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STRAIGHTWASHING THE CENSUS

KYLE C. VELTE*

Abstract: This Article examines the “straightwashing” of the census through the “Identity Undercount”—the failure of the state to collect sexual orientation and gender identity (SOGI) population data in government surveys such as the Census. The Identity Undercount, while counting the literal bodies of LGBT people, erases their lived identity. For many in the LGBT population, their lived identity and reality is one of poverty and powerlessness, a reality contrary to the widely accepted narrative that the LGBT population is more affluent and powerful than the rest of the population. Because federal and state governments rely on population data to drive policy decisions about the allocation of $675 billion in federal funds, most of which is apportioned to anti-poverty programs, the straightwashing of government data does real harm to LGBT people in poverty. If policymakers cannot see the problems, they cannot craft meaningful policy solutions or modify existing policies to meet the needs of the LGBT population. Because data are tied to resource allocation, the Identity Undercount results in resource deserts where LGBT people do not get critical and necessary services. The Article argues that the government should collect SOGI population data and that the near-complete failure to do so makes the state an active participant in creating and sustaining institutionalized poverty for LGBT people.

INTRODUCTION

“What’s measured is what matters when it comes to public policy.”

On March 23, 2016, in a hastily-convened special session lasting only twelve hours and “rife with procedural irregularities,” the North Carolina leg-

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* Associate Professor, University of Kansas School of Law. My thanks go to the many colleagues who provided feedback at the Chicagoland Junior Scholars Workshop, the University of Missouri School of Law Scholarship Colloquium, the Washburn University School of Law Scholarship Colloquium, the ClassCrits Conference WIP Session, and the AALS Section on Sexual Orientation and Gender Identity Emerging Voices session. Additional thanks to Lee Carpenter, Katie Eyer, Justin Levitt, and Jordan Blair Woods for their thoughtful feedback. Finally, thanks to the University of Kansas School of Law for its support of this project as well as to my research assistants, Diana Jarek and Cara Beck.

islature passed the Public Facilities Privacy & Security Act, more commonly known as HB 2.\(^3\) Passed in response to a lesbian, gay, bisexual, and transgender (LGBT) antidiscrimination ordinance enacted by the City of Charlotte, HB 2 repealed all local ordinances throughout the state, prohibited the passage of such protections in the future, and required transgender people to use public restrooms based on sex assigned at birth rather than gender identity.\(^4\) North Carolina was not an outlier as several other state legislatures introduced over two-hundred anti-LGBT laws in 2016.\(^5\)

Pro-equality organizations immediately filed a lawsuit to challenge HB 2.\(^6\) One issue that these organizations faced was that they could not allege with certainty in their complaint the number of LGBT people living in North Carolina. In the words of one advocate: “It’s not OK that I can’t tell you exactly how many LGBT people there are in North Carolina.”\(^7\) When civil rights attorneys challenge laws that discriminate against LGBT people, knowing the number of LGBT people impacted by the law is important to the strength of the legal claims and to the power of the story told by the litigation.

The number of LGBT people in North Carolina and, indeed, the number of LGBT people in the United States as a whole is not known with certainty because the federal government does not collect comprehensive data on sexual orientation or gender identity in the Census or any other major government survey. Such data are necessary not only to fight back against the recent wave of anti-LGBT bills, but as a matter of economic justice for the LGBT community.


\(^3\) See generally Kyle C. Velte, Fueling the Terrorist Fires with the First Amendment: Religious Freedom, the Anti-LGBT Right, and Interest Convergence Theory, 82 BROOK. L. REV. 1109 (2017) (describing HB 2’s history and impact).


\(^7\) See generally Samantha Allen, Why We Need an LGBT Census, DAILY BEAST (Oct. 7, 2016), https://www.thedailybeast.com/why-we-need-an-lgbt-Census [https://perma.cc/A4TG-FHV5] (quoting Laura Durso, a senior director at the Center for American Progress, who stated “[i]t really kills me that we’re having these consequential policy debates and I can’t put a number on how many people are affected”).
The U.S. government uses data collected through surveys such as the U.S. Census and the American Community Survey (ACS) to drive policy decisions concerning the allocation of over $675 billion in federal spending, most of which is apportioned to anti-poverty programs. It uses this data to assess the effectiveness of anti-poverty programs such as Temporary Aid to Needy Families, Medicaid, and food stamps, including their effectiveness with respect to different demographic groups including race, ethnicity, and gender. But the data neither track these programs nor make policy decisions based on sexual orientation and gender identity (SOGI), two other important demographics, because such data are largely absent from major government surveys.8

Many scholars have written about the differential undercount—a white-washing of the Census by which African Americans, Hispanic Americans, and Asian Americans have not been counted at all.9 This Article examines what I call the “Identity Undercount”—the failure of the state to collect SOGI data. It is a “straightwashing” of the Census. In contrast to the differential undercount,

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8 The 2020 U.S. Census will permit cohabitating same-sex couples to choose between “same-sex husband/wife/spouse” or “same-sex unmarried partner.” While this is a positive change, it leaves out single LGBT people, LGBT people who are in non-cohabitating relationships, and bisexual people in different-sex relationships. See Hansi Lo Wang, 2020 Census Will Ask About Same-Sex Relationships, NPR (Mar. 30, 2018), https://www.npr.org/2018/03/30/598192154/2020-Census-will-ask-about-same-sex-relationships [https://perma.cc/C92B-CGP9].

9 See, e.g., Manav Bhatnagar, Identifying the Identified: The Census, Race, and the Myth of Self-Classification, 13 TEX. J. ON C.L. & C.R. 85, 103 (2007) (“The mere existence of racial categories has drawn criticism from the anti-classification camp, which alleges that continued racial data collection stunts the development towards a race-blind society. There is also an anti-subordination argument to be made, since the ambiguous boundaries of the current racial categories, complicated by logistical difficulties in conducting the census, lead to a differential undercount that disproportionately affects minority groups.”); Molly Danahy & Danielle Lang, Distortion in the Census: America’s Oldest Gerrymander?, 49 U. MEM. L. REV. 1065, 1066–67 (2019) (“Decade after decade, the census disproportionately undercounts minority communities. This bias in the results is termed the ‘differential undercount.’ Moreover, the census also miscounts incarcerated individuals in their prison cells rather than their home communities. This practice also disproportionately impacts minority representation. Despite these representational harms, there has been little to no remedy for that undercounting and miscounting in the redistricting context.”) (footnotes omitted); Nathaniel Persily, Color by Numbers: Race, Redistricting, and the 2000 Census, 85 MINN. L. REV. 899, 903 (2001) (“Because [the differential undercount] represents a particular bias in the data as opposed to an inaccuracy randomly distributed throughout the population, the differential rather than net undercount preoccupies those concerned about the census’ effect on equal representation for minorities.”) (footnote omitted); Benjamin J. Razi, Census Politics Revisited: What to Do When the Government Can’t Count?, 48 AM. U. L. REV. 1101, 1109–10 (1999) (“The differential undercount problem is more troubling than the undercount of the population as a whole because the consistent undercounting of minority groups threatens to make hollow the most basic promises of our democracy. . . . In addition, the differential undercount causes inequities that are more tangible as well. These problems include the under-representation of minority communities in Congress and in state legislatures, and the inequitable distribution of funds under government programs to minority communities.”) (footnotes omitted); see also Definitions, U.S. CENSUS BUREAU, https://www.census.gov/coverage_measurement/definitions/ [https://perma.cc/S63N-6VGE].
which fails to count the literal bodies of people of color, the Identity Undercount, while counting the literal bodies of LGBT people, erases their lived identity. Policymakers ignore the needs of the LGBT community, particularly the needs of LGBT people in poverty, because the Identity Undercount renders these needs invisible.10

The Trump Administration’s recent decision to reject proposed SOGI questions from the 2020 Census and the ACS—which is a component of the Census—received widespread attention in the press and in social media.11 Many critics of this decision focused on the symbolic effect of the decision—when one is not counted as a matter of data, one does not count as a matter of morality or humanity. While visibility is important for such symbolic reasons, it is also important as a matter of policy, power, and economic justice.

There is a commonly accepted narrative that the LGBT community is more affluent than the rest of the population. Contrary to that narrative, however, data suggests that LGBT people live in poverty at rates disproportionate to the non-LGBT population.12 Moreover, LGBT people fare far more poorly than their non-LGBT counterparts on other measures including health outcomes,13 homelessness,14 employment discrimination,15 and truancy for LGBT

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13 See generally Travis Franklin Chance, “Going to Pieces” Over LGBT Health Care Disparities: How an Amended Affordable Care Act Could Cure the Discrimination That Ails the LGBT Communi-
students because of harassment and bullying in schools. LGBT people also are victims of hate crimes at higher rates than their non-LGBT counterparts. Many of these disparities lead to economic insecurity and oftentimes to poverty.

Because federal and state governments rely on survey data to inform a multitude of policy and programmatic decisions, the straightwashing of government survey data through the Identity Undercount does real harm to LGBT people. These harms include the denial of statutory civil rights protections, the dilution of political power, and the creation of maintenance of poverty in the LGBT community. Because there is a direct connection between the denial of civil rights and political power on the one hand and economic insecurity and poverty on the other, erasing LGBT identity from the Census leaves policymakers blind to the connected structural problems unique to the LGBT community. Unaware of these intersecting problems, policymakers cannot come up with meaningful solutions nor modify existing policies to meet the needs of the LGBT community. The lack of meaningful, pointed policies—such as job-training and placement programs for transgender workers, the passage of a federal LGBT employment antidiscrimination statute, greater access to culturally competent public health resources, and LGBT-specific housing programs—reveals an incomplete and inaccurate Census system and one that makes the state an active participant in the economic marginalization of LGBT people.

This Article addresses the connection between government data collection and LGBT poverty and power. It has three goals: (1) expose the lack of SOGI population data collection in government surveys and explain its significance to LGBT people; (2) add to existing scholarship debunking the persistent myth that these harms do not exist; and (3) call for meaningful, pointed solutions to address these harms.

16 See generally NPR, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS, at 2 (Nov. 2017) [hereinafter DISCRIMINATION IN AMERICA] https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf [https://perma.cc/5NUY-SVNH] (describing survey results finding 59% of LGBTQ people believe they have fewer employment opportunities because of their SOGI and finding that 50% of LGBTQ people believe they are paid less than non-LGBTQ employees).

15 See generally Hannah Hicks, Note, It’s All in the Family: LGBT Youth Homelessness and Family Conflict Intervention, 7 ALA. C.R. & C.L. L. REV. 311, 320 (2016) (“LGBT youth are particularly vulnerable in [juvenile] proceedings because of their high rates of family conflict and truancy, which often stems from discrimination or bullying at school.”).

14 See, e.g., Mollie Reilly, The Criminal Justice System Disproportionately Targets LGBT People, Study Finds, HUFFINGTON POST (Feb. 25, 2016), https://www.huffingtonpost.com/entry/lgbt-criminal-justice-system_us_56ce3108e4b03260bf756d5c [https://perma.cc/CX9E-VP7K] (stating that LGBT people are “at a higher risk of becoming homeless or turning to criminal activity”).

of LGBT wealth and power; and (3) add to existing scholarship that exposes
government population data collection as a tool used by the state to create
identity, as well as a “method of population management that distributes life
chances.”

The Article proceeds in five parts. Part I provides an overview of the
“why” and “how” of government data collection. Part II makes the case for
the Identity Undercount. Part III debunks the widely-held belief that LGBT
Americans are overwhelmingly wealthy and politically powerful. Part IV
describes the harms of the Identity Undercount. Part V addresses common
critiques to government data collection and argues that the government should
begin collecting SOGI data on all surveys while offering possible avenues to
force such collection. The Article concludes with a description of future work
on this issue and notes that where data are tied to resource allocation, the con-
tinued deliberate failure to collect SOGI data makes the state an active partici-
pant in creating and sustaining institutionalized poverty for LGBT people.

I. THE HOW AND WHY OF GOVERNMENT POPULATION DATA COLLECTION

This Part provides an overview of why the government collects data and
how it goes about collecting that data. Section A discusses the U.S. Constitu-
tion’s Census Clause and the government surveys utilized to collect this infor-
mation. Section B discusses additional reasons for the government to collect
census data including for legal and policy reasons. Section C discusses the
specific population data the Census and the ACS collect, how they have ex-
cluded certain groups, and how it has led to discrimination particularly in the
areas of race, sex, and ethnicity. These summaries set up and frame Parts II
through IV, which describe the pervasive poverty in the LGBT population and
the Identity Undercount that makes the government an active participant in the
creation and continuation of that poverty.

19 See infra notes 28–93 and accompanying text.
20 See infra notes 94–143 and accompanying text.
21 See infra notes 144–253 and accompanying text.
22 See infra notes 260–317 and accompanying text.
23 See infra notes 320–387 and accompanying text.
24 See infra notes 27–59 and accompanying text.
25 See infra notes 60–70 and accompanying text.
26 See infra notes 71–93 and accompanying text.
A. How the Government Collects Data: The Census and the American Community Survey

The Census Clause of the U.S. Constitution directs that an “actual Enumeration” of the U.S. population “shall be made” every ten years. Two purposes were originally served by this provision: apportionment of congressional representatives and levying taxes. Tying taxation to population incentivized states to make accurate population reports because overstating population, which would benefit states in congressional apportionment, meant higher taxes. The taxing purpose of the Census Clause, however, became moot in 1916 with the adoption of the Sixteenth Amendment. As a result, apportionment of congressional representatives today is the only express constitutional mandate fulfilled by the Census.

During its early years, the Census was administered in an ad hoc manner, either by executive order or through the enactment of legislation. The administration of the Census was centralized in 1902, when Congress passed the Permanent Census Act, establishing the Census Office. In 1954, Congress passed a second piece of legislation relating to the Census, Title 13 of the U.S. Code, which codified the administrative particulars for executing the Census.

27 There are a number of other significant government surveys that collect a myriad of data. Examples include the American Housing survey, which gathers data concerning the nation’s housing inventory, the National Crime Victimization Survey, which tracks the types and frequency of crimes and the demographics of its victims, and the Current Population Survey (CPS), which collects labor and employment data, including demographic information of respondents in and out of the workforce. See U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY, https://factfinder.census.gov/faces/nav/jsf/pages/programs.xhtml?program=ahs [https://perma.cc/858s-WAZQ]; BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY, https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245 [https://perma.cc/LR9D-NNTY]; BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, https://www.bls.gov/cps [https://perma.cc/GUR9-CB5B]. This Article focuses on the Census and the ACS because they are the largest government surveys to collect population data and thus the most impactful concerning the distribution of federal funds, which often is population-based. The Article discusses other government surveys where relevant to its thesis and arguments.

29 See id.
31 Id. at 407; see also U.S. CONST. amend. XVI (granting Congress the “power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration”).
33 Id.
34 Id. at 1100–01.
Congress is tasked with conducting the Census each decade “in such Manner as they shall by law direct.” Through passage of Title 13, Congress delegated this responsibility to the Department of Commerce’s Census Bureau. The President appoints the Secretary of Commerce and the Director of the Census Bureau, subject to the Senate’s advice and consent. The task of enumeration consists of three parts: “count each person whose usual residence is in the United States; count that person only once; and count him or her at the right location, where the person lives all or most of the time.”

