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Courtney G. Joslin

Lawrence C. Levine

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The Restatement of Gay(?)

Courtney G. Joslin[†] *& Lawrence C. Levine*[††]

INTRODUCTION

This Symposium—the "Restatement Of . . ." conference—brings together scholars with expertise in a range of subject-matter fields to consider existing Restatements and whether new Restatements are in order. The specific question we ask is whether there should be a Restatement or other type of American Law Institute (ALI) publication[1] devoted to legal issues affecting lesbian, gay, bisexual, and transgender (LGBT) people; or, to put it in a less cumbersome but more crude fashion, whether the ALI should produce *The Restatement of Gay*.[2]

[†] Professor of Law, UC Davis School of Law. I thank Afra Afsharipour, Susan Frelich Appleton, David Horton, Melissa Murray, Dennis Ventry, and Rose Cuison Villazor for helpful feedback. I am grateful to the UC Davis School of Law, particularly Dean Kevin Johnson and Associate Dean Vikram Amar, for providing generous financial support for this project. Finally, I thank the editors of the *Brooklyn Law Review* for their careful editorial assistance.

[††] Professor of Law, University of the Pacific, McGeorge School of Law. I greatly appreciate the able research assistance of Pacific McGeorge students Vignesh Ganapathy, Danielle Lenth, and Vallerye Mosquera. I am also grateful to Professors Anita Bernstein, Julie Davies, Michael Green, and Brian Landsberg for their helpful input. Finally, my thanks to Brooklyn Law School, the *Brooklyn Law Review*, the ALI, and Professor Anita Bernstein for inviting us to participate in this Symposium.

[1] Although Restatements are the most well-known of the ALI's publications, the ALI publishes a number of different types of publications. Restatements were the "ALI's first endeavor." *ALI Overview*, A.L.I., http://www.ali.org/index.cfm?fuseaction=about.instituteprojects (last visited Oct. 29, 2013). Although this description is certainly open to debate, the ALI describes Restatements as documents that seek to "tell judges and lawyers what the law [is]." *Id.* In addition to these more familiar Restatements, the ALI also publishes a number of uniform or model statutory formulations, including the Uniform Commercial Code, the Model Code of Evidence, and the Model Penal Code. Most recently, the ALI has produced a number of "Principles of the Law." In contrast to Restatements, which often seek to a greater degree to "describ[e] the law as it is," Principles forthrightly seek to "express[ ] the law as it should be, which may or may not reflect the law as it is." *Publications Catalog*, A.L.I., http://www.ali.org/index.cfm?fuseaction=publications.faq (last visited Oct. 29, 2013).

[2] Because the word "gay" is used primarily to refer to men, many lesbian, bisexual, and transgender people prefer more inclusive phrases to "gay rights" or the "gay community." *See, e.g.*, American Defamation League, *Unheard Voices: Stories of LGBT History* 5 (2011), http://archive.adl.org/education/curriculum_connections/unheard-voices/pdfs/entire_unit.pdf. While we share these concerns, we use the term

After thinking about the question independently and then discussing it together, we both answered the question in the negative. But, as explained in more detail below, that does not mean we think the ALI need not address LGBT issues. In fact, we think just the opposite is true. Given the influence that ALI publications have on the development of the law, we think it is critically important for the ALI to engage with and address the law as it applies or should apply to LGBT people. But we think that this engagement should be in the context of the relevant subject-matter publications, rather than in the form of a separate, stand-alone publication dedicated to LGBT issues.

Part I of this article develops why we think it is critical for the ALI to more comprehensively consider and address LGBT issues. Part II explains why we advocate an inclusive rather than an exclusive approach for such consideration. We discuss an ALI publication—the Model Penal Code—to help explain why we support such an approach.

Part III provides some concrete examples of how this inclusive approach could be implemented. We start by offering some guidance as to what types of provisions are most likely to be in need of reconsideration and possible revision. Such provisions include those that turn in some way on the existence of a legally recognized relationship. As we explain, these provisions exclude most LGBT couples. Moreover, these provisions are increasingly out-of-step with the demographics of families in the United States and have a disproportionately negative effect on lower-income families and families of color. Other provisions that may be in need of reconsideration are those that relate to discriminatory conduct.[3] To provide more clarity about what we advocate, we offer one example of an ALI publication that already does a good job of incorporating LGBT issues—the *Principles of the Law of Family Dissolution*—as well as an example of an ALI publication that needs further revision—the *Restatement (Third) of Torts*.

I. IMPORTANCE OF THE ALI

Without question, we both believe it is critically important for the ALI to engage with LGBT issues in its publications. As other scholars have noted, "'authorship' of the

"gay" here in the proposed title because it is less cumbersome than the alternatives. In the body of the piece, we use the more inclusive term "LGBT."

[3] *See infra* Part III.D.

American Law Institute serves a strong legitimizing function."[4] ALI publications are the collaborative product of leading scholars, lawyers, and judges. Indeed, ALI projects are unusual in that they bring together experts from both practice and academia. As a result, many (although not all) of the ALI's publications have had tremendous influence on the development of the law in states, spanning the geographical and political spectrum.

The degree of influence varies by publication and subject matter. Some ALI publications have had a profound impact on the development of the law. The Model Penal Code, the Uniform Commercial Code (UCC), and the *Restatements of Torts* arguably fall into this category.[5] The UCC, for example, has been adopted and implemented at least in part by all 50 states.[6] "In the realm of substantive criminal law, by far the most significant development has been the completion of the American Law Institute's Model Penal Code[.]"[7] And the *Restatement of Torts* is an example of a non-Model Code publication that has heavily influenced the development of state law.[8]

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[4] Mary Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL'Y 87, 88-89 (2001); *see also* Michael D. Green & Olivier Moréteau, *Restating Tort Law: The American and European Styles*, 3 J. EUR. TORT LAW 281, 285 (2012) ("By all accounts, the ALI has had enormous success in influencing the development of the common law in the US."); Robin Fretwell Wilson, *Introduction*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 1, 2 n.5 (Robin Fretwell Wilson ed., 2006) [hereinafter RECONCEIVING THE FAMILY] ("It is difficult to overstate the degree of the ALI's influence. As of March 1, 2004, state and federal courts have cited the Restatements 161,486 times."); Carl E. Schneider, *Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform*, *in* RECONCEIVING THE FAMILY, *supra*, at 489, 491 ("The ALI has wielded influence beyond the fantasies of its founders. The Model Penal Code and the Restatements are as close to binding precedent as nongovernmental authority can be, and they are only part of the Institute's agenda.").

[5] Bennett Boskey, *The American Law Institute: A Glimpse at Its Future*, 12 GREEN BAG 2D 255, 258 (2009) ("Perhaps the most influential has been the Model Penal Code adopted by the Institute in 1962, for which Herbert Wechsler was the reporter before he became the Institute's director. The strong influence of this project and its wide acceptability helped to modernize the penal codes of many of the States[.]").

[6] Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 146-47 (2008) ("The Uniform Commercial Code (UCC) is a leading example. Originally promulgated in 1952 and revised periodically since then, some version of the UCC is in force in all fifty states.").

[7] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 3 (2d ed. 1986); *see also* Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 538 (1988) ("[T]he influence of the Model Penal Code has been so great that it has now permeated and transformed the substantive criminal law of this country."); Richard G. Singer, *Foreword*, 19 RUTGERS L.J. 519, 519 (1988) (referring to the MPC as "one of the most historic documents in the history of the criminal law").

[8] Green & Moréteau, *supra* note 4, at 285 ("The three torts Restatements (the most popular and influential of all of the Restatements that the ALI has published) has been cited an estimated 70,000 times since the first one was published in 1934."); Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 932 (2009) ("The classic

Other publications arguably have had less influence.[9] For example, some commentators claim that the ALI's *Principles of the Law of Family Dissolution* (*Principles*) has had little impact on the development of the law.[10] Even allegedly less persuasive publications like the *Principles*, however, heavily influence the scholarly discussions and the way the subject matter is taught in law schools.[11] For example, although no state has "adopted" the *Principles*, they are extensively discussed and analyzed in family law textbooks[12] and have been the subject of scores of law review articles.[13] Over time, this discussion likely will influence the development of the law, even if it is not directly attributed to the *Principles*.

On the whole, these ALI publications have more influence on the development of the law than traditional legal scholarship. Professor Lawrence Waggoner recently reflected on his involvement with the ALI and the Uniform Law Commission (ULC), stating that this work was some of his most important as a law professor because it was only through these projects that he "was . . . able to influence the law."[14]

Both of us are interested in LGBT issues not only from a theoretical perspective, but also from a practical perspective. We care deeply about how the law and the legal system treat LGBT people. For this reason, we strongly support law reform

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example of an ALI process for improving state law is the Restatement (Second) of Torts, which sets out Prosser's privacy torts and heavily influences state law.").

[9] Here we discuss the Principles of the Law of Family Dissolution, but there are other examples one could use, including the Restatement of Surety. We thank Anita Bernstein for this insight.

[10] *See, e.g.*, Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's* Principles of the Law of Family Dissolution*, Eight Years after Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 608-09 (2008) (arguing that the ALI's Principles of the Law of Family Dissolution have had an "anemic influence . . . with rule makers").

[11] *See, e.g.*, JILL ELAINE HASDAY, FAMILY LAW REIMAGINED: RECASTING THE CANON 3 (forthcoming) (on file with author) ("How family law is taught helps determine how the next generation of lawyers, including some future legislators, regulators, and judges will understand family law and its guiding principles.").

[12] For example, the references to the PRINCIPLES in D. Kelly Weisberg & Susan Frelich Appleton's MODERN FAMILY LAW (Aspen) take up almost an entire column of the index. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 1172 (3d ed. 2006).

[13] *See, e.g.*, RECONCEIVING THE FAMILY, *supra* note 4, at vii-ix (consisting of 25 articles critiquing various parties of the Principles); *see also* Timothy Johnson, *Editor's Note*, 8 DUKE J. GENDER L. & POL'Y i (2001) (symposium issue devoted to consideration of the Principles).

[14] Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 731 (2012); *see also id.* at 738 ("Overriding all the other reasons, though, is the hope that the work has improved the law.").

work, such as the work of the ALI. One of us[15] has long been a member of the ALI and has had the good fortune of participating in the drafting of the *Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm*. The other,[16] while not a member of the ALI, has participated in other law reform efforts.[17] Because of the ALI's unique ability to affect the development of the law and its application, we strongly support efforts by the ALI to address LGBT issues in a comprehensive and thoughtful way.

Undertaking such a project is important from the ALI's perspective as well. As the ALI itself explains, the goal of the organization is to "clarify, modernize, and otherwise improve the law."[18] LGBT issues are critical legal issues of our times, and the law on this subject is developing at a rapid pace. Moreover, LGBT issues cut across the range of subject-matter areas that the ALI already addresses, as well as those that the ALI is contemplating for inclusion in future projects.[19] As such, LGBT issues are matters upon which the ALI must provide guidance in order to further its core goals of clarifying and modernizing the law. Consideration and inclusion of LGBT issues in ALI publications will also ensure that the ALI continues to be viewed as providing relevant and up-to-date guidance. The completion of such a project would be of great assistance to lawyers and judges trying to make sense of this rapidly changing body of law.

II. INCLUSIVE OR EXCLUSIVE CONSIDERATION?

Having concluded that it is important for the ALI to engage with LGBT issues, the next question is how this should be done. As we understood it, the specific question we were asked to consider was whether there should be a separate, stand-alone ALI publication on LGBT issues. For a number of

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[15] Professor Lawrence Levine.

[16] Professor Courtney Joslin.

[17] Author Joslin participated in the drafting of the revised version of the Uniform Parentage Act, which was promulgated by the ULC in 2002. *See, e.g.*, John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act* (2002), 37 FAM. L.Q. 1, 3 n.5 (2003). She is also a member of a new ULC study committee that is tasked with "consider[ing] the need for and feasibility of drafting and enacting state legislation concerning the rights of third parties to custody of or visitation with a child." For more information about this project see *Committees: Third Party Child Custody and Visitation*, UNIFORM L. COMM'N, http://www.uniformlaws.org/Committee.aspx?title=Third%20Party%20Child%20Custody%20and%20Visitation (last visited Oct. 29, 2013).

[18] *ALI Overview*, *supra* note 1.

[19] *See, e.g.*, *infra* Part III.B.

reasons developed in this Part, we believe that the development of a "Restatement of Gay" is not the best approach. To the contrary, we think that a more productive and helpful way to engage with LGBT issues would be for the ALI to comprehensively incorporate LGBT issues into all of its relevant existing and future publications.

