

1-29-2020

Straightwashing the Census

Kyle C. Velte

University of Kansas School of Law, kvelte@ku.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>



Part of the [Law and Economics Commons](#), [Law and Gender Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Public Law and Legal Theory Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Kyle C. Velte, *Straightwashing the Census*, 61 B.C.L. Rev. 69 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss1/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

STRAIGHTWASHING THE CENSUS

KYLE C. VELTE

INTRODUCTION	70
I. THE HOW AND WHY OF GOVERNMENT POPULATION DATA COLLECTION	75
<i>A. How the Government Collects Data: The Census and the American Community Survey</i>	76
<i>B. Why the Government Collects Data</i>	79
<i>C. Census and ACS Focus on Particular Subpopulations</i>	81
II. THE IDENTITY UNDERCOUNT: SEXUAL ORIENTATION AND GENDER IDENTITY	83
<i>A. The History of SOGI Exclusion from the Census</i>	84
<i>B. The 2020 Census and ACS Controversy</i>	86
<i>C. The Current State of SOGI Data Collection</i>	88
<i>D. The Identity Undercount</i>	89
III. THE MYTH OF LGBT AFFLUENCE AND POWER	90
<i>A. The Myth</i>	91
<i>B. The Reality</i>	93
1. Lesbian and Bisexual Women	95
2. Gay Men	95
3. Female Same-Sex Couples	95
4. Children of Same-Sex Couples	96
5. Transgender People	96
6. Same-Sex Couples of Color	97
7. Regional Differences	98
8. LGBT Schoolchildren	98
9. Housing	100
10. Food Insecurity	101
IV. THE HARMS OF THE IDENTITY UNDERCOUNT	104
<i>A. The Perpetuation of Harmful Stereotypes</i>	104
<i>B. Inability to Create or Modify (in Substance or Delivery Model) Programs Targeted at Population-Level Disparities</i>	105
<i>C. The Dignitary Harms of the Identity Undercount</i>	108
<i>D. The Economic Harms of the Identity Undercount</i>	109
<i>E. The Political Harms of the Identity Undercount</i>	111
<i>F. The Unique Harms of the Identity Undercount to People of Color</i>	113
<i>G. We Don't Know What We Don't Know</i>	113
V. MOVING FORWARD: TOWARD THE COLLECTION OF SOGI DATA	114
<i>A. The Methods and Mechanics of Adding SOGI Questions</i>	115
<i>B. Critiques of Government Data Collection</i>	117
1. Privacy and Confidentiality Concerns About Government Data Collection	118
2. The Differential Undercount	119
3. Government Data Collection as a Tool of Identity Construction and Distribution of Life Chances	122
CONCLUSION	125
APPENDIX A	126

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.”¹

On March 23, 2016, in a hastily-convened special session lasting only twelve hours and “rife with procedural irregularities,”² the North Carolina leg-

© 2020, Kyle C. Velte. All rights reserved.

* 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.

¹ Rowan Walrath, *Trump’s War on Data Could Quietly Erase LGBT Crime Victims*, MOTHER JONES (Apr. 11, 2018), <https://www.motherjones.com/crime-justice/2018/04/trumps-war-on-data-could-quietly-erase-lgbt-crime-victims/> [<https://perma.cc/H37L-EURU>] (quoting Eliza Byard, executive director of the Gay, Lesbian & Straight Education Network).

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.

² Complaint for Declaratory & Injunctive Relief at 2, *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (No. 1:16-cv-236).

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).

⁴ *Id.* at 1146–47; see also Public Facilities Privacy & Security Act, N.C. GEN. STAT. § 115C–47 (2016), repealed by An Act to Reset S.L. 2016-3 (H.B. 142), 2017 N.C. Sess. Laws 4.

⁵ See generally Kriston Capps, *Mapping the Rise of Anti-LGBT Legislation on the First Anniversary of Nationwide Marriage Equality*, CITYLAB (June 24, 2016), <https://www.citylab.com/equity/2016/06/mapping-the-rise-of-anti-lgbt-legislation-on-the-first-anniversary-of-nationwide-marriage-equality/488642/> [<https://perma.cc/2FCD-7WSL>] (noting that “in 2016 alone, state legislatures have introduced more than 200 anti-LGBT bills in 34 different states”).

⁶ See *Advocacy Groups File Federal Lawsuit Challenging North Carolina’s Sweeping Anti-LGBT Law*, ACLU (Mar. 28, 2016), <https://www.aclu.org/news/advocacy-groups-file-federal-lawsuit-challenging-north-carolinas-sweeping-anti-lgbt-law> [<https://perma.cc/Z8S3-LCP3>]; see also Complaint for Declaratory & Injunctive Relief, *supra* note 2, at 2.

