

INTRODUCTION
FAMILY, LIFE, AND LEGACY: PLANNING ISSUES
FOR THE LESBIAN, GAY, BISEXUAL, AND
TRANSGENDER COMMUNITIES

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[Aristophanes:] And so, when . . . [these lovers are] . . . fortunate enough to meet [their] other hal[ves], they are both so intoxicated with affection, with friendship, and with love, that they cannot bear to let each other out of sight for a single instant. It is such reunions as these that impel [people] to spend their lives together, although they may be hard put to it to say what they really want with one another, and indeed, the purely sexual pleasures of their friendship could hardly account for the huge delight they take in one another's company. The fact is that both their souls are longing for a something else—a something to which they can neither of them put a name, and which they can only give an inkling of in cryptic sayings and prophetic riddles.

—Plato¹

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¹ PLATO, *Symposium*, in *THE COLLECTED DIALOGUES OF PLATO* 526, 545 (Edith Hamilton & Huntington Cairns eds., 2002) (1961). Note that in this quote I have intentionally *neutered* the otherwise gendered terms that appear in the original (and in the original Ancient Greek text). While the original specifically refers to male same-sex lovers, my point in citing this quote is to emphasize the underlying point being made by Aristophanes, and of course by extension, Plato himself: namely, the impelling force of loving relationships, and the breadth and depth of content of those relationships beyond just sexual activity—a longing of souls. While Socrates, in his subsequent speech in this Dialogue, makes the argument that this longing is in fact, longing for something that transcends the relationship, transcends the longing for the beloved, I only touch on it here; a full exploration of that argument is a topic for another venue.

The foregoing quote from Plato's *Symposium* is offered at the outset of this Introduction for two purposes, both of which aim to shed light on the rhetorical shadows often cast on the walls of the cave known as political and scholarly discourse on lesbian, gay, bisexual, and transgender (LGBT) issues.² The first revelatory shadow puppet is—as Aristophanes eloquently noted—that loving intimate relationships embrace a full range of human emotional, intellectual, sexual, and spiritual experience. The second, and perhaps more important, point is to highlight a critical caveat to legal equality initiatives for the LGBT community, including this issue itself.³

This issue includes Articles across a range of subjects relevant to the LGBT client, practitioner, and theorist alike. Many, but not all of these, Articles focus on the issues that arise for LGBT persons in the context of relationships, whether it be a relationship to a same-sex partner or spouse, between a LGBT parent and child, or between a LGBT person and his or her family of origin.⁴

The *Symposium* is one of Plato's most significant Socratic dialogues, arguably one as important as his better known dialogue, *The*

² The reference, of course, is to the cave allegory in Plato's *Republic*, in which those who are not educated, or are not sufficiently thoughtful or well reasoned, mistake shadows cast by puppets as reality. PLATO, *The Republic, Book VII*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 1, at 747.

³ It is impossible to resist noting, at the outset of this Introduction, that the word *symposium* itself derives from the Ancient Greek word of the same name, Συμπόσιον. This is particularly interesting, given the place of same-sex intimate relationships in Ancient Greece. See, e.g., JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 53-107 (1994); DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 4-5 (1988) (noting the nobility of same-sex sexual relationships in Ancient Greece); Martha C. Nussbaum, *Constructing Love, Desire, and Care*, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 17, 27-28 (David M. Estlund & Martha C. Nussbaum eds., 1997) (noting the acceptance of same-sex sexual relationships in Ancient Greece but pointing out the absence of the concept of homosexuality as an identity in Ancient Greece). As noted previously, Aristophanes, himself, is in fact referring specifically to same-sex male lovers in the quote at the start of this Introduction. See PLATO, *supra* note 1.

⁴ See generally JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997) (discussing the distinction between families of choice and families of origin).

Republic.⁵ In Plato's *Symposium*, participants are asked to give a speech in praise of love, and more particularly, romantic love—Eros.⁶ Thus, Socrates begins his speech with the designated topic of romantic love—Ἔρως—human romantic love, physical and other sexual expressions of, love of beauty (of a person), and then draws his listeners toward an understanding of how love that originally arises from this human romantic love eventually leads the lover to love beauty generally, and love of (beautiful) souls, love of wisdom, and ultimately, to love of the divine.⁷