From 1940 through 2000, the Census was comprised of two parts—the short form and the long form. The short form collected basic demographic data such as “age, sex, race, and ethnicity (Hispanic or non-Hispanic) of each person in a household.” The long form, which was sent to a sampling of homes, asked more detailed questions regarding socioeconomic status and housing. The government gathered these data to inform policy decisions for a number of legislative and program purposes. Based on privacy concerns about the questions that arguably fell outside the scope of the constitutionally required enumeration mandate for the Census, beginning with the 2010 Census, the long form was dropped and only the short form was distributed.

The ACS stepped in to replace the long form and was uncoupled from the short form Census. This permitted the Census Bureau to concentrate its de-

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35 U.S. CONST. art. 1, § 2.
36 See, e.g., Pixler, supra note 32, at 1100–01; Stansbury, supra note 30, at 406.
38 Id.
39 Id. During this period, and up until 2003, sodomy laws were constitutional. See Lawrence v. Texas, 539 U.S. 558 (2003) (finding a Texas statute criminalizing sodomy to violate the Due Process clause of the Constitution and overturning Bowers v. Hardwick, 478 U.S. 186 (1986), overruled by Lawrence, 539 U.S. 558). As such, LGBT-focused data collected during this time centered on tracking sodomy prosecutions and sexual psychopath prosecutions. See, e.g., William N. Eskridge, Jr., Hardwick and Historiography, 1999 U. ILL. L. REV. 631; William N. Eskridge, Jr., Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy 1880–1946, 82 IOWA L. REV. 1007 (1997); William N. Eskridge, Jr., Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961, 24 FLA. ST. U. L. REV. 703 (1997); Woods, supra note 10. This legacy of pre-Lawrence prosecutions is an important historical backdrop to the privacy and confidentiality concerns that some have expressed in contesting the collection of data by the government. See discussion infra Part V, Section B.
40 WILLIAMS, supra note 37, at 3.
41 The long form was sent to roughly one in six households. See generally U.S. CENSUS BUREAU, SUBJECTS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY 1 (2017) [hereinafter CENSUS BUREAU, SUBJECTS PLANNED], https://www2.Census.gov/library/publications/decennial/2020/operations/planned-subjects-2020-acs.pdf (providing background to the Census and the ACS and discussing plans for the information to be collected for the 2020 Census); Pixler, supra note 32, at 1103 (discussing the Census and its relationship to policy objectives).
42 See WILLIAMS, supra note 37, at 3.
43 Id.; see also Pixler, supra note 32, at 1098.
44 WILLIAMS, supra note 37, at 3; see also Pixler, supra note 32, at 1098.
cennial Census effort on the constitutional requirement of enumeration while also providing, via the ACS, more current and comprehensive information than any prior Census. Instead of being coupled with the Census, the ACS is sent to different segments of the American population on a monthly basis, thus generating timely and continuous data to the government. The ACS is the most significant survey after the short form Census. The nationwide, continuous ACS “provide[s] communities with reliable and timely demographic, social, economic, and housing data for the nation, states, congressional districts, counties, places, and other localities every year.” The information obtained from the ACS is processed and disseminated to make data-driven decisions at the federal, state, and local levels. It has an annual sample size of about three million addresses across the United States and Puerto Rico and includes both housing units and group quarters (e.g., nursing facilities and prisons). The ACS data are issued annually. It is mandatory to respond to the ACS, even though the information collected by the ACS is outside of the narrow mandate of the Constitution’s Census Clause, which only requires enumeration—the count of everyone residing in the United States on census day. The content of both the Census and the ACS is reviewed regularly to ensure that the federal government requires the data collected. To that end, agencies provide information to the Census Bureau and U.S. Office of Management and Budget outlining their data requirements. The Census Bureau uses this information to evaluate the content being contemplated for the next Census and ACS. Federal law requires that Congress approves all new questions and all questions have some connection with federal funding. In other words, there must be a programmatic need for particular kinds of data before questions col-

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45 See CENSUS BUREAU, SUBJECTS PLANNED, supra note 41, at 1.
46 WILLIAMS, supra note 37, at 3.
50 See CENSUS BUREAU, SUBJECTS PLANNED, supra note 41, at 1.
51 See Pixler, supra note 32, at 1099.
52 See CENSUS BUREAU, SUBJECTS PLANNED, supra note 41, at 1.
53 Id.
54 Id.
55 Pixler, supra note 32, at 1107–08.
lecting such data will be approved and added to the Census or ACS.56 Notably, the ACS is the “only data-gathering effort that collects information from enough people to produce comparable data for every geographic area recognized by the Census Bureau.”57

The 2020 Census will ask questions in seven different categories while the 2020 ACS will ask questions in thirty-three different categories.58 The only questions in the 2020 Census and ACS that collect some SOGI data are the “relationship” questions that have options for “same-sex husband/wife/spouse” and “same-sex unmarried partner.”59 As explained below, these questions fail to capture data about many within the LGBT community—uncoupled LGBT people, polyamorous people, bisexual people in different-sex relationships, and transgender and nonbinary people. Thus, the data that are collected are inadequate to inform LGBT-rights advocates as they lobby for more expansive LGBT civil rights or to inform politicians and policymakers about the real needs of the entire LGBT community as they craft laws, policies, and regulations that impact that community.

B. Why the Government Collects Data

In addition to fulfilling a constitutional mandate for congressional apportionment, federal and state governments, at every level, use Census data for other reasons. Data from the Census and ACS, as well as from other federal surveys, are used to influence law and policy. Most importantly, such data are used by states to draw legislative voting districts and to make decisions about the allocation of government funds.60 The latter purpose—funding decisions, particularly those to fund anti-poverty programs—is the focus of this Article.

Because the United States functions primarily as an administrative state, the importance and impact of the government’s use of Census and other survey data to make programmatic funding decisions cannot be understated.61 The use

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57 CENSUS BUREAU, SUBJECTS PLANNED, supra note 41, at 1.
58 See infra Appendix A.
59 See CENSUS BUREAU, SUBJECTS PLANNED, supra note 41, at 13.
60 Id.
of such data to drive dollars to some programs and away from others has a broad and deep impact on most Americans. Census and ACS data determine the annual distribution of more than $675 billion of federal funding that federal, state, and local governments use to fund social safety net and equal opportunity programs. Population-based grant programs are numerous, “ranging from Medicaid to highway planning and construction programs.” Other programs funded with Census- and ACS-directed money include “education grants, affirmative action programs, community reinvestment and development, public health programs, mortgage lending, low-income housing tax credits, voting rights, employment rights, legislative redistricting, government contracting, food stamps, and veteran benefits.” A majority of the $675 billion is allocated for anti-poverty programming.

Census data are also used to evaluate compliance with and to enforce federal civil rights law, such as the Civil Rights Act and the Voting Rights Act, which prohibit discrimination in employment, credit, and housing. Federal agencies that use Census data to monitor enforcement of civil rights law include the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD). Additionally, federal agencies use Census data to make policy decisions. For example, HUD makes decisions about the placement of low-income and public housing based on ra-

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64 Stansbury, supra note 30, at 408.


cial Census data as well as to “monitor the agency’s attempts to diversify traditionally monoracial neighborhoods.”68

With their variety of applications, the Census and ACS are some “of the most coordinated efforts by the federal government.”69 As a result, they are also a powerful force in the creation of the administrative state as they have the ability to allocate life chances through the distribution of federal dollars.70

C. Census and ACS Focus on Particular Subpopulations

This Section describes three specific data points currently collected, in different degrees of completeness, by the Census and the ACS: sex, race/ethnicity, and SOGI. It highlights that the Census and ACS historically have collected data on sex, race and ethnicity—identities that have powerful prominence in structural discrimination. The government in fact collects this data for the very reason that discrimination based on sex, race, and ethnicity is pervasive throughout society.71 In short, data on sex, race, and ethnicity illuminate continuing patterns of discrimination and thus allow policymakers to adjust laws, policies, regulations, and the enforcement of civil rights law to address the ongoing discrimination. Without data on sex, race, and ethnicity, the scope of structural discrimination would remain hidden and such discrimination would remain resistant to intervention and correction.72 Conversely, collecting such data allows the government to actively engage in remediating such discrimination and its impacts.

The Census collects population data on sex. It does so for several reasons. First, the data are used to plan and fund government programming.73 Second, they are used to evaluate the fairness and equity in government programs and services for men and women.74 Third, the data are used to enforce Title IX as

69 Pixler, supra note 32, at 1103.
70 See generally Spade, supra note 18, at 747 (discussing gender classification and the administrative state).
74 Id.
well as to “allocate funds to institutions of higher learning that increase participation, particularly of minority women, in scientific and engineering programs under the Higher Education Act.” Finally, the data are used to assess employment practices under the Civil Rights Act of 1964 and used by the EEOC to promulgate and assess equal employment opportunity guidelines. Eight different federal agencies rely on these data to analyze and enforce at least fourteen different federal laws.

The Census also collects data on race and ethnicity. The first three Censuses (1790, 1800, and 1810) collected data only on three categories: free white people, “all other free persons,” and slaves. These categories were mandated by the then-controlling Article 1, section 2, clause 3 of the U.S. Constitution. Censuses since that time have varied on the different categories of race and ethnicity data collected. For example, the ethnicity category of “Hispanic, Latino, or Spanish origin” was added to the Census in 1970. The 2020 Census will have fifteen racial categories.

Race and ethnicity population data are collected for several reasons. First, they are required for certain government programs. Second, they are “critical factors in the basic research behind numerous policies, particularly for civil rights.” Third, they are used to “evaluate government programs and policies to ensure they fairly and equivalently serve the needs” of all races and ethnicities, as well as to “monitor compliance with antidiscrimination laws, regulations, and policies” such as the Voting Rights Act and the Civil Rights Act of 1964—regarding employment opportunities. Fourth, states often use the data to ensure proper drawing of legislative districts in the redistricting process.
For example, the data inform the evaluation of federal affirmative action guidelines under the Federal Equal Opportunity Recruitment Program and help identify whether and which populations are not receiving necessary medical services pursuant to the Public Health Service Act.\textsuperscript{88} Six different federal agencies rely on Census and ACS data to analyze and enforce fifteen federal laws.\textsuperscript{89}

The collection of population data for these historically marginalized groups supports the collection of SOGI population data in future Census and ACS surveys. It is beyond dispute that LGBT people have been subjected to institutional discrimination for generations. From the “Lavender Scare” in the 1950s, to the criminalization of same-sex sodomy until 2003,\textsuperscript{90} to the exclusion from the institution of civil marriage until 2015,\textsuperscript{91} to present day where in twenty-six states an LGBT person may still be fired from their job based on their SOGI status,\textsuperscript{92} LGBT marginalization and discrimination cannot be denied.\textsuperscript{93} As a result, the federal government’s surveys should treat SOGI like sex, race, and ethnicity, especially on the two most important surveys, the Census and the ACS. As described below, it is not.

II. THE IDENTITY UNDERCOUNT: SEXUAL ORIENTATION AND GENDER IDENTITY

The federal government has taken the position that it “is interested in better understanding the sexual and gender minority community in order to better serve their needs” and acknowledged that this “cannot be accomplished without better data on the population.”\textsuperscript{94} While a handful of specifically-targeted surveys do collect some SOGI data, neither the Census nor the ACS has ever included a SOGI population category.\textsuperscript{95} Section A provides an overview of the

\textsuperscript{88} Id.

\textsuperscript{89} See CENSUS BUREAU, SUBJECTS PLANNED, supra note 41, at 12.


\textsuperscript{93} See, e.g., Obergefell, 135 S. Ct. at 2596 (describing the historic discrimination against LGBT people).


background and history of SOGI data and its relationship to the Census. Section B discusses SOGI and the 2020 Census and ACS controversy. Section C discusses the present situation of SOGI data collection and the government surveys that collect information regarding same-sex couples. Section D discusses how these uncoordinated surveys collect an incomplete picture of the SOGI population, thus creating an Identity Undercount.

A. The History of SOGI Exclusion from the Census

The Census added the relationship category of “unmarried partner” in 1990 and the ACS added it as a category in 2005. This category presented the first opportunity to count same-sex couples who resided together and thus indirectly (and incompletely) obtained a partial count of LGBT people.

In the 1990 Census, if a same-sex couple chose the “spouse” option, the Census Bureau left the choice of “spouse” intact but changed the sex of the partner, so that the couple was counted as a different-sex couple. Similarly, if a same-sex couple checked the “unmarried partner box” in the 1990 Census, the Census Bureau “treated these entries as if they were in error—recording the gender of one partner so that the couple showed up in data files as a different-sex couple.” The Bureau ceased recoding same-sex couples who checked the “unmarried partner” box on the 2000 Census (though it continued to recode same-sex couples that checked the “married” box).

Prior to the recognition of nationwide marriage equality in 2015, some same-sex couples who were married under state law opted to report themselves as “married” on the 2010 Census. When this occurred, the Census Bureau

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96 See infra notes 100–115 and accompanying text.
97 See infra notes 116–128 and accompanying text.
98 See infra notes 129–138 and accompanying text.
99 See infra notes 139–143 and accompanying text.
101 See LGBTQ CENSUS ADVOCACY, supra note 56.
102 See CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS, supra note 100, at 1.
103 See LGBTQ CENSUS ADVOCACY, supra note 56.
104 See id.
105 See CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS, supra note 100, at 1. No states recognized marriage equality until 2003, so data from the 2000 Census reported all same-sex couples as unmarried couples. See id. at 1, 3.
would edit the response from “spouse” to “unmarried partner.” For the 2010 Census, which was taken at a time when a handful of states recognized marriage equality, the Census Bureau still edited responses: “When a name had at least a 95 percent chance of being male, but female was reported, for example, the gender of that spouse was changed.” These actions by the Census bureau constitute a literal straightwashing of the Census data.

In 2014, the Census Bureau started a content review of the ACS that presented an opportunity for LGBT-rights advocates to push for the inclusion of SOGI questions in that important, ongoing part of the 2020 Census. As a result of that advocacy, the Census Bureau’s National Advisory Committee recommended that SOGI questions be included and several federal agencies jointly published a best-practices report concerning the collection of such data. In 2015 and 2016, there was visible progress toward including SOGI questions in the 2020 Census and ACS. Specifically, (1) two prominent LGBT advocates and researchers were added to one of the Census Bureau’s national advisory committees, (2) federally-convened working groups began studying the need for, and feasibility of, collecting SOGI population data, and (3) advocates for SOGI data collection worked to educate federal agencies about the need for such data.