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-FHVS>] (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,

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’s 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

¹⁰ This Article adds to the scholarly work done by other scholars, who have made the important point about the perils of LGBT erasure in other contexts. See generally Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389 (2017) (noting that the adherence to a gender binary erases gender non-binary people and explaining the harms of that erasure); Nancy J. Knauer, “*Gen Silent*”: *Advocating for LGBT Elders*, 19 ELDER L.J. 289 (2012) (discussing the erasure of elders’ LGBT past and identity in the context of incapacity and guardianship); Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. GENDER & L. 291, 315–32 (2015) (discussing the consequences of bisexual erasure in litigation and legal discourse); Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 168 (2016) (discussing the consequences of erasure of LGBT and other marginalized communities from discourse about police misconduct); Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL’Y REV. 201, 209–16 (2012) (examining erasure as a tool of anti-LGBT subordination); Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017) (describing the limited data on LGBT people in the criminal justice system and its consequences); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 459 (2000) (explaining why bisexuality as a category has been erased in American political and legal discourse).

¹¹ See, e.g., Mary Emily O’Hara, *LGBTQ Americans Won’t Be Counted in 2020 U.S. Census After All*, NBC NEWS (Mar. 29, 2017), <https://www.nbcnews.com/feature/nbc-out/lgbtq-americans-won-t-be-counted-2020-u-s-census-n739911> [<https://perma.cc/532R-HBPT>]; Hansi Lo Wang, *Trump Officials ‘Did Not Want’ Census Survey to Ask About Sexual Orientation*, NPR (Sept. 20, 2018), <https://www.npr.org/2018/09/20/649752485/trump-officials-did-not-want-census-survey-to-ask-about-sexual-orientation> [<https://perma.cc/6MZC-S5KN>].

¹² See M.V. LEE BADGETT ET AL., WILLIAMS INST., *NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 8 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.

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.¹⁶ LGBT people also are victims of hate crimes at higher rates than their non-LGBT counterparts.¹⁷ 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 policy-makers 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

ty, 16 J. HEALTH CARE L. & POL'Y 375, 383–86 (2013) (describing anti-LGBT discrimination in healthcare and its impact on health outcomes).

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”).

¹⁵ 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).

¹⁶ 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.”).

¹⁷ See generally Brief of the American Psychological Ass’n et al. as Amici Curiae Supporting Respondents at 13–14, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

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.”¹⁸

The Article proceeds in five parts. Part I provides an overview of the “why” and “how” of government data collection.¹⁹ Part II makes the case for the Identity Undercount.²⁰ Part III debunks the widely-held belief that LGBT Americans are overwhelmingly wealthy and politically powerful.²¹ Part IV describes the harms of the Identity Undercount.²² 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.²³ The Article concludes with a description of future work on this issue and notes that where data are tied to resource allocation, the continued deliberate failure to collect SOGI data makes the state an active participant 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. Constitution’s Census Clause and the government surveys utilized to collect this information.²⁴ Section B discusses additional reasons for the government to collect census data including for legal and policy reasons.²⁵ Section C discusses the specific population data the Census and the ACS collect, how they have excluded certain groups, and how it has led to discrimination particularly in the areas of race, sex, and ethnicity.²⁶ 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.

¹⁸ Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 747 (2007).

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*²⁷

The Census Clause of the U.S. Constitution directs that an “actual Enumeration” of the U.S. population “shall be made” every ten years.²⁸ Two purposes were originally served by this provision: apportionment of congressional representatives and levying taxes.²⁹ Tying taxation to population incentivized states to make accurate population reports because overstating population, which would benefit states in congressional apportionment, meant higher taxes.³⁰ The taxing purpose of the Census Clause, however, became moot in 1916 with the adoption of the Sixteenth Amendment.³¹ 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.³² The administration of the Census was centralized in 1902, when Congress passed the Permanent Census Act, establishing the Census Office.³³ 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.³⁴

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.

²⁸ U.S. CONST. art. I, § 2.

²⁹ See *id.*

³⁰ Shane T. Stansbury, Note, *Making Sense of the Census: The Decennial Census Debate and Its Meaning for America’s Ethnic and Racial Minorities*, 31 COLUM. HUM. RTS. L. REV. 403, 406–07 (2000).

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”).

³² See Carrie Pixler, Note, *Setting the Boundaries of the Census Clause: Normative and Legal Concerns Regarding the American Community Survey*, 18 WM. & MARY BILL RTS. J. 1097, 1100 (2010).

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.”³⁵ Through passage of Title 13, Congress delegated this responsibility to the Department of Commerce’s Census Bureau.³⁶ The President appoints the Secretary of Commerce and the Director of the Census Bureau, subject to the Senate’s advice and consent.³⁷ 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.”³⁸

From 1940 through 2000, the Census was comprised of two parts—the short form and the long form.³⁹ The short form collected basic demographic data such as “age, sex, race, and ethnicity (Hispanic or non-Hispanic) of each person in a household.”⁴⁰ The long form, which was sent to a sampling of homes, asked more detailed questions regarding socioeconomic status and housing.⁴¹ The government gathered these data to inform policy decisions for a number of legislative and program purposes.⁴² 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.⁴³

The ACS stepped in to replace the long form and was uncoupled from the short form Census.⁴⁴ This permitted the Census Bureau to concentrate its de-

³⁵ U.S. CONST. art. 1, § 2.

