may become manifest at different points in a person’s life and in various ways. The effects of intersex conditions range from ambiguous genitalia to discordant secondary sex characteristics, such as body hair and breasts. *Id.*

116. LAMBDA LEGAL, CREATING EQUAL ACCESS TO QUALITY HEALTH CARE FOR TRANSGENDER PATIENTS: TRANSGENDER-AFFIRMING HOSPITAL POLICIES 20 (2016), https://www.lambdalegal.org/publications/fs_transgender-affirming-hospital-policies [<https://perma.cc/8WNC-8YMT>].

117. KATRINA KARKAZIS, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 56–57 (2008).

tity formation, since they considered gender a learned behavior dependent on environment, with biology irrelevant to the outcome.¹¹⁸ To help the parents adjust to their child, physicians assigned the infant a sex—and performed surgery—as soon as possible, even though the interventions often resulted in heavy scarring, incontinence, infertility, and little to no sexual sensation when the children became adults.¹¹⁹

Although medical professionals have revised their approach to intersex conditions since the mid-twentieth century, genital surgeries have continued apace.¹²⁰ In 2006, after decades of lobbying by intersex rights advocates and internal debates among scientists, medical experts promulgated the *Consensus Statement on Management of Intersex Disorders*.¹²¹ The statement for the first time expressed the need for a cautionary approach to gender normalization procedures, although it did not call for a moratorium on all surgeries. Instead, it emphasized that surgery should be limited to

118. See *id.* at 53–54. Medical professionals made their decisions based on the appearance of external genitalia and, if the infant had female sex organs, attempted to preserve future fertility. GEORGIANN DAVIS, *CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS* 72 (2015).

119. M. JOYCELYN ELDERS ET AL., *PALM CTR., RE-THINKING GENITAL SURGERIES ON INTERSEX INFANTS* (2017); ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 61–63, 85–87 (2000); KARKAZIS, *supra* note 117, at 57–58; see also David Sandberg, *A Call for Clinical Research, HERMAPHRODITES WITH ATTITUDE* (Intersex Soc’y of N. Am., S.F., Cal.), 1995–96, at 8–9, <https://www.digitaltransgenderarchive.net/files/ff365533x> [<https://perma.cc/K5F6-J76D>].

120. ELLEN K. FEDER, *MAKING SENSE OF INTERSEX: CHANGING ETHICAL PERSPECTIVES IN BIOMEDICINE* 140 (2014); Sarah M. Creighton et al., *Childhood Surgery for Ambiguous Genitalia: Glimpses of Practice Changes or More of the Same?*, 5 *PSYCHOL. & SEXUALITY* 34, 38 (2014); Lina Michala et al., *Practice Changes in Childhood Surgery for Ambiguous Genitalia?*, 10 *J. PEDIATRIC UROLOGY* 934, 937 (2014); Stefan Timmermans et al., *Does Patient-centered Care Change Genital Surgery Decisions? The Strategic Use of Clinical Uncertainty in Disorders of Sex Development Clinics*, 59 *J. HEALTH & SOC. BEHAV.* 520, 521 (2018); see also Aimee M. Rolston et al., *Disorders of Sex Development (DSD): Clinical Service Delivery in the United States*, 175 *CAM. J. MED. GENETICS* 268, 276 (2017) (describing variability in clinics’ conformity with informed consent and clinical management guidelines).

121. KARKAZIS, *supra* note 117, at 237, 254; Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, 4 *GLQ: J. LESBIAN & GAY STUD.* 189, 201–02 (1998); Rolston et al., *supra* note 120, at 268. The Academy of Pediatrics adopted the Consensus Statement on Management of Intersex as a policy statement. Rolston et al., *supra* note 120, at 268. It identifies the principles for care, but it does not constitute “practice guidelines.” *Id.* The use of the term “disorders of sex development” to refer to intersex individuals has been a source of conflict between medical professionals and intersex rights advocates. Elizabeth Reis, *Divergence or Disorder?: The Politics of Naming Intersex*, 50 *PERSP. BIOLOGY & MED.* 535, 538 (2007).

