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Reform Agenda Premised upon the Reciprocal Relationship between Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth

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A Reform Agenda Premised upon the Reciprocal Relationship Between Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth

E. GARY SPITKO

Employment discrimination in role model occupations on the basis of LGBT status has long been used systematically to define negatively the LGBT identity and to reinforce the associations between the non-LGBT majority and certain positive qualities, values, and institutions. This Article argues that a reciprocal relationship exists between such discrimination and the bullying of LGBT youth. This Article then proposes a reform agenda to combat anti-LGBT bias in role model occupations grounded in an understanding of the nature of this reciprocal relationship. Part I demonstrates that anti-LGBT discrimination in role model occupations has been employed systematically to disassociate LGBT people from certain positive qualities and values and to maintain and strengthen the associations between these positive qualities and values and the non-LGBT majority as well as the institutions that the non-LGBT majority holds dear. One effect of such discrimination, as intended, is that known LGBT role models are removed from public visibility. This exclusion makes it more likely that young people will come to devalue LGBT people which, in turn, is likely to increase the prevalence of the bullying of LGBT youth. Part II reviews recent empirical studies that evidence that the bullying of LGBT youth is a widespread problem and that the consequences of this bullying can be profound and tragic. This Part also reviews empirical evidence that bullying in the workplace is a significant problem and that much of this workplace bullying targets LGBT people. This hostile environment, in turn, encourages LGBT workers to conceal their sexual orientation or gender identity. Thus, bullying is not only a consequence of the intentional exclusion of known LGBT people from role model occupations; bullying also furthers this exclusionary project. Finally, Part III considers in greater detail the mutually reinforcing relationship between employment discrimination against known LGBT role models and the bullying of LGBT youth, focusing on their common genesis and effects. This Part then proposes a reform agenda grounded in an understanding of the interconnections between such discrimination and the bullying of LGBT youth.

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A Reform Agenda Premised upon the Reciprocal Relationship Between Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth

E. GARY SPITKO*

I. THE EXCLUSION OF KNOWN LGBT PEOPLE FROM ROLE MODEL OCCUPATIONS AS A MEANS TO INFORM SOCIAL UNDERSTANDINGS

The Green Lantern is a DC Comics superhero who first appeared in July 1940 in issue No. 16 of *All-American Comics*.¹ Actually, over the years, there have been several incarnations of the Green Lantern.² The original Green Lantern was Alan Scott.³ Scott, like other Green Lanterns, possesses a green power ring and a green power lantern that allow him to exercise a certain amount of control over the physical world.⁴ As one might imagine, this power comes in handy when fighting evil.

In June 2012, Alan Scott, aka the Green Lantern, came out as gay.⁵ The revelation appeared in the second issue of *Earth 2* and came from the pen of *Earth 2* series author James Robinson. Robinson told the *New York Post* at the time, ““He’s very much the character he was. He’s still the pinnacle of bravery and idealism. He’s also gay.””⁶ Robinson envisions the Green Lantern as the most powerful member of DC Comics’ “Justice Society” and as a positive role model for children.⁷ Robinson’s hope is that

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¹ Tim Beedle, *Lighting the Way: Green Lantern Alan Scott*, DC COMICS (Aug. 6, 2015), <http://www.dccomics.com/blog/2015/08/06/lighting-the-way-green-lantern-alan-scott> [<http://perma.cc/K4U4-9MHK>].

² *Id.*

³ Matt Moore, *Green Lantern Relaunched as Brave, Mighty and Gay*, YAHOO! FINANCE (June 1, 2012), <http://finance.yahoo.com/news/green-lantern-relaunched-brave-mighty-gay-070052544.html> [<http://perma.cc/3G2P-MAQ3>].

⁴ Matthew Jenkin, *Green Lantern Gay Rumors Confirmed*, GAYSTARNEWS (June 1, 2012), <http://www.gaystarnews.com/article/green-lantern-gay-rumors-confirmed010612> [<http://perma.cc/P7HL-PCUM>].

⁵ See James Robinson, Nicola Scott & Trevor Scott, *EARTH 2*, Aug. 2012.

⁶ Dareh Gregorian, *DC Comics Green Lantern Relaunched as Gay Superhero*, N.Y. POST (June 1, 2012), <http://nypost.com/2012/06/01/dc-comics-green-lantern-relaunched-as-gay-superhero/> [<http://perma.cc/N6DN-6V22>].

⁷ *Id.*

an openly gay Green Lantern will help children who feel different develop a positive sense of who they are and will influence other children to decide that they ought not to bully those children who appear different.⁸

Not everyone, however, felt that the Green Lantern's coming out was super. OneMillionMoms.com was among those wishing the Green Lantern had stayed in the closet.⁹ OneMillionMoms.com is a project of the American Family Association. Its stated goal is to impact entertainment media so as to lessen what members of the organization perceive to be negative influences that entertainment media have on children.¹⁰

In May 2012, OneMillionMoms.com issued an action alert to its members concerning the dangers it perceived that gay¹¹ comic book superheroes pose to children.¹² DC Comics had announced that one of its prominent characters would come out as gay but had not yet announced that it would be the Green Lantern. Also, several days after the DC Comics announcement, Marvel Entertainment had announced that its gay superhero Northstar would marry his male partner in issue No. 51 of *Astonishing X-Men*.¹³ The June 2012 wedding would be a first for a gay comic book superhero.¹⁴

In its action alert, OneMillionMoms.com pointed out that children look up to comic book superheroes, desire to emulate them, and even dress up in costumes to resemble them.¹⁵ The group lamented that children were being exposed to homosexuality at an early age and argued that exposure to a gay superhero would confuse children too young to even know what homosexual or coming out mean.¹⁶ The action alert went on to warn that gay men "want to indoctrinate impressionable young minds by placing

⁸ *Id.*

⁹ See *DC Comics AND Marvel Superheroes Come Out of the Closet*, ONEMILLIONMOMS [hereinafter OneMillionMoms Gay Superhero Alert] (on file with author) (warning of the dangers that known gay comic book superheroes pose to children and urging members to lobby against openly gay comic book superheroes).

¹⁰ *About Us*, ONEMILLIONMOMS, <http://www.onemillionmoms.com/about-us> [<http://perma.cc/WG8H-79ZK>] (last visited Aug. 6, 2015).

¹¹ Where the empirical data discussed in this Article is not inclusive of transgender persons, the language used in this Article will reflect that lack of inclusion. Nonetheless, much of this evidence would seem relevant to an analysis of how anti-transgender discrimination in role model occupations operates. For example, the language and the arguments that OneMillionMoms.com expressed in its action alert warning of the effects of a known gay superhero role model on children suggest that the organization would have been concerned by a transgender Green Lantern because of the influence that such a transgender role model would have on the social understandings of children. Thus, in general, this Article seeks to be inclusive of transgender persons in its arguments and recommendations.

¹² See OneMillionMoms Gay Superhero Alert, *supra* note 9.

¹³ Matthew Perpetua, *Marvel Comics Hosts First Gay Wedding in 'Astonishing X-Men'*, ROLLING STONE (May 22, 2012), <http://www.rollingstone.com/culture/news/marvel-comics-hosts-first-gay-wedding-in-astonishing-x-men-20120522> [<http://perma.cc/3Q3K-BDXZ>].

¹⁴ *Id.*

¹⁵ OneMillionMoms Gay Superhero Alert, *supra* note 9.

¹⁶ *Id.*

these gay characters on pedestals in a positive light.”¹⁷ (As an aside, *Earth 2* series author James Robinson, whose idea it was to have the Green Lantern openly identify as gay, is married to a woman.¹⁸) The alert further warned that “[t]hese companies are heavily influencing our youth by using children’s superheroes to desensitize and brainwash them in thinking that a gay lifestyle choice is normal and desirable.”¹⁹ OneMillionMoms.com urged its members to contact DC Comics and Marvel Entertainment to ask that they not display sexual orientation to readers and to “urg[e] them to change and cancel all plans of homosexual superhero characters immediately.”²⁰

This effort by OneMillionMoms.com to closet a fictional gay character is a very real attempt to utilize employment discrimination as a means to inform social understandings. This author has written elsewhere and at some length on the systematic use of sexual orientation discrimination in role model occupations²¹ to disassociate gay people from certain positive qualities and values and to maintain and strengthen the associations between these positive qualities and values and the heterosexual majority as well as the institutions that the heterosexual majority holds dear.²² The case of OneMillionMoms.com and the Green Lantern fits this pattern. The goal of OneMillionMoms.com is to influence negatively how society views gay people. The attempted means is removal of a known gay character from a public social space—“superhero”—that is associated with positive qualities and values such as great bravery, exceptional ability, and selfless and noble intentions.

Indeed, because the target in this case is fictional, the motives that generally ground this and more “real world” attempts to remove lesbian, gay, bisexual, and transgender (LGBT) people from role model occupations as a means to influence social understandings are stripped of all camouflage and complexity. Because neither the Green Lantern nor his job are real, there can be no real concern that the Green Lantern is not suited to perform the job in question.²³ Moreover, because the Green

¹⁷ *Id.*

¹⁸ Gregorian, *supra* note 6.

¹⁹ OneMillionMoms Gay Superhero Alert, *supra* note 9.

²⁰ *Id.*

²¹ This Article uses the term “role model occupations” to refer to those occupations that society admires for the behavior, achievements, and qualities that it associates with those occupations.

²² E. Gary Spitko, *Don’t Ask, Don’t Tell: Employment Discrimination as a Means for Social Cleansing*, 16 EMP. RTS. & EMP. POL’Y J. 179 (2012) [hereinafter Spitko, *Don’t Ask, Don’t Tell*]; E. GARY SPITKO, ANTI-GAY BIAS IN ROLE MODEL OCCUPATIONS: EMPLOYMENT DISCRIMINATION AS A MEANS TO INFLUENCE SOCIAL UNDERSTANDINGS (forthcoming 2016) [hereinafter SPITKO, ANTI-GAY BIAS IN ROLE MODEL OCCUPATIONS].

²³ See András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 616 (2011) (presenting the results of a large-scale audit study of employment discrimination against openly gay men, reporting that “[e]mployers who sought

Lantern does not actually exist, there can be no actual concern that he will subordinate the interests of justice to his own interests,²⁴ cruise fellow superheroes in the group shower,²⁵ molest children with whom he comes in

applicants with stereotypically male heterosexual traits were much more likely to discriminate against gay applicants than employers who did not emphasize the importance of such traits,” and concluding that “[t]his finding suggests that employers’ implicit or explicit stereotypes of gay men are inconsistent with the image of an assertive, aggressive, and decisive employee”).

²⁴ The argument that a gay or lesbian lawyer or judge should be perceived or reasonably could be perceived as being unable or unwilling to subordinate a gay personal or political agenda to the interests of his or her client or the interests of justice has been offered to justify employment discrimination against gay and lesbian lawyers and judges. *See, e.g.*, Brief of Appellee at 13, *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995) (No. 93-9345) (involving the Attorney General of Georgia’s defending the withdrawal of a job offer to a lesbian attorney, in part, on the ground that a lesbian attorney might be less willing or less able to advocate against the interests of gay people in certain cases that might come into the Attorney General’s office, such as sodomy cases or those concerning benefits for same-sex couples); Defendant-Intervenors’ Motion to Vacate Judgment at 4, *Perry v. Brown*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011) (No. 09-cv-02292 JW), 2011 WL 1544807 (seeking to vacate the judgment of the district court in a case concerning the right of same-sex couples to marry, arguing that the district court judge was disqualified from sitting in the case given that he was a gay man in a committed long-term relationship with another man, and stating that “[t]he unprecedented, irregular, and/or preemptory nature of [the judge’s] rulings is difficult—very difficult—to take as the product of an objective, impartial judicial mind”); Matthew Cella, *In Other Words: Va.’s Marshall Says Gay Nominee Not MLK*, WASH. TIMES (May 20, 2012), <http://www.washingtontimes.com/news/2012/may/20/in-other-words-vas-marshall-says-gay-nominee-not-m/?page=all> [<http://perma.cc/X9DF-QNLU>] (reporting the comments of a member of the Virginia House of Delegates questioning whether an openly gay judicial nominee would be impartial as a judge: “[I]f you have a barroom fight between a homosexual and heterosexual, I’m concerned about possible bias”); *see also* Timothy Holbrook, *Where Are the Gay Federal Appellate Judges?*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/timothy-holbrook/where-are-the-gay-federal-appellate-judges_b_4118795.html [<http://perma.cc/9DTZ-SYEK>] (hypothesizing that the dearth of openly LGBT federal appellate court judges is due in part to the fact “that politicians do not believe that an LGBT judge could be impartial in a variety of the important cases percolating in the federal courts today, such as cases dealing with same-sex marriage and other protections for the LGBT community”).

²⁵ The concern that gay and lesbian military personnel would take advantage of group showers and close living quarters to prey sexually on heterosexual service personnel was commonly offered to support the exclusion of openly gay and lesbian service personnel from the U.S. military. *See, e.g.*, S. REP. NO. 103-112, at 283 (1993) (quoting testimony of General Colin Powell before the House Budget Committee in 1992: “[I]t is very difficult in a military setting, where you don’t get a choice of association, where you don’t get a choice of where you live, to introduce a group of [gay] individuals . . . and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers”); RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY 744 (1994) (“Supporters of the ban talked darkly [in 1993] of showers and bathrooms where gay men would seduce young recruits.”); U.S. DEP’T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 13 (2010) (“Most concerns we heard about showers and bathrooms were based on stereotype—that gay men and lesbians will behave as predators in these situations”); NAT’L DEF. RESEARCH INST. (RAND), SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY, at 244 (2010) (noting that “concerns about nudity, showers, and roommates were widespread”).

contact,²⁶ or engage in any of the other harmful behaviors or exhibit any of the host of undesirable traits that opponents of LGBT visibility regularly have attributed to LGBT role models generally.

All that remains in the context of a fictional gay superhero are the fears that OneMillionMoms.com blatantly expressed. When a comic book superhero is identified as gay, children will come to know that gay people exist. Moreover, and more importantly, children who look up to and seek to emulate the superhero may, as OneMillionMoms.com lamented, come to accept that it is “normal and desirable” to be gay.²⁷ If a character who exhibits great bravery, exceptional ability, and selfless and noble intentions is gay, then it stands to reason that there is nothing inherently defective in gay people. Thus, to fortify the social understanding that gay is not good, the character who exhibits great bravery, exceptional ability, and selfless and noble intentions must not be identified as gay.

This very concern that a known LGBT person in a role model occupation may cause children, and society more generally, to view LGBT people in a positive light most often motivates the use of sexual orientation discrimination and gender identity discrimination in role model occupations as a means to influence social understandings. The history of discrimination against known gay and lesbian teachers is a prime example.²⁸ Society and courts have long understood primary and secondary school teachers to be role models who instill the basic values of society in impressionable children.²⁹ Given this role model function of teachers, it is

²⁶ The fear that a gay or lesbian teacher is more likely than a heterosexual teacher to sexually molest his or her pupils has persistently been advanced as a justification for discrimination against gay and lesbian teachers. *See, e.g.,* *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 606–07 (7th Cir. 2001) (“[I]t was not that long ago when homosexual teachers were almost universally considered a public menace likely to seduce or recruit their students into homosexuality”); ANITA BRYANT, *THE ANITA BRYANT STORY* 154–55 (1977) (containing Bryant’s assertion that she was motivated to oppose an ordinance that would protect gay people from employment discrimination, in part, because of her concern that “a particularly deviant-minded teacher could sexually molest children”); Robert Scheer, *A Times Interview with . . . Sen. John Briggs on Homosexuality*, L.A. TIMES, Oct. 6, 1978, at B1 (quoting California state senator John Briggs, who was advocating in favor of a ballot initiative that would have banned known gay and lesbian teachers from teaching in California’s public schools, speaking of society’s knowledge “that homosexuals are attracted to children” and of the necessity of removing those with “a proclivity for having sex with young boys” from the position of school teacher where temptations would abound); Advertisement, *There Is No ‘Human Right’ to Corrupt Our Children*, MIAMI HERALD, June 6, 1977, at 7-B (warning of “a hair-raising pattern of recruitment and outright seduction and molestation” of children).

²⁷ OneMillionMoms Gay Superhero Alert, *supra* note 9.

²⁸ *See generally* KAREN L. GRAVES, *AND THEY WERE WONDERFUL TEACHERS: FLORIDA’S PURGE OF GAY AND LESBIAN TEACHERS* (2009).