³⁶ See, e.g., Pixler, *supra* note 32, at 1100–01; Stansbury, *supra* note 30, at 406.

³⁷ JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., R40551, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 1 (2011).

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.⁴⁵ 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.⁴⁶ 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.”⁴⁷ The information obtained from the ACS is processed and disseminated to make data-driven decisions at the federal, state, and local levels.⁴⁸ 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).⁴⁹

The ACS data are issued annually.⁵⁰ 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.⁵¹ The content of both the Census and the ACS is reviewed regularly to ensure that the federal government requires the data collected.⁵² To that end, agencies provide information to the Census Bureau and U.S. Office of Management and Budget outlining their data requirements.⁵³ The Census Bureau uses this information to evaluate the content being contemplated for the next Census and ACS.⁵⁴ Federal law requires that Congress approves all new questions and all questions have some connection with federal funding.⁵⁵ In other words, there must be a programmatic need for particular kinds of data before questions col-

⁴⁵ See CENSUS BUREAU, SUBJECTS PLANNED, *supra* note 41, at 1.

⁴⁶ WILLIAMS, *supra* note 37, at 3.

⁴⁷ DAPHNE LOFQUIST, U.S. CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS: AMERICAN COMMUNITY SURVEY BRIEFS 4 (2011), <https://www2.Census.gov/library/publications/2011/acs/acsbr10-03.pdf>.

⁴⁸ See U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY INFORMATION GUIDE 3 (2017), U.S. Census Bureau, https://www.Census.gov/content/dam/Census/programs-surveys/acs/about/ACS_Information_Guide.pdf [<https://perma.cc/RT7W-SBH8>].

⁴⁹ See U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY DESIGN AND METHODOLOGY, CHAPTER 4: SAMPLE DESIGN AND SELECTION 1, 15 (2014), https://www2.Census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_ch04_2014.pdf.

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

⁵⁶ See NAT’L LGBTQ TASK FORCE, LGBTQ CENSUS ADVOCACY, 1990–2017 (2017) [hereinafter LGBTQ CENSUS ADVOCACY], <http://www.thetaskforce.org/wp-content/uploads/2017/05/LGBTQ-Census-Advocacy.pdf> [<https://perma.cc/Z82C-FQJP>].

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.*

⁶¹ See generally Brian A. Ellison, *Bureaucratic Politics, the Bureau of Reclamation and the Animals-La Plata Project*, 49 NAT. RESOURCES J. 367, 373 (2009) (stating that “[t]he United States of America is largely governed by the administrative state, which includes national, state, and local agencies that share jurisdiction over substantive policy arenas”); Marie-Amlie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL’Y REV. 83, 94–102 (2018) (describing the pervasive reach of the administrative reach in the lives of LGBT people and the opportunities for resistance within the administrative apparatus); Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 296–302 (2012) (describing the rise of

of such data to drive dollars to some programs and away from others has a broad and deep impact on most Americans.⁶² 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.⁶³ Population-based grant programs are numerous, “ranging from Medicaid to highway planning and construction programs.”⁶⁴ 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.”⁶⁵ A majority of the \$675 billion is allocated for anti-poverty programming.⁶⁶

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.⁶⁷ 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-

the modern administrative state and its dominance); Peter Grieser, Note, *Administrative Contexts of Access to Gender-Confirmation Surgery*, 27 S. CAL. REV. L. & SOC. J. 165, 165, 174 (2018) (writing that the “federal government tracks and provides for its people through the federal administrative state” and describing it further as an “administrative regime”).

⁶² See generally ANDREW REAMER, THE GEORGE WASHINGTON INST. OF PUB. POLICY, COUNTING FOR DOLLARS 2020: THE ROLE OF THE DECENNIAL CENSUS IN THE GEOGRAPHIC DISTRIBUTION OF FEDERAL FUNDS (2017) (providing background on the Census’s role in determining the allocation of certain federal funds).

⁶³ Akiesha Anderson, *The Census Will Officially Count Same-Sex Couples for the First Time Ever—But That’s Not Enough*, THE CONVERSATION (Apr. 23, 2018), <https://theconversation.com/the-census-will-officially-count-same-sex-couples-for-the-first-time-ever-but-thats-not-enough-89902> [<https://perma.cc/3H8Y-DB6S>].

⁶⁴ Stansbury, *supra* note 30, at 408.

⁶⁵ Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1745 (2003).

⁶⁶ See generally MARISA HOTCHKISS & JESSICA PHELAN, U.S. CENSUS BUREAU, USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION: A NEW DESIGN FOR THE 21ST CENTURY 3–7 (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf> (listing programs by amount of funds that used census-based population numbers and population characteristics to determine fund distribution in fiscal year 2015).

⁶⁷ See U.S. CENSUS BUREAU, WHY WE ASK 2020 (2019), <https://www.census.gov/content/dam/Census/library/factsheets/2018/comm/why-we-ask-fact-sheet.pdf> [<https://perma.cc/M8SA-UA43>].