As a starting place for thinking about this question, we note that the ALI does not have any publications specifically devoted to the application of law to any other identity-based group.[20] For example, there is no Restatement of Race or Restatement of Gender.[21] And, as is true with regard to LGBT identity, we do not advocate the creation of such publications. But, again as is true with LGBT identity, we do strongly urge the ALI to consciously and deliberately reflect on whether existing publications do a good job of taking into account these social identities and the law's impact on people in these social identity categories. There has been some attempt to do this—largely with regard to the application of particular provisions of particular publications to women.[22] So, for example, some Restatements have been revised to replace gendered terms (generally gendered male in the past) with gender-neutral terms.[23] That said, as scholars such as Anita Bernstein,[24]

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[20] Although the ALI is currently considering a project on American Indian law. *See, e.g.*, *ALI Considers Possible Project on American Indian Law*, 34 A.L.I. REP. 3 (2012), http://www.ali.org/_news/reporter/spring2012/03-ali-considers-possible-project-american-indian-law.html (last visited Oct. 29, 2013). We think, however, that that publication is distinguishable in that Native American law is a distinct body of law.

In her contribution to this symposium, Susan Appleton advocates the creation of another identity-specific ALI publication—one considering the legal treatment of children. Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525 (2014). As she explains, however, legal issues related to children are different from issues affecting most other identity-based categories—including LGBT identity—because children are, and in many instances should be, treated in unique ways by the law.

[21] *See, e.g.*, *Publications Catalog,* A.L.I.*, supra* note 1.

[22] *See, e.g.*, Anita Bernstein, *Toward More Parsimony and Transparency in "the Essentials of Marriage,"* 2011 MICH. ST. L. REV. 83, 115 (2011) (noting that the RESTATEMENT (SECOND) OF CONFLICTS "switched its old topic heading for [Section 21, the section on domicile,] 'Married Women, Children, and Incompetents' to the neutral-sounding 'Acquisition and Change of Domicil'").

[23] Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1357 (2010) ("[T]he *Restatement (Second)* used explicitly gendered language, defining negligence as the failure to act as a 'reasonable man under like circumstances' . . . . In contrast to its predecessor, the *Restatement (Third)* scrupulously uses gender-neutral language throughout, relying on inclusive terms such as 'person' and 'actor.'").

[24] *See, e.g.*, Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367, 1369 (2001) (arguing that "the *General Principles* look at Torts from a gendered perspective: mostly (but far from uniformly) male").

Martha Chamallas,[25] and Jennifer Wriggins[26] explain, much more work needs to be done on this front.[27] And the need for further reflection and revision is no less great with regard to LGBT people.[28]

So, consciously or not, it appears that the ALI previously chose to address issues of gender within existing publications rather than through the creation of a separate, stand-alone Restatement of Gender. We advocate a similar approach here.

As discussed in more detail in Part III, how this inclusion should be accomplished will vary depending on the type of provision and the existing law. In some places, the drafters may need to consider altering the rules to assure fair and equal treatment of LGBT people. Some alteration may be necessary, for example, with regard to provisions that turn on the existence of a marital relationship. In other places, by contrast, all that may be needed is more explicit guidance that whatever the announced principles are, they apply equally to LGBT people.

A. Limitations of an LGBT-Specific Publication

1. Risk of Marginalization

Addressing LGBT issues in a separate, stand-alone publication would limit the scope of the potential audience. Those lawyers and advocates who do not currently serve many LGBT clients, and who may have given less thought and reflection to these issues, would be much less likely to make use of

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[25] *See, e.g.*, Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2115-16 (2007) [hereinafter Chamallas, *Discrimination and Outrage*]; Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1436 (2005).

[26] Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 139, 139-40 (2005) [hereinafter Wriggins, *Feminist Revision*]; Jennifer B. Wriggins, *Domestic Violence Torts*, 75 S. CALIF. L. REV. 121, 184 (2001).

[27] For a very thoughtful and deep examination of the extent to which torts doctrine, including the *Restatement of Torts*, fails adequately to take into account considerations of race and gender, see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 1 (2010).

[28] *See, e.g.*, Kerry Abrams, Essay, *Citizen Spouse*, 101 CALIF. L. REV. 407, 426 (2013) (noting that although the RESTATEMENT (SECOND) OF CONFLICTS made the domicile provision gender-neutral, "the Reporter's Note acknowledges that the gender-neutral change to the title is purely semantic"); Wriggins, *Feminist Revision*, *supra* note 26, at 139 ("discuss[ing] some of what feminist perspectives can provide in connection with torts"); Dolly M. Trompeter, Comment, *Sex, Drugs, and the Restatement (Third) of Torts, Section 6(c): Why Comment e is the Answer to the Woman Question*, 48 AM. U. L. REV. 1139, 1145 (1999) (considering application of Section 6(c) of the RESTATEMENT (THIRD) OF TORTS to women).

an LGBT-specific publication. The existence of a stand-alone ALI publication on LGBT issues would also reinforce the intuition of many that LGBT issues are marginal, and unworthy of consideration in the "true" or "core" ALI publications.

One of us is the author of several publications that focus exclusively on LGBT legal issues.[29] We hope that these publications demonstrate that there are benefits from creating and publishing LGBT-specific publications. In some contexts and for some purposes, this type of publication makes sense. Publications devoted to a comprehensive analysis of LGBT legal issues can be of great use to lawyers who devote a significant portion of their practice to serving LGBT people and their families. The existence of this type of publication means that there is one publication that these lawyers can turn to for information about many, if not most, of the issues they face in their practice. Without such publications, these lawyers may instead have to turn to many different publications every time they need guidance. Moreover, publications devoted to the LGBT subject matter might be easier to find in the first instance because they clearly identify themselves as providing a comprehensive overview of a particular area of practice. So, for those people who know they need information about an LGBT issue, an LGBT-specific publication might be the most useful source.

There are a number of potential downsides, however, to addressing LGBT issues in a separate, stand-alone publication. As a preliminary matter, addressing LGBT issues only in an LGBT-specific publication would drastically reduce the number of people who would consider and grapple with the subject matter. Most of the users of an LGBT-specific ALI publication likely would be people who write on the topic or lawyers whose practice includes a significant number of LGBT clients. There simply are not that many people who fall into these categories. Moreover, while lawyers who serve LGBT clients likely could learn more about LGBT issues from a comprehensive, LGBT-

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[29] *See, e.g.*, COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW (West 2012); *see also* NAN D. HUNTER, COURTNEY G. JOSLIN, & SHARON M. MCGOWAN, THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK (Eve Cary ed., 4th ed. 2004).

And, of course, many other scholars and lawyers have written books on legal issues specific to the LGBT community. *See, e.g.*, JOAN M. BURDA, ESTATE PLANNING FOR SAME-SEX COUPLES (2d ed. 2013); ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW (2002).

specific ALI publication, this group of lawyers likely has already done a fair amount of thinking about these issues.

By contrast, people who consider LGBT issues to be unrelated to their existing area of practice or expertise would be less likely to utilize such a publication. This group of people probably is much larger than the former group. And, as a whole, this larger group of lawyers likely has done much less thinking about LGBT issues and, therefore, has the most to learn. To try to put some perspective on the relative sizes of these two groups, the American Bar Association, which includes only a slice of all licensed lawyers in this country, has "more than 400,000 members."[30] By contrast, the National LGBT Bar Association—an association dedicated to LGBT lawyers and attorneys serving LGBT clients—has approximately 2,500 members.[31] Thus, an LGBT-specific ALI publication likely would be utilized primarily by a relatively small group of people who already know a fair amount about LGBT issues.

In some ways, this question of incorporation versus exclusive consideration is related to the debate about how to include LGBT and other identity-based issues into the law school curriculum. Having specific seminars addressing LGBT issues, gender, or race is a positive step. These classes enable students who are already knowledgeable about and interested in a particular topic to explore it more deeply. But these classes do not mitigate the need to incorporate these issues into the core law school curriculum. As Cheryl Wade has explained in the context of race:

> Ignoring issues of race in the law school's core courses and relegating such issues to Law and Race and Critical Race Theory seminars disserves my students. Discussions of race become marginalized, exiled to the fringes of the law school curriculum. Only the students who enroll in "race courses" have available opportunities to discuss race and racism.[32]

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[30] *See, e.g.*, *About the ABA Journal*, AM. BAR ASS'N J., http://www.abajournal.com/about (last visited Oct. 29, 2013).

[31] Email from Liz Youngblood, Program Manager, National LGBT Bar Association, to authors (June 20, 2013 9:13AM) (on file with authors). And, likely, many of these lawyers do not practice primarily in the area of LGBT rights.

[32] Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901, 904-05 (2003) (footnote omitted). Many other scholars likewise argue that it is important to incorporate issues of race, class, gender, etc. into the core law school curriculum. *See, e.g.*, Kimberlé Williams Crenshaw, *Foreward: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 33-34 (1994); *see also* Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 55 (1994).

Especially within an ALI publication that has a good chance of actually influencing and impacting the development of the law, it is critical not to marginalize identity-based issues like sexual orientation and gender identity. It is important to incorporate these issues into the existing doctrine in a conscious, thoughtful, and deliberate manner.

2. Discouraging Connections

Addressing LGBT issues in a stand-alone publication can inhibit rather than enable the ability of scholars, lawyers, and judges to see the connections between legal issues affecting LGBT people and those affecting non-LGBT people. Failing to see the connections between related legal issues is of particular concern in the LGBT context.[33] There is already a tendency to see legal issues affecting LGBT people as utterly distinct from those affecting non-LGBT people. Having an LGBT-specific publication may fuel rather than break this cycle.

Bowers v. Hardwick[34] is a striking example of this tendency. *Bowers* involved a constitutional challenge to a Georgia sodomy statute. The statute criminalized oral and anal sex regardless of the sex, sexual orientation, or marital status of the participants.[35] Because of its broad scope, the statute was initially challenged by two sets of plaintiffs: a gay man who had been arrested and charged for violating the statute,[36] and a heterosexual married couple who claimed the statute chilled their sexual activity.[37]

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[33] *See, e.g.*, Charlton C. Copeland, *Creation Stories: Stanley Hauerwas, Same-Sex Marriage, and Narrative in Law and Theology*, 75 LAW & CONTEMP. PROBS., 87, 88 (2012) ("The translation of LGBT lives to the larger public has been one of the most significant strategies of the mainstream LGBT equality movement.").

[34] 478 U.S. 186 (1986).

[35] The statute, GA. CODE ANN. § 16-6-2(a) (1984), criminalized sodomy, which was defined as follows: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." *See* Brief for Petitioner, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720442, at *5 (authored by Laurence Tribe and Kathleen Sullivan) ("In Section 16-6-2, the State of Georgia has criminalized certain sexual activities defined solely by the parts of the body they involve, no matter who engages in them, with whom, or where.").

[36] "After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed." *Bowers*, 478 U.S. at 188.

[37] *See id.* at 188 n.2 ("John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed [by the statute] in the privacy of their home, . . . and that they had been 'chilled and deterred.'").

By the time the case was decided by the Supreme Court, the married couple had been dismissed from the lawsuit.[38] With Michael Hardwick as the sole remaining challenger to the law, the Court reframed the issue as one implicating only LGBT people. According to the Court, the question presented by the case was whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[39] It was only by reframing the question in this way—that is, by entirely distancing the statute from any impact on or relevance to heterosexual people—that the Court reached the conclusion that the claims presented in the case bore "no connection" to "family, marriage, or procreation."[40]

If the Court had not engaged in this kind of siloing or ghettoizing of LGBT issues, it would have had to answer the astute question posed by Justice Stevens in his dissent. That is, the Court would have had to explain why some persons in Georgia, namely lesbian and gay people, did not have "the same interest in 'liberty' that others ha[d]."[41]

We believe that discrimination against LGBT people will not be eliminated until courts and policymakers are forced to appreciate the connections between legal issues as they affect LGBT and non-LGBT people.[42] Having a separate LGBT-specific publication would, we think, obscure these connections rather than bring them into focus.

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[38] *Id.* (noting that the district court had dismissed the heterosexual couple on standing grounds, that this holding was affirmed by the Court of Appeal, and that the couple "[did] not challenge that holding in this Court").

[39] *Id.* at 190.

[40] *Id.* at 191 ("Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated[.]").