In one of the other speeches on love in the *Symposium*, the speaker Pausanias (as chance, or philosophy, would have it) touches on the intersection of law and love, noting categories of lawful versus unlawful love in the legal code of Ancient Greece.⁸ In so doing, he does not focus on the respective genders of the parties in the two legal categories, but rather, emphasizes the *purpose* of particular intimate relationships as the important distinction between lawful versus unlawful categories of love.⁹ He describes economically or politically motivated love, coerced forms of love as examples of the prohibited, and voluntary and beneficial forms of love in the case of those relationships that are supported.¹⁰ In other words, Plato, through Pausanias, makes a distinction that exists in law: there are some relationships that it may be appropriate for law to regulate—those that are nonconsensual, for instance—because they are not victimless.¹¹ On the other hand, Pausanias then suggests that law has no business penalizing relationships that are victimless.¹² While he is referring to criminal sanctions in the dialogue itself, we can extend the analysis to the ways in which law in modern times continues to value, throw protection around, and provide benefits to some victimless relationships (heterosexual), but not others (LGBT relationships). Because of this ongoing distinction in our contemporary legal regime, and despite the Supreme Court's 2003 deci-

⁵ PLATO, *supra* note 2.

⁶ THE COLLECTED DIALOGUES OF PLATO, *supra* note 1.

⁷ *Id.* at 561-63.

⁸ See generally PLATO, *supra* note 1, at 534-39.

⁹ *Id.*

¹⁰ *Id.* at 537-38.

¹¹ *Id.*

¹² *Id.*

sion that struck down as unconstitutional the differential criminalization of consensual same-sex adult sexual activity,¹³ in many instances lawyers for LGBT clients are unsure and need to know how to proceed on matters that continue to rest upon this uneven playing field. These Articles will greatly aid those lawyers and their clients in that endeavor.

One key component of Socrates's philosophical theory of love triggers several caveats, however, which brings us to the second purpose of the quotation above. Socrates makes the point that while love may originate in relationship, it ultimately transcends relationship and becomes a central component of one's moral self. It is this point that is worth emphasizing here at the outset: when analyzing the intersection of law and identity—whether it be racial identity, cultural identity, or in the case of this Symposium, LGBT identity, we must be careful with our categories, how they are conceptualized, deployed, and analyzed, as they have not always been conceptualized as they are today. First, the concept of sexual orientation itself—both heterosexual and homosexual—is a product of modern times.¹⁴ Second, and simultaneously, we should also be cautious about how law—and we who study the law—may overemphasize LGBT identity (and LGBT persons) as only existing in relationship to others. There are a host of other legal issues facing LGBT clients that lawyers representing members of the LGBT community should also ensure they are cognizant of, and educated on. Some of those issues include matters of bias crimes, discrimination, and other issues that arise in the education context, the military, housing, and employment.¹⁵ These Articles are more squarely focused on legal

¹³ *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down statutes that criminalized private, consensual, adult sexual intimacy as a violation of the right to privacy under the United States Constitution).

¹⁴ *See, e.g.*, Nussbaum, *supra* note 3, at 28 (“Ancient Greece, in short, does not divide its sexual actors according to the concept of a stable inner ‘preference’ for objects of a particular gender. In that sense, it lacks the very experience of homosexuality in its modern sense.”); JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 10-12 (1995); MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 303-27 (1999). It is partly this newer understanding that both heterosexuality and homosexuality are modern inventions that led to the overturning of *Bowers v. Hardwick*, 478 U.S. 186 (1986), in *Lawrence*, 539 U.S. at 578. *See Lawrence*, 539 U.S. at 571-73.

¹⁵ *See, e.g.*, ANTHONY C. INFANTI, *EVERYDAY LAW FOR GAYS AND LESBIANS AND THOSE WHO CARE ABOUT THEM* (2007) (including chapters discussing legal issues

issues that arise for LGBT persons in relationships, so perhaps this is an unfair critique to raise in this context.

Notably, however, in one of the Articles contained herein, namely *Gay and Lesbian Elders: Estate Planning and End-of-Life Decision Making*, by Nancy J. Knauer, Professor Knauer addresses legal issues for elderly LGBT clients who may not be in relationships at all, and that this itself creates important legal and social concerns worthy of attention. Knauer's Article thus gives us a key example of why it is worth keeping this in mind: both on the socially liberal left and on the socially conservative right, it is all too often the case that LGBT identity is conflated with relationship, and this may cause us to miss important legal opportunities and challenges as a result. Third and finally, all too often the *B* of LGBT is glossed over, and sexual orientation itself collapses into the hetero- and homo- binary.¹⁶ In our theoretical, doctrinal, and practical aspects of legal issues facing LGBT clients, we should be mindful of how the analysis might gloss over nuances that reveal themselves in the interstices of that binary. That is an issue not squarely addressed in this issue and remains an ongoing challenge to legal scholars and practitioners concerned with the rights and identities of those within the LGBT community.