Because of this advocacy, in 2016, several agencies began to include questions soliciting SOGI data in their surveys. For example, the Bureau of Justice Statistics added SOGI questions to the National Crime Victimization Survey, including SOGI questions directed at sixteen- and seventeen-year-old respondents. In addition, HUD and HHS added SOGI questions. During the Obama Administration, HUD, the Centers for Medicare and Medicaid Ser-
vices, and the Environmental Protection Agency each requested that the Census include the collection of SOGI data.\textsuperscript{115}

\section*{B. The 2020 Census and ACS Controversy}

Prior to 2017, the Census Bureau was moving toward including SOGI questions in the ACS and was seriously considering the inclusion of SOGI questions in future Censuses.\textsuperscript{116} In March of 2017, as required by the Census Act,\textsuperscript{117} the Trump Administration submitted its census plan to Congress, a proposal that \textit{included} SOGI questions in an appendix submitted with the plan.\textsuperscript{118} Several hours later, the Administration, through the Bureau, reversed course, stating that the inclusion of the SOGI questions was done “in error” and was “inadvertent.”\textsuperscript{119} Soon thereafter, the SOGI questions were scrubbed from the online version of the plan submitted to Congress.\textsuperscript{120} The director of the Census

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\item \textsuperscript{116} See U.S. CENSUS BUREAU, SURVEYS AND PROGRAMS CONTRIBUTING TO SAME-SEX COUPLES (2018) [hereinafter CENSUS BUREAU, SURVEYS AND PROGRAMS], https://www.Census.gov/topics/families/same-sex-couples/surveys-programs.html [https://perma.cc/R28C-56TT] (outlining the existing surveys and census that collect data on same-sex couples and showing that collection of such data is feasible from a methodological perspective). Various task forces, focus groups, and working groups constituted by the federal government have studied the need for and feasibility of collecting SOGI data in government surveys; these task force reports identified challenges in crafting SOGI questions and obtaining responses, but their overall conclusion has been that SOGI data collection is feasible. See RENEE ELLIS ET AL., OFFICE OF SURVEY METHODS RESEARCH, U.S. BUREAU OF LABOR STATISTICS, ASSESSING THE FEASIBILITY OF ASKING ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY IN THE CURRENT POPULATION SURVEY: RESULTS FROM COGNITIVE INTERVIEWS 1 (2018) https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/rsm2018-06.pdf [https://perma.cc/AN88-XXHU] (“In 2016, the Department of Labor sponsored research to explore the feasibility of adding sexual orientation and gender identity (SOGI) questions to the Current Population Survey (CPS).”).
\item \textsuperscript{117} See 13 U.S.C. § 141(f)(1) (2018). This section requires that subjects to be included in the next census be submitted to Congress no later than three years before the census date. \textit{Id.} The specific questions that will be used must be submitted to Congress no later than two years before the census data. \textit{Id.} § 141(f)(2).
\item \textsuperscript{118} See Laurie Kellman, \textit{Census Suggests Counting LGBTQ, Then “Corrects” and Deletes}, ASSOCIATED PRESS (Mar. 29, 2017), https://www.apnews.com/619704d091da4b54968a23720aade0f [https://perma.cc/65SY-LH7H] (“The U.S. Census Bureau said Wednesday that it mistakenly proposed counting LGBTQ Americans and has since ‘corrected’ the proposal to remove the gender and sexuality category.”).
Bureau concluded that it was unnecessary from a federal standpoint to revise the Census to incorporate SOGI data.121

The Census Bureau plans to include options for “same-sex husband/wife/spouse” and “same-sex unmarried partner” in the 2020 Census.122 This represents progress for the LGBT community because the government will use the data to plan and fund programs that more accurately serve communities including through better understanding and serving housing needs.123

While this is an improvement upon prior versions of the Census and ACS, it only collects partial population data regarding the LGBT community and thus provides an incomplete picture of the needs of this community. The lack of a full and accurate picture is particularly deleterious for LGBT people in poverty because middle- and upper-class people are more likely to get married than people living in poverty.124 Additionally, collecting data on same-sex households does not directly measure the SOGI for the individuals in those households. For example, if one of the partners is transgender or bisexual, that may not be captured by the current questions.125 Instead, these data provide only an indirect estimate of the LGBT population.126 In short, these data are under inclusive. They fail to capture same-sex couples who do not reside to-
gether and they miss all of the LGBT people who are not in a relationship.127 When it comes to poverty in particular, the data do not allow researchers to investigate patterns of poverty among individual LGBT people, leaving a wide swath of the LGBT community unaccounted for when researchers study LGBT poverty.128 This lack of population data means that researchers and lawmakers alike are missing the complete and accurate picture of what poverty looks like in the LGBT population.

C. The Current State of SOGI Data Collection

Data about same-sex couples are collected in five government surveys. First, the ACS collects data on same-sex couples, which are available from 2000 to the present.129 A category for same-sex married partners was added to the ACS in 2013.130 Second, the American Housing Survey collects housing data and relevant demographic information for Congress and policy experts to utilize when developing national housing policy.131 Third, the CPS is a monthly survey sponsored by the Bureau of Labor that collects data on labor and employment.132 It surveys about sixty thousand households per month and has collected data concerning same-sex couples since 1995.133 Fourth, the Census has collected data regarding same-sex couples residing in the same household from 1990 to the present.134 Finally, the SIPP tracks the success of government assistance programs and income distribution.135 SIPP further provides information about the economic well-being of the country over time and it has collected data on same-sex couples since 1996.136 As noted above, however, data about same-sex couples are under inclusive, leaving out a majority of LGBT people.137

128 See BADGETT ET AL., supra note 12, at 8.
129 See CENSUS BUREAU, SURVEYS AND PROGRAMS, supra note 116.
131 See CENSUS BUREAU, SURVEYS AND PROGRAMS, supra note 116.
132 See id.
133 See id.
134 See id.
135 See id.
136 See id.
137 See supra notes 124–128 and accompanying text.
A total of eleven federal surveys collect some data regarding the sexual orientation of individuals. These are specialized surveys and therefore do not produce an overarching and complete picture of the LGBT population.

**D. The Identity Undercount**

The foregoing illustrates that no federal government survey collects comprehensive SOGI population data. Instead, the current landscape is characterized by a piecemeal and uncoordinated approach to gathering some but not all SOGI data, and thus, is insufficient to inform wide-reaching population-based policies to track and counter the political and economic marginalization of LGBT people. As the Center for American Progress and Movement Advancement Project report explained the situation:

Researchers, policymakers, and advocates struggle to understand the needs of the LGBT community and how changes in policy are impacting the LGBT community because of a lack of data. Very few large, nationally representative surveys ask about sexual orientation and none ask about gender identity. . . . There is great need for more granular data—disaggregated by, for example, gender/gender identity and race/ethnicity—on the LGBT population. More data on subpopulations is critical to developing a comprehensive understanding of, and then addressing, the needs of all members of the LGBT population. . . . A lack of disaggregated data can render invisible the experiences and needs of LGBT subpopulations.

Researchers need surveys that collect SOGI data to accurately assess health, school environments, economic security, and housing and homelessness to better understand the impact that certain policies have on LGBT people and

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138 See WORKING GRP., CURRENT MEASURES, supra note 94, at 5. The federal surveys that collect data regarding individual sexual orientation are the following: Health Center Patient Survey, National Adult Tobacco Survey, National Health and Nutrition Examination Survey, National Health Interview Survey, National Inmate Survey (NIS), National Crime Victimization Survey (NCVS), National Survey of Family Growth, Youth Risk Behavior Surveillance System, National Survey on Drug Use and Health, National Survey of Older Americans Act Participants, and Behavior Risk Factor Surveillance System (BRFSS). See id. All but two of these surveys, the NIS and the NCVS, which are collected by the Department of Justice (DOJ), are collected by the Department of Health and Human Services. Id. In breaking down the data collected, three of these surveys collect information regarding gender attraction, four collect information regarding sexual behavior, and six collect information regarding gender identity. Id.

the disparities that exist.\textsuperscript{140} It is thus important to note that these surveys do not collect information that is as critical as that collected and as used for policy decisions in the Census.\textsuperscript{141}

This lack of comprehensive SOGI population data results in the Identity Undercount, a systemic erasure of LGBT identity that results in political and economic marginalization. As long as such data goes uncollected, the marginalization and the state’s role in creating that marginalization will remain largely invisible.

Social scientists and LGBT-rights advocates alike have criticized the lack of demographic, population-based data about LGBT people in the United States.\textsuperscript{142} Without a clear picture of the LGBT community, namely its numbers and its social, political, and economic challenges, it is impossible to craft a meaningful agenda for change in these three key areas of civic life.\textsuperscript{143}

\section{III. The Myth of LGBT Affluence and Power}\textsuperscript{144}

For most of the post-Stonewall era, LGBT people living in poverty are commonly grouped together with either the LGBT community or the “poor” community and thus “rarely are identified as a distinct group.”\textsuperscript{145} In recent

\begin{footnotesize}
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\item \textsuperscript{140} Id. (noting that “[m]ore precise data collection, stronger samples, and larger sample sizes will allow us to precisely examine disparities facing LGBT people and specifically, how different LGBT communities are impacted by different disparities”).
\item \textsuperscript{141} See Disappearing Act, supra note 120 (noting that these groups were not “doing anything comparable to the importance of the Census info”).
\item \textsuperscript{142} See, e.g., BRADFORD ET AL., supra note 127, at 7 (discussing the limitations of the Census regarding same-sex couples and the LGBT community).
\item \textsuperscript{143} See Marcus & Goldberg, supra note 120 (noting that professionals in various sectors of society are unable to provide for the community without accurate data); see also Leonore F. Carpenter & R. Barrett Marshall, Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof, 24 WM. & MARY J. WOMEN & L. 5, 23–24 (2017) (describing that data collection regarding police harassment does not account for transgender victims of such harassment and explaining its negative consequences for the transgender community); Woods, supra note 10, at 708 (explaining “there is a scarcity of publicly available data involving LGBT offenders at several points of the criminal process including detention and arrest, charging, conviction, sentencing, and probation and parole” and arguing that such “statistical gaps make it difficult to identify and to address LGBT-based inequality at these different points of the criminal process”).
\item \textsuperscript{144} The data about the LGBT community that Parts II and III describe and discuss should not be mistaken for comprehensive, meaningful data about that community. Rather, because there is no such set of comprehensive data, the data described in these sections represent only estimates of the community and its subparts. The data are pulled largely from studies conducted by the Williams Institute at the University of California, Los Angeles and a 2012 Gallup Poll. Because exact data about the LGBT community does not yet exist, the estimates that emerge from the Williams Institute and Gallup form the basis for analysis and recommendations contained in this Article. See generally, Maria Dominguez, Update: LGBTQ Seniors and Federal Surveys, QNOTES (June 15, 2017), https://goqnotes.com/51138/update-lgbtq-seniors-and-federal-surveys/ [https://perma.cc/SXW9-LRXG] (explaining that some institutions have been able to provide meaningful data on the LGBTQ population).
\item \textsuperscript{145} Eric Heinze, Gay and Poor, 38 HOW. L.J. 433, 434 (1995).
\end{itemize}
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years, however, scholars and researchers have given more attention to poverty within the LGBT community with results that are both staggering and disheartening. Section A discusses media and its influence on portraying the myth of LGBT people as wealthy and powerful. Section B provides information regarding the reality of economic security in the LGBT community and covers topics such as education, housing, and food insecurity.

A. The Myth

There are very few images of LGBT poverty in the mainstream media. In contrast, a narrative of gay affluence and power persists, fueling a persistent stereotype that LGBT people are wealthy, powerful, and affluent. The stereotype also asserts that LGBT people are “well-educated, professional elite, occupying positions of power and influence in the workplace and society at large.” One common source of this stereotype is the typical portrayal of the LGBT community in the mass media predominantly through imagery of gay, white, professional men with no children. From the 1990s television sit-com *Will & Grace*, to Ellen DeGeneres, Rachel Maddow, Anderson Cooper, Laverne Cox, and the named plaintiff in the 2015 marriage equality case, Jim Obergefell, such imagery is ubiquitous and enduring. Scaffolding this myth of affluence and power is the “DINK” myth—the myth that LGBT people have “double income, no kids” with “no family responsibilities to hamper their job advancement or accumulation of wealth.” Further scaffolding the myth of affluence and power is the myth of the conspicuous consumer, specifically that LGBT people are self-indulgent, focused on consuming goods, and have a taste for high-end goods.

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147 See infra notes 149–167 and accompanying text.

148 See infra notes 168–253 and accompanying text.

149 See Sears & Badgett, supra note 146.

150 See id.


152 See Sears & Badgett, supra note 146.


154 BADGETT, supra note 151, at 1.

155 Id. at 2 (describing the stereotype that LGBT people are “hedonistic and consumption-oriented, an ideal niche market for upscale products”).
This trope has been utilized in litigation by parties seeking to deny LGBT people basic civil rights. For example, in the litigation of *Romer v. Evans*, the State of Colorado asserted that LGBT people are disproportionately wealthy as compared to the general population and thus do not suffer any negative consequences from anti-LGBT discrimination.\(^{156}\) The narrative of gay affluence often is woven into the narrative that LGBT people are seeking “special rights” when they seek civil rights, such as through passage of antidiscrimination laws.\(^{157}\)

Some judges have bought into the myth of gay affluence. In his *Romer* dissent, Justice Scalia reasoned that LGBT people have significant political leverage because of their high income levels—as a result, he found Colorado’s Amendment 2 to be “an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense” and instead, “merely denies them preferential treatment.”\(^{158}\) On his way to this conclusion, Justice Scalia also opined that it was “nothing short of preposterous” for the majority to describe LGBT people as “politically unpopular” because LGBT people are “a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.”\(^{159}\)

How, when, and where did these myths originate? The gay wealth and power myth is long-held; writers in the ancient Roman era asserted that “homosexuality was a weakness of the upper classes.”\(^{160}\) Additionally, the fact that LGBT people may hide their sexual orientation by staying in the “closet” means that many non-LGBT people are only aware of and familiar with very prominent, and thus powerful or wealthy, LGBT people.\(^ {161}\) More recently, the myth has been sustained by researchers, even LGBT-friendly researchers, who select a homogenous “sample” population to study—one that is disproportionately of a high economic status and not representative of a majority of the LGBT population.\(^ {162}\) Finally, some of this misinformation comes from marketing surveys that have found lesbian, gay, and bisexual people to make up one


\(^{158}\) *Romer*, 517 U.S. at 645–46, 653 (Scalia, J., dissenting).

\(^{159}\) *Id.* at 652.

\(^{160}\) BADGETT, supra note 151, at 2.

\(^{161}\) *Id.* (explaining that “[f]or many decades, the best known lesbian and gay people were part of a cultural elite, including artists and intellectuals such as Oscar Wilde, John Maynard Keynes, Walt Whitman, and Gertrude Stein”).

\(^{162}\) *Id.* (citing Alfred Kinsey as an example of such a well-intentioned researcher).
of society’s more affluent communities that is able to gain a presence through its financial capabilities. The respondents to these surveys are resoundingly not representative of the LGBT population.