[41] *Id.* at 218 (Stevens, J., dissenting). Almost twenty years later, the Court did make this connection between the rights of LGBT people and the rights of non-LGBT people when it overruled *Bowers*. Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right."). *See generally* Lawrence C. Levine, *Justice Kennedy's "Gay Agenda":* Romer*,* Lawrence*, and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1, 10-16 (2013).

[42] To be clear, seeing connections between LGBT and non-LGBT people does not necessarily mean one advocating for LGBT rights must employ a "we are just like straight" people argument. *See, e.g.*, Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1368-75 (2005) (examining the "like-straight reasoning" employed in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)). The point is simply to emphasize the importance of seeing LGBT people *as people* who should be entitled to the same rights and protections as other people even if they are not "just like" straight people.

B. Benefits of Inclusion

1. Moving the Ball Forward Faster

An inclusive, rather than an exclusive, approach also holds the potential to move the law forward more quickly on controversial issues. A good example of this potential was demonstrated by one of the ALI's own projects—the Model Penal Code (MPC). In May of 1955, the ALI approved a tentative draft of the MPC that decriminalized all consensual sodomy, regardless of the actor's sex or sexual orientation.[43]

To be clear, despite their proposal to decriminalize same-sex private sodomy, the ALI drafters certainly did not intend to further a "homosexual agenda." Indeed, even though the MPC decriminalized *private* consensual same-sex sexual intimacy, the drafters nonetheless held the view that such conduct was deviant and something from which the public should be protected when not hidden from sight.[44] Accordingly, the MPC continued to criminalize "loiter[ing] in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations."[45] And the accompanying comments made clear that the purpose of this provision was to prevent the "congregation of homosexuals offensively flaunting their deviance from general norms of behavior."[46]

Thus, in urging the decriminalization of sodomy, the MPC drafters were not seeking to promote LGBT rights. Instead, it was the byproduct of the approach they utilized.

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[43] William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 662 (1999) ("[T]he influential American Law Institute (ALI) narrowly voted in May 1955 to decriminalize consensual sodomy in a tentative draft of its proposed Model Penal Code."); *see also* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, 124 (2008) [hereinafter ESKRIDGE, DISHONORABLE PASSIONS] ("As earlier versions had done, the final MPC made [sodomy] a crime only if it was forcible (or its equivalent) or with a minor.").

[44] *See, e.g.*, Louis B. Schwartz, *Morals Offenses and the* Model Penal Code, 63 COLUM. L. REV. 669, 675-76 (1963) (noting that the MPC drew a line between private and public displays of "deviate sexuality").

[45] MODEL PENAL CODE § 251.3 (1985).

[46] Schwartz, *supra* note 44, at 675, 683 (citing MODEL PENAL CODE § 251.3, status note at 237). The status note provides:

> [T]he main objective is to suppress the open flouting of prevailing moral standards as a sort of nuisance in public thoroughfares and parks. In the case of females, suppression of professionals is likely to accomplish that objective. In the case of males, there is a greater likelihood that non-professional homosexuals will congregate and behave in a manner grossly offensive to other users of public facilities.

Id.

Rather than considering homosexual sodomy in isolation, the drafters assessed the sodomy provisions in the context of broad review of all sex crimes. The need to revise these provisions was prompted in part by the Kinsey studies of the 1950s.[47] These studies showed that large numbers of adults—including large numbers of heterosexual adults—engaged in so-called "deviate" sexual activity.[48] To the drafters, "the criminalization of conduct that most people thought was acceptable [such as fornication] threatened the very legitimacy of the law."[49] Ultimately, the drafters concluded that only conduct that harmed third parties should be regulated by the criminal law.[50]

The proposal to decriminalize all private sodomy—including same-sex sodomy—may seem unsurprising today, but it was quite remarkable given the historical context in which the drafters were working. At the time of drafting "[i]n the 1950s, gay [male] sex was illegal everywhere."[51] It was a time when "'enlightened opinion' held that homosexuality was a mental illness."[52] Further, the government was engaged in a "massive anti-homosexual campaign."[53] This campaign ranged from President Eisenhower's 1953 executive order requiring the discharge of all gay and lesbian employees from any form of

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[47] *See, e.g.*, ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 43, at 121 (noting that the MPC drafting committee "gathered reams of materials, including the Kinsey reports"); *id.* at 122 (noting that the comments to § 207.5 include data from the Kinsey reports).

[48] *See, e.g.*, Anders Walker, *American Oresteia: Herbert Wechsler, the* Model Penal Code*, and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1032 (2009) ("Citing two reports by University of Indiana Professor Alfred Kinsey, Wechsler[,] [the Chief Reporter of the MPC,] noted that 'a large proportion of the population is guilty at one time or another' of adultery, while pre-marital intercourse was 'very common and widely tolerated.'" (footnote omitted)).

[49] *Id.*

[50] *See, e.g.*, MODEL PENAL CODE § 207.1 cmt. at 207 (Tentative Draft No. 4, 1955) ("The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences."); *id.* cmt. at 277-78 ("No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities. . . . [T]here is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others.").

[51] Arthur S. Leonard, *Thoughts on* Lawrence v. Texas, 11 WIDENER L. REV. 171, 172 (2005) ("In the 1950s, gay sex was illegal everywhere in the United States, as it had been since the dawn of our nation.").

[52] *Id.*

[53] Brief of Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003), (No. 02-102), 2003 WL 152350, at *16 [hereinafter Historians' Brief in *Lawrence*].

federal employment,[54] to the FBI's so-called Sex Deviant Program, which sought to root out homosexuals by spying on individuals alleged to be gay or lesbian and to spread rumors of purported homosexuality.[55]

As William Eskridge explains, "[d]ecriminalization [of sodomy] would have been impossible [during this time] if legislators had thought that they were advancing civil rights for homosexuals."[56] The decriminalization of gay sodomy was achieved only by couching these changes within a broad scale criminal law reform effort that impacted the lives of a wide spectrum of the American public, including but not limited to LGBT people.

The promulgation of the MPC certainly did not result in the speedy or full-scale repeal of all sodomy statutes. Repeals were fairly slow to come. But, come they did. By 1979, 17 years after the MPC was completed (in 1962), "[24] states . . . had decriminalized consensual sodomy."[57] States that maintained anti-sodomy statutes rarely enforced them. When states did charge someone with sodomy, the charge was usually a tag-along charge along with rape. The sodomy charge assured a criminal conviction even in cases where all of the elements of rape could not be established.[58]

Of course, it is not always the case that inclusive approaches are the most expedient paths to large-scale change. Arguably, the adoption of same-sex domestic partnership legislation is an example to the contrary. That is, one could argue that states were more willing to adopt these alternative legal relationship statuses *because* they would extend rights only to a limited subset of unmarried couples: same-sex couples. If, by contrast, these alternative statuses were viewed as a broad-scale attempt to make marriage matter less, states might have

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[54] *Id.*

[55] "J. Edgar Hoover's FBI . . . also played a key role—through a 'Sex Deviates' program that Hoover initiated in 1951—in spying on alleged homosexuals, disseminating rumors of homosexuality, and purging homosexuals from government service." David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 906 (2008). Local police departments likewise "stepped up their raids on bars and private parties." Historians' Brief in *Lawrence*, *supra* note 53, at *19.

[56] ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 43, at 138.

[57] *Id.* at 201 (also noting that "two states recriminalized it after a short period").

[58] Mitchell Lloyd Pearl, Note, *Chipping Away at* Bowers v. Hardwick*: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154, 156-57 (1988) ("Though sodomy statutes are rarely used—at present—against consenting heterosexual adults, they are often used against persons charged with sexual assault or abuse when there is doubt on the issue of consent." (footnote omitted)).

been less likely to adopt them. For example, as Douglas NeJaime explains, California's groundbreaking domestic partnership law was largely limited to same-sex couples[59] as then-Governor Gray Davis had "expressed his resistance to a bill that included different-sex couples because such inclusion threatened to minimize the importance of marriage by providing a nonmarital choice to those who could otherwise marry."[60]

While there are some examples to the contrary, advances regarding LGBT rights often have occurred when courts, policy makers, and the public recognized the connections between the rights and general humanity of LGBT and non-LGBT people.[61]

2. Encouraging Holistic Reflection and Engagement

Addressing LGBT issues in an inclusive way better enables one to appreciate the underlying cause of unfair or anachronistic rules and principles. By contrast, addressing LGBT issues through a separate publication might prompt the creation of solutions that resolve only part of a larger problem; it is almost always the case that the rules that apply unfairly to LGBT people harm other people as well. In particular, such rules also tend to have a disproportionately negative effect on other vulnerable groups, including people of color, lower income people, and women. An inclusive approach would encourage comprehensive, rather than partial, reforms.

As discussed in more detail below, the two types of rules deserving reform are those that turn on the existence of a marriage or other legally recognized relationship and those that

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[59] As a compromise position, the California law permitted different-sex couples to register if both members of the different-sex couple were 62 years of age or older. 1999 Cal. Legis. Serv. 93 (West). In 2001, California amended the law to permit different-sex couples to register so long as one member was 62 years of age or older. CAL. FAM. CODE § 297 (West 2004); 2001 Cal. Legis. Serv. 91 (West).

[60] Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Impact on Marriage*, 102 CALIF. L. REV. (forthcoming 2014) (on file with authors) ("While inclusion of same-sex couples did not threaten marriage since those couples could not marry, inclusion of different-sex couples detracted from marriage's channeling function."). For a contrary account of this history, see, e.g., Melissa Murray, *Paradigms Lost: How Domestic Partnership Went From Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 297-99 (2013).

[61] *Cf.* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 263 (2013), http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/windsor%E2%80%99s-right-to-marry/ (noting that the marriage equality movement did not begin to achieve regular success until people saw LGBT relationships as worthy of equal dignity and respect).

relate to discriminatory or biased conduct. Both types of rules have implications beyond LGBT people.

Marriage discrimination is one source of the legal vulnerabilities some LGBT couples and their families face. Although the law is changing, it remains the case that most same-sex couples cannot enter into marriages that are recognized as valid by their home states.[62] As for transgender people, the vast majority of states lack clear guidance for assessing the validity of a marriage involving a transgender person.[63] As a result, rules that turn on the existence of a valid marriage or the existence of some other formal familial relationship have a disproportionately negative impact on LGBT people.[64]

To ensure that rules do not disproportionately and unfairly exclude LGBT people, it is critical to examine instances in which a right or protection—or conversely, a criminal provision—turns on the existence or lack of a marital or family relationship. There are many such provisions in the area of family law, ranging from provisions regarding legal parentage[65] to others governing the distribution of property

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[62] As of January 2014, 17 states and the District of Columbia permit or soon will permit same-sex couples to marry. *See, e.g.*, *Gay Marriage*, PROCON.Org, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 (last updated Jan. 6, 2014); Human Rights Campaign, *Marriage Equality and Other Relationship Recognition Laws* (Jan. 14, 2014), http://www.hrc.org/files/assets/resources/marriage_equality_1-14-2014.pdf. Stated in the converse, same-sex couples in the remaining 33 states may not be able to enter into marriages that are considered valid in their home states. *Gay Marriage*, *supra*; Human Rights Campaign, *supra*; *see also* Human Rights Campaign, *Statewide Marriage Prohibition Laws* (Jan. 14, 2014), http://www.hrc.org/files/assets/resources/marriage_prohibitions_1-14-2014.pdf (providing that 29 states have constitutional amendments restricting marriage to heterosexual couples and that 4 additional states have statutes restricting marriage to heterosexual couples).

[63] Jennifer L. Levi, *Forward, Symposium: Issues in Estate Planning for Same-Sex and Transgender Couples*, 30 W. NEW ENG. L. REV. 671, 673 (2008) ("Just as same-sex couples face legal uncertainty regarding their status, so too do couples where one of the partners is transgendered.").

[64] Same-sex couples from anywhere in the U.S. can marry in any one of the jurisdictions that permit same-sex couples to marry; none of these jurisdictions has a residency requirement. Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1678 (2011). But if the same-sex couple lives in a state that does not permit them to enter into a same-sex marriage, it is very likely that that their home state will not recognize their marriage. *See, e.g.*, Human Rights Campaign, *Statewide Marriage Prohibition Laws*, *supra* note 62 and accompanying text.

