

## PREFACE

*This First Edition is current through the end of December 2013,  
with significant additional developments through May 2014.\**

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This treatise provides a practical guide to both employment discrimination law and human resource practices as they relate to lesbian, gay, bisexual, and transgender (LGBT) employees. It is also a “reader,” composed of 19 essays from a diverse array of writers who help place many of the day-to-day concerns of LGBT individuals within the framework of the law, the workplace, and society generally. A brief summary of the 47 chapters in this treatise is set forth in Section IV. of Chapter 1 (Introduction).

This treatise represents the collective efforts of more than 125 authors, contributors, and reviewers who were willing to donate their time and efforts to help me prepare a work that we all hope will assist practicing lawyers, judges, human resource professionals, students, and others in better understanding legal, employment, and societal issues that LGBT employees and their employers confront in the workplace. Although many of us are advocates on behalf of individuals who are gender affirmed or gender diverse or who have a sexual orientation that is not heterosexual only, in the end I think all the participants were able to set aside their roles as advocates for equal rights, employees, and/or employers. This has allowed us to prepare a treatise that is balanced and offers employers and employees practical solutions to issues regarding what is, in essence, just one subset of the challenge of diversity, and of that challenge primarily as it arises in the workplace, which is just one subset of the challenge of diversity in society in all its parts. Hopefully we have cited all the key cases in this employment discrimination arena, no

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\*[*Editor's Note:* On July 21, 2014, following completion of this treatise, President Barack Obama signed an executive order that added gender identity and sexual orientation to the list of protected classes applying to federal contractors and added a ban on gender identity discrimination to the existing ban on sexual orientation discrimination applying to federal employees. See the Editor's Note at the beginning of Chapter 17 of this treatise.]

matter whether they favored employees or employers. Bad case law actually can be good case law, as badly reasoned opinions and unjust outcomes themselves are educational—and grist for the mill of future cases to be decided by other courts, or even by the same court with the composition changed and/or the advantage of hindsight and/or subsequent decisions.<sup>1</sup>

### Why We Undertook Writing This Treatise

One of the unnamed nonemployment lawyers who reviewed Chapter 14 (Title VII of the Civil Right Act of 1964) remarked to me, “I was astounded by what employees say to one another in the workplace—so many cases with so much totally outrageous conduct. I had no idea the discrimination, the hatred, was so commonplace, even today.” As this three-year writing and editing project was coming to an end, I stepped back and considered how the treatment of LGBT people compares to the workplace discrimination faced by other groups. Not unexpectedly, I concluded that, with respect to the outrageousness of discriminatory animus/conduct or the inhumanness of some people, trying to make such comparisons is not a useful endeavor because each minority group has faced—and continues to face—unique challenges arising from, among other things, how the members of the group are perceived by members of the majority, the vicissitudes of human emotion and conduct, and the mindlessness of bigotry. Moreover, I do not have the ability to fully comprehend what life was like for minorities prior to the enactment of Civil Rights Act of 1964<sup>2</sup> (as well as thereafter)—to grow up in the United States as a nonwhite person or to be a woman denied the same rights and opportunities as men. By the time I started to practice law in 1982, much had changed, but even then I witnessed open displays of degrading conduct—for example, when secretaries were referred to as “sweetie” when being asked by a client to “fetch a cup of coffee for me,” or when a white executive arranged for an office for a newly hired black executive—an office that was at best one-fourth the size of the offices of the white executives at the same level and that, unlike their offices, had no windows.

As a management-side lawyer for more than 30 years, I have investigated my share of truly obnoxious and heinous conduct engaged in at the workplace for all sorts of reasons, including reasons that are not protected by law but constitute what is now becoming recognized as bullying in the workplace. I have no doubts that the victims of these actions were offended and deeply hurt, often tolerating significant adverse actions in order to keep their jobs. And more progress is still needed. For example, how can

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<sup>1</sup>See Richard A. Posner, *I Did Not “Recant” on Voter ID Laws*, NEW REPUBLIC, Oct. 27, 2013, available at [www.newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id](http://www.newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id) (“The main criticisms that commenters on the ‘I plead guilty’ sentence from my book[, *Reflections on Judging* 84–85 (2013),] make are two . . . The first is that a judge shouldn’t admit a mistake, or even the possibility of a mistake, because that undermines faith in the judicial process. That’s ridiculous. Obviously judges are not infallible. Much of American law is quite vague, and even when it is clear, the information that judges would need to apply it with any confidence in the soundness of the application often is missing.”).

<sup>2</sup>Pub. L. No. 88-352 (July 2, 1964) (codified as amended in scattered sections of U.S.C.). See Chapter 14 (Title VII of the Civil Rights Act of 1964).

we be complacent merely because the median hourly earnings of women as a percentage of men's earnings are now 84 percent, even though that is 31 percent higher than in 1980?<sup>3</sup>

Nonetheless, progress continues across a broad front of discrimination issues addressed by Title VII. At the same time, new voices are being heard in society and in the legal community as we as a nation grapple with the implications of equal treatment and opportunity in new contexts. As with the initial identifications of protected classes, these new contexts challenge many in society to understand and become comfortable with groups of individuals they may have little experience with and initially, perhaps, little interest in or sympathy for. It is difficult for many non-LGBT people to fully understand or even be aware of the challenges that LGBT people confront and how those challenges impact this group in particular, and in such very personal ways, such as the open dislike and/or subtle discrimination they confront from coworkers, their own families and faith communities, and others. Few people think twice about whether they are right- or left-handed, or—the point of this treatise—their sexual orientation or whether they are female, male, or something else. These sorts of things are a given in most people's daily lives. But when you are lesbian, gay, or bisexual (LGB), you confront a society and laws that still treat you as second class. As of the end of May 2014, you are not permitted to marry in more than 30 states,<sup>4</sup> you

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<sup>3</sup>PEW RESEARCH CENTER, ON PAY GAP, MILLENNIAL WOMEN NEAR PARITY—FOR NOW DESPITE GAINS, MANY SEE ROADBLOCKS AHEAD 4, 15 (Dec. 11, 2014), available at [www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now](http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now).

<sup>4</sup>See Chapters 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace) and 37 (Employee Benefit Issues). As of April 2014, same-sex marriages were permitted in 17 states. In May 2014, the governors of Oregon and Pennsylvania announced that they would not appeal court decisions issued that month that invalidated their state laws that prohibited same-sex marriages—thereby bringing to 19 the states that permit same-sex marriage. See *Geiger v. Kitzhaber*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 2054264 (D. Or. May 19, 2014), stay denied, No. 14-35427 (9th Cir. May 19, 2014), stay denied sub nom. *National Organization for Marriage v. Geiger*, 572 U.S. \_\_\_, 2014 WL 2514491 (June 4, 2014) (holding that **Oregon's** prohibition against permitting and recognizing same-sex marriages violated the equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution; follow appeal by nonparty at [www.aclu-or.org/RummellWest\\_v\\_Kitzhaber](http://www.aclu-or.org/RummellWest_v_Kitzhaber)); *Whitewood v. Wolf*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 2058105 (M.D. Pa. May 20, 2014) (holding that **Pennsylvania's** prohibition against permitting and recognizing same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment; case summary at [www.aclu.org/lgbt-rights/whitewood-v-wolf](http://www.aclu.org/lgbt-rights/whitewood-v-wolf)).