instances of medical necessity and that interventions should focus on function over appearance.¹²²

The consensus statement did not change the rate of surgeries, only the process by which doctors obtained consent from parents to perform surgery. Rather than simply making a recommendation, clinicians now leave the decision to the parents.¹²³ However, doctors tend to emphasize the surgeries' benefits and positive outcomes, ignoring research on the potential harm of early surgery and dismissing the complaints of intersex adults as the result of outdated surgical methods.¹²⁴ These factors, along with the providers' reluctance to discuss other options, often convince undecided parents to provide their consent.

Instead of focusing on gender identity congruence, doctors today often justify the surgery as a means of reducing stigma, while ignoring the autonomy and privacy principles that underpin reproductive justice. Medical providers argue that "normal-looking" genitals will reduce a child's sense of difference and thereby promote "psychosocial well-being."¹²⁵ The surgery is aimed at alleviating family members' discomfort with the infant's physical appearance, as doctors are concerned that care providers will otherwise isolate the child.¹²⁶ Thus, the surgeries are a function of how the nonintersex world will respond to intersex bodies, with autonomy, privacy, and equality sacrificed to avoid stigma.

Several states have considered legislation to prohibit these surgeries, although none have yet been enacted. In 2018, California passed a resolution that urged healthcare professionals to "defer[] medical or surgical intervention, as warranted, until the child is

122. I. A. Hughes et al., *Consensus Statement on Management of Intersex Disorders*, 91 ARCHIVES DISEASE CHILDHOOD 554, 557 (2006).

123. DAVIS, *supra* note 118, at 123; FEDER, *supra* note 120, at 133, 148; Timmermans et al., *supra* note 120, at 521.

124. See JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 222 (2000); FEDER, *supra* note 120, at 149; Timmermans et al., *supra* note 120, at 521. There are studies of intersex adults who had early genital normalization surgery and support the practice, but scientists debate the validity of that research. There are also studies demonstrating the harm of early surgery. See, e.g., Arlene B. Baratz & Ellen K. Feder, *Misrepresentation of Evidence Favoring Early Normalizing Surgery for Atypical Sex Anatomies*, 44 ARCHIVES SEXUAL BEHAV. 1761, 1761 (2015); A. Binet et al., *Should We Question Early Feminizing Genitoplasty for Patients with Congenital Adrenal Hyperplasia and XX Karyotype?*, 51 J. PEDIATRIC SURGERY 465, 467 (2016); Sara Reardon, *Stuck in the Middle*, 533 NATURE 160, 162 (2016).

125. KARKAZIS, *supra* note 117, at 135.

126. DAVIS, *supra* note 118, at 123; FEDER, *supra* note 120, at 141.

able to participate in decisionmaking[sic].”¹²⁷ A resolution is not a binding law, and therefore does not prohibit infant intersex surgeries, but it expresses legislative priorities and views, as well as helps foster normative commitments.¹²⁸ California and Nevada have tabled legislative bans on infant surgeries,¹²⁹ while Connecticut is considering an intersex nondiscrimination law.¹³⁰

Given the challenges of securing legislation, intersex rights advocates have sought to limit infant surgeries by bringing malpractice suits against providers.¹³¹ In 2017, a case brought by the adoptive parents of an intersex child settled for over \$400,000.¹³² The goal of these suits is not just to compensate intersex individuals, but also induce changes to medical standards of care by putting pressure on insurance companies, since these businesses produce clinical practice guidelines aimed at reducing the cost of litigation.¹³³ Health and liability insurers may enforce compliance with their guidelines, which may differ from those of professional medical associations, as a condition of coverage, or may increase premiums for noncomplying physicians.¹³⁴ Of course, statutes have a broader impact because they change the practices of everyone in

127. S. Con. Res. 110, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

128. *Hearing on S. Con. Res. 110 Before the Assemb. Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. (Cal. 2018); RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 139–42, 166 (2015); see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000). Because laws have important expressive effects, some rights groups have sought primarily expressive statutes to promote their legal agendas. Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017).

