

ARTICLES

The New Sexual Deviancy

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An unprecedented wave of legislation targeting LGBTQ+ communities has swept across the country in recent years. The scope of this legislation is vast, targeting LGBTQ+ people in key areas such as education, healthcare, public accommodations, civil rights, free speech, and child welfare. Dozens of recent anti-LGBTQ+ bills have become actual law, and the ones that have not still stigmatize LGBTQ+ communities. Many of these laws are being challenged in state and federal courts, and in the 2024–25 term, the U.S. Supreme Court will intervene in this space by deciding whether states can ban access to gender-affirming care for minors.

This Article argues that severe polarization in U.S. society and the erosion of U.S. democratic institutions and norms have fueled conditions in recent years for opponents of LGBTQ+ rights to weaponize moral panics about LGBTQ+ people as a means of executing right-wing populist and Christian nationalist agendas that subjugate LGBTQ+ people in law, politics, and society. The main contribution of this Article demonstrates how a complex web of antiquated sexual deviance concepts from different intellectual traditions is providing the backbone for new legislation targeting LGBTQ+ communities and legal strategies to defend this legislation nationwide—a phenomenon that I label in this Article as “the new sexual deviancy.” This new anti-LGBTQ+ legal agenda breathes life into discredited sexual deviance concepts and harnesses institutional power in the criminal legal system, medicine, and other major societal institutions (for instance, families and schools) to subjugate LGBTQ+ people and suppress LGBTQ+ ideas in society. As discussed, these sexual deviance concepts are grounded in dated sociological and psychological theories of deviance and propagate harmful stereotypes of LGBTQ+ people as deviants, sinners, mentally ill, sexual predators, and dangers to children.

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This Article contends that it is crucial to understand the new sexual deviancy as moral panic and a vehicle for enduring anxieties about sexual deviance in society. As argued, the new sexual deviancy pushes us back to a time when sexual deviance concepts rationalized and justified LGBTQ+ people’s subordinate status under the law. This Article identifies several major categories of harm that the new sexual deviancy poses for LGBTQ+ communities today, including encouraging anti-LGBTQ+ societal discrimination, harassment, and violence; worsening LGBTQ+ mental health outcomes and disparities; and undermining LGBTQ+ social visibility in society. These harms are especially devastating for transgender people and LGBTQ+ youth who are already highly vulnerable and are being targeted most under the new sexual deviancy. The new sexual deviancy also poses broader harms to society as a whole by threatening core liberal democratic values of pluralism and peaceful coexistence.

Although challenging the new sexual deviancy will be difficult, this Article concludes by prompting some meaningful questions for LGBTQ+ social movements and charting some potentially promising avenues of reform. Those strategies include coalition building, litigation, protest and community organizing, and voting.

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INTRODUCTION

An unprecedented wave of legislation targeting LGBTQ+ communities has swept across the nation in recent years. In 2023 alone, the American Civil Liberties Union tracked 510 anti-LGBTQ+ bills that were introduced in state legislatures.¹ 2024 easily surpassed this number.² Much of this legislation specifically targets transgender people and LGBTQ+ youth.³ The scope of this legislation is vast, targeting LGBTQ+ communities in key areas that include education, healthcare, child welfare, public accommodations, civil rights, and free speech.⁴

1. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> (Dec. 21, 2023) [hereinafter ACLU, *Legislative Attacks in 2023*].

2. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> (Sept. 5, 2024) [hereinafter ACLU, *Legislative Attacks in 2024*].

3. See *infra* Part II.

4. See *infra* Part II.

Dozens of these recent bills have become actual law and are currently being challenged in state and federal courts.⁵ In the 2024–25 term, the U.S. Supreme Court will intervene in this space by deciding whether states can ban access to gender-affirming care for minors.⁶ Although many bills targeting LGBTQ+ people have failed, their introduction and advancement still target and stigmatize LGBTQ+ communities.⁷

This wave is not an accident. Rather, it is part of a broader pattern of growing anti-LGBTQ+ hostility and rhetoric that has infiltrated law, politics, and society. This wave comes with the rise of a new 6–3 conservative supermajority on the U.S. Supreme Court, which is deciding cases more aggressively in favor of religious litigants and expanding religious protections over competing LGBTQ+ equality interests.⁸ It also comes in the aftermath of great progress for LGBTQ+ rights and visibility in the United States. The 2000s and early 2010s paved the way for marriage equality nationwide and brought dramatic growth in anti-discrimination protections for LGBTQ+ people, legal recognition of LGBTQ+ families and relationships, and societal acceptance of LGBTQ+ people, families, and communities.⁹

One way to conceptualize this recent wave of anti-LGBTQ+ legislation is in terms of backlash to greater acceptance and visibility of LGBTQ+ communities in politics, law, and society.¹⁰ This perspective is consistent with previous backlash that LGBTQ+ communities have endured when achieving similar progress in the past. It also aligns with a broader literature that discusses how backlash politics and jurisprudence have emerged as a response to the gains of different marginalized social groups at various points in time, including women, people of color, and sexual and gender minorities.

5. See *infra* Section VI.C.

6. *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023), *cert. granted*, 144 S. Ct. 2679 (2024) (No. 23-477).

7. *Human Rights Campaign Foundation State Equality Index: 91% of Anti-LGBTQ+ Bills in 2022 Failed to Become Law*, HUM. RTS. CAMPAIGN (Jan. 26, 2023), <https://www.hrc.org/press-releases/human-rights-campaign-foundation-state-equality-index-91-of-anti-lgbtq-bills-in-2022-failed-to-become-law> [<https://perma.cc/25VB-8ZKE>] (stressing that “[w]e know the mere introduction and discussion of these bills further fuels anti-LGBTQ+ stigma nationwide”) (quoting Fran Hutchins, Executive Director of the Equality Federation Institute); ALCU, *Legislative Attacks in 2024*, *supra* note 2 (noting when mapping the 530 anti-LGBTQ+ bills introduced in state legislatures in 2024 that “[w]hile not all of these bills will become law, they all cause harm for LGBTQ people”).

8. See Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 328; see also, e.g., 303 Creative LLC v. Elenis, 600 U.S. 570, 602–03 (2023) (striking down statute forcing religious person to make wedding websites for LGBT+ couples).

9. See generally MOVEMENT ADVANCEMENT PROJECT, *THE MOMENTUM REPORT – 2009 EDITION* (2009), <https://www.lgbtmap.org/file/momentum-report-2009.pdf> [<https://perma.cc/5JSE-CU7Z>] (outlining social and legal progress for LGBTQ+ communities through 2009); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (recognizing a constitutional right for same-sex couples to marry).

10. For an excellent analysis of how many new laws targeting transgender communities are expressions of anti-trans animus, see generally Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024).

Although I agree that there are backlash elements in this recent wave of anti-LGBTQ+ legislation that has swept across the country, this Article illuminates how this wave entails much more than simple backlash against LGBTQ+ progress. Rather, these attacks connect to distinctive problems involving the weakening state of U.S. democracy—problems that have come to a head in the past decade.¹¹ As this Article argues, severe polarization and the erosion of U.S. democratic institutions and norms have fueled conditions in recent years for opponents of LGBTQ+ rights to weaponize moral panics as a means of executing right-wing populist and Christian nationalist agendas that subjugate LGBTQ+ people in law, politics, and society. Understanding the relationship between the recent wave of anti-LGBTQ+ legislation and the erosion of U.S. democratic institutions and norms offers a fuller account of the distinctive nature of recent law and policy attacks against LGBTQ+ communities and what strategies could hold promise to address them moving forward.

The main contribution of this Article is to excavate and illuminate how a complex web of antiquated sexual deviance concepts from different intellectual traditions is providing the backbone for new legislation targeting LGBTQ+ communities and legal strategies to defend this legislation nationwide—a phenomenon that I label in this Article as “the new sexual deviancy.”¹² As explained, this new anti-LGBTQ+ legal agenda breathes life into discredited sexual deviance concepts as a means of harnessing institutional power in the criminal legal system, medicine, and other important societal institutions (for instance, families and schools) with the goals of subjugating LGBTQ+ people and suppressing LGBTQ+ ideas in society.¹³ Sexual deviancy concepts define heterosexuality and being cisgender as the norm and demonize LGBTQ+ people as existential threats to those norms by propagating false stereotypes of LGBTQ+ people as “deviants,” sinners, mentally ill, sexual predators, and dangers to children.¹⁴

In the new sexual deviancy, peaceful coexistence through political and legal compromise, such as tolerating limited religious exemptions in antidiscrimination regimes, is no longer a desirable option for opponents of LGBTQ+ rights. Rather, zero-sum thinking¹⁵ is animating many opponents to push discredited sexual deviance concepts in contradictory ways in both legislatures and courts so that those exemptions become the norm. For instance, opponents of LGBTQ+ rights are stressing the importance of protecting medical professionals’ decisions about providing care in the context of “medical conscience” laws.¹⁶ At the same

11. See *infra* Section I.A.

12. See *infra* Part III.

13. See *infra* Part III.

14. See *infra* Part III.

15. See Kostas Papaioannou et al., *Unravelling the Relationship Between Populism and Belief in Conspiracy Theories: The Role of Cynicism, Powerlessness, and Zero-Sum Thinking*, 114 BRIT. J. PSYCH. 159, 161 (2023) (noting that zero-sum thinking is a “belief system . . . based on the implicit assumption that a finite amount of goods exists in the world, in which one person’s winning makes others the losers”).

16. See *infra* Section II.F.

time, these opponents are discounting medical professionals' judgments and rejecting the positions of leading medical associations in pushing for laws banning gender-affirming care for minors.¹⁷ Similarly, opponents of LGBTQ+ rights are emphasizing the importance of protecting parental choices and parental involvement in children's lives when advocating for laws that censor LGBTQ+ issues from school curricula and require or encourage the outing of transgender and gender-diverse students to parents.¹⁸ At the same time, these opponents are calling for limits on parental rights and rejecting parental choices to affirm transgender children's identities when pushing for laws banning gender-affirming care for minors.¹⁹

Accordingly, this Article argues that it is crucial to understand the new sexual deviancy as moral panic and a vehicle for enduring anxieties about sexual deviance in our severely fractured liberal democratic society.²⁰ The analysis looks to both political science theory on democratic decline in the United States and "moral panic" theories in sociological studies of deviance to substantiate this point.²¹ Moral panic theories are particularly instructive for the analysis because they help to make sense of the dynamics and trajectories in moral panics and how state actors (for instance, lawmakers, government attorneys, and judges) have key roles in creating and enforcing societal norms about "deviance."²² From this perspective, apparent contradictions in how opponents of LGBTQ+ rights are deploying sexual deviance concepts in the new sexual deviancy to enact and justify new anti-LGBTQ+ laws and policies are not contradictions at all. Rather, they are part of very coherent zero-sum right-wing populist and Christian nationalist movement strategies that harness power in the criminal legal system, medicine, and other major societal institutions (for instance, families and schools). These strategies have dual goals of reinforcing traditional norms of sex, sexuality, and gender in society that align with right-wing populist and Christian nationalist worldviews and punish LGBTQ+ people, expression, and ideas that are defined as existential threats to those worldviews.²³

History underscores why it is crucial to take moral panics against LGBTQ+ communities seriously, even when the ideas animating those moral panics are disconnected from empirical reality.²⁴ As this Article explains, the new sexual deviancy pushes us back to a time when sexual deviance concepts were considered valid rationalizations and justifications for subordinating LGBTQ+ people under the law.²⁵ Opponents of LGBTQ+ rights in the past used very similar legal strategies grounded in sexual deviance concepts to rationalize and justify legislation

17. See *infra* Section III.A.3.

18. See *infra* Section III.A.2.

19. See *infra* Section III.A.2.

20. See *infra* Part I.

21. See *infra* Part I.

22. See *infra* Section I.B.

23. See *infra* Section I.B and Part III.

24. See *infra* Part IV.

25. See *infra* Part IV.

targeting LGBTQ+ communities at different previous points in time. Key examples that are discussed in this Article include criminal sodomy laws; “sexual psychopath” laws; bans on lesbian, gay, and ally educators; and same-sex marriage bans.²⁶

This Article identifies and examines several major categories of harms that the new sexual deviancy poses for LGBTQ+ communities and society as a whole.²⁷ The specific harms to LGBTQ+ communities include encouraging anti-LGBTQ+ societal discrimination, harassment and violence, worsening LGBTQ+ mental health outcomes and disparities, and undermining LGBTQ+ social visibility in society.²⁸ Transgender people and LGBTQ+ youth—groups that are already highly vulnerable and being targeted most in the new sexual deviancy—are at special risk for these harms.²⁹ The new sexual deviancy, however, also poses broader harms to society as a whole by further threatening the health of liberal democracy in the United States.³⁰ As discussed, the weaponization of moral panics about LGBTQ+ people and zero-sum right-wing populist and Christian nationalist movement strategies threaten core liberal democratic values of pluralism and peaceful coexistence by denigrating the humanity of LGBTQ+ people as fellow citizens, and seeking to eliminate their very existence in public life.³¹

Although challenging the new sexual deviancy will be difficult, this Article concludes by prompting some meaningful questions for LGBTQ+ social movements and charting some potentially promising avenues of reform. The new sexual deviancy poses a dilemma with fundamental value choices for how LGBTQ+ movements and advocates engage with opponents of LGBTQ+ rights in our highly fragmented and severely polarized democratic society.³² At the heart of this choice is whether LGBTQ+ movements and LGBTQ+ rights advocates adopt strategies that also rely on zero-sum thinking or not. Put another way, does the struggle for LGBTQ+ progress boil down to a battle of radically different worldviews with a clear winner and a clear loser? Or, do LGBTQ+ movements and advocates seek solutions that forge paths to peacefully coexist with people who share radically different, and potentially disagreeable, views towards LGBTQ+ people and ideas?

Beyond these fundamental value choices, various reform strategies that include coalition building, litigation, protest and community organizing, and voting could challenge antiquated sexual deviance concepts that are being revived in the new sexual deviancy today.³³ These strategies are already having some success (although mixed), and they helped to pave the way for LGBTQ+ gains in the past. For instance, prior to the mid-2010s, legislatures and courts at the federal

26. See *infra* Part IV.

27. See *infra* Part V.

28. See *infra* Part V.

29. See *infra* Part V.

30. See *infra* Part V.

31. See *infra* Part V.

32. See *infra* Section VI.A.

33. See *infra* Part VI.

and state levels renounced these exact types of arguments grounded in outdated sexual deviance concepts when invalidating laws criminalizing consensual sodomy and same-sex marriage bans.³⁴ Of course, circumstances are very different today with our severely fractured and polarized political landscape, a wave of new federal judges appointed during the first Trump Administration with demonstrated histories of anti-LGBTQ+ hostility,³⁵ and a new conservative supermajority on the U.S. Supreme Court that has already decided cases that prioritize religious liberty claims over LGBTQ+ equality interests.³⁶ Nevertheless, these strategies could still hold promise to move the needle in the direction of LGBTQ+ progress.

This Article proceeds as follows. Part I sketches an overarching theoretical framework for understanding the new sexual deviancy. It draws on two bodies of theoretical literature: (1) scholarly perspectives in political science on the decline of democracy and (2) “moral panic” theory in sociological studies of deviance. Part II defines the new sexual deviancy and its scope by briefly summarizing several major areas of recently enacted state legislation targeting LGBTQ+ communities.

Part III traces the intellectual underpinnings of the new sexual deviancy. The analysis illuminates how lawmakers and state’s attorneys are invoking discredited sexual deviance concepts with roots in sociological and psychological theories of deviance to justify and defend legislation targeting LGBTQ+ communities in both legislatures and courts. Part IV historically contextualizes the new sexual deviancy by connecting it to the long history in the United States of reliance on sexual deviance concepts in law as a means of galvanizing institutional power in the criminal legal system, medicine, and other vital social institutions (for instance, families and schools) to subordinate LGBTQ+ people and suppress LGBTQ+ ideas in society.

Part V identifies and examines the multifaceted harms of the new sexual deviancy for LGBTQ+ communities and society as a whole. These harms include encouraging anti-LGBTQ+ societal discrimination, harassment and violence; worsening LGBTQ+ mental health outcomes and disparities; undermining LGBTQ+ social visibility; and weakening the health of U.S. liberal democracy by undermining pluralism and peaceful coexistence. Finally, Part VI concludes by briefly discussing potential strategies for reform, including coalition building, litigation, protest and community organizing, and voting.

34. See *infra* Sections IV.A, D.

35. See generally LAMBDA LEGAL, COURTS, CONFIRMATIONS, AND CONSEQUENCES: HOW TRUMP RESTRUCTURED THE FEDERAL JUDICIARY AND USHERED IN A CLIMATE OF UNPRECEDENTED HOSTILITY TOWARD LGBTQ+ PEOPLE AND CIVIL RIGHTS (2021), https://legacy.lambdalegal.org/sites/default/files/judicial_report_2020.pdf [<https://perma.cc/64B3-2ALZ>] (outlining how the Trump Administration reshaped lower federal courts to stack them with judges with histories of anti-LGBTQ+ hostility).

36. See Epstein & Posner, *supra* note 8, at 328; see also, e.g., 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

I. THEORETICAL FRAMEWORK

This Part briefly sketches an overarching framework for understanding the new sexual deviancy as a collision between the erosion of U.S. democratic institutions and norms and the weaponization of new “moral panics” about LGBTQ+ people in U.S. society. Section A briefly discusses scholarly perspectives on the decline of U.S. democracy and focuses in particular on political science literature on increasing polarization and the growth of religious populism in the United States. This discussion provides important context for how the recent surge in anti-LGBTQ+ rhetoric and legislation is intertwined with wider dynamics in U.S. democratic politics and culture. Section B then turns to “moral panic” theory in sociological studies of deviance. Moral panic theories help to illuminate how the new sexual deviancy is, at its core, grounded in fears and anxieties in our highly fragmented society about deviance from traditional societal norms of sex, sexuality, and gender.

A. DEMOCRATIC DECLINE IN THE UNITED STATES

Scholars have argued that liberal democracy in the United States has been in decline for at least two decades, with the most serious challenges occurring in the past ten years.³⁷ Although many factors are at work, political scientists have underscored severe polarization as a key factor driving erosion of U.S. democratic institutions and norms.³⁸ Some leading political scientists contend that this polarization is not simply a matter of differences in political party affiliation.³⁹ Rather, it is grounded in deeper divisions and anxieties about racial and cultural identity in the United States.⁴⁰

As scholars have described, severe polarization that is undermining U.S. democracy today has been a gradual process. It dates back to at least the Civil Rights Movement of the 1960s, when backlash to the Civil Rights Act of 1964 and Voting Rights Act of 1965 motivated increasing numbers of socially-conservative Democratic voters in the South to move to the Republican Party.⁴¹ This party migration continued over the next few decades between the 1960s and 1990s, leading the South to switch from being a Democratic stronghold until the 1960s to the Republican stronghold that it is today.⁴²

Some leading political scientists have stressed that the base of the Republican party has not simply become more socially and politically conservative in the past few decades. Rather, it has also attracted predominantly white, evangelical,

37. See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 149–67 (2018).

38. See, e.g., William G. Howell & Terry M. Moe, *America's Crisis of Democracy*, 136 POL. SCI. Q. 105, 116 (2021) (noting the breaking down of democratic norms “[w]ith polarization between Democrats and Republicans rising”); LEVITSKY & ZIBLATT, *supra* note 37, at 9 (noting that “[t]he weakening of our democratic norms is rooted in extreme partisan polarization”).

39. See, e.g., LEVITSKY & ZIBLATT, *supra* note 37, at 9, 170.

40. *Id.*

41. WILLIAM G. HOWELL & TERRY M. MOE, *PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY* 47 (2020).

42. *Id.*

and increasingly extremist segments of the U.S. population who are angry about racial and cultural changes in U.S. society and fearful of losing their culture, values, and traditions.⁴³ One major factor shaping this mounting hostility and anxiety is backlash against perceptions that people of color, women, and other marginalized groups have gained more rights, opportunities, and power.⁴⁴ Growing economic inequality and increasing concentrations of wealth throughout the 2000s and 2010s only exacerbated these racial and cultural fears, especially within small towns and rural regions experiencing economic decline and whose residents (often disproportionately white) felt “left behind.”⁴⁵

Political scientists Steven Levitsky and Daniel Ziblatt offer one account of how severe polarization along racial and cultural lines has eroded U.S. democratic institutions and norms. Specifically, they describe how two “soft guardrails” that preserved U.S. democratic order throughout the twentieth century have weakened and are currently in jeopardy.⁴⁶ The first is “mutual toleration,” or the norm that as long as partisan rivals “play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern.”⁴⁷ The second is “institutional forbearance,” or the norm in which political actors exercise deliberate self-restraint and avoid actions that “while respecting the letter of the law, obviously violate its spirit.”⁴⁸ Levitsky and Ziblatt contend that these two guardrails of democracy are related in that “[t]he erosion of mutual toleration may motivate politicians to deploy their institutional powers as broadly as they can get away with.”⁴⁹ Such conditions “reinforc[e] beliefs that our rivals pose a dangerous threat”⁵⁰ and enable politicians to “try to win at all costs.”⁵¹

In this environment, conditions are ripe for populism to shape and erode U.S. democratic politics. For instance, political scientists William Howell and Terry Moe argue that “the essence of populism is a rhetorical framing of democratic politics as an apocalyptic battle of ‘the people’ against ‘the system.’”⁵² In discussing the rise of populism in the U.S. Republican Party, Howell and Moe describe that “the people” consist of “an angry segment of the population” that anoints a populist leader as “the embodiment of the nation’s heritage and identity (e.g., white Christians).”⁵³ Howell and Moe further argue that after being anointed with

43. See Paul Starr, *The Anti-Entrenchment Agenda*, AM. PROSPECT (June 26, 2019), <https://prospect.org/justice/anti-entrenchment-agenda> [https://perma.cc/5C38-Y6JG]; HOWELL & MOE, *supra* note 41, at 46.

44. See Starr, *supra* note 43; HOWELL & MOE, *supra* note 41, at 46.

45. Suzanne Mettler & Trevor Brown, *The Growing Rural-Urban Political Divide and Democratic Vulnerability*, 699 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 134–35 (2022).

46. LEVITSKY & ZIBLATT, *supra* note 37, at 101–11 (discussing two soft guardrails of democracy); *id.* at 146 (discussing how “our soft guardrails have weakened” in the United States).

47. *Id.* at 102.

48. *Id.* at 106.

49. *Id.* at 112.

50. *Id.*

51. *Id.* at 115.

52. Howell & Moe, *supra* note 38, at 112.

53. *Id.*

such power, populist leaders generate mass support through “demonizing the ‘other’ (here in the United States: nonwhites, non-Christians, immigrants)” and strategies that “foment fear, insecurity, outrage, and anger.”⁵⁴ As the next Section will discuss, weaponizing new moral panics about LGBTQ+ people aligns with these populist strategies.

Public survey research lends support to the idea that Christian nationalism in particular is growing in the United States and that increased partisanship is closely linked to views about Christian nationalism. For instance, data from the Public Religion Research Institute’s 2023 American Values Survey found that three in every ten U.S. residents qualify as Christian nationalist adherents (10%) or sympathizers (20%).⁵⁵ The survey further revealed that a majority of Republicans (55%) qualify as Christian nationalists, with 21% qualifying as adherents and 34% as sympathizers.⁵⁶ Republicans were more than twice as likely as independents (25%) and three times as likely as Democrats (16%) to hold Christian nationalist views.⁵⁷ In terms of geography, the data further revealed that states with the highest levels of support for Christian nationalism were in the upper Midwest, the deep South, and the Appalachian Mountains.⁵⁸ Importantly, many of these states are leading the push to enact anti-LGBTQ+ laws in the new sexual deviancy.⁵⁹

Consistent with this regional analysis, considering democratic decline at the U.S. state level is of particular importance for the purposes of this Article because the following discussion of the new sexual deviancy focuses on recently enacted anti-LGBTQ+ state legislation. Although more empirical research is needed, in one recent study, political scientist Jacob Grumbach created a comprehensive measure of “electoral democracy” in U.S. states between 2000 and 2018.⁶⁰ The study found that Republican control of state governments reduced democratic performance in those states.⁶¹ Gerrymandering and electoral policy changes that created barriers to voting following GOP gains in state legislatures and governorships during the 2010 elections accounted for much of that finding.⁶²

To be clear, I am not drawing on political science literature to argue that all individuals who affiliate with the Republican Party or voted Republican in recent elections—especially in states that have contributed to the recent and unprecedented wave of anti-LGBTQ+ legislation—are Christian nationalists, right-wing

54. *Id.* at 113.

55. PUBLIC RELIGION RESEARCH INSTITUTE (PRRI), SUPPORT FOR CHRISTIAN NATIONALISM IN ALL 50 STATES: FINDINGS FROM PRRI’S 2023 AMERICAN VALUES ATLAS 6 (2024), <https://www.prri.org/wp-content/uploads/2024/02/PRRI-Feb-2024-Christian-Nationalism.pdf> [<https://perma.cc/69W5-QJND>].

56. *Id.* at 14.

57. *Id.*

58. *Id.* at 8.

59. *See infra* Part II.

60. Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967 (2023). Grumbach defined “electoral democracy” as “whether a political system has elections that are free, fair, and legitimate.” *Id.* at 968–69.

61. *Id.* at 968.

62. *Id.*

populists, or hostile towards LGBTQ+ communities and other marginalized social groups. This caveat, however, relates to an important puzzle that political scientists have wrestled with regarding how the Republican Party continues to receive widespread support throughout the country in spite of the fact that Christian nationalism and right-wing populism have spread throughout the party and its leaders.

On this issue, the research of political scientist Milan Svolik is instructive. Svolik's research examines why voters who genuinely believe that they are committed to democracy ultimately support politicians who undermine democracy.⁶³ Providing one theory, Svolik contends that polarization prevents voters from moderating the undemocratic inclinations of politicians.⁶⁴ Specifically, in sharply polarized democratic electorates, many voters are willing to trade off democratic principles in order to elect politicians that champion their multifaceted partisan values and interests.⁶⁵

Hence, drawing on this background in the political science literature, my argument in this Article is that the problems that are festering and eroding U.S. democracy are paving the way for law and policy agendas that aim to reshape the fabric of U.S. society through highly polarized and populist ideologies (e.g., Christian nationalism). The "new sexual deviancy" is one such agenda. In this environment, misinformation and zero-sum movement strategies are fueling the legal subjugation of various marginalized groups in U.S. society who are defined as existential threats to right-wing populist and Christian nationalist worldviews, including LGBTQ+ communities. As the next Section turns to discuss, weaponizing moral panics help to define LGBTQ+ communities as those existential threats.

B. "MORAL PANIC" THEORY

As this Section discusses, "moral panic" theory in sociological studies of deviance helps to explain how the new sexual deviancy is, at its core, grounded in fears and anxieties about deviance from traditional societal norms of sex, sexuality, and gender. The analysis below specifically applies the late sociologist Stanley Cohen's seminal work on "moral panic" to the new sexual deviancy.⁶⁶ According to Cohen, moral panic occurs when a "condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests."⁶⁷

The discussion below is divided into two parts. Section 1 first applies Cohen's theoretical framework on the dynamics and trajectories of "moral panic" to illuminate the role of moral panic in the new sexual deviancy. Section 2 then draws

63. See generally Milan W. Svolik, *Polarization Versus Democracy*, J. DEMOCRACY, July 2019, at 20.

64. *Id.* at 24.

65. *Id.*

66. See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3d ed. 2002).

67. *Id.* at 1.

on Cohen's ideas about key players in moral panics to specifically explain the roles of legislators, government attorneys, and judges in creating moral panics and enforcing definitions of "deviance" in society.

1. The Dynamics and Trajectory of Moral Panics

In his influential sociological work, Stan Cohen presents a process model of moral panic that includes five elements to explain the dynamics and trajectory of moral panics.⁶⁸ As explained below, all five elements align with the new sexual deviancy.

a. Concern

The first element of moral panic is "*concern* . . . about the potential or imagined threat."⁶⁹ Common reliance on "safety" and "protection" concepts to frame recent legislation targeting LGBTQ+ communities illustrates how lawmakers are defining LGBTQ+ identity as a threat to both the public and children in the new sexual deviancy.⁷⁰ Substantiating this idea, the titles of several pieces of recently enacted anti-LGBTQ+ legislation contain terms like "safety" or "protection," including anti-drag laws,⁷¹ bathroom bills,⁷² and bans on gender-affirming care for minors.⁷³

b. Hostility

The second element is *hostility*, defined as "moral outrage" towards those who are perceived as deviant and the agencies and experts responsible for enabling their deviance.⁷⁴ The recent wave of anti-LGBTQ+ legislation is motivated by moral outrage and hostility towards LGBTQ+ communities. As described in further detail later in this Article, the hostile rhetoric of several state lawmakers that have proposed or supported anti-LGBTQ+ legislation illustrates this moral outrage and hostility. Moreover, the breadth of this moral outrage and hostility is demonstrated by the fact new anti-LGBTQ+ legislation does not only target LGBTQ+ people and communities. Rather, it also targets experts and allies who

68. *Id.* at xxvi–xxvii.

69. *Id.* at xxvi.

70. For a detailed list of cis-woman-protective arguments in recent anti-trans legislation, see Chan Tov McNamara, *Cis-Woman-Protective Arguments*, 123 COLUM. L. REV. 845, 867–68 (2023).

71. *See, e.g.*, S. 1438, 2023 Leg., Reg. Sess. (Fla. 2023) (Florida's drag show ban); *see also* SENATE RSCH. CTR., TEX. S., AUTHOR'S/SPONSOR'S STATEMENT OF INTENT, S. 88-12, Reg. Sess., at 1 (2023), <https://capitol.texas.gov/tlodocs/88R/analysis/pdf/SB00012F.pdf> [<https://perma.cc/S68V-S7ZM>] (stating that the "the goal is to protect children from seeing these performances").

72. *See, e.g.*, H.R. 1521, 2023 Leg., Reg. Sess. (Fla. 2023) ("Safety in Private Spaces Act"); S. 1100, 67th Leg., 1st Reg. Sess. (Idaho 2023) (Idaho's bathroom bill); H.R. 608, 2024 Leg., Reg. Sess. (La. 2024) ("Women's Safety and Protection Act").

73. *See, e.g.*, S. 184, 2022 Leg., Reg. Sess. (Ala. 2022) ("Alabama Vulnerable Child Compassion and Protection Act"); Arkansas Save Adolescents from Experimentation (SAFE) Act, ARK. CODE ANN. §§ 20-9-1501–1504 (Arkansas's ban on gender-affirming care for minors); S. 49, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023) ("Missouri Save Adolescents from Experimentation (SAFE) Act").

74. COHEN, *supra* note 66, at xxvi–xxvii.

affirm LGBTQ+ people's identities (for instance, parents, teachers, and medical professionals).⁷⁵

c. Consensus

The third element of moral panic is *consensus*, defined as “widespread agreement (not necessarily total) that the threat exists, is serious,” and demands action.⁷⁶ Sociologists Erich Goode and Nachman Ben-Yehuda stress that consensus can exist “either in the society as a whole or in certain social sectors of the society.”⁷⁷ Moreover, the proportion of the population that reaches a minimal level of agreement “need not be universal or even make up a majority” of society.⁷⁸

The fact that dozens of introduced anti-LBGTQ+ bills have become actual law in such a short amount of time since 2020 indicates this consensus among lawmakers.⁷⁹ Moreover, formal statements opposing LGBTQ+ people and rights in the national and some state Republican party platforms offer additional persuasive evidence of this consensus in the political domain. For instance, the national GOP party platform adopted in 2024 includes several statements that reject transgender people and display hostile anti-LBGTQ+ rhetoric, including promises to: cut federal funding for any school pushing “critical race theory, radical gender ideology, and other inappropriate racial, sexual, or political content on our children”; “keep men out of women’s sports”; “ban Taxpayer funding for sex change surgeries”; and “stop Taxpayer-funded Schools from promoting gender transition.”⁸⁰ At the state level, for instance, the Texas Republican Party platform describes “homosexuality” as “an abnormal lifestyle choice” and “oppose[s] all efforts to validate transgender identity.”⁸¹ The Idaho Republican Platform states that “[w]e call upon parents, responsible citizens, and officers of government to promote measures that respect and protect the biological gender of children” and “[w]e strongly oppose any person, entity, or policy that attempts to confuse minors regarding their biological gender.”⁸²

The Heritage Foundation’s “Project 2025,” a proposed conservative agenda with input from hundreds of conservative thinkers, including many former officials under the first Trump administration, provides similar evidence of *consensus*

75. See *infra* Part II.

76. COHEN, *supra* note 66, at xxvii.

77. Erich Goode & Nachman Ben-Yehuda, *Moral Panic*, in ROUTLEDGE HANDBOOK OF DEVIANT BEHAVIOR 46, 47 (Clifton D. Bryant, ed., 2011).

78. *Id.*

79. See *infra* Part II (summarizing recent legislation targeting LGBTQ+ communities).

80. 2024 GOP Platform: *Make American Great Again!*, THE AMERICAN PRESIDENCY PROJECT (2024), <https://www.presidency.ucsb.edu/documents/2024-republican-party-platform> [https://perma.cc/DU48-SWKV].

81. REPUBLICAN PARTY OF TEX., PLATFORM AND RESOLUTIONS AS AMENDED AND ADOPTED BY THE 2022 STATE CONVENTION OF THE REPUBLICAN PARTY OF TEXAS 22 (2022), <https://texasgop.org/wp-content/uploads/2024/06/2022-RPT-Platform.pdf> [https://perma.cc/T487-UP3R].