The promulgation and perpetuation of the myth of LGBT affluence is harmful to the LGBT community in several ways. Just as the “stereotypes of high incomes for Jewish families are a staple of anti-Semitism,” the myth of gay affluence is a mainstay of the rhetoric harnessed by opponents of LGBT equality. In fact, the myth of gay affluence has taken on trope-like status in legislative debates about antidiscrimination protections for LGBT people. The argument is made that LGBT people are wealthier than most non-LGBT people and thus have unfettered spending power and political influence. As a result, they are not victims of discrimination so any claim for LGBT antidiscrimination law is unnecessary at best or a claim for “special rights” at worst.

B. The Reality

As noted above, federal population data collection efforts do not include SOGI per se; rather, a few federal surveys collect data about same-sex couples. Because of a lack of meaningful SOGI data, the full picture of poverty in the LGBT community is not accurately painted. The description of LGBT poverty in this Part is pulled largely from work done by the Williams Institute, an LGBT think tank based at the UCLA School of Law. Researchers at the Williams Institute rely on all available data, albeit scarce and incomplete, including data collected by non-governmental organizations such as Gallup and the National Center for Transgender Equality, and surveys conducted by states, such as the California Health Interview Survey. The description below is thus the best picture we currently have of LGBT poverty, but it is neither complete nor accurate because of the paucity of data that realistically could only be collected by the federal government. The limited studies that have been done

164 BADGETT, supra note 151, at 3.
165 See Badgett, supra note 163, at 112.
166 See BADGETT, supra note 151, at 3.
167 See Badgett, supra note 163, at 111.
170 BADGETT ET AL., supra note 12, at 1.
171 Id. at 25 (recommending “an expansion of the number of state and federal surveys” that collect SOGI data because “[t]aking this crucial step” will provide information necessary for researchers to “draw firmer, more generalizable conclusions about” the entire LGBT community).
show remarkable levels of poverty across the LGBT community. These studies include data on same-sex couples as well as individual members of the LGBT communities.

This reality of economic insecurity in the LGBT community shatters the myth of gay affluence and power. Although LGBT people experience poverty based on non-SOGI factors, such as race, ethnicity, and disability, institutionalized discrimination against LGBT people plays a significant part in the disparate poverty rates in the LGBT community. Both as couples and individually, LGBT people are more vulnerable to poverty. Economic insecurity, rather than affluence, is the reality for most LGBT people, even after researchers control for other factors understood to influence the likelihood of being in poverty. The summaries below describe the situation of subpopulations of the LGBT community who are living in poverty, as well as the areas of life in which structural discrimination contributes to LGBT poverty.

Moreover, there is a troubling disconnect between the reality of LGBT poverty and the public policy discussions, including legislative debates, about poverty in general. Legislatures and policymakers alone are not to blame; until very recently, poverty has not been a top policy item for national LGBT organizations. It was not until 2009 that a national LGBT organization published a study addressing LGBT poverty.

172 See generally id. at 1–3.
173 See generally Leonore F. Carpenter, The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality, 13 STAN. J. C.R. & C.L. 255, 274–75, 286 (2017) (describing the high poverty rates in the LGBT community and calling on the LGBT-rights movement to include access to free or low-cost direct legal services programs as a primary movement goal).
174 See, e.g., NICO SIFRA QUINTANA, CTR. FOR AM. PROGRESS, POVERTY IN THE LGBT COMMUNITY 2 (2009), https://americanprogress.org/wp-content/uploads/issues/2009/07/pdf/lgbt_poverty.pdf (noting that “future implementation of progressive equal rights initiatives could have a sweeping effect on the reduction of poverty in the LGBT community” and explaining that institutional inequalities such as the pre-Obergefell exclusion from civil marriage and the lack of federal employment discrimination protections contribute to LGBT poverty).
175 See generally BADGETT ET AL., supra note 12 (reviewing data of LGBT couples and individuals and finding that there are significant rates of poverty among these groups).
177 See generally QUINTANA, supra note 174, at 1 (“Despite recent advances, LGBT civil rights are rarely addressed in policy debates surrounding poverty.”).
178 See ADLER, supra note 124, at 1–3.
1. Lesbian and Bisexual Women

Studies directed only at lesbian women reveal an intersection between gender and sexual orientation, resulting in what amounts to a financial penalty for lesbian women. Women in this population aged eighteen to forty-four are poorer than heterosexual women across all data sets. White lesbian and bisexual women face two levels of employment discrimination, sex-based and sexual-orientation-based, and lesbian and bisexual women of color are subject to a third level of discrimination that is race-based. Employment discrimination further contributes to economic insecurity and poverty. Twenty-four percent of lesbians and bisexual women live in poverty, while only 19% of their heterosexual counterparts live in poverty.

2. Gay Men

A growing body of data reveals the extent of the myth of gay affluence: gay men earn from 13% to 32% less than their heterosexual counterparts. The “equal pay for equal work” rallying cry most often associated with the gender pay gap thus must also be used to educate the public and lawmakers alike about the plight of gay men in the workplace. Lower wages due to discrimination in the workforce further contribute to economic insecurity and poverty.

3. Female Same-Sex Couples

Using data gleaned from the “unmarried partner” category of the 2000 Census, the Williams Institute concluded that 6.9% of lesbian couples lived below the federal poverty line, as compared to 5.4% of married heterosexual couples. Couples with children also revealed disparities in poverty levels. 9.4% of lesbian couples with children lived below the poverty line, compared with 6.7% of heterosexual couples. Finally, older lesbian couples (above the age of sixty-five) were poorer than their heterosexual counterparts, with 9.1% of such lesbian couples living below the poverty line, as compared to 4.6% of

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180 See PAYING AN UNFAIR PRICE 2015, supra note 139, at 1 (stating that “America’s 5.1 million LGBT women face added challenges and worries not just because of their gender, but also because of who they are and whom they love”).
181 QUINTANA, supra note 174, at 2.
182 See Sears & Badgett, supra note 146.
183 Badgett, supra note 163, at 115.
184 Sears & Badgett, supra note 146.
185 Badgett, supra note 163, at 113.
186 Id. at 114.
187 See ALBELDA ET AL., supra note 179, at ii.
188 See id. at 11.
married heterosexual couples.189 “After adjusting for certain characteristics . . . the study found that lesbian couples were significantly more likely—and gay male couples slightly more likely—to be in poverty than heterosexual married couples with the same characteristics.”190 Finally, the income of lesbian couples is far below the income of heterosexual or gay male couples.191

4. Children of Same-Sex Couples

The adults in same-sex couples with children who all reside in the same household are much more likely to be in poverty than similarly situated different-sex married couples.192 Overall, children of same-sex couples live in poverty at twice the rate of children in different-sex married couple households.193

Male same-sex couples with children in the household are most vulnerable to poverty with 19.2% of them in poverty.194 Female same-sex couples with children residing in the household are the next-most-likely to live in poverty, with 15.4% living in poverty.195 In contrast, married couples with children residing in the household have a poverty rate of only 9.3%.196 Race plays a role in the overall higher rate of poverty for children of same-sex parents, as the highest poverty rate involves children who are African-American and live with two male fathers.197 Lastly, single LGBT parents who are raising children are three times more likely to have an annual income close to the poverty line.198

5. Transgender People

One study has described the “rampant economic marginalization” experienced by transgender people; high poverty and unemployment rates and employment discrimination are key features.199 In fact, employment discrimina-
tion against transgender people is often blamed for the high rates of unemployment in that community.\textsuperscript{200} Low earnings are also a problem for transgender people as data have shown that 22\% to 64\% report earnings less than $25,000 per year.\textsuperscript{201} Another study showed that “transgender people are four times as likely to have a household income under $10,000 and twice as likely [as their cisgender counterparts] to be unemployed.”\textsuperscript{202}

Homelessness is also higher for transgender people than cisgender people. In one study from California, 20\% of survey participants revealed that they had been homeless since coming out as transgender.\textsuperscript{203} Gender-segregated homeless facilities with transphobic placement policies turn transgender people away from homeless shelters, which often are the last resource between a transgender person and homelessness.\textsuperscript{204}

6. Same-Sex Couples of Color

African-American same-sex couples are particularly vulnerable to poverty, as they have a poverty rate at least twice the rate of different-sex, married African-American couples.\textsuperscript{205} Moreover, African-American men in same-sex couples are more than six times more likely to be poor than similarly situated white men.\textsuperscript{206} African-American women in same-sex relationships are three times more likely to be poor than are similarly situated white women.\textsuperscript{207} Hispanic people in same-sex couples are more likely to be poor than their white same-sex couple counterparts.\textsuperscript{208} These disparities reveal the intersection of race-based and SOGI-based discrimination.\textsuperscript{209}

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\item \textsuperscript{200} GAY AND LESBIAN TASK FORCE, PRELIMINARY FINDINGS, NATIONAL TRANSGENDER DISCRIMINATION SURVEY 1 (2009)).
\item \textsuperscript{201} Id.
\item \textsuperscript{202} See Sears & Badgett, supra note 146.
\item \textsuperscript{203} QUINTANA, supra note 174, at 3 (citing a study completed in 2009 by the Transgender Law Center titled the “State of Transgender California”).
\item \textsuperscript{204} See, e.g., Dominic Holden, Now Trump Wants to Allow Anti-Transgender Discrimination in Homeless Shelters, BUZZFEED NEWS (May 22, 2019), https://www.buzzfeednews.com/article/dominicholden/homeless-shelters-transgender-rule-trump [https://perma.cc/9MJF-VJYJ] (noting that allowing homeless shelters to turn away transgender people “could put transgender people at a higher risk for homelessness and abuse”).
\item \textsuperscript{205} BADGETT ET AL., supra note 12, at 11.
\item \textsuperscript{206} Id. at 11–12 (providing that 3.1\% of white men in same-sex households are poor, while 18.8\% of black men in same-sex households are poor).
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Id.
\item \textsuperscript{209} DISCRIMINATION IN AMERICA, supra note 15 at 1 (“LGBTQ people of color are at least twice as likely as white LGBTQ people to say they have been personally discriminated against because they are LGBTQ when applying for jobs and when interacting with police, and six times more likely to say..."
7. Regional Differences

Just as many believe—incorrectly—that LGBT people are affluent in relation to the heterosexual population, many also incorrectly believe that LGBT people live exclusively in urban areas. Professor Luke Boso describes the consequences of this “urban bias,” including, among others, the fact that it “masks the vulnerability and needs of those who fail to subscribe to urbanized norms.”

As Boso points out, LGBT people reside in rural and urban areas, and the geographic distinction of where LGBT people live affects their likelihood of living in poverty. Regarding same-sex couples, living in large, metropolitan areas decreases their risk of poverty as compared with their different-sex couple counterparts, while living outside of large or medium-sized cities increases that risk.

8. LGBT Schoolchildren

School climate has a direct connection to educational outcomes, which in turn impacts long-term economic stability. When children feel unsafe in school, or where they are actually unsafe, learning suffers. Studies show that many LGBT schoolchildren feel unsafe or are unsafe in American schools. This homo- and trans-phobic climate manifests itself through peer harassment, bullying, and assault, as well as through structural discrimination, such as transphobic bathroom policies that force transgender schoolchildren to use gender-

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211 Id. at 576.

212 Id. at 608–09; see also QUINTANA, supra note 174, at 3 (noting that geography impacts the poverty level of LGBT people).

213 BADGETT ET AL., supra note 12, at 12. Living in rural areas appears to be “particularly precarious for women in same-sex couples, whose poverty rates jump from 4.5% in a large city to 14.1% in a rural (nonmetropolitan) area.” Id. In addition, men in same-sex couples experience considerably increased rates of poverty when they reside in rural areas as “10.2% of men in same-sex couples in a small metropolitan area are poor compared with only 3.3% of men in same-sex partnerships in a large metropolitan area.” Id.

214 PAYING AN UNFAIR PRICE 2015, supra note 139, at 17 (“Education remains a cornerstone in achieving economic security. . . . Yet for LGBT women, unsafe and unwelcoming schools can make obtaining a quality education more difficult.”).

215 See id. at 17–18.

216 Id. at 1.
segregated facilities consistent with the sex listed on their birth certificate.\textsuperscript{217} A hostile school climate leads to academic underachievement through both absenteeism and an inability to focus while in school.\textsuperscript{218} LGBT students are also disciplined more often and more harshly than their straight and cisgender counterparts.\textsuperscript{219} Academic underachievement, in turn, leads students to drop out of school or to end their education upon completion of high school, which in turn leads to unemployment or employment in low-wage jobs with few or no benefits.\textsuperscript{220}

LGBT youth in the foster care and juvenile justice systems may be difficult to place and often face caseworkers and other institutional actors that lack the cultural competence to properly address the SOGI-related issues of these youth; this is particularly true of transgender youths in these systems.\textsuperscript{221} These negative educational and employment outcomes are even worse for African-American students.\textsuperscript{222} The poverty-related consequences of unsafe schools include higher costs for LGBT students who seek safer educational environments and suffer from reduced graduation rates, which is connected to diminished employment prospects and lower earnings.\textsuperscript{223}


\textsuperscript{218} Paying An Unfair Price 2015, \textit{supra} note 139, at 18.

\textsuperscript{219} Id.

\textsuperscript{220} See, e.g., Moodie-Mills & Mitchum, \textit{supra} note 176, at 6–7 (discussing the impact of harassment on LGBT students); see also CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, \textit{Paying An Unfair Price: The Financial Penalty For LGBT Women In America} 60 (2014) [hereinafter Paying An Unfair Price 2014], http://www.lgbtmap.org/file/paying-an-unfair-price-full-report.pdf [https://perma.cc/UK78-6QS3]; Hutchinson, \textit{supra} note 157, at 1032–33 (“School officials who fail to address homophobic bullying cause many gay and lesbian children to drop out of school or to suffer from emotional distress. Their exclusion from education also renders them susceptible to poverty and related conditions, such as homelessness.”) (footnote omitted).

\textsuperscript{221} See, e.g., Human Rights Campaign, LGBTQ YOUTH IN THE FOSTER CARE SYSTEM 2–3, https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf; See generally Sonja Marett, Note, Beyond Rehabilitation: Constitutional Violations Associated with the Isolation and Discrimination of Transgender Youth in the Juvenile Justice System, 58 B.C. L. REV. 351 (2017) (discussing the vulnerabilities and discrimination transgender youth face in the juvenile justice system). Moreover, some LGBT youth who are homeless or in the foster care system may not be in school, but nevertheless face similar issues of cultural competency and gender-segregation policies that are trans-exclusive. See generally Woods, \textit{supra} note 10, at 671–72 (discussing the challenges that homeless and foster care LGBT youth face).

\textsuperscript{222} Moodie-Mills & Mitchum, \textit{supra} note 176, at 7.