129. S.B. 201 § 1 (b)(2)(C), 2018–2019 Leg., Reg. Sess. (Cal. 2019); S.B. 408 § 1(1)(c), 79th Leg., Reg. Sess. (Nev. 2017).

130. S.B. 388, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019) (Public Health Committee bill). The bill would also offer an intersex gender designation on birth certificates and drivers’ licenses.

131. *M.C. ex rel. Crawford v. Armhein*, 598 F. App’x 143, 145 (4th Cir. 2015).

132. *Id.*; Order Approving Settlement on Behalf of a Minor, *M.C. ex rel. Crawford v. Aaronson*, 13-CP-40-02877 (S.C. Cty. Ct. July 24, 2017). Doctors performed feminizing surgery on the sixteen-month-old M.C., who was born with ovarian and testicular tissue, by removing his phallus, testicle, and testicular tissue, despite concluding there was “no compelling biological reason to raise M.C. as either male or female.” *Crawford*, 598 F. App’x at 146 (internal quotation marks omitted). M.C. later identified as male, rendering the irreversible surgery especially catastrophic. Complaint ¶¶ 1, 7–8, *M.C. ex rel. Crawford v. Aaronson*, No. 2:13-CV-01303 (D. S.C. 2013).

133. Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 U. PA. L. REV. 645, 652–53 (2001).

134. *Id.*

the state, rather than those practitioners covered by specific insurance companies.¹³⁵

Both legislative prohibitions and malpractice suits serve similar ends: eliminating infant genital surgeries that are rooted in conceptions of how sexed bodies should appear, rather than prioritizing consent, bodily autonomy, and privacy. Intersex rights advocacy thus buttresses the principles that promote reproductive rights more broadly.

B. *Insurance Coverage*

For transgender individuals, the challenge is in accessing medical care, rather than being subjected to forcible surgeries. Despite the divergent goals, the underlying issues—privacy, autonomy, and equality—are the same. Reproductive justice advocates have long recognized that the right to abortion is virtually meaningless without the ability to pay for abortion. Insurance law reform is thus as central an issue within the reproductive justice movement as it is for queer rights. At the same time, even when insurance covers reproductive issues, medical practitioners may refuse to provide treatment because of their religious beliefs—an issue that extends from transgender care to abortion and contraception.

To align their physical bodies with their gender identities, transgender individuals often obtain medical treatments, including hormone therapy and transition-related surgery.¹³⁶ These surgical interventions include chest reduction or reconstruction, hysterectomy, phalloplasty, and metoidioplasty, which is the construction of a penis from existing genital tissue.¹³⁷ In a comprehensive survey of transgender individuals in the United States, forty-nine percent of respondents had received hormone therapy, and twenty-five percent had had some form of transition-related surgery.¹³⁸ Many transgender individuals only want some of the treatments available, while others have not had all (or any) of the

135. *See id.* at 654–55.

136. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 99–101 (2016) [hereinafter U.S. TRANSGENDER SURVEY], <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [https://perma.cc/YV3F-CPBH].

137. *Id.* at 101.

138. *Id.* at 99–100.

surgeries they would like.¹³⁹ Transgender bodies consequently may not conform to a binary model of sexual difference.

One significant problem arises when transgender individuals' gender designations do not meet insurers' conceptions of male or female. Insurers have designated some routine care as gender-specific and will therefore deny coverage for these treatments after a transgender individual's gender classification changes.¹⁴⁰ For example, after a person with a uterus and breasts has a double mastectomy, that individual may be classified as male; Medicaid or other insurance may then refuse to cover gynecological care, such as ob-gyn exams, mammograms, and hysterectomies.¹⁴¹ Similar problems arise for females who require testicular care, or other male-coded medical procedures.¹⁴² Survey data show that thirteen percent of transgender individuals have been denied coverage for gender-specific services, including sexual or reproductive health screenings like Pap smears.¹⁴³ The medical providers that transgender individuals visit for routine care may not be familiar with the healthcare of transgender individuals, thereby compounding the insurance problem.¹⁴⁴ Billing staff may be able to reverse claim denials, but the process increases impediments to obtaining reproductive healthcare—and equal treatment.¹⁴⁵