82. IDAHO REPUBLICAN PARTY, IDAHO REPUBLICAN PARTY PLATFORM 15 (2022), <https://idgop.org/wp-content/uploads/2022/08/2022-24-Idaho-Republican-Party-Platform-1.pdf> [https://perma.cc/485M-DNKC].

in right-wing movement circles.⁸³ The agenda, which is an over 900-page blueprint for the next conservative president (now President Trump), recommends eliminating LGBTQ+ federal protections and inclusion in various domains, including military service, health care, education, labor and employment policy, and international development and humanitarian aid.⁸⁴ At various points, Project 2025 invokes hostile rhetoric towards LGBTQ+ communities in support of these proposals, rhetoric that at times denies LGBTQ+ people's very existence. For instance, the foreword of Project 2025 stresses that "under the ruling and cultural elite today . . . children suffer the toxic normalization of transgenderism with drag queens and pornography invading their school libraries."⁸⁵ Rhetoric in the blueprint itself characterizes the number of youth seeking gender-affirming care as a "social contagion";⁸⁶ calls for an end to gender-identity-inclusive federal health care data collection on the grounds that such collection "legitimizes the unscientific notion that men can become women (and vice versa)";⁸⁷ describes interpreting "sex" under federal health care laws to include sexual orientation and gender identity as "highly ideological and unscientific";⁸⁸ and stresses that "[t]he promotion of gender radicalism is anathema to the traditional norms of many societies" where the U.S. Agency for International Development works.⁸⁹

d. Disproportionality

The fourth element is *disproportionality*, which occurs when there is "an exaggeration of the number or strength of the cases, in terms of the damage caused, moral offensiveness, [and] potential risk if ignored."⁹⁰ Put differently, "[p]ublic concern is not directly proportionate to objective harm."⁹¹ Goode and Ben-Yehuda identify two indicators of disproportionality: (1) imaginary threats, meaning "the conjunction of great concern with the complete absence of an actual threat," and (2) exaggerated claims, which occur when "evidence cited to *measure* the scope of the problem is grossly exaggerated" (for instance, the "number of victims, extent of harm to the victims, how widespread the harm is, and financial cost to the society").⁹²

Both indicators of disproportionality are present in the concerns raised by right-wing lawmakers and movement leaders to rationalize and justify new anti-LGBTQ+ legislation. Critics of new anti-LGBTQ+ legislation stress that these

83. See generally HERITAGE FOUND., PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (2023), <https://www.project2025.org/policy>.

84. See, e.g., *id.* at 103 (military service); *id.* at 474–75 (health care); *id.* at 333 (education); *id.* at 582, 584 (labor and employment); *id.* at 259 (international development and humanitarian aid).

85. *Id.* at 1.

86. *Id.* at 345.

87. *Id.* at 456.

88. *Id.* at 475.

89. *Id.* at 259.

90. COHEN, *supra* note 66, at xxvii.

91. *Id.*

92. Goode & Ben-Yehuda, *supra* note 77, at 48.

laws are solutions looking for problems. For instance, they underscore how there is no empirical evidence suggesting that transgender people perpetrate violence in public bathrooms or facilities;⁹³ there is a scarcity of examples of cisgender female students suffering harm when transgender female students are allowed to participate on sports teams consistent with their gender identities;⁹⁴ and gender-affirmation surgeries for minors—which are the focal point in the text and legislative discussions surrounding many recent bans on gender-affirming care for minors—are rare and were not happening in many states that have enacted these bans.⁹⁵ This dearth of objective evidence is grossly disproportionate to the unprecedented volume, breadth, and speed of anti-LGBTQ+ bills that have been introduced in state legislatures in the 2020s, as well as the proposed bills that have become law.⁹⁶

e. Volatility

The fifth and final element of moral panic is *volatility*, which occurs when “the panic erupts and dissipates suddenly without warning.”⁹⁷ The unprecedented and consistently increasing volume of legislation targeting LGBTQ+ communities that has been introduced in state legislatures in each of the past few years during the 2020s illustrates this eruption.⁹⁸ It is too early to tell whether and when it will dissipate.⁹⁹

93. See Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL’Y 70, 78 (2019); see also Alexandra Duggan, *Idaho’s ‘Bathroom Bill’ Makes It Out of Committee*, KTVB (Mar. 15, 2023, 6:23 PM), <https://www.ktvb.com/article/news/local/capitol-watch/idahos-bathroom-bill-makes-it-out-of-committee-transgender-students/277-472f70e7-b974-45f6-981f-4ac00104a837> [https://perma.cc/KG96-88QQ] (discussing the statement of Holli Woodings, Boise City Council President, who sat on the Idaho House Education Committee when the Idaho bathroom advanced through that committee and noted that “to her knowledge, no cases of a transgender person assaulting someone in a bathroom has ever happened”).

94. See, e.g., Samuel Crankshaw, *Statement on Final Passage of SB83 to Ban Trans Girls from Girls’ Sports*, ACLU KY. (Mar. 24, 2022), <https://www.aclu-ky.org/en/press-releases/statement-final-passage-sb83-ban-trans-girls-girls-sports> [https://perma.cc/X9LL-ZY3M] (“Proponents of SB83 provided no examples of any Kentucky students being harmed by including trans girls in girls’ sports.”).

95. See, e.g., Chloe Kim, *Ohio Upholds Ban on Child Transgender Procedures, Overriding Governor’s Veto*, BBC NEWS (Jan. 24, 2024), <https://www.bbc.com/news/world-us-canada-68089932> [https://perma.cc/54EK-XTJ5] (noting in the context of Ohio’s ban on gender-affirming care for minors that “[m]edical professionals say such operations are not happening in the state”); see also Jason D. Wright et al., *National Estimates of Gender-Affirming Surgery in the US*, JAMA NETWORK OPEN, Aug. 23, 2023, at 1, 9 (reporting study results showing that gender-affirming surgeries “were relatively uncommon in patients aged 18 years or younger,” and noting that gender-affirming surgeries “ha[ve] been the focus of intense debate and led to legislative initiatives to limit access to these procedures in adolescents in several states”).

96. See *infra* Part II; MOVEMENT ADVANCEMENT PROJECT, UNDER FIRE: THE WAR ON LGBTQ PEOPLE IN AMERICA 2 (2023), https://www.mapresearch.org/file/Under%20Fire%20report_MAP%202023.pdf [https://perma.cc/9XDH-SB3J].

97. COHEN, *supra* note 66, at xxvii.

98. See ACLU, *Legislative Attacks in 2024*, *supra* note 2; ACLU, *Legislative Attacks in 2023*, *supra* note 1; Matt Laviertes, *2021 was Supposed to be the ‘Worst Year’ for LGBTQ Rights—Then Came 2022*, NBC NEWS (Dec. 29, 2022, 12:37 PM), <https://www.nbcnews.com/nbc-out/out-news/2021-was-supposed-worst-year-lgbtq-rights-came-2022-rcna63334> [https://perma.cc/WDR9-HGMZ].

99. Some LGBTQ+ advocates, however, are “cautiously optimistic” that a reprieve in anti-LGBTQ+ legislation is potentially on the horizon in upcoming state legislative sessions. Orion

2. Key Players in Moral Panics

In addition to offering a theoretical framework to understand the dynamics and trajectory of moral panics, Cohen's influential work also examines the vital roles of four key players in creating and shaping moral panics. As explained below, the behavior of these key players in the new sexual deviancy is consistent with Cohen's ideas.

a. Mass Media

The first key player is the mass media, which presents to society the specific groups or behaviors that are defined as deviant in "a stylized and stereotypical fashion."¹⁰⁰ Scholars and advocates have documented a recent surge in anti-LGBTQ+ rhetoric and imagery, and especially anti-trans content and misinformation, on social media and conservative-leaning news outlets.¹⁰¹ Taking Fox News as one example, several commentators—including popular personalities like Tucker Carlson and Laura Ingraham—have used phrases like "radical transgender ideology" and "extremist movement" when discussing transgender communities and described transgender people as a "danger" and "threatening" to the public, and women in particular.¹⁰² Researchers are connecting this surge in anti-LGBTQ+ rhetoric and imagery to the waves of recent legislation targeting LGBTQ+ communities, especially transgender communities.¹⁰³

Rummier, *Many Trans Americans Are Living in Fear. But LGBTQ+ Advocates See a Reprieve in Statehouses*, 19TH (Apr. 15, 2024, 8:00 AM), <https://19thnews.org/2024/04/anti-trans-lgbtq-bills-statehouses-advocates-reprieve> [<https://perma.cc/2EB2-KLDG>] (quoting Chris Hartman, Executive Director of the Fairness Campaign, a Kentucky LGBTQ+ advocacy group); *id.* (noting that "[t]he Human Rights Campaign and several state advocacy groups believe that the tide is turning against anti-LGBTQ+ bills").

100. COHEN, *supra* note 66, at 1. As Cohen stresses, the ways in which mass media presents "facts" can "generate concern, anxiety, indignation[,] or panic," and provide the precondition for new "social problem definition[s]." *Id.* at 10.

101. See Thomas J. Billard, "Gender-Critical" Discourse as Disinformation: Unpacking TERF Strategies of Political Communication, 46 WOMEN'S STUD. COMM'C'N 235, 236 (2023) (stressing that the spread of misinformation about transgender identity and care "is often intentional and invested in long-standing systems of media power"). See generally CTR. FOR COUNTERING DIGIT. HATE & HUM. RTS. CAMPAIGN, DIGITAL HATE: SOCIAL MEDIA'S ROLE IN AMPLIFYING DANGEROUS LIES ABOUT LGBTQ+ PEOPLE (2022) (analyzing anti-LGBTQ+ rhetoric and misinformation on social media platforms).

102. *E.g.*, Tucker Carlson, *Transgenderism is the Most Dangerous Extremist Movement in the United States*, FOX NEWS (Apr. 7, 2023, 10:49 PM), <https://www.foxnews.com/opinion/tucker-carlson-transgenderism-most-dangerous-extremist-movement-united-states> [<https://perma.cc/S8J5-33RE>]; Laura Ingraham, *Trans-Infiltration of Women's Sports Put Women in Actual Danger*, FOX NEWS (Apr. 4, 2024, 9:12 PM), <https://www.foxnews.com/media/laura-ingraham-trans-infiltration-womens-sports-put-women-actual-danger> [<https://perma.cc/2FNA-Y2TY>]; Jamie Joseph, *Red State AGs Sue Biden Admin to Halt 'Radical Transgender Ideology' Threatening 'Safety of Women and Girls'*, FOX NEWS (May 9, 2024, 2:53 PM), <https://www.foxnews.com/politics/red-state-ags-sue-biden-admin-halt-radical-transgender-ideology-threatening-safety-women-girls> [<https://perma.cc/Z8GZ-UX79>].

103. See, e.g., Anne Alstott, Melisa Olgun, Henry Robinson & Meredith McNamara, "Demons and Imps": Misinformation and Religious Pseudoscience in State Anti-Transgender Laws, 35 YALE J.L. & FEMINISM 223 (2024) (showing how anti-trans laws rest on misinformation and religious pseudoscience); Thomas J. Billard, *The Politics of Transgender Health Misinformation*, 41 POL.

b. Moral Entrepreneurs

The second key player is “moral entrepreneurs,” who are individuals and groups in society who campaign to “eradicate the evil which disturbs” them.¹⁰⁴ Cohen credits the concept of “moral entrepreneurs” to the work of sociologist Howard Becker, who stressed that it was appropriate to view moral entrepreneurs as “crusaders because they typically believe that their mission is a holy one” and that they are interested in forcing their “own morals on others.”¹⁰⁵

Consistent with this idea, right-wing organizations that oppose LGBTQ+ rights are behind the push for many recent anti-LGBTQ+ laws and policies. For instance, the Alliance Defending Freedom—a conservative Christian legal advocacy group—assisted several states in drafting and legally vetting bans on gender-affirming care for minors, bathroom bills, and religious exception laws.¹⁰⁶ Providing additional support for this push, a recent report found that conservative and far-right advocacy groups at the local and national levels, including Moms for Liberty,¹⁰⁷ were behind at least half of the efforts to enact one form of curriculum censorship, book bans, in U.S. schools during the 2021–22 school year.¹⁰⁸ LGBTQ+ content was a major driver of book-banning content in 2023.¹⁰⁹ According to the American Library Association, more than half of the top ten most commonly challenged titles by these types of censorship efforts in 2023 involved LGBTQ+ voices and content.¹¹⁰

COMMC’N 344, 348 (2024) (“When transgender health misinformation is mobilized for political ends, it motivates anti-transgender policy and influences individual-level attitudes, opinions, and behaviors.”); Catherine Lockmiller, *Decoding the Misinformation-Legislation Pipeline: An Analysis of Florida Medicaid and the Current State of Transgender Healthcare*, 111 J. MED. LIBR. ASS’N 750 (2023) (presenting a case study that illustrates how misinformation about transgender people played a key role in excluding gender-affirming care from Florida Medicaid).

104. COHEN, *supra* note 66, at 140.

105. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 148 (1963).

106. Stephen Gruber-Miller, *Will Laws Restricting Trans Rights Survive?: Reynolds, Legal Experts Expect Court Challenges*, DES MOINES REG., Apr. 7, 2023, at A1 (describing that the “Alliance Defending Freedom has helped states draft laws banning gender-affirming care and barring transgender girls from competing in female sports”); *see also* Ark. S., *Senate Floor Session*, ARK. LEGIS., at 2:13:52 PM–2:14:11 PM (Feb. 10, 2021), <https://sg001-harmony.sliq.net/00284/Harmony/en/PowerBrowser/PowerBrowserV2/20210210/-1/21144?mediaStartTime=20210210135326> (Sen. Hammer explaining that Arkansas’s targeted religious exemption law involving medical providers was vetted by the Alliance Defending Freedom).

107. Moms for Liberty is a conservative parents’ rights organization that began in 2021 with local chapters in most states. *See* LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 YALE L.J. 2139, 2161 (2023). The Southern Poverty Law Center has classified Moms for Liberty as a far-right extremist group. *See* *Moms for Liberty*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/moms-liberty> [<https://perma.cc/J2MX-EUA6>] (last visited Mar. 18, 2024).

108. *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools> [<https://perma.cc/W9L8-E7G4>].

109. *American Library Association Reports Record Number of Unique Book Titles Challenged in 2023*, AM. LIBR. ASS’N (Mar. 14, 2024), <https://www.ala.org/news/2024/03/american-library-association-reports-record-number-unique-book-titles> [<https://perma.cc/S6D2-PZQE>].

110. *ALA Kicks Off National Library Week Revealing the Annual List of Top 10 Most Challenged Books and the State of America’s Libraries Report*, AM. LIBR. ASS’N (Apr. 8, 2024), <https://www.ala.org/news/>

c. Societal Control Culture

The third key player—and most important for the purposes of this Article—is “societal control culture,” which is “the laws, procedures, programs, and organizations which in the name of a collectivity help, rehabilitate, punish, or otherwise manipulate deviants.”¹¹¹ Societal control culture “contains not just official institutions and personnel but also typical modes and models of understanding and explaining . . . deviance.”¹¹²

Lawmakers and state’s attorneys who have had and continue to have roles in enacting and defending legislation targeting LGBTQ+ communities belong to this category. Part III will discuss in detail how these state actors are drawing on a range of discredited ideas about sexual deviance to harness institutional power within the criminal legal system, medicine, and other vital social institutions (for instance, families and schools) with the aim of enforcing traditional societal norms of sex, sexuality, and gender.¹¹³ Consistent with Cohen’s ideas, this enforcement occurs through subjugating LGBTQ+ people and suppressing LGBTQ+ ideas in society, which are perceived as threats to those norms.¹¹⁴

d. The Public

The fourth and final key player in creating and shaping moral panics is the public. Cohen asserts that the public is not simply a consumer of information about deviance. Rather, it also has an active role in shaping societal definitions of deviance through public reaction.¹¹⁵ Alongside “societal control culture,” the public can act as an informal agent of social control by “referr[ing] their ‘local’ problem to the legislature.”¹¹⁶

Consistent with this idea, state lawmakers are explicitly referencing alleged reports of concerned parents in their respective jurisdictions when sponsoring or expressing support for different laws targeting LGBTQ+ communities.¹¹⁷ Concerned citizens who support these bills are also bringing their concerns to state lawmakers through public testimony in committee hearings.¹¹⁸

* * *

2024/04/ala-kicks-national-library-week-revealing-annual-list-top-10-most-challenged [https://perma.cc/DTT4-WXZP].

111. COHEN, *supra* note 66, at 89–90 (quoting EDWIN M. LEMERT, *SOCIAL PATHOLOGY* 68, 447 (1951)) (drawing on Lemert’s concept of “societal control culture”).

112. *Id.* at 77.

113. *See infra* Part III.

114. *See infra* Part III.

115. COHEN, *supra* note 66, at 124.

116. *Id.*

117. *See, e.g.*, Fla. S., *4/4/23 Senate Session*, FLA. CHANNEL, at 56:06–56:35 (Apr. 4, 2023) <https://thefloridachannel.org/videos/4-4-23-senate-session> (Sen. Yarborough discussing concerns of parent constituents in introducing Florida’s anti-drag law).

118. *See, e.g.*, Idaho House Standing Comm. on Educ., *March 15, 2023*, IDAHO LEG., at 14:06–15:58 (Mar. 15, 2023), <https://lso.legislature.idaho.gov/MediaArchive/MainMenu.do> (select “2023” as meeting year, “House Standing Committees” as category, and “Education” as committee) (concerned parent advocating for Idaho’s bathroom bill); *id.* at 18:34–20:46 (concerned former teacher advocating for Idaho’s bathroom bill).

With this theoretical foundation, this Article now shifts gears to define the new sexual deviancy.

II. WHAT IS THE NEW SEXUAL DEVIANCY?

What is the new sexual deviancy? I argue that severe polarization and the erosion of U.S. democratic institutions and norms have fueled conditions in recent years for opponents of LGBTQ+ rights to weaponize moral panics as a means of executing right-wing populist and Christian nationalist agendas that subjugate LGBTQ+ people in law, politics, and society. As this Article will later trace, antiquated sexual deviance concepts are providing support for new anti-LGBTQ+ legislation aligned with those agendas and for legal strategies to defend it nationwide.

The scope of legislation supporting the new sexual deviancy is vast. To demonstrate this point, this Part briefly summarizes several major areas of newly enacted state legislation targeting LGBTQ+ communities.¹¹⁹ Since the early 2020s, hundreds of bills targeting LGBTQ+ communities have been introduced in state legislatures, and dozens of these bills have become law.¹²⁰ Not only is the number of anti-LGBTQ+ bills unprecedented, but lawmakers are introducing these bills at record speed and in more states.¹²¹ Transgender people and LGBTQ+ youth—two already highly marginalized LGBTQ+ groups¹²²—are

119. Given space constraints, this discussion focuses on state-based legislation, although it is important to underscore that ordinances and governing policies at the local levels are targeting LGBTQ+ communities across the country in similar ways. See Jill Cowan, *The Latest Target for California Conservatives? Local School Boards*, N.Y. TIMES (Oct. 30, 2023), <https://www.nytimes.com/2023/10/30/us/california-school-transgender-policy.html>; Colleen Hamilton, *School Board Meetings Are the New Front Line for LGBTQ+ Rights*, THEM (Sept. 7, 2022), <https://www.them.us/story/school-boards-anti-lgbtq>.

120. See ACLU, *Legislative Attacks in 2024*, *supra* note 2; ACLU, *Legislative Attacks in 2023*, *supra* note 1; Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), <https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law> [<https://perma.cc/5L7P-ftpM>] (noting that more than 250 bills were introduced in state legislatures in 2021).

121. MOVEMENT ADVANCEMENT PROJECT, *supra* note 96, at 2.

122. For statistics illustrating how transgender communities face special risks of discrimination, harassment, and victimization in society, see generally SANDY E. JAMES ET AL., *EARLY INSIGHTS: A REPORT OF THE 2022 U.S. TRANSGENDER SURVEY* (2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf [<https://perma.cc/X7WV-QG2A>] [hereinafter 2022 U.S. TRANS SURVEY] and CAROLINE MEDINA & LINDSAY MAHOWALD, CTR. FOR AM. PROGRESS, *DISCRIMINATION AND BARRIERS TO WELL-BEING: THE STATE OF THE LGBTQI+ COMMUNITY IN 2022* (2023), <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022> [hereinafter 2022 CAP STUDY]. For related statistics involving LGBTQ+ youth, see generally JOSEPH G. KOSCIW ET AL., GLSEN, *THE 2017 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS* (2018), <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf> [<https://perma.cc/V8RM-KZGX>] [hereinafter 2017 National School Climate Survey] and THE TREVOR PROJECT, *2024 U.S. NATIONAL SURVEY ON THE MENTAL HEALTH OF LGBTQ+ YOUNG PEOPLE* (2024), https://www.thetrevorproject.org/survey-2024/assets/static/TTP_2024_National-Survey.pdf [<https://perma.cc/3BZY-2H5L>].

common targets for these legislative attacks.¹²³ As of 2024, 93% of transgender youth between the ages of thirteen and seventeen in the United States live in a state that has recently introduced or passed legislation that specifically targets transgender youth.¹²⁴

With mixed success, litigants are challenging these new laws in both federal and state courts.¹²⁵ At the same time, state attorneys general—many from states leading the push to pass new laws that restrict LGBTQ+ rights—coordinated actions to block Biden Administration federal rules that include protections for LGBTQ+ people, especially LGBTQ+ youth.¹²⁶ Some of these challenges have been successful, especially in the context of Title IX and the Affordable Care Act.¹²⁷ When successful, these challenges create greater opportunity for states to enact legislation targeting LGBTQ+ communities that would have conflicted with federal laws and regulations.

The discussion below illustrates the breadth and depth of recent legislation targeting LGBTQ+ communities. Each Section summarizes a major area of recent anti-LGBTQ+ state legislation: (A) bans on gender-affirming care for minors; (B) bans on transgender athlete participation in sports; (C) restrictions on access to bathrooms and changing facilities; (D) laws involving LGBTQ+ curriculum censorship, forced student outing, and student pronouns/names; (E) anti-drag laws; (F) targeted religious exemption laws; and (G) trans erasure laws. The discussion illuminates how this new legal agenda targets LGBTQ+ communities in vital domains of everyday life, including health care, education, child welfare, public accommodations, civil rights, and free speech.

A. BANS ON GENDER-AFFIRMING CARE FOR MINORS

Laws that prohibit or restrict gender-affirming care for minors have swept across the country in recent years. Arkansas passed the first law of this kind in

123. See 2022 CAP STUDY, *supra* note 122 (describing how in 2022 “state lawmakers introduced more than 300 bills targeting the rights of LGBTQI+ people—especially LGBTQI+ youth and transgender people”).

124. ELANA REDFIELD ET AL., WILLIAMS INSTITUTE, THE IMPACT OF 2024 ANTI-TRANSGENDER LEGISLATION ON YOUTH 2 (2024), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/2024-Anti-Trans-Legislation-Apr-2024.pdf> [<https://perma.cc/6UPK-W66P>].

125. See *infra* Section VI.C.

126. See Matt Lavietes, *Over 20 GOP-Led States Sue Biden Administration over Title IX Rules for LGBTQ Students*, NBC NEWS (May 8, 2024, 4:47 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/20-gop-led-states-sue-biden-administration-title-ix-rules-lgbtq-studen-rcna151247> [<https://perma.cc/F4YR-P23W>].

127. See generally, e.g., *Carroll Indep. Sch. Dist. v. U.S. Dep’t of Educ.*, No. 24-cv-461, 2024 WL 3381901 (N.D. Tex. July 11, 2024) (Title IX); *Tennessee v. Cardona*, No. 24-072, 2024 WL 3019146 (E.D. Ky. June 17, 2024) (Title IX); *Louisiana v. U.S. Dep’t of Educ.*, No. 24-cv-563, 2024 WL 2978786 (W.D. La. June 13, 2024) (Title IX); *Tennessee v. Becerra*, No. 24cv161, 2024 WL 3283887 (S.D. Miss. July 3, 2024) (Affordable Care Act).

2021.¹²⁸ Since then, twenty-four states have passed laws that ban both gender-affirming medications (for instance, puberty blockers and hormone therapies) and gender-affirming surgeries (for instance, trans-feminizing and trans-masculinizing chest surgeries (colloquially referred to as “top surgery”) and genital surgeries (colloquially referred to as “bottom surgery”)) for minors.¹²⁹ Two states have passed laws banning gender-affirming surgeries, without addressing gender-affirming medications, for minors.¹³⁰

In general, these bans target health care providers with a range of potential civil lawsuits that might include public enforcement actions initiated by state attorneys general as well as private causes of action from minors (or parents on their behalf) who underwent gender-affirming care.¹³¹ The range of potential penalties includes licensing sanctions, civil fines, injunctive relief, and compensatory damages.¹³² The laws in six of these states, however, go even further than civil liability to include criminal provisions that make it a felony for medical professionals to provide gender-affirming care to minors.¹³³ For states that have enacted criminal bans, possible penalties include incarceration and heavy fines.¹³⁴

Notably, many of these laws include exceptions that allow the very same treatments for minors when used to address medical conditions that do not involve gender affirming-care.¹³⁵ “Precocious puberty,” which occurs when puberty starts

128. Jordan Blair Woods, *Arkansas Passes Sweeping and Draconian Law Targeting Transgender Youth*, JURISTNEWS (Apr. 12, 2021, 9:00 AM), [https://www.jurist.org/commentary/2021/04/jordan-blair-woods-arkansas-law-targets-transgender-youth/\[https://perma.cc/9QEN-L8GA\]](https://www.jurist.org/commentary/2021/04/jordan-blair-woods-arkansas-law-targets-transgender-youth/[https://perma.cc/9QEN-L8GA]).

129. S. 184, 2022 Leg., Reg. Sess. (Ala. 2022); H.R. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) (codified at Act 626, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021)); S. 254, 2023 Leg., Reg. Sess. (Fla. 2023); S. 140, 2023 Gen. Assemb., Reg. Sess. (Ga. 2023); H.R. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023); S. 480, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023); S. 538, 90th Gen. Assemb., Reg. Sess. (Iowa 2023); S. 150, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); H.R. 648, 2023 Leg., Reg. Sess. (La. 2023); H.R. 1125, 2023 Leg., Reg. Sess. (Miss. 2023); S. 49, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); S. 99, 68th Leg., Reg. Sess. (Mont. 2023); Legis. B. 574, 108th Leg., 1st Sess. (Neb. 2023); H.R. 808, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023); H.R. 1254, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.R. 68, 135th Gen. Assemb., Reg. Sess. (Ohio 2024); S. 613, 2023 Leg., Reg. Sess. (Okla. 2023); H.R. 4624, 2024 Gen. Assemb., 125th Sess. (S.C. 2024); H.R. 1080, 2023 Leg., 98th Leg. Sess. (S.D. 2023); S. 1, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); S. 14, 88th Leg., Reg. Sess. (Tex. 2023); S. 16, 2023 Leg., Gen. Sess. (Utah 2023); H.R. 2007, 2023 Leg., Reg. Sess. (W. Va. 2023); S. 99, 67th Leg., Budget Sess. (Wyo. 2024). For a list of procedures that fall under the umbrella of gender-affirmation surgeries, see *Gender Confirmation Surgeries*, AM. SOC’Y PLASTIC SURGEONS, <https://www.plasticsurgery.org/reconstructive-procedures/gender-confirmation-surgeries> [https://perma.cc/3F5C-B8XV] (last visited Mar. 18, 2025).

130. S. 1138, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.R. 619, 2023 Gen. Ct., Reg. Sess. (N.H. 2023).

131. See, e.g., Ark. Act 626 (discussing enforcement of Arkansas’s ban on gender-affirming care for minors); Miss. H.R. 1125 (same but for Mississippi).

132. See examples in sources cited *supra* note 131.

133. Ala. S. 184; Idaho H.R. 71; Fla. S. 254; N.D. H.R. 1254; S.C. H.R. 4624; Okla. S. 613.

134. See, e.g., Fla. S. 254 (defining violations as third-degree felonies); FLA. STAT. ANN. § 775.082 (3)(e) (providing for third-degree felonies to be punished by up to five years of imprisonment); *id.* § 775.083(1)(c) (providing for third-degree felonies to be punishable by a fine up to \$5,000).

135. See, e.g., S.C. H.R. 4624 (providing exceptions for minors “for precocious puberty, prostate cancer, breast cancer, endometriosis, or other procedure unrelated to gender transition”); S. 1, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (providing exceptions “to treat a minor’s congenital defect, precocious puberty, disease, or physical injury”).

too early for the child experiencing it,¹³⁶ is a common example. These exceptions illustrate the contradictory nature of anti-LGBTQ+ laws being introduced and passed in the new sexual deviancy.

B. BANS ON TRANSGENDER ATHLETE PARTICIPATION IN SPORTS

Laws banning transgender students' participation in school sports have also swept across the country in the past few years. Idaho passed the first law of this kind in 2020.¹³⁷ Since then, twenty-five states have passed laws banning transgender students from participating on school sports teams consistent with their gender identity.¹³⁸ Most of these laws apply to students in K–12 and college and specifically target transgender female students' participation on girls' and women's sports teams.¹³⁹ Notably, this is one of many examples of intersections between transphobia, homophobia, and misogyny in the new sexual deviancy. These bans are broad, typically applying to all girls' and women's interscholastic, intercollegiate, intramural, and club athletic teams and sports.¹⁴⁰

In terms of remedies, many of these laws allow students (or parents on their behalf) to bring civil lawsuits against public schools based on allegations involving the denial of athletic opportunities, retaliation or adverse action taken against them by schools for reporting noncompliance, or suffering direct or indirect harm (psychological, emotional, or physical).¹⁴¹ Some laws also create a cause of

136. *Precocious Puberty*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/precocious-puberty/symptoms-causes/syc-20351811> [<https://perma.cc/HFC8-GYLD>] (last visited Mar. 18, 2025).

137. Talya Minsberg, *'Boys Are Boys and Girls Are Girls': Idaho is First State to Bar Some Transgender Athletes*, N.Y. TIMES (updated Mar. 29, 2021), <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html>.

138. The states with bans that cover all of K–12 and college include: H.R. 391, 2021 Leg., Reg. Sess. (Ala. 2021) (K–12); H.R. 261, 2023 Leg., Reg. Sess. (Ala. 2023) (college); S. 1165, 55th Leg., 2d Reg. Sess. (Ariz. 2022); S. 354, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); H.R. 500, 65th Leg., 2nd Reg. Sess. (Idaho 2020); H.R. 1041, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022); H.R. 2416, 89th Gen. Assemb., Reg. Sess. (Iowa 2022); H.R. 2238, 2023 Leg., Reg. Sess. (Kan. 2023); S. 44, 2022 Leg., Reg. Sess. (La. 2022); S. 2536, 2021 Leg., Reg. Sess. (Miss. 2021); S. 39, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); H.R. 112, 67th Leg., Reg. Sess. (Mont. 2021); H.R. 1249, 68th Leg. Assemb., Reg. Sess. (N.D. 2023) (K–12); H.R. 1489, 68th Leg. Assemb., Reg. Sess. (N.D. 2023) (college); H.R. 1205, 2024 Leg., Reg. Sess. (N.H. 2024); H.R. 68, 135th Gen. Assemb., Reg. Sess. (Ohio 2024); S. 2, 2022 Leg., Reg. Sess. (Okla. 2022); H.R. 4608, 2022 Gen. Assemb., 124th Sess. (S.C. 2022); S. 46, 2022 Leg., 97th Leg. Sess. (S.D. 2022); H.R. 25, 87th Leg., 3d. Spec. Sess. (Tex. 2021) (K–12); S. 15, 88th Leg., Reg. Sess. (Tex. 2023) (college). The states with bans covering some of K–12 and college include: H.R. 3, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (grades 5–12); S. 2153, 112th Gen. Ass. (Tenn. 2022) (college); S. 83, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022) (grades 6–12 and college); H.R. 574, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023) (grades 6–12 and college); S. 1028, 2021 Leg., Reg. Sess. (Fla. 2021) (secondary schools and college); H.R. 3293, 2021 Leg., Reg. Sess. (W. Va. 2021) (secondary schools and college). Utah's ban covers K–12 only. *See* H.R. 11, 2022 Leg., Gen. Sess. (Utah 2022). Wyoming's ban covers grades 7–12 only. *See* S. 133, 67th Leg., Gen. Sess. (Wyo. 2023).

139. *See* sources cited *supra* note 138; McNamarah, *supra* note 70, at 883 (noting that “more than 75% of states with trans sports bans have policies that prohibit transgender girls' participation from the kindergarten level upwards”).

140. *See, e.g.*, Idaho H.R. 500; Miss. S. 2536; Mont. H.R. 112; N.D. H.R. 1249.

141. *See, e.g.*, Ark. S. 354 (outlining cause of action for students and potential remedies); Idaho H.R. 500 (same); Mont. H.R. 112 (same).

action for public schools that allege to suffer direct or indirect harm to sue government entities or athletic organizations that mandate transgender students' inclusion in school sports.¹⁴² Potential remedies for these different causes of action include injunctive relief, monetary damages, and reasonable attorney fees.¹⁴³

C. RESTRICTIONS ON ACCESS TO BATHROOMS AND CHANGING FACILITIES

In 2016, North Carolina passed the first law restricting transgender people's access to bathrooms in public schools and state and local government facilities.¹⁴⁴ The state repealed the law in 2017 following widespread protests and business and sports boycotts that cost the state hundreds of millions of dollars.¹⁴⁵ Laws restricting transgender people's access to bathrooms reemerged in 2021 with state legislation passed in Tennessee that year.¹⁴⁶

Since 2021, thirteen states have passed laws that ban transgender students from using bathrooms and changing facilities in K–12 public schools consistent with their gender identity.¹⁴⁷ The bans in four of these thirteen states go beyond K–12 public schools to ban transgender people from using bathrooms and changing facilities consistent with their gender identity in public colleges and universities and some government buildings (for instance, domestic violence shelters or

142. See, e.g., Idaho H.R. 500 (outlining private cause of action for schools against government entities or athletic organizations requiring transgender inclusion in school sports); Mont. H.R. 112 (same).