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

⁶⁸ Lisa K. Pomeroy, *Restructuring Statistical Policy Directive No. 15: Controversy Over Race Categorization and the 2000 Census*, 32 U. TOL. L. REV. 67, 74 (2000).

⁶⁹ Pixler, *supra* note 32, at 1103.

⁷⁰ See generally Spade, *supra* note 18, at 747 (discussing gender classification and the administrative state).

⁷¹ See generally Letter from Senators Tom Carper and Kamala D. Harris to John H. Thomas, Dir., U.S. Census Bureau (May 22, 2017) [hereinafter Letter from Senators Tom Carper and Kamala D. Harris], <https://www.harris.senate.gov/imo/media/doc/2017-05-22-carper-harris-letter-to-census-bureau-renew-subjects-press-.pdf> [<https://perma.cc/NKZ8-EP4X>] (describing the prominence of census data and the importance in accounting for all people).

⁷² See, e.g., Chandra L. Ford, *Public Health Critical Race Praxis: An Introduction, an Intervention, and Three Points for Consideration*, 2016 WIS. L. REV. 477, 480; Eva Paterson & Oren Sellstrom, *Equal Opportunity in a Post-Proposition 209 World*, 26 HUM. RTS. 9, 12 (1999).

⁷³ See U.S. CENSUS BUREAU, QUESTIONS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY 15 (2018) [hereinafter CENSUS BUREAU, QUESTIONS PLANNED], <https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf>.

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.”⁷⁵ 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.⁷⁶ Eight different federal agencies rely on these data to analyze and enforce at least fourteen different federal laws.⁷⁷

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.⁷⁸ 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.⁷⁹ For example, the ethnicity category of “Hispanic, Latino, or Spanish origin” was added to the Census in 1970.⁸⁰ The 2020 Census will have fifteen racial categories.⁸¹

Race and ethnicity population data are collected for several reasons. First, they are required for certain government programs.⁸² Second, they are “critical factors in the basic research behind numerous policies, particularly for civil rights.”⁸³ Third, they are used to “evaluate government programs and policies to ensure they fairly and equitably serve the needs”⁸⁴ of all races and ethnicities, as well as to “monitor compliance with antidiscrimination laws, regulations, and policies”⁸⁵ such as the Voting Rights Act and the Civil Rights Act of 1964—regarding employment opportunities.⁸⁶ Fourth, states often use the data to ensure proper drawing of legislative districts in the redistricting process.⁸⁷

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See CENSUS BUREAU, SUBJECTS PLANNED, *supra* note 41, at 10 (listing each agency and the laws for which Census and ACS data are used to analyze and enforce).

⁷⁸ *What Census Calls Us: A Historical Timeline*, PEW RESEARCH CTR. (2015), <http://www.pewsocialtrends.org/interactives/multiracial-timeline/> [<https://perma.cc/8TXP-CXGM>].

⁷⁹ The Censuses of 1820, 1830, and 1840 collected data on free white people, free “colored” people, and slaves. See *id.* In 1850, the Census expanded its racial categories to include the following: white, black, mulatto, black slaves, and mulatto slaves. See *id.* In 1860, the category “Indian” was added. See *id.* The Fourteenth Amendment, passed in 1868, required that the 1870 Census remove the “slave” categories, so that the 1870 Census included white, black, mulatto, and Indian. See *id.* An “Asian” category was added in 1920 and “Native Alaskan” was added in 1960. *Id.*

⁸⁰ See CENSUS BUREAU, QUESTIONS PLANNED, *supra* note 73, at 9.

⁸¹ *Id.*

⁸² See *id.* at 9–12.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

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.⁸⁸ Six different federal agencies rely on Census and ACS data to analyze and enforce fifteen federal laws.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 2003,⁹⁰ to the exclusion from the institution of civil marriage until 2015,⁹¹ to present day where in twenty-six states an LGBT person may still be fired from their job based on their SOGI status,⁹² LGBT marginalization and discrimination cannot be denied.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.”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.⁹⁵ Section A provides an overview of the

⁸⁸ *Id.*

⁸⁹ See CENSUS BUREAU, SUBJECTS PLANNED, *supra* note 41, at 12.

⁹⁰ See Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36 L. & INEQ. 67, 72, 74 (2018).

⁹¹ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁹² See *Equality Maps: Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [<https://perma.cc/27FG-DSYS>].

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

⁹⁴ FED. INTERAGENCY WORKING GRP. ON IMPROVING MEASUREMENT OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FED. SURVEYS, CURRENT MEASURES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS 22 (2016) [hereinafter WORKING GRP., CURRENT MEASURES], https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/WorkingGroupPaper1_CurrentMeasures_08-16.pdf.