\textsuperscript{223} See Paying An Unfair Price 2015, \textit{supra} note 139, at 17–18 (discussing the economic losses that result as a consequence of unsafe schools).
9. Housing

Housing discrimination based on SOGI is legal in twenty-six states.\(^{224}\) While there are some protections from SOGI discrimination in several federal housing programs, there is no federal law that explicitly forbids relying on SOGI to evict a tenant, refuse to rent to a prospective tenant, or refuse a housing loan.\(^{225}\) Data confirm that such discrimination is occurring. HUD found that 16% of the time, landlords preferred to rent housing to a different-sex couple over a same-sex couple.\(^{226}\) LGBT elders who are in same-sex couples also face housing discrimination as 48% of LGBT same-sex couples experienced “adverse treatment compared to an opposite-sex couple when exploring a move to an independent living, continuing care or assisted living facility.”\(^{227}\) Transgender women also face housing discrimination, perhaps more than other segments of the LGBT population. In one study, 19% of transgender women reported being refused a home or apartment, while 11% reported they had been evicted; as a result of this discrimination, 50% of transgender women reported they had moved to other housing, as compared to 34% of transgender men who said they had been forced to move due to discrimination.\(^{228}\) The poverty-related consequences of housing discrimination include housing instability that leads to time in emergency shelters, higher housing costs or less desirable housing options, longer and more costly housing searches, and increased loan and insurance costs.\(^{229}\)

Finally, homeless shelters—which are often sex-segregated—are often the last social support between a person living in economic security and falling into poverty, and they consistently turn away transgender clients based on outdated policies that require clients to be placed based on their sex assigned at birth rather than their gender identity.\(^{230}\) Housing insecurity increases the risk of living in poverty. Because of the dearth of SOGI population data necessary to paint an accurate picture of how housing and shelter discrimination impacts LGBT people, it is presently impossible to enact robust protective policies or institute new housing programming to adequately address this rampant discrimination.

\(^{224}\) See Equality Maps: Non-Discrimination Laws, supra note 92.

\(^{225}\) See PAYING AN UNFAIR PRICE 2014, supra note 220, at 22. In 2012, HUD issued regulations that expressly prohibit SOGI and marital status discrimination in federally funded housing programs. See id.

\(^{226}\) Id. at 19.

\(^{227}\) Id. at 21.

\(^{228}\) PAYING AN UNFAIR PRICE 2015, supra note 139, at 19.

\(^{229}\) See PAYING AN UNFAIR PRICE 2014, supra note 220, at 21, 23.

\(^{230}\) PAYING AN UNFAIR PRICE 2015, supra note 139, at 19.
10. Food Insecurity

LGBT adults experience food insecurity—not having enough money to purchase food for themselves or their family within the last year—at a higher rate than their non-LGBT counterparts.\(^{231}\) These LGBT adults are thus more likely to have participated in the federal government’s Supplemental Nutrition Assistance Program (SNAP), administered by the U.S. Department of Agriculture (USDA).\(^{232}\) Having such uncertain access to adequate food is not evenly experienced across the LGBT community. Rather, LGBT women, LGBT youth, LGBT people of color, unmarried LGBT people, LGBT people without a college degree, and LGBT people raising children are more vulnerable to food insecurity than other segments of the LGBT population.\(^{233}\) With respect to data collection, the USDA conducts ongoing surveys to monitor food insecurity.\(^{234}\) The largest and most significant survey is the CPS Food Security Supplement, conducted once a year by the U.S. Census Bureau as a supplement to the CPS.\(^{235}\) Neither of these two surveys collects SOGI data, meaning that “researchers cannot analyze these data to examine food insecurity among LGBT-headed households.”\(^{236}\)

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Why does much of the LGBT community live in poverty at levels higher than the general population? Why does it lack political power to change these circumstances? Without more data—the type that could be provided by the Census and the ACS—scholars, advocates, and policymakers are left using incomplete data to hypothesize about the answer to these questions.\(^{237}\)

Most agree that a confluence of several factors contributes to higher levels of LGBT poverty, including (until 2015) the denial of access to civil marriage, employment discrimination, the denial of family benefits, and the gen-

\(^{231}\) See Taylor N.T. Brown et al., Williams Inst., Food Insecurity and SNAP Participation in the LGBT Community 3 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf (noting that “LGBT adults are 1.62 times more likely than non-LGBT adults, on average, to report not having enough money for the food that they or their families needed at some point in the last year”).

\(^{232}\) See id. at 4.

\(^{233}\) See id. at 2–3.

\(^{234}\) Id. at 4.

\(^{235}\) See id. (explaining that the CPS Food Security Supplement’s goal is to obtain “information regarding disparities across social statuses such as race, ethnicity, gender, and age”).

\(^{236}\) Id. While the USDA monitors food insecurity with other federal surveys, one of which collects sexual orientation—but not gender identity—data (the NHIS), this only allows for some analysis of food insecurity by sexual orientation. See id.

\(^{237}\) See, e.g., Stephanie Coontz, Why American Families Need the Census, 631 Annals Am. Acad. Pol. & Soc. Sci. 141, 148 (2010) (contending that “the very categories we measure [in federal surveys] are in transition” and that “we need to keep fine-tuning, rethinking, and updating the categories that are being measured” so that meaningful laws and policies can be enacted).
eral denial of full civil rights. The lack of opportunity to legally marry meant that many LGBT people could not take advantage of the economic benefits of interdependence that comes with marriage. In addition, LGBT youth make up a disproportionate portion of the youth homeless population because their parents hold biases, and thus, reject them and kick them out of their homes. All of these factors contribute to the cycles of poverty that LGBT people encounter.

The wage gap and unemployment of LGBT people, along with employment discrimination that is still legal in most states, leads to lack of health insurance (or sporadic health insurance coverage), reduced savings, housing insecurity, and general economic insecurity. Barriers to employment for transgender people are often compounded: not only do they face legal employment discrimination in many states, many states also make it extremely burdensome to change the gender marker on their identity documents, making it even more difficult to secure employment. In addition, LGBT people have a higher risk of being homeless, beginning in their youth.

Discrimination in health care, especially for transgender people, also creates poverty. Because of discriminatory laws and policies—such as public accommodation laws that allow physicians to turn away LGBT would-be patients and insurance policies that exclude medical procedures that are critical for a transitioning transgender person—securing competent and consistent healthcare often is a challenge for LGBT people. In one study, 56% of lesbian, bisexual, and gay respondents, and 70% of transgender respondents reported discrimination.

238 See, e.g., QUINTANA, supra note 174, at 1 (explaining how civil rights protections can improve economic security for LGBT people); see also Heinze, supra note 145, at 445 (noting that “[m]any gays take dead-end jobs to avoid reviews which might reveal their minority status and result in their dismissal”).

239 Heinze, supra note 145, at 442.

240 Id. at 443 (“Estrangement from one’s family means the loss of a critical safety net in a society that still expects the family to act as an insurer in times of need.”); see also TRAN, supra note 198, at 4; PAYING AN UNFAIR PRICE 2015, supra note 139, at 4 (“The economic challenges facing LGBT women are the direct result of discriminatory and outdated laws.”).

241 MOODIE-MILLS & MITCHUM, supra note 176, at 4; see also PAYING AN UNFAIR PRICE 2014, supra note 220, at 19–21.

242 PAYING AN UNFAIR PRICE 2015, supra note 139, at 6, 16 (“Transgender women face added challenges because they often cannot obtain accurate identity documents necessary for work or may be forced to come out as transgender at work. . . . Non-matching identification . . . makes employment more difficult and can expose transgender people to harassment, violence, job loss, and other problems. For transgender women, this added barrier can exacerbate economic insecurity already experienced based upon race, sexual orientation, or immigration status.”).

243 See, e.g., TRAN, supra note 198, at 4.

244 See PAYING AN UNFAIR PRICE 2014, supra note 220, at 27.

245 PAYING AN UNFAIR PRICE 2015, supra note 139, at 22–23. In another study, “24% of transgender women had been refused health treatment because of their gender identity compared to 20% of transgender men.” Id.
in a healthcare environment. Poverty-related consequences of health care discrimination include delayed (and thus often more expensive) medical care, higher out-of-pocket expenses for medical care, and lost productivity at work due to more work absences. Lack of access to medical care leads to both economic insecurity and to negative health outcomes, which in turn can impact employability, thus creating a cycle of economic insecurity and poverty. Limited data on these health care disparities mean that meaningful policies, laws, or other interventions cannot be adequately crafted. Adding SOGI questions to health surveys such as the BRFSS is critical for advocates, researchers, policymakers, and service providers who need comprehensive and accurate data on the LGBT population to craft effective responses to these disparities.

In short, “legalized employment, housing, and healthcare discrimination” all combine to create a disproportionate poverty level for many LGBT people. These same factors lend themselves to diminished political power. The LGBT community’s fraught (and longstanding) relationship with law enforcement is another source of powerlessness. From the beginning of the modern LGBT civil rights movement at the Stonewall Inn to the modern-day phenomenon of “walking while trans,” the mistreatment of the LGBT community by the law enforcement community sets up a power dynamic—one in which the LGBT community is further marginalized—that diminishes LGBT political power.

246 See PAYING AN UNFAIR PRICE 2014, supra note 220, at 28.
247 See generally PAYING AN UNFAIR PRICE 2015, supra note 139, at 4, 23 (noting that healthcare discrimination may lead to patients delaying finding care and “leading to more costly treatment later and potential loss of wages resulting from a more serious illness”).
249 See TRAN, supra note 198, at 4.
250 See, e.g., Jacqueline Jones, The Late Twentieth-Century War on the Poor: A View from Distressed Communities Throughout the Nation, 16 B.C. THIRD WORLD L.J. 1, 1 (1996) (“Rather than grappling with the social manifestations of large-scale economic change, politicians and policy makers persist in focusing on the alleged immorality of the poor. Indeed, beleaguered poor women of all races now serve as scapegoats for all of the nation’s ills, real and imagined.”).
252 Carpenter & Marshall, supra note 143, at 13–14 (noting that transgender women are “pervasively profiled as sex workers by the police based on their gender expression, and then subjected to aggressive, often abusive, policing practices based upon law enforcement’s perception that they are universally and perpetually engaged in sex work”).
IV. THE HARM OF THE IDENTITY UNDERCOUNT

The harms of the Identity Undercount cannot fully be known—precisely because we do not have the data needed to fully know them. A number of reasonable inferences may, however, be made based on what we do know now. This Part describes those harms, which include dignitary, economic, and political harms. Section A discusses how the Identity Undercount perpetuates stereotypes contributing to the negative consequences of LGBT equality. Section B discusses programs that address inequalities in society and how LGBT people are often left out from the benefits that these programs provide. Section C discusses the negative impact of exclusion on the dignity of LGBT people. Sections D and E discuss additional harms to LGBT populations, including the economic and political consequences. Section F discusses the particular harms that LGBT people of color experience as a result of the Identity Undercount. Section G concludes this Part by explaining the societal consequences of not accurately collecting SOGI data.

A. The Perpetuation of Harmful Stereotypes

The Identity Undercount perpetuates a set of stereotypes that are deeply harmful to addressing LGBT equality, including economic inequality. These include most conspicuously the stereotype that LGBT people are wealthy, as well as the stereotype that LGBT people only live in urban environments. This latter stereotype leads to an “urban bias” by courts and LGBT advocates alike.

The perpetuation of this set of stereotypes contributes to the continuation of anti-LGBT discrimination, which in turn contributes substantially to LGBT poverty. Put another way, the perpetuation of these stereotypes makes the need for LGBT-inclusive antidiscrimination laws seem less pressing because LGBT people are presumed to be doing well. Moreover, it obscures the need for the enforcement of the LGBT-inclusive antidiscrimination laws that do exist. Finally, it allows opponents of LGBT equality to minimize the harm to LGBT people. For example, religious exemptions are thought not to harm LGBT people because they are presumed to live in large metropolitan areas where they

254 See infra notes 260–261 and accompanying text.
255 See infra notes 262–277 and accompanying text.
256 See infra notes 278–289 and accompanying text.
257 See infra notes 290–312 and accompanying text.
258 See infra notes 313–314 and accompanying text.
259 See infra notes 315–317 and accompanying text.
260 See Boso, supra note 210, at 564–67 (noting that “[s]exual minorities are uniquely vulnerable in many small towns and rural areas” because of this “urban bias”).
have access to a multitude of providers of goods and services. In failing to collect SOGI population data—data that almost certainly will show disproportionate levels of poverty in the LGBT community, as well as significant numbers of LGBT people living in rural communities—the state actively constructs poverty among the LGBT community. Failing to facilitate and aggressively pursue antidiscrimination measures targeted at the LGBT community, the state also perpetuates this poverty.261

B. Inability to Create or Modify (in Substance or Delivery Model) Programs Targeted at Population-Level Disparities

There are many programs targeted at population-level disparities in outcomes based on race and ethnicity as a result of Census population data collected for those groups. For example, with regard to population-level health disparities, the Center for Medicare and Medicaid Services uses racial and ethnic Census data, which “have revealed important differences in the extent and nature of disparities for different minority subgroups and the need to tailor interventions to specific subgroups.”262 More specifically, such data allow public health officials to identify risks for smoking, unsafe sexual practices, and environmental factors along racial and ethnic population-level lines for the purpose of “allocating health care resources and developing appropriate public health interventions.”263

Census and ACS racial and ethnic data are also used to compare educational outcomes of different racial and ethnic groups, including to measure the

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261 Of course, the passage and enforcement of LGBT antidiscrimination laws is just one piece of the puzzle to solving the problems of inequality and poverty, one that must co-exist with “integrated enforcement strategies that make the law come to life,” such as “legal services, administrative advocacy, public education, and publicly funded programs that increase access to jobs and services for” LGBT people. See Davis & Wertz, supra note 199, at 468. Simply put, an interdisciplinary approach to economic equality is the most comprehensive approach and more likely to succeed in realizing economic equality for LGBT people. Id. at 481. Multidisciplinary strategies include “advocacy, litigation, policy advocacy, community and movement building, and public education” that would result in a concrete, multifaceted program to fight LGBT poverty. Id. at 482–89. These strategies should include robustly enforcing antidiscrimination laws, creating programs for workforce development and job training that focus on challenges that LGBT people face in the workforce, as well as engaging in educational efforts aimed at LGBT people, attorneys, and judges. Id. Also integral to these efforts would be the institution of housing programs (or modification of existing ones) to focus on the particular barriers encountered by LGBT people. Id. Collecting SOGI data through the Census and ACS would provide a clear picture of the needs of the LGBT community for each of these coordinated strategies.


263 Id.
rates at which different races and ethnicities utilize educational programs and interventions, to track changes over time, and to assess such programs and interventions.\footnote{See, e.g., INST. OF EDUC. SCIENCES NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 36 (2016).}

The development of similar programs around LGBT disparities is substantially hindered by a lack of data about LGBT disparities. The incomplete data that do exist indicate, for example, disparities for LGBT schoolchildren and health disparities for LGBT people generally.\footnote{See supra notes 165–261 and accompanying text.} Without comprehensive data, the full scope of these disparities can neither be known nor used to inform decisions regarding interventions to disrupt those disparities.

Moreover, we currently do not know how many LGBT people living in poverty simply do not apply for government assistance because they fear discrimination.\footnote{PAYING AN UNFAIR PRICE 2015, supra note 139, at 35.} Coming out to intake or other staff at government assistant offices carries with it the risk of being turned away because of one’s SOGI status, a fear particularly salient in smaller and rural communities and for transgender people, who may not have consistent gender markers on their identity documents.\footnote{Id. (“These concerns may be justified in many cases, as there is no guarantee that frontline staff has received cultural competency training and have been made aware of program changes so they are able to effectively and courteously serve LGBT people.”).} To the extent LGBT people may experience stigma and discrimination within social services, they may be underutilizing the anti-poverty programs that in theory should be available to them.