During the 11 months following the Supreme Court's June 2013 decision in *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675, 118 FEP 1417 (2013), which held that §3 of Defense of Marriage Act (1 U.S.C. §7)—which denied equality of federal benefits to married same-sex couples—violated the due process and equal protection guarantees of the Fourteenth Amendment, trial courts in 12 other states invalidated laws that prohibited or denied recognition of same-sex marriages or otherwise issued orders that enjoined the enforcement of those laws in part. Nearly all of those decisions were appealed. See *Obergefell v. Kasich*, 2013 WL 3814262 (S.D. Ohio July 22, 2013) (holding that **Ohio's** laws barring the recognition of lawful out-of-state same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment and granting a temporary restraining order requiring Ohio to recognize the Maryland marriage of a same-sex couple where one spouse was terminally ill); *Gray v. Orr*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (granting a temporary restraining order that permitted two persons of the same sex, one of whom was terminally ill, to marry in **Illinois**, with the court concluding that the couple had established the likelihood of success on their claim that the Illinois' prohibition against same-sex marriage violated the

Equal Protection Clause of the Fourteenth Amendment; case summary at [www.lambdalegal.org/in-court/cases/gray-v-orr](http://www.lambdalegal.org/in-court/cases/gray-v-orr)); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *stay granted*, 571 U.S. \_\_\_, 134 S. Ct. 893 (2014), *appeal pending*, No. 13-4178 (10th Cir. oral argument held Apr. 10, 2014) (holding that **Utah**'s prohibitions against permitting same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment; audio recording of oral argument in the Tenth Circuit available at [www.uscourts.gov/courts/ca10/13-4178.mp3](http://www.uscourts.gov/courts/ca10/13-4178.mp3); follow appeal at [www.nclrights.org/cases-and-policy/cases-and-advocacy/kitchen-v-herbert](http://www.nclrights.org/cases-and-policy/cases-and-advocacy/kitchen-v-herbert)); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *appeal pending sub nom.* *Obergefell v. Himes*, No. 14-3057 (6th Cir. filed Jan. 16, 2014) (holding that to the extent **Ohio** law does not recognize same-sex marriages lawfully entered into in other jurisdictions, such law deprived same-sex couples of their due process and equal protection guarantees of the Fourteenth Amendment; follow appeal at [www.aclu.org/lgbt-rights/obergefell-et-al-v-himes](http://www.aclu.org/lgbt-rights/obergefell-et-al-v-himes)); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *appeal pending sub nom.* *Bishop v. Smith*, Nos. 14-5003 & 14-5006 (10th Cir. oral argument held Apr. 17, 2014) (holding that **Oklahoma**'s prohibitions against permitting same-sex marriages violated the equal protection guarantees of the Fourteenth Amendment; audio recording of oral argument in the Tenth Circuit available at [www.uscourts.gov/courts/ca10/14-5003.mp3](http://www.uscourts.gov/courts/ca10/14-5003.mp3)); *Bourke v. Beshear*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), *stay pending appeal extended sub nom.* *Love v. Beshear*, 2014 WL 1117271 (W.D. Ky. Mar. 19, 2014), *appeal pending sub nom.* *Bourke v. Beshear*, No. 14-5291 (6th Cir. filed Mar. 19, 2014) (holding that **Kentucky**'s prohibitions against recognizing same-sex marriages violated the equal protection guarantees of the Fourteenth Amendment; final appellate brief due June 26, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *appeal pending sub nom.* *Bostic v. Schaefer*, No. 14-1167 (L) (4th Cir. oral argument held on May 13, 2014) (holding that **Virginia**'s prohibitions against permitting and recognizing same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment; audio recording of oral argument in the Fourth Circuit available at [www.uscourts.gov/courts/ca4/14-1167-20140513.mp3](http://www.uscourts.gov/courts/ca4/14-1167-20140513.mp3); follow appeal at [www.aclu.org/lgbt-rights/bostic-v-schaefer-harris-class-action](http://www.aclu.org/lgbt-rights/bostic-v-schaefer-harris-class-action)); *Lee v. Orr*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (holding that **Illinois**' prohibitions against same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment; although all the parties to the case, including intervenor Illinois Attorney General, agreed that the court should apply its decision statewide, the court limited the ruling to Cook County in view of the posture of the case; case summary at [www.lambdalegal.org/in-court/cases/lee-v-orr](http://www.lambdalegal.org/in-court/cases/lee-v-orr)); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), *appeal pending*, No. 14-50196 (5th Cir. briefing schedule issued on May 30, 2014) (holding that **Texas**' prohibitions against permitting and recognizing same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment); *Tanco v. Haslam*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014), *stay of preliminary injunction denied sub nom.* *Jesty v. Haslam*, 2014 WL 1117069 (M.D. Tenn. Mar. 20, 2014), *stay granted pending appeal sub nom.* *Tanco v. Haslam*, No. 14-5297 (6th Cir. Apr. 25, 2014) (holding that **Tennessee**'s prohibitions against recognizing same-sex marriages likely violated the equal protection guarantees of the Fourteenth Amendment and issuing a temporary restraining order limited to the parties before the court; final appellate brief due June 26, 2014; follow appeal at [www.nclrights.org/cases-and-policy/cases-and-advocacy/tanco\\_v\\_haslam](http://www.nclrights.org/cases-and-policy/cases-and-advocacy/tanco_v_haslam)); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *stay granted pending appeal*, No. 14-1341 (6th Cir. Mar. 25, 2014) (holding that **Michigan**'s prohibition against permitting and recognizing same-sex marriages violated the equal protection guarantees of the Fourteenth Amendment; final appellate brief due June 26, 2014); *Henry v. Himes*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014), *partial stay granted pending appeal*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 1512541 (S.D. Ohio Apr. 16, 2014), *appeal pending*, No. 14-3464 (6th Cir. filed May 12, 2014) (holding that **Ohio**'s prohibitions against recognizing same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment and Ohio's failure to recognize a court order from another state that granted an adoption to a married same-sex couple violated the Full Faith and Credit Clause of Article IV, §1, of the U.S. Constitution; final appellate brief due July 15, 2014; follow appeal at [www.lambdalegal.org/in-court/cases/henry-v-himes](http://www.lambdalegal.org/in-court/cases/henry-v-himes)); *Baskin v. Bogan*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 1568884 (S.D. Ind. Apr. 18, 2014) (holding that **Indiana**'s law barring the recognition of lawful out-of-state same-sex marriages violated the due process and equal protection rights of a same-sex couple where one spouse was fighting a fatal disease and granting a temporary restraining order requiring Indiana to recognize the couple's Massachusetts marriage); *Baskin v. Bogan*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 1814064 (S.D. Ind. May 8, 2014), *appeal pending*, No.

are not expressly protected from employment discrimination in 29 states,<sup>5</sup> and a federal law—the Defense of Marriage Act (DOMA)<sup>6</sup>—still expressly states that you and your same-sex marriage are not worthy of equal dignity.<sup>7</sup>

If you are gender affirmed or gender diverse, even fewer state laws expressly protect you from employment discrimination,<sup>8</sup> and you confront

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14-2037 (7th Cir. filed May 8, 2014) (entering preliminary injunction; follow appeal at [www.lambdalegal.org/in-court/cases/baskin-v-bogan](http://www.lambdalegal.org/in-court/cases/baskin-v-bogan)); *Wright v. Smith*, No. 60CV-13-2662 (Ark. Cir. Ct. May 9, 2014), available at [http://media.arkansasonline.com/news/documents/2014/05/09/plaintiff\\_win.pdf](http://media.arkansasonline.com/news/documents/2014/05/09/plaintiff_win.pdf), stay granted pending appeal, No. CV-14-427 (Ark. Sup. Ct. May 16, 2014) (holding that Arkansas' prohibition against permitting and recognizing same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment and Article 2, §3, of the Arkansas Constitution's Declaration of Rights); *Latta v. Otter*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 1909999 (D. Idaho May 13, 2014), temporary stay granted, Nos. 14-35420 & 14-35421 (9th Cir. May 20, 2014) (holding that Idaho's prohibition against permitting and recognizing same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment; oral argument in Ninth Circuit scheduled for week of September 8, 2014; follow appeal at [www.nclrights.org/cases-and-policy/cases-and-advocacy/latta-v-otter](http://www.nclrights.org/cases-and-policy/cases-and-advocacy/latta-v-otter)).