²⁹ *See, e.g.,* *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952) (“A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live.”); *Bd. of Educ. v. Wood*, 717 S.W.2d 837, 839 (Ky. 1986) (“A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been regarded as a moral

not surprising that gay and lesbian teachers have often been the target of employment discrimination as a means to influence social understandings.³⁰ Specifically, school administrators have long removed known gay and lesbian teachers from the classroom in order to fortify the social norm that homosexuality is immoral.³¹ The concern is that students exposed to an openly gay or lesbian teacher are more likely to come to see homosexuality as morally acceptable.³² Indeed, when a child comes to

example for the students.”); *Younge v. Bd. of Educ.*, 788 N.E.2d 1153, 1161 (Ill. App. Ct. 2003) (“Teachers, as leaders and role models, with their education and background, have the duty to implant basic societal values and qualities of good citizenship in their students.”); *McBroom v. Bd. of Educ.*, Dist. No. 205, 494 N.E.2d 1191, 1196 (Ill. App. Ct. 1986) (“We are cognizant of the special position of leadership occupied by a teacher who serves as a role model and instills the basic values of our society.”).

³⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Many Americans do not want persons who openly engage in homosexual conduct . . . as teachers in their children’s schools . . . They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.”); DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 293–300, 365–88 (1999) (discussing the 1977 campaign to repeal an anti-discrimination ordinance in Dade County, Florida and the campaign’s focus on gay and lesbian teachers and discussing a 1978 California referendum known as the Briggs Initiative that, had it not failed, would have prevented many openly gay people from teaching in California’s public schools and also would have prevented many teachers and school employees from discussing homosexuality in a positive light); *Outcome an Expression of Fears and Emotions*, MIAMI HERALD, June 8, 1977, at 1A (summarizing comments of voters who voted to repeal Dade County, Florida anti-discrimination ordinance including that “[o]pen acknowledgement of homosexuality is not accepted as a normal part of community life, especially among school teachers who might serve as role models for children”).

³¹ See, e.g., *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1174 n. 23 (S.D. Ohio 1998) (reporting the argument of a school board that “a board of education could, consistent with the rational relationship test, conclude that homosexuality is morally objectionable to a substantial number of persons in the community, and might create such tensions and hostilities which would undermine the ability of a homosexual to be an effective teacher”); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1347 (Wash. 1977) (affirming trial court’s rejection of a gay teacher’s challenge to his discharge and commenting that “[i]t is important to remember that Gaylord’s homosexual conduct must be considered in the context of his position of teaching high school students[] [and specifically that] [s]uch students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality”); WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003*, at 306 (2008) (quoting Dallas school superintendent Dr. Nolan Estes as stating in 1977 that “any schoolteacher identified as a homosexual will be asked to resign immediately, regardless of whether the person has engaged in improper conduct [because] . . . [w]e’re not going to have our young people exposed to that”); JoAnne Viviano, *The Bishop’s Stand*, COLUMBUS DISPATCH, May 1, 2013, at A1 (discussing the decision by administrators at a Catholic high school to fire a lesbian teacher because the teacher’s inclusion of her partner’s name in her mother’s obituary made public their relationship).

³² See, e.g., BRYANT, *supra* note 26, at 154 (containing Bryant’s statement that she was motivated in part to lead a campaign to repeal a Dade County, Florida anti-discrimination ordinance by the fear that “public approval of admitted homosexual teachers could encourage more homosexuality by inducing pupils to look upon it as an acceptable life-style”); Arthur Lubow et al., *The Homosexual Teacher*, NEWSWEEK, Dec. 18, 1978, at 91 (discussing the concern that coming to know an openly gay or lesbian teacher as a role model would cause students to regard homosexuality as an acceptable lifestyle); cf. *In re Grossman*, 316 A.2d 39, 44, 49 (N.J. Super. Ct. App. Div. 1974) (upholding the

know that his teacher is gay or lesbian, that child also may come to accept that a gay person can be a moral and non-predatory mentor—an ethical role model from whose example one might learn moral principles that should govern behavior. Thus, to reinforce the social understanding that homosexuality is immoral, a primary or secondary school teacher who is known to be gay or lesbian must not be allowed in the classroom.

In addition to this fear that a known LGBT person in a role model occupation may elevate the status of LGBT people generally, there is the fear that a known LGBT person in a role model occupation may diminish the status of straight people and the institutions they value. This fear that a known LGBT person in a role model occupation might so tarnish straight people or their institutions also frequently motivates the use of sexual orientation discrimination and gender identity discrimination in role model occupations as a means to inform social understandings. For example, under the “Don’t Ask, Don’t Tell” policy, the U.S. military for many years excluded openly gay people from military service as a means to safeguard the masculine identities of both the military and its warriors.³³ Given the popular perceptions that gay men are by turns effeminate and sexually predatory of heterosexual men, the fear arose that the presence of openly gay men in the military would call into question the masculinity of fellow servicemen and the institution of the military as a whole.³⁴ For this reason, openly gay people were excluded from the U.S. military.³⁵

In light of the efforts to remove known LGBT people from a host of role model occupations as a means to influence social understandings,³⁶ an LGBT person who seeks a career in one of the targeted role model occupations may find himself between a rock and a hard place. He must

discharge of an elementary school teacher who had undergone surgery to change her external anatomy from male to female and who sought to present in the classroom as female on the ground that the teacher was “incapacitated to teach children . . . because of the potential her presence in the classroom presented for psychological harm to the students”).

³³ Spitko, *Don’t Ask, Don’t Tell*, *supra* note 22, at 191.

³⁴ *Id.* at 192–205 (discussing empirical support for the proposition that the military’s exclusion of openly gay service members was motivated by a desire to preserve the masculine identity of the military and its warriors).

³⁵ *Id.* at 204–05. For an argument that “the military’s efforts to socially cleanse itself of lesbians can be seen as supporting rather than undermining the conclusion that the effort to purge openly gay service members from the military has been driven in large part by a desire to maintain the masculine identity of the military and its service men,” see *id.* at 205.

³⁶ See generally SPITKO, ANTI-GAY BIAS IN ROLE MODEL OCCUPATIONS, *supra* note 22 (arguing that there has been a systematic effort to closet gay people or to remove known gay people from positions of visibility as a means to define and reinforce the qualities and values that society attaches to both the gay minority and the heterosexual majority; specifically, known gay people have been excluded from role model occupations that society associates with integrity, ethical advocacy, and impartiality (lawyers and judges); masculinity (soldiers); morally correct behavior (teachers); representativeness (politicians); the all-American image (major league athletes); and blessedness (clergy), among others).

closet himself or risk exclusion from his chosen profession. Thus, discrimination in role model occupations on the basis of sexual orientation or gender identity removes known LGBT role models from public visibility in several ways. First, such discrimination removes those known LGBT people who are denied employment or whose employment is terminated as a result of invidious discrimination. Second, such discrimination removes known LGBT role models by encouraging those who seek to avoid invidious discrimination to hide their sexuality or gender identity.³⁷

The exclusion of known LGBT people from role model occupations also removes LGBT role models from public visibility by circumscribing expectations. The immediate consequence of this systematic employment discrimination used as a means to influence social norms is, as intended, that there are fewer visible known LGBT role models. The dearth of LGBT role models may affect how LGBT people come to view themselves and the lives that they might construct.³⁸

Particularly for a young LGBT person, a lack of known LGBT people in role model occupations might suggest limitations that will govern his career path and progress. For example, if one has never seen an openly gay major league athlete (and especially if one understands that in the history of major league sports dating back to the first game of the National League of Professional Baseball Clubs on April 22, 1876, there has been only one openly gay person to play in a major league contest³⁹) then one might come

³⁷ See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 17–18, 79–92 (2006) (explaining how invidious discrimination in general coerces minority groups to assimilate in various ways, and specifically with respect to gay people encourages “conversion,” “passing,” and “covering”); Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 *LOY. L.A. L. REV.* 715, 735–36 (2012) (reviewing empirical evidence that many lesbian, gay, and bisexual people hide their sexual orientation at work because they fear workplace discrimination on the basis of sexual orientation).

³⁸ See JASON CIANCOTTO & SEAN CAHILL, *LGBT YOUTH IN AMERICA’S SCHOOLS* 85–87 (2012); RAFAEL M. DÍAZ & GEORGE AYALA, *SOCIAL DISCRIMINATION AND HEALTH: THE CASE OF LATINO GAY MEN AND HIV RISK* 19, 26 (2001); Corrine Munoz-Plaza et al., *Lesbian, Gay, Bisexual, and Transgender Students: Perceived Social Support in the High School Environment*, 85 *HIGH SCH. J.* 52, 55, 59 (2002); see also GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 282–86 (1994) (discussing how gay men in the late nineteenth century and early twentieth century countered negative images of gay men and constructed their own gay identity by creating gay histories claiming that certain heroic historical figures were gay).

³⁹ See Andrew Keh, *Jason Collins, First Openly Gay N.B.A. Player, Signs With Nets and Appears in Game*, *N.Y. TIMES* (Feb. 23, 2014), http://www.nytimes.com/2014/02/24/sports/basketball/after-signing-with-nets-jason-collins-becomes-first-openly-gay-nba-player.html?_r=0 (noting that, on February 23, 2014, Jason Collins became the first openly gay person to play in a National Basketball Association (NBA) game and also that no openly gay person has ever played in a Major League Baseball (MLB), National Football League (NFL), or National Hockey League (NHL) game or match).

to believe that a career in major league sports is not a possibility for a gay person and certainly not for an openly gay person.⁴⁰ Billy Bean, who chose to remain closeted throughout his career in Major League Baseball and who chose to end that career in part because he thought it inconceivable that he would come out while in the major leagues, has explained, “Because young gay athletes have never seen a role model in male team sports, they assume quite logically that they would be unwelcome in that arena, that the competitive disadvantage would be too great and too

Michael Sam earned national attention in May 2014 when he became the first openly gay person to be drafted by an NFL team. Ken Belson, *In Historic Pick, Rams Take Michael Sam in Final Round of Draft*, N.Y. TIMES (May 10, 2014), <http://www.nytimes.com/2014/05/11/sports/football/michael-sam-picked-by-st-louis-rams-in-nfl-draft.html>. The Saint Louis Rams, who drafted Sam, waived him during the preseason. Lynn Zinser & Ben Shpigel, *Cowboys Release Michael Sam from Practice Squad*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/sports/football/cowboys-release-michael-sam-from-practice-squad.html>. Shortly thereafter, Sam signed with the practice squad of the Dallas Cowboys, but the Cowboys released Sam after seven weeks. *Id.* Sam never played in a regular-season NFL game.

⁴⁰ See JOHN AMAECHI & CHRIS BULL, MAN IN THE MIDDLE 108 (2007) (containing recollection of gay former NBA player of his belief during his college athletic career that “[i]f my secret [that he was gay] got out, my career was dead”); BILLY BEAN & CHRIS BULL, GOING THE OTHER WAY: LESSONS FROM A LIFE IN AND OUT OF MAJOR LEAGUE BASEBALL 143 (2003) (containing recollection of gay former MLB player of his fear that “[o]ne slip of the tongue, one unguarded moment [with respect to his sexual orientation], could cost me my career”); *id.* at 157 (containing remark of Bean that it would have been “career suicide” to tell the San Diego Padres trainer or medical staff that his partner had tested positive for HIV and that Bean was concerned that he too might be HIV positive); GLENN BURKE & ERIK SHERMAN, OUT AT HOME: THE GLENN BURKE STORY 37, 83 (1995) (containing gay former MLB player’s recounting that during his playing days he believed that coming out as gay would be “baseball-suicide”); DAVID KOPAY & PERRY DEANE YOUNG, THE DAVID KOPAY STORY: AN EXTRAORDINARY SELF-REVELATION 129 (1977) (containing gay former NFL player’s discussion of the fear he had while playing in the NFL that he would be “ruined as a professional football player” if it became known that he was gay); ROY SIMMONS & DAMON DIMARCO, OUT OF BOUNDS: COMING OUT OF SEXUAL ABUSE, ADDICTION, AND MY LIFE OF LIES IN THE NFL CLOSET 126 (2006) (containing gay former NFL player’s description of his anger that an NFL player “could get away with pretty much anything, but never—under any circumstances whatsoever—could you announce that you were gay. That was the one unpardonable sin, the big taboo, the league secret”); ESERA TUAOLO & JOHN ROSENGREN, ALONE IN THE TRENCHES: MY LIFE AS A GAY MAN IN THE NFL 2, 197 (2006) (containing gay former NFL player’s recollection of his fear that “[n]o NFL team would give me a chance if my secret [that he was gay] was out”); Chris Bull, *Dave Kopay*, ADVOCATE, Aug. 18, 1998, at 44 (reporting on gay former NFL player recalling himself as an expendable “borderline player” who would have been replaced had he come out as gay during his NFL career); *cf.* DAVE PALLONE & ALAN STEINBERG, BEHIND THE MASK: MY DOUBLE LIFE IN BASEBALL 238 (1990) (containing gay former MLB umpire’s recollection of his fear that his being outed as gay would end his career umpiring in professional baseball); MARK TEWKSBURY, INSIDE OUT: STRAIGHT TALK FROM A GAY JOCK 33, 57 (2006) (containing gay Canadian Olympic gold medalist’s recollection of how, as a closeted amateur swimmer, he feared the consequences of the swimming world’s finding out that he was gay); Frank Bruni, *A New Inning, Late in the Game*, N.Y. TIMES (Sept. 22, 2012), <http://www.nytimes.com/2012/09/23/opinion/sunday/bruni-a-new-inning-late-in-the-game.html> (discussing gay former MLB Pittsburgh Pirates co-owner’s belief that he had to choose between being open about his sexuality and being the managing general partner of a professional sports team).

unpleasant.”⁴¹ Thus, such employment discrimination used as a means to influence social understandings likely has a snowball effect. The lack of known LGBT people in a certain role model occupation might cause a young LGBT person to forgo pursuit of a career in that role model occupation.

The lack of known LGBT people in role model occupations also might cause a young LGBT person to wonder more generally about the qualities and values of LGBT people. A young LGBT person who sees few known LGBT figures of respect—people who have demonstrated qualities and values worthy of respect and emulation—may come to question whether much of the dominant negative portrayal of LGBT people might be true.⁴² In this way, a young LGBT person might come to devalue LGBT people, including himself. Thus, the intentional exclusion of known LGBT people from role model occupations would seem to lead in a straight line to lessened self-esteem among young LGBT people.

The intentional exclusion of known LGBT people from role model occupations also would seem to lead in a straight line to lessened respect for LGBT people among straight people. The exclusion and closeting of LGBT people from role model occupations also means that straight people know fewer openly LGBT figures of respect. It stands to reason that this lack of known LGBT figures of respect will increase the likelihood that a straight person will come to devalue and disrespect LGBT people.⁴³

When a black politician like President Barack Obama, a Latina jurist such as U.S. Supreme Court Justice Sonia Sotomayor, or an Asian-American and evangelical Christian major league athlete like National Basketball Association player Jeremy Lin reaches the top of his or her chosen field in a highly visible way, each serves as a role model not just for black people, Latinos, women, Asian-Americans, or evangelical Christians respectively. Rather, each serves as a figure of respect for all people. Thus, their examples should tend to prompt persons from outside these groups to reconsider prejudices that they might harbor with respect to people who belong to these groups.

So it is also with known LGBT figures of respect. Consider, for example, Minnesota state senator Allen Spear, who in 1976 became the first publicly out gay man to be elected to a public office anywhere in the

⁴¹ BEAN & BULL, *supra* note 40, at 231; *see also id.* at 221 (containing Bean’s statement wondering how his life might have been different if as a young person he had been aware of openly gay and lesbian athletes).

⁴² For a discussion of the gay male identity as effeminate, deceitful, untrustworthy, unable to commit to or enjoy a stable relationship, selfish, self-absorbed, and hyper-sexual, *see* E. Gary Spitko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, 24 ST. LOUIS U. PUB. L. REV. 195, 198–208 (2005).

⁴³ *See* CIANCOTTO & CAHILL, *supra* note 38, at 86–87.