[65] *See, e.g.*, Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CALIF. L. REV. 1177, 1184 (2010) (noting that "in the vast majority of states, the existing statutory provisions or common law address only the legal parentage of children born to married couples through alternative insemination").

upon dissolution of the relationship.[66] But family law is not the only area of law in which rights or protections turn on marriage. For example, most states' criminal law and the ALI's MPC treat marital rape differently than rape by someone other than a spouse.[67] In the civil domain, the tort of alienation of affections applies only to the alienation of the affections of a spouse.[68]

If one decided to deal with LGBT issues in a separate, LGBT-specific publication, one might devise a set of special rules that seeks to address the legal vulnerabilities faced by LGBT people. This LGBT-specific solution might be to create a separate legal familial status available only to same-sex couples, such as civil unions or domestic partnerships, or to advocate that same-sex couples be permitted to marry. Having purportedly "resolved" the challenges faced by same-sex couples, one might then think "our job is now done; we've solved the problem."

Resolving these specific legal inadequacies by creating a set of rules applicable only to LGBT couples, however, would leave many other families vulnerable. As Nancy Polikoff has explained, "the injustice same-sex couples suffer [as a result of marriage-based rules] is not unique."[69] Lesbian and gay couples are far from the only couples that are unmarried, and, therefore, are left vulnerable by a legal system that uses marriage as a prerequisite to a huge array of rights and protections. Increasing numbers of different-sex couples are cohabiting outside of marriage.[70] But despite this reality,

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[66] *See, e.g.*, Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J. L. & FAM. STUD. 289, 289 (2011) ("The fact of whether a married or unmarried couple is cohabitating may have a significant impact on a number of family law doctrines. Perhaps the best known of these doctrines involves the question of whether a party to non-marital cohabitating relationship is entitled to a share of property accumulated by the other party during the relationship upon its termination." (footnotes omitted)); Courtney G. Joslin, *The Evolution of the American Family*, 36 HUM. RTS. 2, 4 (2009) (noting that, "generally speaking, . . . unmarried cohabitants do not take on or acquire obligations to support each other or to share in their partner's earnings").

[67] Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1465 (2009) (noting that "[a]t least twenty-four states . . . retain some form of a marital rape exception"); Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269, 275 (2007) ("Most rape statutes, including the MPC, stipulated that rape was forced sexual intercourse with a woman not his wife, thus creating a marital rape exemption for husbands.").

[68] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 683 (1976) ("Alienation of Spouse's Affections"); *see also* WEISBERG & APPLETON, *supra* note 12, at 312 (noting that one of the elements of the tort of alienation of affections is "a valid marriage").

[69] NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 123 (2008).

[70] *See infra* notes 74-79 and accompanying text.

marriage remains a prerequisite for access to hundreds of critical rights and protections. Taking into account *all* of these changing demographics and family formation patterns is absolutely critical to engender thoughtful and effective reform.

Historically, most people who could marry[71] married and stayed married until they or their spouses died.[72] In such a world, using marriage as the line for allocating rights and responsibilities made sense.[73] But this pattern of behavior is simply no longer the overwhelming norm. "Between 1950 and 2000, married-couple households declined from more than three-fourths of all households (78 percent) to just over one-half (52 percent)."[74] And today, the number has now dropped below 50%.[75] As the number of married couples has decreased, cohabitation rates have increased dramatically. According to the U.S. Census, there were 523,000 cohabiting couples in 1970.[76] By 2000, this number had increased ten-fold, to almost 5.5 million.[77] And about 50% of people who marry will divorce at least once.[78] In sum, there simply are many more adults who are living in non-marital relationships than there were in the past.[79] Indeed, a 2010 Pew Study found that almost 40% of Americans report that marriage is becoming obsolete.[80]

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[71] Slaves were not permitted to marry. *See, e.g.*, Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J. L. & HUMAN. 251, 252 (1999) ("Antebellum social rules and laws considered enslaved people morally and legally unfit to marry.").

[72] *See, e.g.*, Joslin, *supra* note 66, at 2.

[73] Marriage also "played a crucial role in the creation and replication of the social and cultural roles for men and women." *Id.*

[74] U.S. Census Bureau, *Demographic Trends in the 20th Century*, at 2 (Nov. 2002), http://www.census.gov/prod/2002pubs/censr-4.pdf.

[75] "The 2010 Census reported that, for the first time in history, married couples constituted fewer than one-half of all American households." Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 580 (2013) (citing Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES (May 26, 2011), http:// www.nytimes.com/2011/05/26/us/26marry.html).

[76] *See* Ann Laquer Estin, *Golden Anniversary Reflections: Changes in Marriage After Fifty Years*, 42 FAM. L.Q. 333, 336 n.21 (2008).

[77] *Id.* at 336.

[78] ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 4 (2009).

[79] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *Introduction*, at 31 [hereinafter PRINCIPLES] ("During the final quarter of the 20th century, all western countries experienced extraordinary growth in the rate of nonmarital cohabitation.").

[80] Pew Research Center, *The Decline of Marriage and the Rise of New Families* 21, 64 (Nov. 18, 2010) [hereinafter *The Decline of Marriage*], *available at* http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf ("Most adults ages 65 and older are critical of these unmarried couples, whether they are same-sex or opposite-sex couples. Most young adults, ages 18 to 29, are not.").

Although it was not true historically, today, reliance on formal family status has profound racial and class implications.[81] According to the same 2010 Pew Study:

> 50 years ago there was virtually no difference by socio-economic status in the proclivity to marry: 76% of college graduates and 72% of adults who did not attend college were married in 1960. By 2008, that small gap had widened to a chasm: 64% of college graduates were married, compared with just 48% of those with a high school diploma or less.[82]

The marriage rate gap is even greater for some racial or ethnic groups. "Blacks (32%) are much less likely than whites (56%) to be married, and this gap has increased significantly over time."[83]

Studies suggest that part of the reason for this growing socio-economic and racial divide is the belief of some people that they should delay marriage until they have achieved financial security.[84] Changes in our economy have made this goal of financial security much more difficult to achieve.[85] But whatever the reason, it is clear that cohabitation is on the rise, particularly among people with less education and fewer financial resources.

In other words, not only does the use of marriage-based rules result in the exclusion of many lesbian and gay people, these rules also disproportionately exclude people of color and lower and middle-class people. And, more fundamentally, in many situations, marriage-based rules may no longer do a good job of correctly screening the people who should be entitled to those rights and protections.[86] Thinking about LGBT issues in a vacuum would inhibit law reformers' ability to think more reflectively and broadly about whether and in what

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[81] *See, e.g.*, June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313, 324-25 (2010) ("The cumulative result of these [demographic and economic] changes is that family form has become a marker of class and culture. . . . For the poorest Americans, concentrated in urban centers, marriage has effectively disappeared.").

[82] *The Decline of Marriage*, *supra* note 80, at 23.

[83] *Id.*

[84] J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J. L. & PUB. POL'Y 521, 542 (2011).

[85] *See, e.g.*, Carbone, *supra* note 81, at 321 ("The Journal of Economic Literature, for example, reports that that while wages across the population rose in lockstep through the 1960s, they began to diverge in 1970, with the top ten percent of the population enjoying a substantial increase in earnings that has accelerated since the 1980s, the middle stagnating, and the relative earning power of the bottom ten percent of males declining significantly over the last forty years.").

[86] For a comprehensive and thoughtful consideration of this question, see POLIKOFF, *supra* note 69.

circumstances marriage should continue to be a prerequisite to legal rights and protections. As Rachel Moran explains, "concerns about access to marriage are significant, but the most profound questions of justice could turn on how we rectify the gap between those who choose to express their affection through marriage and those who do not."[87]

Using marriage as a prerequisite for critical legal remedies and protections has a disproportionately negative effect not only on LGBT people, but also on lower income people and people of color. The important rights or provisions that turn on the existence of a valid marriage include, but certainly are not limited to, the right to sue for loss of consortium or for a wrongful death, and whether a forced sexual encounter is considered rape. In light of the importance of these provisions, and the large and growing number of couples who are living together outside of marriage, the ALI should carefully consider whether existing marriage-based requirements do a good job of identifying those people who should be entitled to a given right or remedy.

And looking beyond provisions that turn on the existence of a marital relationship, addressing LGBT issues in a separate, stand-alone publication may reduce the likelihood of broader and deeper reflection about the extent to which existing bodies of law are shaped by and, in some cases, still reflect our discriminatory past. Many other scholars have written about how various bodies of law fail to adequately protect people who are the victims of discriminatory and biased conduct. For example, Martha Chamallas and Jennifer Wriggins argue that "when viewed through a wider cultural lens, the basic structure of contemporary tort law still tends to reflect and reinforce the social marginalization of women and racial minorities and to place a lower value on their lives, activities, and potential."[88] It is only by reforming the doctrine as a whole, and not just as it applies to members of one particular group, that one can truly assess whether such biases exist and, if so, how to appropriately remedy them.

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[87] Rachel F. Moran, *Beyond the* Loving *Analogy: The Independent Logic of Same-Sex Marriage*, *in* *LOVING V. VIRGINIA* IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE 252 (Kevin Noble Maillard & Rose Cuison Villazor eds. 2012).

[88] CHAMALLAS & WRIGGINS, *supra* note 27, at 2.

III. IMPLEMENTING LGBT INCORPORATION

A. The Law As It Is or As It Should Be?

As explained above, we believe that LGBT issues should be incorporated into all existing and future ALI publications, rather than addressed in a separate, stand-alone publication. But how, exactly, should this incorporation be done?

There is the preliminary question of what these ALI publications generally should aim to accomplish. Should the relevant ALI subject-matter publications simply restate the law as it is? That is, should the publication seek to cull the current majority approach to a thorny legal issue? Or should the publications be more aspirational and seek to state the law as it should be, regardless of its current state?[89]

The answer may vary to some degree depending on the subject matter of the publication or the particular provision at issue.[90] There are some areas of law where development and evolution are happening at a fairly rapid pace.[91] Other areas are fairly well settled, at least relatively speaking.[92] How aspirational the publication should be depends on where on this spectrum the particular body of law falls.[93] That said, while there has been ongoing debate about what the Restatements should do,[94] it seems clear to us that the

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[89] For more comprehensive discussions of this debate, see, e.g., V. William Scarpato, Comment, *"Is" v. "Ought," or How I Learned to Stop Worrying and Love the Restatement*, 85 TEMPLE L. REV. 413, 414-15 (2013); Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1667-68 (1995) (reviewing JANE STAPLETON, PRODUCT LIABILITY (1994)).

[90] It will also be affected by the type of publication. Some ALI publications are more overtly aspirational in nature. Such publications include "Principles of." Other publications, such as the Restatements, at least purport to be less aspirational. *See, e.g.*, *Publications Catalog,* A.L.I., *supra* note 1. (comparing Principles to Restatements).

[91] *E.g.*, Intellectual Property.

[92] *E.g.*, Judgments. *The Restatement of Judgments* has not been revised since 1982. *See id.*

[93] *See, e.g.*, James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's* Principles of the Law of Family Dissolution, 2001 B.Y.U. L. REV. 923, 923-24 (2001) (noting that because of the "brisk pace of cultural and technological change" in the area of family law, a "Restatement" is "unthinkable").

[94] G. Edward White, *From the Second Restatements to the Present: The ALI's Recent History and Current Challenges*, 16 GREEN BAG 2d 305, 319 (2013) ("Looking back to the formative years of the Second Restatements, one gets a sense that ALI projects have consistently struggled to define the relationship between black-letter principles and the policy dimensions of legal synthesis, and between the declarative and normative dimensions of lawmaking[.]"); *see also* Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 206 (2007) ("Criticism of the American Law Institute and the Restatement movement is a common

Restatements are intended to and often do accomplish much more than simply restate the existing law.[95]

As an example, even though much of tort law is fairly settled, the treatment of defective products in the *Restatement (Second) of Torts* was highly innovative.[96] Likewise, the treatment of duty in the *Restatement (Third) of Torts* is widely divergent from the approach of the majority of jurisdictions.[97] And there are many other examples of aspirational Restatement provisions that do not simply state the law as it is.

Moreover, we think it would be a missed opportunity if the drafters were limited to the goal of articulating the current state of the law. The drafters of the ALI publications are among

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phenomenon and comes from two sides. The critique from one side is that the Restatements are too activist, stating the law as the Institute believes it should be rather than the law as it is. The critique from the other side is that the Institute is too conservative—frozen in time in the late 1800s or early 1900s—and fails to incorporate the best contemporary practices in the study of law." (footnotes omitted)); *see also* John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 617 (1998) ("A problem, which has confronted the Institute from then until now, was foreshadowed in that original committee report: the problem of the 'is or the ought'; is it the function of a Restatement to report precisely what the law is, as by counting decisions, or should it give some consideration to what the law ought to be?").