Knauer's Article also addresses legal issues that arise most acutely for LGBT persons, some of which arise for those *in* relationships, and others that arise for those *not* in relationships. She highlights those barriers that arise by operation of current law, such as the limitation of various benefits that are restricted to heterosexual married couples. These benefits discussed include social security, Medicare/Medicaid, and other federal benefits, pension and other death benefits, family-based decision-making authority over medical care, and issues that arise in the probate context.

Professor Knauer brings to light the troubling situation for elder LGBT persons, particularly the contemporary cohort who came of age

that arise in these contexts, in addition to those that arise in the context of relationships between same-sex adults and between LGBT parents and their children).

¹⁶ See, e.g., Julie Greenberg, Marybeth Herald & Mark Strasser, *Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?*, 17 MICH. J. GENDER & L. 13 (2010).

during a time of greater hostility toward gays and lesbians and who weathered the AIDS crisis which added additional social stigma for gay men in particular. As she notes, many of these elder LGBT clients will be estranged from their families because of their sexual orientation and are more likely to be closeted because of their life experience. Even if estranged from their families while alive, an LGBT person may anticipate will challenges from those same hostile family members, should he or she attempt to will assets to a surviving partner or other beneficiary.

Knauer further identifies a problem that may also be true for other single, non-LGBT persons but is more acute for LGBT elderly people, namely that a single person's support network typically will be peers who are similarly aging and thus less able to provide aging and end-of-life care that is typically present for those with children or with closer ties to their families of origin. Finally, Professor Knauer points out the pervasive sexual orientation bias in the elder-care system that creates additional obstacles to care and to empathetic care for LGBT persons, including the need to remain closeted if they are to get the care they need. Having carefully identified the problems, Knauer offers suggestions for preparing for and dealing with them.

In the course of the dialogue, Plato—again, through Pausanias—also notes “that it is better to love openly than in secret,”¹⁷ a key component of LGBT discourse about the phenomenon of the *closet*—*being* closeted (not revealing one's sexual orientation) and *coming out* of the closet (revealing one's sexual orientation) as part of LGBT persons' lived experience. This Symposium—*Family, Life, and Legacy: Planning Issues for the Lesbian, Gay, Bisexual, and Transgender Communities*—was thus aptly titled and keeps us mindful of the changes that have happened in law and in society, since the time of Ancient Greece, both progressive and retrograde.¹⁸

Many thoughtful scholars in a number of disciplines have explicated, interrogated, and deepened the theoretical underpinnings of the

¹⁷ PLATO, *supra* note 1, at 536.

¹⁸ It is of course important to remain cognizant of recent counter-examples. *See, e.g.*, Jesse McKinley, *Suicides Put Light on Pressures of Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9, available at 2010 WLNR 19655910 (reviewing instances of recent teen suicide attempts as a result of gay bullying—cyber and otherwise).

interface between law and identity over the past several decades.¹⁹ Others have written more specifically on the theoretical and practical complexity that arises when identity is multivectored, involving the *intersection* of gender and race, or gender and sexual orientation, gender and (biological) sex, or gender, race, and sexual orientation.²⁰ And yet, others have written extensively on the particular place of lesbian, gay, bisexual, transgendered, intersexed, and queer identities (LGBTIQ) within the law.²¹ Some of this latter scholarship has been more theoretical in nature, building upon the identity scholarship noted above.²² Another body of this commentary has focused closely on the specific legal issues that arise for LGBTIQ individuals, sometimes offering incisive

¹⁹ See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1999); ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* (1996); PAULA C. RODRIGUEZ RUST, *BISEXUALITY IN THE UNITED STATES* (Lillian Faderman & Larry Gross eds., 2000); *CRITICAL RACE FEMINISM: A READER* (Adrien Katherine Wing ed., 1997); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); *THE LESBIAN AND GAY STUDIES READER* (Henry Abelove, Michèle Aina Barale & David M. Halperin eds., 1993). The group of law and identity scholars notably includes, among many others, Kimberle Crenshaw (race and gender), Richard Delgado (race), and Robin West (gender). Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing The Conflation Of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995).