United States.⁴⁴ Nearly a quarter century later, in May 2000, on the occasion of Senator Spear's retirement from the Minnesota Senate (and as president of the senate), one of his colleagues remarked, "[Spear] did a great job in the educating process. Homosexuality was something I'd barely heard of in my little town. It wasn't talked about. Here we had Allen Spear. He was a good person, no different from the rest of us. We all needed that education."⁴⁵ Another colleague—a conservative Republican from the opposite end of the political spectrum as Spear—reiterated this point: "Such a competent senator who's openly gay contributes to the understanding of everybody."⁴⁶

LGBT youth, and straight youth especially, need such education and understanding. More precisely, LGBT youth in particular would benefit tremendously from straight youth gaining this education and understanding. Indeed, there is good reason to believe that the lack of this education and understanding contributes to the bullying of LGBT youth and of young people perceived to be LGBT.

This Article next considers in detail the mutually reinforcing relationship between employment discrimination against known LGBT role models and the bullying of LGBT youth. Part II of this Article discusses the prevalence and consequences of the bullying of LGBT youth. Part III of this Article then proposes a reform agenda grounded in an understanding of the interconnections between anti-LGBT discrimination in employment and the bullying of LGBT youth. Specifically, this Part argues that an optimal reform agenda to combat the exclusion of known LGBT people from role model occupations as a means to influence social understandings should include not only direct efforts to reduce sexual orientation discrimination and gender identity discrimination in employment but also direct efforts to reduce the incidence of bullying of LGBT youth and young people perceived to be LGBT.

⁴⁴ ALLAN H. SPEAR, *CROSSING THE BARRIERS: THE AUTOBIOGRAPHY OF ALLAN H. SPEAR* 211 (2010). Spear was first elected to the Minnesota Senate in 1972 when he was not out as gay publicly. *Id.* at 236. Interestingly, the *Advocate* published a story in August 1972 describing Spear as a gay candidate for the Minnesota Senate. *Id.* at 245. In his autobiography, Spear recalls that, "no one seemed to have noticed it." *Id.* In December 1974, Spear came out as gay publicly in an interview with a reporter for the *Minneapolis Star*. *Id.* at 303; see also Doug Grow, *Legislator Who Educated Minnesota Is Retiring; Praise for Gay Senator Underscores how State's Political Climate Has Changed*, STAR TRIB., May 17, 2000, at 2B; Deborah Howell, *State Sen. Allan Spear Declares He's Homosexual*, MINNEAPOLIS STAR, Dec. 9, 1974, at 1A; Tom Webb, *Spear's Career: From 60's Radical to Noted Gay Rights Advocate to Senate Traditionalist*, ST. PAUL PIONEER PRESS, May 17, 1999, at 4A. He explained in that interview that he was coming out publicly for several reasons, including his desire to be a role model for gay people. Howell, *supra*, at 4A. Spear easily won reelection in 1976 as an openly gay incumbent, winning more than seventy percent of the vote. SPEAR, *supra*, at 333.

⁴⁵ Grow, *supra* note 44 (comment of Senator Doug Johnson (DFL-Tower)).

⁴⁶ *Id.* (comment of Senator Steve Dille (R-Dassel)).

II. THE BULLYING OF LGBT YOUTH: PREVALENCE AND CONSEQUENCES

Bias-based bullying is a widespread and serious problem in U.S. primary and secondary schools.⁴⁷ In recent years, numerous teenage suicides have been linked to bullying, prompting the media and policymakers to pay increased attention to the problem.⁴⁸ Straight youth, as well as LGBT youth, are targeted for bullying. But there is substantial evidence that LGBT youth and young people perceived to be LGBT are bullied more frequently and more severely than are straight youth.⁴⁹

A. *The Prevalence of the Bullying of LGBT Youth*

In June 2012, the Human Rights Campaign published the key findings from the largest survey of LGBT youth ever undertaken in the United

⁴⁷ See, e.g., GAY, LESBIAN & STRAIGHT EDUC. NETWORK & HARRIS INTERACTIVE, PLAYGROUNDS AND PREJUDICE: ELEMENTARY SCHOOL CLIMATE IN THE UNITED STATES: A SURVEY OF STUDENTS AND TEACHERS xiii (2012), <http://www.glsen.org/sites/default/files/Playgrounds%20&%20Prejudice.pdf> [<http://perma.cc/L57V-BXS5>] (“Name-calling and bullying in elementary schools reinforce gender stereotypes and negative attitudes towards people based on their gender expression, sexual orientation, disability, race, religion or family composition.”); JOSEPH G. KOSCIW ET AL., THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 9–52 (2014), <http://www.glsen.org/article/2013-national-school-climate-survey> [<https://perma.cc/4DV3-977E>] (follow “2013 National School Climate Survey (pdf)” hyperlink) (presenting survey data with respect to anti-LGBT bullying at school).

⁴⁸ See CIANCOTTO & CAHILL, *supra* note 38, at 3, 41, 173 (“In September 2010, unprecedented national attention to anti-LGBT bullying in schools occurred after several students, some as young as thirteen years old, completed suicide.”); Carolyn Jones, *Seth’s Law Strikes Back at Bullying in Schools*, S.F. CHRON. (Oct. 18, 2011), <http://www.sfgate.com/bayarea/article/Seth-s-Law-strikes-back-at-bullying-in-schools-2326617.php> [<http://perma.cc/7NQG-2UML>] (describing the suicide of Seth Walsh, a thirteen-year-old boy who hung himself after “relentless harassment from classmates because he was gay,” and the anti-bullying legislation enacted in California named after him); *What Is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> [<http://perma.cc/7KPH-2RBU>] (describing project created in 2010 by columnist and author Dan Savage in response to the suicides of a number of teenagers who took their own lives after being subjected to anti-LGBT bullying in school).

⁴⁹ See, e.g., CIANCOTTO & CAHILL, *supra* note 38, at 4, 36–48 (noting that “[s]tudents who openly identify as LGBT experience more sexual harassment . . . than their heterosexual peers” and providing students’ accounts of their bullying); KOSCIW ET AL., *supra* note 47, at xvi (“Schools nationwide are hostile environments for a distressing number of LGBT students, the overwhelming majority of whom routinely hear anti-LGBT language and experience victimization and discrimination at school.”); Brian Mustanski et al., *Mental Health of Lesbian, Gay, and Bisexual Youths: A Developmental Resiliency Perspective*, 23 J. GAY & LESBIAN SOC. SERVICES 204, 215–16 (2011) (reporting that 94% of a community sample of lesbian, gay, and bisexual youth reported experiencing victimization ranging from verbal insults to physical violence perceived to be a result of their sexual orientation).

States.⁵⁰ The Human Rights Campaign surveyed more than 10,000 youth ages thirteen to seventeen who self-identified as LGBT.⁵¹ Survey respondents were invited to take the survey through a variety of social media as well as direct communications with LGBT youth centers; thus, the survey did not utilize a random sample and the survey results may not be representative of the LGBT youth population as a whole.⁵² Nonetheless, the survey data suggest both that bullying of LGBT youth is a widespread problem and that LGBT youth are far more likely to experience bullying, both inside school and outside of it, than are straight youth.⁵³

In the Human Rights Campaign survey, LGBT survey respondents were more than two times as likely as non-LGBT youth to report that they had been verbally harassed and called names at school: more than half of LGBT respondents (51%) reported that they had been verbally harassed and called names at school, as compared to 25% of non-LGBT students.⁵⁴ Similarly, LGBT respondents were far more likely than non-LGBT students to report that they had been physically assaulted, punched, kicked, or shoved at school: 17% of LGBT respondents reported having been the victim of such physical attacks, as compared to 10% of non-LGBT youth.⁵⁵

Moreover, LGBT respondents were nearly twice as likely to have been verbally harassed and called names outside of school and nearly twice as likely to have been physically assaulted outside of school as were their straight peers: 18% of LGBT youth reported verbal harassment outside of school, as compared to 10% of non-LGBT youth.⁵⁶ Five percent of LGBT youth reported physical assault outside of school, as compared to 3% of non-LGBT youth.⁵⁷

Some of the questions in the Human Rights Campaign survey did not distinguish between incidents that occurred inside of school versus those that occurred outside of school. Fifty-four percent of LGBT youth who responded to the survey reported that they had been verbally harassed and called names involving anti-gay slurs such as “fag.”⁵⁸ Only 13% of non-LGBT students reported being the target of such anti-gay verbal harassment.⁵⁹ Finally, LGBT respondents were nearly twice as likely as

⁵⁰ HUMAN RTS. CAMPAIGN, GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS 1 (2012), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf [<http://perma.cc/N8MS-T75H>].

⁵¹ *Id.*

⁵² *Id.* at 24. The “straight” population for the survey consisted of 510 youth ages 13–17 who were interviewed after having been drawn from the Harris Poll OnlineSM. *Id.*

⁵³ *See id.* at 2, 7, 11, 16–17 (presenting survey data that supports this conclusion).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 11.

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 17.

their non-LGBT peers to report having been excluded by their peers because they are different: 48% of LGBT youth reported having been so excluded as compared to 26% of non-LGBT youth.⁶⁰

B. *The Consequences of the Bullying of LGBT Youth*

The consequences of this bullying can be profound and tragic.⁶¹ It is difficult to study the relationship between sexual orientation and gender identity and completed suicide in youth because death records generally do not note the decedent's sexual orientation or gender identity.⁶² Numerous studies in recent years, however, have found that LGBT youth are at greater risk than their straight peers for suicidal behaviors such as attempting suicide, having thoughts of suicide, and engaging in non-suicidal self-harm behavior.⁶³ There is much anecdotal evidence suggesting that the bullying of LGBT youth contributes to the elevated rates of these behaviors among such youth.⁶⁴

Indeed, recent empirical evidence reinforces this abundant anecdotal

⁶⁰ *Id.* at 16.

⁶¹ See CIANCIOTTO & CAHILL, *supra* note 38, at 49–55 (discussing how the “threat of violence and harassment makes school an unsettling and unsafe place for LGBT students”); KOSCIW ET AL., *supra* note 47, at 41–52 (presenting data demonstrating a relationship between anti-LGBT victimization and discrimination at school and negative educational outcomes).

⁶² Ann P. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations*, 58 J. HOMOSEXUALITY 10, 15 (2011).

⁶³ See Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH & ADOLESCENCE 1001, 1011 (2009) (reporting findings that, as compared to heterosexual, non-transgender youth, LGBT youth scored significantly higher on a scale of depressive symptomology and were more likely to report suicidal ideation and self-harm); Tara L. Deliberto & Matthew K. Nock, *An Exploratory Study of Correlates, Onset, and Offset of Non-Suicidal Self-Injury*, 12 ARCHIVES SUICIDE RES. 219, 228 (2008) (reporting finding that “a non-heterosexual orientation is related to engagement in NSSI,” defined as “direct, deliberate destruction of one’s body tissue without suicidal intent”); Yongwen Jiang et al., *Adolescent Suicide and Health Risk Behaviors: Rhode Island’s 2007 Youth Risk Behavior Survey*, 38 AM. J. PREVENTIVE MED. 551, 554 (2010) (analyzing data from Rhode Island’s 2007 Youth Risk Behavior Survey and reporting that identifying as lesbian, gay, bisexual, or “unsure” was a significant predictor for five suicide/depressed mood behaviors: felt sad/hopeless, considered suicide, planned suicide, attempted suicide, or attempted suicide resulting in treatment by a doctor or nurse); Richard T. Liu & Brian Mustanski, *Suicidal Ideation and Self-Harm in Lesbian, Gay, Bisexual, and Transgender Youth*, 42 AM. J. PREVENTIVE MED. 221, 225 (2012) (citing to several studies indicating “that LGBT youth are at higher risk for suicidal ideation and self-harm”); Mustanski et al., *supra* note 49, at 205 (citing several studies involving youth that suggest a link between LGB identity, same-sex attractions, or same-sex behavior and “aspects of suicidality”); Vincent M.B. Silenzio et al., *Sexual Orientation and Risk Factors for Suicidal Ideation and Suicide Attempts Among Adolescents and Young Adults*, 97 AM. J. PUB. HEALTH 1717, 1718 (2007) (analyzing data from the National Longitudinal Study of Adolescent Health and reporting finding “higher adjusted rates of suicidal ideation and suicide attempts among LGB adolescents and young adults than among non-LGB respondents.”).

⁶⁴ See Jens Erik Gould, *Seth’s Law: Can a Bullied Boy Leave California a Legal Legacy?*, TIME (Aug. 5, 2011), <http://content.time.com/time/nation/article/0,8599,2086521,00.html> [<http://perma.cc/ZG8E-PXSC>] (describing some of the anti-gay bullying endured by a thirteen-year-old boy who hung himself and left a suicide note blaming his school for his suicide).

evidence.⁶⁵ In 2010, Dr. Ann P. Haas, Ph.D., Director of Prevention Projects for the American Foundation for Suicide Prevention, and her colleagues from a variety of centers and universities published their review of research focusing on suicidal behavior in LGBT populations.⁶⁶ Haas and her colleagues noted that “[s]ince the early 1990s, population-based surveys of U.S. adolescents that have included questions about sexual orientation have consistently found rates of reported suicide attempts to be two to seven times higher in high school students who identify as LGB, compared to those who describe themselves as heterosexual.”⁶⁷ The researchers further noted that “[a] nationally representative U.S. survey [published in 2001] and [seven] non-random studies in the United States and abroad [published from 1994 through 2007] have linked suicidal behavior in LGB adolescents to school-based harassment, bullying or violence because of sexual orientation.”⁶⁸ In their public policy recommendations, Haas and her colleagues advocated for anti-bullying and safe school legislation and for the specific inclusion of sexual orientation and gender identity in such protective legislation.⁶⁹

More recently, a March 2012 study by Dr. Richard T. Liu, Ph.D., of the Brown University Alpert Medical School, and Dr. Brian Mustanski, Ph.D., of the Northwestern University Feinberg School of Medicine, titled *Suicidal Ideation and Self-Harm in Lesbian, Gay, Bisexual, and Transgender Youth* concluded that having recently experienced LGBT “victimization” is predictive of an increased incidence of suicidal ideation (thoughts of ending one’s life) and self-cutting among LGBT youth.⁷⁰ Liu and Mustanski followed 246 self-identified LGBT youth aged sixteen to twenty years old over five points in time at regular six-month intervals and examined them for various possible risk factors for suicidal ideation and the most common form of self-harm—intentional self-cutting.⁷¹ Among the factors examined were “[l]esbian, gay, bisexual, and transgender

⁶⁵ See, e.g., Almeida, *supra* note 63, at 1001 (reporting findings that “perceived discrimination accounted for increased depressive symptomology [as compared to heterosexual, non-transgender youth] among LGBT males and females, and accounted for an elevated risk of self-harm and suicidal ideation among LGBT males”); Haas, *supra* note 62, at 22–23 (“A nationally representative U.S. survey and several nonrandom studies in the United States and abroad have linked suicidal behavior in LGB adolescents to school-based harassment, bullying or violence because of sexual orientation.” (citations omitted)); Liu & Mustanski, *supra* note 63, at 225 (“Within-person over time, LGBT victimization was associated with both suicidal ideation and self-harm, as was a history of attempted suicide.”).

⁶⁶ Haas, *supra* note 62, at 10.

⁶⁷ *Id.* at 17. Haas and her colleagues also noted that “[g]ender-specific analyses have found sexual orientation to be a stronger independent predictor of suicide attempts in young males than in young females.” *Id.* (citation omitted).

⁶⁸ *Id.* at 22–23 (citations omitted).

⁶⁹ *Id.* at 41.

⁷⁰ Liu & Mustanski, *supra* note 63, at 225.