⁹⁵ See, e.g., GARY J. GATES & FRANK NEWPORT, GALLUP, SPECIAL REPORT: 3.4% OF U.S. ADULTS IDENTIFY AS LGBT (2012), <https://news.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx>

background and history of SOGI data and its relationship to the Census.⁹⁶ Section B discusses SOGI and the 2020 Census and ACS controversy.⁹⁷ Section C discusses the present situation of SOGI data collection and the government surveys that collect information regarding same-sex couples.⁹⁸ Section D discusses how these uncoordinated surveys collect an incomplete picture of the SOGI population, thus creating an Identity Undercount.⁹⁹

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 2005.¹⁰⁰ 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*.¹⁰¹

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.¹⁰² 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—recoding the gender of one partner so that the couple showed up in data files as a different-sex couple.”¹⁰³ 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).¹⁰⁴

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.¹⁰⁵ When this occurred, the Census Bureau

[<https://perma.cc/PWS6-W4ZN>] (noting that the Department of Health and Human Services’ (HHS) National Survey of Family Growth collected sexual orientation data in two different surveys, one regarding 2002 data and another regarding 2006–2010 data).

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.

¹⁰⁰ See U.S. CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS ABOUT SAME-SEX COUPLES, FERTILITY AND FAMILY STATISTICS BRANCH (2013) [hereinafter CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS], <https://www2.census.gov/topics/families/same-sex-couples/faq/sscplfactsheet-final.pdf>. The Census added the category to the CPS in 1995 and to the Survey of Income and Program Participation (SIPP) in 1996. *Id.*

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.”¹⁰⁶ 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.”¹⁰⁷ These actions by the Census bureau constitute a literal straightwashing of the Census data.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ In 2015 and 2016, there was visible progress toward including SOGI questions in the 2020 Census and ACS.¹¹¹ 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.¹¹²

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.¹¹³ In addition, HUD and HHS added SOGI questions.¹¹⁴ During the Obama Administration, HUD, the Centers for Medicare and Medicaid Ser-

¹⁰⁶ See *id.* at 1.

¹⁰⁷ See *id.* at 3.

¹⁰⁸ See Hayley Gorenberg, *The Affirmative Power of Visibility*, HUFFINGTON POST (Nov. 15, 2010), https://huffpost.com/entry/the-affirmative-power-of-_b_783611 [<https://perma.cc/8JKT-2N6S>] (last updated, May 25, 2011) (noting that in population counts before 2010, “if a same-sex couple checked the box that said ‘married,’ the federal government actually assumed they’d mismarked their form, changed one partner’s gender identity, and ‘straightened’ them for the count”).

¹⁰⁹ See LGBTQ CENSUS ADVOCACY, *supra* note 56.

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See generally Walrath, *supra* note 1 (highlighting the effects of including or not including SOGI questions on the National Crime Victimization Survey). The Trump Administration stated it had “concerns about the potential sensitivity of these questions for adolescents,” and thus recommended that the questions only be targeted to respondents eighteen years old and older, notwithstanding that the questions were confidential and voluntary. *Id.*

¹¹⁴ See LGBTQ CENSUS ADVOCACY, *supra* note 56.

vices, and the Environmental Protection Agency each requested that the Census include the collection of SOGI data.¹¹⁵

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.¹¹⁶ In March of 2017, as required by the Census Act,¹¹⁷ the Trump Administration submitted its census plan to Congress, a proposal that *included* SOGI questions in an appendix submitted with the plan.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.”¹¹⁹ Soon thereafter, the SOGI questions were scrubbed from the online version of the plan submitted to Congress.¹²⁰ The director of the Census

¹¹⁵ See Hansi Lo Wang, *Census Bureau Caught in Political Mess Over LGBT Data*, NPR (July 18, 2017), <https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it> [<https://perma.cc/LV8X-E2PG>].

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).”).

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. *Id.* The specific questions that will be used must be submitted to Congress no later than two years before the census date. *Id.* § 141(f)(2).

¹¹⁸ See Laurie Kellman, *Census Suggests Counting LGBTQ, Then “Corrects” and Deletes*, ASSOCIATED PRESS (Mar. 29, 2017), <https://www.apnews.com/619704d091da4b54968a23720aaadee0f> [<https://perma.cc/6S5Y-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.”).

¹¹⁹ See Hansi Lo Wang, *U.S. Census to Leave Sexual Orientation, Gender Identity Questions Off New Surveys*, NPR (Mar. 29, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/29/521921287/u-s-census-to-leave-sexual-orientation-gender-identity-questions-off-new-surveys> [<https://perma.cc/WFW5-HTH5>].

¹²⁰ See generally *Disappearing Act*, LAMBDA LEGAL (2017), <https://www.lambdalegal.org/impact-fall-2017/disappearing-act> [<https://perma.cc/L33V-J6KE>]; Nancy Marcus & Ariel Goldberg, *Erasing LGBTQ People from the 2020 Census Isn’t Just Wrong, It’s Life-Threatening*, LAMBDA LE-

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-

GAL (Mar. 29, 2017), https://www.lambdalegal.org/blog/20170329_erasing-lgbtq-people-from-census [<https://perma.cc/S23H-V7AR>] (noting that despite the fact that previous drafts had included SOGI questions as part of the census, the final draft submitted to Congress did not).