[95] *See, e.g.*, White, *supra* note 94, at 307 (quoting former ALI Director Herbert Wechsler as stating that "when the Institute's adoption of the view of a minority of courts has helped to shift the balance of authority, it is quite clear that this has been regarded as a vindication of our judgment and a proper cause for exultation"); *see also* Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 434 (2004) ("Despite the project's name, some evidence suggests that the Restatements were never meant simply to re-state the common law of the United States."); Green & Moréteau, *supra* note 4, at 292 (noting that a plaque hangs in the ALI Conference Room quoting Herbert Wechsler's perspective that, while the majority law position should be given weight it "[sh]ould not be thought to be conclusive").

[96] *See, e.g.*, Charles E. Cantu, *The Recycling, Dismantling, and Destruction of Goods as a Foreseeable Use Under Section 402A of the* Restatement (Second) of Torts, 46 ALA. L. REV. 81, 81 n.1 (1994) (describing the RESTATEMENT (SECOND) OF TORTS rule regarding defective products as "innovative"). Indeed, the RESTATEMENT (SECOND) OF TORTS created the tort of strict products liability in the highly influential Section 402A, at a time when the concept "had almost no support in American jurisprudence." Green & Moréteau, *supra* note 4, at 302; *see also* Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1163 (1992) ("Section 402A [of the *Restatement (Second) of Torts*] did not 'restate' the dominant common law rule in America circa 1964; rather it reflected the judgment of the ALI as to what the law should be.").

[97] *See, e.g.*, W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CALIF. L. REV. 671, 671-72 (2008) ("The Restatement (Third) of Torts ('Third Restatement') confronts the duty question head on, but has received stinging criticism for failing to restate the law.").

For other examples of Restatement provisions that adopt minority positions, see, e.g., Andrew Russell, Comment, *The Tenth Anniversary of the* Restatement (Third) of Property, Servitudes*: A Progress Report*, 42 U. TOL. L. REV. 753, 761 (2011) (discussing how the Restatement of Servitudes, at least "[o]n its face significantly departs from the familiar elements of traditional servitude law (which it acknowledges courts still routinely use)").

the leading legal thinkers in their respective areas of law. Where they are of the opinion that change is important and necessary, they should have the ability to advocate for that change.[98]

In terms of assessing when the drafters should state the law as it should be rather than as it is, one of the co-reporters of the *Restatement (Third) of Torts (Liability for Physical and Emotional Harm)* and his co-author put it quite nicely: Deviation from the majority rule in a Restatement is the right thing to do "[w]hen there are sufficiently powerful reasons to reject a majority rule or to anticipate an incipient reform that has not yet fully taken hold."[99] For the reasons discussed below, we believe that a more forward-looking approach is appropriate with respect to many of the provisions affecting the rights of LGBT people.

The demographics of and the law governing families and family relationships are changing at a rapid pace. As a result, not only is it difficult to "restate" the law as it is (because there is so much variation), but any such restatement would be quickly out of date. The ALI appears to have reached the same conclusion. Thus, the ALI's recent publication on families—the *Principles of the Law of Family Dissolution*—forthrightly seeks to state not what the law is but what the law should be in order to serve today's families.[100] With regard to areas of law that are either widely criticized or are not keeping up with changes on the ground,[101] this type of overtly reformist approach is not only appropriate but also necessary. Other areas of law may not require such wide-scale reevaluation and assessment, but even

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[98] *Cf.* Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 161 (2007) ("This might be a good time for the Institute to consider other areas of law where our work would seek to contribute to enlightenment and debate rather than to articulating definitive legal principles.").

[99] Green & Moréteau, *supra* note 4, at 294.

[100] While there certainly has been a fair amount of criticism of particular conclusions reached by the drafters, see, e.g., RECONCEIVING THE FAMILY, *supra* note 4 (consisting of 25 articles critiquing various parts of the Principles), the Principles have provoked thoughtful and critically needed reflection on the current state of family law and the ways in which family law should evolve.

[101] Both comments could be lodged against family law. To use just one example, scholars widely criticize the "best interest of the child" standard that is used by all fifty states with regard to child custody determinations. *See, e.g.*, Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1559 (1998) ("Few legal standards have encountered as much criticism in as short a time as has the best interest of the child standard.").

in these other areas, there may be individual rules that are in need of updating.[102]

When one contemplates the inclusion of LGBT issues into ALI publications, it becomes even clearer that the relevant provisions may need to have a more aspirational goal. The process of drafting and adopting Restatements is "excruciatingly slow."[103] Moreover, the revision process is only periodic; once the slow process of drafting a Restatement is complete, the process generally is not restarted for quite some time. For example, three decades passed between the completion of the second and the third *Restatement of Torts*.[104]

By contrast, the law on LGBT issues is evolving at a rapid pace.[105] If ALI publications simply stated what the law is, they would cement in place (in some areas of law, for an entire generation or more) law that has already or quickly will become outdated. The *Restatement of Torts* nicely illustrates this point. One of the very few places that the *Restatement (Third) of Torts* expressly mentions LGBT issues is with regard to recovery for bystander emotional distress.[106] Section 48 of the *Restatement* provides that one can only recover for bystander emotional distress if, among other things, one is a "close family member."[107] Of course, in most jurisdictions in the United States, same-sex and other unmarried partners—even long-term, committed partners—are considered legal strangers, not "family members,"[108] and therefore are unable to recover for this tort.

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[102] For example, as discussed above, while Torts is largely fairly settled, some rules have had to adapt over time to reflect new developments and understandings of the law. *See supra* notes 96-97 and accompanying text.

[103] Charles W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 BUS. LAW. 1343, 1347 (1986) (noting that "the study, promulgation, and enactment of uniform state laws and amendments is an excruciatingly slow and cumbersome process").

[104] Volumes 1 and 2 of the RESTATEMENT (SECOND) OF TORTS were published in 1965. *Publications Catalog,* A.L.I., *supra* note 1. The third edition of *A Concise Restatement of Torts* was published almost fifty years later, in 2013. *Id.*

[105] *See, e.g.*, Nancy J. Knauer, *"Gen Silent": Advocating for LGBT Elders*, 19 ELDER L.J. 289, 324 (2012) ("The legal landscape of marriage equality is evolving so rapidly that any attempt to describe the patchwork of relationship recognition laws that exist across the United States is quickly outdated."); Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. DAVIS L. REV. 373, 375 (2011) ("Only four years earlier, the Supreme Court had upheld the validity of sodomy laws that subjected LGBT people to criminal prosecution and imprisonment. Since then, the case law on LGBT rights has evolved rapidly." (footnotes omitted)).

[106] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 48 (2012).

[107] *Id.*

[108] Meredith E. Green, Comment, *Who Knows Where the Love Grows?: Unmarried Cohabitants and Bystander Recovery for Negligent Infliction of Emotional Distress*, 44 WAKE FOREST L. REV. 1093, 1098 (2009) ("Among the class of plaintiffs

While the Reporters' Note acknowledges the likelihood of this outcome, and while the *Restatement*'s accompanying comments suggest that courts "take into account changing practices and social norms and employ a functional approach" when defining what "constitutes a family,"[109] the text of the *Restatement* itself does not mandate such an approach.[110]

One of us[111] contacted Michael Green, Reporter for the *Restatement (Third) of Torts*, to discuss section 48 and its application to, and likely exclusion of, same-sex partners. Green was asked whether he felt he had the authority to draft a more inclusive Restatement provision, rather than just urge such a standard in the comments.[112] While Green opined that as a Reporter he did have this authority, he acknowledged that they did not exercise this authority with regard to same-sex partners. Green noted, however, that much had changed in the last few years and that it is quite possible that if the section were drafted in 2013 rather than in 2007, it would have indeed advocated that same-sex couples in certain committed relationships be considered "close family members" entitled to sue.[113] To the extent that ALI publications intend and purport only to restate what the law is, it is surely hard for the Restatements to have the agility to remain current, especially in areas of law that evolve at a rapid pace, like those affecting LGBT people.

B. Incorporation Where?

In undertaking the task of reviewing and potentially revising provisions that affect LGBT people, an important question arises: How should one go about identifying which of the thousands of provisions in the hundreds of ALI publications merit reconsideration and revision? One group of provisions that may be in need of revision are those provisions that turn on the existence of a family or marital relationship. By this, we do not only mean provisions in publications that focus on families and their rights, like the *Principles of the Law of*

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whom this [close family member] limitation has excluded, unmarried cohabitants have been especially affected[.]" (footnotes omitted)).

[109] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 48 cmt. f (2012).

[110] *See infra* Part III.D.1.

[111] Professor Lawrence Levine.

[112] Interview with Michael Green, Reporter for the RESTATEMENT (THIRD) OF TORTS (Jan. 16. 2013) (notes on file with authors).

[113] *Id.*

Family Dissolution or the *Restatement (Third) of the Law, Trusts*. Instead, we mean *any* provision that uses a marital or family relationship as a prerequisite. This would include provisions criminalizing certain consensual sexual conduct[114] or rape.[115] It would also include spousal evidentiary privileges and relational torts that are available only to close family members. When the Restatements use the terms marriage or family, they refer to that status as a matter of the relevant state law.[116] Thus, if the couple lives in a state that does not recognize marriages between same-sex couples,[117] parties to that relationship will be excluded from those areas of tort, property, and criminal law that use marriage as a prerequisite.

Relationship-based rights, however, are not the only areas where LGBT issues should be taken into account. Examples of other types of provisions that may also require additional reflection regarding their impact on LGBT people include provisions pertaining to discrimination. These provisions appear in a range of ALI publications, from the *Restatement (Second) of Property: Landlord and Tenant*,[118] to the *Restatement (Third) of Employment Law*.[119] Provisions that relate to a person's

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[114] Historically, states criminalized sexual activity outside of the bounds of marriage. William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1888 (2012); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1268-69 (2009) ("Until the late twentieth century, the criminal law in most jurisdictions prohibited fornication—sex outside of marriage—thereby highlighting marriage's role as the licensed locus for sexual activity." (footnotes omitted)); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 814-15 (2010) ("Criminal law traditionally prohibited and punished a wide range of sexual activity, including sex between unmarried people, [and] sex between a married person and someone other than his or her spouse[.]").

[115] Historically, marital rape was not criminalized. Joslin, *supra* note 66, at 2 (noting that "[a]t common law, the concept of marital rape was a legal impossibility"). Even today, most states treat marital rape differently than rape by a nonspouse. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) ("A majority of states still retain some form of the common law regime: They criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions." (footnotes omitted)).

[116] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM, § 48, cmt. f (2012) ("[T]his Section does require that the person seeking recovery be a close family member, howsoever defined by the jurisdiction[.]").

[117] And, as of January 2014, the vast majority of states still refuse to recognize marriages between two people of the same sex. Human Rights Campaign, *Statewide Marriage Prohibition Laws* (June 4, 2013), http://www.hrc.org/files/assets/resources/marriage_prohibitions_072013.pdf.

[118] RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 3.1 (1976) (regarding "[r]estrictions on [f]reedom to [r]efuse to [l]ease," including conduct prohibited by state and federal nondiscrimination statutes).

[119] RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.03 (Tentative Draft No. 2, 2009) ("Wrongful Discipline in Violation of Public Policy").

membership in a certain identity-based group—such as those that may apply in the defamation context—may also be in need of reconsideration.[120] The concern raised by these two types of provisions[121] is whether LGBT identity is being treated similarly to other types of identity-based characteristics. So, for example, with regard to defamation, the question would be whether being falsely accused of being gay is treated in the same way as being falsely accused of being African American or Latino.[122]

C. Existing Examples of LGBT Incorporation

An example of an existing ALI publication that comprehensively includes and takes account of LGBT people is the *Principles of the Law of Family Dissolution*.[123] The *Principles* do not single out LGBT issues or address them in separate provisions or sections. Instead, the *Principles* forthrightly apply equally to all families, without regard to the gender or sexual orientation of the parents.[124] The *Principles* demonstrate an understanding and appreciation of how a growing number of unmarried couples should be treated under the law. The *Principles* largely take the position that there should be less, rather than more, difference in the legal treatment of married and unmarried couples.[125]

Thus, although there are provisions in the *Principles* that apply to married couples,[126] the same property division

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[120] *See, e.g.*, Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1711 (2010) (discussing the application of a number of privacy torts to LGBT plaintiffs).

[121] That is, those related to discrimination and those related to identity-based characteristics.