⁷¹ *Id.* at 223.

victimization,” which the researchers defined as experiencing property damage or verbal or physical threats or assault during the most recent six-month period because the victim was LGBT or was thought to be LGBT.⁷² The researchers concluded from their study that such “victimization experienced across the assessment waves prospectively predicted self-harm and suicidal ideation.”⁷³ Indeed, such victimization was associated with a 2.5-fold increase in risk of self-harm and was second only to suicide attempt history as a predictor of self-harm.⁷⁴ In light of these findings, Liu and Mustanski urged increased efforts to reduce the stigma associated with being LGBT.⁷⁵

There also is recent empirical evidence suggesting that childhood bullying has negative effects well into adulthood. In February 2013, Dr. William E. Copeland, Ph.D., of the Duke University Medical Center and his colleagues at Duke and at the University of Warwick (England) published the first study to explore prospectively the relationship between childhood bullying and adult psychiatric diagnoses and suicidality.⁷⁶ The study followed over time three cohorts of children, ages nine, eleven, and thirteen at the time of their enrollment in the study, and included annual assessments with each child participant and the child’s primary caregiver until the adolescent participant reached age sixteen, and additional assessments with the participants in their adulthood at ages nineteen, twenty-one, and twenty-four to twenty-six years of age.⁷⁷

Dr. Copeland and his colleagues found that, even after accounting for preexisting childhood psychiatric problems and family hardships, bullying had negative effects into adulthood.⁷⁸ Adults who were bullied as children were 4.3 times more likely to suffer from anxiety disorders as compared to adults who had neither suffered bullying nor engaged in bullying as children.⁷⁹ Adults who were both a child perpetrator and a child victim of bullying were 4.8 times more likely to suffer depression and 14.5 times more likely to suffer panic disorder as compared to adults who had neither suffered bullying nor engaged in bullying as children.⁸⁰ Moreover, female

⁷² *Id.* at 224.

⁷³ *Id.* at 226.

⁷⁴ *Id.*

⁷⁵ *Id.* (“On a broader societal level, the findings relating to LGBT victimization and gender non-conformity suggest that, despite increasing social acceptance of sexual minorities in recent years and the protective effects this has been shown to have against suicidal behavior, additional efforts are required to reduce stigma.” (internal citations omitted)).

⁷⁶ William E. Copeland et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, 70 JAMA PSYCHIATRY 419, 419 (2013).

⁷⁷ *Id.* at 420. The study followed up in young adulthood on 1273 of the 1420 participants assessed in childhood. *Id.* at 422.

⁷⁸ *Id.* at 424.

⁷⁹ *Id.* at 423 tbl.3.

⁸⁰ *Id.*

adults who were both a child perpetrator and a child victim of bullying were 26.7 times more likely to have developed agoraphobia, while male adults who were both a child perpetrator and a child victim of bullying were 18.5 times more likely to experience suicidality as compared to the “neither” group.⁸¹

Dr. Copeland and his colleagues rejected the notion that childhood bullying is just a “harmless rite of passage.”⁸² Rather, they concluded that their study “provides strong evidence that being a victim of [childhood] bullying or being both a victim and a perpetrator is a risk factor for serious emotional problems [in adulthood] for both males and females, independent of preexisting problems.”⁸³

It takes no great leap of imagination to conclude that youth who devalue LGBT people are more likely to bully other youth whom they know to be LGBT or perceive to be LGBT, and that youth who respect LGBT people are less likely to do so. The intentional exclusion of known LGBT people from role model occupations makes it less likely that young people will be exposed to and become aware of known LGBT figures of respect. Youth who lack such LGBT role models would seem less likely to value and respect LGBT people. Thus, the systematic use of sexual orientation discrimination and gender identity discrimination in role model occupations as a means to inform social understandings likely increases both the incidence of the bullying of LGBT youth and young people perceived to be LGBT as well as the profound and tragic consequences that follow from such bullying.

C. *Workplace Bullying and the Cycle of Bullying and Invisibility*

Bullying does not stop upon graduation from high school. There has been increased awareness in recent years that bullying in the workplace is a significant problem.⁸⁴ An August 2010 Zogby International survey conducted for the Workplace Bullying Institute gives some indication of

⁸¹ *Id.* at 423. The study focused on bullying in the school setting rather than bullying in the home or the greater community. *Id.* at 425.

⁸² *Id.* at 425.

⁸³ *Id.* at 424.

⁸⁴ See generally David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 478 (2000) (“In recent years . . . we have begun to gain a more sophisticated understanding of the phenomenon called ‘workplace bullying.’ In particular, scholars, therapists, and industrial psychologists have begun to create a conceptual framework for analyzing workplace bullying.”); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251, 251–52 (2010) (describing increasing public awareness of workplace bullying and growing public support for legislation making workplace bullying illegal).

the extent of the problem.⁸⁵ Zogby asked survey respondents about their experience with bullying at work.⁸⁶ The survey defined bullying as “any or all of the following types of repeated mistreatment: sabotage by others that prevented work from getting done, verbal abuse, threatening conduct, intimidation or humiliation.”⁸⁷ Nearly 9% of respondents reported that they currently were being bullied at work.⁸⁸ Another nearly 26% of respondents reported that they had been bullied at work in the past.⁸⁹ Thus, slightly more than one-third of respondents reported that they had been bullied on the job.⁹⁰ An additional 15.5% of respondents reported witnessing bullying of others at work although they themselves had not been bullied.⁹¹

Professor David Yamada has drafted proposed legislation that would provide employees a legal remedy for this type of health-harming cruelty at work.⁹² Since 2003, such proposed legislation—labeled the “Healthy Workplace Bill”—has been introduced in twenty-nine states.⁹³ To date, however, no state has enacted the legislation.⁹⁴

⁸⁵ GARY NAMIE, WORKPLACE BULLYING INST. & ZOGBY INT’L, THE WBI U.S. WORKPLACE BULLYING SURVEY (2010), http://workplacebullying.org/multi/pdf/WBI_2010_Natl_Survey.pdf [<http://perma.cc/U3Q9-PX5S>].

⁸⁶ *Id.* at 1–2.

⁸⁷ *Id.* at 2.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* These 2010 survey results were similar to the results of a 2007 Zogby International survey also conducted for the Workplace Bullying Institute in which respondents were asked the identical question. See GARY NAMIE, WORKPLACE BULLYING INST. & ZOGBY INT’L, U.S. WORKPLACE BULLYING SURVEY 4 (2007), <http://workplacebullying.org/multi/pdf/WBIsurvey2007.pdf> [<http://perma.cc/5ZBD-XW4P>]. In the 2007 survey, 12.6% of respondents reported being bullied at work currently or in the last year; 24.2% of respondents reported having been bullied at work, but not in the past year; and an additional 12.3% of respondents reported having witnessed bullying at work. *Id.*

The number of respondents who reported that they had witnessed bullying at work but had not themselves been a target of any such bullying takes on added significance in light of a recent Canadian study suggesting that employees who are not a target of bullying at work but who witness bullying of others at work are more likely to intend to leave their employment than are those who do not witness such bullying. See Marjan Houshmand et al., *Escaping Bullying: The Simultaneous Impact of Individual and Unit-Level Bullying on Turnover Intentions*, 65 HUM. REL. 901, 911 (2012) (“Our results show that merely working in a work unit with a considerable amount of bullying is linked to higher employee turnover intentions.”).

⁹² See David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL’Y J. 475, 498 (2004) (proposing legislation that would make it “an unlawful employment practice . . . to subject an employee to an abusive work environment”).

⁹³ See Legislatures that Have Introduced the Healthy Workplace Bill, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states.php> [<http://perma.cc/5LL3-GXHL>] (last visited Sept. 26, 2015) (showing the twenty-nine states where the Healthy Workplace Bill has been introduced).

⁹⁴ See *id.* (indicating that no state had enacted the Healthy Workplace Bill as of Sept. 26, 2015). In May 2014, Tennessee became the first state to enact a workplace bullying-related law. See Healthy Workplace Act, TENN. CODE ANN. §§ 50-1-503 to -505 (West, Westlaw through 2015 1st Reg. Sess.). The statute makes employers immune from bullying-related lawsuits if they adopt a policy to prevent abusive conduct in the workplace that complies with Tennessee’s model policy. *Id.* § 50-1-104. In

Much of this workplace bullying targets LGBT people and people perceived to be LGBT. The hostile environment toward gay people prevalent in major league sports both on the court and field and in the locker room provides a high-profile example in the context of a role model occupation—major league athlete.⁹⁵ Less high-profile but even more

September 2014, California enacted legislation requiring certain employers to include training on prevention of workplace abusive conduct as a component within their state-mandated sexual harassment prevention training. CAL. GOV'T CODE § 12950.1(b) (West, Westlaw through 2015 Reg. Sess.).

⁹⁵ See, e.g., AMAECHI & BULL, *supra* note 40, at 141 (recalling, as a former NBA player, hearing “anti-gay epithets pour forth” in the NBA locker room); *id.* at 199 (recalling anti-gay diatribe of NBA teammate that “homosexuals get what they deserve because they choose their immoral lifestyle”); *id.* at 202 (reporting that another NBA player called him “fag” whenever they were on the court together); *id.* at 268 (“Homosexuality is an obsession among ballplayers, trailing only wealth and women. They just didn’t like ‘fags’—or so they insisted over and over again.”); *id.* at 269 (recalling homophobic comments of his NBA teammates when the team bus drove past a billboard that sought to promote tolerance of gay people); BEAN & BULL, *supra* note 40, at 52 (containing former MLB player’s description of the homophobic reaction of his triple-A Toledo Mud Hens teammates to a gay pride parade being held in the town where they were staying during a road trip); *id.* at 54 (describing a teammate who, after recording a save or win, “would prance around the locker room mimicking the stereotype of an effeminate homosexual” to the howls of his teammates); *id.* at 113 (recalling L.A. Dodgers manager Tommy LaSorda telling a “cocksucker” joke to players in the dugout and the players roaring with laughter); *id.* at 160 (recalling MLB teammate jokingly shouting on the team bus “Let’s kick the faggot’s ass” as the bus drove past a man who appeared to be stereotypically gay); SIMMONS & DIMARCO, *supra* note 40, at 84 (containing former NFL player’s description of how his teammate used to call him “cocksucker,” “faggot”, and “fairy” in the locker room); TUAOLO & ROSENGREN, *supra* note 40, at 153 (containing former NFL player’s description of the homophobic comments made by players in the Minnesota Vikings’ locker room after unfounded rumors surfaced that an NFL quarterback was gay); *id.* at 215 (noting that Atlanta Falcons “players traded occasional faggot remarks” in the locker room); Demian Bulwa, *Braves Coach Apologizes for Insulting Fans*, S.F. CHRON., Apr. 28, 2011, at C2 (reporting that MLB Atlanta Braves pitching coach Roger McDowell heckled San Francisco Giants fans with a stream of homophobic remarks); Jim Buzinski, *Hearst Apologizes for ‘Faggot’ Comment*, SB NATION (Nov. 22, 2002, 8:55 PM), <http://www.outsports.com/2013/3/6/4073844/hearst-apologizes-for-faggot-comment> [<http://perma.cc/LU3E-T4G6>] (reporting San Francisco 49ers player’s anti-gay diatribe in response to a former NFL player’s coming out); Cam Inman, *Super Bowl 2013: 49ers’ Chris Culliver Made Anti-Gay Comments in Interview*, SAN JOSE MERCURY NEWS (Jan. 30, 2013), http://www.mercurynews.com/ci_22482376/super-bowl-2013-49ers-chris-culliver-reportedly-made [<http://perma.cc/X4X3-6942>] (reporting the anti-gay comments of an NFL San Francisco 49ers player in response to a reporter’s question as to whether a gay teammate would be welcomed on the 49ers); Brendan Kennedy & Mark Zwolinski, *Blue Jays Suspend Escobar for Slur*, TORONTO STAR, Sept. 19, 2012, at S1 (reporting that MLB Toronto Blue Jays shortstop Yunel Escobar during a game wore stickers under his eyes on which he wrote “tu ere maricon”—commonly translated into English as “You are a faggot”); Nate Taylor, *Hibbert’s Remarks Result In a Fine*, N.Y. TIMES (June 2, 2013), http://www.nytimes.com/2013/06/03/sports/basketball/hibbert-apologizes-for-using-gay-slur.html?_r=0 (reporting that NBA Indiana Pacers center Roy Hibbert used an anti-gay slur in a post-playoff game news conference); Rick Telander, *Sport Has Heard the Voice of Hate*, CHI. SUN-TIMES, Feb. 16, 2007, 2007 WLNR 26027941 (reporting the on-air anti-gay comments of a five-time NBA all-star former player in response to the coming out of a fellow former NBA player).

In recent years, each of the major professional sports leagues has taken steps to prepare for the eventuality of an openly gay player and to increase the likelihood that the announcement by a player that he is gay would be met with a positive reaction. Howard Beck & John Branch, *With the Words*

extreme workplace bullying of LGBT people and people perceived to be LGBT can be found in abundance in reported case decisions, which detail the plight of workers subjected to frequent anti-gay name calling (e.g., “faggot,” “queer,” “dyke,” “bitch,” etc.), lewd remarks, vulgar gestures, threats of homosexual rape, sexual assault, poisoning of food, and other physical abuse and humiliating actions at work.⁹⁶

Thus, the circle is complete. The intentional exclusion of known LGBT people from role model occupations promotes bullying in primary and secondary schools of LGBT youth and young people perceived to be LGBT. This schoolyard bullying behavior graduates to the workplace where it is part of a work environment that is hostile to LGBT workers. This hostile environment sends a message to other LGBT workers that it may be prudent for them to conceal their sexual orientation or gender identity in the workplace and from their co-workers. Thus, bullying is not only a consequence of the intentional exclusion of known LGBT people from role model occupations; bullying also furthers this exclusionary project.

“*I’m Gay*,” *an N.B.A. Center Breaks a Barrier*, N.Y. TIMES (Apr. 29, 2013), <http://www.nytimes.com/2013/04/30/sports/basketball/nba-center-jason-collins-comes-out-as-gay.html>; Jeff Z. Klein & Judy Battista, *Major Sports Leagues Prepare for the “I’m Gay” Disclosure*, N.Y. TIMES (Apr. 11, 2013), <http://www.nytimes.com/2013/04/12/sports/hockey/nhl-announces-initiative-in-support-of-gay-athletes.html>. Significantly, each league has adopted policies prohibiting sexual orientation discrimination. Klein & Battista, *supra*.

⁹⁶ See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759–60 (6th Cir. 2006) (detailing accusations by an employee against his co-workers who allegedly ridiculed employee for being homosexual, called employee derogatory names such as “fag,” and physically harassed employee); *Doe ex rel. Doe v. City of Belleville*, 119 F.3d 563, 566–67 (7th Cir. 1997), *judgment vacated sub nom.*, *City of Belleville v. Doe ex rel. Doe*, 523 U.S. 1001 (1998), *abrogated by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (detailing accusations by employees against a co-worker who allegedly called employees “fag,” “queer,” and “bitch,” suggested he would take employees “out to the woods” and “get [them] up the ass,” and grabbed the crotch of one of the employees); *Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118, 118–19 (5th Cir. 1996), *rev’d*, 523 U.S. 75 (1998) (detailing allegations of an employee against his co-workers who allegedly restrained the employee so that one of the co-workers could place his penis on the employee’s neck and arm, threatened the employee with homosexual rape, and suggested that they would push a bar of soap into the employee’s anus); see also BRAD SEARS ET AL., WILLIAMS INST., DOCUMENTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 12-1 (2009), <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment> [<http://perma.cc/9SZA-949H>] (follow hyperlink “12”) (compiling nearly 400 examples—which are discussed in detail in Chapter Twelve of the Report—culled from court opinions, administrative complaints, and other sources, of sexual orientation discrimination and gender identity discrimination against public employees in the forms of verbal harassment and physical violence).

III. AN AGENDA TO COMBAT ANTI-LGBT BIAS IN ROLE MODEL OCCUPATIONS

A. *Focusing on the Common Genesis and Effects of Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth*

In considering which strategies to employ as means to combat the efforts to exclude known LGBT people from role model occupations, it is best to keep in mind the reciprocal relationship between sexual orientation discrimination and gender identity discrimination in role model occupations and the bullying of LGBT youth. In fighting against sexual orientation discrimination and gender identity discrimination in employment, one is also attacking the problem of bullying of LGBT youth and young people perceived to be LGBT. And in attacking the problem of schoolyard bullying of LGBT youth and young people perceived to be LGBT, one also is fighting sexual orientation discrimination and gender identity discrimination in employment. The optimal strategy for combatting the intentional exclusion of known LGBT people from role model occupations, therefore, should include direct efforts to reduce sexual orientation discrimination and gender identity discrimination in employment, as well as direct efforts to reduce bullying of LGBT youth and young people perceived to be LGBT.

In considering which strategies to employ against the intentional exclusion of known LGBT people from role model occupations, it also is critical to keep in mind both the goal that motivates such exclusion and the means employed to promote that goal. The goal of such exclusion is to define the qualities and values that society attaches to LGBT people and to the non-LGBT majority. The principal means employed is to maintain LGBT invisibility generally, but especially and to the extent feasible to do so in cases in which the LGBT person would otherwise be seen as LGBT in a positive light. Such principal means include most prominently shielding children from the knowledge that LGBT people exist and closeting LGBT people who otherwise would be seen as known LGBT figures of respect.