Transgender rights advocates have consequently pressed for insurance law reform by challenging policy exclusions for transgender care.¹⁴⁶ Insurance agents and medical professionals often reject routine care claims for transgender individuals because the policies exclude “transgender-related services.”¹⁴⁷ For that reason, whether insurers provide transition-related coverage is tied to other types of care for transgender individuals.

139. *Id.* at 99–102.

140. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 241–42 (2016).

141. *Id.*

142. LAMBDA LEGAL, *supra* note 116, at 20.

143. U.S. TRANSGENDER SURVEY, *supra* note 136, at 95.

144. *Id.* at 97–98.

145. LAMBDA LEGAL, *supra* note 116, at 20.

146. Samuel Rosh, *Beyond Categorical Exclusions: Access to Transgender Healthcare in State Medicaid Programs*, 51 COLUM. J.L. & SOC. PROBS. 1, 11–13 (2017); Strangio, *supra* note 140, at 241.

147. LGBT MOVEMENT ADVANCEMENT PROJECT & SERVS. & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS, IMPROVING THE LIVES OF LGBT OLDER ADULTS 41 tbl.3 (2010).

Beyond implicating autonomy, privacy, and dignity, insurance coverage has been a central concern for reproductive justice advocates, as insurance funding restrictions for abortion and contraception have become proxies for the broader struggle over reproductive rights.¹⁴⁸ Although the two battles are not identical, both draw on conceptions of what constitutes an “elective” procedure. Reframing one may help reshape ideas of the other.

Even where individuals obtain insurance coverage for their reproductive healthcare, another issue arises that aligns queer reproductive claims with reproductive justice advocacy more generally: religious refusals.¹⁴⁹ Conscience-based claims serve as a barrier to abortion and contraception access, as well as access to transition-related treatment.¹⁵⁰ A primary source of contention in gender-affirming care is hospitals’ refusals to perform “elective sterilization” because of their religious objections.¹⁵¹ Sterilization is often required for a transgender individual to legally change their gender designation, making the procedure a regular part of transition-related care. Beyond the legal effect of sterilization, the procedure avoids the potential psychological toll of pregnancy on transgender men, for whom the quintessentially female condition undermines their male sense of self.¹⁵²

Even when doctors at religiously affiliated hospitals have ordered the procedures to treat gender dysphoria, the institutions may prevent the operations because of conscience claims. Thus, a day before Evan Minton, a transgender man, was scheduled to

148. Mary Ziegler, *Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 *BUFF. L. REV.* 701, 728 (2012); Alisha Patton, Note, *Harris and Whole Woman’s Health Collide: No Funding Provisions Unduly Burden Reproductive Freedom*, 70 *HASTINGS L.J.* 297, 300 (2018).

149. NAT’L LGBTQ TASK FORCE, TRUMP ADMINISTRATION FINAL HEALTHCARE “CONSCIENCE” RULE: FREQUENTLY ASKED QUESTIONS (2019), <https://www.thetaskforce.org/wp-content/uploads/2019/05/Final-Healthcare-Conscience-Rule-FAQ.pdf> [<https://perma.cc/3K43-2HTN>].

150. NAT’L LGBTQ TASK FORCE, *supra* note 9, at 8; Aliya Bean, *Queering Reproductive Justice: How to Ensure LGBTQ Access to Sexual and Reproductive Health Care on the Federal Level*, VICTORY INST. (June 2019), <https://victoryinstitute.org/wp-content/uploads/2019/06/VCF-Policy-Paper-Update.pdf> [<https://perma.cc/SL89-HVAH>].

151. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 675 (N.D. Tex. 2016).