143. See, e.g., Idaho H.R. 500 (describing potential remedies in private cause of action brought by students or schools); Mont. H.R. 112 (same).

144. See Deena Prichet, *Transgender Bathroom Bills Are Back, Gaining Traction After Past Boycotts*, NPR (May 6, 2024, 5:30 PM), <https://www.npr.org/2024/05/06/1249406353/transgender-bathroom-bill-republican-states> [<https://perma.cc/7U2H-WLYD>]. These bathroom restrictions were included in H.R. 2, which was a broader scheme that prohibited local governments in North Carolina from enacting LGBTQ-inclusive antidiscrimination protections. See H.R. 2, 151st Gen. Assemb., 2nd Extra Sess. (N.C. 2016).

145. Richard Fausset, *North Carolina Strikes a Deal to Repeal Restrictive Bathroom Law*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/us/north-carolina-lawmakers-reach-deal-to-repeal-so-called-bathroom-bill.html> (discussing boycotts in North Carolina by sports leagues in response to H.R. 2 and repeal of H.R. 2 in 2017); Jim Morrill et al., *A Year Later, HB2 Has Cost North Carolina Millions. How Much Worse Will It Get?*, CHARLOTTE OBSERVER (Mar. 23, 2017, 7:19 PM), <https://www.charlotteobserver.com/news/politics-government/article139129808.html> (reporting research estimates that “HB2 has cost North Carolina between \$450 million and \$630 million”).

146. H.R. 1233, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); see also Wyatt Ronan, *Tennessee Gov. Lee Signs Anti-Transgender ‘Business Bathroom Bill’ into Law*, HUM. RTS. CAMPAIGN (May 17, 2021), <https://www.hrc.org/press-releases/tennessee-gov-lee-signs-anti-transgender-business-bathroom-bill-into-law> [<https://perma.cc/CR2F-5VR2>] (noting that two Tennessee bills signed into law that restrict transgender people's access to bathrooms in public schools and businesses “are the first bathroom bills to be enacted since North Carolina HB2 in 2016”).

147. H.R. 322, 32d Leg., Reg. Sess. (Ala. 2022); H.R. 1156, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); H.R. 1521, 2023 Leg., Reg. Sess. (Fla. 2023); S. 1100, 67th Leg., 1st Reg. Sess. (Idaho 2023); S. 482, 90th Gen. Assemb., Reg. Sess. (Iowa 2023); S. 150, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); H.R. 608, 2024 Leg., Reg. Sess. (La. 2024); S. 2753, 2024 Leg., Reg. Sess. (Miss. 2024); H.R. 1522, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); S. 615, 58th Leg., Reg. Sess. (Okla. 2022); H.R. 5100, 2024 Gen. Assemb., 125th Sess. (S.C. 2024); H.R. 1182, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); Tenn. H.R. 1233; H.R. 257, 2024 Leg., Gen. Sess. (Utah 2024).

correctional and juvenile detention institutions).¹⁴⁸ The bans in other states prohibit transgender people from using bathrooms and changing facilities in all government-owned and government-leased buildings and spaces, including public colleges and universities.¹⁴⁹

Many of these laws allow students (or parents on their behalf) to bring lawsuits against public K–12 schools for school noncompliance with the law or based on allegations of suffering direct or indirect harm (psychological, emotional, or physical) after sharing a school bathroom or other facility with a transgender student.¹⁵⁰ Iowa’s law allows for any citizen of the state to file a claim with the state attorney general if that citizen notifies the school and they do not cure the violation within a certain period of time.¹⁵¹ Other state laws that apply to government-owned and government-leased buildings allow lawsuits to be brought against government entities that do not comply with the law, individuals who violate the law, or both.¹⁵²

In terms of remedies, some laws allow individuals who prevail on claims that they suffered psychological, emotional, or physical harm after sharing a school bathroom or other facility to receive money damages and reasonable attorney fees.¹⁵³ In addition, some laws provide for decreased K–12 school funding, and civil fines and other disciplinary sanctions that licensing boards deem appropriate against K–12 schools, administrators, and teachers who allow transgender students to use bathrooms consistent with their gender identity.¹⁵⁴ Laws that apply to all government-owned and government-leased buildings and spaces differ in terms of potential remedies, which may include injunctive relief, licensure and regulatory disciplinary action, civil fines, damages, or reasonable attorney fees.¹⁵⁵

148. See S.B. 129, 2024 Leg., Reg. Sess. (Ala. 2024); La. H.R. 608; Miss. S. 2753; H.R. 1473, 68th Leg. Assemb., Reg. Sess. (N.D. 2023).

149. See Fla. H.R. 1521; Utah H.R. 257; Miss. S. 2753.

150. See, e.g., Idaho S. 1100 (providing civil cause of action available to students and parents against K–12 schools); Tenn. H.R. 1233 (providing civil causes of action available to students, parents, teachers, and employees of public schools against K–12 schools).

151. Iowa S. 482 (allowing an Iowa citizen to file a complaint with state attorney general if they provide written notice to the school of violation and the school does not cure violation within three business days of receiving written notice).

152. Fla. H.R. 1521 (providing state civil enforcement action against covered government entities); Miss. S. 2753 (providing private cause of action and attorney general enforcement against parties who violate law).

153. See, e.g., Idaho S. 1100 (outlining monetary damages for students suffering psychological, emotional, or physical harm); Tenn. H.R. 1233 (outlining remedies for private civil actions, including monetary damages for “all psychological, emotional, and physical harm suffered” and “reasonable attorney fees and costs”).

154. See, e.g., S. 615, 58th Leg., Reg. Sess. (Okla. 2022) (providing for 5% decrease in state funding in the following fiscal year for school districts or public charter schools found in noncompliance).

155. See, e.g., Fla. H.R. 1521 (outlining injunctive relief and civil fines for state enforcement actions brought against government entities); H.R. 608, 2024 Leg., Reg. Sess. (La. 2024) (outlining potential remedies in private causes of action including injunctions, actual damages, reasonable attorney fees, and costs).

D. CURRICULUM CENSORSHIP, FORCED STUDENT OUTING, AND
STUDENT PRONOUNS AND NAMES

Recent legislative attacks against transgender and LGBTQ+ youth in schools extend beyond limiting access to school bathrooms and participation on school sports teams. One battleground is the school curriculum, which is not a completely new front in the culture wars over LGBTQ+ inclusion and recognition in schools. Between the late 1980s and 2001, nine states enacted legislation that restricted discussions of “homosexuality” in specific areas of the school curriculum—namely, sex and health education.¹⁵⁶ Most of those laws were repealed in the late 2010s and early 2020s, with only four remaining on the books today.¹⁵⁷

A new wave of anti-LGBTQ+ curricular laws, however, emerged in the early 2020s with much broader restrictions than the ones in the previous laws discussed above. With legislation starting in 2021, seven states have passed laws that require advance parental notification of any LGBTQ-related curricula, give parents a right to inspect LGBTQ-related instructional materials, and allow parents to opt into or out of such instruction for their child.¹⁵⁸ Moreover, starting with Florida’s infamous “Don’t Say Gay” bill that passed in 2022,¹⁵⁹ eight states have passed laws that censor discussions of LGBTQ+ people or issues from public school curricula through various pre-K–12 grade levels.¹⁶⁰ These new laws go even further than existing laws in many states that censor discussions of LGBTQ+ issues in specific parts of school curricula, such as sex or health education.

Student names and pronouns are another major battleground involving LGBTQ+ youth in schools. Starting with Alabama in 2022, eight states have passed laws that force school administrators, teachers, and staff to “out” transgender youth to their parents or legal guardians by requiring parental notification of name or pronoun changes.¹⁶¹ Moreover, after Florida’s “Don’t Say Gay” bill that

156. MOVEMENT ADVANCEMENT PROJECT, LGBTQ CURRICULAR LAWS 6–7 (2024), <https://www.lgbtmap.org/img/maps/citations-curricular-laws.pdf> [<https://perma.cc/6HGG-JGF3>]. For a comprehensive analysis of laws censoring LGBTQ+ issues from school curricula before the new sexual deviancy, see generally Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017).

157. MOVEMENT ADVANCEMENT PROJECT, *supra* note 156, at 4.

158. H.R. 2035, 55th Leg., 1st Reg. Sess. (Ariz. 2021); S. 389, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); H.R. 241, 2021 Leg., Reg. Sess. (Fla. 2021); S. 99, 67th Leg., Reg. Sess. (Mont. 2021); H.R. 1312, 2024 Leg., Reg. Sess. (N.H. 2024); H.R. 727, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.R. 529, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); S. 9, 67th Leg., Budget Sess. (Wyo. 2024).

159. H.R. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (limiting classroom discussion on sexual orientation and gender identity issues in grades K–3); see Paton Moody, *Don’t Say Gay (or Race) Bills*, UCLA L.: CRT FORWARD (Aug. 3, 2022) <https://crtforward.law.ucla.edu/dont-say-gay-or-race-bills> [<https://perma.cc/9Y3H-BHYX>].

160. H.R. 322, 32d Leg., Reg. Sess. (Ala. 2022); S. 294, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); Fla. H.R. 1557; H.R. 1069, 2023 Leg., Reg. Sess. (Fla. 2023); H.R. 1608, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023); S. 496, 90th Gen. Assemb., Reg. Sess. (Iowa 2023); S. 150, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); H.R. 122, 2024 Leg., Reg. Sess. (La. 2024); S. 49, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

161. S. 184, 2022 Leg., Reg. Sess. (Ala. 2022); H.R. 538, 67th Leg., 2d Reg. Sess. (Idaho 2024); Ind. H.R. 1608; Iowa S. 496; N.C. S. 49; H.R. 1522, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.R. 4624,

passed in 2022, five states have passed laws that promote, but do not require, such outing.¹⁶² For instance, Florida's law forbids school districts from adopting policies that prohibit school personnel from notifying a student's parents or legal guardians about a name or pronoun change.¹⁶³ Conversely, Arizona's law prohibits school personnel from encouraging or coercing students to withhold this information from their parents or legal guardians.¹⁶⁴ Closely related to these laws that force or promote the outing of transgender students, at least six states have passed laws since 2023 that prohibit public school employees from using, or shield public school employees or students from discipline or liability for refusing to use, pronouns and names that are consistent with transgender or gender-diverse students' gender identities.¹⁶⁵

Although most of these recent laws do not explicitly speak to remedies, some laws involving curriculum censorship and parental notification provide for disciplinary action against school employees for noncompliance and require school districts to establish necessary procedures for parents or guardians to file complaints for noncompliance.¹⁶⁶ Moreover, at least one state law shielding teachers and students from discipline for using pronouns and names that do not align with a student's gender identity provides a cause of action for improperly disciplined teachers and students to seek injunctive relief, monetary damages, and reasonable attorney fees.¹⁶⁷

E. ANTI-DRAG LAWS

Starting with legislation in Arkansas and Tennessee in early 2023, there has been a concerted effort to pass legislation targeting drag shows.¹⁶⁸ These laws emerged in the wake of backlash from extreme right-wing groups against programs like Drag Queen Story Hour, which feature drag queens reading stories to

2024 Gen. Assemb., 125th Sess. (S.C. 2024); H.R. 2165, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024); S. 1810, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024).

162. H.R. 2161, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.R. 241, 2021 Leg., Reg. Sess. (Fla. 2021); H.R. 1557, 2022 Leg., Reg. Sess. (Fla. 2022); Ky. S. 150; H.R. 676, 68th Leg., Reg. Sess. (Mont. 2023); S. 518, 68th Leg., Reg. Sess. (Mont. 2023); S. 100, 2023 Leg., Gen. Sess. (Utah 2023).

163. Fla. H.R. 1557.

164. Ariz. H.R. 2161.

165. H.R. 1468, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); Fla. H.R. 1069; Ky. S. 150; H.R. 361, 68th Leg., Reg. Sess. (Mont. 2023); S. 2231, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); S. 466, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

166. *See, e.g.*, Fla. H.R. 241; S. 9, 67th Leg., Budget Sess. (Wyo. 2024).

167. *See* Ark. H.R. 1468.

168. *See* Brooke Migdon, *Tennessee Enacts Nation's First Law Restricting Drag Shows, Bans Gender-Affirming Care for Youth*, HILL (Mar. 2, 2023, 5:42 PM), <https://thehill.com/homenews/state-watch/3881688-tennessee-enacts-nations-first-law-restricting-drag-shows-bans-gender-affirming-care-for-youth> (describing Tennessee as "the first state to enact a law explicitly targeting drag shows"). In February 2022, Arkansas passed a law that targeted "adult-oriented" performances, using language broader than an earlier version that specifically targeted drag shows. *See* Austin Gelder, *No Longer Specifically Anti-Drag but Still a Drag, SB43 Now Targets 'Seminude' Displays*, ARK. TIMES (Feb. 3, 2023, 5:34 PM), <https://arktimes.com/arkansas-blog/2023/02/03/no-longer-specifically-anti-drag-but-still-a-drag-sb43-now-targets-seminude-displays> [<https://perma.cc/FZ9F-NYTM>].

children in public spaces to educate about queer culture and communities.¹⁶⁹ Since 2023, two states have enacted laws explicitly banning drag performances in the presence of minors,¹⁷⁰ and four states have enacted new laws involving “adult” or “sexually oriented” performances that could be used to restrict drag shows where minors are present.¹⁷¹ About two dozen states have introduced anti-drag legislation that has failed to become law.¹⁷²

These new laws criminalize drag performers with first-time violations classified as serious misdemeanors, and in some states, even low-level felonies for second-time offenses.¹⁷³ The potential criminal penalties are harsh, including up to a year in jail and thousands of dollars in fines for each offense.¹⁷⁴ In addition, many of these new laws authorize state enforcement actions against business owners, managers, and employees who host drag shows that could result in civil fines in amounts of thousands of dollars for each violation, injunctive relief, or loss of operating licenses.¹⁷⁵ Some of these laws also allow minors or parents whose children attend prohibited drag shows to bring private lawsuits against business owners, employees, or performers.¹⁷⁶ Potential remedies include injunctive relief, statutory damages, actual damages, and reasonable attorney fees.¹⁷⁷

F. TARGETED RELIGIOUS EXEMPTIONS

Targeted religious exemption laws provide blanket exceptions for entities and individuals to offer certain services in ways that align with their sincerely held religious or moral beliefs.¹⁷⁸ Several states passed targeted religious exemption laws in the three years immediately following *Obergefell v. Hodges* in 2015, which recognized marriage equality for same-sex couples.¹⁷⁹ Most of those laws

169. See Julia Carrie Wong, *Drag Queen Story Hour Goes on Despite Neo-Nazi's Attempts to Burn Church Down*, GUARDIAN (Apr. 3, 2023, 3:39 PM), <https://www.theguardian.com/us-news/2023/apr/03/drag-queen-story-hour-chesterland-community-church> [https://perma.cc/MNN3-Z7LD] (describing attempts to stop Drag Queen Story Hour at Ohio church); Scott Shackford, *The Fight over Kids at Drag Shows is a Classic Moral Panic*, REASON (Dec. 29, 2022, 3:20 PM), <https://reason.com/2022/12/29/the-fight-over-kids-at-drag-shows-is-a-classic-moral-panic> [https://perma.cc/W52E-VCH8] (highlighting Florida politicians' opposition to touring drag queen stage production).

170. H.R. 359, 68th Leg., Reg. Sess. (Mont. 2023); S. 3, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

171. S. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); S. 1438, 2023 Leg., Reg. Sess. (Fla. 2023); H.R. 1333, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); S. 12, 88th Leg., Reg. Sess. (Tex. 2023).

172. ACLU, *Legislative Attacks in 2024*, *supra* note 2.

173. See sources cited *supra* notes 170–71.

174. See sources cited *supra* notes 170–71.

175. See, e.g., Tex. S. 12 (providing for state enforcement against businesses and penalties); Mont. H.R. 359 (same); Fla. S. 1438 (same).

176. See, e.g., Mont. H.R. 359 (providing private right of action); Ark. S. 43 (describing and limiting “adult-oriented performance[s]” in public spaces); ARK. CODE ANN. § 14-1-305(b) (providing private right of action for injunctive relief).

177. See, e.g., Mont. H.R. 359 (providing remedies for private right of action); ARK. CODE ANN. § 14-1-305(b) (providing private right of action for injunctive relief).

178. MOVEMENT ADVANCEMENT PROJECT, RELIGIOUS EXEMPTION LAWS 2 (2024), <https://www.lgbtmap.org/img/maps/citations-religious-exemption.pdf> [https://perma.cc/9ZKG-3BN3].

179. 576 U.S. 644 (2015); see *id.* at 3–5 (listing states that have enacted targeted religious exemption laws by type and date).

involved adoption and foster care services in child welfare, and to some extent, the services of health care providers, businesses and establishments serving the public, and government officials who solemnize marriages.¹⁸⁰

1. Health Care

In the new sexual deviancy, there have been renewed pushes in state legislatures to enact targeted religious exemption laws in the healthcare domain.¹⁸¹ Starting with Arkansas in early 2021, six states have enacted targeted religious exemption laws that allow healthcare professionals to deny providing, or insurers to deny coverage for, medical services that conflict with their sincerely held religious or moral beliefs.¹⁸² Also called “medical conscience” laws, these laws are usually written in ways that do not formally target particular groups or services.¹⁸³ However, critics warn that the renewed push for these laws is animated by specific religiously-motivated desires to deny health care services to LGBTQ+ people (for instance, HIV prevention drugs or gender-affirming medications) as well as reproductive care to women.¹⁸⁴ In general, these laws create rights of action for health care providers whose “conscience” rights are violated, with potential remedies that include civil damages, injunctions, and reasonable attorney fees.¹⁸⁵ These laws also shield entities and professionals from liability for refusing to provide or pay for health care services on the basis of their sincerely held religious or moral beliefs.¹⁸⁶

2. Child Welfare

Starting with Tennessee in 2020, there also has been a renewed push in state legislatures to enact targeted religious exemption laws in the areas of child

180. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 178, at 3–5 (listing eight states that passed targeted religious exemption laws between 2015–2018 involving child welfare and three states that passed similar laws involving medical providers during the same period). Mississippi passed a law (in 2016) and Kansas used an executive order (in 2015) to allow businesses to deny marriage-related services to married same-sex couples. *Id.* at 7–8. Mississippi (in 2016) and North Carolina (in 2015) passed a law permitting government officials to decline to marry same-sex couples if they disapprove based on moral or religious beliefs. *Id.* at 8–9.

181. See *id.* at 3–5 (listing states that have enacted targeted religious exemption laws by date and type).

182. S. 289, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); S. 1580, 2023 Leg., Reg. Sess. (Fla. 2023); S. 1352, 67th Leg., 2d Reg. Sess (Idaho 2024) (only applying to counselors and therapists); H.R. 303, 68th Leg., Reg. Sess. (Mont. 2023); H.R. 110, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.R. 4776, 2022 Gen. Assemb., 124th Reg. Sess. (S.C. 2022).

183. See Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, HASTINGS CTR. (June 30, 2023), <https://www.thehastingscenter.org/briefingbook/conscience-clauses-health-care-providers-and-parents> [<https://perma.cc/D3PS-MCG4>].

184. See, e.g., Carly Graf, ‘Conscience’ Bills Let Medical Providers Opt Out of Providing a Wide Range of Care, KFF HEALTH NEWS (Aug. 3, 2023), <https://kffhealthnews.org/news/article/medical-conscience-bills-montana-florida-abortion/> [<https://perma.cc/M97C-2UPS>]; Zane McNeill, *Florida’s Latest Anti-LGBTQ Law Legalizes Medical Discrimination*, TRUTHOUT (May 15, 2023), <https://truthout.org/articles/floridas-latest-anti-lgbtq-law-legalizes-medical-discrimination> [<https://perma.cc/9R5H-LMFR>].

185. See, e.g., Fla. S. 1580 (indicating enforcement of law through fines, injunctions, and reasonable attorney fees).

186. See, e.g., *id.* (indicating entities and professionals have immunity from liability).

welfare.¹⁸⁷ In general, these laws prevent states from taking action against child welfare agencies or current or prospective foster or adoptive parents for providing child welfare services in ways that are consistent with their sincerely held religious or moral beliefs.¹⁸⁸ The practical effect of these laws is that they allow relevant actors in the child welfare system to reject LGBTQ+ people and couples from being foster or adoptive parents and increase the risks that LGBTQ+ youth will be denied child welfare services or placed in unsupportive homes that reject their sexual orientations and gender identities.¹⁸⁹ Since 2020, four states have enacted such laws.¹⁹⁰ Many provisions of these new laws align with the targeted religious exemptions in child welfare that states passed in the wake of *Obergefell*.¹⁹¹

New forms of targeted religious exemptions in child welfare, however, have emerged in this renewed push. Notably, these new forms are much broader than previously enacted religious exemptions in child welfare in that they go beyond addressing specific protections to faith-based agencies and religious parents and instead preempt LGBTQ-inclusive policies of state child welfare departments and redefine legal presumptions in existing state family laws. In 2024, Tennessee enacted the first law of this kind to prohibit the state's department of child services from creating or enforcing a policy that precludes parents from being considered for a particular placement based on their sincerely held religious or moral beliefs.¹⁹² The law also redefines presumptions in Tennessee family law so that such "beliefs do not create a presumption that any particular placement is contrary to the best interest of the child."¹⁹³ Oklahoma and West Virginia introduced similar bills in 2024 that never became law.¹⁹⁴ It is unclear whether these new forms of religious exemptions in child welfare will gain force in future legislative sessions.

187. MOVEMENT ADVANCEMENT PROJECT, *supra* note 178, at 3–5 (listing states that have enacted targeted religious exemption laws by date and type).

188. Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2347 (2019).

189. *See id.* at 2345 (discussing in the context of Mississippi's H.R. 1523 how religious exemption laws in child welfare harm LGBTQ+ youth); MOVEMENT ADVANCEMENT PROJECT, KIDS PAY THE PRICE: HOW RELIGIOUS EXEMPTIONS FOR CHILD WELFARE AGENCIES HARM CHILDREN 5 (2017), <https://www.lgbtmap.org/file/Kids%20Pay%20the%20Price%20FINAL.pdf> [<https://perma.cc/XE7X-GVJ9>] (discussing how religious exemption laws in child welfare harm prospective LGBTQ+ foster and adoptive parents). Related to the discussion above, in *Fulton v. City of Philadelphia*, the U.S. Supreme Court held that the refusal of the City of Philadelphia to contract with a faith-based child welfare agency to provide child welfare services on the grounds that the agency refused to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. 593 U.S. 522, 542 (2021).

190. H.R. 836, 111th Gen. Assemb., Reg. Sess. (Tenn. 2020); S. 1738, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024); S. 1399, 55th Leg., 2d Reg. Sess. (Ariz. 2022); S. 154, 2023 Leg., Gen. Sess. (Utah 2023) (protecting private agencies only); H.R. 578, 67th Leg., 2d Reg. Sess. (Idaho 2024).

191. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 178, at 3–5 (listing states that have enacted targeted religious exemption laws by date and type).

192. Tenn. S. 1738.

193. *Id.*

194. *See* S. 1677, 2024 Leg., Reg. Sess. (Okla. 2024); H.R. 4898, 2024 Leg., Reg. Sess. (W. Va. 2024).

Nevertheless, in states that enact them, these new forms of religious exemptions in child welfare could have the practical effect of eliminating, or eliminating the enforcement of, existing state and local child welfare departmental policies that offer protections for LGBTQ+ youth. For instance, Tennessee's department of child services has had a comprehensive policy in place since 2015 to affirm LGBTQ+ youth identities throughout the state's child welfare system.¹⁹⁵ The department is now reconsidering that policy in light of the state's new religious exemption law.¹⁹⁶ The scope of the affirming policies at risk include guidance on: how to appropriately evaluate LGBTQ+ youth during intake screenings (for instance, not searching or physically examining transgender or intersex youth for the sole purpose of determining their sex at birth); the appropriate placement of LGBTQ+ youth (for instance, giving LGBTQ+ youth's views on their own safety serious consideration, not placing transgender youth automatically based on their sex assigned at birth, and not prohibiting LGBTQ+ youth from having a roommate because they identify as LGBTQ+); appropriate names, language, and dress (for instance, child welfare staff and volunteers must avoid derogatory language and stereotypes about LGBTQ+ people, refer to transgender youth based on the preferred names and pronouns that align with their gender identities, and allow youth to dress and present themselves in a manner consistent with their gender identity); and on medical and mental health care (for instance, providing LGBTQ+ youth access to medical and mental health providers who are knowledgeable about the needs of LGBTQ+ people and maintaining gender-affirming care for transgender youth who are receiving it).¹⁹⁷ For these reasons, critics warn that these new forms of religious exemptions in child welfare will further undermine protections for LGBTQ+ youth in child welfare systems and increase the risk of placing them in homes that reject their LGBTQ+ identities.¹⁹⁸

G. TRANS ERASURE LAWS

In early 2023, Kansas became the first state to pass a new type of anti-trans law that defines the term "sex" (and other associated terms) throughout all state law in binary terms based on one's sex assigned at birth.¹⁹⁹ Since 2023, nine states in total have passed these types of laws.²⁰⁰ LGBTQ+ rights advocates have dubbed

195. See generally TENN. DEP'T OF CHILD.'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES: 20.20 (2015), <https://files.dcs.tn.gov/policies/chap20/20.20.pdf> [<https://perma.cc/8G9Q-9XJ3>].

196. See Anita Wadhvani, *Tenn. Passes Law Giving Legal Rights to Anti-LGBTQ Parents to Foster, Adopt LGBTQ Kids*, TENN. LOOKOUT (Apr. 24, 2024, 5:01 AM), <https://tennesseelookout.com/2024/04/24/in-the-childs-best-interest> [<https://perma.cc/L5M4-BJUB>].

197. TENN. DEP'T OF CHILD.'S SERVS., *supra* note 195, at 1–3.

198. See Lauren Irwin, *Tennessee Passes Bill Permitting Non-Accepting Parents to Adopt LGBTQ Children*, HILL (Apr. 2, 2024, 6:59 PM), <https://thehill.com/homenews/state-watch/4570946-tennessee-passes-bill-permitting-non-accepting-parents-to-adopt-lgbtq-children> [<https://perma.cc/X998-98QE>].

199. S. 180, 2023 Leg., Reg. Sess. (Kan. 2023); Kynala Phillips & Katie Bernard, *Kansas Will Legally Define Gender as Sex at Birth. What that Means for Transgender Rights*, KAN. CITY STAR (May 5, 2023, 11:55 AM), <https://www.kansascity.com/news/politics-government/article274806761.html> (noting that Kansas's trans erasure law "is the first of its kind passed in the U.S.").

200. H.R. 421, 67th Leg., 2d Reg. Sess. (Idaho 2024); Kan. S. 180; H.R. 608, 2024 Leg., Reg. Sess. (La. 2024); S. 2753, 2024 Leg., Reg. Sess. (Miss. 2024); S. 458, 68th Leg., Reg. Sess. (Mont. 2023); H.R. 1474, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.R. 1449, 2024 Leg., Reg. Sess. (Okla. 2024);

these laws as trans “erasure” laws because they literally remove transgender and nonbinary identity from recognition under state law and seek to erase them from public life.²⁰¹ To be clear, trans erasure laws are separate from, but can work together with, the various types of other legislation targeting transgender communities in the new sexual deviancy discussed above, such as laws restricting transgender people’s access to bathrooms and changing facilities in public schools and government-owned and government-leased buildings and spaces.

Critics warn that it is difficult to assess the potential harm of trans erasure laws to transgender and gender-diverse people because they are vaguely written to apply to state legal codes in their entirety.²⁰² These laws, however, could potentially harm transgender and gender-diverse people in multiple ways that perhaps differ depending on the state.²⁰³ For instance, trans “erasure” laws could work to exclude transgender and gender-diverse people from statewide legal protections (such as nondiscrimination laws) as well as official state and local government surveys (for instance, surveys that collect public health, crime, or economic data).²⁰⁴ Moreover, these laws can inhibit transgender and gender-diverse people’s ability to update gender markers on identity documents.²⁰⁵ Trans erasure laws could also jeopardize transgender and gender-diverse people’s access to government-owned or privately-owned places of public accommodation (for example, public bathrooms, changing facilities, and locker rooms) and publicly available services (such as homeless or domestic violence shelters) consistent with one’s gender identity. Illustrating this point, the text of Kansas’s trans erasure law explicitly invokes health, safety, and privacy as important government

S. 1440, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.R. 257, 2024 Leg., Gen. Sess. (Utah 2024). An executive order is also in place in Nebraska that defines “sex” throughout state law in similar terms. Neb. Exec. Order No. 23-16 (2023). *See also* MOVEMENT ADVANCEMENT PROJECT, NONDISCRIMINATION: REGULATING GENDER TO ALLOW DISCRIMINATION AGAINST TRANSGENDER AND NONBINARY PEOPLE 3 (2024), <https://www.lgbtmap.org/img/maps/citations-defining-sex.pdf> [<https://perma.cc/5JSE-CUTZ>] (listing states that have enacted trans erasure laws by date and type).

201. *See, e.g., Protecting Pride: Defending the Civil Rights of LGBTQ+ Americans: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. (2023) (written statement of Kelley Robinson, President, Human Rts. Campaign, dubbing these laws as “LGBTQ+ Erasure Laws”); Gloria Rebecca Gomez, *GOP-Backed Bill Critics Say Will ‘Erase’ Trans and Nonbinary Arizonans Heads to the Governor*, AZ MIRROR (Apr. 4, 2024, 10:35 AM), <https://azmirror.com/2024/04/04/gop-backed-bill-critics-say-will-erase-protections-for-trans-and-nonbinary-arizonans-heads-to-the-governor> [<https://perma.cc/6BZ4-G45C>] (stressing that critics of Arizona’s proposed trans erasure law say it “will erase transgender and nonbinary people from public life”). Although the Arizona legislature passed a trans erasure law, Arizona Governor Katie Hobbs vetoed it. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 200, at 3.

202. MOVEMENT ADVANCEMENT PROJECT, *supra* note 200, at 2 (noting that trans erasure laws “are often vaguely written”).

203. *See id.* (noting that the “actual impact” of trans erasure laws “may vary across each state”).

204. *See, e.g., Human Rights Campaign Calls on Gianforte to Veto LGBTQ Erasure Act*, HUM. RTS. CAMPAIGN (Apr. 27, 2023), <https://www.hrc.org/press-releases/human-rights-campaign-calls-on-gianforte-to-veto-lgbtq-erasure-act> [<https://perma.cc/SXN3-WWCD>] (stressing that Kansas’s trans erasure law would “prohibit LGBTQ+ people from bringing claims of sexual orientation or gender identity discrimination in areas like employment, housing, public accommodations, health care, credit, and education”); Kan. S. 180 (requiring official state and local surveys to “identify each individual who is part of the collected data set as either male or female at birth”).

205. *See* Gomez, *supra* note 201.

objectives that constitutionally justify “distinctions between the sexes with respect to athletics, prisons or other detention facilities, domestic violence shelters, rape crisis centers, locker rooms, restrooms and other areas where biology, safety or privacy are implicated.”²⁰⁶

III. TRACING THE NEW SEXUAL DEVIANCY

This Part traces the new sexual deviancy and its intellectual underpinnings. The analysis demonstrates how state lawmakers and state’s attorneys are invoking antiquated ideas about sexual deviance in multifaceted and contradictory ways to achieve desired anti-LGBTQ+ outcomes in both legislatures and courts. As explained, these discredited ideas have intellectual roots in two main theoretical perspectives on deviance: (1) sociological theories of deviance and (2) psychological theories of deviance. The analysis illustrates how ideas from both camps define heterosexual and cisgender people as “normal” and embrace harmful stereotypes of LGBTQ+ people as deviants, sinners, mentally ill, sexual predators, and dangers to children.²⁰⁷

Two explanatory notes are useful at the outset. First, given the incredible volume of anti-LGBTQ+ laws and policies that have been introduced in recent years, it is impossible in the confines of a single Article to trace the intellectual underpinnings of the new sexual deviancy based on a comprehensive analysis of every recently proposed measure that targets LGBTQ+ communities. This analysis focuses on successfully enacted state legislation as key examples. I consider legislative text, supporting documents, committee statements, expert testimony, the briefs of state’s attorneys, and available court opinions in lawsuits challenging these laws.

Second, the analysis below primarily focuses on the ideas about deviance that lawmakers and state’s attorneys are advancing. This focus connects back to “societal control culture” in Cohen’s “moral panic” theory.²⁰⁸ As discussed above, societal control culture not only involves societal institutions but also the personnel within those institutions and their “models of understanding and explaining . . . deviance.”²⁰⁹ As representatives of the state and its legal institutions, lawmakers and states’ attorneys are critical agents who delineate and enforce the boundaries of “deviance” in society.