On January 6, 2014, the Supreme Court stayed the *Kitchen* decision pending final disposition of an appeal in the Tenth Circuit. See also *Evans v. Utah*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 2048343 (D. Utah May 19, 2014) (granting, but staying for 21 days to permit an appeal to the Tenth Circuit, a preliminary injunction requiring Utah to recognize all same-sex marriages entered into in Utah subsequent to the district court's decision in *Kitchen* and the Supreme Court's grant of a stay of that decision; case summary at [www.aclu.org/lgbt-rights/evans-v-utah](http://www.aclu.org/lgbt-rights/evans-v-utah)). In view of the Supreme Court's action in *Kitchen*, most district court judges stayed their subsequent decisions that invalidated or barred enforcement of state law bans on same-sex marriage pending final disposition of any appeals in those cases. As a result of these decisions, several state governors and attorneys general decided to no longer defend in litigation their state laws that barred same-sex marriages. **Note:** Following completion of this treatise, the decisions in the *Kitchen*, *Bishop*, and *Bostic* cases were affirmed on appeal. See *Kitchen v. Herbert*, No. 13-4178 (10th Cir. June 25, 2014); *Bishop v. Smith*, Nos. 14-5003 & 14-5006 (10th Cir. July 18, 2014); *Bostic v. Schaefer*, No. 14-1167 (4th Cir. July 26, 2014). Readers can follow the legal developments in this area at Web pages such as *Special Collection/Same-Sex Marriage*, THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE (periodically updated), [www.clearinghouse.net/results.php?searchSpecialCollection=10](http://www.clearinghouse.net/results.php?searchSpecialCollection=10) (extensive collection of case filings and opinions); *Pending Marriage Equality Cases*, LAMBDA LEGAL (periodically updated), [www.lambdalegal.org/pending-marriage-equality-cases](http://www.lambdalegal.org/pending-marriage-equality-cases) (includes status reports on the leading cases across the United States); EQUALITY ON TRIAL (periodically updated), <http://equalityontrial.com>; and FREEDOM TO MARRY (periodically updated), [www.freedomtomarry.org/states](http://www.freedomtomarry.org/states). For timelines of the laws and court decisions relating to same-sex marriage, see *States Decide on Same-Sex Marriage After Court Ends DOMA*, BLOOMBERG.COM (periodically updated), [www.bloomberg.com/info-graphics/2013-03-25/supreme-court-weighs-same-sex-marriage.html](http://www.bloomberg.com/info-graphics/2013-03-25/supreme-court-weighs-same-sex-marriage.html); *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY (periodically updated), [www.freedomtomarry.org/pages/history-and-timeline-of-marriage](http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage); *Same Sex Marriage Fast Facts*, CNN.COM (periodically updated), [www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts](http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts); *The Changing Landscape of Same-Sex Marriage*, WASH. POST (periodically updated), [www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage](http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage).

<sup>5</sup>See Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

<sup>6</sup>Pub. L. No. 104-199 (Sept. 21, 1996) (codified at 1 U.S.C. §7 and 28 U.S.C. §1738C). DOMA is discussed at length in Chapter 37 (Employee Benefit Issues).

<sup>7</sup>As noted above, in 2013, in *Windsor*, the Supreme Court held that §3 of DOMA was unconstitutional. The remaining substantive part of DOMA—§2 (28 U.S.C. §1738C)—allows states not to honor marriages legally entered into elsewhere. The constitutionality of §2 was not an issue addressed in *Windsor*. *Windsor* is discussed in Chapters 15 (Federal Equal Protection), 18 (Immigration and LGBT Employees), and 37 (Employee Benefit Issues).

<sup>8</sup>See Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

overwhelming societal pressure to conform to a binary gender construct, even in the face of mounting evidence—and court decisions<sup>9</sup> that acknowledge—that sex is not a simple binary choice between “female” and “male.”<sup>10</sup> Try to imagine what it must be like for people who know with certitude that they are not boys but are forced to live in all ways that are male. If you are not such a person, you simply cannot fully appreciate the emotional turmoil one must endure and the mental gymnastics one must perform in order to “conform” to masculine gender stereotypes. Try to imagine being one of the gender-affirmed elementary school students who in 2013–2014 were the subject of national attention, vicious vilification, and several legal proceedings simply because they endeavored to use the restrooms at school that matched their gender identity<sup>11</sup>—an issue that is still playing out in

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<sup>9</sup>Among the many court decisions noting that sex is not binary are two from 2014, issued by the highest courts in Australia and India: *New S. Wales Registrar of Births, Deaths and Marriages v. Norrie*, No. S273/2013, [2014] HCA 11, slip op. at ¶¶35, 37 (Austl. High Ct. Apr. 2, 2014), *available at* [www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/cases/cth/HCA/2014/11.rtf](http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/cases/cth/HCA/2014/11.rtf) (the Australia High Court held that the New South Wales Registrar of Births, Deaths and Marriages should have recorded respondent’s sex as “non-specific” given that respondent submitted evidence that her sex was ambiguous and the fact that “not everyone is male or female”; that is, “the sex of a person is not . . . in every case unequivocally male or female.”); *National Legal Servs. Auth. v. Union of India*, Writ Petition (Civil) No. 400 of 2012, slip op. at ¶59 (India Sup. Ct. Apr. 15, 2014), *available at* <http://supremecourtsofindia.nic.in/out-today/wc40012.pdf> (in recognizing that transgender individuals have a constitutional right to self-identify and present as female, male, or a “third gender,” the India Supreme Court held as follows: “Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one’s self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of ‘sex’ under Articles 15 and 16 [of the Constitution of India], therefore, includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.”). Additional cases are cited in Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Sections III.E.2.

<sup>10</sup>The nonbinary nature of sex is discussed in Chapter 2 (The Transformative Power of Words), Section IV.; Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Sections III.E.2.–3. and III.G.2.b.viii.; and Chapters 43 (Portraits of Gender in Today’s Workplace) and 44 (A Millennial Moment: Understanding Twenty-First Century LGBT Workers and Their Allies).

<sup>11</sup>*See, e.g., Doe v. Regional Sch. Unit 26*, 86 A.3d 600, 604 (Me. 2014), *rev’g sub nom. Doe v. Clenchy*, No. CV-09-201 (Me. Super. Ct. Nov. 20, 2012) (in holding that a middle school violated the Maine Human Rights Act by barring a gender-affirmed girl from using the girls’ restroom, the Maine Supreme Judicial Court observed that “the public’s potential discomfort” with the girl’s use of the bathroom that matched her gender identity is not a legitimate basis for denying her access); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, No. P20130034X, at 9–13 (Colo. Div. Civ. Rts. June 17, 2013), *available at* [www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf) (in a case decided under Colorado’s law barring discrimination in places of public accommodations, the Colorado Division of Civil Rights, in finding that there was probable cause that a school district wrongly denied a six-year-old, gender-affirmed girl the right to use the girls’ restrooms, concluded that she was “socially, legally, and medically” a girl; that the district lacked an “understanding of the complexity of transgender issues”; and that the district’s action in “[t]elling [the girl] that she must disregard her identity while performing one of the most essential human functions constitute[d] severe and pervasive treatment and create[d] an environment that is objectively and subjectively hostile, intimidating or offensive”); *Conciliation Agreement, §II.B, Mathis v. Fountain-Fort Carson Sch. Dist. 8*, No. P20130034X (Colo. Div. Civ. Rts. Feb. 27, 2014), *available at* [www.transgenderlegal.org/media/uploads/doc\\_549](http://www.transgenderlegal.org/media/uploads/doc_549).

numerous states and that prompted *The New York Times* Editorial Board to refer to their struggle as “the next civil rights frontier.”<sup>12</sup>

If you are gender affirmed or gender diverse, or if you are LGB, you transgress political and religious lines that are firmly based on both widely disseminated and broadly believed “proper” gender roles of men and women in society.<sup>13</sup> You face the blind spots of persons who simply have not taken the time to understand who you are or who are unwilling to take the time to learn. Or you confront persons who do understand but simply think you are inferior to them.

In the end, trying to compare relative degrees of discrimination—whether among different minority groups, different generations, or different countries<sup>14</sup>—is not a fruitful endeavor. Rather, the overarching societal perspective needs to be that mistreatment of people based on who they intrinsically are is simply wrong.

Being different from majoritarians has resulted in significant economic discrimination against and physical violence directed at all minorities, including LGBT individuals.<sup>15</sup> At their essence, discrimination and violence are

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pdf (school district agreed that transgender students shall be permitted to use the “sex- or gender-segregated facilities that are consistent with their gender identity, without exception”); Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, OCR Case No. 09-12-1020 and DOJ Case No. 169-12C-70 (July 24, 2013), *available at* [www.nelrights.org/cases-and-policy/cases-and-advocacy/student-v-arcadia-unified-school-district](http://www.nelrights.org/cases-and-policy/cases-and-advocacy/student-v-arcadia-unified-school-district) (in settling of civil rights action involving a school district’s refusal to let a transgender boy use the gender-segregated accommodations that are designated for male students, the district agreed to permit transgender students to access sex-segregated facilities based on their gender identity). See generally Chapter 36 (Gender-Segregated Facilities).

<sup>12</sup>Editorial Board, *The Next Civil Rights Frontier*, N.Y. TIMES, July 31, 2013, *available at* [www.nytimes.com/2013/08/01/opinion/the-next-civil-rights-frontier.html](http://www.nytimes.com/2013/08/01/opinion/the-next-civil-rights-frontier.html).