Like employment discrimination against known LGBT role models, the bullying of LGBT youth also has a closeting effect. A young LGBT person who sees others being bullied because of their known or perceived homosexuality or gender identity learns of the consequences that may await him should he choose to come out to his schoolmates. Thus, the young LGBT person, like the LGBT worker employed in a workplace that is hostile to LGBT people, may conclude that it would be prudent for him to conceal his sexuality or gender identity from his peers.

If one posits that this closeted LGBT youth in many cases will be the high school quarterback, president of the student council, or a similar role model, one comes to see that the bullying of LGBT youth, like the

intentional exclusion of known LGBT people from role model occupations, reduces the visibility of known gay and transgender figures of respect. Thus, the bullying of LGBT youth makes more difficult the task of countering the dominant negative narrative about the qualities and values of gay and transgender people. At the same time, it enables the argument that primary and secondary school children should not be exposed to LGBT role models. In both of these ways, the bullying of LGBT youth facilitates the intentional exclusion of known LGBT people from role model occupations.

The bullying of LGBT youth and the intentional exclusion of known LGBT people from role model occupations also share a common genesis. Both derive, at least in part and in many cases, from a lack of respect for gay or transgender people coupled with an intolerance of them. The two elements are related but distinct. The former entails a belief that LGBT people lack qualities, abilities, or achievements worthy of admiration. The latter entails a belief that LGBT people need not be allowed to exist without interference.

These commonalities between the intentional exclusion of known LGBT people from role model occupations and the bullying of LGBT youth suggest, if not a common antidote, a relationship between remedies. The most effective weapon in the fight against the intentional exclusion of known LGBT people from role model occupations is greater visibility of known LGBT people. Such increased visibility of known LGBT role models will tend to promote tolerance of and respect for LGBT people. This increased tolerance of and respect for LGBT people will, in turn, promote a social climate that allows for even greater visibility of known LGBT role models.

The most effective weapon in the fight against the bullying of LGBT youth is the promotion of tolerance of LGBT people and respect for the qualities, values, abilities, and achievements of LGBT people. As discussed above, the promotion of such tolerance and respect will tend to promote the visibility of known LGBT role models. The increased visibility of such known LGBT role models will, in turn, further promote tolerance of and respect for LGBT people. Thus, attacking the cycle of LGBT invisibility, disrespect, and intolerance anywhere in the series is likely to have positive effects all along the chain.

In general, to promote the prescribed greater visibility of known LGBT role models, tolerance of LGBT people, and respect for the qualities, values, abilities, and achievements of LGBT people, an overall strategy should seek to increase the costs and difficulties incurred by those who engage in the effort to exclude known LGBT people from role model occupations or who engage in the bullying of LGBT youth. The overall strategy, in general, should also seek to decrease the benefits and incentives that might otherwise motivate those who engage in the effort to

exclude known LGBT people from role model occupations or who engage in the bullying of LGBT youth. Indeed, here too there is a synergistic relationship between the prongs of the overall strategy. Increasing the costs incurred by those who engage in sexual orientation discrimination or gender identity discrimination against known LGBT role models makes it less likely that such discrimination will occur and, thus, makes it more likely that LGBT role models will come out. The resulting increased visibility of known LGBT role models, in turn, lowers the likely payout from attempts to exclude known LGBT people from role model occupations—attempts at exclusion that seek to render LGBT people invisible. Similarly, efforts to reduce the bullying of LGBT youth and to teach tolerance of LGBT people and LGBT families make it more likely that LGBT youth who are respected will come out. This increased visibility of LGBT youth who are respected will lead to greater tolerance of and respect for LGBT people and, thus, make it less likely that peers will want to engage in the bullying of LGBT youth.

More specifically, a strategy to undermine the systematic efforts to exclude known LGBT people from role model occupations should include the following elements: first, employment discrimination on the basis of sexual orientation and gender identity should be banned at the federal, state, local, and corporate levels. Second, programs should be put in place at the federal, state, local, and school levels to prevent and respond to the bullying of LGBT youth. Such programs should include prohibitions on such bullying and application of appropriate consequences for those who engage in such bullying. Third, elementary and secondary schools should teach tolerance of and respect for LGBT people and families. Relatedly but separately, elementary and secondary schools should raise awareness of the qualities and values of LGBT people by teaching LGBT history including the stories of LGBT role models. These LGBT history lessons should also include a focus on the record of official and private discrimination against LGBT people throughout recorded history and the various means used to erase LGBT people from the historical record. Finally, the strategy should include efforts specifically targeted at encouraging LGBT people to be visible as LGBT people whenever and wherever it is relatively safe to do so.

B. *Banning Sexual Orientation and Gender Identity Discrimination in Employment*

The cornerstone of efforts to end the intentional exclusion of known LGBT people from role model occupations should be the enactment of express bans on sexual orientation and gender identity discrimination in employment at the federal, state, local, and employer levels. Some such bans already exist. Twenty-two states and the District of Columbia presently prohibit employment discrimination on the basis of sexual

orientation.⁹⁷ Nineteen of these states and the District of Columbia also proscribe employment discrimination on the basis of gender identity or expression.⁹⁸ In general, these states are clustered in the Northeast, Midwest, and Western United States.⁹⁹ In addition, numerous cities and counties prohibit discrimination in employment on the basis of sexual orientation and gender identity or expression.¹⁰⁰ Moreover, according to the Human Rights Campaign's 2015 Corporate Equality Index, eighty-nine percent of Fortune 500 companies include sexual orientation in their corporate non-discrimination policies and two-thirds include explicit protection against gender identity discrimination in their corporate non-discrimination policies.¹⁰¹

Presently, however, no federal statute exists that expressly prohibits sexual orientation discrimination or gender identity discrimination in employment. In 1998, President Clinton issued an executive order amending Executive Order 11478 (issued by President Nixon) to proscribe sexual orientation discrimination against civilian employees working in the executive branch of the federal government.¹⁰² President Obama, in 2014, issued an executive order that further amended Executive Order 11478 by adding gender identity to this ban.¹⁰³ In the same executive order, President Obama amended Executive Order 11246 (issued by President Lyndon Johnson) to add both sexual orientation and gender identity to an existing prohibition of certain discrimination by covered federal contractors.¹⁰⁴ Most private employers remain free under federal law, however, to discriminate against an applicant or employee because of the worker's sexual orientation or gender identity.¹⁰⁵ In contrast, federal statutes ban

⁹⁷ Denise M. Visconti & Christine Michelle Duffy, *Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace*, in *GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 20-18* (Christine Michelle Duffy & Denise M. Visconti eds., 2014).

⁹⁸ *Id.* In March 2015, Utah became the twenty-second state to ban employment discrimination on the basis of sexual orientation and the nineteenth state to ban employment discrimination on the basis of gender identity. See UTAH CODE ANN. § 34A-5-106(1) (West, Westlaw through 2015 1st Spec. Sess.).

⁹⁹ See *Statewide Employment Laws and Policies*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/state_maps (select "Statewide Employment Laws & Policies") (last visited Oct. 28, 2015).

¹⁰⁰ Visconti & Duffy, *supra* note 97, at 20–24.

¹⁰¹ See HUMAN RTS. CAMPAIGN, CORPORATE EQUALITY INDEX 2015: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 1, 6 (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/CEI-2015-rev.pdf> [<http://perma.cc/Q2FY-D6NB>].

¹⁰² Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

¹⁰³ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

¹⁰⁴ *Id.*

¹⁰⁵ Transgender employees have had some success recently in arguing that Title VII's prohibition on sex discrimination forbids an employer from discriminating against a transgender employee on the basis of his failure to conform to gender stereotypes. See *Schroer v. Billington*, 577 F. Supp. 2d 293,

discrimination in private employment on the basis of race, color, national origin, sex, religion, age, disability, and certain genetic information about the worker.¹⁰⁶

Repeated efforts in Congress to enact federal legislation that would proscribe employment discrimination on the basis of sexual orientation or both sexual orientation and gender identity have been met with consistent failures.¹⁰⁷ In May 1974, Representative Bella Abzug (D-NY) introduced in the U.S. House of Representatives the first federal bill to ban sexual orientation discrimination in employment.¹⁰⁸ The bill failed to advance out of committee. Since 1994, various versions of an “Employment Non-

305 (D.D.C. 2008) (stating that it is irrelevant “for purposes of Title VII liability whether the [employer] withdrew its offer of employment because it perceived [the applicant] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual” and concluding that the applicant was “entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping”); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (“Having included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions, plaintiff [whom the court described as a ‘pre-operative transsexual’] has sufficiently pleaded claims of gender discrimination.”). Transgender employees also recently have had limited success in arguing that Title VII’s sex discrimination prohibition includes also a ban on gender identity discrimination. *See Schroer*, 577 F. Supp. 2d at 308 (holding that the employer’s “refusal to hire [an applicant] after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex’” (emphasis in original)). Indeed, the Equal Employment Opportunity Commission, which is charged with enforcing Title VII, held in 2012 that “discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.” *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012). Moreover, in December 2014, U.S. Attorney General Eric Holder announced that he had “determined that the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status” and, therefore, the Department of Justice “will no longer assert that Title VII’s prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination).” Memorandum from Eric Holder, United States Attorney General, on Treatment of Transgender Employment Discrimination Claims, to United States Attorneys and Heads of Department Components (Dec. 15, 2014), <http://www.justice.gov/file/188671/download> [<http://perma.cc/3X58-UFPN>].

¹⁰⁶ *See* 29 U.S.C. § 623(a) (2012) (proscribing employment discrimination on the basis of age); 42 U.S.C. § 2000e-2(a) (2012) (proscribing employment discrimination on the basis of race, color, national origin, sex, and religion); 42 U.S.C. § 2000ff-1 (2012) (proscribing employment discrimination on the basis of genetic information); 42 U.S.C. § 12112 (2012) (proscribing employment discrimination on the basis of disability).

¹⁰⁷ *See generally* Suzanne B. Goldberg et al., *The Employment Non-Discrimination Act: Its Scope, History, and Prospects*, in *GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE*, *supra* note 97, at 19-16 to 19-48.

¹⁰⁸ The bill, entitled “the Equality Act of 1974,” more broadly targeted discrimination on the basis of sex, marital status, and sexual orientation in employment, housing, and public accommodations. *See* 120 CONG. REC. 14,647 (1974) (introducing H.R. 14752 on May 14, 1974).

Discrimination Act,” often referred to as “ENDA,” have been introduced, but have not been enacted, in each session of Congress from the 103rd Congress through the 113th Congress, save the 109th Congress, during which no such bill was introduced.¹⁰⁹ ENDA would ban employment discrimination on the basis of sexual orientation and, in one version introduced in 2007¹¹⁰ and all versions introduced since 2009, on the basis of gender identity. ENDA is modeled on Title VII of the Civil Rights Act of 1964,¹¹¹ which generally proscribes employment discrimination on the basis of race, color, religion, sex, or national origin. More than half a century after Congress passed Title VII, the prospects for ENDA’s passage remain bleak.¹¹²

¹⁰⁹ See Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Equal Rights and Equal Dignity for Americans Act of 2003, S. 16, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003); Protecting Civil Rights for All Americans Act, S. 19, 107th Cong. (2001) (providing that Title V of this Act may be cited as the “Employment Non-Discrimination Act of 2001”); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong. (2001); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994).

¹¹⁰ See Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007).

¹¹¹ 142 CONG. REC. S9986 (daily ed. Sept. 6, 1996) (statement of Sen. Kennedy).

¹¹² See, e.g., Chris Johnson, *Pelosi Talks ENDA at Netroots Nation*, WASH. BLADE (June 22, 2013, 7:46 PM), <http://www.washingtonblade.com/2013/06/22/pelosi-talks-enda-at-netroots-nation/> [<http://perma.cc/RY8V-4U7H>] (reporting that House Minority Leader Nancy Pelosi is doubtful that there are enough votes to pass ENDA); Ed O’Keefe, *Gay Rights Groups Pull Support for Anti-Bias Bill*, WASH. POST, July 9, 2014, at A3 (reporting that major gay rights groups pulled support for ENDA because of concerns about religious exemptions from the bill); Justin Snow, *Freedom to Work Doubles Down on Push for LGBT Workplace Protections*, METRO WKLY. (June 17, 2013), <http://www.metroweekly.com/2013/06/freedom-to-work-doubles-down-o/> [<http://perma.cc/NQY8-3M2U>] (quoting Freedom to Work President as saying “there is a tiny, tiny, tiny chance that ENDA is signed into law in the next year [T]here is a more significant chance the president will sign the executive order”).

On July 8, 2014, several leading LGBT advocacy and civil rights groups—the American Civil Liberties Union, Gay & Lesbian Advocates & Defenders, Lambda Legal, the National Center for Lesbian Rights, and the Transgender Law Center—announced that they were withdrawing their support for the pending version of ENDA. See *Joint Statement on Withdrawal of Support for ENDA*, GLAD (July 8, 2014), <http://www.glad.org/current/item/joint-statement-on-withdrawal-of-support-for-enda> [<http://perma.cc/BGS4-JJTW>]. The groups objected to the broad exemption for religious organizations contained in that version of ENDA. See *id.* (“The provision essentially says that anti-LGBT

A federal civil rights statute that proscribes sexual orientation discrimination and gender identity discrimination in private and public employment would combat the efforts to exclude known LGBT people from role model occupations in several ways, both direct and indirect. Perhaps most directly, such a statute would allow a known LGBT worker who has been the victim of employment discrimination on the basis of his sexual orientation or gender identity to sue for equitable relief, such as an order of reinstatement, which would ensure that a known LGBT role model remains in the job at issue. Moreover, by providing for the recovery of monetary damages from employers found to have engaged in sexual orientation discrimination or gender identity discrimination, such a statute would deter employers from discriminating on the basis of sexual orientation or gender identity in the first place. This would be so even with respect to employers that retain a discriminatory animus toward LGBT people and that would prefer to discriminate against LGBT workers absent the financial risk that such a statute would attach to doing so.

Less directly, but perhaps even more importantly, a federal statute such as ENDA that would prohibit sexual orientation discrimination and gender identity discrimination in employment would promote a social norm against such discrimination.¹¹³ The statutory prohibition would advance the development of such a social norm as the public became aware of the legal prohibition, of the circumstances of LGBT employees who attempt to vindicate their rights under the statute, and of employers that the law sanctions for violating the rights that the statute protects. The value of this norm development and transformation function should not be underestimated.

In general, “[e]mployment discrimination statutes seek not only to protect individual workers from discrimination in specific cases, but also seek to prevent harm to society as a whole by teaching and reinforcing that certain forms of employment discrimination are inconsistent with society’s core values.”¹¹⁴ Thus, a statute such as ENDA would teach and strengthen the social norm that sexual orientation discrimination and gender identity

discrimination is different—more acceptable and legitimate—than discrimination against individuals based on their race or sex.”). A discussion of the merits and demerits of such a broad exemption for religious organizations is beyond the scope of this Article.

¹¹³ For a brief discussion of expressive theories of law, see Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 WASH. U. L. REV. 573, 591–94 (2006) (arguing that “government action can communicate a specific belief or attitude of the state,” which can affect social norms). See also E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1063–67 (1999) (arguing that facially neutral succession laws send a discriminatory message with respect to gay people by failing to recognize relevant fundamental differences between gay people and non-gay people).

¹¹⁴ E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Pre-dispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 602–03 (2009).

discrimination in employment are unjust and unacceptable in our society. An employer that internalized this norm would be less likely to discriminate on the basis of sexual orientation or gender identity. Thus, such a federal statute would lessen the prevalence of sexual orientation discrimination and gender identity discrimination not only by deterring those who would prefer to engage in such discrimination absent the risk of incurring a penalty for doing so, but also by making it less likely that an employer would want to engage in sexual orientation discrimination or gender identity discrimination even if there were no risk of incurring a penalty for engaging in such discrimination.