For example, some homeless shelters turn away transgender people based on transphobic policies about placement in sex-segregated facilities.\footnote{See, e.g., Rachel D’Oro, Anchorage Shelter Seeks to Exclude Transgender People, U.S. NEWS & WORLD REPORT (Nov. 1, 2018), https://www.usnews.com/news/healthiest-communities/articles/2018-11-01/anchorage-shelter-seeks-to-exclude-transgender-people[https://perma.cc/3GFZ-NU6C] (reporting that a “faith-based women’s homeless shelter in Anchorage is suing to block the city from requiring it to accept transgender women, which it said would violate its religious beliefs”); Will Wrigley, District Homeless Shelter Being Sued for Turning Away Transgender Women: John L. Young Women’s Shelter Sued on Behalf of Lakiesha Washington, HUFFINGTON POST (Apr. 11, 2013), https://www.huffingtonpost.com/2013/04/11/district-shelter-transgender_n_3063608.html [https://perma.cc/P884-KD9J].} Moreover, the recent wave of cases seeking religious exemptions in public accommodations indicates that this is a likely phenomenon.\footnote{See D’Oro, supra note 268; Wrigley, supra note 268; see also, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719 (2018).} Federal and state governments often funnel funds to religious organizations to implement anti-poverty programs. This government-church partnership began with President Lyndon Johnson’s “war on poverty” campaign and con-
continues today. For example, Catholic Charities, a nonprofit, religiously-based group whose mission is to provide services to people in poverty, receives 65% of its annual budget from federal and state funding. Religiously-affiliated anti-poverty charities have thus become “an arm of the federal welfare state.”

The current wave of religious exemption cases, however, demonstrates that anti-poverty programs delivered via religiously-based organizations funded with federal money may seek to turn LGBT people away. Census and other government survey data about the number of LGBT people in poverty and the services they seek and receive (or do not receive) would shine a light on the extent to which LGBT people are denied such services through claims of religious exemption. This information could inform not only the federal government’s decision to give funding to faith-based organizations, but could also inform litigants, attorneys, and courts as they seek to answer the unanswered questions surrounding the claims for religious exemptions from antidiscrimination laws.

In sum, population data collection would allow us to better understand whether this phenomenon exists, either based on religious objections or secular homophobia/transphobia, and to address it to the extent it does.

Finally, some government programs that help alleviate poverty may be built on a model of heterosexual or marital parenting that may not serve LGBT parents and their children. For example, in families consisting of unmarried partners with children, one of whom is not a legal parent to the child, seeking

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271 See id.

272 See id.

273 See generally, e.g., Kyle C. Velte, All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes, 49 CONN. L. REV. 1, 3–7 (2016) (discussing religious protections and explaining their implications as an impediment to the development of antidiscrimination protections for LGBT people).

274 See, e.g., SEAN CAHILL ET AL., FENWAY INST., EXECUTIVE BRANCH ACTIONS PROMOTING RELIGIOUS REFUSAL THREATEN LGBT HEALTHCARE ACCESS 8 (2017), https://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Religious-Refusal-Laws-Policy-Brief.pdf (“It appears from the October 2017 memo [by Attorney General Jeff Sessions] that it would also support discrimination against LGBT people by a religious organization providing a social service or health care with federal funds.”); see also, e.g., D’Oro, supra note 268 (discussing a homeless shelter that is litigating against it having to allow transgender women, arguing that it is a violation of its religious beliefs).

275 See generally Disappearing Act, supra note 120 (“[E]rasure of data could mean agencies completely ignoring the LGBT community because, for example, they’re directing all of their housing or support services through religious organizations that historically have been hostile to LGBT people. You are in essence denying folks access to these programs.”).

276 See Masterpiece Cakeshop, Ltd., 138 S. Ct. at 1719.
child support from the non-legal parent is difficult if not impossible. We cannot know more about this phenomenon without data collection and thus cannot address such structural barriers that prevent LGBT parents, for example, from accessing resources to diminish poverty.

C. The Dignitary Harms of the Identity Undercount

The Identity Undercount erases the existence of LGBT people from the national community and the nation’s conscience. Including such data would make LGBT lives more visible and would normalize LGBT people and families. Invisibility is harmful. Omission from the Census and ACS “sends a wider and more profound message around erasure at a time when LGBT rights themselves are under attack.” The Identity Undercount creates LGBT invisibility because the identities counted in the Census not only reflect the reality of identity categories but also play a role in constructing that reality. Invisibility leads to ignorance, which in turn leads to discrimination and the under-servicing of LGBT Americans living in poverty. When a group is “otherized” to such an extent that the basic fact about the size of their community is unknown, that group becomes even less human and even more abstract, both of which make it easier to discriminate against that group. Visibility, in contrast, creates humanity and power. There is “a symbiotic relationship between categories for the tabulation of data and the processes of group consciousness and social recognition, which in turn can be reflected in specific legislation and social policy.”

Furthermore, coming out matters—for the LGBT individual’s emotional and mental health, their dignity, as well as for political power. Stories matter.

278 See, e.g., Wang, supra note 8 (“It really normalizes our experience on an American government form so that everybody looking at it and everybody filling it out sees that we exist . . . .”)
279 Teeman, supra note 121.
283 Mezey, supra note 65, at 1748 (citing SPOTLIGHT ON HETEROGENEITY: FEDERAL STANDARDS FOR RACIAL AND ETHNIC CLASSIFICATION 9 (Barry Edmonston et al. eds., 1996)).
Stories mobilize movements. Stories attract allies. LGBT stories cannot be fully told without SOGI Census population data.\(^{284}\) Moreover, the inclusion of SOGI questions on the Census and ACS sends a signal that LGBT lives matter and that they count. This message may further encourage more LGBT people to come out in other facets of their lives—beyond coming out in their response to the census question—an act central to self-autonomy and dignity.\(^{285}\)

We can therefore conceptualize the omission of SOGI questions from the Census and ACS as another version of the closet—the “Census closet”—not unlike the “case law closet” built by *Bowers v. Hardwick*.\(^{286}\) Like *Bowers*,\(^{287}\) the omission of SOGI questions on the Census and ACS renders the government an active participant in building a closet for LGBT people, which in turn denies them dignity and humanity.\(^{288}\) It is a redux of what scholars in the 1990s revealed, explained, and illuminated as “coerced invisibility.”\(^{289}\) This is administrative closeting, rather than legislative or judicial.

**D. The Economic Harms of the Identity Undercount**

The “life chances” the government distributes as a result of Census data are numerous. It does so through programs designed to increase access to the


\(^{285}\) Gorenberg, supra note 108 (citing Jeffrey Byrne for the proposition that coming out “not only essentially contributes to the individual’s psychological well-being, but also plays a central political role in the gay and lesbian community’s liberation[,] indeed, for gay and lesbian people, coming out is the key political strategy for changing attitudes and overcoming oppression”).


\(^{287}\) See Velte, supra note 90, at 75 (“*Bowers* had devastating consequences for LGBT people for the seventeen years that it remained binding precedent. Despite being a criminal law case, it was used in numerous civil cases to deny LGBT people protection from discrimination in housing, employment, the military, and parenting.”) (footnotes omitted).

\(^{288}\) Gorenberg, *Gay Rights as Human Rights*, supra note 284 (“None of us should be asked or forced to live our lives invisibly. Schools, employers and governments that impose invisibility continue to feed the fear of the unknown—and the well-documented and often tragic consequences that follow.”).

\(^{289}\) Jane S. Schacter, *Romer v. Evans and Democracy’s Domain*, 50 VAND. L. REV. 361, 369, 371 (1997) (“[Such invisibility] has high aggregate costs for gay men and lesbians, whose social presence is obscured and sometimes erased entirely under the force of this pressure. Gay inequality is thus critically structured and given shape by a legally and socially coerced marginalization and invisibility.”) (using Colorado’s Amendment 2 as an example of “coerced invisibility”). Other examples are the military’s “Don’t Ask, Don’t Tell” policy and the “Lavender Scare” of the 1950s. See Gorenberg, *Gay Rights as Human Rights*, supra note 284 (describing the work of William Adams Jr. and Bill Eskridge).
workforce, housing, health care, food, educational opportunities, and credit, to name just a few. \(^{290}\) But without inclusive data, policymakers, social service providers, and others are unable to know if these activities meet the needs of LGBT people and help them thrive. Without this information, stereotypes and myths may drive policies that impact LGBT people. \(^{291}\) Put another way, LGBT poverty—which could be ameliorated through government programs tailored to LGBT people—can put LGBT on different life paths, impacting their opportunities for education, employment, and marriage. \(^{292}\)

Discrimination in employment often leads to economic insecurity and poverty. Although there is no federal law that explicitly protects against SOGI discrimination in housing, employment, or public accommodation, some states do have such antidiscrimination laws. \(^{293}\) Moreover, some courts have held that Title VII, the federal law that prohibits sex-based employment discrimination, and Title IX, the federal law that prohibits sex-based educational discrimination by any school that receives federal funds, include SOGI discrimination within their protections. \(^{294}\) Without Census and ACS SOGI data, an analysis of the enforcement of these two federal laws with respect to LGBT people is not possible. Moreover, states use population data collected by the federal government to analyze the efficacy and enforcement of state antidiscrimination law for all protected classes, such as sex, race, and SOGI; in those states where antidiscrimination law includes SOGI, such analysis is impossible with regard to SOGI, but possible for other protected classes, such as sex. \(^{295}\) Tracking SOGI discrimination in relation to Title VII and Title IX connects directly to LGBT poverty, as employment discrimination is a factor that leads to poverty, as are adverse educational outcomes caused by under enforcement of Title IX.

The economic harms created or perpetuated by the Identity Undercount lead to social harms. As noted in Part III, LGBT people are disproportionately subject to poverty (including homelessness) and to domestic and other violence. \(^{296}\) In addition, LGBT people suffer negative health outcomes, both in mental and physical wellness, at disproportionate rates. Without SOGI data,

\(^{290}\) See supra Part I.
\(^{291}\) See supra Part I.
\(^{292}\) See PAYING AN UNFAIR PRICE 2014, supra note 220, at 14.
\(^{293}\) See id. at 19.
\(^{294}\) See, e.g., Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc), cert. granted, 139 S. Ct. 1599 (mem.) (holding that Title VII’s “because of sex” provision protects LGBT employees from employment discrimination); A.H. ex rel. Handling v. Minersville Area Sch. Dist., 290 F. Supp. 3d 321, 324 (M.D. Pa. 2017) (holding that a transgender student may state a claim for discrimination under Title IX).
\(^{296}\) See supra notes 144–253 and accompanying text.
there is no way to capture a thorough portrait of the LGBT community and its attendant needs.

Public policy organizations, such as the Williams Institute, have done their best to estimate the extent of these disparities, but have conceded that the estimates are only reasonable estimates due to the lack of SOGI data collection by the federal government. As a result, we “have painfully little in terms of governmental statistics on what’s needed to serve the LGBT community. That means fewer opportunities to fund programs that would serve LGBT needs, and contributes to a snowballing cycle of disadvantaging LGBT people.” Moreover, the messenger often matters. Data collected and analyzed by private organizations may not carry the same weight or legitimacy in the eyes of the public and lawmakers as does the data collected by the federal government.

E. The Political Harms of the Identity Undercount

The Identity Undercount creates concrete and widespread economic and social harms. Because the extent of the disparities that the LGBT community faces is not accurately quantified, advocates and lawmakers are hamstrung. It results in fewer opportunities to fund programs that would serve the unique needs of LGBT people and “contributes to a snowballing cycle of disadvantaging LGBT people.”

Recent media accounts of LGBT schoolchildren being bullied in schools and treated unfairly by school administrators, of LGBT people being denied goods and services, and of the murder of many transgender women of color are reminders that LGBT people continue to suffer real consequences from marginalization, stigmatization, and legal discrimination. Moreover, as noted above, poverty is pervasive in the LGBT community. To craft responsive policies, lawmakers need accurate and complete data to draft laws and regulations and to garner support for such legislative measures from other lawmakers. Politics run on data; without government surveys that collect up-to-date, comprehensive data about what it is like to be an LGBT person in America, LGBT-friendly lawmakers are disadvantaged. For this same reason, LGBT advocacy groups are limited in their political power. Lacking the political power that comes with data to back up their claims, LGBT people are politically harmed by the Identity Undercount.

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297 Allen, supra note 7.
298 Gorenberg, supra note 108.
299 See generally Allen, supra note 7 (noting that government-collected data “would carry more authority in public-policy conversations”).
300 Gorenberg, supra note 108.
301 Baker & Durso, supra note 295.
302 Id.
It does so by rendering LGBT people less politically powerful. The Identity Undercount means that politicians may try to argue that there are no LGBT people in their district, or that there is only a negligible number, one so low that LGBT issues are not a priority. Thus, without SOGI data to refine and flesh out data on social services, information about the extent to which LGBT people are discriminated against in such programs simply will not exist. Because “even well-intentioned policymakers often want advocates to quantify the cost of a particular policy proposal and the impact of unequal treatment,” without such data, it is more difficult to gather political clout to pass new or more robust antidiscrimination laws and policies. As one national LGBT organization, Lambda Legal, put it:

How will we be able to understand how many LGBTQ people are living in this country and experiencing systemic financial and social oppressions that disadvantage them in the health care system, lead to elevated rates of discrimination in seeking or maintaining employment and are the root cause of poverty and homelessness? . . . Answer: We won’t.

Political clout is needed for the passage of a federal SOGI employment antidiscrimination bill. Such a bill has been proposed since 1974 but has yet to pass. At the state level, twenty-six states lack such laws. SOGI population data collected in government surveys likely would provide a rich and robust picture of employment discrimination against LGBT people (a factor in poverty), and thus, provide necessary information to build the political clout and coalition to finally pass such legislation at the federal level and perhaps in the twenty-six states that still lack such protections.

The recent wave of anti-transgender bills highlights the need for SOGI data as “LGBT people see newly minted, anti-LGBT legislators taking their positions in government, and are frightened with good reason.”