Section A traces ideas in the new sexual deviancy that are grounded in sociological theories of deviance. These theories explain “deviance” in terms of societal and environmental factors external to the individual (for instance, culture, peer interactions, families, schools, and other societal institutions).²¹⁰ Section B traces ideas that are grounded in psychological theories of deviance. These

206. Kan. S. 180.

207. See Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, at 685, 691, 716 (2017).

208. See *supra* Section I.B.

209. COHEN, *supra* note 66, at 77.

210. See Woods, *supra* note 207, at 691.

theories attempt to explain “deviance” in terms of personality traits and psychological factors that are specific to the individual.²¹¹

A. SOCIOLOGICAL THEORIES OF DEVIANCE

In the new sexual deviancy, lawmakers and state’s attorneys are propagating discredited ideas about LGBTQ+ identity and people that have intellectual roots in sociological theories of deviance. As noted above, sociological theories of deviance explain “deviance” in terms of social and environmental causes external to the individual.²¹² Examples include culture, peer interactions, families, schools, and other societal institutions.²¹³

Although there is a diversity of sociological perspectives on deviance, one could divide these perspectives into two camps: (1) positivistic and (2) constructionist.²¹⁴ The first (positivistic) camp assumes that there is a general set of norms involving behavior and conduct on which all of society can agree.²¹⁵ The second (constructionist) camp assumes that definitions of deviance are socially constructed based on people’s societal interactions.²¹⁶

As discussed below, lawmakers and state’s attorneys in the new sexual deviancy are advancing some arguments that align with positivistic and others that align with constructionist perspectives to justify and defend legislation targeting LGBTQ+ communities. Specifically, these state actors are molding arguments in four concepts that are connected to dated sociological theories of deviance: (1) social contagion, (2) “improper” sexual socialization of youth, (3) religious authority, and (4) vice. Each is discussed in turn below.

1. Social Contagion

The notion that deviant or antisocial conduct can be socially contagious has deep roots in sociological theories of deviance.²¹⁷ Social contagion theory posits that ideas, behaviors, and practices are “spread” from one actor to another through social interaction and communication.²¹⁸

In the past decade, controversy has emerged over new research applying social contagion theory to describe a purported epidemic of adolescents suddenly

211. See Woods, *supra* note 188, at 2354.

212. See Woods, *supra* note 207, at 691.

213. See *id.*

214. See ERICH GOODE, *DEViant BEHAVIOR* 14 (13th ed. 2023).

215. See *id.* (arguing that “deviance is objectively real”).

216. See *id.*

217. See Milena Tsvetkova & Michael W. Macy, *The Social Contagion of Antisocial Behavior*, 2 SOCIO. SCI. 36, 37 (2015) (describing that “[c]riminologists and scholars of deviance were among the first to argue that antisocial behavior can be contagious”).

218. See Ronald S. Burt, *Social Contagion and Innovation: Cohesion Versus Structural Equivalence*, 92 AM. J. SOCIO. 1287, 1288–89 (1987) (describing the theory underlying social contagion); Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, in THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 688, 689 (Daniel J. Flannery et al. eds., 2007) (describing that “social contagion involves the mutual influence of individuals within social networks who turn to each other for cues and behavioral tools that reflect the contingencies of specific situations”).

identifying as transgender during or after puberty. In 2018, medical researcher Lisa Littman first introduced the concept of “rapid-onset gender dysphoria” (ROGD) into the medical literature.²¹⁹ Littman’s research has been propagated in mainstream conservative news outlets as well as podcasts that have embraced extremist right-wing conspiracy theories and misinformation.²²⁰ Proponents of ROGD discount the authenticity of youth trans identity, argue that such identities are usually maladaptive coping mechanisms for psychological problems (for instance, depression and anxiety), and posit that gender-affirming care and youth trans identities should be discouraged in society.²²¹

To provide background on ROGD theory, Littman’s study recruited 256 parents to complete surveys placed on websites where parents had reported “rapid onsets of gender dysphoria” in their children.²²² Littman claimed that ROGD is a new subcategory of gender dysphoria and hypothesized that social contagion is a key determinant of ROGD.²²³ According to Littman, prior to coming out as transgender, adolescents affected by ROGD: (1) belonged to peer groups where one or more friends came out as transgender near the same time as they did²²⁴ and (2) were exposed to transgender-related content through increased social media and internet use.²²⁵

A growing body of research is discrediting the soundness of the ROGD hypothesis and Littman’s study.²²⁶ One set of critiques involves substantive problems with Littman’s hypothesis. For instance, scholars have called attention to the fact that proponents of ROGD fail to conceptually distinguish ROGD from *late-onset* or *adolescent-onset* gender dysphoria—a clinically-recognized pattern of gender dysphoria under the most recent edition of the American Psychiatric

219. See Lisa Littman, *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, PLOS ONE, Aug. 16, 2018, at 1.

220. See, e.g., Alexander Hall, *Joe Rogan: When Did Society Forget that Kids ‘Should Not Make Life-Changing Choices’ Like Gender Surgery?*, FOX NEWS (July 27, 2023, 4:11 PM), <https://www.foxnews.com/media/joe-rogan-when-did-society-forget-kids-should-not-make-life-changing-choices-like-gender-surgery> [https://perma.cc/AKX3-5X8C] (noting discussion of “Lisa Littman’s work describing the rise of rapid onset gender dysphoria as a ‘social contagion’” on Joe Rogan’s podcast); see also Alana Mastrangelo, *Study: Transgenderism is ‘Social Contagion’ for Teens*, BREITBART (Apr. 3, 2023), <https://www.breitbart.com/politics/2023/04/03/study-transgenderism-social-contagion-teens> [https://perma.cc/L7QU-H5QS] (discussing Littman’s study and noting that a “new study strongly suggests that social contagion is a factor in teenagers and young adults identifying as transgender”).

221. Florence Ashley, *A Critical Commentary on ‘Rapid-Onset Gender Dysphoria,’* 68 SOCIO. REV. 779, 781–83 (2020).

222. Littman, *supra* note 219, at 4.

223. *Id.* at 32.

224. *Id.* at 10.

225. *Id.*

226. See, e.g., Ashley, *supra* note 221, at 781–89 (describing interpretive and methodological flaws with ROGD, including that “Littman’s study was based on parental reports sampled from transantagonistic websites”); Jack L. Turban et al., *Rapid-Onset Gender Dysphoria is Not a Recognized Mental Health Diagnosis*, 73 J. ADOLESCENT HEALTH 1162, 1164 (2023) (stressing that “the ROGD hypothesis has no discernible empirical basis”). See generally Arjee Javellana Restar, *Methodological Critique of Littman’s (2018) Parental-Respondents Accounts of ‘Rapid-Onset Gender Dysphoria,’* 49 ARCHIVES SEXUAL BEHAV. 61 (2020) (providing a methodological critique of Littman’s study).

Association's Diagnostic and Statistical Manual of Mental Disorders (DSM)—which recognizes that individuals can experience gender dysphoria during adolescence or adulthood, with or without early signs in childhood.²²⁷ Another set of critiques involves methodological problems with the study. For instance, researchers stress that the study sampled parents from trans-antagonistic²²⁸ websites that attract parents who are disturbed by their child's gender identity, causing sampling bias.²²⁹ In addition, many parents do not recognize signs of gender dysphoria, children may not tell parents that they identify as trans for various reasons, and individuals who experience late-onset gender dysphoria may not have verbally expressed signs during childhood to others—points that scholars and the most recent edition of the DSM also stress.²³⁰

Nevertheless, some lawmakers and state's attorneys in the new sexual deviancy cite ROGD research and its hypothesis to undermine the authenticity of transgender youths' identities and rationalize laws that target them. These ideas appear most in legislative discussions and litigation surrounding bans on gender-affirming care for minors. Consider the following examples.

In briefs defending Tennessee's ban on gender-affirming care for minors, the State's attorney general stressed: “[i]n the face of an astonishing rise in cases [of gender dysphoria], which common sense and experts attribute to social contagion, Tennessee took appropriate action to protect minors.”²³¹ On appeal, the State's brief opens by emphasizing that “[t]he Western world is seeing an astonishing increase in young people presenting with gender dysphoria.”²³² Similarly, in briefs defending Alabama's ban, the State stressed “the unexplained explosion

227. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 455 (5th ed. 2013) [hereinafter DSM-V] (noting that “[l]ate onset gender dysphoria occurs around puberty or much later in life” and that some individuals “do not recall any signs of childhood gender dysphoria”); see also Victoria Pitts-Taylor, *The Untimeliness of Trans Youth: The Temporal Construction of a Gender ‘Disorder,’* 25 SEXUALITIES 479, 485–86 (2022) (noting that ROGD “contradicts” late-onset and adolescent-onset gender dysphoria, which are recognized in “the established literature”).

228. The National Institutes of Health (NIH) defined “trans-antagonistic” as “[a]ctive hostility towards trans and gender-expansive people with the goal of enacting harm.” *Sexual & Gender Minority: Terms and Definitions*, NAT'L INSTS. HEALTH, <https://www.edi.nih.gov/people/sep/lgbti/safezone/terminology> [<https://perma.cc/ERV7-DZKK>] (last visited Dec. 20, 2024).

229. See Ashley, *supra* note 221, at 780; Pitts-Taylor, *supra* note 227, at 483.

230. DSM-V, *supra* note 227, 455–56 (noting that “[f]or adolescent males with late-onset gender dysphoria, parents often report surprise because they did not see signs of gender dysphoria during childhood”); *id.* at 455 (noting that some individuals who experience late-onset gender dysphoria “report having had a desire to be of the other gender in childhood that was not expressed verbally to others”); *id.* at 456 (noting that “[p]arents of natal adolescent females with the late-onset form also report surprise, as no signs of childhood gender dysphoria were evident”); Pitts-Taylor, *supra* note 227, at 487 (noting that taking “parental observations at face value belies the subjective accounts of trans youth who identify as trans for various periods prior to coming out to their parents”).

231. Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 11, *L.W. ex rel. Williams v. Skrmetti*, No. 23-cv-00376 (M.D. Tenn. May 19, 2023) [hereinafter Tennessee Response] (citations omitted).

232. Brief of Defendants-Appellants at 3, *L.W. ex rel. Williams v. Skrmetti*, No. 23-5600 (6th Cir. July 24, 2023).

in gender discordance among young people,”²³³ and discussed Littman’s study on ROGD.²³⁴ In defending Montana’s ban, the State’s brief argued that “the sudden rise in gender discordance in young individuals is cause for concern considering this was extremely rare just a generation ago.”²³⁵ It then discussed Littman’s study and described that participants in that study “were not born in the wrong body—their discordance was the result of a social phenomenon.”²³⁶ Each of these examples reinforces the idea that youth trans identity is a social contagion, “spread” from one youth to the next through ROGD.

Lawmakers have also invited expert witnesses to testify at committee hearings who have pushed social contagion ideas and the ROGD hypothesis in their testimony. For instance, Arkansas lawmakers invited a pediatric anesthesiologist who had never treated gender dysphoria in minors to testify in support of Arkansas’s ban on gender-affirming care for minors. In testimony, the doctor stressed, “it has really been an explosion of adolescents with this acute onset dysphoria.”²³⁷ Tennessee lawmakers invited one expert witness who founded a nonprofit organization and introduced herself before the state senate committee as “an advocate for children harmed by medical exploitation and gender mutilation.”²³⁸ In her testimony, the expert witness invoked social contagion ideas not only to explain the increasing demand for gender-affirming care for minors but also to blame trans-affirming medical care professionals for higher rates of suicide among transgender youth:

For those who might wonder if this is a problem large enough to need intervention, I would warn that in 2007 there were only one or two pediatric transgender clinics. Today, there are more than 300. What created this demand? Social contagion. What used to be something like teenagers becoming goth because they felt out of place as a teen has become a similar social contagion where changing your sex has become the way to deal with those feelings of confusion about your identity or places in society. The trans-medicine industry is helping to grow this contagion through emotional blackmail where suicide is threatened if you don’t give in to their demands.²³⁹

233. Defendants’ Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 3–4, *Eknes-Tucker v. Ivey*, No. 22-cv-00184 (M.D. Ala. May 2, 2022) [hereinafter *Alabama Response*].

234. *Id.* at 22.

235. Defendants’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction, at 4, *Van Garderen v. State*, No. 2023-0541 (Mont. Dist. Ct. Sept. 1, 2023) [hereinafter *Montana Response*].

236. *Id.* at 5.

237. Ark. House Public Health, Welfare, & Labor Comm., *House Public Health, Welfare, and Labor Committee*, ARK. LEG., at 4:36:29–4:36:35 (Mar. 9, 2021), <https://sg001-harmony.sliq.net/00284/Harmony/en/PowerBrowser/PowerBrowserV2/20210309/-1/21303?mediaStartTime=20210309161445> (statement of Dr. Grady Crosland); *id.* at 4:50:10–4:50:13 (Dr. Grady Crosland responding that “I have not taken care of those patients” in response to a lawmaker’s question about how many patients the doctor had treated with gender dysphoria).

238. Tenn. S. Health & Welfare Comm., *Senate Health and Welfare Committee*, TENN. GEN. ASSEMB., at 39:24–39:30 (Feb. 1, 2023), <https://tnga.granicus.com/player/clip/27361> (statement of Landon Starbuck, founder of Freedom Forever).

239. *Id.* at 43:50–44:28.

Florida lawmakers referenced social contagion ideas in legislative discussions to undermine LGBTQ+ youth's identities and justify Florida's "Don't Say Gay" bill passed in 2022.²⁴⁰ The Florida senator who sponsored the bill stressed before the Florida senate:

We are in a trending posture right now . . . I mean, . . . why is everybody now all about coming out when you're at school? . . . [T]here really is a dynamic of concern of how much of this are genuine types of experiences and how many of them are just kids trying on different kinds of things they hear about and different kinds of identities—and experimenting—that's what kids do.²⁴¹

Later, a senator opposed to the bill asked the sponsor whether the law was needed because of "a big uptick in the number of children who are coming out as gay or experimenting."²⁴² The sponsor responded, "[w]e know there's social inputs into how people act and what they decide to do. So, yeah, that's part of our concern for the well-being of our children."²⁴³

As this Article will discuss later in more detail, these social contagion ideas are harmful to LGBTQ+ people, and transgender and gender-diverse individuals in particular.²⁴⁴ They stigmatize transgender communities and reject the authenticity of transgender and gender-diverse youth's identities.

2. "Improper" Sexual Socialization of Youth

In the new sexual deviancy, lawmakers and state's attorneys are also invoking concerns about the "improper" sexual socialization of youth, which have intellectual roots in outdated sociological theories of deviance. Although there is some potential overlap with the "social contagion" ideas discussed above that liken LGBTQ+ youth identity to a social disease, ideas about the "improper" sexual socialization of youth have more of an institutional focus in that they place primacy on how socialization patterns within societal institutions that are often at the center of youth's lives (for instance, schools and families) encourage "deviance"—in this context, LGBTQ+ youth identity. As discussed below, sociological ideas about the "improper" sexual socialization of youth help to resolve a glaring contradiction in the discourse surrounding parental rights in legislatures and courts. In certain instances lawmakers and state's attorneys are invoking parental rights to justify certain types of legislation (for instance, LGBTQ+ censorship in school curricula, parental opt-in/opt-out requirements for LGBTQ-related school instruction, and forced outing of transgender students to parents). In fact, several states with "Don't Say LGBTQ+" laws currently in place explicitly

240. H.R. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

241. Fla. S., 3/7/22 *Senate Session Part 3*, FLA. CHANNEL, at 3:53:57–3:54:29 (Mar. 7, 2022) <https://thefloridachannel.org/videos/3-7-22-senate-session-part-3> (statement of Sen. Baxley).

242. *Id.* at 3:56:44–3:56:50 (statement of Sen. Polsky).

243. *Id.* at 3:57:13–3:57:22 (statement of Sen. Baxley).

244. *See infra* Part V (discussing the harms of the new sexual deviancy).

invoke parental rights in the title or text of the laws.²⁴⁵ At the same time, lawmakers and state's attorneys are critiquing parental rights and calling for limits on those rights to support other types of legislation targeting LGBTQ+ communities (for instance, bans on gender-affirming care for minors and anti-drag laws).

Dated sociological theories of deviance that explain LGBTQ+ identity in terms of "improper" socialization patterns help to resolve these contradictions. In the 1950s, "symbolic interactionism" gained popularity as a leading sociological framework to study deviance.²⁴⁶ Scholars began to apply this approach to study how people's interactions within families, peer groups, and society more broadly shaped "homosexuality" (which back then was largely understood to encompass gender nonconformity).²⁴⁷ To study questions about deviant sexuality, deviance scholars specifically looked to B.F. Skinner's theory of operant conditioning, which posits that behavior is more likely to occur in environments that reinforce those behaviors.²⁴⁸

Deviance scholars in sociology who promoted "symbolic interactionism" stressed that the sexual and gender identities of adolescents and children were still developing and thus subject to environmental influences.²⁴⁹ They further viewed "homosexual" and "heterosexual" as social roles rooted in gendered expectations of appropriate sexual behavior.²⁵⁰ These thinkers used operant conditioning theory to explain how reinforcing homosexual conduct through socialization encouraged people to move from an isolated same-sex sexual experience to a "stable pattern of deviant sexuality."²⁵¹ In the context of youth, socialization patterns in families, schools, and other societal institutions that touched their lives were key to whether youth would continue on this deviant path for good.²⁵²

From this perspective, the apparently contradictory positions that lawmakers and state's attorneys are taking with respect to parental rights in the new sexual deviancy have a clear and consistent underlying logic. Under the moral panic framework, these seemingly contradictory positions are about guiding the socialization of youth in vital institutions to reinforce traditional notions of sex, sexuality, and gender. As the examples below will show, lawmakers and state's

245. See Fla. H.R. 1557 ("parental rights in education" in title); S. 496, 90th Gen. Assemb., Reg. Sess. (Iowa 2023) (same); S. 49, 2023–24 Gen. Assemb., Reg. Sess. (N.C. 2023) ("Parents' Bill of Rights" in title).

246. See Woods, *supra* note 188, at 2356.

247. See *id.*

248. B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 62–66 (1st ed. 1953) (outlining operant conditioning theory); see Woods, *supra* note 188, at 2356.

249. See Woods, *supra* note 188, at 2363. As discussed later in this Article, emerging psychological perspectives on deviance also emphasized the malleability of sexual and gender identity development in youth. See *infra* Section III.B.

250. See Woods, *supra* note 188, at 2363; see also RONALD L. AKERS, DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH 189 (2d ed. 1977) ("Heterosexual and homosexual are distinguishable social roles, but people are not inherently one or the other . . ."); Mary McIntosh, *The Homosexual Role*, 16 SOC. PROBS. 182, 182 (1968) (conceptualizing homosexuality as a social category and label).

251. AKERS, *supra* note 250, at 193; see also Woods, *supra* note 188, at 2363.

252. Woods, *supra* note 188, at 2360.

attorneys are arguing that teaching LGBTQ+ affirmation in schools “socializes” youth in ways that are inconsistent with the values and belief systems of *some* parents. In prioritizing the values and beliefs of certain parents over others, state intervention is protecting socialization within societal institutions that emphasize traditional norms of sex, sexuality, and gender while undermining socialization within societal institutions that do not.

Legislators seemingly prioritize parental rights over state intervention. When presenting Florida’s “Don’t Say Gay” bill involving LGBTQ+ school censorship in the Florida senate, the sponsor of the bill stressed ideas about child socialization and parental rights, noting: “I don’t want us to keep moving in this direction that we are about socialization instead of about educating them with learning skills that will allow them to prosper.”²⁵³ In later testimony, the sponsor stressed: “The problem is—are you training people to think a certain way with a planned program of action? That’s my concern. Because you’re going to have parents that say ‘they are trying to retrain my kid to think differently than [how] our value system works. . . . Somebody has to be in charge. And I’m just shoring up the fact the parent is in charge.’”²⁵⁴

But other legislators’ statements show how concerns about sexual socialization can prioritize state intervention over parental rights. For instance, in defending Texas’ anti-drag law, the state attorney general stressed that the law was “[d]esigned to protect children from the harms that can be caused by exposure to such performances.”²⁵⁵ To substantiate these alleged harms, the state attempted to introduce a written report of a forensic psychiatrist which emphasized social learning ideas, stating that “minors, and more so adolescents in puberty, remain vulnerable to copying/acting out the sexual behavior which they have been exposed to.”²⁵⁶ Offering a second example, the same expert witness who Tennessee lawmakers invited to testify in support of the state’s ban on gender-affirming care was also invited to speak in favor of the state’s anti-drag bill. In testimony, the expert witness pushed social learning ideas to argue that drag shows sexualize children:

So when children are legally permitted to sit and watch an adult strip off pieces of clothing, and simulate sexual behaviors as an audience thunderously claps and rewards the performer with a monetary gift of dollar bills, what does that child learn? They learn that sexuality is a vehicle for attention, affirmation, and money. You can get paid to take off your clothes and sexualizing yourself. People will love you for sexualizing yourself to please them.²⁵⁷

253. Fla. S., *supra* note 241, at 2:43:38–2:43:41 (statement of Sen. Baxley).

254. *Id.* at 3:09:53–3:10:09.

255. Appellant’s Opposed Motion for Stay Pending Appeal at 1, Woodlands Pride, Inc. v. Paxton, No. 23-20480 (5th Cir. Oct. 27, 2023).

256. Defendant Colmenero’s Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) and Response in Opposition to Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction at 31, Woodlands Pride, Inc. v. Colmenero, No. 23-cv-2847 (S.D. Tex. Aug. 23, 2023).

257. Tenn. S. Judiciary Comm., *Senate Judiciary Committee*, TENN. GEN. ASSEMB., at 16:22–16:45 (Jan. 31, 2023), <https://tnga.granicus.com/player/clip/27348> (statement of Landon Starbuck, founder of Freedom Forever).

When opposing lawmakers asked about parental rights, the expert witness stressed that “[t]he moment [parents] see an adult spreading their legs and rubbing their genitalia in front of their child, that’s where their parental rights end and that’s where a crime is committed.”²⁵⁸

Some lawmakers have openly admitted that anti-drag laws prioritize the moral judgments of the state and local communities over parents. For instance, in legislative discussion over Florida’s anti-drag law, the senator-sponsor stressed: “Parents have the right to raise their children as they see fit and government intervention should be a last resort. As lawmakers, we have a responsibility to protect children from viewing lewd conduct that is patently offensive to prevailing standards in our communities.”²⁵⁹ In a later hearing, a Florida lawmaker opposed to the bill pressed the representative-sponsor why the legislature was taking away a parent’s right to determine suitable content for their children. The sponsor responded, “A parent who would choose to take their child into a strip club . . . cannot do that today. . . . [W]e should be able to censor the decisions of what kinds of content a parent should be able to expose their child to.”²⁶⁰

Beyond legislatures, concerns about the “improper” sexual socialization of youth are also shaping state’s attorneys’ constitutional arguments in lower courts. For instance, state’s attorneys have had to defend anti-drag laws against First Amendment challenges.²⁶¹ In defending these laws, state’s attorneys have relied on arguments about the “improper” sexual socialization of youth. State’s attorneys have argued that lower courts should apply the U.S. Supreme Court’s “secondary effects doctrine” when evaluating the constitutionality of anti-drag laws.²⁶² The secondary effects doctrine allows laws aimed at the secondary effects of speech, rather than the speech itself, to be evaluated under a less stringent standard.²⁶³ In arguing that the secondary effects doctrine should apply to anti-drag laws, state’s attorneys contend that the laws are principally concerned with the secondary effects of early child sexualization and sexual exploitation and rely on harmful ideas grounded in antiquated sexual deviance concepts to craft this argument. For instance, after the federal district court declined to apply

258. *Id.* at 18:00–18:10.

259. Fla. S., *supra* note 117, at 57:13–57:35 (statement of Sen. Yarborough).

260. Fla. H.R., *4/18/23 House Session*, FLA. CHANNEL, at 1:40:07–1:40:40 (Apr. 18, 2020), <https://thefloridachannel.org/videos/4-18-23-house-session> (statement of Rep. Fine).

261. *See, e.g.*, Ariane de Vogue & Devan Cole, *Supreme Court Says Florida Can’t Enforce Anti-Drag Law*, CNN (Nov. 16, 2023, 7:55 PM), <https://www.cnn.com/2023/11/16/politics/supreme-court-rules-against-florida-anti-drag-law/index.html> [<https://perma.cc/LG72-UXZF>]; Alejandro Serrano & William Melhado, *Texas’ Ban on Certain Drag Shows is Unconstitutional, Federal Judge Says*, TEX. TRIB. (Sep. 27, 2023) <https://www.texastribune.org/2023/09/26/texas-drag-queen-law-unconstitutional> [<https://perma.cc/KN7H-4R2J>]; Adrian Sainz & Kimberlee Kruesi, *Ruling on Tennessee’s Anti-Drag Law Leaves Questions About Enforcement, Next Steps*, AP NEWS (June 6, 2023, 3:56 PM) <https://apnews.com/article/tennessee-drag-law-enforcement-196463fe8e022f71ba3ff89214fe7a0f> [<https://perma.cc/53XY-WQ9L>].

262. *See, e.g.*, *Friends of George’s, Inc. v. Mulroy*, 108 F.4th 431, 455 (6th Cir. 2024).

263. *See* Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 394–95 (2022) (describing the secondary effects doctrine).

the secondary effects doctrine to Texas's anti-drag law,²⁶⁴ the State argued in its briefs on appeal that law "is aimed at combatting the secondary effects of exposure of minors to sexually explicit content."²⁶⁵ Stressing social learning ideas, the state discussed expert testimony at trial suggesting that minors' "behavior is shaped by experience and copying behavior" and that their "cognitive and emotional immaturity may lead them to reenact such behavior."²⁶⁶ Illustrating a clear link to sexual deviance ideas, the State also emphasized that the law's "age-limitation requirement seeks to guard against downstream effects that may manifest later in time, such as possible criminal and antisocial behavior and sexual deviancy."²⁶⁷

In arguing for the secondary effects doctrine to apply to Tennessee's anti-drag ban, the State pushed different ideas about sexual deviance which associate drag performers with damaging stereotypes of LGBTQ+ adults as sexual predators.²⁶⁸ Specifically, the state identified "an increase in 'sexual exploitation crimes'" as the key secondary effect associated with children's exposure to "obscene content."²⁶⁹ In support of this idea, the state's brief cited expert witness testimony during the legislative proceedings that such exposure "sexually desensitize[d] children," "render[ed] them more vulnerable to sexual predation," and "empower[ed] child predators and increas[ed] the demand to exploit and sexually abuse children."²⁷⁰

So far, lower courts have declined to apply the secondary effects doctrine to evaluate the constitutionality of anti-drag laws.²⁷¹ Rather, lower courts have concluded that these laws are primarily concerned with suppressing unpopular expression and not the secondary effects of sexually explicit speech.²⁷² Nevertheless, state's attorneys continue to advance these arguments grounded in discredited sexual deviance ideas in attempts to persuade courts otherwise.

As this Article will later discuss, these ideas about the "improper" sexual socialization of youth are harmful because they frame LGBTQ+ identity as deviant for both LGBTQ+ adults and youth. Moreover, opponents of LGBTQ+ rights in the past have used these stigmatizing ideas to justify anti-LGBTQ+ legislation in ways that reinforce traditional norms of sex, sexuality, and gender in vital societal institutions including families (for instance, in the context of

264. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 847 n. 98 (S.D. Tex. 2023).

265. Appellant Attorney General Paxton's Opening Brief at 30, *Woodlands Pride, Inc. v. Paxton*, No. 23-20480 (5th Cir. Jan. 9, 2024).

266. *Id.* at 31 (alterations omitted).

267. *Id.* at 30.

268. *See infra* Section III.B.3 (discussing harmful stereotypes of LGBTQ+ adults as sexual predators).

269. Brief of Steven J. Mulroy in His Official Capacity at 19, *Friends of George's, Inc. v. Mulroy*, 675 F. Supp. 3d 831 (W.D. Tenn. Apr. 28, 2023) (Nos. 23-cv-2163 & 23-cv-2176) [hereinafter *Tennessee Brief*].

270. *Id.*

271. *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 870 (W.D. Tenn. 2023); *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 847 n. 98 (S.D. Tex. 2023); *Imperial Sovereign Ct. v. Knudsen*, 699 F. Supp. 3d 1018, 1037 (D. Mont. 2023).

272. *See cases cited supra* note 271.

same-sex marriage bans) and schools (for instance, in the context of prior laws targeting lesbian, gay, and ally educators).²⁷³

3. Religious Authority

As sociologists of deviance have stressed, religious norms can have significant roles in shaping which groups and conduct are defined as deviant in society.²⁷⁴ Consistent with this idea, there is a long history of subjugating LGBTQ+ people in law based on arguments that appeal to religious authority.²⁷⁵ For instance, early sodomy laws in the U.S. colonies during the seventeenth and eighteenth centuries were modeled on the 1533 Act of Henry VIII in England, which made the crime of “buggery” punishable by death.²⁷⁶ Scholars have discussed how the 1533 Act has its origins in the regulation of sodomy by ecclesiastical courts in medieval England dating back to the thirteenth century.²⁷⁷

In the new sexual deviancy, arguments that appeal to religious authority have largely arisen in the context of laws targeting transgender people. At times, appeals to religion are explicit and disparaging toward transgender communities. For instance, when speaking in favor of Arkansas’s ban on gender-affirming care for minors, one state representative stressed in legislative discussions:

We read in Genesis 1:27, “So God created man in his own image, in the image of God he created him; male and female, he created them.” We also see the Father’s heart in Deuteronomy 22:5, where he states, “A woman shall not wear anything that pertains to a man, nor a man put on a woman’s garments, for all who do so are an abomination to the Lord, your God.”²⁷⁸

Soon after, another Arkansas lawmaker made similar appeals to religion to express support for the ban:

You want to talk about God? I’ll tell you about God. God made you like you are. God formed you. Why in the world would we want to encourage and get up here and say, “Let them do it”? I can’t sit down here and do that. This is absolutely ridiculous. Change from a man to a woman? It’ll never work. You can talk about the suicide rate, you can talk about the intellectual aspect of it, but here is the truth: Jeremiah, and I’m going to quote the Bible, because I’m telling you, that’s God’s word. That’s what this nation is based on.²⁷⁹

273. See *infra* Part V.

274. See Charles R. Tittle & Michael R. Welch, *Religiosity and Deviance: Toward a Contingency Theory of Constraining Effects*, 61 SOC. FORCES 653, 656–69 (1983) (summarizing different sociological approaches to theorizing the relationship between religion and deviance).

275. See *infra* Section IV.A.

276. See Woods, *supra* note 188, at 2393.

277. See *id.*; JEFFREY RICHARDS, SEX, DISSIDENCE AND DAMNATION: MINORITY GROUPS IN THE MIDDLE AGES 139 (1991).

278. ARK. H.R., HB1570 – *To Create the Arkansas Save Adolescents from Experimentation (SAFE) Act: House Meeting*, ARK. LEG., at 2:18:54–2:19:22 (Mar. 10, 2021), <https://www.arkleg.state.ar.us/Bills/Detail?id=HB1570&ddBienniumSession=2021%2F2021R> (statement of Rep. Bentley).

279. *Id.* at 2:25:51–2:27:55 (statement of Rep. Wooten).

In another explicit appeal to religious authority, one lawmaker described the state's Republican platform, which intertwines religion and binary definitions of sex and gender, to express support for Idaho's bathroom bill:

I would just like to point out Article 14, Section 4 of the Idaho Republican Party, our platform here. "The Idaho Republican Party recognizes that children are a heritage of the Lord. . . . We call upon parents, responsible citizens, and officers of government to promote measures that respect and protect the biological gender of children. We strongly oppose any person, entity, or policy that attempts to confuse minors regarding their biological gender." So that's our stance statewide.²⁸⁰

In other instances, lawmakers' appeals to religion are not explicit, but their arguments rationalizing anti-LGBTQ+ legislation align with religion-based arguments that place primacy on procreation to legitimize traditional sexuality and gender roles. This emphasis on procreation is evident from the text of many recent bans on gender-affirming care for minors. My research revealed that the text of the bans in half of the twenty-six states to date that ban or severely restrict gender-affirming care for minors explicitly describe gender-affirming care as "sterilizing" or causing "infertility."²⁸¹

Procreation-centered arguments have also emerged in legislative discussions surrounding bans on gender-affirming care for minors. For instance, when introducing Iowa's ban on gender-affirming care for minors to state lawmakers, the senator-sponsor of the bill stressed: "How can [children] be mature enough to consent to experimental, irreversible procedures that may lead to permanent sterilization?"²⁸² Moreover, when introducing Tennessee's ban on gender-affirming care for minors to state lawmakers, the senator-sponsor denied the benefits of gender-affirming care and stressed that its "severe risks" to minors included "permanent sterilization, total loss of adult sexual function, bone loss, [and] depression."²⁸³ In addition, when presenting Idaho's criminal ban to the state house of

280. Idaho House Standing Comm. on Educ., *supra* note 118, at 23:56–24:35 (statement of Sen. Trakel).

281. See S. 184, 2022 Leg., Reg. Sess. (Ala. 2022) ("irreversible sterility"); H.R. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) ("permanently sterilizing" and "irreversible infertility"); H.R. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023) ("transient or permanent infertility" and "irreversible sterility"); S. 538, 90th Gen. Assemb., Reg. Sess. (Iowa 2023) ("sterilize"); S. 150, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023) ("sterilizing"); H.R. 648, 2023 Leg., Reg. Sess. (La. 2023) ("sterilizing" and "infertility or sterility"); S. 49, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023) ("sterilize" and "infertile"); H.R. 68, 135th Gen. Assemb., Reg. Sess. (Ohio 2024) ("sterilize" and "irreversible infertility"); H.R. 1080, 2023 Leg., 98th Leg. Sess. (S.D. 2023) ("sterilizing"); S. 1, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) ("irreversibly sterile"); S. 14, 88th Leg., Reg. Sess. (Tex. 2023) ("sterilizes" and "transient or permanent infertility"); S. 16, 2023 Gen. Sess., Reg. Sess. (Utah 2023) ("sterilization" and "irreversible infertility"); S. 99, 67th Leg., Gen. Sess. (Wyo. 2024) ("sterilizes" and "transient or permanent infertility").

282. Iowa S., *Senate Video (2023-03-07)*, IOWA GEN. ASSEMB., at 7:34:13 PM–7:34:26 PM (Mar. 7, 2023), <https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20230307034631076&dt=2023-03-07> (statement of Sen. Edler).