The norm development and transformation function of employment discrimination statutes is particularly important in light of the great difficulty involved in proving that an employer has discriminated on an impermissible basis in a specific case. Indeed, this norm development and transformation function likely would be beneficial to LGBT applicants for employment even with respect to role model employment opportunities that an employment discrimination statute typically would not cover or could not cover as a practical matter. Examples include the appointment of a judge,¹¹⁵ the drafting of a professional athlete,¹¹⁶ and the election of a politician.¹¹⁷

¹¹⁵ See, e.g., Sabrina Tavernise, *Gay Prosecutor Is Denied Virginia Judgeship Despite Bipartisan Support*, N.Y. TIMES, May 16, 2012, at A15 (reporting on the rejection of an openly gay judicial nominee after a conservative group and conservative lawmakers expressed concern that the nominee would not be impartial in light of his past advocacy for gay equality); Laura Vozzella, *Gay Judge Nominee Tracy Thorne-Begland Challenged in Virginia*, WASH. POST (May 12, 2012), http://www.washingtonpost.com/blogs/virginia-politics/post/gay-judge-nominee-challenged-in-va/2012/05/12/gIQAtERQJU_blog.html [<http://perma.cc/X7EQ-68VF>] (reporting the comments of the Family Foundation of Virginia questioning whether an openly gay judicial nominee would uphold laws he disagreed with and arguing that the nominee's advocacy for gay civil rights made him unsuitable for the role of an impartial judge).

¹¹⁶ See, e.g., Christine Brennan, *NFL Reps Asking Wrong Questions*, USA TODAY, Feb. 28, 2013, at 1C (reporting that draft hopefuls are being asked inappropriate questions about their sexuality); Lynn Zinser, *The Fifth Down; Seeking a Stronger Stand*, N.Y. TIMES (Mar. 15, 2013), <http://query.nytimes.com/gst/fullpage.html?res=9A00E2DF1E38F936A25750C0A9659D8B63> (discussing the allegations of several NFL prospects that team representatives had asked each questions during the 2013 NFL combine seeking to determine whether the prospect was gay).

¹¹⁷ See, e.g., NEIL GIULIANO, *THE CAMPAIGN WITHIN: A MAYOR'S PRIVATE JOURNEY TO PUBLIC LEADERSHIP* 1, 170, 210 (2012) (relating the assertion of the former mayor of Tempe, Arizona, who came out publicly while in office, that an effort to recall him from office "was bogus, organized by anti-gay bigots"); Interview with Neil Giuliano, CEO, San Francisco AIDS Foundation, in San Francisco, CA (May 16, 2014) (containing the statement of the first openly gay mayor of a major American city (Tempe, Arizona) that privately he "thought for sure" that his coming out publicly would negatively impact his political future); DONALD P. HAIDER-MARKEL, *OUT AND RUNNING: GAY AND LESBIAN CANDIDATES, ELECTIONS, AND POLICY REPRESENTATION* 52 (2010) (reviewing survey data and concluding that "[a]t its base, about one-quarter of the general public, and also likely voters, appear ready to oppose LGBT candidates for virtually any office, but the public may be slightly more supportive of LGBT candidates who come out as incumbents"); *id.* at 39–41 (summarizing and excerpting responses to various surveys conducted between 1991 and 2004, the

Consider, for example, the known gay politician who is running for elected office. An employment discrimination statute that banned sexual orientation discrimination would not and should not constrain the voting public's choices or the rationales grounding those choices in the election. Nonetheless, the message that a statute such as ENDA would send may be of critical importance in shaping a voter's choice once he draws the curtain on the voting booth. Thus, the principal value of an employment discrimination statute such as ENDA may well be found in the message it sends and the lesson it teaches to society about the invidious and unacceptable nature of the proscribed discrimination rather than in the specific instances in which an individual employee is able to assert successfully his rights against an individual employer.¹¹⁸

The same might well be said of a state statute, a local anti-discrimination ordinance, or a corporate equal opportunity policy. But a federal statute banning employment discrimination on the basis of sexual orientation and gender identity would promote the norm against such discrimination far more effectively than any state law, local ordinance, or corporate policy ever could: a federal statute would send the message that sexual orientation discrimination and gender identity discrimination in employment are simply un-American.¹¹⁹

Indeed, to clarify the point by contradistinction, consider the message that the federal law of employment discrimination presently communicates to society with respect to sexual orientation discrimination and gender identity discrimination. It has been a quarter century since Congress passed the Americans with Disabilities Act to ban certain employment discrimination on the basis of disability.¹²⁰ It has been nearly half a century since Congress passed the 1967 Age Discrimination in Employment Act to ban certain employment discrimination against those forty years old and older on the basis of their age.¹²¹ It has been more than half a century since Congress passed Title VII of the Civil Rights Act of 1964 to ban employment discrimination on the basis of race, color, national origin, sex,

results of which showed that twenty-four percent or more of respondents stated that they would not vote for an openly gay candidate for elected office).

¹¹⁸ See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 975 (1997) ("At least in part because of the Civil Rights Act of 1964—the most important statutory embodiment of the ideal of racial justice—American culture, American government, and the American people have absorbed the concepts of equality and integration embodied in the Act as the proper ethical framework for the resolution of issues of race." (footnote omitted)).

¹¹⁹ Cf. Pizer et al., *supra* note 37, at 757–60 (discussing limitations on the effectiveness of state, local, and corporate prohibitions on sexual orientation discrimination and gender identity discrimination).

¹²⁰ See 42 U.S.C. § 12112 (2012).

¹²¹ See 29 U.S.C. § 623(a) (2012).

and religion.¹²² Yet, in the face of overwhelming evidence that sexual orientation discrimination and gender identity discrimination in employment are widespread,¹²³ session after session of Congress has refused to enact a federal statute banning employment discrimination on the basis of sexual orientation and gender identity. Thus, by its deliberate inaction, Congress suggests that sexual orientation discrimination and gender identity discrimination in employment are not unjust in the way that discrimination in employment on the basis of disability, age, race, color, national origin, sex, and religion are unjust.¹²⁴

Indeed, some members of Congress have argued explicitly, and effectively, that anti-LGBT discrimination in certain role model occupations is needed to protect the moral well-being of children and of society.¹²⁵ By its failure to pass ENDA or a similar federal ban on sexual orientation discrimination and gender identity discrimination in employment, Congress implicitly endorses that argument. The most obvious victims of this failure are the known LGBT people who have been, and continue to be, targeted for sexual orientation discrimination or gender identity discrimination in employment. However, other LGBT people, and especially LGBT youth, who are denied the opportunity to see those known LGBT role models in the jobs from which they were excluded on the basis of their sexual orientation or gender identity are profoundly damaged by this failure as well.

¹²² See 42 U.S.C. § 2000e-2(a) (2012).

¹²³ See, e.g., Pizer et al., *supra* note 37, at 720–22 (concluding that recent research findings indicate that workplace discrimination against LGBT people is still prevalent); Tilcsik, *supra* note 23, at 614 (concluding that the results of the study presented “indicate that gay men encounter significant barriers in the hiring process because, at the initial point of contact, employers more readily disqualify openly gay applicants than equally qualified heterosexual applicants” and further concluding that these findings, along with other less direct evidence of sexual orientation discrimination, “suggest that sexual orientation discrimination is a prominent feature of many American labor markets”).

¹²⁴ See S. REP. NO. 107-341, at 11 (2002) (“The consequence of Congress’ failure to take a stance on anti-gay discrimination in the workplace is a tacit endorsement by the Federal Government of anti-gay bias.”).

¹²⁵ See 142 CONG. REC. S9986, S9992–93 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch) (arguing against the passage of ENDA on the grounds that such an anti-discrimination statute might preclude a school from firing a gay teacher who engages in public displays of affection with his same-sex partner, such as walking arm in arm or kissing, whether such a display occurs in school and in front of school children or away from school); *id.* at S9997–98, S10004–05 (statement of Sen. Nickles) (arguing against the passage of ENDA by asserting several times that ENDA would require employers to employ gay people in positions where they would serve as role models for children, such as in the Boy Scouts, youth sports camps, day-care centers, churches, and elementary schools); *id.* at S10000–01 (statement of Sen. Ashcroft) (speaking repeatedly, in opposition to ENDA, of the role model status of teachers and of the choice one makes to be homosexual or heterosexual, and implying that gay teachers cause school children to become gay and that ENDA should be rejected so as not to allow or encourage this).

C. *Implementing Anti-Bullying Programs*

As argued above, one consequence of the conspicuous absence of known LGBT role models is an increased prevalence of bullying of LGBT youth.¹²⁶ Additionally, there is a reinforcing relationship between the widespread bullying of LGBT youth and the intentional exclusion of known LGBT people from role model occupations: such exclusion fosters the bullying of LGBT youth and, in turn, bullying promotes further exclusion of known LGBT people from role model occupations.¹²⁷ Thus, another critical component of the strategy to end the intentional exclusion of known LGBT people from role model occupations should be the implementation of programs at the federal, state, local, and school levels to prevent and respond to the bullying of LGBT youth. Indeed, in light of recent greater awareness of both the prevalence and consequences of the bullying of LGBT students—such as increased risks of poor academic performance and self-harm—initiatives have been launched at the federal, state, and local levels to reduce the incidence of anti-LGBT bullying in primary and secondary schools.

At the federal level, two important pieces of legislation have been introduced in Congress to combat the bullying of LGBT students. Neither has been enacted. In the spring of 2013, Senator Al Franken (D-MN) and Representative Jared Polis (D-CO) introduced the most recent version of the Student Non-Discrimination Act (SNDA).¹²⁸ The proposed SNDA sought “[t]o end discrimination based on actual or perceived sexual orientation or gender identity in public schools”¹²⁹ and was modeled after Title IX of the Education Amendments of 1972, which proscribes certain discrimination in education on the basis of sex.¹³⁰ The SNDA was predicated on the findings that LGBT students are subject to widespread harassment and bullying in public schools and that such widespread harassment and bullying can lead to academic underachievement as well as adverse health consequences and suicide.¹³¹ The SNDA would have prohibited discrimination and harassment in public schools on the basis of sexual orientation or gender identity.¹³² Thus, schools that failed to take reasonable steps to prevent or respond to the bullying of LGBT students would have risked losing federal funding if they were found to have been

¹²⁶ See *supra* Part II.A.

¹²⁷ See *supra* Part II.C.

¹²⁸ See S. 1088, 113th Cong. (2013); H.R. 1652, 113th Cong. (2013).

¹²⁹ S. 1088; H.R. 1652.

¹³⁰ JODY FEDER, CONG. RESEARCH SERV., THE STUDENT NON-DISCRIMINATION ACT (SNDA): A LEGAL ANALYSIS 1 (2013), <http://www.fas.org/sgp/crs/misc/R42652.pdf> [<http://perma.cc/DF5Z-Q2RQ>].

¹³¹ S. 1088, § 2(a)(1), (3)–(4); H.R. 1652, § 2(a)(1), (3)–(4).

¹³² S. 1088, § 4(a)–(b); H.R. 1652, § 4(a)–(b).

in violation of the Act.¹³³ Such schools also would have risked being sued by the bullying victim for injunctive relief as well as compensatory damages.¹³⁴

Additionally, Senator Robert Casey, Jr. (D-PA) and Representative Linda Sánchez (D-CA) introduced the most recent version of the Safe Schools Improvement Act (SSIA) in February and March of 2013, respectively.¹³⁵ The purpose of the Act was “to address the problem of bullying and harassment conduct of students in public elementary schools and secondary schools.”¹³⁶ The SSIA would have required any state that receives certain federal funds to mandate that its local educational agencies: (1) establish policies that prevent and prohibit bullying and harassment conduct that is based on, among other factors, a student’s actual or perceived sexual orientation or gender identity; (2) establish grievance procedures by which students or parents might register complaints regarding alleged violations of their anti-bullying and anti-harassment policies; (3) annually provide notice to students, parents, and educational professionals describing the conduct prohibited by their anti-bullying and anti-harassment policies; and (4) collect annually and report publicly data concerning the incidence and frequency of behavior prohibited by their anti-bullying and anti-harassment policies.¹³⁷ The SSIA expressly defined the bullying and harassment that would have been within the purview of the statute as conduct that is “sufficiently severe, persistent, or pervasive” such that it “create[s] a hostile or abusive educational environment” or “limit[s] a student’s ability to participate in” a public school program or activity.¹³⁸

Before the SNDA of 2013 was proposed, earlier versions of the Act were introduced in both the 111th and the 112th Congresses.¹³⁹ Similarly, earlier versions of the SSIA were introduced in the 110th, 111th, and 112th Congresses.¹⁴⁰ However, none of these bills has advanced out of committee in any session of Congress. While President Obama announced his support for both the SNDA and the SSIA in April 2012,¹⁴¹ the passage of these pro-

¹³³ S. 1088, § 5(b)(1); H.R. 1652, § 5(1).

¹³⁴ S. 1088, § 6(a); H.R. 1652, § 6(a).

¹³⁵ See S. 403, 113th Cong. (2013) (amending § 4401 of Title IV of the Elementary and Secondary Education Act of 1965); H.R. 1199, 113th Cong. (2013) (amending § 4401 of Title IV of the Elementary and Secondary Education Act of 1965).

¹³⁶ See S. 403, § 3(a); H.R. 1199, § 3(a).

¹³⁷ S. 403, § 3(a); H.R. 1199, § 3(a).

¹³⁸ S. 403, § 3(a); H.R. 1199, § 3(a).

¹³⁹ See S. 555, 112th Cong. (2011); S. 3390, 111th Cong. (2010); H.R. 998, 112th Cong. (2011); H.R. 4530, 111th Cong. (2010).

¹⁴⁰ S. 506, 112th Cong. (2011); H.R. 1648, 112th Cong. (2011); S. 3739, 111th Cong. (2010); H.R. 2262, 111th Cong. (2009); H.R. 3132, 110th Cong. (2007).

¹⁴¹ See Valerie Jarrett, *Ending Bullying in Our Schools & Communities*, WHITE HOUSE BLOG (Apr. 20, 2012, 5:42 PM), <http://www.whitehouse.gov/blog/2012/04/20/ending-bullying-our-schools->

LGBT bills will be difficult as long as a Republican majority controls Congress.¹⁴²

At the local level, Washington, D.C. has enacted one of the most comprehensive youth anti-bullying statutes in the nation, which should serve as a model for the states.¹⁴³ D.C.'s Youth Bullying Prevention Act of 2012 seeks not only to prevent bullying, but also to ensure that when bullying does occur and is reported that those in positions of responsibility take any such report seriously and act aggressively to remedy the situation.¹⁴⁴ The D.C. statute required that the city's mayor establish a bullying prevention task force charged with, among other things, developing a model anti-bullying policy and assisting educational institutions and agencies covered by the Act with developing bullying prevention policies.¹⁴⁵ The Act also requires each covered educational institution, agency, and grantee to adopt a bullying prevention policy that must prohibit bullying, set out an expected code of conduct, and specify the consequences to an individual that may result from that individual engaging in bullying in violation of the policy.¹⁴⁶ The bullying prevention policy that covered entities adopt must establish procedures for reporting bullying, promptly investigating a report of bullying, and appealing the outcome of any such investigation.¹⁴⁷ The Act further requires covered entities to publicize the bullying prevention policy and to train employees with respect to the bullying prevention policy.¹⁴⁸ Finally, the Act prohibits retaliation against anyone who reports bullying and provides that one who in good faith reports bullying shall have immunity from civil lawsuits arising from such a report.¹⁴⁹

D.C.'s youth bullying prevention statute defines bullying as "severe, pervasive, or persistent" conduct that would reasonably be predicted to cause a targeted youth to fear physical harm to himself or his property,

communities [<http://perma.cc/TFJ2-THMS>] ("[T]he President supports [the SNDA and the SSIA] and wants to work with Congress as they move forward in the process.").

¹⁴² See Chris Johnson, *Polis Reintroduces Bill to Protect LGBT Students*, WASH. BLADE (Apr. 18, 2013, 2:51 PM), <http://www.washingtonblade.com/2013/04/18/polis-reintroduces-student-non-discrimination-act-2/> [<http://perma.cc/4NN6-LKST>] ("Passage of SNDA—as with any pro-LGBT bill—will be difficult along [sic] as a Republican majority controls the House.").

¹⁴³ See D.C. CODE §§ 2-1535.01 to .09 (Westlaw through Sept. 16, 2015); see also JOHN ROMAN & SAM BIELER, YOUTH BULLYING PREVENTION TASK FORCE, DISTRICT-WIDE MODEL BULLYING PREVENTION POLICY 3 (2013), http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DCBullyingPreventionPolicy_PressQ_022513.pdf [<http://perma.cc/TN7N-68D9>].