²⁰ The notion of *intersectionality* was first developed by Kimberle Crenshaw in her groundbreaking article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; see also *FEMINISM MEETS QUEER THEORY* (Elizabeth Weed & Naomi Schor eds., 1997) (describing the intersection of feminist and queer theory); *TROUBLING INTERSECTIONS OF RACE AND SEXUALITY: QUEER STUDENTS OF COLOR AND ANTI-OPPRESSIVE EDUCATION* (Kevin K. Kumashiro ed., 2001) (describing the intersection of anti-racist and queer theory).

²¹ For the most comprehensive bibliography of scholarship on LGBT issues, see JAMES M. DONOVAN ET AL., *SEXUAL ORIENTATION AND THE LAW: A RESEARCH BIBLIOGRAPHY SELECTIVELY ANNOTATING LEGAL LITERATURE THROUGH 2005* (2006), which is updated regularly by the UCLA School of Law's Williams Institute, available at <http://www.lgbtbib.org/index.php>.

²² For more theoretical treatments, see, for example, DOLGIN, *supra* note 4; THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990); Karla C. Robertson, Editor's Note, *Symposium: InterSEXionality Interdisciplinary Perspectives on Queering Legal Theory*, 75 DENV. U. L. REV. 1129 (1998) (applying Queer theories to sex, gender, sexual orientation, marriage, and legal theory).

critique, at other points cogent doctrinal analysis,²³ and other related commentaries focus on giving guidance to practitioners who represent these clients in what is often a hostile social, political, and legal environment.²⁴

This Symposium bridged what is often a divide between the theoretical, doctrinal, and practical, offering an opportunity for each to draw and build upon the other, to the benefit of all. This Symposium was of particularly timely importance as we move into an era where a new generation, the Millennial generation, displays a greater comfort with difference, and who themselves are increasingly diverse, whether multiracial, or *queer*, *gender queer*, or comfortably *out* as gay or lesbian,²⁵ but who, overall, exhibit a level of comfort (perhaps even non-chalance) particularly in regard to LGBT persons.²⁶ However, they live in a world where the legal and political establishment(s) as yet continue

²³ For a doctrinal analysis, see, for example, ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997); Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357 (2010) (addressing both theory and doctrine regarding sexual identity in tort litigation); Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges To State Enforcement Of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465 (2009); Taylor Flynn, *Transforming The Debate: Why We Need To Include Transgender Rights In The Struggles For Sex And Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002); E. Gary Spitko, *Open Adoption, Inheritance, and the "Uncleing" Principle*, 48 SANTA CLARA L. REV. 765 (2008).

²⁴ For a practitioner or layperson discussion, see, for example, INFANTI, *supra* note 15; Phyllis Randolph Frye, *TRANSGENDER LEGAL*, <http://www.transgenderlegal.com/> (indexing doctrinal and practitioner-focused scholarship on transgender issues).

²⁵ I hazard a guess that those who are bisexual, as opposed to straight or gay, continue to be marginalized both within the gay/lesbian community and the heterosexual community. See, e.g., Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98 (1995); see also Bloom, *supra* note 23 (discussing the problems of binary biological sexual categories).

²⁶ See, e.g., Steve Eubanks, *Millennials: Themes in Current Literature* (2006), <http://eubie.com/themes.pdf> (discussing Millennials' comfort with difference, particularly with respect to sexual orientation); David Crary, *Suicide Surge: Schools Confront Anti-Gay Bullying*, ASSOCIATED PRESS, Oct. 10, 2010, available at 2010 WLNR

to be populated primarily by those of earlier generations who sometimes demonstrate a less robust degree of acceptance of the diversity among us.²⁷ Despite the wealth of theoretical, doctrinal, and practitioner-focused commentary, rarely is there an attempt to bring everyone to the same table.²⁸ This Symposium took up this challenge.

In his Article, *Estate Planning for Same-Sex Couples: Practicalities, Precautions, Perils, and Proposals*, Anthony Brown offers a careful analysis of the critical legal issues facing attorneys representing LGBT clients, drawing on his long experience both representing clients and his groundbreaking work with national organizations devoted to policy issues relevant to LGBT couples and their families. He outlines important caveats about many of the unique challenges in estate planning for LGBT clients. At the outset, Brown notes the critical problem of *portability* (or lack thereof) of LGBT persons' estate plans: because

20657241 (noting an increased number of biracial and multiracial persons; contrast recent phenomenon of cyber bullying and suicides of gay teenagers).