<sup>13</sup>As Rev. Jean Southard observes in the introduction to her essay in Chapter 45 (Faith Communities and LGBT Justice), some religions teach their parishioners “that to deviate from gender roles accepted by their faith communities is to be unacceptable to God. Living one’s life as a gay or lesbian person is a prime example of deviating from acceptable gender roles for men and women in terms of dating, marriage, sexual activity, and raising children.” In addition, children acquire “knowledge about expected sex-related behaviors (gender stereotyped knowledge)” by age three. Anne Fausto-Sterling et al., *Sexing the Baby: Part 2—Applying Dynamic Systems Theory to the Emergences of Sex-Related Differences in Infants and Toddlers*, 74 SOC. SCI. & MED. 1693, 1696 (2012), *available at* <http://dx.doi.org/10.1016/j.socscimed.2011.06.027>.

<sup>14</sup>See, e.g., Andrew MacAskill & Pratap Patnaik, *India[’s Top] Court Upholds 153-Year-Old Law Criminalizing Gay Sex*, BLOOMBERG NEWS (Dec. 11, 2013), [www.bloomberg.com/news/2013-12-11/india-s-top-court-upholds-153-year-old-law-criminalizing-gay-sex.htm](http://www.bloomberg.com/news/2013-12-11/india-s-top-court-upholds-153-year-old-law-criminalizing-gay-sex.htm).

<sup>15</sup>See Chapter 40 (Employment Discrimination Against LGBT People: Existence and Impact). In holding that New Mexico’s ban on same-sex marriage violated the New Mexico Constitution, the New Mexico Supreme Court observed the following in 2013:

[W]e recognize that [the LGBT community has] had some recent political success regarding legislation prohibiting discrimination against them. However, we also conclude that effective advocacy for the LGBT community is seriously hindered by their continuing need to overcome the already deep-rooted prejudice against their integration into society. . . . The political advocacy of the LGBT community continues to be seriously hindered, as evidenced by the uncontroverted difficulty in determining whether LGBTs are under-represented in positions of political power, because many of them keep their sexual orientation private to avoid hostility, discrimination, and ongoing acts of violence.

Griego v. Oliver, 316 P.3d 865, 882 (N.M. 2013) (citation omitted).

about the exercise of power, ignorance of the facts, outright hatred, and/or fear of the unknown. It is within the power of each of us to effect change, by addressing our own blind spots and taking the lead within our organizations to ensure that all employees are treated with dignity and respect. When we look back at history regarding minorities that have now been accepted, it is hard to believe that a country that prides itself on modeling a just society to the world could have tolerated such discrimination and violence for so long. In the same way, future generations likely will look back in amazement at the mistreatment faced by LGBT people.<sup>16</sup> Indeed, with Millennials and their successors in the iGeneration, this already may be happening,

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<sup>16</sup>Sadly, one need not look back at history in order to be amazed at the discrimination and violence that many groups continue to suffer today. See, e.g., Ellen Barry, *In Case That Transfixed a Nation, Court in India Convicts Four Men of Rape*, N.Y. TIMES, Sept. 10, 2013, available at [www.nytimes.com/2013/09/11/world/asia/four-men-convicted-in-rape-case-that-transfixed-india.html](http://www.nytimes.com/2013/09/11/world/asia/four-men-convicted-in-rape-case-that-transfixed-india.html); Dan Bloom, *India's Top Police Officer Forced To Apologise for "If You Can't Prevent Rape, You Enjoy It" Comment*, MAIL ONLINE (Nov. 13, 2013), [www.dailymail.co.uk/news/article-2505311/Ranjit-Sinha-Indias-police-officer-forced-apologise-rape-comment.htm](http://www.dailymail.co.uk/news/article-2505311/Ranjit-Sinha-Indias-police-officer-forced-apologise-rape-comment.htm); Jasmine Bager, *Forbidden to Drive: A Saudi Woman On Life Inside the Kingdom*, TIME, Oct. 25, 2013, available at <http://ideas.time.com/2013/10/25/forbidden-to-drive-a-saudi-woman-on-life-inside-the-kingdom>. In a 2013 opinion concurring in the denial of a writ of certiorari, Justice Sonia Sotomayor, in an opinion joined by Justice Stephen Breyer, addressed a federal prosecutor's clearly inappropriate appeal to racial bias when, during the cross examination of the defendant, he "asked, 'You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, This is a drug deal?'" *Calhoun v. United States*, 568 U.S. \_\_\_, 133 S. Ct. 1136, 1136 (2013) (Sotomayor, J., concurring). Justice Sotomayor observed:

By suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation. There was a time when appeals to race were not uncommon . . . . The prosecutor's comment . . . was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason.

It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century. Such conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice.

*Id.* at 1137–38. Similarly, according to the *New York Post*, during oral arguments in the December 2013 sentencing phase in a case involving the strangulation of a transgender woman, Amanda Gonzalez-Andujar, by Rasheen Everett, the defense lawyer argued that

"[a] sentence of 25 years to life is an incredibly long period of time judge . . . ."

"Shouldn't that be reserved for people who are guilty of killing certain classes of individuals?"

Then, taking callousness to a new level, he said: "Who is the victim in this case? Is the victim a person in the higher end of the community?"

[New York] Supreme Court Justice Richard Buchter scolded [the lawyer] as he sentenced Everett to 29 years in prison.

"This court believes every human life is sacred" . . . . "It's not easy living as a transgender, and I commend the family for supporting her."

Christina Carrega-Woodby, *Hey, She Was Just A Ho: Sick Bid By Killer's Lawyer*, N.Y. POST, Dec. 6, 2013, available at <http://nypost.com/2013/12/06/hey-she-was-just-a-ho-sick-bid-by-killers-lawyer>; see also Dani Heffernan, *LGBT Group Calls for Attorney's Apology After He Argues Transgender Murder Victim Wasn't a "Certain Class" of Person*, GLAAD BLOG (Dec. 9, 2013), [www.glaad.org/blog/lgbt-group-calls-attorneys-apology-after-he-argues-transgender-murder-victim-wasnt-certain](http://www.glaad.org/blog/lgbt-group-calls-attorneys-apology-after-he-argues-transgender-murder-victim-wasnt-certain).



partly because social media are giving them vastly greater exposure to the personal experiences of diverse peers, broadening their understanding of, and empathy with, the “other.”<sup>17</sup> “Just get over it” is a common mantra of younger generations.

The time for people and employers to act is now. As Martin Luther King, Jr., aptly observed: “[H]istory will have to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but the appalling silence of the good people.”<sup>18</sup>

For these reasons, when Tim Darby from Bloomberg BNA reached out to me about writing this treatise, I accepted his offer. It was time for a treatise that brought together a comprehensive review of underlying legal principles and practical human resource guidance and placed both in the overall context of societal attitudes toward LGBT people.

I explained to Tim that I felt it was critical to include a set of essays that would help readers humanize who people unlike them are. If people who are not LGBT are able to see that LGBT people are simply individuals who have normal life desires and struggles, then hopefully they will appreciate that, despite their differences, LGBT people are pretty much the same as they are. Simply put, by recognizing our diversity, we are better able to see our similarity in our common humanity.<sup>19</sup> If like me you did not grow up in the era of social media and perhaps have not been exposed to as much diversity as is now the norm, I hope this set of 19 essays will help broaden your horizons. And I hope as well that inclusion of these essays provides an additional dimension to the discussion of the related legal issues in the workplace that is the core of this treatise.<sup>20</sup>

I also felt it was important to bring in others to work with me on this treatise, as I wanted the discussion to reflect diverse voices, as no one person or group can adequately speak on behalf of an entire community. This is especially so where there is a lack of clarity regarding who exactly fits under the LGBT umbrella and what is acceptable terminology, a theme discussed in Chapter 2 (The Transformative Power of Words). While the timeline for completing this treatise was stretched out with the involvement of more than

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<sup>17</sup>See Chapter 44 (A Millennial Moment: Understanding Twenty-First Century LGBT Workers and Their Allies).

<sup>18</sup>MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 196 (Beacon Press 2010) (1958).

<sup>19</sup>I highly recommend that readers take the time to review documentary and performing arts photographer Jana Marcus’ enlightening photo-essay slide show *Transfigurations*. An abbreviated version is online, at [www.janamarcus.com/docus/TransPresentation](http://www.janamarcus.com/docus/TransPresentation), and an extended, high-quality coffee-table version—JANA MARCUS, *TRANSFIGURATIONS* (2011)—is available at [www.7angelspress.com](http://www.7angelspress.com). The book was awarded a 2012 Independent Publisher Gold Medal. The gold medal was for the category “Gay/Lesbian—Non-Fiction,” yet another illustration of the point made in Chapter 2 (The Transformative Power of Words), Section III.C., that commercial vendors (and many others) incorrectly place materials pertaining to gender-affirmed and gender-diverse people under the “Gay & Lesbian” genre.