¹²¹ Tim Teeman, *This Is Why the Erasing of LGBT Americans on the 2020 Census Matters*, DAILY BEAST (Mar. 29, 2017), <https://www.thedailybeast.com/this-is-why-the-erasing-of-lgbt-americans-on-the-2020-census-matters> [<https://perma.cc/5U5C-K3TK>] (quoting the Census Bureau director who released a statement noting that the initial version was a mistake and that the Bureau’s review “concluded there was no federal data need to change the planned census and ACS subjects”).

¹²² See CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS, *supra* note 100, at 4.

¹²³ Julie Moreau, *In a First, 2020 Census to Count Same-Sex Couples*, NBC NEWS (Apr. 24, 2018), <https://www.nbcnews.com/feature/nbc-out/first-2020-census-count-same-sex-couples-n868506> [<https://perma.cc/6TMA-QPDC>] (noting that these questions will help the government in “ensuring available housing in a community meets the needs of residents and exploring whether existing programs are making a difference for families”).

¹²⁴ See, e.g., W. Bradford Wilcox & Wendy Wang, *The Marriage Divide: How and Why Working-Class Families Are More Fragile Today*, INST. FOR FAM. STUD. (Sept. 25, 2017), <https://ifstudies.org/blog/the-marriage-divide-how-and-why-working-class-families-are-more-fragile-today> [<https://perma.cc/D3UD-36UM>]. Moreover, “the *discourse* in which the same-sex marriage agenda [was] *pursued* . . . imposes unseen costs on the poor.” LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM 111 (2018). Adler also explains that the “discursive element of moral equivalency and mutual responsibility [put forward by the LGBT marriage equality movement] hurts the poor because . . . it operates in tandem with the neoliberal trend favoring privatized family obligation.” *Id.*

¹²⁵ See WORKING GRP., CURRENT MEASURES, *supra* note 94, at 19, 21 (explaining the confusion and challenges with capturing these categories of data through the surveys as written).

¹²⁶ *Id.*

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

¹²⁷ See generally JUDITH BRADFORD ET AL., THE 2000 CENSUS AND SAME-SEX HOUSEHOLDS: A USER'S GUIDE 7 (2002) (providing an overview of the limitations of Census data regarding LGBT people but also explaining how the available data can still be useful).

¹²⁸ See BADGETT ET AL., *supra* note 12, at 8.

¹²⁹ See CENSUS BUREAU, SURVEYS AND PROGRAMS, *supra* note 116.

¹³⁰ See Carol Morello, *Census to Change the Way It Counts Gay Married Couples*, WASH. POST (May 26, 2014), https://www.washingtonpost.com/local/Census-to-change-the-way-it-counts-gay-married-couples/2014/05/26/e6c6edd0-e2a3-11e3-9743-bb9b59cde7b9_story.html?noredirect=on&utm_term=.e40c6fb8d050 [<https://perma.cc/YSP5-BNTX>].

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.¹³⁸ 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.¹³⁹

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

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 sexual attraction, four collect information regarding sexual behavior, and six collect information regarding gender identity. *Id.*

¹³⁹ See CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR LGBT WOMEN IN AMERICA 25 (2015) [hereinafter PAYING AN UNFAIR PRICE 2015], www.lgbtmap.org/file/paying-an-unfair-price-lgbt-women.pdf [https://perma.cc/3CDE-SW6B].

the disparities that exist.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.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.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.¹⁴³

III. THE MYTH OF LGBT AFFLUENCE AND POWER¹⁴⁴

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.”¹⁴⁵ In recent

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”).

¹⁴¹ See *Disappearing Act*, *supra* note 120 (noting that these groups were not “doing anything comparable to the importance of the Census info”).

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).

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”).

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).

¹⁴⁵ Eric Heinze, *Gay and Poor*, 38 HOW. L.J. 433, 434 (1995).

years, however, scholars and researchers have given more attention to poverty within the LGBT community with results that are both staggering and disheartening.¹⁴⁶ Section A discusses media and its influence on portraying the myth of LGBT people as wealthy and powerful.¹⁴⁷ Section B provides information regarding the reality of economic security in the LGBT community and covers topics such as education, housing, and food insecurity.¹⁴⁸

A. The Myth

There are very few images of LGBT poverty in the mainstream media.¹⁴⁹ In contrast, a narrative of gay affluence and power persists, fueling a persistent stereotype that LGBT people are wealthy, powerful, and affluent.¹⁵⁰ 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.”¹⁵¹ 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.¹⁵² 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.¹⁵³ 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.”¹⁵⁴ 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.¹⁵⁵

¹⁴⁶ See, e.g., Brad Sears & Lee Badgett, *Beyond Stereotypes: Poverty in the LGBT Community*, WILLIAMS INST. (June 2012), <https://williamsinstitute.law.ucla.edu/williams-in-the-news/beyond-stereotypes-poverty-in-the-lgbt-community/> [<https://perma.cc/GQN7-3NUS>]; see also ADLER, *supra* note 124, at 2–3, 176–211.

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.*

¹⁵¹ M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 1 (2001).