152. HUMAN RIGHTS WATCH, “A REALLY HIGH HURDLE”: JAPAN’S ABUSIVE TRANSGENDER LEGAL RECOGNITION PROCESS (2019), <https://www.hrw.org/report/2019/03/19/really-high-hurdle/japans-abusive-transgender-legal-recognition-process> [<https://perma.cc/TK7D-9LU6>]; Samantha Allen, *It’s Not Just Japan. Many U.S. States Require Transgender People Get Sterilized*, *DAILY BEAST* (Mar. 22, 2019, 5:13 AM ET), <https://www.thedailybeast.com/its-not-just-japan-many-us-states-require-transgender-people-get-sterilized> [<https://perma.cc/XA99-W8AU>].

have a hysterectomy at a Catholic hospital in California, the hospital's president called Minton's doctor to cancel the procedure.¹⁵³ The president explained the doctor "would 'never' be allowed to perform a hysterectomy on Minton at [the hospital] because 'it was scheduled as part of a course of treatment for gender dysphoria, as opposed to any other medical diagnosis.'"¹⁵⁴ The Catholic hospital followed the United States Conference of Catholic Bishops' "Ethical and Religious Directives for Catholic Health Care Services," which prohibits sterilization and requires the protection and preservation of "bodily and functional integrity."¹⁵⁵ Similarly, a Catholic hospital prohibited Jionni Conforti, a transgender man whose doctors recommended a hysterectomy as part of his transition-related care, from scheduling an operation at their facility.¹⁵⁶ The hospital's director emphasized that, as a Catholic hospital, they could not permit the operation because it "was being performed for the purposes of 'gender reassignment.'"¹⁵⁷

Catholic hospitals are an increasingly significant part of the healthcare landscape, rendering religious refusals a particularly salient problem for transgender individuals—as well as those seeking abortion. After Congress enacted the Affordable Care Act ("ACA"), hospital consolidation intensified, and experts predict that a fifth of the country's hospitals will merge or consolidate in the near future.¹⁵⁸ Catholic hospital systems have enjoyed particular commercial success, such that mergers are likely to intensify the problem of religious objections.¹⁵⁹

Hospitals' and doctors' religious refusals are statutorily protected in eighteen states, and a recent federal guideline on "statutory conscience rights in health care" noted that such refusals were possible under the law.¹⁶⁰ Religious objections implicate the ability

153. *Minton v. Dignity Health*, 39 Cal. App. 5th 1155, 1159 (2019)

154. *Id.*

155. *Id.*

156. *Conforti v. Saint Joseph's Healthcare Sys., Inc.*, No. 2:17-cv-00050-CCC-CLW, 2019 U.S. Dist. LEXIS 138433, at *1–2 (D.N.J. Aug. 15, 2019).

157. *Id.* at *2 (quoting Complaint at 16, *Conforti*, 2019 U.S. Dist. LEXIS 138433).

158. Elizabeth B. Deutsch, Note, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 *YALE L.J.* 2470, 2484 (2015).

159. *Id.* at 2487.

160. Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2019) (codified at 45 C.F.R. pt. 88); *Refusing to Provide Health Services*, GUTTMACHER INST. (Dec. 1, 2019), <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services> [<https://perma.cc/V4XT-6QL5>].

to access abortion and contraception, with recent Supreme Court cases balancing the First Amendment's religious liberty protections and the Fourteenth Amendment's equality guarantee.¹⁶¹

The ACA's antidiscrimination provision may alleviate at least some of the reproductive justice access to care issues, but it is currently mired in litigation. The Department of Health and Human Services ("HHS"), which issued implementing regulations, interpreted the ACA's protections based on sex and gender as including sexual orientation and gender identity.¹⁶² In its regulations, HHS mandated that "a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual" because "the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available."¹⁶³ Therefore, under this rule, insurers must extend sex-specific coverage to transgender individuals, regardless of their gender designation. HHS also defined discrimination on the basis of sex as including "termination of pregnancy," thereby protecting abortion rights.¹⁶⁴