<sup>20</sup>The essays are in Parts II (Personal Essays: Walk in Our Shoes) and VIII (LGBT People in the Context of Culture, Religion, and Society).

125 participants—all of whom have other, significant commitments—I hope you will agree that the delay was worth it.

### **Why the Royalties From This Treatise Are Going Directly to the Gay & Lesbian Advocates & Defenders**

After having read every case cited in this treatise and hundreds more, I am truly impressed by the legal talent that has worked, and continues to work, to effectuate positive change for LGBT and other individuals who have faced discrimination. Despite judges who gave no ground for years, these lawyers have continued to fight for justice and equal rights for LGBT individuals and other minorities, finding the right plaintiffs, who had compelling stories to tell, and adapting currently accepted legal theories to yield positive results. Much of this groundwork has been laid by pro bono lawyers.

Reading all of those cases confirmed a decision I had made prior to agreeing to undertake this project. I had advised Tim that I would take on this treatise only if Bloomberg BNA would agree to pay all royalties directly to one of several pro bono legal services organizations that would have been equally deserving—the **Gay & Lesbian Advocates & Defenders (GLAD)**, in Boston. In its low-key way, GLAD, through its staff and volunteer lawyers, has helped to change the law through advocacy and litigation. It has represented or assisted the plaintiffs in numerous landmark cases, including the sampling set forth here:

- *Bragdon v. Abbott* (1998):<sup>21</sup> In its first case addressing the human immunodeficiency virus (HIV), the U.S. Supreme Court ruled that the federal Americans with Disabilities Act (ADA)<sup>22</sup> prohibits discrimination against people living with HIV, regardless of whether they show any visible symptoms or have a diagnosis of acquired immunodeficiency syndrome (AIDS).<sup>23</sup>
- *Rosa v. Park West Bank & Trust Co.* (2000):<sup>24</sup> In one of two key decisions issued in 2000 by federal appellate courts, the First Circuit Court of Appeals held that transgender people are protected from sex discrimination based on gender stereotypes. Earlier in the year, the Ninth Circuit Court of Appeals had reached a similar result.<sup>25</sup> Neither case involved Title VII, but both courts looked to Title VII

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<sup>21</sup>524 U.S. 624, 8 AD 239 (1998).

<sup>22</sup>Pub. L. No. 101-336 (July 26, 1990) (codified as amended at 42 U.S.C. §12101 *et seq.*).

<sup>23</sup>*Bragdon* and the ADA are discussed in Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973). To read more about GLAD's involvement in the *Bragdon* litigation, see *A Culture-Shifting Moment: Bragdon v. Abbott and HIV Discrimination*, GLAD.ORG (undated), [www.glad.org/30years/case\\_apr.html](http://www.glad.org/30years/case_apr.html), and *Bragdon v. Abbott*, GLAD.ORG (undated), [www.glad.org/work/cases/bragdon-v-abbott](http://www.glad.org/work/cases/bragdon-v-abbott).

<sup>24</sup>214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act, 15 U.S.C. §§1691–1691f).

<sup>25</sup>Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act, 42 U.S.C. §13981).

in reaching their decisions, and subsequent courts have applied their holdings in Title VII cases.<sup>26</sup>

- *Doe v. Yunits* (2000–2001):<sup>27</sup> In this litigation, Massachusetts courts upheld the right of students to appear and dress in accordance with their gender identity—confirming that a person’s gender expression “is not merely a personal preference but a necessary symbol of her very identity”<sup>28</sup>—and expressly rejected engrafting onto the commonwealth’s ADA-like, three-pronged definition of “disability” the federal exclusion of gender identity disorders not resulting from physical impairments.<sup>29</sup> These holdings from the *Yunits* litigation have been cited and relied on by numerous courts, including by the India Supreme Court in its 2014 landmark decision in *National Legal Services Authority v. Union of India*,<sup>30</sup> where the high court quoted the passage in *Yunits* from which the preceding quote was taken and held that transgender individuals have a constitutional right to self-identify and present as female, male, or a “third gender.”<sup>31</sup>
- *Goodridge v. Department of Public Health* (2003):<sup>32</sup> In the first decision of its kind issued by the highest court of a state, the Massachusetts Supreme Judicial Court held that same-sex couples have a constitutional right to marry. As a result, Massachusetts became the first U.S. state to recognize and permit such marriages.<sup>33</sup>
- *Kerrigan v. Commissioner of Public Health* (2008):<sup>34</sup> The Connecticut Supreme Court similarly held that same-sex couples have a

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<sup>26</sup>*Rosa, Schwenk*, and other cases involving gender stereotyping are discussed in Chapters 14 (Title VII of the Civil Rights Act of 1964), 15 (Federal Equal Protection), and 39 (Law and Culture in the Making of *Macy v. Holder*). To read more about GLAD’s involvement in the *Rosa* litigation, see *What Men and Women Should Look Like: Rosa v. Park West Bank*, GLAD.ORG (undated), [www.glad.org/30years/case\\_jul.html](http://www.glad.org/30years/case_jul.html), and *Rosa v. Park West Bank*, GLAD.ORG (undated), [www.glad.org/work/cases/rosa-v-park-west-bank](http://www.glad.org/work/cases/rosa-v-park-west-bank).

<sup>27</sup>2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff’d sub nom.* *Doe v. Brockton Sch. Comm.*, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000), *subsequent proceeding sub nom.* *Doe v. Yunits*, 15 Mass. L. Rep. 278, 2001 WL 664947 (Super. Ct. Feb. 26, 2001).

<sup>28</sup>2000 WL 33162199, at \*3. This aspect of the *Yunits* litigation is discussed in Chapter 35 (Appearance, Dress, and Grooming Codes), Section III.B.3.a.

<sup>29</sup>*Doe v. Yunits*, 15 Mass. L. Rep. 278, 2001 WL 664947, at \*4–5 (Super. Ct. Feb. 26, 2001). This aspect of the *Yunits* litigation is discussed in Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Section III.G.2.c.i. and 3.d. To read more about GLAD’s involvement in the *Yunits* litigation, see *Not in My School: Doe v. Yunits*, GLAD.ORG (undated), [www.glad.org/30years/case\\_aug.html](http://www.glad.org/30years/case_aug.html), and *Doe v. Yunits*, GLAD.ORG (undated), [www.glad.org/work/cases/pat-doe-v-yunits](http://www.glad.org/work/cases/pat-doe-v-yunits).

<sup>30</sup>Writ Petition (Civil) No. 400 of 2012 (India Sup. Ct. Apr. 15, 2014), *available at* <http://supremecourtsofindia.nic.in/outtoday/wc40012.pdf>.

<sup>31</sup>See *id.*, slip op. at ¶¶64–65, 76–77, 129.

<sup>32</sup>798 N.E.2d 941 (Mass. 2003).

<sup>33</sup>To read more about GLAD’s involvement in the *Goodridge* litigation, see *The Dignity and Equality of All Individuals: Goodridge v. Department of Public Health*, GLAD.ORG (undated), [www.glad.org/30years/case\\_nov.html](http://www.glad.org/30years/case_nov.html), and *Goodridge et al. v. Department of Public Health*, GLAD.ORG (undated), [www.glad.org/work/cases/goodridge-et-al-v-dept-public-health](http://www.glad.org/work/cases/goodridge-et-al-v-dept-public-health).

<sup>34</sup>957 A.2d 407 (Conn. 2008).

constitutional right to marry.<sup>35</sup> A month later, on the fifth anniversary of the *Goodridge* decision, GLAD announced its “6x12” campaign, to “ensur[e] that same-sex couples in all six New England states will be able to marry in their home state by 2012.”<sup>36</sup> GLAD achieved that goal, albeit a few months late, in 2013, when Rhode Island<sup>37</sup> joined Vermont (2009),<sup>38</sup> New Hampshire (2010),<sup>39</sup> and Maine (2012)<sup>40</sup> in permitting and recognizing same-sex marriages.