[122] *See infra* Part III.D.2.B.

[123] *See, e.g.*, June Carbone, *Back to the Future: The Perils and Promise of a Backward-Looking Jurisprudence*, *in* RECONCEIVING THE FAMILY, *supra* note 4, at 209 ("The Principles strive to treat all families and intimate relationships on equal terms and insist on few, if any, preconditions for the recognition of family relationships.").

[124] For example, illustration 9 to § 2.03 of the Principles involves a same-sex couple.

[125] *See* PRINCIPLES, *supra* note 79, at 34 ("Other countries primarily ask the question: Does this nonmarital family look like a marital family? If so, they apply some or all of their family law to the dissolution of the nonmarital family. . . . Chapter 6 adopts this approach."). For critiques of this approach, see, e.g., Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts and Law Reform*, *in* RECONCEIVING THE FAMILY, *supra* note 4, at 332; Margaret F. Brinig, *Domestic Partnership and Default Rules*, *in* RECONCEIVING THE FAMILY, *supra* note 4, at 269; Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, *in* RECONCEIVING THE FAMILY, *supra* note 4, at 305.

[126] *See, e.g.*, PRINCIPLES, *supra* note 79, § 4.11 (Division of Property Upon Dissolution).

rules apply to "domestic partners."[127] Moreover, all of the rules apply equally without regard to the sex or sexual orientation of the parties.[128] For example, the rules in Chapter 6 regarding property division between unmarried cohabitants apply to *all* unmarried cohabitants—same-sex or different-sex—who fulfill the relevant criteria.[129]

And, again, as stated above, the overarching theme of the *Principles* is to elevate function over form when considering whether the relationship of the parties is such that they should be treated as a unit rather than as individuals. This premise applies to both the economic provisions and to the provisions regarding children. Thus, under both the custody and child support provisions, there are a variety of circumstances where a non-marital partner would have parental rights and/or obligations even when he or she lacks a legal parent-child relationship.[130] And these rules apply equally to same-sex couples. Same-sex couples are included in the *Principles* without regard to their sexual orientation. If same-sex couples are married, they are treated as a married couple. If same-sex couples are unmarried, they are treated as "domestic partners" provided they fulfill the relevant criteria.[131] This result is not an accident. The drafters explicitly chose to include same-sex couples and to treat them equally.[132]

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[127] *See, e.g.*, *id.* § 6.05 ("Domestic-partnership property should be divided according to the principles set forth for the division of marital property[.]").

[128] *See, e.g.*, *id.* at 34-35 ("Chapter 6 generally defines domestic partners as 'two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.'").

[129] *See, e.g.*, *id.* § 6.03 (defining "domestic partners" to mean "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple").

[130] *See, e.g.*, *id.* § 2.03(1)(b)(iii) (providing that a person is a parent by estoppel if he or she has "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent . . . to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests"); *id.* § 3.03(1) (providing that a court may impose child support on a person who is not a legal parent when the person's "prior course of affirmative conduct equitably estops that person from denying a parental support obligation to the child"). For an insightful discussion of the tension or lack of consistency between the child custody and child support standards, see Katharine K. Baker, *Asymmetric Parenthood*, *in* RECONCEIVING THE FAMILY, *supra* note 4, at 121.

[131] *See, e.g.*, PRINCIPLES, *supra* note 79, § 6.03(1) ("For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.").

[132] *See, e.g.*, *id.* (defining domestic partner to include couples of the "same or opposite sex").

Again, while one may disagree with particular rules adopted by the drafters, the drafters' approach in thinking both holistically and inclusively about the subject matter is commendable, and it is the type of approach we hope will serve as a model for future ALI projects.

D. Examples of Needed LGBT Incorporation

As described above, there are examples of ALI publications that, at least in some respects, have succeeded in incorporating LGBT concerns. There are, however, other ALI publications or parts of ALI publications that deserve more consideration, reflection, and possibly revision. The *Restatements of Torts* serve as good examples of such publications.[133] The *Restatement (Second) of Torts* took an approach reflective of the time in which it was drafted. At the time of its adoption in 1965, the Second Restatement did not include a single mention of sexual orientation.[134] The *Restatement (Third) of Torts* fares somewhat better, as it includes LGBT issues and cases in some of the Comments and Notes.[135] But there is more work to be done.[136]

There are a number of provisions in the *Restatements of Torts* that have a particular impact on LGBT individuals. While others could be discussed, here we choose to limit ourselves to three such areas: relational harms, intentional infliction of emotional distress, and defamation.[137]

1. Relational Torts

An obvious place for the consideration of LGBT issues is relational torts, such as bystander emotional distress, loss of

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[133] There are many other publications that fall into this category. We discuss the RESTATEMENT OF TORTS here because it is within our areas of expertise.

[134] RESTATEMENT (SECOND) OF TORTS (1965). In more recent years, courts have applied some of the Second Restatement provisions in LGBT contexts, as noted in the Appendices to the RESTATEMENT OF TORTS.

[135] *See infra* Parts III.D.1–2.

[136] Other scholars have explained how the RESTATEMENT OF TORTS fails to adequately address concerns of race and gender. *See, e.g.*, *supra* notes 24-28. In addition to our concerns about the application of principles adopted by or advocated for in ALI publications to LGBT people, as we discuss herein, we are also concerned about their application to members of other marginalized groups, including women and people of color.

[137] The public duty doctrine is another such area of tort law. *See, e.g.*, Brandon v. Cnty. of Richardson, 566 N.W.2d 776, 780 (Neb. 1997) (finding an exception to the public duty doctrine when a police officer failed to arrest a transgender rape victim's assailants and those assailants subsequently shot and killed the victim). The tort for invasion of privacy is another. *See, e.g.*, Allen, *supra* note 120, at 1711.

consortium, and wrongful death. As noted earlier, a starting point for creating a more LGBT-inclusive Restatement is to focus on those provisions that rely on a marital or family relationship.[138]

We start by considering bystander recovery for negligently inflicted emotional distress. The *Third Restatement* permits recovery only to a percipient witness who suffers serious emotional distress arising from the infliction of bodily harm to "a close family member."[139] There has been ample litigation about who constitutes a "close family member."[140] Persons in a close and committed relationship short of legal marriage have largely been unsuccessful in their efforts to recover for bystander negligent infliction of emotional distress because most courts have required proof of a legal marriage as a prerequisite to recovery.[141] Because gays and lesbians are prohibited from legal marriage in most jurisdictions,[142] the legal claims for bystander emotional distress are foreclosed for most LGBT people.[143] And,

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[138] *See supra* Part III.B.

[139] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM, § 48 (2012). In so doing, the THIRD RESTATEMENT adopts something akin to the approach taken by the California Supreme Court in Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989). In *Thing*, the court adopted the requirements that the claimant contemporaneously perceive the harm-causing event and have a close family relationship with the victim. *Id.* at 815. Many other jurisdictions have adopted a similar approach. *See, e.g.*, Clohessy v. Bachelor, 675 A.2d 852, 863 (Conn. 1996); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 48 cmt. f (2012).

Although the THIRD RESTATEMENT broadens recovery from that of its predecessor, it continues to treat recovery for emotional harm more restrictively than physical injury or even property damage. This more restrictive treatment of emotional injury grows out of American tort law's concerns about disproportionate liability and feigned claims. *See* JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 160-61 (4th ed. 2010); *see also* DAN B. DOBBS, THE LAW OF TORTS 821-24 (2000). While our focus is on the Restatement's impact on LGBT persons, it should be noted that a restrictive view of emotional distress also negatively impacts other vulnerable and marginalized groups. Women, for example, have been particularly harmed by the continuing undervaluation of emotional injury. *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 816 (1990); *see also* CHAMALLAS & WRIGGINS, *supra* note 27, at 92 (noting that although the "rules governing emotional and relational harms are stated in gender-neutral terms, . . . [they] tend[] to place women at a disadvantage because [these] important and recurring injuries in women's lives are more often classified as lower-ranked").

[140] *See, e.g.*, Trombetta v. Conkling, 626 N.E.2d 653, 655 (N.Y. 1993).

[141] A typical example is Smith v. Toney, 862 N.E.2d 656, 661-62 (Ind. 2007), in which the Indiana Supreme Court refused to allow the victim's fiancée to recover. Similarly, in Coon v. Joseph, 192 Cal. App. 3d 1269, 1272 (1987), the court held that an intimate same-sex relationship did not constitute a "close relationship" for purposes of bystander negligent infliction of emotional distress.

[142] *See supra* note 62 and accompanying text.

[143] To date, only a few courts have permitted non-married cohabitants to recover for bystander negligent infliction of emotional distress. *See, e.g.*, Paehl v. Lincoln Cnty. Care Ctr., Inc., 466 F. Supp. 2d 1249, 1254 (D.N.M. 2004); Graves v. Estabrook, 818 A.2d 1255, 1262 (N.H. 2003) (permitting engaged different-sex cohabitant to recover); Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994).

as noted above, the large and growing number of other non-marital couples are also precluded from protection under this standard.[144] Moreover, and more importantly, as a few courts have noted, requiring a marital relationship does not necessarily do a good job of identifying the people who are most harmed.[145]

The current *Third Restatement* forthrightly acknowledges that there is an ongoing debate about the definition of "family" as it applies to bystander emotional distress recovery.[146] To their credit, the drafters encouraged jurisdictions to "take into account changing practices and social norms and employ a functional approach to determine what constitutes a family."[147] Indeed, in urging a "functional approach" to the definition of "close family member," the drafters hinted at their support for permitting those "living together in a stable, mutually supportive, and emotionally dependent relationship" to be included within the definition of family.[148] As for LGBT couples specifically, Comment f cites two references that favor a broader and LGBT-inclusive vision of family: a 2010 New York Times article[149] and the book *Counted Out: Same-Sex Relations and Americans' Definitions of Family*.[150]

A more overtly inclusive approach, however, is called for; one that is not based on a formal legal status, but instead is based on a variety of functional criteria. The recognition of the debate and the citation to some authority that supports the broadening of recovery to include some same-sex couples[151] is a far cry from outright adoption of that position.[152] In our view, the *Restatement* missed an important opportunity. Because of the influence of the *Restatements of Torts*,[153] the adoption of an

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[144] *See supra* Part II.B.2.

[145] *See supra* note 143 and accompanying text. For a thoughtful and comprehensive analysis of marriage requirements, see POLIKOFF, *supra* note 69, at 2-5, 123.

[146] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 48 cmt. f (2012).

[147] *Id.* ("[T]his Section does require that the person seeking recovery be a close family member, howsoever defined by the jurisdiction[.]").

[148] *Id.* (citing a few of the cases that permit non-married individuals to recover for bystander emotional distress recovery).

[149] Sam Roberts, *Study Finds Wider View of "Family,"* N.Y. TIMES, Sept. 15, 2010, at A.14.

[150] BRIAN POWELL ET AL., COUNTED OUT: SAME-SEX RELATIONS AND AMERICANS' DEFINITIONS OF FAMILY 13-15 (2010).

[151] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 48 cmt. f (2012).

[152] *Cf.* CHAMALLAS & WRIGGINS, *supra* note 27, at 18 ("Even when the Restatement explicitly ventures 'no opinion' on a particular aspect of doctrine . . . it cannot be taken at face value. Instead, such a disclaimer may be implicitly expressing the normative judgment that the matter is not of sufficient importance to justify taking a position.").

[153] *See supra* Part II.

explicit position of inclusion would have gone a long way toward influencing legal developments regarding bystander emotional distress claims by gays and lesbians, as well as other non-marital couples.[154]

We recognize that taking a position advocating an expansion of what constitutes a "close family relationship" engenders debate not only about the propriety of including gay and lesbian couples, but also about how to determine which non-marital couples should be allowed to recover for bystander emotional distress. Because some courts are deeply concerned about expansive liability for bystander emotional distress, they have adopted bright-line, marriage-based limitations on recovery.[155]

The adoption by courts or by the ALI itself of a more inclusive, functional approach would not be unprecedented. Although it is certainly a minority position, some courts have permitted unmarried heterosexual and homosexual couples in committed relationships to recover for bystander emotional distress.[156] Indeed, almost 20 years ago, the New Jersey Supreme Court recognized that the "family relationship" required for bystander emotional distress recovery extends beyond relationships of legal marriage, noting:

> An intimate familial relationship that is stable, enduring, substantial, and mutually supportive is one that is cemented by strong emotional bonds and provides a deep and pervasive emotional security. We are satisfied that persons who enjoy such an intimate familial relationship have a cognizable interest in the continued mutual emotional well-being derived from their relationship.[157]

And the ALI itself has already endorsed a similar, more flexible and functional understanding of family in its *Principles*

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[154] In author Levine's conversation with Reporter Michael Green regarding this section, Green acknowledged that while the reporters should act with restraint and humility, the drafters could have taken the position that same-sex committed couples constitute a "close family member[]" for purposes of bystander negligent infliction of emotional distress. *See supra* notes 111-13 and accompanying text. As Reporter Green noted, none of the ALI members (including author Levine) actually advocated that such a position be taken. Absent such pressure, restraint by the reporters seemed appropriate. Interview with Michael Green, *supra* note 112.