¹⁵² See Sears & Badgett, *supra* note 146.

¹⁵³ See generally Lorena Blas, *Who Tops the “Out” Power 50 List of LGBTQ Influencers?*, USA TODAY (July 19, 2017), <https://usatoday.com/story/life/people/2017/07/19/outs-power-50-lgbtq-community-leaders/489849001/> [<https://perma.cc/5PR5-A2XJ>] (discussing LGBT people in mainstream culture).

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

¹⁵⁶ 517 U.S. 620 (1996); see Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado’s Amendment 2*, 21 *FORDHAM URB. L.J.* 1057, 1068 (1994).

¹⁵⁷ See Goldberg, *supra* note 156, at 1072; see also Darren Lenard Hutchinson, “Not Without Political Power”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 *ALA. L. REV.* 975, 981 (2014).

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.¹⁶³ The respondents to these surveys are resoundingly not representative of the LGBT population.¹⁶⁴

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.¹⁶⁵ In fact, the myth of gay affluence has taken on trope-like status in legislative debates about antidiscrimination protections for LGBT people.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ 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,¹⁶⁹ and surveys conducted by states, such as the California Health Interview Survey.¹⁷⁰ 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.¹⁷¹ The limited studies that have been done

¹⁶³ M.V. Lee Badgett, *The Double-Edged Sword in Gay Economic Life? Marriage and the Market*, 15 WASH. & LEE J. C.R. & SOC. JUST. 109, 110 (2008) (noting that lesbians, gays, and bisexuals are “an affluent and underappreciated market niche”).

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.

¹⁶⁸ See WILLIAMS INST., UCLA SCH. OF LAW, <https://williamsinstitute.law.ucla.edu> [<https://perma.cc/2BQ8-S46A>].

¹⁶⁹ See *Issues: Research & Data Needs*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/research-data-needs> [<https://perma.cc/4KBV-756F>].

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.¹⁷² 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.¹⁷³ 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.¹⁷⁴ Both as couples and individually, LGBT people are more vulnerable to poverty.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ Legislatures and policymakers alone are not to blame; until very recently, poverty has not been a top policy item for national LGBT organizations.¹⁷⁸ It was not until 2009 that a national LGBT organization published a study addressing LGBT poverty.¹⁷⁹

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).

¹⁷⁶ AISHA C. MOODIE-MILLS & PRESTON MITCHUM, CTR. FOR AM. PROGRESS, LESSONS FROM BAYARD RUSTIN: WHY ECONOMIC JUSTICE IS AN LGBT ISSUE 3 (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/08/BayardRustinEconomicLGBT-2.pdf>.

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.

¹⁷⁹ See RANDY ALBELDA ET AL., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY, WILLIAMS INST. (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.

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.¹⁸⁰ Women in this population aged eighteen to forty-four are poorer than heterosexual women across all data sets.¹⁸¹ 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.¹⁸² Employment discrimination further contributes to economic insecurity and poverty.¹⁸³ Twenty-four percent of lesbians and bisexual women live in poverty, while only 19% of their heterosexual counterparts live in poverty.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸ 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

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-

¹⁸⁹ *See id.*

¹⁹⁰ QUINTANA, *supra* note 174, at 2.

¹⁹¹ Badgett, *supra* note 163, at 114.

¹⁹² BADGETT ET AL., *supra* note 12, at 15.

¹⁹³ *See id.*; Sears & Badgett, *supra* note 146.

¹⁹⁴ BADGETT ET AL., *supra* note 12, at 15–16.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2, 16 (finding that at a poverty rate of 52.3%, “African American children in gay male households have the highest poverty rate . . . of any children in any household type”).

¹⁹⁸ *Id.* at 17 (noting the poverty rate to be 35.3% for single LGBT adults with children); *see, e.g.*, VIET TRAN, THE IMPACT OF POVERTY ON LGBT FAMILIES AND INDIVIDUALS, CTR. FOR THE STUDY OF SOC. POLICY 4 (2016) (on file with author).

¹⁹⁹ *See* Masen Davis & Kristina Wertz, *When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice*, 8 SEATTLE J. SOC. JUST. 467, 470 (2010) (citing NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L

tion against transgender people is often blamed for the high rates of unemployment in that community.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.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.”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.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.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.²⁰⁵ Moreover, African-American men in same-sex couples are more than six times more likely to be poor than similarly situated white men.²⁰⁶ African-American women in same-sex relationships are three times more likely to be poor than are similarly situated white women.²⁰⁷ Hispanic people in same-sex couples are more likely to be poor than their white same-sex couple counterparts.²⁰⁸ These disparities reveal the intersection of race-based and SOGI-based discrimination.²⁰⁹

GAY AND LESBIAN TASK FORCE, PRELIMINARY FINDINGS, NATIONAL TRANSGENDER DISCRIMINATION SURVEY 1 (2009)).

²⁰⁰ QUINTANA, *supra* note 172, at 2–3.

²⁰¹ *Id.*

²⁰² *See* Sears & Badgett, *supra* note 146.