303 See, e.g., BRADFORD ET AL., supra note 127, at iii (“The greater our numbers [of LGBT Americans], the more people may feel that we should have equal civil rights.”).
304 See, e.g., id. (noting that it “has not been uncommon for elected officials to claim that they needn’t be concerned with the rights of [LGBT] people because ‘I don’t have any of them in my district’”). The Report notes, however, that the relationship question in the 2000 Census disproved such statements because same-sex couples reported in more than 99% of all counties in the U.S. Id.
305 BRADFORD ET AL., supra note 127, at 8.
306 Marcus & Goldberg, supra note 120 (discussing the harms of the current Census on the LGBT population).
309 Teeman, supra note 121.
sion of SOGI questions on the Census and ACS “means not only won’t LGBT people be counted, but all that could be gleaned about LGBT people, and who they are and what might best be done in terms of funding and assisting those who may need it most, will not be counted.”\(^\text{310}\) Opponents of regressive and transphobic “bathroom bills” would benefit from knowing just how many transgender people reside in their districts; yielding data on the number of constituents who will be negatively impacted by legislation makes political opposition to such bills more informed and thus more persuasive and powerful.\(^\text{311}\) And, as noted in the Introduction of this Article, when such bills pass, as one did in North Carolina, the data is needed to inform impact litigation efforts.\(^\text{312}\)

**F. The Unique Harms of the Identity Undercount to People of Color**

LGBT people of color are doubly at risk of being undercounted. Many people of color are literally not counted at all; this is the differential undercount.\(^\text{313}\) For those people of color who are counted, and who also identify as LGBT, they experience the Identity Undercount. In one way or another, LGBT people of color are not fully counted. When people of color are counted, that racial and ethnic data is important to the enforcement of civil rights laws and the allocation of federal funds. When LGBT people of color are counted, only one axis of their identity is captured—their race—while their sexual orientation and gender identity is erased. Anti-poverty programs, state and federal health programs, housing programs, and antidiscrimination laws cannot be robustly analyzed or enforced when the intersectional issues of race and SOGI are absent from the data used for that analysis and enforcement.\(^\text{314}\)

**G. We Don’t Know What We Don’t Know**

Finally, the lack of comprehensive SOGI data means that there may be unknowable and unknown problems that we simply cannot know without the data.

* * *

\(^{310}\) Id.

\(^{311}\) See generally Allen, supra note 7 (quoting Laure Durso who stated, “[i]t really kills me that we’re having these consequential policy debates and I can’t put a number on how many people are affected”).

\(^{312}\) See supra notes 3–6 and accompanying text.


The lack of government SOGI data means that LGBT people are “forced to go without funding for real, everyday services and remain virtually non-existent in the eyes of our government.”315 Erasing LGBT people from the analysis of anti-poverty programs “will have a generational impact on our community’s ability to benefit from government programs in the way that other groups expect.”316

Collecting data and using it to address structural issues of LGBT poverty connects with the broader goal of analyzing the role of data in discrimination and equality questions more generally.317

V. MOVING FORWARD: TOWARD THE COLLECTION OF SOGI DATA

This Part recommends that the Census and ACS begin to collect SOGI population data as one way to begin to understand and address LGBT poverty. Section A begins with an overview of the mechanics of adding SOGI questions.318 Section B addresses common critiques of government data collection generally and concludes that SOGI data should be collected, notwithstanding the validity of these critiques.319

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316 See Disappearing Act, supra note 120.

317 See, e.g., A. Leon Higginbotham, Jr. & William C. Smith, The Hughes Court and the Beginning of the “Separate but Equal” Doctrine, 76 MINN. L. REV. 1099, 1129 (1992) (“[E]ven today for at least one-third of black Americans, the distance between the goal of equality and the tragic daily reality of discrimination is still devastating, as reflected in the data on poverty, extraordinarily high unemployment rates, excessively deteriorating housing, and disproportionate health deficiencies.”); Julie Ringelheim, Collecting Racial or Ethnic Data for Antidiscrimination Policies: A U.S.-Europe Comparison, 10 RUTGERS RACE & L. REV. 39, 136–37 (2008) (“Once it has been established that persons with specific national or ethnic origin face substantial discrimination, collecting data on peoples’ origins can be deemed an objective and appropriate mode of identifying the persons who are the most likely to suffer discrimination and whose situation must be followed in order to promote equality.”) (footnote omitted). In addition, one article summarizes the benefits of data collection to improve policy:

Similarly, data about populations that experience discrimination is often lacking, despite the existence of accepted methods to ethically achieve such measurement. The current lack of data should not be used as an argument against future monitoring of inequalities. Rather, improving indicator definition and data-gathering methods can be used precisely to bring certain issues to light. In this regard, the boundaries of what is currently perceived as measurable should be expanded, and methods for engaging in rights-protective measurement should be emphasized.


318 See infra notes 320–333 and accompanying text.

319 See infra notes 334–387 and accompanying text.
A. The Methods and Mechanics of Adding SOGI Questions

Before SOGI questions may be added to the Census or ACS, there must be a programmatic need for the data collected through such questions. Federal law requires that (1) Congress approve all new ACS questions; and (2) all ACS questions have some connection with federal funding. In other words, there must be a programmatic need for particular kinds of data before questions collecting such data will be approved and added to the Census or ACS.

As described in detail above, the Identity Undercount and the harms it causes reflect a programmatic need for such data. There is a myriad of federal government-funded programs, all of which rely on data gathered by the government, that cannot assess whether they are serving all of those who need benefits without collecting SOGI population data. Working groups and expert panels assembled by the government acknowledge the need for the collection of SOGI data. Additionally, several agencies, including a committee of the U.S. Senate, HUD, HHS, and the DOJ have written letters to the Census Bureau requesting the collection of SOGI data and explaining the programmatic needs for such data collection. Some members of Congress have taken note of the importance of collecting SOGI data in federal surveys and have proposed legislation such as the LGBT Data Inclusion Act to mandate collection of such data while at the same time recognizing the privacy and confidentiality concerns that are unique to LGBT people.

320 Pixler, supra note 32, 1107–08.
321 See LGBTQ CENSUS ADVOCACY, supra note 56.
322 See supra Part II.
323 See Letter from Senators Tom Carper and Kamala D. Harris, supra note 71.
327 See PAYING AN UNFAIR PRICE 2014, supra note 220, at 71 (“The absence of these questions limits understanding of the experiences of LGBT people across a wide range of topics. By including these questions, government agencies and researchers will be better able to gauge the impact of discrimination and anti-LGBT laws on LGBT people—as well as measure progress in improving the lives of LGBT people.”) (explaining why it is important to incorporate questions regarding SOGI on government surveys).
Inclusion of SOGI questions in the Census or ACS could come about in one of two ways. First, if the political will to add the questions were present, as it was during the Obama Administration, the director of the U.S. Census can simply add the SOGI questions to the Census or ACS when it submits it to Congress. As long as the questions were added consistent with the Administrative Procedure Act (APA), have a programmatic need, and are politically palatable to Congress, they will be added.

Second, assuming that the current lack of political will demonstrated by the Trump Administration will continue, litigation seeking an injunction requiring the Census Bureau to add SOGI questions is the only means of getting such questions added.\(^{329}\) Although the specific contours of such a lawsuit are outside the scope of this Article, a complaint likely would center on the APA’s arbitrary and capricious standard and the Equal Protection Clause, rather than the Constitution’s Census Clause.

Once such data is collected and analyzed, solutions to LGBT poverty may take two different policy approaches: one policy approach is to focus on anti-poverty programs generally, and the second policy approach is to focus on LGBT-specific programs.\(^{330}\) Poverty-focused policies, that focus on either or both preventing poverty and assisting people out of poverty, benefit LGBT and non-LGBT people alike.\(^{331}\) LGBT-focused policies, such as passing antidiscrimination laws, agency policies to ensure cultural competency by the providers of anti-poverty programs, and creating greater health care coverage for LGBT people, benefit LGBT people specifically.\(^{332}\) Without complete SOGI population data about all LGBT Americans, it will not be possible to make informed policy decisions on either front. The same is true for the intra-community poverty variances within the LGBT community. Without more complete and accurate SOGI population data, lawmakers cannot make informed decisions about policies that might affect rural LGBT people, LGBT youth, LGBT parents and their children, and LGBT people of color, all of concerns that often are heightened for LGBT people given the rampant legal discrimination against them—the proposed legislation states that no one will be required “to disclose their sexual orientation or gender identity to an agency” and that no one will be “subjected to fines or penalties for refusing to answer, or providing a false answer to, any survey question regarding gender identity or sexual orientation. Nothing in this bill shall be construed to permit the use of such collected information in a manner that would adversely affect an individual.” H.R. 3273.

\(^{329}\) See generally WILLIAMS, supra note 37, at 3.

\(^{330}\) See BADGETT ET AL., supra note 12, at 24.

\(^{331}\) Id.

\(^{332}\) Id. at 25.
which are subpopulations within the LGBT community that face higher rates of poverty than their counterparts outside of the LGBT community.333

B. Critiques of Government Data Collection

Many people do not give much thought to government data collection through the Census and ACS; rather, it is seen as a part of everyday life in the United States, a huge country with a behemoth administrative infrastructure that serves over 325 million people. In fact, the creation of Census categories and the effects of such classification “rarely appear as controversial political decisions because people who find the commonly evoked societal norms used in classification familiar and comfortable tend to take these classification systems as neutral given in their lives.”334 This attitude toward the Census as a neutral, value-free, and innocuous survey is common.335 This Section summarizes two prevalent critiques of government data collection, both of which reveal that it is not neutral and innocuous. To the contrary, it is political, discriminatory, and constitutive of identity categories to which government resources are allocated in a manner that doles out life chances in unequal ways.

333 Id. at 25–26 (noting that because “[p]olicies and interventions to lift people out of poverty may be differentially effective among different geographical locations, within communities of color, within rural environments, or among young people,” more complete data about the factors that contribute to poverty in these subpopulations are needed). When SOGI data is collected it is helpful in consequential ways. As an example, SOGI data collected in Massachusetts revealed that LGBT people in the state experienced sexual assault, binge drinking, tobacco use, and anxiety and depression at rates higher than non-LGBT people. See Baker & Hughes, supra note 249, at 4. Using these data, Massachusetts was able to “better target these issues through direct services such as suicide prevention programs, domestic violence prevention and services, homeless services, meals for LGBT elders, and LGBT youth services.” Id.

334 DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 141 (2011) (“We are used to filling out forms with certain questions. We rarely question how we came to be asked for those particular pieces of information and not others . . . .”).

335 See Pixler, supra note 32, at 1097; see also, e.g., SPADE, supra note 334, at 38 (“Administrative systems often appear ‘neutral,’ especially when discrimination has been framed as a problem of individuals with bad intentions who need to be prohibited from their bad acts by law.”); Bhatnagar, supra note 9, at 85, 95 (“In attempting to square the idea of self-classification with the jurisprudence on the race-based classifications, it becomes clear that the government’s role in data collection goes far beyond neutral collection.”); Sean Pager, Is Busing Preferential? An Interpretive Analysis of Proposition 209, 21 WHITTIER L. REV. 3, 39 n.211 (1999) (“For example, consider the United States census, a seemingly innocuous exercise of race conscious classification that no one would normally consider as granting preferential treatment. Yet, if one looks to effects, disparities nonetheless emerge.”).
1. Privacy and Confidentiality Concerns About Government Data Collection

There is a normative question that underlies all of the foregoing discussion about government data collection: should the government collect such data?\(^{336}\) Notwithstanding prohibitions on the dissemination of personal information, collection of data raises concerns about privacy and confidentiality.\(^{337}\) Those concerns raise the question of the proper balance between individual privacy rights and governmental need for the data.\(^{338}\) Some scholars have argued that the balance must be struck in favor of individual privacy rights and they contend that the questions asked in the ACS are wrong as a normative matter and prohibited as a legal matter.\(^{339}\)

The risk of governmental misuse of data, namely by breaching confidentiality and privacy requirements, largely informs such arguments. For example, the Census Bureau planned to include a citizenship question on the 2020 Census.\(^{340}\) The question—“Is this person a citizen of the United States?”—was challenged in court as violating the Census Clause of the Constitution and the APA.\(^{341}\) The challengers’ practical concerns included the potential for identifying information to be used by government officials to advance its “massive dragnet for unauthorized immigrants.”\(^{342}\) Moreover, advocates for immigrants

\(^{336}\) See Pixler, supra note 32, at 1120.

\(^{337}\) Pursuant to Title 13 of the U.S. Code, it is unlawful to publish any personal information, or for a government agency or court to use the information provided by respondents. See 13 U.S.C. § 9 (2018). Census Bureau employees take a lifetime oath to protect the confidentiality of such information and face a federal prison sentence of up to five years and/or a fine of up to $5,000 for violating that oath. Id. § 214. The privacy and confidentiality provisions in Title 13 mean that “the Census Bureau has one of the strongest confidentiality guarantees in the federal government.” Privacy & Confidentiality, U.S. CENSUS BUREAU, https://www.Census.gov/history/www/reference/privacy_confidentiality/ [https://perma.cc/DQT5-G7MF].

\(^{338}\) See Privacy & Confidentiality, supra note 337. The Census Bureau has enacted privacy and confidentiality measures to allay some of these concerns. Described as “data stewardship,” these measures include a statement of privacy principles, an online privacy policy, and a data protection policy. Moreover, the Census Bureau removes personally identifiable information from its data, restricts the number of individuals authorized to access private information, and criminalizes a violation of the privacy policies with up to five years in federal prison and/or a $250,000 fine. See Data Protection and Privacy Program, U.S. CENSUS BUREAU, https://www.Census.gov/about/policies/privacy/data_stewardship/our_privacy_principles.html [https://perma.cc/VXK4-47SH].

\(^{339}\) See Pixler, supra note 32, at 1119–22.


also worried “about the potential unethical or extralegal power such data can lend to an anti-immigration regime,” notwithstanding that the Census Bureau is prohibited from sharing such identifying information.\(^{343}\) While a federal trial court ruled that the addition of the citizenship question violated the APA and thus may not be included in the 2020 Census,\(^{344}\) the litigation and widespread public outcry exemplifies the privacy and confidentiality concerns surrounding the Census.\(^{345}\) Finally, the LGBT community’s history of being targeted by law enforcement—from Stonewall to *Bowers v. Hardwick* and into the present—renders privacy and confidentiality concerns particularly salient for the LGBT population.\(^{346}\)

2. The Differential Undercount

Since its origin, the Census has undercounted the American population.\(^{347}\) The undercount, however, is not proportional among racial and ethnic groups.\(^{348}\) Instead, a phenomenon known as the “differential undercount”—the

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\(^{343}\) Id. (noting that “in times of American turmoil the Census Bureau has broken that mandate” and “in the past, not all ICE officials have proven scrupulous about data privacy”).


\(^{347}\) See, e.g., Stansbury, *supra* note 30, at 408.

\(^{348}\) To be clear, this means that the number of literal bodies of people of color that are not counted at all is larger than the literal bodies of white people that are not counted at all. In other words, the differential undercount is not a situation in which people of color are counted but they are not identified as people of color, which would be another kind of identity undercount. It is that these people of color are not counted *at all*. See Anderson & Fienberg, *supra* note 281, at 666 (“The burden of being missed in the Census fell disproportionately on members of minority groups—Blacks, Hispanics,
disproportionate undercount of people of color in comparison to the undercount of white people—has been traced back to at least 1940.349 The difference in the undercount between people of color and white people has ranged from a 5.8% difference in 1950 to a 6.4% difference in 1990.350 This differential undercount is most pronounced in urban centers.351

Several causes of the differential undercount have been identified. First, living arrangements for people of color may be more nuanced than for their white counterparts, as people of color tend to have larger households and to move more often than white people.352 Second, people of color face structural educational disadvantages, including with their ability to be proficient in the English language, and thus may not have the skills necessary to complete the questionnaire.353 Third, people of color may perceive additional costs associated with the completion of the Census, such as eviction from overcrowded housing or the loss of welfare benefits.354 Finally, the undercount is also higher in heavily populated areas, particularly in inner cities, which often contain significant minority populations.355

The differential undercount is constitutionally and pragmatically problematic. The constitutional problem is grounded in the purpose of the Census itself, namely the constitutional mandate that the decennial Census be completed to apportion seats in Congress. Thus, “census figures are used to determine the distribution of political power in the institutions that comprise the heart of our democracy.”356 The differential undercount thus compromises the constitutional promise of “one person[.] one vote.”357

Furthermore, states use Census data to draw political districts for both the federal House of Representatives and the state legislature, again threatening the “one person, one vote” principle when people of color are not counted.358 When the literal bodies of people of color are not counted by the Census, they

Asian Americans, and American Indians.”). Anderson & Fienberg also note that “[t]he Census misses more minority, younger, and urban residents than it does majority, older, and suburban residents.” Id. at 669.