²⁷ See, e.g., Proposing an Amendment to the Constitution of the United States Relating to Marriage, H.R.J. Res. 56, 108th Cong. (2003), <http://www.gpo.gov:80/fdsys/pkg/BILLS-108hjres56ih/pdf/BILLS-108hjres56ih.pdf> (draft amendment to the U.S. Constitution defining marriage as between one man and one woman); Darren Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145, 155 (2005) (discussing the historical backdrop for successful and unsuccessful constitutional amendments); David M. Herszenhorn, *Senators Vote to Block Debate on Military Bill*, N.Y. TIMES, Sept. 22, 2010, at A1, available at 2010 WLNR 18777144; Sara Johnson, *Tea Party and Diversity: Bad Rap for Liberals or a Genuine Need?*, CHRISTIAN SCI. MONITOR, Sept. 17, 2010, available at 2010 WLNR 18534534 (discussing the Tea Party movement and diversity issues).

²⁸ This is perhaps in part because many of the identity scholars and practitioners working with LGBT clients operate in different arenas (the legal academy versus legal practice). There also is sometimes a mutual antipathy and critique that the *other camp* either has its head in the clouds and is writing of things of little real importance in the world (practitioners of theorists), or is insufficiently deep thinking about the undergirding social, political, and ideological structures that create and support a legal regime hostile to LGBT identities (theorists of practitioners). It is undoubtedly true that this is not always the case, but we have learned much from critical race theorists, critical race feminists, and feminist legal scholars generally, as well as from law and society scholars, that the two cannot live in isolation. That law and culture, law and society, individual and political, are inherently intertwined, interdependent, and mutually reinforcing and attention needs to be paid to both the practical and the theoretical if we are to move forward at all.

there are significant differences from state to state as to recognition of same-sex partnerships, when LGBT persons move from one state to another, carrying with them their estate plan that was validly executed in the state of their previous residence, they cannot automatically expect that it will be recognized as valid in the state to which they relocate.

Brown makes clear that even an attorney with a strong background in estate planning for heterosexual couples or heterosexual parents could easily overlook critical details that could eviscerate the ultimate outcome for an LGBT client. For instance, while challenges to a will during the probate process are always a possibility, will contests are a particularly keen risk in probating wills for LGBT persons with homophobic family members. In addition, federal tax consequences may differ for same-sex partners from those for opposite-sex couples. Brown also points out the critical importance of clear medical visitation directives and medical powers of attorney for same-sex partners given existing case precedent. He makes the case for a complex collection of legal documents necessary to protect the LGBT client, and he also advocates for the development of “sophisticated asset transfer mechanisms” with the near-dizzying acronyms of GRIT, QPRT, GRAT, ILIT, CRAT, and CRUT. Brown clearly makes the case that a simplistic knowledge, or even a sophisticated knowledge, of estate planning for heterosexual couples will not be sufficient for estate-planning protection of LGBT clients.

Brown’s Article not only adds to the toolkit of estate-planning attorneys working with this client base, but in identifying these unique challenges, his Article also highlights important areas for future changes to the law if LGBT clients are to be treated equally under the law. His discussion of some aspects that parallel between the civil rights and gay rights movements sheds particular light on the possible future of these legislative reforms, complementing William Eskridge’s recent work documenting the typical pattern of reform of law affecting LGBT persons.²⁹ Brown’s Article thus highlights the critical importance of con-

²⁹ See generally William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 McGEORGE L. REV. 641 (2000). For a comparison of Brown’s discussion of probate issues of surviving spouses from an interracial marriage, see Adrienne D. Davis, *The*

tinued dialogue between practitioners, legal reformers, legal scholars, and jurists in equality efforts for the LGBT community.

In his Article, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, Mark Strasser, a long-time scholar and advocate for same-sex marriage recognition,³⁰ offers his insights into the debate over proposed legislative initiatives, referred to as *conscience exceptions*, that would allow public servants to refuse to perform same-sex marriage ceremonies in states that otherwise recognize same-sex marriage. Professor Strasser critiques these initiatives as failing “to provide sufficient limitations on the reach of the exemptions” such that they may lead to the ostracization of LGBT persons (establishing an *untouchable status*, in Professor Strasser’s words) and, ultimately, an increased *balkanization* of the United States. He argues that while religious liberty should be respected, the exemption clauses may violate other constitutional guarantees such as equal protection.