[155] *See, e.g.*, Clohessy v. Bachelor, 675 A.2d 852, 863 (Conn. 1996); Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989).

[156] *See, e.g.*, Paehl v. Lincoln Cnty. Care Ctr., Inc., 466 F. Supp. 2d 1249, 1254 (D.N.M. 2004); Graves v. Estabrook, 818 A.2d 1255, 1262 (N.H. 2003) (permitting engaged different-sex cohabitant to recover); Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994).

[157] *Dunphy*, 642 A.2d at 380. *See generally* Green, *supra* note 108, at 1093 (advocating that the legal status of the parties should be only one of several factors in determining who may recover for bystander emotional distress).

of the Law of Family Dissolution.[158] Specifically, rather than relying solely on formal legal relationships created under state law, the *Principles* also uses multi-factor, functional tests to determine whether the parent-child relationship[159] or the adult-adult relationship[160] is entitled to protection. For example, to decide whether parties are entitled to protections as "domestic partners," courts are instructed to consider a range of functional criteria, including how long they have lived together, whether they have a child in common, oral or written promises they have made to each other, and the extent of intermingling of their finances.[161] The *Restatement (Third) of Torts* could have—and should have—adopted this more flexible and modern position.

The tort of loss of consortium—providing recovery for the loss of comfort, companionship, and access to sexual relations[162]—raises similar issues of exclusion.[163] Here, too, LGBT individuals and other unmarried couples largely have been barred from recovery due to the lack of legal recognition of their relationships.[164] A more inclusive approach, one that is based on the nature rather than the legal form of the relationship, is in order.[165]

Broadening the types of familial relationships entitled to legal recovery may be the most challenging in the context of wrongful death. State statutes dictate which family members

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[158] PRINCIPLES, *supra* note 79, at 33 ("As the incidence of cohabitation has dramatically increased and cohabitation has become socially acceptable at all levels of society, it has become increasingly implausible to attribute special significance to the parties' failure to marry.").

[159] *Id.* § 2.03.

[160] *Id.* § 6.03.

[161] *Id.*

[162] *See* DIAMOND ET AL., *supra* note 139, at 160.

[163] For example, the RESTATEMENT (SECOND) OF TORTS § 693 (1977) limits recovery for loss of consortium to "spouse[s]." Section 693 of the RESTATEMENT (SECOND) OF TORTS provides that "[o]ne who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse." *Id.* § 693(1).

[164] Typical of the approach taken by most courts is that of the Florida Appellate Court in *Bashaway v. Cheney Bros., Inc.*, in which the court refused the plaintiff's loss of consortium claim despite uncontroverted evidence of an exclusive and long-term, committed lesbian relationship with the tortiously injured party. 987 So. 2d 93, 96 (Fla. App. 2008). The court reached this result despite a history of expansion of consortium rights in the state of Florida. *Id.* at 94; *see also, e.g.*, Mueller v. Tepler, 33 A.3d 814, 818 (Conn. App. 2011). Professor Culhane suggests that courts have been particularly resistant to expanding the scope of loss of consortium claims to unmarried persons because sexual intimacy of the relationship is a key component of the damages. John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 950 (2001).

[165] Again, this approach would not be unprecedented. *See, e.g.*, Lozoya v. Sanchez, 66 P.3d 948, 961 (N.M. 2003) (allowing persons with intimate familial relationships with the injured party to recovery for loss of consortium).

may bring a wrongful death claim. As is true with the other relational torts discussed above, those in non-marital relationships who suffer the economic and emotional harm of the death of a partner are unable to recover in most jurisdictions.[166] Thus, it remains the case that in the majority of jurisdictions, LGBT people will not be able to recover under this standard.[167] The Restatement should urge states to adopt a more flexible standard for assessing who is entitled to sue for wrongful death.[168]

As the ALI recognizes in the *Principles*,[169] in at least some contexts, using marriage as a bright-line prerequisite for important rights and protections is no longer consistent with the realities of contemporary family life. It often unfairly denies recognition of, and protection to, functionally equivalent relationships, and it is inconsistent with the trajectory of the law. Accordingly, these relational torts are examples of provisions in which the ALI should urge the deviation from the current majority rule.

2. Other Torts

Although torts involving relational injury are those that most directly cry out for revision, there are other areas of tort law that affect the lives of LGBT individuals in ways worthy of inclusion in any effort to restate the law of torts. These areas tend to be provisions that can, in some cases, turn on a right to recover for discriminatory conduct. Here, we note two of the many areas where the current or future Restatements of the law of torts should consider the impact of the law on LGBT individuals: intentional infliction of emotional distress and defamation. These examples are intended to be illustrative, not exhaustive; the complete list of provisions in need of reconsideration would be more extensive.

In these areas, there are two overriding concerns that reformers should bear in mind. First, there is a concern about whether people who experience harm based on real or perceived

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[166] John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L.J. 171, 174 (2005); *see also, e.g.*, Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476 (N.Y. App. Div. 2005), *rev'g* 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003), *appeal dismissed*, 817 N.Y.S.2d 625 (N.Y. App. Div. 2006) (denying recovery for a civil union spouse); Raum v. Rest. Assocs., Inc., 675 N.Y.S.2d 343, 348 (N.Y. App. Div. 1998) (denying recovery for a nonmarital partner).

[167] *See supra* note 62 and accompanying text.

[168] The California legislature, for example, expanded the coverage of the state's wrongful death statute to include those in registered domestic partnerships. CAL. CIV. PROC. CODE § 377.60 (West 2013).

[169] *See supra* note 158 and accompanying text.

sexual orientation or gender identity receive equal treatment as compared to people who experience harm based on other identity characteristics. Second, there is also a more general concern about whether tort law provides adequate relief for, and recognition of, the harm caused by such conduct.

a. Intentional Infliction of Emotional Distress

The *Restatement (Third) of Torts*' treatment of intentional infliction of emotional distress largely fares well on the first concern regarding similar treatment, but may require more consideration with regard to whether it provides adequate relief.

The *Third Restatement*'s treatment of intentional infliction of emotional distress, at least implicitly, integrates LGBT issues in a manner similar to that which we advocate here. At various places, the drafters include cases that involve LGBT individuals seeking to recover for their emotional injury.[170] Further, the intentional infliction of emotional distress section implicitly suggests that the claims of LGBT plaintiffs should be treated similarly to the claims of women and people of color.[171] The ALI takes a step in the right direction by implicitly suggesting that these forms of biased treatment should be treated similarly. The drafters, however, should go further and include a clearer statement to help ensure that state tort law comports with such an inclusive approach.[172]

Although the provision addresses adequately the equality concern, the high standard adopted by the Restatement may

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[170] The Notes in Section 46 cite *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001), in which the court found that a police officer's brutal questioning of a transgender sexual assault victim was extreme and outrageous as a matter of law. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM, § 46 cmt. d (2012). Further, Comment j includes a reference to a case in which a supervisor's sexual-orientation based verbal attack was deemed extreme and outrageous, although the plaintiff ultimately lost the claim because the court did not find the injury sufficiently severe to justify a claim for IIED. *Id.* § 46 cmt. j.

[171] *Id.*

[172] There is one aspect of the new Section 46 that is of concern, however, for reasons similar to those discussed in Part III.D.1. Like the SECOND RESTATEMENT, the THIRD RESTATEMENT grapples with the issue of third party recovery for intentional infliction of emotional distress. The THIRD RESTATEMENT limits recovery for emotional harm to "bystanders" who are "close family members and who contemporaneously perceive the event." RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. m (2012) (suggesting that the spousal limitation is "justified by the generalization that the harmed person's close family members are more likely to suffer severe emotional harm than are strangers or acquaintances"). By so doing, the same concerns raised with regard to other relational torts are implicated. We advocate a similar inclusive approach here.

wrongly bar some worthy claims for intentional infliction of emotional distress. The *Third Restatement* largely adopts its predecessor's approach. Thus, to be actionable, a plaintiff must prove that the defendant intentionally or recklessly engaged in extreme and outrageous behavior that caused severe emotional distress.[173] The *Third Restatement* defines "extreme and outrageous conduct" as conduct that "goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community."[174] The drafters of this section made clear that this standard (along with the requirement of proof of severe emotional distress) is designed to create a high threshold for recovery.[175] By noting that "ordinary insults and indignities are not enough for liability to be imposed" for intentional infliction of emotional distress,[176] the *Third Restatement* continues to adhere to the traditional approach where even the worst kinds of insults are deemed inadequate for recovery because such bad behavior is just a part of our culture to which people need to adjust.[177]

Indeed, under the *Third Restatement*'s approach, even racist, sexist, and homophobic insults—hate speech designed to harm the recipient's psyche by reinforcing a history of

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[173] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (2012).

[174] *Id.* § 46 cmt. d (2012); *see also, e.g.*, Lewis v. Schmidt Baking Co., Inc., 16 F.3d 614, 615 (4th Cir. 1994).

[175] In fact, the THIRD RESTATEMENT in Section 46 repeatedly advocates that judges play a particularly active gatekeeping function regarding this "extreme and outrageous" standard in order to prevent the tort "from being so broad as to intrude on important countervailing policies," such as the freedom of speech. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (2012); *see also* MacDermid v. Discover Fin. Servs., 488 F.3d 721, 732 (6th Cir. 2007) (""[T]he outrageousness requirement is an 'exacting standard'""); DAN DOBBS ET AL., THE LAW OF TORTS § 48 (2d ed. 2011).

[176] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. d (2012).

[177] *See, e.g.*, Brown v. Zaveri, 164 F. Supp. 2d 1354, 1363 (S.D. Fla. 2001) (denying recovery to African-American plaintiff when a manager of McDonald's refused to serve him and hurled hateful racist epithets at him because the conduct was not extreme and outrageous as a matter of law); *see also* Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided* Snyder, 46 SUFFOLK U. L. REV. 45, 75 (2013) ("Because of the restricted nature of IIED, the burden imposed on expression by subjecting speakers to tort liability for targeted hate speech is minimal.").

The THIRD RESTATEMENT recognizes that even within its narrow view of what constitutes extreme and outrageous conduct, particularly hateful insults may give rise to liability when they were launched by a person in a position of power against someone in a subordinate or dependent position (such as a supervisor against an employee or a police officer against a crime victim). RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. d (2012). The drafters acknowledge that sexual orientation-based insults may give rise to liability in the abuse of authority context just like other forms of particularly hateful speech although, again, the THIRD RESTATEMENT so provides only implicitly by citing to two cases raising this issue. *Id.*; *id.* § 46 cmt. j. Again, ideally, Section 46 of the THIRD RESTATEMENT would have made this clearer.

subjugation and mistreatment[178]—are seen as just a part of our culture that traditionally mistreated and particularly vulnerable persons simply have to accept.[179] This approach ignores the well-documented harmful effects of discriminatory hate speech.[180]

The *Restatement* could have adopted an aspirational standard of what constitutes extreme and outrageous conduct. That is, the drafters could have chosen not to use a test that accepts boorish and mean-spirited behavior as the norm. Powerful arguments have been made that liability under a theory of intentional infliction of emotional distress[181] or a new intentional tort[182] should be imposed on at least some forms of hate speech and other discriminatory conduct. And as we noted above, in some circumstances, it is appropriate for the Restatements to depart from the majority approach and to state the law as it should be rather than as it is.[183] This may be one area of law in which further consideration and reflection is warranted.[184]

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[178] *See*, *e.g.*, Chamallas, *Discrimination and Outrage*, *supra* note 25, at 2127 ("For the most part, courts do not equate discrimination with outrageous conduct . . . . [C]ourts have refused to classify discrimination as per se outrageous and have even hesitated to declare the 'severe' or 'pervasive' harassment required to prove a Title VII claim of hostile environment sufficient to satisfy the threshold tort requirement of 'extreme and outrageous' conduct." (footnotes omitted)); *see also* Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115, 147 (1994) ("[F]ew cases ever seem to meet the threshold of extreme and outrageous conduct necessary for intentional infliction of emotional distress claims. . . . Rarely are these issues addressed so directly in a judicial opinion; . . . gender matters and affects how, when and why the court finds causes of action to exist." (footnotes omitted)).