283. Tenn. S. Health and Welfare Comm., *supra* note 238, at 3:02–3:11 (statement of Sen. Johnson).

representatives, the sponsor mentioned sterilization at multiple points and framed the bill as being “about protecting children from sterilization and genital mutilation.”²⁸⁴ The sponsor also invoked the fundamental right to procreate as a justification to limit parental rights and the decisions of trans-affirming medical professionals:

We have a duty to protect fundamental rights. Can parents or counselors decide to permanently deprive a minor child of their constitutional right to procreate before those children have legal capacity to consent? I would assert no.²⁸⁵

State’s attorneys are also emphasizing procreation-related concerns to defend bans on gender-affirming care for minors in courts. To date, bans in seventeen states are being actively challenged in federal and state courts with mixed success.²⁸⁶ My research found that state’s attorneys’ briefs in more than half of these states mention concerns about sterility or infertility, and often multiple times.²⁸⁷

284. Idaho H. Judiciary, Rules & Administration Comm., *February 7, 2023*, IDAHO LEG., at 4:07–4:14 (Feb. 7, 2023), <https://lso.legislature.idaho.gov/MediaArchive/MainMenu.do> (select “2023” as meeting year, “House Standing Committees” as category, and “Judiciary, Rules & Administration” as committee) (statement of Rep. Skaug); *see also* Idaho H.R., *February 14, 2023*, IDAHO LEG., at 14:34–14:40 (Feb. 14, 2023) <https://lso.legislature.idaho.gov/MediaArchive/MainMenu.do> (select “2023” as meeting year and “House Chambers” as category) (statement of Rep. Skaug) (stressing “this bill again is about protecting children from sterilization and removal of sex organs”).

285. Idaho H. Judiciary, Rules & Administration Comm., *supra* note 284, at 7:11–7:56 (statement of Rep. Skaug).

286. *See* MOVEMENT ADVANCEMENT PROJECT, HEALTHCARE LAWS AND POLICIES: BANS ON BEST PRACTICE MEDICAL CARE FOR TRANSGENDER YOUTH 4–6 (2024), <https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf> [<https://perma.cc/Z6KH-KXBS>] (providing status notes on lawsuits challenging bans on gender-affirming care for minors).

287. *See* Alabama Response, *supra* note 233, at 3–4, 7, 41, 44, 64, 66–67, 86, 90, 99, 139 (mentioning “sterilization” or derivatives thereof thirteen times); *id.* at 5, 66, 71 (mentioning “infertility” or derivatives thereof three times); Brief in Support of Motion to Dismiss at 1, 8, *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 21-cv-450) (mentioning “infertility” three times); The State’s Response in Opposition to Plaintiffs’ Preliminary-Injunction Motion at 15, *Doe v. Ladapo*, 676 F. Supp. 3d 1205 (N.D. Fla. 2023) (No. 23-cv-114) (mentioning “sterilization” and “infertility” once each); Combined Memorandum of Law in Opposition to Motion for Preliminary Injunction and in Support of Motion to Dismiss at 1, 5–6, 8, *Poe v. Labrador*, 709 F. Supp. 3d 1169 (D. Idaho 2023) (No. 23-cv-269) [hereinafter Idaho Memorandum] (mentioning “sterility” or derivatives five times); *id.* at 6 (mentioning “infertility” once); Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 1, 28, *K.C. v. Individual Members of the Med. Licensing Bd.*, 677 F. Supp. 3d 802 (S.D. Ind. 2023) (No. 23-cv-595) [hereinafter Indiana Memorandum] (mentioning “sterility” or derivatives twice); *id.* at 1 (mentioning “infertility” once); The Commonwealth of Kentucky’s Response in Opposition to the Plaintiff’s Motion for Preliminary Injunction at 3, 14, *Doe 1 v. Thornbury*, 679 F. Supp. 3d 576 (W.D. Ky. 2023) (No. 23-cv-230) [hereinafter Kentucky’s Response] (mentioning “sterility” or derivatives three times); Defendants’ Answer and Counterclaim at 36, *Noe v. Parson*, No. 23AC-CC04530 (Mo. Cir. Ct. filed Sept. 22, 2023) (mentioning “infertile” once); Montana Response, *supra* note 235, at 2, 16–17, 22, 39 (mentioning “sterilization” or derivatives five times); *id.* at 12, 15–16, 18, 28–29 (mentioning “infertility” or derivatives nine times); Memorandum Contra Plaintiffs’ Motion for Temporary Restraining Order at 3, *Moe v. Yost*, No. 24 CV 002481 (Ohio Ct. C.P. 2024) [hereinafter Ohio Memorandum] (mentioning “infertility” twice); Defendants 15–53’s Response to Plaintiffs’ Motion for Preliminary Injunction at 6–8, 10, 23, *Poe v. Drummond*, 697 F. Supp. 3d 1238 (N.D. Okla. 2023) (No. 23-cv-177) [hereinafter Oklahoma Response] (mentioning “sterility” or

Moreover, several of the state's attorneys' briefs place unique emphasis on sterilization or infertility to advance the state's legal position. For instance, the Tennessee Attorney General opened one brief by stressing that "[p]laintiffs say the Constitution requires Tennessee to stand by while vulnerable children, who cannot give truly informed consent, are permanently sterilized."²⁸⁸ In defending its ban, Alabama filed a brief emphasizing that "Alabama children face irreversible damage from unproven, sterilizing, and permanently scarring medical interventions pushed by ideological interest groups."²⁸⁹ Montana opened its brief by describing the law as "prohibiting the use of experimental, irreversible, and often sterilizing medications and procedures on Montana children."²⁹⁰

As this Article will later discuss, there is a long history of using legal arguments cloaked in religion and religious authority to subjugate LGBTQ+ communities. For instance, "responsible procreation" arguments had a key role in sustaining same-sex marriage bans.²⁹¹ These old tools are being used again in the new sexual deviancy.

4. Vice

Lawmakers and state's attorneys are also associating LGBTQ+ identity with vice behaviors (for instance, gambling, smoking, or illicit drug use) to justify and defend legislation targeting LGBTQ+ communities in the new sexual deviancy. Associations between LGBTQ+ identity and vice behaviors have deep roots in sociological literature on deviance. In the 1960s, sociologists of deviance advanced labeling and societal reaction theories to explain then-existing criminal laws against homosexuality, gambling, drug use, and other vices.²⁹² These sociological perspectives emphasized society's role in defining a person as "deviant" or "criminal."²⁹³ Howard Becker—a pioneer of labeling theory—argued that deviance "is not a quality that lies in behavior itself, but in the interaction between the person who commits the act and those who respond to it."²⁹⁴

In the new sexual deviancy, some lawmakers are advancing comparisons that intertwine issues involving LGBTQ+ identity, vice behaviors, and children's capacity to consent in order to justify legislation targeting LGBTQ+ youth. For instance, when introducing Idaho's ban on gender-affirming care for minors to lawmakers, the representative-sponsor of the bill stressed, "we do not allow

derivatives nine times); *id.* at 8–10 (mentioning "infertility" three times); Tennessee Response, *supra* note 231, at 1, 7, 10, 12, 15 (mentioning "sterility" or derivative five times); Appellants' Brief at 12, 14, 32, *Loe v. Texas*, No. 23-0697 (Tex. 2023) [hereinafter Texas Brief] (mentioning "infertility" three times).

288. Tennessee Response, *supra* note 231, at 1.

289. Alabama Response, *supra* note 233, at 7–8.

290. Montana Response, *supra* note 235, at 2.

291. See *infra* Part IV.D.

292. See, e.g., BECKER, *supra* note 105, at 12.

293. FRANK P. WILLIAMS III & MARILYN D. MCShANE, *CRIMINOLOGY THEORY: SELECTED CLASSIC READINGS* 181–82 (2d ed. 1998) (explaining that "labelling theorists developed a perspective that emphasized the importance of society's role in defining a person as a criminal or delinquent").

294. BECKER, *supra* note 105, at 14.

minors to get tattoos, smoke cigarettes, drink alcohol, [or] sign legal documents.”²⁹⁵ The sponsor of Iowa’s ban stressed that “we have prohibited minors from using or participating in other harmful substances [and] activities, regardless of parental consent,” including “prohibiting the purchasing of alcohol and tobacco until the age of 21, prohibiting receiving a tattoo until the age of 18, prohibiting gambling, purchasing lottery tickets, [and] medical cannabidiol.”²⁹⁶

In addition, lawmakers and state’s attorneys are using vice analogies to justify limiting the rights of LGBTQ-supportive and affirming parents. For instance, in legislative discussion on Arkansas’s ban on gender-affirming care for minors, the senator-sponsor stressed, “[w]e do not allow parents to transport their children without car seats or seat belts, [or] to supply their children with alcohol or cigarettes or illicit drugs.”²⁹⁷ And in briefs defending Tennessee’s drag show ban and its lack of a parental consent exception, the Tennessee Attorney General stressed that “children are not allowed in strip clubs, even with their parents’ consent. . . . [C]hildren cannot participate in pornography, even if their parents would allow it.”²⁹⁸

As this Article will discuss later in greater detail, in previous decades opponents of LGBTQ+ rights invoked the similar arguments that defined LGBTQ+ identity and conduct as a vice to justify legislation targeting LGBTQ+ communities.²⁹⁹ These arguments were accepted in courts at the highest levels, including the U.S. Supreme Court in *Bowers v. Hardwick* in 1986.³⁰⁰

* * *

So far, the analysis has demonstrated the variety of ways in which lawmakers and state’s attorneys are advancing ideas with intellectual roots in sociological theories of deviance to rationalize and defend recent legislation targeting LGBTQ+ communities. The next Section illuminates that this is only half of the story.

B. PSYCHOLOGICAL THEORIES OF DEVIANCE

In the new sexual deviancy, lawmakers and state’s attorneys are also advancing ideas grounded in outdated psychological theories of deviance to justify and defend legislation targeting LGBTQ+ communities. Psychological theories explain deviance in terms of individual personality traits and psychological causes.³⁰¹ The analysis below traces three of these major ideas: (1) desistance paradigms that reject the authenticity of LGBTQ+ identity and assume that

295. Idaho H. Judiciary, Rules & Administration Comm., *supra* note 284, at 8:55–9:00 (statement of Rep. Skaug).

296. Iowa S., *supra* note 282, at 7:33:16 PM–7:34:07 PM (statement of Sen. Edler).

297. Ark. S., *Senate Floor Session*, ARK. LEG., at 4:00:17–4:00:29 (Mar. 29, 2021), <https://www.arkleg.state.ar.us/Bills/Detail?id=HB1570&ddBienniumSession> (statement of Sen. Clark).

298. Appellant’s Opening Brief at 49, *Friends of George’s, Inc. v. Mulroy*, 108 F.4th 431 (6th Cir. 2024) (No. 23-5611) (citation omitted).

299. See *infra* Part IV.

300. See *infra* Section IV.A; 478 U.S. 186, 195–96 (1986).

301. Woods, *supra* note 188, at 2354.

LGBTQ+ youth will “grow out” of identifying as LGBTQ+ as they reach adulthood; (2) LGBTQ+ identity, and trans identities in particular, as mental illnesses that can be effectively “cured” through psychotherapy; and (3) stereotypes of LGBTQ+ adults as sexual predators who are dangerous to society, and children in particular.

Organizing and mapping these ideas through the lens of psychological deviance exposes contradictions in how opponents of LGBTQ+ rights characterize LGBTQ+ identity to achieve anti-LGBTQ+ outcomes in the new sexual deviancy. For instance, some opponents of LGBTQ+ rights invoke desistance paradigms to deny that LGBTQ+ identity is real and discourage gender-affirming care and other types of support that recognize its authenticity.³⁰² In other instances, they characterize LGBTQ+ identity as a mental illness that poses a real threat to society, and children in particular, and embrace methods to treat and “eradicate” LGBTQ+ identity.

1. Desistance Paradigms

In the new sexual deviancy, lawmakers and state’s attorneys are advancing arguments that push desistance paradigms. Desistance paradigms assume that most youth struggling with gender dysphoria will simply “grow out” of it during later adolescence or adulthood.³⁰³ As discussed below, these ideas have strong roots in psychological theories of deviance that conceptualize youth’s sexual and gender identity development as malleable.

In the 1920s, when sodomy laws were in full force, psychologists and criminologists started to apply Sigmund Freud’s theory of psychoanalysis to study crime and deviance.³⁰⁴ At first, scholars accepted Freud’s position that “homosexuality” in adults (which was then understood to include gender nonconforming identities and expressions) was a nonharmful variation of sexual development.³⁰⁵ Starting in the 1940s, however, scholars advanced new ideas of psychopathy that reshaped prevailing conceptions of homosexuality in the psychology and psychiatric profession towards pathological views that defined homosexuality as a mental illness.³⁰⁶ Demonstrating this emerging consensus, the American Psychiatric Association included homosexuality as a sexual disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1952.³⁰⁷

Even if they rejected Freud’s view that homosexuality was a non-harmful variant of human sexuality, medical experts who adopted these emerging pathological definitions still relied on Freud’s position that psychosexual development in

302. See *infra* Part IV.B.

303. Florence Ashley, *The Clinical Irrelevance of “Desistance” Research for Transgender and Gender Creative Youth*, 9 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 387, 387 (2022) (defining desistance research).

304. Woods, *supra* note 188, at 2359.

305. *Id.*

306. *Id.* at 2355, 2359–60.

307. *Id.* at 2356; see RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 39 (1981).

youth progressed through different stages.³⁰⁸ From this perspective, leading psychologists and psychiatrists argued that sexual development in children and adolescents was malleable and subject to change.³⁰⁹

In the new sexual deviancy, some lawmakers opposed to LGBTQ+ rights have pushed harmful desistance paradigms, especially when advocating for laws that ban gender-affirming care for minors. The Idaho representative-sponsor emphasized, “Studies show that most kids that have gender dysphoria—and some genuinely do—they work through it through natural puberty and some counseling just fine.”³¹⁰ Arkansas lawmakers invited a primary care physician in Arkansas, who had never been involved in a case where an adolescent with gender dysphoria was treated with hormone therapy, to testify in support of Arkansas’s ban.³¹¹ In testimony, the physician stressed desistance research suggesting that “approximately 85% of gender dysphoric children experience remittance of their dysphoria around or after puberty.”³¹²

State’s attorneys are also pushing the same harmful ideas to defend state bans on gender-affirming care for minors in courts. My research revealed that several state’s attorneys’ briefs in the seventeen states where bans are being actively challenged explicitly rely on desistance ideas.³¹³ Desistance ideas are pervasive. For example, Alabama’s brief references or discusses desistance ideas at multiple points.³¹⁴ The state quotes research suggesting that “most cases—somewhere between 61% and 94%—of childhood gender dysphoria resolve naturally.”³¹⁵ At a different point, the state stresses that “[b]ecause desistance is probable, though not inevitable, for most gender dysphoric youth, ‘the “watchful waiting” method became the standard approach”’ to care.³¹⁶ Later, the state characterizes gender-affirming care as “disrupting the natural path of desistance.”³¹⁷

Elevating the personal stories of adult “detransitioners”³¹⁸ is another common strategy that lawmakers are using to push desistance ideas and frame the malleability

308. See Woods, *supra* note 188, at 2359, 2362.

309. *Id.* at 2359.

310. Idaho H. Judiciary, Rules & Administration Comm., *supra* note 284, at 5:14–5:28 (statement of Rep. Skaug).

311. Ark. H. Public Health, Welfare, and Labor Comm., *supra* note 237, at 4:51:18–4:51:21 (statement of Dr. Kendall Wagner) (stating that “I have not been involved with any who were treated with hormones” in response to a lawmaker’s question about how many patients the doctor had treated with gender dysphoria).

312. *Id.* at 4:24:39–4:24:47 (statement of Dr. Kendall Wagner).

313. See, e.g., Alabama Response, *supra* note 233, at 2, 24, 26–27; Indiana Memorandum, *supra* note 287, at 6; Kentucky’s Response, *supra* note 287, at 16, 22; Montana Response, *supra* note 235, at 7, 9–11, 13–14, 29, 35; Oklahoma Response, *supra* note 287, at 7; Tennessee Response, *supra* note 231, at 12; Texas Brief, *supra* note 287, at 12–13, 18.

314. Alabama Response, *supra* note 233, at 2, 17–19, 24–29, 31, 93, 96–97, 137, 140.

315. *Id.* at 2.

316. *Id.* at 24.

317. *Id.* at 26–27.

318. See Jack L. Turban et al., *Factors Leading to “Detransition” Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis*, 8 LGBT HEALTH 273, 273 (2021) (defining “detransition” as “a process through which a person discontinues some or all aspects of gender affirmation”).

of youth's sexual and gender identity development.³¹⁹ For instance, Arkansas lawmakers invited an adult detransitioner from California who shared his experience of undergoing hormone therapy and gender-affirmation surgery as an *adult*.³²⁰ The witness testified that therapists and medical researchers “identified [him] as transgender and they were wrong,”³²¹ and that if he could, he “would have quickly chosen any path to have transitioned . . . to female when [he] was young.”³²² Before lawmakers, the witness alleged that medical professionals pressured him into taking hormones and undergoing surgery, gave graphic testimony about the surgeries he underwent as an adult, and stated that the care he received did not resolve his gender dysphoria.³²³

State's attorneys are also relying on detransitioner accounts to push desistance ideas in courts. For instance, after the Arkansas ban was challenged in federal court, the Arkansas Attorney General referenced the detransitioner's testimony in legal briefs as a reason why the state legislature concluded that gender-affirming care is harmful to youth.³²⁴ Moreover, to defend Alabama's ban on gender-affirming care for minors, the state's attorney's brief alleges an “explosion of detransitioners” and discusses the results of two recent surveys on the phenomenon with no mention of their analytical or methodological limitations.³²⁵ This connects to broader problems of how opponents of LGBTQ+ rights are boldly advancing and relying on shaky empirical research to achieve anti-LGBTQ+ outcomes in legislatures and courts.

For instance, the first study cited in Alabama's brief was an exploratory study published by Elie Vandebussche, which consisted of an online survey of 237 detransitioners that found that one-third had reported that their “[d]ysphoria resolved itself over time.”³²⁶ The subjects of Vandebussche's study—only half of which reported coming from the United States—were recruited through online social media and the survey shared by Post Trans—an online platform geared toward female detransitioners that Vandebussche co-created, and which LGBTQ+ advocates have described as trans-antagonistic.³²⁷ The second study was a study published by Lisa Littman, which consisted of a survey of one

319. See Maggie Astor, *How a Few Stories of Regret Fuel the Push to Restrict Gender Transition Care*, N.Y. TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/us/politics/transgender-care-detransitioners.html> (discussing how detransitioners have testified in several states that have passed bans on gender-affirming care for minors).

320. Ark. H. Public Health, Welfare, and Labor Comm., *supra* note 237, at 4:31:51–4:32:33 (statement of Billy Burleigh).

321. *Id.* at 4:34:40–4:34:44.

322. *Id.* at 4:31:43–4:31:49.

323. *Id.* at 4:31:50–4:34:15.

324. Defendants' Post-Trial Briefing at 3, *Brandt v. Griffin*, No. 21-cv-450 (E.D. Ark. Feb. 1, 2023).

325. Alabama Response, *supra* note 233, at 55–56.

326. *Id.* at 55 (citing Elie Vandebussche, *Detransition-Related Needs and Support: A Cross-Sectional Online Survey*, 69 J. HOMOSEXUALITY 1602, 1607 (2022)).

327. Vandebussche, *supra* note 326, at 1604–05 (describing the recruitment of study participants and participant backgrounds); see also *About Us*, POST-TRANS, <https://post-trans.com/About-Us> [<https://perma.cc/W6T9-869Q>] (listing Elie Vandebussche as a co-creator of Post Trans); AJ Eckert & Quinnehtukqut McLamore, *Detransition, Retransition, and What Everyone Gets Wrong*, SCI-BASED

hundred detransitioners that found that “[t]he most frequently endorsed reason for detransitioning was that the respondent’s personal definition of male and female changed and they became more comfortable identifying with their natal sex (60.0%).”³²⁸ As discussed above, Littman’s research is behind the controversial and increasingly discredited rapid-onset gender dysphoria hypothesis applying social contagion theory to describe a purported epidemic of surging numbers of adolescents suddenly identifying as transgender during or after puberty.³²⁹ The subjects of Littman’s study were recruited using similar methods that Littman used in research developing the ROGD hypothesis, which critics have methodologically critiqued as trans-antagonistic and lead to sampling bias.³³⁰

Although the body of existing empirical research on detransitioners is admittedly limited, it is important to note the findings of both studies can be contrasted with at least one empirical study published in 2021 based on a much greater sample size and broader representation of U.S. subjects.³³¹ That study was, to that authors’ knowledge, the first national study to systematically examine reasons for detransition in a large sample of transgender and gender-diverse adults in the United States.³³² The study was based on secondary analysis conducted on data from the 2015 U.S. Transgender Survey, a cross-sectional non-probability survey of 27,715 transgender and gender-diverse adults in the United States.³³³ Contrary to the results of the studies discussed above in the Alabama brief, the findings revealed that only 13.1% of the 17,151 respondents who reported pursuing gender affirmation reported a history of detransition, and that in the vast majority of cases, detransition was “due at least in part to external factors, such as pressure from family, nonaffirming school environments, and sexual assault.”³³⁴ These results, albeit from adults that currently identify as gender diverse, suggest there is more to the story than other studies suggest.³³⁵

Nevertheless, as the next Section discusses, lawmakers and state’s attorneys in the new sexual deviancy are elevating the same shaky empirical research and stories of detransitioners to advance other stigmatizing ideas about transgender people and identity that are grounded in different psychological theories of deviance.

MED. (May 14, 2023), <https://sciencebasedmedicine.org/detransition-retransition-and-what-everyone-gets-wrong> [<https://perma.cc/F7FP-VJAU>] (describing Post-Trans as a “trans antagonistic” space).

328. Alabama Response, *supra* note 233, at 55–56 (quoting Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, 50 ARCHIVES OF SEXUAL BEHAV. 3353, 3361 (2021)).

329. *See supra* Section III.A.1.

330. *See* Littman, *supra* note 328, at 3355 (discussing study recruitment); *supra* Part III.A.1 (discussing methodological critiques of Littman’s research underlying ROGD).

331. *See generally* Turban et al., *supra* note 318 (finding external factors as a leading cause of detransition). *See also id.* at 274 (stressing that “virtually no rigorous studies have been published about those who detransition”).

332. *See id.* at 274.

333. *Id.*

334. *Id.* at 276.

335. *Id.* at 274.

2. Trans Identity as Mental Illness and Psychotherapy as a “Cure”

As noted above, emerging ideas about psychopathy in the 1940s pushed dominant attitudes towards homosexuality in the psychological and psychiatric professions towards pathological views of homosexuality as a mental illness.³³⁶ From this perspective, medical experts explained the etiology of homosexuality (which again, was then understood to include gender nonconformity) in terms of problems with an individual’s mind and personality.³³⁷ Put differently, LGBTQ+ identity was a mental illness, not a valid social identity or characteristic. In turn, some medical thinkers advocated for using psychotherapeutic techniques on both LGBTQ+ adults and youth to overcome their homosexual desires and redirect them towards heterosexual and cisgender identities and conduct.³³⁸

Some of these psychotherapy techniques fall under the umbrella of what we consider “conversion therapy” today.³³⁹ Importantly, these methods have lost popular support and are widely considered harmful and unethical in the psychological and psychiatric profession.³⁴⁰ To prevent licensed medical practitioners from subjecting LGBTQ+ youth to these harmful practices, twenty-three states (and the District of Columbia) have enacted laws that ban conversion therapy for minors.³⁴¹ Not all states, however, have enacted these bans, and these bans only reach licensed medical professionals.³⁴² Today, conservative religious groups are a principal provider of conversion therapy, and continue to advocate for its use on LGBTQ+ youth.³⁴³ A 2023 report from the Trevor Project found that conversion therapy is still commonly practiced nationwide.³⁴⁴ The report identified over 1,320 conversion therapy practitioners across forty-eight U.S. states, which included more than 605 practitioners with active professional licenses and 716 practitioners who operate in a ministerial (official religious) capacity.³⁴⁵ In the specific context of transgender and gender-diverse youth, one recent study based on data from the 2015 U.S. Transgender Survey reported that childhood exposure to gender identity conversion efforts is associated with adverse mental health

336. See Woods, *supra* note 188, at 2355–56.

337. See *id.* at 2359.

338. See *id.* at 2359–60.

339. See Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 821 (2017) (noting “[c]onversion therapy’s treatment methods . . . meld psychoanalysis and theology”).

340. See *id.* at 796–97 (2017) (noting that “[m]ental health professionals have rejected efforts to change sexual orientation as unethical”); *id.* at 803–05 (discussing how conversion therapy fell out of the medical mainstream).

341. See MOVEMENT ADVANCEMENT PROJECT, LGBTQ YOUTH: CONVERSION “THERAPY” LAWS 2 (2024), <https://www.lgbtmap.org/img/maps/citations-conversion-therapy.pdf> [<https://perma.cc/F5GN-H584>].

342. See *id.* at 2–3.

343. See George, *supra* note 339, at 821 (noting that “[r]eligious groups are the predominant providers of conversion therapy”).

344. See TREVOR PROJECT, IT’S STILL HAPPENING: A REPORT ON PRACTITIONERS OF SO-CALLED CONVERSION “THERAPY” IN THE U.S. 14–17 (2023), https://www.thetrevorproject.org/wp-content/uploads/2023/12/FINAL_Its-Still-Happening-Report.pdf [<https://perma.cc/U65M-MFZZ>].

345. *Id.* at 14, 17.

outcomes in adulthood, “including severe psychological distress, lifetime suicidal ideation, and lifetime suicide attempts.”³⁴⁶

Nevertheless, as detailed below, lawmakers and state’s attorneys in the new sexual deviancy are drawing on these outdated ideas about psychological “deviance” to advance three separate, yet related, claims: (1) that the root causes of a youth’s gender dysphoria are grounded in other psychological comorbidities, (2) that psychotherapy is an effective “cure” for youth’s gender dysphoria, and (3) that gender-affirming care under the mainstream and medically-accepted standards of care does not solve gender dysphoria and may even exacerbate psychological comorbidities for youth who receive such care. As explained, these claims are especially prominent in the push for legislative bans on gender-affirming care for minors. Together, these claims not only undermine the legitimacy of transgender people’s gender identities, but they also completely ignore the role of social context in contributing to those problems. In particular, these claims neglect how many transgender adults and youth still experience pervasive societal discrimination after receiving gender-affirming care because of transphobia in society.³⁴⁷

In some instances, legislative proponents of anti-LGBTQ+ legislation have advanced these claims that characterize youth trans identity as a mental illness requiring psychotherapy during legislative discussions. For instance, while introducing Tennessee’s ban on gender-affirming care before state lawmakers, a senator-sponsor of the bill stressed that “[g]ender dysphoria is a mental health condition, and it should therefore be treated like other mental health conditions through psychotherapy, counseling, and other appropriate medical interventions.”³⁴⁸ In other instances, these claims are front and center in the text of recent legislation targeting transgender communities. Consider Arkansas’s ban on gender-affirming care for minors. The legislative findings, which are published in the statute, stress the following alleged psychological causes of gender dysphoria:

[S]cientific studies show that individuals struggling with distress at identifying with their biological sex often have already experienced psychopathology, which indicates these individuals should be encouraged to seek mental health services to address comorbidities and underlying causes of their distress before undertaking any hormonal or surgical intervention³⁴⁹

The legislative findings then stress the ineffectiveness of gender-affirming care to address the alleged psychological causes of gender dysphoria, stating that “[e]ven among people who have undergone inpatient gender reassignment

346. Jack L. Turban et al., *Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults*, 77 JAMA PSYCHIATRY 68, 75 (2020). As noted previously, the 2015 U.S. Transgender Survey is a cross-sectional non-probability survey of 27,715 transgender and gender diverse adults in the United States. *Id.* at 69.

347. See *infra* Section V.B.

348. Tenn. S., *Senate Floor Session – 9th Legislative Day*, TENN. GEN. ASSEMB., at 42:16–42:28 (Feb. 13, 2023), <https://tnga.granicus.com/player/clip/27513> (statement of Sen. Johnson).

349. H.R. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

procedures, suicide rates, psychiatric morbidities, and mortality rates remain markedly elevated above the background population.”³⁵⁰

State’s attorneys are advancing similar claims to defend legislative bans on gender-affirming care for minors. My research uncovered several state’s attorneys’ briefs that push psychotherapy as a “cure” for gender dysphoria in minors while discouraging gender-affirming care under medically-accepted standards of care.³⁵¹ For instance, in defending Georgia’s ban, the State’s brief characterized psychotherapy as a “safer treatment[] for treating gender dysphoria” than the prohibited forms of gender-affirming care under the new Georgia law, which includes both gender-affirming medications and surgeries.³⁵² Moreover, in defending Idaho’s similar ban, the State’s brief described psychotherapy as “an accepted approach to treating gender dysphoria” and described that the prohibited forms of gender-affirming care “cause known harms and carry unknown risks.”³⁵³ In yet another example, Alabama’s brief quoted research suggesting that “[s]everal case reports indicate that the distress of young people with gender dysphoria can lessen or resolve with appropriate psychotherapeutic interventions that address the central issues.”³⁵⁴ It then referenced an expert report submitted from a psychotherapist who provided “a number of such vignettes.”³⁵⁵

The legislative findings discussed above in Arkansas’s ban on gender-affirming care for minors demonstrate another important point that is worth discussing—namely, that lawmakers are using these ideas grounded in psychological theories of deviance to reframe the narrative surrounding high rates of suicide among transgender youth.³⁵⁶ For instance, when expressing support for Idaho’s ban on gender-affirming care for minors, one lawmaker spent several minutes discussing her experiences with an adult detransitioner in legislative discussion.³⁵⁷ The representative told Idaho lawmakers that the detransitioner described the “emotional

350. *Id.*

351. Alabama Response, *supra* note 233, at 25, 31, 101, 140; Response in Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at 21, *Koe v. Noggle*, No. 23-cv-2904 (N.D. Ga. July 3, 2023) [hereinafter Georgia Response]; Idaho Memorandum, *supra* note 287, at 5, 25; Indiana Memorandum, *supra* note 287, at 6–8, 11, 22–23, 26, 34, 42–44; Kentucky’s Response, *supra* note 287, at 20; Montana Response, *supra* note 235, at 9–10, 13, 29, 34; Oklahoma Response, *supra* note 287, at 7; Tennessee Response, *supra* note 231, at 12, 15; Texas Brief, *supra* note 287, at 12–13, 15, 17–18, 32, 36.

352. Georgia Response, *supra* note 351, at 21; S. 140, 2023 Gen. Assemb., Reg. Sess. (Ga. 2023) (banning both gender-affirming medications and surgeries).

353. Idaho Memorandum, *supra* note 287, at 5.

354. Alabama Response, *supra* note 233, at 25 (internal brackets omitted).

355. *Id.*

356. See, e.g., Marla E. Eisenberg et al., *Risk and Protective Factors in the Lives of Transgender/ Gender Nonconforming Adolescents*, 61 J. ADOLESCENT HEALTH 521, 524 (2017) (presenting results from one large-scale study finding over 60% of transgender and gender nonconforming youth “reporting ever considering suicide and almost one in three reporting an attempt”).

357. Idaho H. Judiciary, Rules & Admin. Comm., *supra* note 284, at 51:32–54:45 (statement of Rep. Young).

effects”³⁵⁸ from taking puberty blockers and undergoing hormonal treatment as a teenager, and that she was never suicidal until after taking testosterone.³⁵⁹

State’s attorneys are advancing similar ideas to reframe the narrative surrounding transgender youth suicide. My research revealed several briefs that advance these ideas in the seventeen states where bans on gender-affirming care for minors are being actively challenged in lower courts.³⁶⁰ For instance, in defending Idaho’s ban, the Idaho Attorney General stressed that “[e]very systematic review of medically and surgically transitioning minors has indicated ‘that there is insufficient evidence’ to justify this practice. No systematic review has ever demonstrated reduced death by suicide resulting from these treatments.”³⁶¹ Moreover, in defending Alabama’s ban, the State’s attorney emphasized that “the best evidence available does not show that the interventions improve mental health or reduce suicide rates in the long term. Some research even suggests that transition may be associated with an increased risk of suicide.”³⁶²

These arguments, however, are in tension with existing empirical research. For instance, one recent major study published in 2020 examined the relationship between adolescents’ access to hormonal medication to suppress puberty and risks of suicidal ideation based on a subsample of 20,619 transgender adult participants between the ages of eighteen and thirty-six in the 2015 U.S. Transgender Survey.³⁶³ Of those 20,619 participants, only 3,494 (16.9%) reported that they had ever wanted pubertal suppression, and only 89 participants (2.5%) of that smaller subgroup of participants ever accessed that treatment.³⁶⁴ After controlling for various demographic variables, the findings revealed that receiving treatment for pubertal suppression “was associated with decreased odds of lifetime suicidal ideation.”³⁶⁵

As this Article will discuss later in more detail, these types of arguments stigmatize transgender and gender diverse youth by telling them that they are mentally ill and deviant. The resulting harms are not only psychological, but also physical when youth are denied access to medically necessary and often life-saving gender-affirming care.

358. *Id.* at 51:48–51:49.

359. *Id.* at 52:10–52:19.

360. Alabama Response, *supra* note 233, at 3; Idaho Memorandum, *supra* note 287, at 1, 8; Indiana Memorandum, *supra* note 287, at 22–23, 27; Kentucky’s Response, *supra* note 287, at 3–4; Montana Response, *supra* note 235, at 18–19; Ohio Memorandum, *supra* note 287, at 2; Oklahoma Response, *supra* note 287, at 12; Tennessee Response, *supra* note 231, at 10; Texas Brief, *supra* note 287, at 12.