¹⁴⁴ See D.C. CODE § 2-1535.03(b) (Westlaw through Sept. 16, 2015) (providing that agencies must adopt a bullying prevention policy that prohibits bullying and contains consequences that can result from an incident of bullying).

¹⁴⁵ *Id.* § 2-1535.02.

¹⁴⁶ *Id.* § 2-1535.03.

¹⁴⁷ *Id.* § 2-1535.03(b)(6)–(8).

¹⁴⁸ *Id.* §§ 2-1535.03(f), 2-1535.06.

¹⁴⁹ *Id.* § 2-1535.05(a), (c).

cause a substantial and detrimental effect on the targeted youth's physical or mental health, or substantially interfere with the targeted youth's academic performance, academic attendance, or ability to participate in or benefit from services or activities provided by a covered agency, educational institution, or grantee where such conduct is based on any one or more of certain enumerated distinguishing characteristics.¹⁵⁰ Among the enumerated characteristics are actual or perceived sexual orientation and gender identity or expression.¹⁵¹

It is critically important that D.C.'s anti-bullying efforts, like both the SNDA and the SSIA, expressly address bullying motivated by the target's sexual orientation or gender identity. Although every state has enacted anti-bullying legislation,¹⁵² only eighteen states, in addition to the District of Columbia, have legislation that specifically includes anti-LGBT bullying.¹⁵³ Even where an anti-bullying statute or policy applies to any and all bullying or, as does the D.C. legislation, to any bullying motivated by "any . . . distinguishing characteristic,"¹⁵⁴ it is preferable that the statute or policy specifically mention bullying motivated by sexual orientation or gender identity bias.¹⁵⁵ The importance, in part, lies in the message that such inclusion sends to young LGBT people. As Human Rights Campaign President Chad Griffin stated at the bill-signing ceremony for D.C.'s Youth Bullying Prevention Act of 2012, laws have an expressive function and can send a powerful message: "The fact that we're standing here today and the mayor will soon sign this bill into law tells every LGBT young person not just in D.C. but around the country that they have value and that they have reason to be hopeful."¹⁵⁶ Such express inclusion also tells non-LGBT youth—as well as teachers and administrators—that LGBT persons have value.

D.C.'s anti-bullying statute goes beyond those of other jurisdictions in a second critically important way: the statute applies not only to primary and secondary schools, but also to all city agencies that work directly with

¹⁵⁰ *Id.* § 2-1535.01(2)(A).

¹⁵¹ *Id.*

¹⁵² See *Policies & Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/index.html#listing> [<http://perma.cc/AMQ9-6T2Q>] (last updated May 27, 2015) (providing a map with access to summaries of each state's anti-bullying laws).

¹⁵³ See *State Maps*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, <http://glsen.org/article/state-maps> [<http://perma.cc/D3ME-LPCW>] (last visited July 30, 2015). The states with LGBT-inclusive, anti-bullying statutes are Arkansas, California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington. *Id.*

¹⁵⁴ D.C. CODE § 2-1535.01(2)(A)(i) (Westlaw through Sept. 16, 2015).

¹⁵⁵ CIANCOTTO & CAHILL, *supra* note 38, at 70–71; KOSCIW ET AL., *supra* note 47, at 68–71.

¹⁵⁶ Michael K. Lavers, *Gray Signs D.C. Anti-Bullying Bill*, WASH. BLADE (June 22, 2012, 12:02 PM), <http://www.washingtonblade.com/2012/06/22/gray-signs-d-c-anti-bullying-bill/> [<http://perma.cc/G6FV-89GR>].

youth and to “grantees,” which the legislation defines to include any entity that provides services to youth on behalf of the D.C. government or assisted by funding from the D.C. government.¹⁵⁷ Thus, the anti-bullying policies adopted pursuant to the Act will protect youth not only in schools, but also in other city-funded areas where youth tend to congregate, such as parks, libraries, recreation centers, and swimming pools.

D. *Teaching Tolerance of and Respect for LGBT People and Families*

It is one thing to prohibit an action and to prescribe consequences for engaging in that action, but it is another to teach expressly why an action is wrong. Thus, in addition to prohibiting bullying and providing for appropriate consequences for those who engage in bullying, an anti-bullying program should affirmatively teach tolerance—the allowance of beliefs or behaviors with which one does not necessarily agree.

A number of organizations provide assistance to elementary and secondary schools that may choose to teach tolerance of LGBT people and families. Among the most prominent are the Gay, Lesbian, & Straight Education Network (GLSEN) and the “Welcoming Schools” project of the Human Rights Campaign Foundation. Both organizations offer resources and sample lessons aimed at promoting tolerance of LGBT people and their families and at ending bullying.¹⁵⁸

Such discussions of tolerance toward LGBT people may well reduce the incidence of anti-LGBT bullying by challenging the mindset that grounds such bullying behavior. Thus, in response to episodes of anti-LGBT bullying of LGBT students, many school districts have implemented tolerance lessons with respect to LGBT people.¹⁵⁹ These lessons might include discussions that gay and transgender people exist, such that some children will grow up to love in a romantic way a person of the same gender, and that gay and transgender families exist, such that some children might have two moms or two dads.¹⁶⁰

These lessons of tolerance, however, have made some parents and

¹⁵⁷ D.C. CODE §§ 2-1535.01(1), (6), 2-1535.03(a)–(c), (f) (Westlaw through Sept. 16, 2015).

¹⁵⁸ See *Inclusion and Respect: GLSEN Resources for Educators*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, <http://www.glsen.org/educate/resources> [<http://perma.cc/62UU-MBJQ>] (last visited July 30, 2015) (providing resources for educators to use in the promotion of tolerance of LGBT people and their families); *Resources from Welcoming Schools*, WELCOMING SCHS., <http://www.welcoming-schools.org/resources/> [<http://perma.cc/6BLH-2BUA>] (last visited July 30, 2015) (providing a variety of resources concerning LGBT tolerance and education).

¹⁵⁹ See Gerry Shih, *Clashes Pit Parents vs. Gay-Friendly Curriculums in Schools*, N.Y. TIMES, Mar. 4, 2011, at A21 (discussing the increase in the last fifteen years of school curricula that teach tolerance of the LGBT community).

¹⁶⁰ See, e.g., Erik Eckholm, *In Schools' Efforts to End Bullying, Some See Agenda*, N.Y. TIMES, Nov. 7, 2010, at A21 (detailing Montana's proposed curriculum, which would “teach[] first graders that ‘human beings can love people of the same gender’”).

community leaders uncomfortable. This has been especially so when the lessons have included an explicit discussion of sexuality. For example, in 2009, school officials in Helena, Montana proposed teaching fifth graders that sexual intercourse may include anal penetration.¹⁶¹ After some parents and religious leaders objected, however, the Helena school board adopted a revised plan for teaching about sexuality and diversity that removed not only the sexually explicit language concerning anal penetration, but also some of the references to gay families.¹⁶²

The principal lesson to be learned from the episode in Helena, Montana is that educators ought to distinguish between teaching about LGBT people and their families on the one hand and teaching about LGBT sex on the other. The cost of including an explicit discussion of homosexual sex typically will be more fierce opposition to any discussion relating to gay people, transgender people, or their families. Moreover, in the context of teaching tolerance, the benefits of including a sexually explicit discussion do not merit this cost. One can teach perfectly well that LGBT people and LGBT families exist and should be tolerated and even respected without including any discussion of how gay people have sex. The point bears emphasis: one can have a discussion about LGBT people even with very young children without having an age-inappropriate and context-inappropriate discussion about sex. Accordingly, it not only is imprudent to include an explicit discussion of anal sex in teaching tolerance of LGBT people, it also is wholly unnecessary.

This distinction between teaching tolerance of LGBT people and teaching the mechanics of LGBT sex has been lost not only on some educators, but also on some prominent jurists. The opinion and concurring opinion in *Schroeder v. Hamilton School District*,¹⁶³ a case from the United States Court of Appeals for the Seventh Circuit, are illustrative. Tommy Schroeder taught sixth grade at the Templeton Middle School in Hamilton, Wisconsin.¹⁶⁴ After he came out as gay, students began to harass him. Among other things, students repeatedly called him “queer” and “faggot” in the hallways, chanted “faggot, faggot, faggot” in harassing phone calls, and vandalized a school bathroom with graffiti labeling Schroeder a “faggot” and describing in vulgar language sexual acts in which they presumed he engaged.¹⁶⁵ Because much of the harassment he suffered was anonymous, Schroeder asked the school to conduct “sensitivity training” for students that would teach tolerance of gay people.¹⁶⁶ The school

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 282 F.3d 946 (7th Cir. 2002).

¹⁶⁴ *Id.* at 948.

¹⁶⁵ *Id.* at 948–49.

¹⁶⁶ *Id.* at 949.

declined to do so.¹⁶⁷

Schroeder later brought suit against the school district and various school administrators alleging that they had denied him the equal protection of the law by failing to take reasonable measures to prevent students from harassing him on the basis of his sexual orientation.¹⁶⁸ The district court granted summary judgment for the defendants.¹⁶⁹ On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision.¹⁷⁰

In his opinion for the Court of Appeals, Judge Daniel Manion argued that Schroeder's request for sensitivity training was "especially problematic in an elementary or early middle school (i.e., sixth grade) setting."¹⁷¹ Judge Manion explained that, as he saw it, the problem arose from the difficulty of separating gay people from gay sex: "Unfortunately, there is no simple way of explaining to young students why it is wrong to mock homosexuals without discussing the underlying lifestyle or sexual behavior associated with such a designation."¹⁷²

Similarly, in his concurring opinion, Judge Richard Posner argued that, "when harassment of a teacher or student is based upon his sexual orientation or activity, the school authorities' options are limited by an understandable reticence about flagging issues of sex for children."¹⁷³ Judge Posner further explained how school administrators who are confronted with the problem of anti-gay harassment face a dilemma: "It is possible for a rational school administrator to fear that if it explains sexual phenomena, including homosexuality, to schoolchildren in an effort to get them to understand that it is wrong to abuse homosexuals, it will make children prematurely preoccupied with issues of sexuality."¹⁷⁴

One might question whether the children who taunted their teacher with chants of "faggot, faggot, faggot" and who wrote on the bathroom wall in vulgar language about the homosexual sex acts they presumed their teacher engaged in were not already "preoccupied with issues of sexuality." Regardless, just as one might teach tolerance of interracial heterosexual marriage without dwelling on the mechanics of vaginal intercourse, the school district might have attempted to teach tolerance of the LGBT community by describing LGBT people as those who love people of the same gender in a romantic way.¹⁷⁵ Any discussion of the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 950.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 956.

¹⁷¹ *Id.* at 954.

¹⁷² *Id.*

¹⁷³ *Id.* at 958 (Posner, J., concurring).

¹⁷⁴ *Id.*

¹⁷⁵ See Shih, *supra* note 159.

mechanics of LGBT sex would not have been necessary or helpful.

As the earlier discussion of calls for discrimination against gay comic book heroes suggests, however, many people likely will oppose teaching school children that LGBT people and LGBT families exist and should be tolerated or respected even if those lessons do not contain a sexually explicit discussion of homosexuality.¹⁷⁶ Some will equate teaching tolerance with promoting the “homosexual agenda” or “homosexual lifestyle.” As one pastor in Helena, Montana expressed during the debate about educating youth on tolerance of the LGBT community, “the Bible says very clearly that homosexuality is wrong, and Christians do not want the schools to teach subjects that are repulsive to their values.”¹⁷⁷

Thus, if tolerance is the allowance of beliefs or behaviors with which one disagrees, many people do not favor tolerance when it comes to homosexuality. Unlike the unnecessary conflict over the classroom discussion of anal penetration, however, the disagreement between those who wish to teach school children tolerance of the LGBT community and those who wish to forbid any mention in the schools of the existence of the LGBT community may well be unavoidable: teaching school children that LGBT people and LGBT families exist and are deserving of tolerance is an effective counterweight to anti-LGBT discrimination in role model occupations that is intended to render LGBT role models invisible.

E. *Teaching LGBT History in Primary and Secondary Schools*

Merely acknowledging that LGBT people and LGBT families exist will not go far enough toward countering the dominant negative narrative that LGBT people are inferior in character and abilities. Therefore, the strategy to end the intentional exclusion of known LGBT people from role model occupations should include the teaching of LGBT history in primary and secondary schools. These lessons should emphasize the stories of LGBT role models and the qualities and values that such LGBT role models embody.

In July 2011, California became the first state in the nation to require

¹⁷⁶ See, e.g., Elon Green, *Lesléa Newman: So, What Was That Like?*, NEW YORKER (Apr. 24, 2014), <http://www.newyorker.com/culture/culture-desk/lesla-newman-so-what-was-that-like> [http://perma.cc/9GE6-3M2Y] (recounting the hostile reaction to Lesléa Newman’s children’s story—*Heather Has Two Mommies*—which tells the story of a child and her lesbian parents).

¹⁷⁷ Eckholm, *supra* note 160. For an argument against the idea that one cannot be a member of the gay and lesbian community or support their inclusion and legal rights and be Christian, see Tim Holbrook, *Why Being a Gay Christian Isn’t an Oxymoron*, TALKING POINTS MEMO (Oct. 4, 2013, 9:00 AM), <http://talkingpointsmemo.com/cafe/why-being-a-gay-christian-isn-t-an-oxymoron> [http://perma.cc/P96K-NT8P]. For an extensive discussion of the struggle faced by LGBT Christians for full acceptance, especially with respect to the ordination of openly gay clergy, within each of the five major progressive mainline or ecumenical Protestant denominations in the U.S., see R.W. HOLMEN, *QUEER CLERGY: A HISTORY OF GAY AND LESBIAN MINISTRY IN AMERICAN PROTESTANTISM* (2013).

that its public schools teach some LGBT history.¹⁷⁸ The “Fair, Accurate, Inclusive, and Respectful Education Act,” better known as SB 48, became effective in January 2012.¹⁷⁹ The statute requires that public schools include in their textbooks and their social sciences instruction a study of the contributions made by LGBT Americans to the economic, political, and social development of California and the United States.¹⁸⁰ California also requires that its public schools include in their textbooks and teach about the contributions made to the state and to the nation by a number of other groups, including men and women, African Americans, Asian Americans, European Americans, Mexican Americans, Native Americans, Pacific Islanders, and persons with disabilities.¹⁸¹ SB 48 also added a provision to California’s Education Code that prohibits school boards from adopting any textbook for use in public schools “that contain[s] any material reflecting adversely upon persons on the basis of . . . sexual orientation,” prohibits public school teachers from giving instruction that promotes a discriminatory bias on the basis of sexual orientation, and prohibits school districts from sponsoring any activity that promotes such a bias.¹⁸² The Education Code also prohibits public schools from adopting textbooks, giving instruction, or sponsoring activities that promote a discriminatory bias on such bases as disability, ethnicity, gender, nationality, race, or religion.¹⁸³

SB 48’s author and chief sponsor was then California state senator Mark Leno, who was the first openly gay man to serve in the California Senate and who previously was one of the first two openly gay men to serve in the California Assembly.¹⁸⁴ Senator Leno viewed the bill as a complement to anti-bullying legislation that was working its way through the California legislature at the same time as SB 48.¹⁸⁵ (That proposed anti-bullying legislation, known as “Seth’s Law,” was enacted in October 2011 and took effect in July 2012.¹⁸⁶) Senator Leno argued that teaching about

¹⁷⁸ Ian Lovett, *California to Require Gay History in Schools*, N.Y. TIMES, July 15, 2011, at A16.

¹⁷⁹ Fair, Accurate, Inclusive, and Respectful Education Act, 2011 Cal. Stat. 1914.

¹⁸⁰ CAL. EDUC. CODE §§ 51204.5, 60040 (West, Westlaw through Ch. 132 of 2015 Reg. Sess.).

¹⁸¹ *Id.*

¹⁸² CAL. EDUC. CODE §§ 51500, 51501 (West, Westlaw through Ch. 132 of 2015 Reg. Sess.).

¹⁸³ *Id.*

¹⁸⁴ Lovett, *supra* note 178; Shih, *supra* note 159.