- *O’Donnabhain v. Commissioner of Internal Revenue* (2010):<sup>41</sup> The U.S. Tax Court held, contrary to the Internal Revenue Service’s position, that gender-affirming medical procedures are not cosmetic procedures and are tax-deductible.<sup>42</sup>
- *Gill v. Office of Personnel Management* (2013):<sup>43</sup> The First Circuit Court of Appeals issued the first appellate decision striking down Section 3 of DOMA.<sup>44</sup> Thirteen months later, the Supreme Court reached the same result in *United States v. Windsor*.<sup>45</sup> In *Windsor*, GLAD coordinated the strategy of the groups serving as amici who sought to have Section 3 invalidated.<sup>46</sup>

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<sup>35</sup>To read more about GLAD’s involvement in the *Kerrigan* litigation, see *Kerrigan & Mock v. Connecticut Dept. of Public Health*, GLAD.ORG (undated), [www.glad.org/work/cases/kerrigan-mock-v-connecticut-dept-of-public-health](http://www.glad.org/work/cases/kerrigan-mock-v-connecticut-dept-of-public-health).

<sup>36</sup>Press Release, GLAD, 5 Years After Goodridge, GLAD Announces “6x12” (Nov. 18, 2008), available at [www.glad.org/current/pr-detail/5-years-after-goodridge-glad-announces-6x12](http://www.glad.org/current/pr-detail/5-years-after-goodridge-glad-announces-6x12).

<sup>37</sup>See *Family Law in Rhode Island*, GLAD.ORG (Feb. 25, 2014), [www.glad.org/rights/rhodeisland/c/family-law-in-rhode-island](http://www.glad.org/rights/rhodeisland/c/family-law-in-rhode-island).

<sup>38</sup>See *Family Law in Vermont*, GLAD.ORG (Mar. 4, 2014), [www.glad.org/rights/vermont/c/family-law-in-vermont](http://www.glad.org/rights/vermont/c/family-law-in-vermont). “Vermont was the first state to obtain marriage rights for same-sex couples through a legislative process rather than a court case.” *Id.*

<sup>39</sup>See *Family Law in New Hampshire*, GLAD.ORG (Feb. 25, 2014), [www.glad.org/rights/newhampshire/c/family-law-in-new-hampshire](http://www.glad.org/rights/newhampshire/c/family-law-in-new-hampshire).

<sup>40</sup>See *Family Law in Maine*, GLAD.ORG (Feb. 25, 2014), [www.glad.org/rights/maine/c/family-law-in-maine](http://www.glad.org/rights/maine/c/family-law-in-maine). “Maine became the first state to obtain marriage rights for same-sex couples through an initiative process rather than a court case or vote by a legislature.” *Id.* As a result of other elections held on the same day that the Maine initiative was voted on (November 6, 2012), voters in Maryland and Washington also approved same-sex marriage in their states, and voters in Minnesota voted down a constitutional amendment that would have prohibited such marriages. Lila Shapiro, *Gay Marriage Victory In Maine, Maryland; Minnesota Votes Down ‘Traditional’ Amendment*, HUFFINGTON POST (Nov. 7, 2012), [www.huffingtonpost.com/2012/11/07/gay-marriage-victory\\_n\\_2085900.html](http://www.huffingtonpost.com/2012/11/07/gay-marriage-victory_n_2085900.html). In 2013, same-sex marriage was approved by the Minnesota legislature.

<sup>41</sup>134 T.C. No. 4, Tax Ct. Rep. (CCH) 58,122, 2010 WL 364206 (2010).

<sup>42</sup>*O’Donnabhain* is discussed in Chapter 37 (Employee Benefit Issues), Section III.H. To read more about GLAD’s involvement in the *O’Donnabhain* litigation, see *O’Donnabhain v. Commissioner of Internal Revenue*, GLAD.ORG (undated), [www.glad.org/work/cases/in-re-rhiannon-odonnabhain](http://www.glad.org/work/cases/in-re-rhiannon-odonnabhain).

<sup>43</sup>*Gill* was decided with *Massachusetts v. U.S. Department of Health & Human Services*, 682 F.3d 1, 115 FEP 65 (1st Cir. 2012), cert. denied, 570 U.S. \_\_\_, 133 S. Ct. 2884, 2887 (2013).

<sup>44</sup>Section 3 is discussed in Chapter 37 (Employee Benefit Issues). To read more about GLAD’s involvement in the *Gill* litigation, see *Gill et al. v. Office of Personnel Management et al.*, GLAD.ORG (undated), [www.glad.org/work/cases/gill-v-office-of-personnel-management](http://www.glad.org/work/cases/gill-v-office-of-personnel-management).

<sup>45</sup>570 U.S. \_\_\_, 133 S. Ct. 2675, 118 FEP 1417 (2013). *Windsor* is discussed in Chapters 15 (Federal Equal Protection), 18 (Immigration and LGBT Employees), and 37 (Employee Benefit Issues).

<sup>46</sup>To read more about GLAD’s involvement in the *Windsor* appeal, see *Windsor v. United States Briefs*, GLAD.ORG (undated), [www.glad.org/doma/documents](http://www.glad.org/doma/documents).

- *Kosilek v. Spencer* (2014):<sup>47</sup> In a case where GLAD participated as amicus curiae, the First Circuit Court of Appeals again led the way, issuing the first appellate decision upholding the right, under the Eighth Amendment to the U.S. Constitution, of transgender prisoners to receive gender-affirming surgery. The court observed that prisoners have a constitutional right to “receiv[e] medically necessary treatment . . . , even if that treatment strikes some as odd or unorthodox.”<sup>48</sup> In February 2014, the First Circuit granted rehearing, vacated the majority and dissenting opinions issued a month earlier by a panel of the court, and set oral argument before the entire court for May 2014.<sup>49</sup>
- *Doe v. Regional School Unit 26* (2014):<sup>50</sup> The Maine Supreme Judicial Court held that a middle school had wrongly barred Susan Doe, a gender-affirmed girl, from using the girls’ restroom. The court rejected the school’s reliance on the complaints of others about Susan’s use of the girls’ restroom: “She was treated differently from other students solely because of her status as a transgender girl. This type of discrimination is forbidden by the [Maine Human Rights Act]. . . .”<sup>51</sup> For the first time, a state’s highest court expressly upheld the right of transgender individuals to use the public restrooms that correspond to their gender identity. Perhaps most important, the court’s majority and concurring opinions, in both words and tone, reflect that six of the seven justices simply saw Susan as a normal young girl, entitled to be treated with the same dignity and respect that all her classmates were entitled to.<sup>52</sup>

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<sup>47</sup>740 F.3d 733 (1st Cir. 2013), *aff’g* 889 F. Supp. 2d 190 (D. Mass. 2012), *reh’g en banc granted and majority and dissenting appellate opinions withdrawn by Order of Court*, No. 12-2194 (1st Cir. Feb. 12, 2014) (oral argument en banc held May 8, 2014).

<sup>48</sup>740 F.3d at 772. It is interesting to note that the legal framework for the First Circuit decision was established in significant part as the result of another litigation involving a transgender plaintiff, Dee Farmer, and her allegations that a prison did not adequately protect her from sexual assaults by male prisoners. Farmer was represented by the American Civil Liberties Union (ACLU). *See Farmer v. Brennan*, 511 U.S. 825 (1994); *see also* Alison Flowers, *Dee Farmer Won a Landmark Supreme Court Case on Inmate Rights. But That’s Not the Half of It*, VILLAGE VOICE (Jan. 29, 2014), available at [www.villagevoice.com/2014-01-29/news/dee-farmer-v-brennan-prison-rape-elimination-act-transgender-lgbt-inmate-rights](http://www.villagevoice.com/2014-01-29/news/dee-farmer-v-brennan-prison-rape-elimination-act-transgender-lgbt-inmate-rights).

<sup>49</sup>*Kosilek v. Spencer*, No. 12-2194 (1st Cir. Feb. 12, 2014). To read more about GLAD’s involvement in the *Kosilek* litigation and to track the appeal, *see Kosilek v. Spencer*, GLAD.ORG (undated), [www.glad.org/work/cases/kosilek-v.-spencer](http://www.glad.org/work/cases/kosilek-v.-spencer).

<sup>50</sup>86 A.3d 600 (Me. 2014), *rev’g sub nom. Doe v. Clenchy*, No. CV-09-201 (Me. Super. Ct. Nov. 20, 2012). This litigation is commonly referred to as the *Clenchy* case.