361. Idaho Memorandum, *supra* note 287, at 8 (citations omitted).

362. Alabama Response, *supra* note 233, at 3 (emphasis omitted).

363. Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, PEDIATRICS, Mar. 15, 2020, at 2–3. As noted previously, the 2015 U.S. Transgender Survey is a cross-sectional non-probability survey of 27,715 transgender and gender diverse adults in the United States. *Id.*; see also *supra* note 346 and accompanying text.

364. Turban et al., *supra* note 363, at 3–5.

365. *Id.* at 5.

3. LGBTQ+ Adults as Sexual Predators

In the new sexual deviancy, lawmakers and state's attorneys are also propagating harmful stereotypes of LGBTQ+ adults as sexual predators to justify and defend legislation targeting LGBTQ+ communities. Stereotypes of LGBTQ+ adults as sexual predators are prominent in dated psychological theories of deviance as well.³⁶⁶ For instance, Kate Friedlander, a pioneering criminologist and psychoanalyst from the 1940s and 1950s, distinguished “active homosexuals” from “passive homosexuals.”³⁶⁷ Friedlander described “active homosexuals” as including adult men who desired to have sex with young boys and assumed the traditionally male, penetrative role, during those encounters (i.e., the “top”).³⁶⁸ Friedlander stressed that “people with a disturbance of this kind” pose a “danger of seducing young boys.”³⁶⁹

Aligning with these ideas, lawmakers and state's attorneys in the new sexual deviancy are pushing demeaning stereotypes of LGBTQ+ adults as hyper-sexualized and sexually threatening to young children. The momentum behind anti-drag legislation provides a clear illustration as concerns about child safety are animating these laws. For instance, emphasis on protecting children is front and center in the title of Florida's anti-drag legislation: “An act relating to the protection of children.”³⁷⁰ Moreover, the sponsor's stated intent for Texas' anti-drag law states that “the goal is to protect children from seeing these performances.”³⁷¹ Tennessee's senate-sponsor introduced its law as a “common sense safety bill for children.”³⁷²

In emphasizing child safety and child protection, lawmakers and attorneys are simultaneously propagating harmful stereotypes of LGBTQ+ adults as “groomers” and sexual predators towards children. For instance, when introducing Louisiana's “Don't Say Gay” bill to the state house education committee in 2024, the representative-sponsor stressed:

I am bringing this bill to you today to protect our parent–child relationship from inappropriate influence and intrusion. There have been a few instances of educators . . . that have used their precious classroom instructional time to validate their own lifestyle choice by discussing their own personal relationship with young children. Having sexualized personal discussions between educators and students in our classroom are not appropriate and they can rob

366. Woods, *supra* note 188, at 2364–65.

367. KATE FRIEDLANDER, *THE PSYCHO-ANALYTICAL APPROACH TO JUVENILE DELINQUENCY* 159 (1947).

368. *Id.* Friedlander described “passive homosexuals” as adult men who assumed the female role (i.e., the “bottom”) during same-sex sexual encounters. *Id.*

369. *Id.* at 162.

370. S. 1438, 2023 Leg., Reg. Sess. (Fla. 2023).

371. SENATE RSCH. CTR., TEX. S., *AUTHOR'S/SPONSOR'S STATEMENT OF INTENT*, S. 88-12, Reg. Sess., at 1 (2023), <https://capitol.texas.gov/tlodocs/88R/analysis/pdf/SB00012F.pdf> [<https://perma.cc/S68V-S7ZM>].

372. Tenn. S. Judiciary Comm., *supra* note 257, at 5:46–5:47 (statement of Sen. Jackson).

children of their innocence while imposing suggestive influence over these developing young minds.³⁷³

The representative-sponsor stressed the same ideas when introducing the bill before the state's house of representatives.³⁷⁴

In another example, when introducing Florida's anti-drag law before the state house of representatives, the representative-sponsor opened with: "[t]here is evil in this world and we face it here today."³⁷⁵ Although the sponsor repeatedly denied in legislative discussions that the law targeted drag shows, previously the sponsor had taken to social media to describe Drag Queen Story Hour as "gateway propaganda" to "evil," and assert that the law would prevent "drag queen adult entertainers from grooming our children!"³⁷⁶ Later in legislative discussion, another Florida lawmaker who supported the bill stressed that "the sexualization of our children is wrong. I'll go back to the opening statement . . . Today, we fight evil. This is evil."³⁷⁷

Expert witnesses invited by state lawmakers to testify in support of anti-LGBTQ+ bills have also pushed harmful tropes of LGBTQ+ adults as groomers and sexual predators. Some state's attorneys are then utilizing witness testimony of this kind to craft legal arguments in court. For instance, in defending Tennessee's anti-drag law, the Tennessee Attorney General relied on witness testimony in the legislative discussions alleging that "obscene performances sexually desensitize children, . . . rendering them more vulnerable to sexual predation," which leads to "empowering child predators and increasing the demand to exploit and sexually abuse children."³⁷⁸ That witness was the same witness mentioned previously who testified before Tennessee lawmakers in support of the state's ban on gender-affirming care for minors and characterized gender dysphoria in youth as social contagion.³⁷⁹

* * *

To recap, the analysis above traced how a complex web of discredited sexual deviance concepts from dated sociological and psychological theories of deviance is providing the backbone for anti-LGBTQ+ legislation in the new sexual deviancy. As the next Part turns to discuss, opponents of LGBTQ+ rights in the past invoked many of these same harmful ideas to justify various laws that subjugated LGBTQ+ communities. Accordingly, providing historical context for the

373. La. H.R. Comm. on Educ., *Apr. 10 2024*, LA. LEG., at 44:29–45:04 (Apr. 10, 2024), https://house.louisiana.gov/h_video/VideoArchivePlayer?v=house/2024/apr/0410_24_ED (statement of Rep. Horton).

374. La. H.R., *Chamber Day 19, 24RS*, LA. LEG., at 3:55:53–3:57:30 (Apr. 16, 2024), https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2024/apr/0416_24_24RS_Day19 (statement of Rep. Horton).

375. Fla. H.R., *supra* note 260, at 1:25:15–1:25:21 (statement of Rep. Fine).

376. Christie Zizo, 'Damn Right.' Florida Lawmaker's Controversial Comments Amid Drag Show Drama, *CLICKORLANDO* (Apr. 12, 2023, 7:07 PM), <https://www.clickorlando.com/news/local/2023/04/12/florida-lawmaker-on-concept-of-erasing-lgbtq-community-over-drag-show-drama-damn-right> [<https://perma.cc/B3T6-P2SX>].

377. Fla. H.R., *supra* note 260, at 2:20:13–2:21:21 (statement of Rep. Black).

378. Tennessee Brief, *supra* note 269, at 19 (alterations omitted).

379. *See supra* Section III.A.1.

new sexual deviancy illuminates how current opponents of LGBTQ+ rights are rehashing old tropes to achieve similar anti-LGBTQ+ outcomes in both legislatures and courts.

IV. HISTORICIZING THE NEW SEXUAL DEVIANCY

Having traced its intellectual underpinnings, this Part historically contextualizes the new sexual deviancy by connecting it to the long history of sexual deviance concepts applied in U.S. law to (1) reinforce traditional norms of sex, sexuality, and gender; and (2) subordinate LGBTQ+ people and ideas in society. This history illustrates why the new sexual deviancy is so dangerous for LGBTQ+ communities. This legal agenda gives effect to discredited sexual deviance concepts in ways that push LGBTQ+ people back in time to when they held a subordinate status under the law.

The Sections below discuss four major historical examples that demonstrate these points: (A) sodomy laws; (B) “sexual psychopath” laws; (C) bans on lesbian, gay, and ally educators; and (D) same-sex marriage bans. The analysis illustrates how very similar, if not identical, sexual deviance arguments to the ones traced above have been utilized in prior moral panics about LGBTQ+ communities to subjugate LGBTQ+ people in U.S. law. These historical examples also map onto the same institutions in the new sexual deviancy in which power is harnessed to reinforce traditional societal norms of sex, sexuality, and gender in ways that subjugate LGBTQ+ people: the criminal legal system (sodomy laws), medicine (“sexual psychopath” laws), schools (bans on lesbian, gay, and ally teachers), and families (same-sex marriage bans).

The analysis further highlights how over time, through the mid-2010s, some courts and legislatures rejected these exact types of legal agendas that are grounded in sexual deviance ideas when used to discriminate against LGBTQ+ people. These insights not only hold promise for reform strategies—as this Article will discuss later in more detail—but also underscore the important point that opponents of LGBTQ+ rights in the new sexual deviancy are recycling old tools that had been discredited in law.³⁸⁰ That is, of course, until the mid-2010s when severe political polarization, a new wave of Trump-appointed judges with demonstrated histories of anti-LGBTQ+ hostility,³⁸¹ and our new conservative supermajority on the U.S. Supreme Court, opened space for the revival of these antiquated sexual deviancy concepts in U.S. law.

A. SODOMY BANS (CRIMINAL LAW)

Between the 1860s and 1970s, sodomy laws existed in almost every U.S. state and were widely enforced against LGBTQ+ people (and gay men in particular).³⁸² At its core, sodomy legislation used the power of the criminal law to reinforce traditional norms of sex, sexuality, and gender and punish LGBTQ+

380. See *infra* Section V.I.C (discussing litigation reform strategies).

381. See generally LAMBDA LEGAL, *supra* note 35 (outlining how the Trump Administration reshaped lower federal courts to stack them with judges with histories of anti-LGBTQ+ hostility).

382. See William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. REV. 631, 682.

people who veered from those norms.³⁸³ Lawmakers, attorneys, and judges embraced sexual deviance ideas to justify sodomy laws and rationalize their application to target LGBTQ+ people (and gay men in particular).³⁸⁴

A brief look at the U.S. Supreme Court's sodomy jurisprudence illustrates these points. First, consider the Court's infamous 1986 decision in *Bowers v. Hardwick*, which upheld the constitutionality of Georgia's sodomy law.³⁸⁵ The facts of *Bowers* involved a gay man who was arrested for sodomy after having consensual sex with another man "in the bedroom of his own home."³⁸⁶ Georgia's Attorney General explicitly invoked sexual deviance ideas to defend the law. Specifically, the attorney general stressed that "[i]t is submitted that homosexual sodomy as an act of sexual deviancy expresses no ideas. It is purely an unnatural means of satisfying an unnatural lust, which has been declared by Georgia to be morally wrong."³⁸⁷ The majority in *Bowers* agreed, stressing that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" provided a rational basis for the law.³⁸⁸ Further pushing ideas about deviance, Chief Justice Burger's concurrence defined legitimate sexual norms in terms of religious authority, stressing that the condemnation of "homosexual conduct" is "firmly rooted in Judaeo-Christian moral and ethical standards."³⁸⁹

The Georgia Attorney General also characterized homosexuality as vice to justify state intrusion into the privacy of the home. In legal briefs, the state referenced the Court's prior precedent to argue that "this Court made it quite clear that the home was not an inviolable haven for crime or criminals."³⁹⁰ To refute the argument that Georgia's sodomy law targeted expression, the state also stressed that the law was "directed toward an act which is in itself immoral."³⁹¹ The majority in *Bowers* accepted the state's argument. In rationalizing the legitimacy of the state interference into the privacy of the home via sodomy statutes, the Court emphasized that "[v]ictimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home."³⁹²

This intertwining of sexual deviance ideas and sodomy laws was not random. In prior work, I have described that when criminal sodomy laws were in force, "there was little discursive space to think of LGBT people in the criminal justice

383. See Ryan Goodman, *Beyond the Enforcement Principles: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 671 (2001) (noting that sodomy laws "manipulate, confine, sentence, and punish individuals' lives").

384. *Id.* at 728 ("Sodomy laws have also reinforced the ontological universe of anti-gay psychiatry by promoting certain conceptions of agency and blame.").

385. 478 U.S. 186 (1986).

386. *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985).

387. Brief of Petitioner Michael J. Bowers, Att'y Gen. of Ga. at 27, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) [hereinafter Brief of Petitioner].

388. *Bowers*, 478 U.S. at 196.

389. *Id.* (Burger, C.J., concurring).

390. Brief of Petitioner, *supra* note 387, at 26.

391. *Id.* at 27.

392. *Bowers*, 478 U.S. at 195.

system other than as deviant sexual offenders.”³⁹³ In that work, I provided an intellectual history of the treatment of LGBT identity and crime dating back to the late 1800s.³⁹⁴ That intellectual history demonstrated how criminal sodomy legislation propagated shifting and emerging ideas about sexual deviance over the course of the twentieth century.³⁹⁵ Importantly, those ideas had intellectual roots in the same sociological and psychological theories of deviance that are shaping new forms of LGBTQ+ subjugation in the new sexual deviancy today.³⁹⁶

Lawrence v. Texas, which was decided seventeen years after *Bowers*, rejected its homophobic logic.³⁹⁷ *Lawrence* overruled *Bowers* and recognized a constitutionally-protected liberty interest in private, consensual sex between two adults.³⁹⁸ Notably, the Texas law at issue had sexual deviance concepts explicitly engrained into its text. As reflected in its title, “Homosexual Conduct,” the law only applied to same-sex sex and criminalized people who engaged “in deviate sexual intercourse with another individual of the same sex.”³⁹⁹ Throughout his majority opinion in *Lawrence*, Justice Kennedy stressed the stigma that the law imposed on lesbians and gays and noted that, even though the law criminalized consensual same-sex sex as only a low-level misdemeanor, “it remains a criminal offense with all that imports for the dignity of the persons charged.”⁴⁰⁰ Accordingly, sodomy laws provide a critical example of courts at the highest level rejecting legal agendas grounded in sexual deviance concepts to subjugate LGBTQ+ people in law. Later, this Article will return to this idea when discussing potential directions for reform in the new sexual deviancy.⁴⁰¹

In sum, the history surrounding criminal sodomy laws resonates with how harmful ideas about sexual deviance are shaping criminal laws that target LGBTQ+ populations in the new sexual deviancy today. For instance, these ideas undergird criminal laws in several states that make it a felony for medical providers to provide gender-affirming care to minors.⁴⁰² They also provide the foundation for criminal anti-drag laws in several states that put drag performers at risk for arrest and prosecution.⁴⁰³ Similar to sodomy laws in the past, these new laws harness institutional power in the criminal legal system to enforce traditional societal norms of sex, sexuality, and gender, and subjugate LGBTQ+ people under the law.

393. Woods, *supra* note 207, at 679.

394. *See id.* at 679–707.

395. *See id.*

396. *See id.* at 685–95.

397. 539 U.S. 558, 564 (2003).

398. *Id.* at 578.

399. TEX. PENAL CODE ANN. § 21.06(a) (2003) (emphasis added) (overturned by *Lawrence*, 539 U.S. at 558). Section 21.01(1) of the Texas Penal Code defined “deviate sexual intercourse” to mean: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.”

400. 539 U.S. at 575.

401. *See infra* Section V.I.C.

402. *See supra* Section II.A.

403. *See supra* Section II.E.

B. "SEXUAL PSYCHOPATH" LAWS (MEDICAL CONTROL)

"Sexual psychopath" laws are a key historical example to show how the new sexual deviancy is repackaging discredited sexual deviance concepts that are grounded in psychological theories of deviance. As noted previously, the introduction of "psychopathy" as a concept in the 1940s paved the way for new pathological definitions of criminalized "sexual deviance," including then-criminalized homosexuality.⁴⁰⁴ Proponents of "sexual psychopath" laws stressed that many sex crimes in society were committed by "sexual psychopaths" who posed grave dangers to society, and needed to be separated from society until their psychological problems were cured.⁴⁰⁵ Critics of these laws described them as "dangerous and futile" because they often relied on imprecise and vague definitions of "sexual psychopath," making it difficult if not impossible to define its meaning as a concept.⁴⁰⁶ Nevertheless, they were popular: twenty-nine states enacted sexual psychopath legislation between 1946 and 1959.⁴⁰⁷ These laws were written to cover a variety of crimes and sexual disorders, but were almost exclusively applied against gay men.⁴⁰⁸

Sexual psychopath laws generally took two forms. First, any person who was charged with a crime and found by a jury to be a "sexual psychopath" could be handed over to the state's department of public health, perhaps indefinitely, until that person was "cured."⁴⁰⁹ Second, a civil variation of these laws permitted the psychiatric commitment of sexual psychopaths, perhaps indefinitely, regardless of whether they were charged with a crime.⁴¹⁰

Connecting back to moral panic theory, the wave of "sexual psychopath" laws in the 1940s and 1950s coincided with moral panic about sexual predators that swept across the United States during and immediately after World War II.⁴¹¹ World War II was a major disruption to traditional gender roles in society. The war displaced millions of men from their homes and drove the proportion of women in the workforce to record highs.⁴¹² When the war concluded, U.S. society and culture placed primacy on strengthening traditional family values and

404. Woods, *supra* note 207, at 688–89.

405. See Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 142 (1950) (describing common justifications advanced to support "sexual psychopath" laws).

406. See *id.*

407. WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA: 1861–2003*, at 95 (2008). Many sexual psychopath laws were repealed in the 1970s alongside the repeal of laws that criminalized consensual sodomy. See Woods, *supra* note 207, at 696–97, 699 (describing decriminalization of consensual sodomy and repeal of sexual psychopath laws in many states during relevant time period).

408. See ESTELLE B. FREEDMAN, *Uncontrolled Desires: The Response to the Sexual Psychopath, 1920–1960*, in *FEMINISM, SEXUALITY, & POLITICS* 121, 132 (2006).

409. *Id.*

410. *Id.*

411. See *id.* at 131–32.

412. PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 71–72 (1998).

pre-war gender norms.⁴¹³ This environment fueled fears and anxieties about people who were perceived as threats to those values and norms, including LGBTQ+ people.⁴¹⁴

Sexual psychopath laws weaponized emerging ideas in sexual psychopathy to harness the power of medicine and control LGBTQ+ people in society. These now-discredited sexual deviance concepts legitimized state and private interventions that forced or pressured LGBTQ+ people to undergo invasive and harmful medical treatments (for instance, electric shock therapy, insulin shock therapy, hormonal therapy, sterilization, drug therapy, and in some instances frontal lobotomy).⁴¹⁵

This history resonates with how medical control is currently being weaponized in the new sexual deviancy today to fuel anxieties surrounding LGBTQ+ communities, especially transgender adults and youth. The psychotherapy interventions that opponents of LGBTQ+ rights are advocating for today—which are widely discredited and considered unethical among medical professionals—are grounded in similar intellectual traditions as sexual psychopath laws of the past.⁴¹⁶ Moreover, through restricting minors' access to gender-affirming care, sexual deviance concepts are being used to control medical practice in just as draconian and harmful ways to enforce traditional norms of sex, sexuality, and gender. As critics of these bans stress, such care is often life-saving and medically necessary for many transgender and gender diverse youth.⁴¹⁷

C. BANS ON LESBIAN, GAY, AND ALLY EDUCATORS (SCHOOLS)

Prior legislative attacks against lesbian, gay, and ally educators in public schools are another historical example that show how the new sexual deviancy is rehashing discredited sexual deviance concepts from dated sociological theories of deviance—in this context, by harnessing institutional power in schools. In the late 1970s and 1980s, lawmakers in several states introduced or considered legislation banning lesbian, gay, and ally educators from teaching in public schools.⁴¹⁸ These legislative attacks occurred after several lower courts had upheld the decisions of school districts to fire or transfer lesbian and gay teachers out of the classroom

413. See ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 258 (1990).

414. See *id.*

415. Freedman, *supra* note 408, at 134.

416. See *supra* Section III.B.2.

417. See, e.g., Kareen M. Matouk & Melina Wald, *Gender-Affirming Care Saves Lives*, COLUM. UNIV. DEP'T PSYCHIATRY (Mar. 30, 2022), <https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives> [<https://perma.cc/78Q8-28SX>].

418. The analysis to follow will discuss legislation introduced in California and Oklahoma. See also George Michaelson, *Teachers Under Fire in Nevada*, GAY CMTY. NEWS, May 5, 1979, at 1 (discussing Nevada lawmaker's plans to introduce legislation modeled on Oklahoma law); KAREN M. HARBECK, *GAY AND LESBIAN EDUCATORS: PERSONAL FREEDOMS, PUBLIC CONSTRAINTS* 96 (1997) (noting that state lawmakers in North Carolina, Nevada, Texas, and Arkansas considered bans on lesbian and gay teachers after the U.S. Supreme Court's 1985 decision in *City of Oklahoma City v. The National Gay Task Force*).

after their sexualities became known to the districts.⁴¹⁹ As discussed below, the reasoning in many of these cases relied on “role model” arguments, concerns about the improper sexual socialization of youth, and the then-criminal status of lesbians and gays under existing sodomy laws.⁴²⁰

Anti-gay activist Anita Bryant was a major figure in attacks on lesbian, gay, and ally educators in the late-1970s and 1980s.⁴²¹ Bryant was a former beauty queen and popular singer from Oklahoma, and widely known in the 1970s for promoting Florida orange juice on TV commercials.⁴²² In 1977, Anita Bryant mobilized religious conservatives and spearheaded her infamous “Save Our Children” campaign, which led to the repeal of an ordinance in Miami-Dade County, Florida that prohibited discrimination on the basis of sexual orientation.⁴²³ Inspired by her victory, Bryant expanded her campaign and mobilized religious conservatives to lead a national crusade against lesbian and gay rights.⁴²⁴ Concern for school children was a focal point of Bryant’s national crusade. For instance, one of Bryant’s donation request letters sent to millions across the country described how “radical, militant homosexuals” want “to recruit your children and teach them the virtues of becoming a homosexual.”⁴²⁵

In 1978, Bryant brought her crusade against LGBTQ+ people and ideas in schools to California by collaborating with California state senator John Briggs on Proposition 6 (informally known as the “Briggs Initiative”). Proposition 6 not only would have banned all lesbian and gay teachers and administrators from working in public schools, but it also would have prohibited any teacher or administrator from saying anything positive, empathetic, or supportive about homosexuality.⁴²⁶ In his arguments to the public in favor of Proposition 6, Briggs stressed two points with connections to ideas about sexual deviance discussed

419. See e.g., *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1346–47 (Wash. 1977) (en banc); *Acanfora v. Bd. of Educ. of Montgomery Cnty.*, 359 F. Supp. 843, 857 (D. Md. 1973), *aff’d on other grounds*, 491 F.2d 498 (4th Cir. 1974); *Morrison v. State Bd. of Ed.*, 74 Cal. Rptr. 116, 118 (Cal. Ct. App. 1969), *rev’d* 461 P.2d 375.

420. Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 609 (2013); George, *supra* note 339, at 832.

421. Rosky, *supra* note 156, at 1477–78.

422. Jillian Eugenios, *How 1970s Christian Crusader Anita Bryant Helped Spawn Florida’s LGBTQ Culture War*, NBC NEWS (Apr. 14, 2022, 12:21 PM), <https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna24215> [<https://perma.cc/D9ML-EJ5L>]; Rosky, *supra* note 156, at 1477.

423. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 101 (2014).

424. *Id.* (noting that “Bryant fueled successful campaigns to repeal pro-gay ordinances in Saint Paul, Minnesota; Eugene, Oregon; and Wichita, Kansas”).

425. JACKIE M. BLOUNT, *FIT TO TEACH: SAME-SEX DESIRE, GENDER, AND SCHOOL WORK IN THE TWENTIETH CENTURY* 148 (2005) (providing an excerpt of Anita Bryant’s donation request letter).

426. Specifically, Proposition 6 allowed school districts to refuse to hire or fire “a schoolteacher, a teacher’s aide, a school administrator or a counselor” who “engages in public homosexual activity and/or public homosexual conduct directed at, or likely to come to the attention of, schoolchildren or other school employees.” School Employees—Homosexuality. Initiative Statute, 1978 Cal. Stat. A-168 (to be codified at CAL. EDUC. CODE § 44837.5 et seq.) (presented as Prop. 6, and rejected by voters, in general election of Nov. 7, 1978). The proposed law’s definition of “public homosexual conduct” included

above. First, invoking “role model” and social learning ideas, Briggs warned that if the proposition failed, “homosexual teachers” would “go public” and “provid[e] their students with a living example of the acceptability of the homosexual way of life.”⁴²⁷ Second, Briggs defined homosexuality through the lens of vice, stressing that “the undermining of traditional values which began in the ‘60s has left many Americans in a moral vacuum which they attempt to fill with drugs, alcohol, and ‘alternative life styles.’”⁴²⁸

Proposition 6 ultimately failed by a fifty-eight percent to forty-two percent margin, in part due to community mobilization efforts led by San Francisco Board of Supervisors member Harvey Milk—California’s first openly gay elected official.⁴²⁹ Although defeated in California, Proposition 6 inspired other states to explore legislative action.

Oklahoma—Anita Bryant’s home state—enacted legislation in April 1978 that was modeled on the Briggs Initiative.⁴³⁰ Illustrating how the law propagated theories of deviance, the Oklahoma statute explicitly included “role model” and social learning ideas in its text. Specifically, the statute listed “[w]hether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity” as a factor to consider when determining the unfitness of public school educators.⁴³¹

In 1982, the National Gay Task Force challenged the constitutionality of the Oklahoma law on several grounds, including, *inter alia*, the First Amendment.⁴³² The federal district court upheld the law in its totality.⁴³³ In a divided panel, however, the federal appellate court invalidated the portion of the law that prohibited “advocating, encouraging, or promoting homosexual activity” after concluding that portion was unconstitutionally overbroad under the First Amendment.⁴³⁴ In dissent, Judge Barrett stressed sexual deviance concepts. Specifically, Judge Barrett stated that when a teacher “advocates, solicits, encourages or promotes the practice of *sodomy*” in a way that creates a “substantial risk” of coming to the attention to school children, that teacher is “*inciting* school children to participate in the abominable and detestable crime against nature.”⁴³⁵

“advocating, soliciting, imposing, encouraging or promoting . . . private or public homosexual activity”—placing school employees who openly supported gays and lesbians under its scope. *Id.*

427. John V. Briggs et al., *Rebuttal to Argument Against Proposition 6*, in VOTER INFORMATION GUIDE FOR 1978, GENERAL ELECTION, 30 (1978).

428. John V. Briggs et al., *Argument in Favor of Proposition 6*, in VOTER INFORMATION GUIDE FOR 1978, GENERAL ELECTION, 31 (1978).

429. BLOUNT, *supra* note 425, at 152 (noting that “Proposition 6 had gone down in a resounding defeat—by a margin of 58 percent to 42 percent”).

430. 70 OKLA. STAT. § 6-103.15 (1978) (repealed by Laws 1989, 1st Ex. Sess., c. 2, § 122). The full text of the statute is available at *Nat’l Gay Task Force v. Bd. of Educ. of Okla. City*, 729 F.2d 1270, 1272 (10th Cir. 1984), *aff’d by an equally divided court*, 470 U.S. 903 (1985) (per curiam).

431. See *Nat’l Gay Task Force*, 729 F.2d at 1272 (providing full text of Oklahoma statute).

432. *Id.* at 1273–74. The National Gay Task Force was a national lesbian and gay rights advocacy organization whose members included Oklahoma public school teachers. *Id.* at 1272.

433. *Id.* at 1272.

434. *Id.* at 1272, 1274.

435. *Id.* at 1276 (Barrett, J., dissenting) (emphasis in original).

The Oklahoma City Board of Education appealed the case to the U.S. Supreme Court. Before the Court, the Board of Education intertwined “role model” arguments, concerns about indoctrinating students, and then-existing sodomy laws against homosexuality to frame the key “evil” that the law aimed to address:

[T]he substantive evil which the Oklahoma legislature had a right—and probably a duty—to prevent consists not only in the danger that impressionable school children will imminently commit the crime of homosexual sodomy, but also the dangers that the educational process will be disrupted, that the students’ normal process of social integration may be impaired, and that school children will develop the attitude that law violation in general is socially acceptable conduct.⁴³⁶

Moreover, the Board of Education explicitly asked the Court not to reject “role model” arguments or the idea that openly lesbian and gay teachers would induce “impressionable” students to commit “homosexual sodomy”:

Concerning the “role model imitation” issue . . . , while the Board of Education is well aware of the heated academic debate regarding whether homosexuality is predominantly a function of hereditary or environmental factors, it would respectfully urge this Court to refrain from concluding as a matter of law that impressionable students will not be induced to commit homosexual sodomy by their teachers when no consensus has been reached on that issue by the medical and scientific community as a whole.⁴³⁷

Without a written opinion, an equally divided 4–4 Court affirmed the decision of the lower appellate court, which invalidated the portion of the law that prohibited “advocating, encouraging, or promoting homosexual activity.”⁴³⁸ Nevertheless, the arguments that opponents of LGBTQ+ rights advanced in support of these prior bans track many of the arguments being advanced today to support laws involving LGBTQ+ censorship in schools.⁴³⁹ These arguments have intellectual roots in sociological theories of deviance that are concerned about the “improper” sexual socialization of youth.⁴⁴⁰

Scholars and commentators have drawn parallels between these early attacks on lesbian, gay, and ally educators in the late 1970s and early 1980s, and attacks against LGBTQ+ teachers, students, and ideas in schools today.⁴⁴¹ In both waves

436. Brief of Appellant at 29–30, *Bd. of Educ. of Okla. Cit. v. Nat’l Gay Task Force*, 470 U.S. 903 (1985) (No. 83-2030).

437. Reply Brief of Appellant at 8, *Bd. of Educ. of Okla. City v. Nat’l Gay Task Force*, 470 U.S. 903 (1985) (No. 83-2030).

438. *Bd. of Educ. of Okla. City*, 470 U.S. 903, 903 (1985) (per curiam). Because the vote was equally split 4–4, the Court’s decision did not establish controlling precedent.

439. See *supra* Section III.A.2.

440. See *supra* Section III.A.2.

441. See, e.g., Eugenios, *supra* note 422; Linda C. McClain, “Do Not Ever Refer to My Lord Jesus Christ with Pronouns”: Considering Controversies Over Religiously Motivated Discrimination on the Basis of Gender Identity, 38 J.L. & RELIGION 1, 9 (2023).

of attacks, crusaders against LGBTQ+ rights invoked sexual deviance concepts to reinforce traditional societal values about sex, sexuality, and gender in school settings, demonize LGBTQ+ identity, and punish teachers and other adult authority figures at school who identify as LGBTQ+ or support LGBTQ+ people. The discussion later in this Article will explain how these results are especially harmful to LGBTQ+ youth, who are a highly vulnerable segment of the LGBTQ+ population.⁴⁴²

D. SAME-SEX MARRIAGE BANS (FAMILIES)

Same-sex marriage bans are a fourth and final historical example that show how the new sexual deviancy reuses discredited ideas about sexual deviancy in order to control LGBTQ+ people in vital institutions—in this context, families. At their core, same-sex marriage bans delineated which families were and were not deserving of recognition and protection under the law.⁴⁴³

Proponents of same-sex marriage bans advanced different arguments that rested on antiquated sexual deviance concepts. One type of argument, “role model” arguments, posited that children do best in households headed by one man and one woman.⁴⁴⁴ Illustrating their success in courts, the New York Court of Appeals accepted “role model” arguments when it upheld the constitutionality of New York’s same-sex marriage ban in its 2006 decision *Hernandez v. Robles*.⁴⁴⁵ In its reasoning, the New York high court stressed that the “[l]egislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.”⁴⁴⁶

Legal scholars vigorously critiqued “role model” arguments in marriage equality litigation for relying on improper sex stereotypes.⁴⁴⁷ These arguments, however, also relied on very specific assumptions about “appropriate” childhood socialization as well as anxieties about the decline of the traditional nuclear family. This is explicit in Justice Cordy’s 2003 dissent in *Goodridge v. Department of Public Health*—the first decision by a state’s highest court to recognize marriage equality for same-sex couples.⁴⁴⁸ In dissent, Justice Cordy stressed that “[t]he marital family is . . . the foremost setting for the education and socialization

442. See *infra* Section V.A.2; see also 2017 KOSCIW ET AL., *supra* note 122; TREVOR PROJECT, *supra* note 122.

443. See *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

444. Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 463 (2007).

445. 855 N.E.2d 1 (N.Y. 2006), *abrogated by* *Obergefell*, 576 U.S. 644; see also Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 165 (2010) (noting that, in general, “[s]ex-role-based arguments against same-sex marriage have fared surprisingly well in court”).

446. *Hernandez*, 855 N.E.2d at 8.

447. See, e.g., Widiss et al., *supra* note 444, at 491–92.

448. 798 N.E.2d 941 (Mass. 2003); see also Pam Belluck, *Same-Sex Marriage: The Overview; Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES (Nov. 19, 2003), <https://www.nytimes.com/2003/11/19/us/same-sex-marriage-overview-marriage-gays-gains-big-victory-massachusetts.html> (noting that *Goodridge* was the first decision by a state’s highest court recognizing marriage equality for same-sex couples).

of children.”⁴⁴⁹ To support his argument, Justice Cordy cited leading conservative scholars whose work argued that the decline of the traditional nuclear family was an urgent social problem, especially for the future of children.⁴⁵⁰

One variation of the role model argument linked concerns about children’s sexual identity development to raising children in same-sex-headed-families or promoting same-sex marriage in schools.⁴⁵¹ This variation has intellectual roots in the same discredited social learning ideas that are being propagated today in the new sexual deviancy. These ideas took center stage in the 2008 Proposition 8 (“Prop 8”) campaign in California. Prop 8 was a proposed amendment to the California Constitution which stated that “[o]nly marriage between a man and a woman is valid or recognized in California.”⁴⁵² In one recurring ad, the “Yes on 8” campaign targeted parents with a clip showing a young girl running up to her mother in the kitchen and saying, “Mom! Guess what I learned in school today! . . . I learned that a prince can marry a prince, and I can marry a princess.”⁴⁵³ The ad ended with bold text, “Protect Our Children. Restore Marriage.”⁴⁵⁴

An analysis of opinion data revealed that in the last six weeks before Prop 8 passed, more than 500,000 parents with children under eighteen living at home in California changed their minds to vote in favor of Prop 8—a “shift alone [that] more than handed victory to proponents.”⁴⁵⁵ That analysis attributed the shift to ads that perpetuated a number of falsehoods about the dangers of same-sex marriage, including “that impressionable kids would be indoctrinated; that they would learn about gay sex; that they would be more likely to become gay; and that they might choose to be gay.”⁴⁵⁶ The federal district court in *Perry v. Schwarzenegger* recognized these strategies when it held that Prop 8 was unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁴⁵⁷ Specifically, the court’s findings stressed that “[t]he Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian.”⁴⁵⁸

449. *Id.* at 996 (Mass. 2003) (Cordy, J., dissenting).