¹⁸⁵ See Mathew S. Bajko, *CA Schools Already Teaching Gay History*, BAY AREA REP. (Apr. 21, 2011), <http://www.ebar.com/news/article.php?article=5645&sec=news> [<http://perma.cc/W73J-KHVMV>] (reporting that Leno “said he sees the bill as a companion measure to AB 9 introduced this year”); see also Andrea Koskey, *Bill to Mandate Teaching LGBT History in California Moves Closer to Classroom*, S.F. EXAMINER (July 6, 2011), <http://archives.sfexaminer.com/sanfrancisco/bill-to-mandate-teaching-lgbt-history-in-california-moves-closer-to-classroom/Content?oid=2177694> [<http://perma.cc/VJQ8-3TFC>]; Erin Sherbert, *Gay-History Lessons in State Schools Debated*, S.F. EXAMINER (Dec. 15, 2010), <http://archives.sfexaminer.com/sanfrancisco/gay-history-lessons-in-state-schools-debated/Content?oid=2166302> [<http://perma.cc/BV5N-JC8Z>].

¹⁸⁶ Safe Place to Learn Act, 2011 Cal. Stat. 5609.

the positive contributions of LGBT people would help students to view LGBT people as part of the fabric of society rather than as outsiders or misfits.¹⁸⁷ Thus, Senator Leno argued, the statute would promote self-esteem among LGBT youth and would encourage other students to treat their LGBT peers with dignity and respect.¹⁸⁸ Such changes in knowledge and attitudes, advocates predicted, would help to combat the bullying of LGBT public school students.¹⁸⁹

SB 48 engendered considerable controversy. Indeed, shortly after SB 48 became law, opponents launched several efforts to undo the law by ballot initiative. The proposed initiatives took various approaches. One approach would have amended California law to remove LGBT people from the list of groups whose contributions to California and the nation must be included in the social sciences curriculum.¹⁹⁰ Another approach would have ensured that parents could opt their children out from any school instruction that conflicted with the parents' moral convictions.¹⁹¹ Opponents of SB 48 failed, however, to gather the more than 500,000 signatures needed to qualify any of the several initiatives for a statewide ballot referendum.¹⁹²

Along with a raft of blatantly homophobic attacks,¹⁹³ opponents raised several more serious objections to SB 48. Several of the arguments raised against SB 48 echoed arguments made in support of policies to exclude from schools teachers known to be gay or lesbian. Some opponents reiterated the view, discussed above,¹⁹⁴ that one could not teach children about LGBT people (or LGBT history) without teaching children about LGBT sex.¹⁹⁵ A related and frequently voiced objection to any discussion in the public schools of LGBT history was that parents, and not teachers, should determine what their children learn about homosexuality or same-

¹⁸⁷ Jennifer Medina, *California May Require Teaching of Gay History*, N.Y. TIMES, Apr. 15 2011, at A15; Shih, *supra* note 159.

¹⁸⁸ Rex Wockner, *Leno Education Bill Heads to Governor*, BAY AREA REP. (July 16, 2011), <http://www.ebar.com/news/article.php?sec=news&article=5835> [<http://perma.cc/Y79M-W4W8>].

¹⁸⁹ Lovett, *supra* note 178; *see also* CIANCOTTO & CAHILL, *supra* note 38, at 92, 94 (“Students attending schools with inclusive curricula also reported . . . that there was less anti-LGBT bullying in their schools.”).

¹⁹⁰ Seth Hemmelgarn, *SB 48 Faces New Repeal Efforts*, BAY AREA REP. (Nov. 24, 2011), <http://ebar.com/news/article.php?sec=news&article=6234> [<http://perma.cc/5TDN-HPRN>].

¹⁹¹ *Id.*

¹⁹² Michelle Garcia, *Stop SB48 Organizers Fail in Second Attempt to Repeal LGBT Education Law*, ADVOCATE (July 17, 2012, 12:16 PM), <http://www.advocate.com/society/education/2012/07/17/stop-sb48-organizers-fail-second-attempt-repeal-lgbt-education-law> [<http://perma.cc/9RS6-58GC>].

¹⁹³ *See, e.g.*, Shih, *supra* note 159 (reporting the comments of an SB 48 opponent that the bill was part of a “gay political agenda to ‘queer’ the schools”).

¹⁹⁴ *See supra* Part III.D.

¹⁹⁵ Bajko, *supra* note 185.

sex relationships.¹⁹⁶ Opponents also argued that SB 48 amounted to an endorsement of the homosexual lifestyle and would indoctrinate children to accept homosexuality.¹⁹⁷ These arguments often were combined with arguments that a same-sex relationship “is not a Godly relationship” and, thus, teaching about the contributions of gay people to society would conflict with the religious beliefs of many parents.¹⁹⁸ Critics also objected to the anti-discrimination component of SB 48 as censorship in that it prevents schools from presenting gay people in a negative light.¹⁹⁹

Finally, some opponents also argued that SB 48 was misguided, in that a person’s sexual orientation is not relevant to his contributions to society or his place in history.²⁰⁰ As one education analyst with Focus on the Family, a Colorado-based Christian ministry, argued, “Ben Franklin is in the history books because he discovered electricity and not because of his sexual choices.”²⁰¹ The argument is ironic in that the systematic effort to exclude known gay people from elementary and secondary schools, as historical figures and as teachers, has been grounded in the belief that a person’s known homosexuality is highly relevant to a person’s suitability to serve as a role model.²⁰²

The argument also betrays a seeming ignorance of several important points. First, some people are important in history precisely because of

¹⁹⁶ Medina, *supra* note 187; *see also* Shih, *supra* note 159 (reporting the comments of parents asserting that they should have control over whether their children receive lessons depicting same-sex families).

¹⁹⁷ Judy Lin, *LGBT Studies on the Books*, S.F. EXAMINER, July 15, 2011, at 10; Seth Hemmelgarn, *EQCA: “No Illusion” on Stop SB 48*, BAY AREA REP. (Sept. 1, 2011), <http://ebar.com/news/article.php?sec=news&article=6005> [<http://perma.cc/8G7N-DUHG>] (quoting a video urging repeal of SB 48 as warning that “impressionable children as young as 5 would be indoctrinated into these lifestyles”); Sherbert, *supra* note 185 (quoting the president of a conservative legal defense group as stating, “[t]his bill is no doubt an attempt to convert history into an opportunity for teachers and liberal educators to promote acceptance of the homosexual lifestyle”); *see also The Problem Facing California Public School Parents*, RESCUEYOURCHILD.COM, http://rescueyourchild.com/The_Problem.html [<http://perma.cc/DF3M-VNXY>] (last visited Aug. 15, 2015) (arguing that as a result of SB 48, “[c]hildren as young as 6 years old will be taught to admire homosexuality, same-sex marriages, bisexuality, and transsexuality”).

¹⁹⁸ Hemmelgarn, *supra* note 190.

¹⁹⁹ Lovett, *supra* note 178 (quoting Republican state assemblyman Tim Donnelly); Medina, *supra* note 187.

²⁰⁰ Sherbert, *supra* note 185.

²⁰¹ *Id.*

²⁰² *See, e.g.,* John V. Briggs, *Deviants Threaten the American Family*, L.A. TIMES, Oct. 23, 1977, at VII-5 (containing a California state senator’s argument that “[a] teacher who is a known homosexual will automatically represent that way of life to young, impressionable students at a time when they are struggling with their own critical choice of sexual orientation” and “[w]hen children are constantly exposed to such homosexual role models, they may well be inclined to experiment with a life-style that could lead to disaster for themselves and, ultimately, for society as a whole”); Michael Paulson, *Gay Marriages Confront Catholic School Rules*, N.Y. TIMES, Jan. 23, 2014, at A1 (describing several instances between February 2012 and December 2013 where a Catholic school terminated the employment of a teacher after the teacher’s same-sex relationship became publicly known).

their minority sexual orientation or gender identity and the choice that they made to fight discrimination on the basis of that sexual orientation or gender identity. Just as it makes sense to study Rosa Parks in studying the black civil rights movement, it makes sense to study Frank Kameny in studying the gay civil rights movement.²⁰³ And just as it would make no sense to speak of Rosa Parks as a woman who insisted on sitting in the front of the bus without mentioning why that insistence caused conflict and resulted in progress,²⁰⁴ it would make no sense to speak of Frank Kameny as someone who was fired from his job as an astronomer with the U.S. Army Map Service without speaking of why he was fired and how his choice to fight against that termination and against sexual orientation discrimination more generally led to changes in how society views and treats gay people.²⁰⁵

For other gay and transgender historical figures, the relationship between their contributions to society and their sexuality or gender identity is subtler. An artist whose work is a reflection of his life experiences would be one example. Thus, one might come to understand a certain poet's poems differently if one accepts that the poet's most important emotional attachments were to persons of the same sex. One's appreciation of the

²⁰³ Some have suggested that Kameny was to the gay civil rights movement what Rosa Parks was to the black civil rights movement. David W. Dunlap, *Franklin Kameny, Gay Rights Leader, Dies at 86*, N.Y. TIMES, Oct. 13, 2011, at B19. In fact, he was both the movement's Rosa Parks and its Thurgood Marshall. See DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 212–13 (2004) (describing Kameny's behind-the-scenes efforts to orchestrate the bringing of gay rights litigation and reporting comments that Kameny was the “father” and the “grandfather” of the gay civil rights movement).

²⁰⁴ See *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956) (holding that state and local statutes and ordinances requiring racial segregation of Montgomery, Alabama buses violated the Fourteenth Amendment's Due Process and Equal Protection Clauses).

²⁰⁵ See Koskey, *supra* note 185 (quoting Senator Leno as arguing, “[i]t is no different than instructing students about the historical role of an African-American man by the name of Dr. Martin Luther King Jr., fighting for his civil rights and being assassinated for his efforts than teaching students about a gay American man by the name of Harvey Milk fighting for every man's civil rights and being assassinated for his efforts”).

Kameny was an astronomer who, in 1957, lost his civilian job with the U.S. Army Map Service under the Civil Service Commission's policy excluding homosexuals. Franklin E. Kameny, *Government v. Gays: Two Sad Stories with Two Happy Endings*, *Civil Service Employment and Security Clearances*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 188, 191 (John D'Emilio et al. eds., 2000). He challenged his dismissal in administrative proceedings; by means of a letter-writing campaign to President Eisenhower, members of Congress, and the Chairman of the Civil Service Commission; and in the courts. *Id.* at 191; JOHNSON, *supra* note 203, at 53, 180. Kameny ultimately lost his court challenge. See *Kameny v. Brucker*, 365 U.S. 843 (1961). The United States Court of Appeals for the District of Columbia Circuit opinion rejecting Kameny's request for reinstatement is notable for its failure to mention why he was fired. The court made no mention of homosexuality in its opinion but concluded rather obliquely that “[w]e are satisfied that . . . valid regulations of the Civil Service Commission authorized [Kameny's] separation from the service.” *Kameny v. Brucker*, 282 F.2d 823, 824 (D.C. Cir. 1960). Kameny went on to become one of the towering figures of the gay civil rights movement.

poet's work might again evolve if one were to explore the possibility that he was sexually attracted to, and perhaps sexually involved with, persons of the same sex.

Even when a person's contributions to society or his place in history have nothing to do with his sexual orientation or gender identity, it is meaningful to teach that the person who made those contributions or earned that place in history is or was a gay or transgender person. For a student who has been told by large segments of society and perhaps also by his church, his peers, and even his family that he is less than equal because he is a gay or transgender person, it may be tremendously affirming to learn of other gay or transgender people who have achieved great things or made significant contributions to society. Moreover, as Senator Leno argued, for the LGBT student's straight peers, such an LGBT role model teaches a lesson about the worth of all human beings and in particular about the worth of the LGBT youth they otherwise might have been inclined to bully.²⁰⁶

Finally, it is true that generally teachers do not consider the sexuality of heterosexual historical figures or role models such as Ben Franklin when discussing their contributions to society. It is also true, however, that there is no need to do so. The presumption is that any given historical figure is heterosexual until he is identified as not. Thus, gay and lesbian historical figures and role models will become closeted and presumed straight unless their sexuality is discussed. Consequently, unless their sexuality is discussed, their homosexuality will be erased from history.

Also in danger of being erased from history is the record of official and private discrimination against LGBT people. To take one example, school children throughout the United States commonly are taught about McCarthyism and the federal government's effort to identify and purge communists from federal government employment in the early days of the Cold War. Relatively few of those children, however, will ever hear about the simultaneous efforts of the Senate subcommittee charged by the Senate with investigating and reporting back to the Senate on "the alleged employment by the departments and agencies of the Government of homosexuals and other moral perverts" as well as the government's preparedness "for the protection of life and property against the threat to security inherent in the employment of such perverts" by the federal government,²⁰⁷ or of the recommendations of that subcommittee that gay

²⁰⁶ See KOSCIW ET AL., *supra* note 47, at 48, 60–62 (discussing findings that inclusion of LGBT-related information in the curriculum correlates with a less hostile school climate, less absenteeism due to feeling unsafe, higher levels of school belonging for LGBT students, and higher rates of student intervention in homophobic remarks).

²⁰⁷ See S. Res. 280, 81st Cong. (1950).

people be barred from any federal government employment,²⁰⁸ or of the resulting witch hunts of gay people that followed.²⁰⁹ This is so even though far more federal government employees were purged during the McCarthy era because of their homosexuality than because of their communist affiliation.²¹⁰

Thus, in addition to teaching about the contributions that LGBT role models have made to society, as California law now requires, school curricula should go further and teach about the ways in which societies across time and place have discriminated against LGBT people. Such lessons give context to the contemporary arguments that seek to closet LGBT people from the public's awareness. In 1950, the Senate subcommittee that recommended the official exclusion of gay people from all federal government employment justified that recommendation in part by arguing that "[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices [and t]his is particularly true in the case of young and impressionable people who might come under the influence of a pervert."²¹¹ This warning sounds a great deal like the warning that OneMillionMoms.com issued in 2012 that homosexuals "want to indoctrinate impressionable young minds" through exposure to gay comic book heroes.²¹² Thus, it would be a mistake to interpret the provision of California's SB 48 prohibiting instruction that promotes a discriminatory bias on the basis of sexual orientation as prohibiting an open and honest discussion of the many ways that law and society have traditionally disadvantaged LGBT people and, indeed, continue to disadvantage LGBT people.

IV. CONCLUSION

Teaching tolerance of LGBT people and families as well as teaching LGBT history in primary and secondary schools, including teaching about the contributions of LGBT role models and the discrimination that they have experienced and overcome, will lead to greater awareness among youth of the positive qualities and values of LGBT people. Thus, these lessons should raise self-esteem in LGBT youth as well as tolerance of LGBT people by their straight peers. In promoting such self-esteem and tolerance, these lessons will make it easier for those LGBT youth who choose to do so to come out as gay or transgender. Similarly, anti-bullying

²⁰⁸ See S. DOC. NO. 81-241, at 3 (1950).

²⁰⁹ See generally JOHNSON, *supra* note 203.

²¹⁰ See *id.* at 3, 76; see also ESKRIDGE, *supra* note 31, at 75 ("The paranoid domestic politics of the 1950s ultimately expended more resources in its anti-homosexual witch hunts than in its anti-Communist ones . . .").

²¹¹ S. DOC. NO. 81-241, at 4 (1950).

²¹² See OneMillionMoms Gay Superhero Alert, *supra* note 9.

programs and bans on sexual orientation discrimination and gender identity discrimination in employment will make it easier for LGBT youth and adults to come out as gay or transgender not only because the programs and bans proscribe actions that intimidate LGBT people, but also because they send a message that LGBT people are valued.

Facilitating the coming out process is critical to combating attempts to exclude known LGBT people from role model occupations. Those exclusionary efforts, at their core, aim to make LGBT people invisible, particularly where LGBT people might be seen in a positive light. Thus, the ultimate goal of any strategy to undermine such efforts must be to have LGBT people come out as gay or transgender visibly in their communities. While the government, school, and employer initiatives discussed above should be made to protect those who come out, ultimately progress toward ending the exclusion of known LGBT people from role model occupations will always depend upon LGBT people taking personal and professional risks by coming out.

Thus, a final and critical component of any strategy to combat the efforts to exclude known LGBT people from role model occupations should include specific efforts to encourage LGBT people out of their professional closets. Such encouragement need not rely on any government legislation or program. Rather, such encouragement can be undertaken at the individual and firm level. Individual efforts might be as simple as coming out professionally oneself if one is in a relatively secure set of circumstances to do so, or mentoring and taking a special interest in protecting the careers of LGBT people who make the decision to be visible as LGBT role models.