[179] Logan v. Sears, Roebuck & Co., 466 So. 2d 121, 124 (Ala. 1985) (holding that "[i]n order to create a cause of action, the conduct must be such that would cause mental suffering, shame, or humiliation to a person of ordinary sensibilities, not conduct which would be considered unacceptable merely by homosexuals").

[180] *See*, *e.g.*, Ronald Turner, *Regulating Hate Speech and the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis*, 29 IND. L. REV. 257, 293-98 (1995) (laying out the many harms of hate speech).

[181] *See, e.g.*, Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 159 (1990); *see also* Okainer Christian Dark, *Racial Insults: "Keep Thy Tongue From Evil,"* 24 SUFFOLK U. L. REV. 559, 562 (1990).

[182] *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 181 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* MATSUDA ET AL., WORDS THAT WOUND 17, 34-35 (1993); *cf.* Julie Seaman, *Hate Speech and Identity Politics: A Situationalist Proposal*, 36 FLA. ST. U. L. REV. 99, 103-05 (2008).

[183] *See supra* Part III.A.

[184] Indeed, as Professor Chamallas explains, "the tort of [IIED] has been knee-deep in issues relating to gender, sexuality, and personal morality" since its creation. Chamallas, *Discrimination and Outrage*, *supra* note 25, at 2121.

b. Defamation

Currently, there is no *Restatement of Torts* project that seeks to review the complex law of defamation. But if and when such a project is undertaken, there will be an opportunity to clarify one of the most complex and confused areas of American tort law.[185] This undertaking would also provide an opportunity for the drafters to ensure that anti-LGBT conduct is treated similarly to other forms of discriminatory conduct.[186] Consistent with the way the law has evolved with regard to race and ethnicity, the drafters could clarify that false imputations that a person is LGBT should no longer be considered defamatory.

The *Restatement (Second) of Torts* provides that "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[187] The Second Restatement further provides that the harm to the plaintiff's reputation must be "in the eyes of a substantial and respectable minority,"[188] a position adopted by many courts.[189] Other courts use a similar concept and require that the plaintiff's reputation be harmed in the eyes of a "right-thinking" person.[190] Regardless of which test a jurisdiction applies, a statement that lowers the reputation of

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[185] Defamation law is particularly complex because of the conflict between its original goal of making it easy to recover for reputational harm and the countervailing First Amendment concerns of protecting the freedom of speech and of the press raised by permitting such an easy recovery. Also, there have been several significant opinions by the United States Supreme Court that have altered defamation law mightily since the Restatement last dealt with the issue in 1977. *See* DIAMOND ET AL., *supra* note 139, at 356; RODNEY SMOLLA, LAW OF DEFAMATION § 5.26 (2d ed. 2003).

[186] This issue has engendered substantial scholarly commentary. *See generally* Matthew D. Bunker et al., *Not That There's Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 581, 601 (2011); *see also* Jay Barth, *Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case*, 34 U. ARK. LITTLE ROCK L. REV. 527, 527, 542 (2012); Robert D. Richards, *Gay Labeling and Defamation Law: Have Attitudes Toward Homosexuality Changed Enough to Modify Reputational Torts?*, 18 COMMLAW CONSPECTUS 349, 356, 368-69 (2010); Haven Ward, *"I'm Not Gay, M'Kay?": Should Falsely Calling Someone a Homosexual be Defamatory?*, 44 GA. L. REV. 739, 766 (2010).

[187] RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[188] *Id.* § 559 cmt. e.

[189] *See, e.g.*, West v. Thomson Newspapers, 872 P.2d 999, 1009 (Utah 1994).

[190] *See, e.g.*, Foster v. Churchill, 665 N.E.2d 153, 157 (N.Y. 1996); DIAMOND ET AL., *supra* note 139, at 357-58.

the plaintiff only among some bigoted or otherwise largely anti-social group is not actionable.[191]

The concept of what is defamatory has evolved over time. Based on the "right-thinking" or "respectable minority" approach, what is considered defamatory changes based on such things as "the temper of the times [and] the current of contemporary public opinion."[192] With the passage of time and the development of more tolerant attitudes, communications assumed to be defamatory in the past no longer sustain a claim for defamation. Thus, it is now well-settled that a false statement that a Caucasian person is African-American or of mixed-race cannot be found to be defamatory even though it was in the past.[193]

The ALI should make clear that the result should be the same with regard to false assertions that a person is gay or lesbian. Although to date no court has expressly determined that a false imputation of homosexuality can *never* be defamatory, some recent court decisions have moved in that direction.[194] Further, in light of both cultural and constitutional law developments, it is hard to justify a rule that permits a false imputation of LGBT status to be defamatory.

In the years both before and directly after *Bowers v. Hardwick*,[195] courts often concluded that false imputations of homosexuality were defamatory per se[196] because most states had criminalized private, consensual same-sex sexual conduct.[197] But the legal and cultural landscape has changed significantly over the last decade. *Bowers* was forcefully overruled by *Lawrence v. Texas*.[198] *Lawrence* struck down the "dozen or so . . . sodomy laws that still existed . . . in the country" and recognized the

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[191] *See, e.g.*, DIAMOND ET AL., *supra* note 139, at 358 ("If the group that could interpret the communication in a way that injures the plaintiff's reputation is blatantly anti-social, courts may deny the plaintiff a defamation action.").

[192] Stern v. Cosby, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009) (quoting Mencher v. Chesley, 75 N.E.2d 257 (N.Y. 1947)).

[193] SMOLLA, *supra* note 185, at § 4:6; *see also* Anthony Michael Kreis, Lawrence *Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L. J. ONLINE 125, 134 (2012), http://yalelawjournal.org/2012/11/12/kreis.html; Ward, *supra* note 186, at 749-50.

[194] *See, e.g*, Albright v. Morton, 321 F. Supp. 2d 130, 136 (D. Mass. 2004).

[195] 478 U.S. 186 (1986).

[196] Communications classified as "defamat[ory] per se" are considered so noxious that reputational harm damages are presumed and plaintiffs are relieved of the obligation of proving economic losses flowing from the defamation as a prerequisite to recovering for reputational harm. Barth, *supra* note 186, at 531.

[197] *See, e.g.*, Manale v. City of New Orleans Dep't of Police, 673 F.2d 122, 125 (5th Cir. 1982) (agreeing with trial court's finding that falsely calling someone gay was defamatory per se); *see also* Barth, *supra* note 186, at 532-34 (discussing cases); Ward, *supra* note 186, at 753-55 (same).

[198] 539 U.S. 558 (2003).

dignity and right to equal treatment "of homosexual persons."[199] As of January 2014, 17 states and the District of Columbia permit or soon will permit same-sex couples to marry.[200] Likewise, public attitudes about gays and lesbians have shifted dramatically.[201]

Consistent with these changes, a number of courts have recently rejected defamation claims brought by people who were falsely accused of being LGBT. In 2004, for example, a federal district court reasoned that in light of Massachusetts' broad nondiscrimination protections for LGBT individuals and the state's expansion of marriage rights to include same-sex couples, false imputations of sexual orientation were not defamatory per se.[202] As the court explained: "If we were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate the sentiment and legitimize relegating homosexuals to second-class status."[203] Even more recently, a New York appellate court refused to follow precedent that had established that false imputations of homosexuality were defamatory per se, reasoning that to do so would have wrongly suggested that there was something shameful or disgraceful about being gay, lesbian, or bisexual.[204]

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[199] Levine, *supra* note 41, at 10-11.

[200] *Supra* note 62 and accompanying text.

[201] *See* Jeffery M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP (May 13, 2013), http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx ("Just three years ago, support for gay marriage was 44%. The current 53% level of support is essentially double the 27% in Gallup's initial measurement on gay marriage, in 1996."); Susan Page, *Attitudes Toward Gays Changing Fast, Poll Finds*, USA TODAY, Dec. 5, 2012, at A.1; Pew Research Center, *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable'* (June 6, 2013), http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/ ("For the first time in Pew Research Center polling, just over half (51%) of Americans favor allowing gays and lesbians to marry legally.").

[202] Albright v. Morton, 321 F. Supp. 2d 130, 136 (D. Mass. 2004) ("Looking at any 'considerable and respectable class of the community' in this day and age, I cannot conclude that identifying someone as a homosexual discredits him, that the statement fits within the category of defamation per se.").

[203] *Id.* at 138; *see also* Murphy v. Millennium Radio Grp., No. 08-1742, 2010 WL 1372408, at *7 (D.N.J. 2010), *rev'd on other grounds*, 650 F.3d 295 (3d Cir. 2011) (dismissing a sexual orientation-based defamation action because the court concluded that "it appears unlikely that the New Jersey Supreme Court would legitimize discrimination against [LGBT persons] by concluding that referring to someone as homosexual" was defamatory).

[204] Yonaty v. Mincolla, 945 N.Y.S.2d 774, 777 (N.Y. App. Div. 2012). These courts rejected a per se categorization of sexual-orientation based defamation but did not go as far as to determine that such communications could never be defamatory. Although courts are moving away from the per se classification regarding false imputations of homosexuality, one author contends that a per se classification should remain given the pervasive anti-LGBT bias in parts of society. Richards, *supra* note 186, at 362, 365-68, 374; *see also* Ward, *supra* note 186, at 763 ("[C]ourts finding the

If and when the ALI revisits the tort of defamation, the ALI should explicitly endorse the emerging trend in the case law and make clear that, as is true for false imputations of race, false imputations of homosexuality should not give rise to a cognizable defamation claim. A determination that sexual-orientation defamation cannot be actionable would be a substantial step toward recognizing the dignity of the LGBT community.[205]

CONCLUSION

The ALI makes itself more influential and relevant when it deliberately and comprehensively takes steps to ensure that its publications keep up with changes in the law. This is no less true with regard to LGBT issues. Incorporating LGBT issues into all existing and future ALI publications would be entirely consistent with the purpose of the ALI, as the ALI was founded to modernize our concepts of "the law."[206] Indeed, as stated in its Certificate of Incorporation, part of the ALI's mission is to ensure the law's "better adaptation to social needs."[207]

As we have explained above, the most appropriate way to grapple with LGBT legal issues is through an inclusive rather than an exclusive approach. That is, rather than attempting to address LGBT issues through a separate, stand-alone publication, we urge the ALI to be mindful of how any and all of its provisions apply to LGBT people. Moreover, given the speed of evolution in this area of the law, when undertaking this inclusive revision, these provisions will often call for a more reformist rather than a static approach to drafting.

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false imputation of homosexuality defamatory amounts to a judicial pronouncement that homophobic views are worthy of the law's respect, thereby validating and endorsing homophobia. In so finding the courts effectively legally sanction homophobia." (footnotes omitted)).

Indeed, in light of constitutional developments, it may no longer be permissible for courts to permit these defamation cases in which the legal process is being used to further private biases. Kreis, *supra* note 193, at 138-39 ("[W]henever courts permit sexual-orientation defamation suits, they entangle themselves with anti-LGBT animus in precisely the way that the Supreme Court has tried to prohibit.").

[205] By the time the topic of defamation is revisited by the ALI, it is likely that some courts will have adopted the position we advocate. Moreover, to the extent that some courts are still lagging behind, it is not unprecedented for the ALI to lead the way. The ALI has done this before, and will surely do so again in other contexts when there are "powerful reasons" to do so. Green & Moréteau, *supra* note 4, at 294.

[206] *Id.* at 283-84.

[207] Michael Greenwald, *The American Law Institute Simplification Experience*, 105 DICK. L. REV. 225, 225 (2001).

Further, this inclusive approach would not be a new path for the ALI. Over half a century ago, the ALI took bold steps to advocate for the reform of the law in ways that positively affected LGBT individuals.[208] We think that such an undertaking would prove very worthwhile and important. Keeping up to date with the evolution of the law is critical to the ALI's continued influence and relevance. And, if undertaken, the approach we propose has the potential to positively impact the development of the law. We hope it is one that the ALI embraces.

[208] *See supra* Part II.B.1 (discussing how the MPC's treatment of private, consensual sodomy was in many aspects a major departure from existing law in a way that was protective of LGBT rights).