450. *Id.* at 995 (citing, *inter alia*, JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 28, 40, 66–67 (2002)).

451. See William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 307, 317 (1998) (“The most perverse argument against same-sex marriage . . . is concern for children’s sexuality.”); JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* 45 (2012) (describing that “some have argued that extending marriage to gays will cause more children to become gay”).

452. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010) (providing the proposed amendment in its entirety).

453. VoteYesonProp8, *Yes on 8 TV Ad: It’s Already Happened*, YOUTUBE (Oct. 8, 2008), <https://www.youtube.com/watch?v=0PgjcqFYP4>; see also David Fleisher, *Behind the Numbers of Prop. 8*, L.A. TIMES (Aug. 3, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-aug-03-la-oe-fleisher-gay-marriage-20100803-story.html> [<https://perma.cc/3SSC-KKYK>].

454. VoteYesonProp8, *supra* note 453.

455. Fleisher, *supra* note 453.

456. *Id.*

457. 704 F. Supp. 2d 921, 1003.

458. *Id.* at 989.

In addition to role model arguments, marriage equality opponents also advanced arguments that placed primacy on procreation, and more specifically, “responsible procreation.” These arguments are important to consider given that opponents of LGBTQ+ rights in the new sexual deviancy are also raising procreation-centered arguments to support anti-LGBTQ+ laws, especially in the context of bans on gender-affirming care for minors.⁴⁵⁹ In the context of marriage equality, responsible procreation arguments stressed that same-sex sex could not result in children, whereas heterosexual sex could result in children (especially accidentally), thus inspiring a need for promoting and limiting marriage to opposite-sex couples.⁴⁶⁰ Specifically, marriage equality opponents argued that same-sex marriage bans encouraged responsible fatherhood among heterosexuals and protected vulnerable women and children from “irresponsible” men.⁴⁶¹ Legal scholars and advocates called attention to the fact that responsible procreation arguments were usually framed in these highly gendered terms that rested on improper sex stereotypes, illustrating another important intersection between homophobia and sexism in past opposition to LGBTQ+ rights.⁴⁶² These arguments rested on historically entrenched assumptions that, merely on account of gender, women were more likely to rely on men for financial security, and that men were less likely to stay financially and emotionally attached to their children without the legal bond of marriage.⁴⁶³

Nonetheless, several courts accepted responsible procreation arguments to uphold same-sex marriage bans.⁴⁶⁴ For instance, in the *Hernandez v. Robles* case discussed above upholding New York’s same-sex marriage ban, the New York high court concluded that “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.”⁴⁶⁵ It reasoned that “[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.”⁴⁶⁶

In addition to relying on sex stereotypes, responsible procreation arguments also have deep historical roots in religion.⁴⁶⁷ Underscoring this history is

459. See *supra* Section III.A.3.

460. Widiss et al., *supra* note 444, at 494–95 (describing responsible procreation arguments); see also, e.g., Brief Amici Curiae of James Q. Wilson et al., Legal & Family Scholars in Support of Defendant-Appellees at 5, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. 17716) (raising responsible procreation arguments in litigation challenging Connecticut’s same-sex marriage ban).

461. Widiss et al., *supra* note 444, at 498.

462. *Id.* at 494–98.

463. *Id.* at 496.

464. *Id.* at 495 (stressing that the responsible procreation rationale “has been the predominant justification in many of the court decisions denying same-sex couples the right to marry”).

465. 855 N.E.2d 1, 7 (N.Y. 2006).

466. *Id.*

467. Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781, 783 (2012) (describing that “[t]he roots of responsible procreation are undoubtedly religious”).

important given that some opponents of LGBTQ+ rights are appealing to religious authority when raising procreation-centered arguments in support of anti-LGBTQ+ laws, especially bans on gender-affirming care for minors.⁴⁶⁸ For instance, in response to developments in assisted reproductive technology in the late 1980s, the Vatican used responsible procreation arguments to advance guidelines based on Catholic morality and natural law.⁴⁶⁹ The guidelines opposed those developments, stressing ideas about responsible procreation and “natural”⁴⁷⁰ procreation within traditional marriage:

[T]he vitality and stability of society require that children come into the world within a family and that the family be firmly based on marriage. The tradition of the Church and anthropological reflection recognize in marriage and in its indissoluble unity the only setting worthy of truly responsible procreation.⁴⁷¹

As legal scholars have described, the Vatican’s responsible procreation arguments resemble responsible procreation arguments later advanced in U.S. marriage equality litigation in that they both emphasize the welfare of children and the importance of natural procreation within traditional marriage as essential for social order and stability.⁴⁷² In some instances, religiously-motivated opponents of same-sex marriage advanced arguments in courts that explicitly linked religion to traditional marriage and natural procreation.⁴⁷³

Similar to anti-sodomy laws, marriage equality is an important context to consider for combating discredited ideas about deviance in the new sexual deviancy. In invalidating same-sex marriage bans, many lower courts rejected different iterations of both role model and responsible procreation arguments.⁴⁷⁴ For instance, the federal district court in *Perry* holding Prop 8 unconstitutional stressed that the

468. See *supra* Section III.A.3.

469. Nice, *supra* note 467, at 794–95; see also Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, VATICAN (Feb. 22, 1987) [hereinafter *The Instruction*], https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html [<https://perma.cc/S876-DTA2>].

470. In this context, “natural” procreation refers to the idea that opposite-sex sex can lead to procreation on its own, without further or intentional intervention to procreate. See *The Instruction*, *supra* note 469.

471. *Id.*

472. See, e.g., Nice, *supra* note 467, at 796.

473. See, e.g., Brief of Amici Curiae United States Conference of Catholic Bishops; California Catholic Conference; National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; The Ethics & Religious Liberty Commission; Lutheran Church—Missouri Synod; Calvary Chapel Fellowship of Ministries of California; The Christian and Missionary Alliance; Coral Ridge Ministries; The Council of Korean Churches in Southern California; Southern California Korean Ministers Association; Holy Movement for America In Support of Defendant-Intervenors-Appellants and Supporting Reversal at 7–14, *Perry v. Schwarzenegger*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696).

474. Linda C. McClain, *Can Religion Without God Lead to Religious Liberty Without Conflict?*, 94 B.U. L. REV. 1273, 1316 (2014); Nice, *supra* note 467, at 837.

“gender of a child’s parent is not a factor in the child’s adjustment,”⁴⁷⁵ and that “[m]any of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples.”⁴⁷⁶ Moreover, the Massachusetts high court in *Goodridge* explicitly rejected the legislative rationale that prohibiting same-sex couples from marrying provides “a favorable setting for procreation.”⁴⁷⁷ It reasoned that “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”⁴⁷⁸

The U.S. Supreme Court’s reasoning in *Obergefell v. Hodges*, which extended the constitutional right to marry to same-sex couples, also rebukes these deviance-based arguments.⁴⁷⁹ For instance, Justice Kennedy’s majority opinion in *Obergefell* stressed “[t]he marriage laws at issue . . . harm and humiliate the children of same-sex couples” and that “children suffer the stigma of knowing their families are somehow lesser.”⁴⁸⁰ This position inherently rejects the idea that same-sex marriage somehow threatens the well-being of children, whether through “improper” sexual socialization via a lack of male and female parental role models or other means.⁴⁸¹ In addition, Justice Kennedy’s majority opinion stressed that “[t]he constitutional marriage right has many aspects, of which childbearing is only one” and explicitly accepted the idea that “[a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State.”⁴⁸² This reasoning repudiates the validity of procreation-centered arguments as justifications for subjugating LGBTQ+ people in law.

In sum, the history surrounding same-sex marriage bans illuminates how opponents of LGBTQ+ rights in the past have used harmful ideas grounded in sexual deviance concepts to define “proper” families in ways that exclude LGBTQ+ people. Similar patterns are occurring in the new sexual deviancy. Specifically, opponents of LGBTQ+ rights are rehashing the same ideas about deviance to control “the family” in ways that prevent families from being safe spaces for LGBTQ+ people, particularly youth. For instance, in the push for bans on gender-affirming care for minors, lawmakers and state’s attorneys are raising deviance-centered arguments that resemble prior arguments in the fight for marriage equality that strip families of the ability to make fundamental decisions about medical care for transgender youth, which in turn, inhibits the family from functioning as an institution that can fully support and affirm transgender youth’s identities. Moreover, in the new sexual deviancy, ideas about sexual deviance

475. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010).

476. *Id.* at 1002.

477. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

478. *Id.*

479. 576 U.S. 644 (2015).

480. *Id.* at 668.

481. Naomi Schoenbaum, *Heteronormativity in Employment Discrimination Law*, 56 WASHBURN L.J. 245, 252 (2017) (noting that “[t]he final rejection of the idea that a child needs both a male and a female parental role model came with *Obergefell v. Hodges*”).

482. *Obergefell*, 576 U.S. at 669.

and “proper” family structures are animating new types of targeted religious exemptions in child welfare that exclude LGBTQ+ foster and adoptive parents, and jeopardize protections for LGBTQ+ youth in child welfare systems.⁴⁸³ Similar to past same-sex marriage bans, these new laws harness the family to enforce traditional societal norms of sex, sexuality, and gender in ways that harm LGBTQ+ people, and LGBTQ+ youth in particular.

* * *

To recap, historically contextualizing the new sexual deviancy illustrates how sexual deviance ideas are very similar, if not identical to those used in the past to subjugate LGBTQ+ people under the law. Lawmakers and attorneys are repackaging the same antiquated ideas today to justify and defend laws targeting LGBTQ+ communities. With this important history in mind, this Article now shifts to discuss the harms of the new sexual deviancy for LGBTQ+ communities and broader society.

V. HARMS OF THE NEW SEXUAL DEVIANCY

This Part identifies and examines the harms of the new sexual deviancy. History tells us that legal agendas that are grounded in ideas about sexual deviance can have serious and far-reaching harms for LGBTQ+ communities. Consistent with this idea, Section A discusses three major categories of harms that the new sexual deviancy poses for LGBTQ+ communities: (1) encouraging anti-LGBTQ+ societal discrimination, harassment and violence; (2) worsening LGBTQ+ mental health outcomes and disparities; and (3) undermining LGBTQ+ social visibility. Given that they are common targets in the new sexual deviancy, transgender individuals and LGBTQ+ youth are at special risk for these harms.

Section B then discusses broader harms that the new sexual deviancy poses to U.S. democratic society. Specifically, the analysis discusses how the new sexual deviancy further jeopardizes core, liberal, democratic values of pluralism and mutual co-existence.

A. HARMS TO LGBTQ+ COMMUNITIES

1. Encouraging Anti-LGBTQ+ Societal Discrimination, Harassment, and Violence

The first category of harms that the new sexual deviancy poses for LGBTQ+ communities involves encouraging anti-LGBTQ+ societal discrimination, harassment, and violence.

LGBTQ+ people’s experiences with societal discrimination are far from new. A robust body of social science research demonstrates that LGBTQ+ communities have been and still are vulnerable to pervasive discrimination in major societal institutions and systems, including employment, health care,

483. See *supra* Sections III.A.3, II.F.

schools, housing, and criminal justice.⁴⁸⁴ Transgender individuals, LGBTQ+ communities of color, LGBTQ+ people with disabilities, and other highly marginalized LGBTQ+ groups are especially vulnerable to these forms of discrimination.⁴⁸⁵

Substantiating these points, the 2022 Center for American Progress (CAP) study—which is based on a nationally representative sample of LGBTQI+ people in the United States—concluded “that LGBTQI+ individuals continue to experience significantly higher rates of discrimination than non-LGBTQI+ individuals, a trend that holds true in virtually every setting surveyed—including health care, employment, housing, and public spaces.”⁴⁸⁶ Specifically, the survey found that more than one-third of LGBTQI+ adults reported facing some kind of discrimination in the year prior to taking the survey, compared to less than one in five for non-LGBTQI+ individuals.⁴⁸⁷ In addition, nearly half of LGBTQI+ people color and LGBTQI+ people with disabilities, and more than half of transgender or nonbinary individuals, reported facing some kind of discrimination in the year prior to taking the survey.⁴⁸⁸

Although more research is needed, the volume, scope, and speed of recent legislation targeting both LGBTQ+ adults and youth is exacerbating these problems. For instance, a 2022 study of 106 LGBTQ+ parents in Florida found that one in every four of the participants experienced anti-LGBTQ+ harassment after Florida passed its “Don’t Say Gay” bill earlier that year.⁴⁸⁹ The propagation and acceptance of discredited sexual deviance concepts by state actors (including lawmakers, government attorneys, and judges) in the new sexual deviancy stigmatizes and dehumanizes LGBTQ+ people. It sends the message that broad-based discrimination against LGBTQ+ people is appropriate and acceptable in society. The effects of this discrimination disrupt how LGBTQ+ people live and function in their respective communities.⁴⁹⁰

Revisiting Justice Kennedy’s majority opinion in *Lawrence v. Texas* is instructive to examine these points. In *Lawrence*, Justice Kennedy recognized that legislation targeting lesbians and gays in one domain (e.g., criminal law) can enable

484. See generally 2022 U.S. TRANS SURVEY, *supra* note 122 (documenting the experiences of transgender people in the United States); 2017 National School Climate Survey, *supra* note 122 (documenting the experiences of LGBTQ+ youth in the United States); Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017), <https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways> (discussing study findings involving LGBTQ+ people’s experiences with discrimination).

485. Singh & Durso, *supra* note 484; see also 2022 U.S. TRANS SURVEY, *supra* note 122, at 23.

486. 2022 CAP STUDY, *supra* note 122.

487. *Id.*

488. *Id.*

489. ABBIE E. GOLDBERG, IMPACT OF HB 1557 (FLORIDA’S DON’T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA 1 (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf> [<https://perma.cc/TV2N-QRZ8>].

490. See AM. PSYCH. ASS’N, APA RESOLUTION ON OPPOSING DISCRIMINATORY LAWS, POLICIES, AND PRACTICES AIMED AT LGBTQ+ PERSONS 3 (2020), <https://www.apa.org/about/policy/resolution-opposing-discriminatory-laws.pdf> [<https://perma.cc/6WCR-C95Z>].

pervasive discrimination in other domains.⁴⁹¹ As Justice Kennedy stressed, sodomy laws were “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”⁴⁹² In the lead up to *Lawrence*, scholars described how the harms of criminal sodomy laws extended far beyond potential arrest and criminal prosecution into the civil sphere.⁴⁹³ For instance, even when not heavily enforced, sodomy laws were used to deny LGBTQ+ parents custody of their children, allow employers to fire or refuse to hire LGBTQ+ people, and deny LGBTQ+ people educational opportunities in schools and universities.⁴⁹⁴ These lessons from *Lawrence* underscore the fact that the discriminatory consequences of anti-LGBTQ+ legislation in one domain (for instance, health care) can bleed into other domains (for instance, schools or the workplace).

Moreover, a long line of research documents how LGBTQ+ people experience greater rates of violence and harassment than non-LGBTQ+ people.⁴⁹⁵ Highly marginalized LGBTQ+ groups and LGBTQ+ people who experience multiple forms of identity-based marginalization (for instance, transgender people, homeless LGBTQ+ people, LGBTQ+ youth, and LGBTQ+ people of color) are at even greater risk for experiencing violence and harassment.⁴⁹⁶

Scholars and LGBTQ+ advocates are sounding the alarm that surging anti-LGBTQ+ legislation and rhetoric is encouraging greater anti-LGBTQ+ violence and harassment nationwide.⁴⁹⁷ In 2023, the Human Rights Campaign—the largest LGBTQ+ advocacy organization in the United States—issued its first ever “State of Emergency” for LGBTQ+ Americans with guidance to ensure safety for LGBTQ+ residents and travelers.⁴⁹⁸ Reinforcing these concerns, some

491. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

492. *Id.*

493. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 116 (2000).

494. *See id.*; *see also id.* at 112–68 (discussing various harms of sodomy laws in both criminal and civil contexts).

495. *See generally* Tasseli McKay et al., *Understanding (and Acting On) 20 Years of Research on Violence and LGBTQ+ Communities*, 20 TRAUMA, VIOLENCE, & ABUSE 665 (2019).

496. *See* Amy L. Gower et al., *Application of an Intersectional Lens to Bias-Based Bullying Among LGBTQ+ Youth of Color in the United States*, 8 STIGMA & HEALTH 363, 367–68 (2023); *see also* Brodie Fraser et al., *LGBTQ+ Homelessness: A Review of the Literature*, INT’L J. ENV’T RSCH. & PUB. HEALTH, July 27, 2019, at 1, 7.

497. *See generally* Sara Brightman et al., *Anti-Transgender Ideology, Laws, and Homicide: An Analysis of the Trifecta of Violence*, 28 HOMICIDE STUD. 251 (2024) (analyzing data that demonstrates anti-transgender rhetoric and transgender homicide are correlated and increasing); Delphine Luneau, *FBI’s Annual Crime Report — Amid State of Emergency, Anti-LGBTQ+ Hate Crimes Hit Staggering Record Highs*, HUM. RTS. CAMPAIGN (Oct. 16, 2023), <https://www.hrc.org/press-releases/fbis-annual-crime-report-amid-state-of-emergency-anti-lgbtq-hate-crimes-hit-staggering-record-highs> [https://perma.cc/B33Y-DPNX] (discussing FBI annual report 2022).

498. *See* Luneau, *supra* note 497; *For the First Time Ever, Human Rights Campaign Officially Declares ‘State of Emergency’ for LGBTQ+ Americans; Issues National Warning and Guidebook to Ensure Safety for LGBTQ+ Residents and Travelers*, HUM. RTS. CAMPAIGN (June 6, 2023), <https://www.hrc.org/press-releases/for-the-first-time-ever-human-rights-campaign-officially-declares-state-of-emergency-for-lgbtq-americans-issues-national-warning-and-guidebook-to-ensure-safety-for-lgbtq-residents-and-travelers>.

lawmakers in states that are aggressively passing legislation targeting LGBTQ+ communities have been openly apathetic towards anti-LGBTQ+ violence. For instance, in February 2024, a state senator in Oklahoma called LGBTQ+ people “filth” when asked about anti-LGBTQ+ laws in Oklahoma in the wake of Nex Benedict’s death.⁴⁹⁹ Nex Benedict was a nonbinary high school student in Oklahoma who died of suicide one day after being bullied by classmates in the school bathroom.⁵⁰⁰

Recent statistics also provide some greater insight into these problems. According to annual crime data from the U.S. Federal Bureau of Investigation, the number of reported hate crime offenses based on sexual-orientation bias increased from 1,320 offenses in 2021, to 2,210 offenses in 2022, to 2,402 offenses in 2023.⁵⁰¹ Moreover, the number of reported hate crime offenses based on gender-identity bias increased from 307 offenses in 2021, to 515 offenses in 2022, to 547 offenses in 2023.⁵⁰² In calling attention to this data, LGBTQ+ advocates have stressed that anti-LGBTQ+ hate crimes have increased in spite of the fact that overall violent crime rates have declined during the same years.⁵⁰³

Many recent incidents of hate-motivated violence and harassment against LGBTQ+ people have ties to rising extremism in the United States, and are targeting the exact spaces where LGBTQ+ rights are under attack in the new sexual deviancy. For instance, between June 2022 and April 2023, the Anti-Defamation League and GLAAD⁵⁰⁴ documented 356 anti-LGBTQ+ extremist and non-extremist incidents of violence and harassment across the United States.⁵⁰⁵ Of these

499. Kelly McClure, *Oklahoma Senator Calls LGBTQ+ People “Filth” While Commenting on Death of Nex Benedict*, SALON (Feb. 24, 2024, 11:42 AM) <https://www.salon.com/2024/02/24/oklahoma-senator-calls-lgbtq-people-filth-while-commenting-on-of-nex-benedict> [https://perma.cc/ZBC6-7JV5].

500. See Colbi Edmonds & Adeel Hassan, *What We Know About the Death of a Nonbinary Student in Oklahoma*, N.Y. TIMES (Mar. 15, 2024), <https://www.nytimes.com/article/nex-benedict-oklahoma.html>.

501. FBI, U.S. DOJ, HATE CRIME STATISTICS, 2021: INCIDENTS AND OFFENSES 3 (2022), <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/downloads> [hereinafter HATE CRIME STATISTICS, 2021] (select “2021” from the dropdown under “Hate Crime Statistics and Annual Reports” to download document); FBI,

U.S. DOJ, HATE CRIME STATISTICS, 2022: INCIDENTS AND OFFENSES 3 (2023), <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/downloads> [hereinafter HATE CRIME STATISTICS, 2022] (select “2022” from the dropdown under “Hate Crime Statistics and Annual Reports” to download document); FBI, U.S. DOJ, HATE CRIME STATISTICS, 2023: INCIDENTS AND OFFENSES 4 (2024), <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/downloads> [hereinafter HATE CRIME STATISTICS, 2023] (select “2023” from the dropdown under “Hate Crime Statistics and Annual Reports” to download document).

502. HATE CRIME STATISTICS, 2021, *supra* note 501, at 4; HATE CRIME STATISTICS, 2022, *supra* note 501, at 4; HATE CRIME STATISTICS, 2023, *supra* note 501, at 5.

503. Delphine Luneau, *New FBI Data: Anti-LGBTQ+ Hate Crimes Continue to Spike, Even as Overall Crime Rate Declines*, HUM. RTS. CAMPAIGN (Sept. 23, 2024), <https://www.hrc.org/press-releases/new-fbi-data-anti-lgbtq-hate-crimes-continue-to-spike-even-as-overall-crime-rate-declines> [https://perma.cc/PKG6-B6BU].

504. GLAAD (formerly the Gay & Lesbian Alliance Against Defamation) “is the world’s largest Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) media advocacy organization.” *About GLAAD*, GLAAD, <https://glaad.org/about> [https://perma.cc/D2Y2-J4AA] (last visited Mar. 30, 2025).

505. Of those 356 incidents, 305 involved harassment, 40 involved vandalism, and 11 involved assault. ANTI-DEFAMATION LEAGUE & GLAAD, YEAR IN REVIEW: ANTI-LGBTQ+ HATE & EXTREMISM

incidents, 138 related to drag events and performers, 33 involved schools and educators, 23 involved health care facilities and providers, and 22 related to government buildings and elected officials.⁵⁰⁶ Nearly half (49%) of the incidents “were perpetrated wholly or substantially by individuals associated with extremist groups.”⁵⁰⁷ At least 191 of the 356 incidents also made explicit references to “grooming” conspiracies or “pedophilia.”⁵⁰⁸

Experiencing anti-LGBTQ+ societal discrimination, harassment, or violence is a harm in its own right. But as the next Section turns to discuss, these experiences can also negatively affect the mental well-being of LGBTQ+ people and communities.

2. Worsening LGBTQ+ Mental Health Outcomes and Disparities

The second category of harms that the new sexual deviancy poses for LGBTQ+ communities is worsening mental health outcomes and disparities.

Research indicates that LGBTQ+ people experience negative mental health outcomes at higher rates than non-LGBTQ+ people do.⁵⁰⁹ These negative outcomes include higher rates of depression, anxiety, suicide and suicidal ideation, and substance use disorders.⁵¹⁰ Disparities are especially prominent for highly marginalized LGBTQ+ groups (for instance, LGBTQ+ youth and transgender individuals) as well as LGBTQ+ people who experience multiple and intersecting forms of discrimination (for instance, LGBTQ+ people of color and LGBTQ+ people with disabilities).⁵¹¹

In the new sexual deviancy, mental health disparities involving LGBTQ+ youth are of particular concern given the high volume of recent legislation targeting LGBTQ+ youth in vital systems, including health care, families, and schools.⁵¹² The 2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People reported alarming rates of negative mental health outcomes for

INCIDENTS, 2022–2023 (2023), <https://www.adl.org/resources/report/year-review-anti-lgbtq-hate-extremism-incidents-2022-2023> [https://perma.cc/N2EJ-WMVR].

506. *Id.*

507. *Id.*

508. *Id.*

509. See Brandon L. Velez, David Zelaya & Jillian Scheer, *Context Matters: Minority Stress and Mental Health Experiences of Diverse LGBTQ People*, in QUEER PSYCHOLOGY: INTERSECTIONAL PERSPECTIVES 103, 103 (Kevin L. Nadal & María R. Scharrón-del Río eds., 2021).

510. *Id.*

511. Myeshia Price-Feeney et al., *Understanding the Mental Health of Transgender and Nonbinary Youth*, 66 J. ADOLESCENT HEALTH 684, 689–90 (2020) (discussing mental health disparities for LGBTQ+ youth); Elliot A. Tebbe & Stephanie L. Budge, *Factors That Drive Mental Health Disparities and Promote Well-Being in Transgender and Nonbinary People*, 1 NATURE REVIEWS PSYCH. 694, 698–99 (2022) (describing mental health disparities for transgender and nonbinary people). See generally Maleeha Abbas & James J. García, *Mental Health in LGBTQ PoC*, in HEART, BRAIN AND MENTAL HEALTH DISPARITIES FOR LGBTQ PEOPLE OF COLOR 109 (James J. García ed., 2021) (describing mental health disparities for LGBTQ+ people of color).

512. See *supra* Part II (summarizing legislation).

LGBTQ+ youth.⁵¹³ The study findings revealed that LGBTQ+ young people reported high rates of experiencing recent symptoms of depression (53%) and anxiety (66%), seriously considering attempting suicide in the past year (39%), and attempted suicide in the past year (12%).⁵¹⁴ The rates were even higher for transgender and nonbinary young people. Fifty-nine percent of transgender and nonbinary young people reported experiencing recent symptoms of depression, 71% reported experiencing symptoms of anxiety, 46% reported seriously considering attempting suicide in the past year, and 14% reported attempting suicide in the past year.⁵¹⁵

The analysis in Part III illustrates how opponents of LGBTQ+ rights in the new sexual deviancy are refusing to consider societal and sociocultural explanations for these mental health disparities, and are weaponizing these disparities to justify legislation that targets LGBTQ+ communities in general, and transgender and gender diverse youth in particular. These strategies conflict with established research which places primacy on sociocultural factors for LGBTQ+ mental health disparities, including minority stress and social stigma.⁵¹⁶ Of particular note are studies that have found that LGBTQ+ people have greater negative mental health outcomes in geographic regions where laws and policies are hostile towards, or lack protections for, LGBTQ+ individuals.⁵¹⁷

Although more research is necessary, emerging research is enhancing our understanding of how hostile social and legal climates in the new sexual deviancy are harming the mental health of both LGBTQ+ adults and youth. For instance, the previously cited 2022 Center for American Progress study found that 51% of LGBTQI+ adults and 86% of transgender or nonbinary adults reported that recent “anti-LGBTQI+ state laws had affected their mental health or made them feel less safe to a moderate or significant degree.”⁵¹⁸ These statistics also aligned with findings from the 2024 U.S. National Survey on the Mental Health of

513. See TREVOR PROJECT, *supra* note 122. The survey consisted of 18,663 LGBTQ+ youth between the ages of 13 and 24 who were recruited via targeted ads on social media (49% were between the ages of 13–17 and 51% were between the ages of 18–24). *Id.* at 31–32.

514. *Id.* at 3, 6

515. *Id.*

516. See David M. Frost & Ilan H. Meyer, *Minority Stress Theory: Application, Critique, and Continued Relevance*, CURRENT OP. PSYCH., Apr. 6, 2023, at 1, 1–2 (explaining minority stress theory and its application to explain mental health disparities involving sexual and gender minorities); Tebbe & Budge, *supra* note 511, at 696–98 (describing sociocultural explanations for mental health disparities among transgender and gender nonbinary people).

517. See, e.g., Abbie E. Goldberg & JuliAnna Z. Smith, *Stigma, Social Context, and Mental Health: Lesbian and Gay Couples Across the Transition to Adoptive Parenthood*, 58 J. COUNSELING PSYCH. 139, 147 (2011) (finding that same-sex adoptive parents internalized homophobia at higher rates in states with unfavorable legal climates regarding same-sex adoption); 2017 National School Climate Survey, *supra* note 122, at 75–77 (finding inclusive and supportive school policies result in lower levels of victimization); Ellen D.B. Riggle et al., *Psychological Distress, Well-Being, and Legal Recognition in Same-Sex Couple Relationships*, 24 J. FAM. PSYCH. 82, 84–85 (2010) (discussing associations between legal recognition of same-sex relationships and positive mental health outcomes); Maks Truszczynski et al., *Does Policy Matter? The Impact of State and City Anti-Discrimination Policy on the Discrimination Experiences of Trans and Nonbinary People*, 19 SEXUALITY RES. & SOC. POL’Y 1786, 1790–91 (2022) (examining impact of anti-discrimination policy on trans and nonbinary people).

518. 2022 CAP STUDY, *supra* note 122.

LGBTQ+ Young People. In that study, an overwhelming majority of the LGBTQ+ young people (90%) reported that their “well-being was negatively impacted due to recent politics” and over half (53%) reported that their “well-being was negatively impacted by politics a lot.”⁵¹⁹ Moreover, LGBTQ+ young people who reported living in very accepting communities also reported attempting suicide at less than half the rate of LGBTQ+ young people who reported living in very unaccepting communities.⁵²⁰

Other emerging research focuses on the perspectives of medical providers and parents who seek to affirm the LGBTQ+ identities of their patients or children. For instance, a 2021 survey of 103 providers who deliver gender-affirming medical care to youth found that an overwhelming majority of the providers are concerned that new laws targeting transgender communities would lead to them seeing an increase in suicide and suicidal ideation, depression, and anxiety among transgender and gender diverse youth and their families.⁵²¹ A 2022 survey of 134 parents of transgender and gender diverse youth reported similarly high rates of concern among parents for their transgender and gender diverse children.⁵²² This research not only contradicts the justifications that legislators and state’s attorneys are advancing in the new sexual deviancy to support anti-LGBTQ+ legislation, but also suggests that their actions are exacerbating these problems.

3. Undermining LGBTQ+ Social Visibility

The third category of harms that the new sexual deviancy poses for LGBTQ+ communities involves undermining LGBTQ+ social visibility. By “social visibility” here I mean the extent to which LGBTQ+ people are openly seen and LGBTQ+ ideas, perspectives, and symbols are openly expressed in spaces and communities.

Although LGBTQ+ social visibility is not without risks or critique, it can bring important benefits at both the individual and societal levels.⁵²³ For instance, LGBTQ+ social visibility can help LGBTQ+ people overcome feelings of isolation and foster feelings of authenticity with respect to how LGBTQ+ people feel

519. TREVOR PROJECT, *supra* note 122, at 11.

520. *Id.* at 2.

521. Landon D. Hughes et al., “*These Laws Will Be Devastating*”: Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender Adolescents, 69 J. ADOLESCENT HEALTH 976, 979–80 (2021).

522. Roberto L. Abreu et al., *Impact of Gender-Affirming Care Bans on Transgender and Gender Diverse Youth: Parental Figures’ Perspective*, 36 J. FAM. PSYCH. 643, 647 (2022).

523. As scholars have discussed, LGBTQ+ visibility can work in certain contexts to increase experiences of violence and harassment for LGBTQ+ communities. See Ben Colliver & Marisa Silvestri, *The Role of (In)Visibility in Hate Crime Targeting Transgender People*, 22 CRIMINOLOGY & CRIM. JUST. 235, 237 (2020) (describing visibility “both as a facilitator of hate crime and as a preventative barrier to victimisation”); CAROL T. TULLY, LESBIANS, GAYS, & THE EMPOWERMENT PERSPECTIVE 33 (2000) (discussing how increased lesbian and gay visibility in the 1970s resulted in an increase in anti-lesbian and anti-gay hate crimes); see also CARLY THOMSEN, VISIBILITY INTERRUPTED: RURAL QUEER LIFE AND THE POLITICS OF UNBECOMING x (2021) (questioning “the notion that LGBTQ+ visibility necessarily leads to rights, justice or freedom”).

about their own sexual or gender identities.⁵²⁴ Moreover, LGBTQ+ social visibility can send broader messages that challenge homophobia, transphobia, and oversimplified tropes of LGBTQ+ people in particular communities and society at large.⁵²⁵ In addition, LGBTQ+ social visibility can foster feelings of inclusion, solidarity, and safety in specific spaces, communities, and public life.⁵²⁶ Moreover, LGBTQ+ social visibility can provide opportunities for people to learn about LGBTQ+ history and culture.⁵²⁷ Finally, LGBTQ+ social visibility can facilitate LGBTQ+ community mobilization against homophobia and transphobia as well as coalition building with different justice movements in struggles against discrimination and oppression.⁵²⁸

With these benefits in mind, the new sexual deviancy threatens LGBTQ+ social visibility in at least three significant ways. First, in propagating discredited sexual deviance concepts to target LGBTQ+ communities, LGBTQ+ people may feel less safe to be open about their LGBTQ+ identities in private or public.⁵²⁹ For instance, LGBTQ+ people may be more hesitant to be “out” at work. Parents in LGBTQ+-headed families may be more hesitant to be open about their identities within their communities or children’s schools. Moreover, LGBTQ+ youth may be more hesitant to tell family members, friends, or peers and teachers at school about their identities.