<sup>51</sup>*Id.* at 606. *Clenchy* and other cases involving restroom access are discussed in Chapter 36 (Gender-Segregated Facilities). To read more about GLAD’s involvement in the *Clenchy* litigation, *see Doe v. Clenchy*, GLAD.ORG (undated), [www.glad.org/work/cases/doe-v.-clenchy](http://www.glad.org/work/cases/doe-v.-clenchy).

<sup>52</sup>In contrast to these justices, the lone dissenting justice never referred to Susan by her name or as a girl. In fact, he never referred to her at all and instead wrote generically about transgender individuals. In essence, the dissenting justice focused on “transgender” in “transgender girl,” whereas the other justices focused on “girl”—which is precisely how Susan views herself and other should view her. Indeed, to make this point to the Supreme Judicial Court, both GLAD and the Maine Human Rights Commission followed the adage that a picture is worth a thousand words and included photographs of Susan in their appellate briefs. *See* Brief of Appellants John and Jane Doe as Parents and Next Friend of Susan Doe, *Doe v. Clenchy*,

- *In re National Coverage Determination for Transsexual Surgery* (2014).<sup>53</sup> The U.S. Department of Health and Human Services Departmental Appeals Board (DAB) overturned its 1989 decision—which was based on a highly questionable 1981 report—that had held “transsexual surgery” is both experimental and controversial and thus should not be covered by Medicare. In its 2014 decision, the DAB held that the undisputed evidence clearly established that such surgery is a safe, effective, widely accepted, nonexperimental, medically necessary treatment for gender dysphoria and, therefore, is covered by Medicare. The DAB closed its decision by observing that in 1989 it erroneously relied on the controversial nature of the surgery as a basis for denying coverage: “Considerations of social acceptability (or nonacceptability) of medical procedures appear on their face to be antithetical to Medicare’s ‘medical necessity’ inquiry, which is based in science.”<sup>54</sup>

Indeed, it is fitting that I started to write this Preface shortly after the 10th anniversary of the *Goodridge* decision. During those 10 years, through focused educational efforts and strategic litigation, GLAD led the effort to ensure equality for LGBT individuals in all six New England states and set the groundwork for similar progress in many other states. During the decade following *Goodridge*, 16 more states authorized same-sex marriages, setting the stage for the inevitable authorization and recognition of such marriages in all 50 states.

### **Appreciation for All Those Who Have Helped Make This Treatise a Reality**

This project has involved the efforts of many people who deserve special recognition and thanks. First, **Denise Visconti**, managing shareholder in Littler Mendelson’s San Diego office, led the effort to prepare summaries

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Law Docket No. PEN-12-582 (Me. Sup. Jud. Ct. filed Mar. 14, 2013), *available at* [www.glad.org/uploads/docs/cases/doe-v-clenchy/2013-03-14-doe-v-clenchy-brief-of-appellants.pdf](http://www.glad.org/uploads/docs/cases/doe-v-clenchy/2013-03-14-doe-v-clenchy-brief-of-appellants.pdf); Brief of Appellant Maine Human Rights Commission, *Doe v. Clenchy*, Law Docket No. PEN-12-582 (Me. Sup. Jud. Ct. filed Mar. 14, 2013), *available at* [www.glad.org/uploads/docs/cases/doe-v-clenchy/2013-03-14-doe-v-clenchy-mhrc-brief.pdf](http://www.glad.org/uploads/docs/cases/doe-v-clenchy/2013-03-14-doe-v-clenchy-mhrc-brief.pdf).

Susan Doe, whose real name is Nicole Maines, and her parents have gone public in an effort to educate the public about gender identity. To learn more about the Maines family, see the second footnote appended to the Editor’s Note in Chapter 12 (A Parent’s Perspective on Gender Affirmations).

<sup>53</sup>No. A-13-47, Decision No. 2576 (U.S. Department of Health & Human Services Departmental Appeals Board, May 30, 2014), *available at* [www.glad.org/uploads/docs/news/medicare-decision-sex-reassignment-surgery-5-30-14.pdf](http://www.glad.org/uploads/docs/news/medicare-decision-sex-reassignment-surgery-5-30-14.pdf). *See also Medicare to Update Healthcare Standards for Transgender Patients*, GLAD.ORG (May 30, 2014), [www.glad.org/current/item/medicare-to-update-healthcare-standards-for-transgender-patients](http://www.glad.org/current/item/medicare-to-update-healthcare-standards-for-transgender-patients); National Center for Transgender Equality, *Fact Sheet on Medicare Coverage of Transition-Related Care* (May 2014), *available at* <http://transequality.org/PDFs/MedicareFactSheet.pdf>. The administrative proceedings in this matter were commenced in 2013 by GLAD, the ACLU, and the National Center for Lesbian Rights.

<sup>54</sup>No. A-13-47, Decision No. 2576, at 24.

of the laws in the 50 states, the District of Columbia, and Puerto Rico. She lined up a team of her colleagues to assist her. Denise expresses her thanks to her assistant, **Pam Gomez**, for all of her assistance in bringing this project to fruition; to **her spouse** for all of the support and forbearance during this project; and to **her colleagues** for their work on this project.

Denise and I are appreciative of the efforts of **D’Arcy Kennitz**, executive director of The National LGBT Bar Association, and her staff in assisting us in arranging for plaintiff-side lawyers to serve as reviewers of the state law summaries. We were also assisted in this effort by **Rob Wiley**, president of the Dallas-Fort Worth Employment Lawyers Association.

A significant strength of this treatise is the fact that so many talented professionals participated in this project as **authors, contributors, and reviewers**. All of their names and affiliations are set forth in the Contributors list, *supra*, and at the beginning of the chapters or state law summaries they worked on.<sup>55</sup> Some of these individuals also assisted me with other aspects of this project. Without exception, all the participants graciously tolerated my editorial comments, suggestions, and changes. We were all saddened by the May 2014 death of **David Rosenblum**, the legal director of the Philadelphia-based Mazzoni Center, who reviewed the Pennsylvania law summary in this treatise and freely shared his perceptive thoughts whenever I asked.<sup>56</sup>

I am also grateful that Governor Jack Markell, Justice Virginia Long, and Asaf Orr were willing to pen their insightful Forewords, which nicely set the stage for the rest of the treatise.

In addition, numerous people offered their time to serve as sounding boards, to provide suggestions, to help me locate hard-to-find slip opinions and articles, to review chapters (without specific attribution), or to help with other matters:

- **Pierce Blue**, special assistant and attorney advisor, Office of Commissioner Chai R. Feldblum, U.S. Equal Employment Opportunity Commission;
- **Greg Brock**, senior editor/standards, *The New York Times*;
- **Mickey Diamond**, director, Pacific Center for Society and Sex, and retired professor of Anatomy and Reproductive Biology, John A. Burns School of Medicine, University of Hawai’i at Mānoa;

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<sup>55</sup>Two of the contributors wrote their chapters prior to joining the federal government. At their request, to ensure that their writings would not be attributed to their governmental employers, we did not list their current employers in the *Contributors* list or under their names at the beginning of their respective chapters. Victoria Neilson, who wrote Chapter 18 (Immigration and LGBT Employees), is now Associate Counsel in the Refugee and Asylum Law Division of the Office of the Chief Counsel at the United States Citizenship and Immigration Services. Sharon McGowan, author of Chapter 22 (Transgender Discrimination Claims: A Plaintiff Perspective on Proofs and Trial Strategies), is Acting General Counsel of the Office of Personnel Management.

<sup>56</sup>*Mazzoni Center Mourns the Loss of Legal Director David M. Rosenblum*, MAZZONI CENTER (May 5, 2014), <http://mazzonicenter.org/news/mazzoni-center-mourns-loss-legal-director-david-m-rosenblum>.

- **Bill Duffy**, head of Reference, David & Lorraine Cheng Library, and member and former chair of the Faculty Senate, William Paterson University;
- **Siobain Duffy**, assistant professor, Department of Ecology, Evolution & Natural Resources, Rutgers, The State University of New Jersey;
- **Jonathon Dworkin**, communications advisor, Office of Delaware Governor Jack A. Markell;
- **Jamie Feldman**, associate professor, Program in Human Sexuality, University of Minnesota;
- **James Gleason**, Library Services manager, *The Republican*;
- **Belinda Grant-Anderson**, vice president, Workforce Development & Diversity, AT&T Inc.;
- **Elizabeth Grossman**, regional attorney, U.S. Equal Employment Opportunity Commission;
- **Geri Haight**, former member, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo (now director of Litigation and Intellectual Property, Panera LLC);
- **Art Leonard**, professor of law, New York Law School, editor-in-chief, *Lesbian/Gay Law Notes*,<sup>57</sup> and the voice of the *Art Leonard Observations* blog;<sup>58</sup>
- **Christina Luini**, assistant librarian, Law Library, U.S. Court of Appeals for the Ninth Circuit;
- **Stephanie Plotin**, reference & Williams Institute librarian, Hugh & Hazel Darling Law Library, UCLA School of Law;
- **Larry Rickles**, member, Eckert Seamans Cherin & Mellott;
- **Anna Satcher Johnson**, team leader, National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention;
- **Ralph Seep**, law revision counsel, U.S. House of Representatives; and
- **the staff** at the Massachusetts Trial Court Law Libraries.