349 Stansbury, supra note 30, at 404, 409.
350 Id. at 409–10; see Williams, supra note 37.
351 Razi, supra note 9, at 1108.
352 Stansbury, supra note 30, at 410; see also Razi, supra note 9, at 1109.
353 Stansbury, supra note 30, at 410.
354 Id.
355 Id.
356 Razi, supra note 9, at 1102.
358 Razi, supra note 9, at 1103.
are also not counted for purposes of congressional apportionment, which in turn can result in the allocation of fewer congressional representatives in areas heavily populated by people of color. Moreover, if Census data is racially incomplete, elected officials cannot accurately know who they represent and, as a result, cannot represent the interests of all their constituents in an informed way. A politician cannot adequately represent people without knowing his or her constituents.359

Finally, on a programmatic level, the federal government uses Census data to allocate billions of dollars of funding for anti-poverty programs. This began in the 1960s when Congress established a grant-based system based on population sizes to appropriate federal money to state and local governments, including programs for “vocational education, highway construction, agricultural extension, and public health.”360 The 1960s also saw the civil rights movement harness the differential undercount to argue for the amelioration of race-based discrimination.361 It used the undercount to argue that racial minorities would be underrepresented, which would lead to employment discrimination, diminished community participation, and decreased access to housing.362 Activists and attorneys used Census data to make these arguments, and Congress responded with passage of civil rights laws, such as the Voting Rights Act of 1965 that utilized Census data for enforcement.363

The differential undercount means that the allocation of federal dollars to social safety net programs is racialized and discriminatory.364 It creates concrete inequities in the everyday lives of people of color living in poverty.365 A specific example of the differential undercount at work comes from Hartford, Connecticut:

As the city with the sixth highest rate of undercount in the 1990 Census, Hartford’s predominantly minority population was undercounted by about 6,500 persons. The 6,500-person undercount has resulted in Hartford losing a seat in the state legislature and receiving approximately $5 million less each year from the federal government than it would if the city’s population was accurately counted by the Census. That $5 million in federal aid would come in the form of homes for people with low incomes, child care centers, and

359 See generally id. at 1110 (explaining that if individuals are not accurately counted, their representatives cannot properly represent them).
360 Anderson & Fienberg, supra note 281, at 669.
361 Id. at 669–70.
362 Id. at 665–70.
363 Id. at 666–71.
364 Id. at 671–72; Razi, supra note 9, at 1102.
365 Razi, supra note 9, at 1110.
more social service programs that bring food to the elderly and counsel victims of domestic violence. Additionally, if Hartford’s true population is counted by the 2000 Census, state aid to the city will increase significantly. The fact that federal and state assistance of this kind is needed in Hartford—America’s eighth poorest city—is poignant and important.366

In addition to these concrete harms, the persistence of the differential undercount “can diminish the perception that the count is equitable to the entire population.”367 Moreover, because the differential undercount creates the correct perception that the Census is unfair to certain populations, the Census “cannot successfully fulfill its political functions of distributing political power and money.”368

3. Government Data Collection as a Tool of Identity Construction and Distribution of Life Chances

In addition to the privacy risks through misuse, data collection is criticized because it serves as a mechanism for the government to construct both identities and status regimes.369 In the specific context of race data, scholars have critiqued the racial categories of the Census along several axes. One axis is in the constitutive power of the Census’s racial categories: by requiring respondents to choose one of several racial categories, the Census is an archetypal example of the legal construction of race.370

There is thus a substantial body of scholarship that vigorously and effectively argues against government data collection because such data becomes a powerful tool for the state to create identities and then surveil and control those identities.371 When the government categorizes people, it can use those categories to target particular identities for surveillance, discipline, or mistreatment.372 There is good reason for these critiques and concerns. Census data have been used for various surveillance and disciplinary purposes throughout history. For example, one scholar notes that “[w]ithin two days of the attack on

366 Id. at 1110–11 (footnotes omitted).
367 WILLIAMS, supra note 37, at 9.
368 Anderson & Fienberg, supra note 281, at 665–66.
369 See Mezey, supra note 65, at 1702.
370 See, e.g., Bhatnagar, supra note 9, at 87; Mezey, supra note 65, at 1702–03. Another common criticism is that the racial categories are imperfect and incomplete, and that one’s “legal” identity as reflected by the Census categories may conflict with one’s personal identity. See, e.g., Julissa Reynoso, Race, Censuses, and Attempts at Racial Democracy, 39 COLUM. J. TRANSNAT’L L. 533, 536 (2001).
371 See, e.g., Mezey, supra note 65, at 1702; Razi, supra note 9, at 744–45.
372 Razi, supra note 9, at 744–45; see also Mezey, supra note 65, at 1715–18.
Pearl Harbor and before the United States declared war, the Census Bureau began locating Japanese Americans with the same IBM tabulating machines that Hitler was simultaneously using in Germany.”

Eventually, almost 112,000 Japanese Americans were rounded up and interned by using Census data. Such scholars are rightly concerned about the potential discriminatory use of Census data given this history.

Seen through this lens of the Census as a “state apparatus,” the Census “is not just legal by virtue of its constitutional and statutory origins, but in the way it generates and enforces cultural norms, race-based rights and disabilities, and the boundaries of identity.”

The same might be argued about LGBT-based rights and disabilities if the Census and ACS were to begin collecting and using SOGI data as it does race data.

These critiques build on the work of Michel Foucault and propose that state-created categories become a mechanism for state control of identity through surveillance and discipline. In Foucaultian terms, the Census “makes each person seen and known by an invisible bureaucracy; each person becomes an object of observation, a subject of surveillance.”

The Foucaultian analysis also asserts that once the state controls the creation of identity categories, it then uses those categories to exclude some identity categories while officially recognizing and providing resources to others.

Professor Spade conceptualizes and describes the result of governmental construction of identities as “administrative systems that govern the distribution of life chances.” Put another way, state creation of identity categories through the Census and ACS enables the distributive functions of the administrative state: “[A]dministrative systems that classify people actually invent and produce meaning for the categories they administer, and . . . those categories manage both the population and the distribution of security and vulnerabil-

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373 Pixler, supra note 32, at 1123.
374 Id. at 1124.
375 See Mezey, supra note 65, at 1703. Considered in this way, the Census may be further described “as a technology of affirmative and disciplinary power employed by the bureaucratic state.” Id. at 1706.
377 See Mezey, supra note 65, at 1719.
378 See Bhatnagar, supra note 9, at 87 (“The [C]ensus is alleged to have enabled the exclusion and social control of groups, such as Native Americans and Chinese immigrants, while serving as a medium of expression and official recognition for other groups, including Hispanics and multiracial individuals. These simultaneously exclusionary and affirming powers have rendered the [C]ensus the site of much political contest.”) (footnotes omitted).
379 SPADE, supra note 334, at 11.
ity.” The Census and ACS are “population-level interventions” that depend on state-created identity categories. The state then uses its categories to sort the population and then dole out financial resources to certain identity categories. These resources take the form of government social safety net “care taking programs” that are tailored to certain demographic populations: anti-poverty programs for food and housing assistance, public health programs, preschool assistance for children living in poverty, job-training programs, and the like. Identity categories that qualify for and receive such resources become an “in” group, while those identity categories that are not within the reach of such care-taking programs are constructed as the “outside” group. As a result, “population-level care-taking programs always include population surveillance as a core function of their work.”

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Each of the foregoing critiques is well-founded and deserving of continued engagement and interrogation. This Article, while accepting such critiques as valid and important, nonetheless recommends the collection of SOGI data. While perhaps unidealistic, it is also a pragmatic recommendation.

It is a way for the LGBT population to seek “recognition of a group identity and inclusion in the national community.” The Article accepts the Foucaultian and Spadeian critique that government data collection engages in the construction of identity for the most pragmatic of reasons: if the government is in the business of creating identity through data collection, and distributing life chances through those categorical identities, LGBT people should be a part of that regime. While critics articulate reasons that it is far from perfect, the government construction of identity and the distribution of resources to which it is tied is the ongoing reality of living in a neoliberal America. As such, LGBT Americans should be among the identity categories to which life chances are distributed.

In short, the Article’s recommendation is the result of a weighted analysis. That weighted analysis considers the well-founded critiques—ones likely to be

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380 Id. at 32.
381 See id. at 138–39.
382 See generally id. at 139.
383 Id.
384 Id. at 140. Spade notes that “[s]tandardized, categorical data collection is essential to the creation of these programs because it allows governments, institutions, and agencies (U.S. Census Bureau . . . ) to have a general picture of the population: its health, vulnerabilities, needs, and risks. Importantly, it is this way of thinking about population that allows such programs to exist at all.” Id.
385 See Mezey, supra note 65, at 1705, 1713–15.
386 See generally ADLER, supra note 124, at 111–12 (discussing the bipartisan efforts of neoliberalism and how the argument for gay marriage contributes to the neoliberal idea that society can rely on the private sector instead of requiring a social welfare state).
transformative if operationalized against government data collection—but nonetheless advocates for the inclusion of LGBT people into a flawed system of government data collection. It is a sanguine recommendation that recognizes and appreciates that the beneficial work accomplished through government data collection is never fully severable from the work that government data do to control and discipline.387

CONCLUSION

Where data are tied to resource allocation, the Identity Undercount results in resource deserts and LGBT people do not get the critical and necessary benefits and services. The government’s current near-complete failure to collect SOGI data makes the state an active participant in creating and sustaining institutionalized poverty for LGBT people, as well as continues the political marginalization of LGBT people.

This Article contends that LGBT rights advocates should embrace an anti-poverty agenda for the movement and insist that the state collect such data and use it to create anti-poverty programs for the LGBT community. Moreover, these advocates should harness such data to increase the political power for the LGBT community because the Census “does more than facilitate a body count; it also tells us whose body counts, and for how much.”388

There is, of course, future work to do surrounding the issue of government data collection beyond the first step of securing its collection. For example, inquiry into the lessons learned from the Identity Undercount will be important for the larger projects of antidiscrimination and equality. Moreover, connecting the Identity Undercount to ongoing discussions about the use of data in government oversight and discrimination more broadly is another important aspect for future inquiry and consideration. This Article’s conceptualization of the Identity Undercount is thus a jumping-off point for such future work, all of which is pointed toward securing economic justice, political agency, and equality for all LGBT Americans.

387 See Mezey, supra note 65, at 1705 (“But these seemingly contradictory impulses of the Census are always entangled as part of the project and power of enumeration. Identity recognition is also identity production and discipline in the sense that every act of recognition entails other categorical erasures, elisions, and enforcements.”).

388 See id.
APPENDIX A

The 2020 Census will ask the following questions:

- Age
- Hispanic origin
- Race
- Relationship
- Sex
- Tenure, which means how the respondent occupies his or her residence
- Operational questions

The 2020 ACS will ask questions on the following subjects:

- Acreage
- Age
- Ancestry
- Commuting (journey to work)
- Computer and internet use
- Disability

389 See Census Bureau, Questions Planned, supra note 73, at 5.
390 See id. at 9. There are five options to respond to this question: (1) No, not of Hispanic, Latino, or Spanish origin; (2) Yes, Mexican, Mexican Am., Chicano; (3) Yes, Puerto Rican; (4) Yes, Cuban; and (5) Yes, another Hispanic, Latino, or Spanish origin, with a box to print the specific type. Id.
391 Id. at 11. There are fifteen options to respond to this question: (1) White; (2) Black or African American; (3) American Indian or Alaska Native; (4) Chinese; (5) Filipino; (6) Asian Indian; (7) Vietnamese; (8) Korean; (9) Japanese; (10) Native Hawaiian; (11) Samoan; (12) Chamorro; (13) Other Asian, with a box to write in a description; (14) Other Pacific Islander, with a box to write in a description; and (15) Some other race, with a box to write in a description. Id.
392 See id. at 13. There are sixteen options to respond to this question: (1) Opposite-sex husband/wife/spouse; (2) Opposite-sex unmarried partner; (3) Same-sex husband/wife/spouse; (4) Same-sex unmarried partner; (5) Biological son or daughter; (6) Adopted son or daughter; (7) Stepson or stepdaughter; (8) Brother or sister; (9) Father or mother; (10) Grandchild; (11) Parent-in-law; (12) Son-in-law or daughter-in-law; (13) Other relative; (14) Roommate or housemate; (15) Foster child; and (16) Other nonrelative. Id. These data are used to plan and fund government programs that provide services and funding for families, to assess whether a community’s housing is meeting the needs of its residents, as well as to assist communities to enroll eligible families with children in programs such as Head Start. Id.
393 Id. at 15. There are two options to answer this question: Male and Female. Id.
394 Id. at 17. There are four options to answer this question: (1) Owned by you or someone in this household with a mortgage or loan; (2) Owned by you or someone in this household free and clear; (3) Rented; and (4) Occupied without payment of rent. Id.
395 These questions include the number of people living in the house, apartment, or mobile home on “Census day” (April 1, 2020), the telephone number of the respondent, and requesting a list of each person living in the residence, with “Person 1” defined as the person living at the residence who owns it or pays rent. If the person who owns the residence or pays its rent does not live there, then any adult living there may be listed as “Person 1.” Id. at 19.
• Fertility
• Grandparent caregivers
• Health insurance
• Hispanic origin
• Home heating fuel
• Home value and rent
• Income
• Industry, occupation, and class of worker
• Labor force status
• Language spoken at home
• Marital status and marital history
• Migration
• Place of birth, citizenship, and year of entry
• Plumbing facilities, kitchen facilities, and telephone service
• Race
• Relationship
• School enrollment, educational attainment, and undergraduate field of degree
• Selected monthly owner costs (cost of utilities, condominium and mobile home fees, taxes, insurance, and mortgages)
• Sex
• SNAP/food stamps
• Tenure
• Units in structure, rooms, and bedrooms
• Vehicles available
• Veteran status, period of service, and department of veteran’s affairs service-connected disability rating
• Work status last year
• Year built and moved in
• Operational questions396

396 See CENSUS BUREAU, SUBJECTS PLANNED, supra note 41, at 7–70; see also CENSUS BUREAU, QUESTIONS PLANNED, supra note 73, at 23–87.