The consequences for LGBTQ+ youth are especially damaging. As discussed above, the new sexual deviancy harnesses institutional power in critical institutions that are supposed to be safe spaces for youth and children (namely, families and schools). Researchers have described how “visibility management”—the ongoing process by which LGBTQ+ youth make careful decisions about to whom, how, and when they disclose or express their sexual and gender identities—can play an important role in how LGBTQ+ youth negotiate their own

524. See JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 430 (1976) (describing that for isolated gay people, the mere existence of LGBTQ+ groups “was so much better than simply living in their own little cocoon”).

525. See, e.g., KATHERINE MCFARLAND BRUCE, *PRIDE PARADES: HOW A PARADE CHANGED THE WORLD* 5 (2016) (noting that the stated purpose of Pride is to “promote the visibility and validate the existence of gay, lesbian, bisexual, and transgender people” and that pride parade participants “transform[] public streets into sites of resistance to heteronormativity”).

526. See, e.g., Catherine Lee, *Coming Out in the University Workplace: A Case Study of LGBTQ+ Staff Visibility*, 85 *HIGHER EDUC.* 1181, 1195 (2023) (noting that study participants “attributed the visibility of out LGBTQ+ senior leaders to their feelings of safety at work”); Jennifer Katz et al., *Effect of Exposure to a Safe Zone Symbol on Perceptions of Campus Climate for Sexual Minority Students*, 3 *PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY* 367, 368 (2016) (discussing studies finding that Safe Zone programs in schools and universities had positive effects on safety, inclusiveness, and support for sexual minority students and staff).

527. See, e.g., Conor Barker & Daniel G. Seguin, *5 Things to Know About Drag Queen Story Time*, *CONVERSATION* (June 1, 2023, 3:39 PM), <https://theconversation.com/5-things-to-know-about-drag-queen-story-time-206547>.

528. See, e.g., Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 *U.C. DAVIS L. REV.* 1667, 1678–79 (2014) (discussing the gay liberation movement).

529. See GOLDBERG, *supra* note 489, at 12 (highlighting experiences and worries of LGBTQ+ parents as a result of Florida’s Don’t Say Gay Bill).

identities.⁵³⁰ LGBTQ+ youth are at greater risk of internalizing homophobia and transphobia, including feelings of shame, guilt, and stigma, when their environments and support systems signal that LGBTQ+ identity is unacceptable and deviant.⁵³¹

Second, fear of legal action, social backlash, and violence may deter businesses, establishments, public venues, and public institutions from hosting LGBTQ+ events or offering space for LGBTQ+ expression, voices, and ideas. For instance, Pride events were cancelled in various cities in 2023 as a result of newly enacted anti-drag laws and threats of extremist violence.⁵³² Some business owners have stopped hosting drag shows due to threats of extremist violence and armed protesters.⁵³³ In August 2023, a family-run distillery that hosted drag brunches in a small town in Texas permanently closed its doors with plans to relocate to a different city.⁵³⁴ Prior to shutting down, the distillery became a center of controversy on conservative news and social media outlets, and protesters and counter-protesters clashed outside of the establishment.⁵³⁵ In June 2023, a Montana public library canceled a speaking appearance by an indigenous transgender author who planned on speaking about the history of two-spirit⁵³⁶ and LGBTQ+ people in Montana, citing concerns about violating the state's new anti-drag law.⁵³⁷

Third, legislation targeting LGBTQ+ communities may prompt families and LGBTQ+ people to feel less welcome or safe in their home states, and in turn, potentially undermine LGBTQ+ social visibility in areas that arguably need it most. Recent studies are lending support to this idea. For instance, preliminary

530. See Jon Lasser & Deborah Tharinger, *Visibility Management in School and Beyond: A Qualitative Study of Gay, Lesbian, Bisexual Youth*, 26 J. ADOLESCENCE 233, 237 (2003) (defining visibility management).

531. See Ellen D.B. Riggle et al., *Outness, Concealment, and Authenticity: Associations with LGB Individual's Psychological Distress and Well-Being*, 4 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 54, 55 (2016) (noting that "[m]uch of the research on the associations between outness (and disclosure) and psychological distress and well-being highlights positive outcomes associated with higher levels of outness").

532. See Zane McNeill, *Legislative Attacks on Drag Performances Lead to Cancellation of Pride Events*, TRUTHOUT (May 15, 2023), <https://truthout.org/articles/legislative-attacks-on-drag-performances-lead-to-cancellation-of-pride-events> [https://perma.cc/5KHL-949Z].

533. See, e.g., John Riley, *Straight Business Owner Attacked for Hosting Drag Event*, METRO WEEKLY (Feb. 8, 2023), <https://www.metroweekly.com/2023/02/straight-business-owner-attacked-for-hosting-drag-event> [https://perma.cc/C4XB-SFYR].

534. See Amber Gaudet, *'It's Who We Are': After National Controversy, Family-Run Distillery Looks to Put Down Roots in Denton*, DENTON RECORD-CHRONICLE (Oct. 17, 2023), https://dentonrc.com/business/it-s-who-we-are-after-national-controversy-family-run-distillery-looks-to-put-down/article_7fec66ac-9ea9-50d7-bef3-f0cf68aa2f58.html [https://perma.cc/AVV9-V9HN].

535. *Id.*

536. See generally Margaret Robinson, *Two-Spirit Identity in a Time of Gender Fluidity*, 67 J. HOMOSEXUALITY 1675 (2019) (discussing the meaning of two-spirit and its origins among indigenous sexual and gender minorities).

537. See Samantha Riedel, *Montana Officials Canceled a Trans Woman's Library Event Citing Anti-Drag Law*, THEM (June 2, 2023), <https://www.them.us/story/montana-canceled-trans-womans-library-event> [https://perma.cc/XF2W-TZA8].

findings from the 2022 U.S. Trans Survey, just released in 2024, revealed that almost half (47%) of the 92,329 transgender and gender nonbinary respondents had thought about moving out of state because their state considered or passed legislation targeting transgender people, and 5% had actually moved out of state for that reason.⁵³⁸ The ten states where respondents moved away from included Alabama, Arizona, Florida, Georgia, Missouri, North Carolina, Ohio, Tennessee, Texas, and Virginia.⁵³⁹

These findings are consistent with other emerging research. For instance, the 2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People discussed above revealed that 39% of the LGBTQ+ young people respondents—and 45% of transgender and nonbinary youth respondents specifically—reported that they or their family have considered moving out of state due to anti-LGBTQ+ politics and laws.⁵⁴⁰ Moreover, a 2022 study surveyed the experiences of 106 LGBTQ+ parents in Florida after the state passed its “Don’t Say Gay” bill earlier that year.⁵⁴¹ The study findings revealed that 40% of the LGBTQ+ parents said they would like to move out of state and 11% reported that they were very likely to move out of state in the next two years.⁵⁴²

Of course, many families and individuals do not have the financial resources or ability to move out of state due to family or personal circumstances.⁵⁴³ Those families and people have little choice but to bear the harms of laws that target LGBTQ+ people. And even if they do have the financial means to move, moving out of state can still create new challenges such as financial strain, difficult job transitions, disruption of family and friend support networks and routines, and stress.⁵⁴⁴

B. BROADER HARMS TO U.S. DEMOCRATIC SOCIETY

The new sexual deviancy also poses harms to society as a whole by further weakening the health of liberal democracy in the United States. Pluralism and peaceful coexistence are core pillars of liberal democracy.⁵⁴⁵ Although pluralism has been defined in various ways, broadly speaking, it requires a commitment to encouraging a diversity of different ideals, beliefs, and ways of living in society.⁵⁴⁶ Moreover, peaceful coexistence demands mutual tolerance and respect for

538. 2022 U.S. TRANS SURVEY, *supra* note 122, at 23. The 2022 U.S. Trans Survey is the largest survey ever conducted on transgender and gender nonbinary people in the United States with 92,329 transgender and gender nonbinary respondents. *Id.*

539. *Id.* at 23.

540. TREVOR PROJECT, *supra* note 122, at 2, 11.

541. ABBIE E. GOLDBERG, PERSPECTIVES OF FLORIDA PARENTS ON HB 1557, THE PARENTAL RIGHTS IN EDUCATION ACT 1 (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Perspectives-Aug-2023.pdf> [<https://perma.cc/C8P9-CSAD>].

542. *Id.* at 2.

543. *Id.* at 22.

544. *Id.*

545. *See supra* Section I.A.

546. JOHN GRAY, TWO FACES OF LIBERALISM 11–12 (2000) (noting that “the standard types of contemporary liberal thought . . . mean the diversity of personal ethical beliefs and ideals”); Sirkku

others so that individuals and groups with different convictions can live together in society without resorting to violence.⁵⁴⁷ As explained below, the new sexual deviancy threatens both of these core pillars.

In the new sexual deviancy, moral panics about LGBTQ+ people are being weaponized to advance right-wing populist and Christian nationalist agendas that embrace zero-sum movement strategies to achieve anti-LGBTQ+ outcomes and other ends that further those agendas. These zero-sum strategies encourage unhealthy democratic politics in which government officials who accept or sympathize with right-wing populist and Christian nationalist worldviews frame protections for LGBTQ+ people as “losses” to their own interests, and in turn, demonize LGBTQ+ people as existential threats to society. Through virulent anti-LGBTQ+ rhetoric and rapid and broad-based anti-LGBTQ+ legal and political attacks, opponents of LGBTQ+ rights in the new sexual deviancy denigrate the humanity of LGBTQ+ people as fellow citizens, and in some instances, seek to erase their existence from public life. In our highly fragmented and polarized society, the states and localities where those officials hold concentrated power are the places where LGBTQ+ communities are most at risk for experiencing dehumanizing anti-LGBTQ+ rhetoric, unprecedented law and policy attacks, and anti-LGBTQ+ violence. In this regard, the new sexual deviancy harms broader society by encouraging unhealthy democratic politics that undermine the core pillars of pluralism and peaceful coexistence in society.

VI. REFORM STRATEGIES

This Part concludes by prompting some meaningful questions for LGBTQ+ social movements and charting some potentially promising avenues of reform. Admittedly, challenging the revival of antiquated sexual deviance concepts in the new sexual deviancy will be difficult. The social, legal, and political climate for LGBTQ+ communities in the United States is very different than it was in the 2000s and early 2010s when there were great advancements for LGBTQ+ rights and LGBTQ+ recognition.⁵⁴⁸ We now have a severely fractured and polarized political landscape, a wave of new federal judges appointed during the first Trump Administration with demonstrated histories of anti-LGBTQ+ hostility,⁵⁴⁹ and a new conservative supermajority on the U.S. Supreme Court that has already decided cases that prioritize religious liberty claims over LGBTQ+ equality interests.⁵⁵⁰ The reelection of former President Trump will exacerbate these problems in the next several years.

Kristiina Hellsten, *Moral Individualism and the Justification of Liberal Democracy*, 11 *RATIO JURIS* 320, 321 (1998) (noting that “the requirement of pluralism demands that liberal society allows and even encourages cultural diversity and many different ways of living”).

547. WILLY BRANDT, *THE ORDEAL OF COEXISTENCE* 2 (1963) (stating that “coexistence with one another is based on mutual tolerance and . . . proper respect”).

548. See *supra* note 9 and accompanying text.

549. See generally LAMBDA LEGAL, *supra* note 35 (outlining how the Trump Administration reshaped lower federal courts to stack them with judges with histories of anti-LGBTQ+ hostility).

550. See Epstein & Posner, *supra* note 8, at 328; see also, e.g., 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

Recognizing these challenges, it is still possible to identify some avenues of reform that hold promise to move the needle in the direction of LGBTQ+ progress. Section A first discusses how the new sexual deviancy prompts fundamental questions about how LGBTQ+ social movements decide to engage with opponents of LGBTQ+ rights in our highly fragmented and fractured society. The analysis then explores four areas of reform strategies. Section B discusses movement framing and coalition building. Next, Section C examines litigation. Section D then discusses protest and community organizing. Finally, Section E discusses voting.

A. ENGAGING WITH OPPONENTS OF LGBTQ+ RIGHTS

The new sexual deviancy poses a dilemma with fundamental value choices for how LGBTQ+ movements engage with opponents of LGBTQ+ rights in our highly fragmented and severely polarized democratic society. The heart of this choice is whether or not LGBTQ+ movements similarly adopt a zero-sum mindset as LGBTQ+ rights opponents in the new sexual deviancy are embracing. Put another way, does the struggle for LGBTQ+ progress boil down to a battle of radically different worldviews with a clear winner and a clear loser? Or, do LGBTQ+ movements seek solutions that forge paths to peacefully coexist with people who share radically different views that are less accepting of LGBTQ+ people and ideas?

This value choice prompts meaningful questions that go beyond existing debates in LGBTQ+ movements about which specific issues should be prioritized (e.g., marriage equality), which actors should have the power to set those agendas, and which specific tactics are most effective to further those agendas (e.g., litigation or non-litigation strategies). To be clear, I am not arguing that choices about zero-sum strategies are entirely new for LGBTQ+ movements. Rather, my main point is that LGBTQ+ movements may need to reevaluate how they approach these questions in the current moment characterized by distinctive threats to our democratic institutions and norms. Those threats, combined with the high stakes for LGBTQ+ communities in states and localities where severe polarization has given way to anti-LGBTQ+ agendas that are grounded in right-wing extremism and religious populism (e.g., Christian nationalism), make these value choices all the more pressing in the here-and-now.

These choices will ultimately reside with LGBTQ+ movement circles. Some political scientists, however, have given serious thought about proper responses to populists who adopt political strategies and agendas that seek to exclude others in society who do not share their worldviews.⁵⁵¹ Those scholars warn against responding to populists with similar strategies that seek to exclude.⁵⁵² They argue that such responses further erode liberal democratic commitments to pluralism.⁵⁵³ Instead, these scholars claim that so long as populists stay within the bounds of

551. See, e.g., JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 83 (2016).

552. See, e.g., *id.*

553. See, e.g., *id.*

the law, and do not incite violence, then political actors and other relevant actors in society are obligated to engage with them.⁵⁵⁴

What does this engagement look like? As political scientists have recognized, engaging with populist lawmakers and their constituencies is difficult in that rational argument and empirical evidence will likely not lead them to abandon their worldviews.⁵⁵⁵ In the new sexual deviancy, we see this through repeated examples of lawmakers and state's attorneys pushing anti-LGBTQ+ laws based on misinformation about LGBTQ+ people while simultaneously discounting empirical evidence and consensus among professional experts in the mainstream that underscore the harms of those laws for LGBTQ+ communities.⁵⁵⁶ At the same time, political scientists have stressed that continuing to advance rational argument and empirical evidence in the public domain can make a difference to eventually defeat populist logic in legislatures, public debate, and voting.⁵⁵⁷

This point underscores the importance within LGBTQ+ movements to prioritize challenging and defeating misinformation and false conspiracy theories about LGBTQ+ people through reasoned law and policy arguments as well as empirical research.

B. COALITION BUILDING

Regardless of how LGBTQ+ movements answer the questions prompted above, it is critical to view the recent surge in legislation targeting LGBTQ+ communities as part of a broader organized movement to strip the privacy and civil rights of marginalized groups in society and suppress their voices. Put differently, LGBTQ+ people belong to a broader collection of marginalized communities that are being demonized as “other” in our highly fragmented and polarized democracy.

History underscores the importance of broad movement framing and coalition building to address LGBTQ-related injustices. Gay liberationist groups in the 1970s and 1980s aligned their agendas with other justice movements (for instance, racial, economic, reproductive, and antiwar movements). From this standpoint, gay liberationist groups framed ending lesbian and gay oppression as part of a broader fight to end multiple forms of societal oppression.⁵⁵⁸

Sodomy law reform provides another meaningful example. In the 1970s and 1980s, a wave of over twenty states decriminalized private consensual sodomy between adults.⁵⁵⁹ State's adoption of the Model Penal Code, which omitted consensual sodomy in the 1950s, was the formal impetus for much of this decriminalization.⁵⁶⁰ But as scholars have described, this omission was intentional and embodied a much broader push to protect individual privacy rights from state interference in the mid-

554. *See, e.g., id.* at 84.

555. *See, e.g., id.*

556. *See generally* Alstott et al., *supra* note 103.

557. *See, e.g.,* MÜLLER, *supra* note 551, at 84.

558. *See* Leachman, *supra* note 528, at 1678.

559. Woods, *supra* note 207, at 696–97.

560. *Id.* at 697–98.

twentieth century that not only implicated sexual intimacy but also access to contraception.⁵⁶¹

Two areas of anti-LGBTQ+ legislation in the new sexual deviancy demonstrate urgency for broader coalition building. They are part of a broader effort among right-wing populists and Christian nationalists to execute law and policy agendas that emphasize cultural homogeneity by defining marginalized communities who do not fit their worldviews as existential threats.

The first area is the connection between recent laws targeting LGBTQ+ issues and race in schools. State legislatures which have introduced and enacted laws involving LGBTQ+ censorship in schools have also considered and enacted laws attacking diversity, equity, and inclusion programming and critical race theory in schools.⁵⁶² Florida passed the “Don’t Say Gay” bill (targeting LGBTQ+ issues in public schools) and “Stop-W.O.K.E. Act” (targeting critical race theory in schools) in the same week in 2022.⁵⁶³ In February 2024, following the directives of the university’s legal counsel, a student-run drag show was cancelled and campus libraries removed university-sponsored “Pride Week” events at the University of North Texas to comply with Texas’s new anti-DEI law.⁵⁶⁴ Lawmakers opposing these laws are not turning a blind eye to these connections and have made powerful statements in legislative discussions about how the heart of these laws lies in targeting and silencing minority and marginalized groups.⁵⁶⁵

The second area is the connection between recent laws targeting transgender people’s access to health care and attacks on reproductive freedoms and rights. Specifically, opponents of LGBTQ+ rights are using the U.S. Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization* to justify laws prohibiting gender-affirming care for minors.⁵⁶⁶ In *Dobbs*, the Court overturned *Roe v. Wade*, which for almost fifty years had protected a federal constitutional privacy right to abortion.⁵⁶⁷ State’s attorneys and other opponents of LGBTQ+ rights are now using *Dobbs* to characterize gender-affirming care for minors as “experimental” and argue that there is no constitutional right for minors (or parents on their

561. See, e.g., Melissa Murray, *Griswold’s Criminal Law*, 47 CONN. L. REV. 1045, 1055–56 (2015).

562. See Paton Moody, *supra* note 159; see also Thomas M. Cassaro, Note, *A Student’s First Amendment Right to Receive Information in the Age of Anti-CRT and “Don’t Say Gay” Laws*, 99 N.Y.U. L. REV. 280, 288–92 (2024).

563. *Statement from ADL Florida on Passage of Stop-Woke Act and Don’t Say Gay Bill*, ANTI-DEFAMATION LEAGUE (Mar. 10, 2022), <https://florida.adl.org/news/stop-woke-act-dont-say-gay-bill> [<https://perma.cc/M9NZ-GXBV>].

564. Ismael M. Belkoura, *UPC Drag Show and Libraries’ Pride Week Canceled Due to Anti-DEI Law*, N. TEX. DAILY (Feb. 7, 2024), https://www.ntdaily.com/news/upc-drag-show-and-libraries-pride-week-canceled-due-to-anti-dei-law/article_96330556-c52a-11ee-9f03-6b0153e79a4d.htm 1 [<https://perma.cc/Z5NL-3QP6>].

565. See, e.g., Fla. S., *supra* note 241, at 19:00–19:20 (statement of Sen. Cruz); *id.* at 21:07–22:00 (statement of Sen. Polsky).

566. 597 U.S. 215 (2022).

567. *Id.* at 231 (overturning *Roe v. Wade*, 410 U.S. 113 (1973)).

behalf) to access such care.⁵⁶⁸ To date, at least two federal appellate courts have relied on the constitutional reasoning in *Dobbs* to vacate or stay preliminary injunctions issued by lower trial courts that blocked states from enforcing bans on gender-affirming care for minors.⁵⁶⁹

Hence, coalition building and not losing sight of how current attacks against LGBTQ+ rights are part of broader right-wing populist and Christian nationalist agendas that seek to exclude many marginalized communities who are defined as threats to those worldviews are critical to reform in the new sexual deviancy.

C. LITIGATION

Litigation is another potential strategy for reform that can and should be used in conjunction with the strategies discussed above. There is a long history of LGBTQ+ movement groups using litigation strategies to challenge anti-sodomy laws, bans on same-sex marriage, and other discriminatory laws in both state and federal courts.⁵⁷⁰ When carefully pursued, litigation has achieved incremental gains and laid the groundwork for more expansive judicial precedents that affirm and protect LGBTQ+ communities.⁵⁷¹ As discussed previously, litigation strategies in the context of sodomy laws and same-sex marriage bans successfully convinced some courts, including the U.S. Supreme Court, to reject anti-LGBTQ+ legal agendas that were grounded in sexual deviance concepts.⁵⁷²

For understandable reasons, the new conservative 6–3 supermajority on the U.S. Supreme Court, and influx of federal judges appointed during the first Trump Administration with demonstrated histories of anti-LGBTQ+ hostility, has caused people to lose faith in courts as vehicles for institutional change. In his concurrence in *Dobbs v. Jackson Women’s Health Organization*, Justice Thomas called on the Supreme Court to reconsider all of its substantive due process precedents, including *Lawrence v. Texas* (invalidating anti-sodomy laws) and *Obergefell v. Hodges* (invalidating same-sex marriage bans).⁵⁷³ Although the majority in *Dobbs* stressed that “nothing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion,” the three dissenting judges raised skepticism about that claim.⁵⁷⁴

At the same time, litigation strategies have already had some success in challenging legislation targeting LGBTQ+ communities in the new sexual deviancy. For instance, federal district courts enjoined and declared anti-drag laws in

568. See, e.g., Brief Amici Curiae Ala., Ark., Tenn., Alaska, Ga., Iowa, Kan., Ky., La., Miss., Mont., Neb., Okla., S.C., Utah., and W. Va. Supporting Defendants and Denial of Plaintiff’s Motion for Preliminary Injunction at 6–9, *Noe v. Parson*, No. 23AC-CC04530 (Mo. Cir. Ct. filed Aug. 16, 2023).

569. See L. W. v. Skrametti, 73 F.4th 408, 419, 422 (6th Cir. 2023); *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1229–31 (11th Cir. 2023).

570. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1552 (1993); Leachman, *supra* note 528, at 1670–71.

571. Leachman, *supra* note 528, at 1723–24.

572. See *supra* Sections IV.A, C.

573. 597 U.S. 215, 332–33 (2022) (Thomas, J., concurring).

574. *Id.* at 382–83 (Breyer, Sotomayor & Kagan, JJ., dissenting).

Montana, Tennessee, and Texas as unconstitutional under the First Amendment.⁵⁷⁵ Federal district courts also enjoined and declared laws prohibiting gender-affirming care for minors in Arkansas and Idaho as unconstitutional under Fourteenth Amendment.⁵⁷⁶ Moreover, on both Title IX and Fourteenth Amendment grounds, federal appellate courts upheld injunctions against school bathroom policies in Virginia and Indiana that segregated transgender students from their peers.⁵⁷⁷

Of course, litigation can end with devastating losses for LGBTQ+ communities. The U.S. Supreme Court's 1986 decision in *Bowers v. Hardwick*, which upheld the federal constitutionality of laws that criminalize consensual sodomy, is a key example.⁵⁷⁸ Given the current Court's recent decisions against LGBTQ+ equality and privacy rights,⁵⁷⁹ there is reason to fear that its upcoming decision in *United States v. Skrametti*, involving the constitutionality of bans on gender-affirming care for minors, could have similarly devastating consequences for transgender communities, and transgender and gender diverse youth in particular.⁵⁸⁰

Recent losses in lower courts amplify these concerns. For instance, the Eleventh Circuit recently ruled against a transgender high school student and upheld a school bathroom policy in Florida.⁵⁸¹ The Sixth and Eleventh Circuits recently upheld laws in Tennessee and Alabama prohibiting gender-affirming care for minors.⁵⁸² The Sixth Circuit also dismissed the lawsuit challenging Tennessee's anti-drag law for lack of standing.⁵⁸³ And a federal judge in Florida has twice rejected a lawsuit seeking to block Florida from enforcing its "Don't Say Gay" law.⁵⁸⁴

The history of LGBTQ+ movements, however, underscores that it is still possible to shift litigation strategies in the face of devastating losses at the U.S. Supreme Court. For instance, after *Bowers* foreclosed possibilities of challenging sodomy laws in federal courts, movement organizations shifted their focus to

575. *Imperial Sovereign Ct. v. Knudsen*, 699 F. Supp. 3d 1018, 1048–49 (D. Mont. 2023); *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 851 (S.D. Tex. 2023); *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 878–879 (W.D. Tenn. 2023). In July 2024, the Sixth Circuit dismissed the lawsuit challenging Tennessee's anti-drag law for lack of standing. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 440 (6th Cir. 2024).

576. *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 917–18 (E.D. Ark. 2023); *Poe v. Labrador*, 709 F. Supp. 3d 1169, 1190–95 (D. Idaho 2023).

577. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616, 619 (4th Cir. 2020); *A.C. v. Metro Sch. Dist. of Martinsville*, 75 F.4th 760, 764, 773 (7th Cir. 2023).

578. 478 U.S. 186, 196 (1986).

579. *See, e.g.*, 303 *Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022).

580. *L.W. ex rel. Williams v. Skrametti*, 73 F.4th 408 (6th Cir. 2023), *cert. granted*, 144 S. Ct. 2679 (2024) (No. 23-477).

581. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 817 (11th Cir. 2022) (en banc).

582. *L.W. ex rel. Williams v. Skrametti*, 73 F.4th 408, 422 (6th Cir. 2023); *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1229–30 (11th Cir. 2023).

583. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 440 (6th Cir. 2024).

584. *Cousins v. Sch. Bd. of Orange Cnty.*, No. 22-1312, 2022 WL 19348696, at *20 (M.D. Fla. Sept. 2, 2022); *Cousins v. Sch. Bd. of Orange Cnty.*, 636 F. Supp. 3d 1360, 1383 (M.D. Fla. 2022).

state legislatures and state courts.⁵⁸⁵ Specifically, movement lawyers argued in state courts that sodomy laws could still be invalidated under state constitutions, in spite of *Bowers*.⁵⁸⁶ Some of these strategies were successful. Eight of the eleven states that decriminalized sodomy in the period after *Bowers* was decided in 1986 and before it was overruled in 2003 did so by judicial decree.⁵⁸⁷

D. PROTEST AND COMMUNITY ORGANIZING

Protest and community organizing is a third and final potential strategy for reform. There is a strong tradition of LGBTQ+ protest and grassroots community organizing in the United States. A few influential examples include the Stonewall Riots of 1969, the Gay Liberation Front in the 1970s and 1980s, and the AIDS Coalition to Unleash Power (“ACT-UP”) in the late 1980s and 1990s. As these examples demonstrate, protest and community organizing can raise social awareness about LGBTQ+ discrimination and engender positive social change for LGBTQ+ communities on both local and national scales.

Continuing this tradition, LGBTQ+ people have mobilized in different parts of the country to protest recent legislation targeting LGBTQ+ communities. For instance, crowds of hundreds of drag performers and their allies have held rallies in front of state capitols in multiple states that passed anti-drag laws, including Florida, South Carolina, and Tennessee.⁵⁸⁸ Similar crowds of LGBTQ+ people and allies have protested in front of state capitols in states that introduced or passed legislation targeting transgender people and LGBTQ+ youth.⁵⁸⁹ Moreover, empowered LGBTQ+ youth and youth allies have organized student walkouts and school protests to express their

585. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1249 (2010).

586. *Id.* at 1249–50.

587. *Id.*

588. See Hunter Hoagland, *Hundreds Protest Bill that Would Ban Public Drag Performances in Tennessee*, NEWSCHANNEL 5 (Feb. 15, 2023, 3:48 PM), <https://www.newschannel5.com/news/hundreds-protest-bill-that-would-ban-public-drag-performances-in-tennessee> [https://perma.cc/D78D-PVWU]; Lianna Hubbard, *Drag Performers Protest at SC Statehouse Over Bill Banning Shows: ‘My Life is Not a Crime,’* POST AND COURIER (May 5, 2023), https://www.postandcourier.com/columbia/news/drag-performers-protest-at-sc-statehouse-over-bill-banning-shows-my-life-is-not-a/article_5af0b620-e9e6-11ed-8bb7-df4b3b7aa66f.html; Lauren Peace, *Drag Performers Descend on Tallahassee to Protest Anti-LGBTQ+ Bills as Sessions Nears End*, TAMPA BAY TIMES (Apr. 25, 2023), <https://www.tampabay.com/news/florida/2023/04/25/drag-performers-descend-tallahassee-protest-anti-lgbtq-bills-session-nears-end> [https://perma.cc/J44Z-MZ8H].

589. See, e.g., Noelle Alviz-Gransee, *‘We Will Not Be Silent.’ Hundreds of Iowans Gather at Capitol to Protest LGBTQ Bills*, DES MOINES REG. (Mar. 6, 2023, 9:33 AM), <https://www.desmoinesregister.com/story/news/politics/2023/03/05/hundreds-rally-at-iowa-capitol-to-protest-lgbtq-legislation/69967597007> [https://perma.cc/76Z8-LYKM]; Jacob Holmes, *LGBTQ Community Marches on the Capitol to Protest Anti-Trans Bills*, ALA. POL. REP. (May 17, 2023, 7:23 AM), <https://www.alreporter.com/2023/05/17/lgbtq-community-marches-on-the-capitol-to-protest-anti-trans-bills> [https://perma.cc/9P24-LT4D]; William Melhado, *Terrified and Angry, LGBTQ Texans and Allies Rally at Capitol to Protest Bills Targeting Queer Community*, TEX. TRIB. (Apr. 15, 2023, 5:00 PM), <https://www.texastribune.org/2023/04/15/lgbtq-rally-texas-capitol-bills> [https://perma.cc/9H8F-77N6].

disapproval of legislation targeting LGBTQ+ youth in their respective states.⁵⁹⁰ These protest and community organizing efforts are critical to raise awareness about LGBTQ+ oppression in the new sexual deviancy and fight for social change.

E. VOTING

Voting is another essential strategy to defeating anti-LGBTQ+ laws in the new sexual deviancy. Political scientists who have written on the erosion of U.S. democracy stress the importance of protecting U.S. democratic institutions and norms through voter participation.⁵⁹¹ They also stress the need for building broad voter coalitions that extend beyond natural allies to defeat the threat that populist politicians and movements pose to U.S. democracy.⁵⁹² Coalition building strategies could help to mobilize voters from different marginalized communities to vote against anti-LGBTQ+ politicians and referenda with the common goal of pushing back against defining society through the homogeneous lens of right-wing populism and Christian nationalist worldviews. To build broad-based voter coalitions, LGBTQ+ rights advocates will be required to engage with voters who may not see LGBTQ+ rights as a priority, and convince them to vote against anti-LGBTQ+ politicians and referenda in the interest of democracy.

CONCLUSION

It is critical to understand the new sexual deviancy as moral panic and a vehicle for enduring anxieties about sexual deviance in our highly fractured and polarized liberal democratic society. As this Article has demonstrated, severe polarization in U.S. society and the erosion of U.S. democratic institutions and norms have fueled conditions in recent years for opponents of LGBTQ+ rights to weaponize moral panics about LGBTQ+ people as a means of executing right-wing populist and Christian nationalist agendas that subjugate LGBTQ+ people in law, politics, and society. The analysis in this Article has illustrated how a complex web of discredited sexual deviance concepts from different intellectual traditions is providing the backbone for this new anti-LGBTQ+ legal agenda. These same concepts were used in the past to galvanize institutional power in the criminal legal system, medicine, and other important societal institutions (including families and

590. Samantha Hernandez et al., “We Say Gay!” *Hundreds of Students Across Iowa Walk Out of Class to Protest LGBTQ Bills*, DES MOINES REG. (Mar. 1, 2023, 7:26 PM); <https://www.desmoinesregister.com/story/news/education/2023/03/01/hundreds-of-iowa-students-walk-out-to-protest-lgbtq-bills/69949781007> [<https://perma.cc/73DS-VF8X>]; Richard Luscombe, *Florida Students Walk Out in Support of Staff Who Flouted DeSantis Trans Ban*, GUARDIAN (Nov. 28, 2023, 12:32 PM), <https://www.theguardian.com/us-news/2023/nov/28/florida-students-protest-trans-athletes-monarch-high-school> [<https://perma.cc/8HY7-PYZT>]; Gloria Oladipo, *Thousands of Virginia Students Walk Out in Protest at Governor’s Trans Proposal*, GUARDIAN (Sept. 28, 2022, 11:14 AM), <https://www.theguardian.com/us-news/2022/sep/28/virginia-schools-students-walkout-protest-trans-glenn-youngkin> [<https://perma.cc/46JZ-R3WX>].

591. See Steven Levitsky & Daniel Ziblatt, *The Crisis of American Democracy*, AM. EDUCATOR, Fall 2020, at 1, 13.

592. See LEVITSKY & ZIBLATT, *supra* note 37, at 219–20.

schools) in order to subjugate LGBTQ+ people and suppress LGBTQ+ ideas in society.

Although the path to reform will be difficult, not all hope is lost. Various reform strategies, including coalition building, litigation, protest and community organizing, and voting, hold promise. Advocates can use these strategies to challenge these discredited sexual deviance concepts in the new sexual deviancy today.