Like Anthony Brown, Strasser identifies a correlation between earlier objections to interracial marriage and to current hostility toward same-sex marriage within some religious communities, and also from some contemporary legal scholars such as Robin Fretwell Wilson. Professor Strasser rightly critiques Professor Wilson’s attempt to distinguish religious objections to interracial marriage from similar objections to same-sex marriage, noting that she fails to provide any support for the distinction. In analyzing the argument that the absence of exemptions of conscience threatens religious liberty, he also notes that the divergence among religious faiths on the acceptability of same-sex marriage reveals that the debate over same-sex marriage is not “a war between the religious and the antireligious,” urging us toward a more nuanced understanding of the various positions on the issue.

Professor Strasser argues that allowing exemptions of conscience will create a dearth of officiants for same-sex couples wishing to marry. While this concern may not bear out in more popular urban areas, which in most areas of the country are also more tolerant of di-

Private Law of Race and Sex: An Antebellum Perspective, 51 STAN. L. REV. 221 (1999).

³⁰ See, e.g., Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 WIS. J.L. GENDER & SOC’Y 1 (2010).

versity generally, certainly Strasser's point is well-taken, that this could be a real problem for LGBT persons in less populous, more rural areas.

Scott Titshaw's contribution to this Symposium, *Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, addresses the particular issues that arise for LGBT parents in the context of immigration status. Again, as with the prior Articles, Titshaw focuses on LGBT persons in relationship—both couple relationships and more particularly, parent-child relationships formed through the use of Assisted Reproductive Technology (ART). Professor Titshaw's central argument is that while other countries have addressed the complexities of immigration status for children conceived through ART, immigration law in the United States not only lags behind, it is also internally contradictory.

The general rule is that a child born abroad to a U.S. citizen mother is deemed a U.S. citizen as well, regardless of the citizenship of the child's father. By contrast, a child fathered by a U.S. citizen father, born abroad to a non-U.S. citizen mother, does not similarly receive citizen-status. Further, a child born within U.S. borders is considered a U.S. citizen regardless of the citizenship of either biological parent.³¹ Professor Titshaw focuses on the complexity that arises when a child is born to, but not genetically related to, the birth mother and where traditional presumptions of parenthood for marital couples either do not apply, or if applied create absurdity. In any event, these issues certainly multiply the layers of complexity of parentage determinations.

Finally, Professor Jillian Weiss, the keynote speaker for this Symposium, addresses the intersection of free exercise of religion claims and nondiscrimination requirements based on sexual orientation in her Article, *The First Amendment Right to Free Exercise of Religion, Nondiscrimination Statutes Based on Sexual Orientation and Gender Identity, and the Free Exercise Claims of Non-Church-Related Employers*. This Article builds on Professor Weiss's keynote speech, which in turn drew upon her previous article entitled, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of*

³¹ This latter situation triggered the recent *anchor-baby* debates in immigration policy reform.

“*Sex*” in Title VII of the Civil Rights Act of 1964?.”³² In her keynote speech and her earlier article, Professor Weiss used a combination of postmodern theory developed by the likes of Judith Butler,³³ legal scholars such as Katherine Franke,³⁴ and a historical lens to argue that a “radical disjunction between sex and gender is neither desirable nor realistic”³⁵ when antidiscrimination law is faced with the bodies, minds, and lives of transgendered persons. In the Article for this Symposium, Professor Weiss takes on a different aspect of employment discrimination on the basis of sexual orientation and gender identity, engaging in a careful doctrinal analysis of the standard of review that should be employed by courts when faced with free exercise claims in response to claims of discrimination on these two bases. Her particular focus in this Article is on free exercise claims raised not within the context of a religious institution, but rather, in a civil context. Professor Weiss carefully works through the historical development of the free exercise doctrine, ultimately concluding that “a claim based on the Free Exercise Clause for an exception to a neutral and generally applicable law, such as a law prohibiting employment discrimination, will not lie.” She further concludes that the standard of review to be applied in this context will not be full-on strict scrutiny, but rather, that they will be subjected to “a *compelling interest* standard of review, but will not be reviewed for the narrowness of the remedy, or whether it is the least restrictive means possible”—the second prong of the traditional strict scrutiny standard.

These five Articles provide a solid foundation in identification of legal issues in family, life, and legacy for the LGBT community, and they provide suggestions for planning for and resolving those issues. In addition, the authors give us a wide range of approaches to these issues, ranging from historical, to theoretical, to solid doctrinal analysis. The authors are saluted for their contribution to these important issues of the day.

³² Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573 (2009).

³³ *Id.* at 574 n.3 and accompanying text (citing JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 1 (1993)).

³⁴ *Id.* at 613 n.240 and accompanying text (citing Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995)).

³⁵ *Id.* at 616.