Less than a week after HHS issued its rule, eight states and three private healthcare providers filed a lawsuit challenging it, arguing that the rule violated doctors' religious freedom, thwarted independent medical judgment, and imposed impermissible burdens on health insurance plans.¹⁶⁵ The plaintiffs objected to the requirement that they provide either abortion or transition-related care, especially sterilization procedures.¹⁶⁶ The Texas district court issued an injunction prohibiting HHS from enforcing the antidiscrimination rule while the case was pending.¹⁶⁷

Recent reproductive rights cases before the Supreme Court have turned on religious refusals, rendering conscience claims a central

161. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

162. *See* 45 C.F.R. §§ 92.1, 92.3, 92.206 (2016).

163. *Id.* § 92.206; Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376–77 (May 18, 2016). Insurance companies may, however, apply neutral policies that ultimately deny coverage for these treatments.

164. 45 C.F.R. § 92.4 (2016).

165. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670–72, 696 (N.D. Tex. 2016); Complaint, *Franciscan All., Inc. v. Burwell*, 7:16-cv-00108-O (N.D. Tex. Aug. 23, 2016).

166. *Franciscan All., Inc.*, 227 F. Supp. 3d at 673–75; Complaint, *supra* note 165, at 35–36, 41, 43.

167. *Franciscan All., Inc.*, 227 F. Supp. 3d at 696.

obstacle for LGBTQ and reproductive rights advocates.¹⁶⁸ The specific religious tenets that underpin one as opposed to the other are not the same, and yet the question of how much weight to give religious objections is almost identical. Given that religious objectors to LGBTQ antidiscrimination laws have not fared well in the courts, addressing the queer element of this problem may prove to be the best path forward.¹⁶⁹

Religious refusals and insurance coverage are two areas in which transgender reproductive justice claims and abortion access rights align directly. As for intersex infant surgeries, while further removed from traditional reproductive justice issues, they likewise implicate the fundamental questions of autonomy, equality, dignity, and liberty on which reproductive decision-making turns. Thus, as with school curricula and family formation, queer medical decision-making issues provide a clear opportunity from which the reproductive justice movement can build.

CONCLUSION

Queer reproductive rights projects may serve as the foundation for the broader reproductive justice movement. The reproductive issues this Article has highlighted—family formation, sex education, and medical decision-making—are ones that implicate all citizens, not just queer ones. However, addressing specifically queer issues may allow courts to focus on the equality, autonomy, dignity, privacy, and liberty concerns that have propelled LGBTQ rights, rather than being mired in abortion's undue burden framework and its attendant politics.

By focusing on queer reproductive rights, the reproductive justice movement may invert the typical social movement framework, whereby advocates tend to prioritize the needs of more privileged group members.¹⁷⁰ Rather than tackling abortion and contraception rights, and then having those principles trickle down to LGBTQ reproductive justice issues, queer rights advances would trickle up to nonqueer issues. Given that the reproductive justice

168. See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1559–60 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91 (2014).

169. J. Stuart Adams, *Cultivating Common Ground: Lessons from Utah for Living with Our Differences*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* 441, 445 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019).

170. See George, *Framing Trans Rights*, *supra* note 26, at 615–20.

movement formed to address the needs of marginalized women, families, and communities, this new strategy would promote the movement's goals *and* principles.¹⁷¹ For that reason, the reproductive justice movement would not just win specific rights battles—it would secure victories in ways that also further its fundamental values.¹⁷² This, in turn, may give rise to trickle-up effects.

Reproductive justice and LGBTQ rights both fundamentally shape individuals' decision-making and place in society. Queer rights advocacy has benefited from reproductive justice precedent, drawing arguments from the parallels between the two. The reproductive justice movement may succeed by doing the reverse, rendering the two mutually constitutive, rather than just related. The future of reproductive rights is currently fraught, such that focusing on the issues that affect the most marginalized may seem counterintuitive. And yet, as this Article has shown, the future of reproductive justice may be queer.

171. See *Reproductive Justice*, *supra* note 5.

172. George, *Framing Trans Rights*, *supra* note 26, at 620–25.