Special thanks are due **Kent Hansen**, the retired general counsel of Fedders Corp., and **Maureen McTernan**, a retired assistant general counsel from Prudential Financial, both of whom are now my colleagues at Pro Bono Partnership, for their willingness after hours to review and comment on many of the chapters in the treatise.

Of equal importance to this project has been the team at **Bloomberg BNA**, led by project director **Tim Darby**. Tim was a wonderful source of ideas, always provided constructive comments on drafts (as did **Ken May** from Bloomberg BNA), and helped to significantly improve the overall

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<sup>57</sup>See *Lesbian/Gay Law Notes*, NEW YORK LAW SCHOOL JUSTICE ACTION CENTER (undated), [www.nyls.edu/justice-action-center/publications/lesbiangay\\_law\\_notes](http://www.nyls.edu/justice-action-center/publications/lesbiangay_law_notes).

<sup>58</sup>See *Art Leonard Observations*, NEW YORK LAW SCHOOL (periodically undated), [www.artleonardobservations.com](http://www.artleonardobservations.com).



structure of the treatise. **Joanne Nobile**, senior book editor, did likewise as she shepherded the treatise through its final stages of production, including the extensive copyediting process and dealing with my lack of fondness for some of the legal citation formats set forth in *The Bluebook*. **Debbie Hardin** supported Joanne and me as copy editor in editing the manuscript. Joanne and Tim also had to try to tame my incessant updating of footnotes during the final months of production as the rapidity of positive change in this area of the law and in societal views toward LGBT people accelerated at an astonishing, and heartening, pace—indeed, the last-minute footnote appended to this sentence demonstrates both the remarkable change and my penchant for adding footnotes.<sup>59</sup> **Catherine Kitchell**, reference services team leader in the Bloomberg BNA Library, provided timely assistance with legal research when I was unable to find what I was looking for.

I am also grateful that the following individuals and organizations permitted us to reprint materials they previously published: **Jennifer Levi** and the *Columbia Journal of Gender and Law*; **Sharon McGowan** and the *Harvard Civil Rights-Civil Liberties Law Review*; **Fenway Health**; **Human Rights Campaign Foundation**; and the *Tampa Bay Times*.

Finally, I want to thank my wife and daughter for all their support, not only while I worked on this project, but generally. I cannot imagine my life without **Kathie** and **Laura**.

### Closing Thoughts

I encourage readers to advise me of any mistakes or omissions, to keep me apprised of legal and workplace developments so that we will be in a better position to provide this information in the event that supplements to or new editions of this treatise are warranted, and to inform me if they have any interest in helping (on a pro bono basis) with the preparation of a supplement or new edition. You can send e-mails to me at GISOLaw@outlook.com. Please include your contact information.

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<sup>59</sup>On May 29, 2014, the day before I finalized the Preface, *Time* previewed online the cover of its then forthcoming June 9, 2014, issue, featuring Laverne Cox, the transgender star of the Netflix's series *Orange Is the New Black*, and the cover story "The Transgender Tipping Point: America's Next Civil Rights Frontier," written by Katy Steinmetz. See <http://time.com/135480/transgender-tipping-point>. It is believed that this is the first time an "out" transgender person has been featured on the magazine's cover. The following day, on *Time*'s website, Steinmetz reported that earlier in the day the U.S. Department of Health and Human Services' DAB "recognize[d] [gender reassignment surgery] as a necessary medical procedure, ... overturn[ed] a longstanding rule preventing the [Medicare] program from covering such procedures[,] and open[ed] the doors for other Medicare enrollees to make similar requests. It comes at a time when states are beginning to prohibit insurance companies from including specific exclusions for treatments related to gender transitions." Katy Steinmetz, *Board Rules That Medicare Can Cover Gender Reassignment Surgery*, *TIME* (May 30, 2014), available at <http://time.com/2800307/medicare-gender-reassignment>. See also *Medicare to Update Healthcare Standards for Transgender Patients*, GLAD.ORG (May 30, 2014), [www.glad.org/current/item/medicare-to-update-healthcare-standards-for-transgender-patients](http://www.glad.org/current/item/medicare-to-update-healthcare-standards-for-transgender-patients) (includes a link to a copy of the DAB's decision).

I debated whether to eliminate the uniform resource locators (URLs) in this treatise, given that some websites are constantly reorganized. In the end, I decided in favor of keeping the URLs because, even if they no longer work, many times one can recover a missing webpage with the Internet Archive's Wayback Machine.<sup>60</sup> Once you locate the old page, often times you can use a search engine to find the identical text on the current version of the website in question.

When available, parallel citations to the various Bloomberg BNA reporters are provided. We use the following abbreviations:

- AD—Americans with Disabilities Cases
- EB—Employee Benefits Cases
- FEP—Fair Employment Practice Cases
- IER—Individual Employment Rights Cases
- LA—Labor Arbitration Reports
- LRRM—Labor Relations Reference Manual
- OSH—Occupational Safety and Health Cases
- Pens. & Ben. Rep.—Pension and Benefits Reporter
- WH—Wage and Hour Cases

The views expressed in the treatise do not necessarily represent the views of all the authors, contributors, reviewers, or editors; or of any federal, state, or local agency; or of any other organization. Rather, they are simply the collective, but not necessarily the individual, views of the authors, contributors, reviewers, and editors. Identification of the affiliations of the authors, contributors, reviewers, and editors who worked on this treatise is for informational purposes only and does not constitute an official endorsement of the information contained in this treatise by any of the organizations with whom they are affiliated. The authors, contributors, reviewers, and editors participated in this project on a personal, pro bono basis and not as representatives of their employers.

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<sup>60</sup>The Wayback Machine is available at <http://archive.org/web/web.php>. With the Wayback Machine, after you enter the URL you are looking for, if archived versions of the web page exist, the versions likely will be from different months and/or years. On some occasions, a version from a particular month and year might not be accessible, in which case you should try the links for earlier versions of the archived page. It will be interesting to see how the May 2014 decision of the European Court of Justice (ECJ), in *Google Spain SL v. Agencia Española de Protección de Datos*, No. C-131/12 (E.C.J. May 13, 2014), holding that “search engine[s] [are] obliged upon request to remove links from a person’s name to third-party information if that information is ‘inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue,’” will affect archival sites such as the *Wayback Machine*. Peter Coy, *Europe’s “Right to Be Forgotten” Ruling Is Unforgettably Confusing*, BLOOMBERG-BUSINESSWEEK (May 15, 2014), [www.businessweek.com/articles/2014-05-15/europes-right-to-be-forgotten-ruling-is-unforgettably-confusing](http://www.businessweek.com/articles/2014-05-15/europes-right-to-be-forgotten-ruling-is-unforgettably-confusing) (includes link to the ECJ’s decision). See also Margaret Sullivan, *Make No Mistake, but if You Do, Here’s How to Correct It*, N.Y. TIMES, Jan. 16, 2013, available at <http://publiceditor.blogs.nytimes.com/2013/01/16/make-no-mistake-but-if-you-do-heres-how-to-correct-it> (noting that both *The New York Times* and *The Washington Post* have firm policies against “unpublishing,” meaning removing a story entirely from the Web”).

Due to the large number of individuals involved in preparing this treatise and the different times at which drafts of the various chapters and state law summaries were completed, the editors, without consultation with specific authors, contributors, or reviewers, may have made some changes that they felt were necessary to provide a clear, balanced, and consistent presentation throughout the treatise or to supplement the text with additional resources and cross references. In the end, as editor-in-chief, I am ultimately responsible for any errors, omissions, or failures to achieve the hoped-for clarity, balance, and consistency, and I apologize in advance for any such failings and request readers (and for that matter, authors and contributors) to bring those matters to my attention.

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