²⁰³ QUINTANA, *supra* note 174, at 3 (citing a study completed in 2009 by the Transgender Law Center titled the “State of Transgender California”).

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”).

²⁰⁵ BADGETT ET AL., *supra* note 12, at 11.

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).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

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.²¹⁰ 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.”²¹¹

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.²¹² 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.²¹³

8. LGBT Schoolchildren

School climate has a direct connection to educational outcomes, which in turn impacts long-term economic stability.²¹⁴ When children feel unsafe in school, or where they are actually unsafe, learning suffers.²¹⁵ Studies show that many LGBT schoolchildren feel unsafe or are unsafe in American schools.²¹⁶ 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-

they have avoided calling the police (30%) due to concern for anti-LGBTQ discrimination, compared to white LGBTQ people (5%).”); see also MOODIE-MILLS & MITCHUM, *supra* note 176, at 3.

²¹⁰ See, e.g., Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 578–79 (2013) (noting that “[a]s cities rose to prominence in modern gay narratives, a corollary belief surfaced and cemented: those with same-sex desire do not belong in small towns” and describing there to be a “geographic conflation of gay people and cities”).

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.²¹⁷ A hostile school climate leads to academic underachievement through both absenteeism and an inability to focus while in school.²¹⁸ LGBT students are also disciplined more often and more harshly than their straight and cisgender counterparts.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.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.²²¹ These negative educational and employment outcomes are even worse for African-American students.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.²²³

²¹⁷ See, e.g., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY EXECUTIVE SUMMARY 5 (2016), <https://www.glsen.org/sites/default/files/2019-10/GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Executive%20Summary.pdf> [<https://perma.cc/AAV7-PMVE>].

²¹⁸ PAYING AN UNFAIR PRICE 2015, *supra* note 139, at 18.

²¹⁹ *Id.*

²²⁰ See, e.g., MOODIE-MILLS & MITCHUM, *supra* note 176, at 6–7 (discussing the impact of harassment on LGBT students); see also CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, 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, *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).

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 Maret, 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, *supra* note 10, at 671–72 (discussing the challenges that homeless and foster care LGBT youth face).

²²² MOODIE-MILLS & MITCHUM, *supra* note 176, at 7.

²²³ See PAYING AN UNFAIR PRICE 2015, *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

* * *

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.²³⁸ 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.²³⁹ 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.²⁴⁰ 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.²⁴¹ 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.²⁴² In addition, LGBT people have a higher risk of being homeless, beginning in their youth.²⁴³

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 person²⁴⁴—securing competent and consistent healthcare often is a challenge for LGBT people.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹

In short, “legalized employment, housing, and healthcare discrimination” all combine to create a disproportionate poverty level for many LGBT people.²⁵⁰ These same factors lend themselves to diminished political power.²⁵¹ 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 Inn²⁵² to the modern-day phenomenon of “walking while trans,”²⁵³ 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 *Id.*

²⁴⁷ See PAYING AN UNFAIR PRICE 2014, *supra* note 220, at 28.

²⁴⁸ 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 KELLAN E. BAKER & MARGARET HUGHES, CTR. FOR AM. PROGRESS, SEXUAL ORIENTATION AND GENDER IDENTITY DATA COLLECTION IN THE BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM 1 (Mar. 29, 2016), <https://cdn.americanprogress.org/content/uploads/2016/03/05064109/BRFSSdatacollect-brief-04.05.17.pdf> [<https://perma.cc/SEX6-H83D>].

²⁵⁰ See TRAN, *supra* note 198, at 4.

²⁵¹ 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 See, e.g., AMNESTY INT’L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 2 (2005), <https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf> [<https://perma.cc/A7JU-TSQB>] (noting that police raids of gay bars were commonplace in the 1950s and 1960s and that the Stonewall Riots were “act[s] of defiance against police abuse and repression”).

²⁵³ 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 HARMS 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.²⁵⁴ Section B discusses programs that address inequalities in society and how LGBT people are often left out from the benefits that these programs provide.²⁵⁵ Section C discusses the negative impact of exclusion on the dignity of LGBT people.²⁵⁶ Sections D and E discuss additional harms to LGBT populations, including the economic and political consequences.²⁵⁷ Section F discusses the particular harms that LGBT people of color experience as a result of the Identity Undercount.²⁵⁸ Section G concludes this Part by explaining the societal consequences of not accurately collecting SOGI data.²⁵⁹

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.²⁶⁰

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

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.

²⁶² See Allen Fremont & Nicole Lurie, *Appendix D: The Role of Racial and Ethnic Data Collection in Eliminating Disparities in Health Care*, in NAT’L RESEARCH COUNCIL, *ELIMINATING HEALTH DISPARITIES: MEASUREMENT AND DATA NEEDS* (Michele Ver Ploeg & Edward Perrin eds., 2004), <https://www.ncbi.nlm.nih.gov/books/NBK215740/> [<https://perma.cc/2XRT-PSTA>].

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.²⁶⁴

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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ Moreover, the recent wave of cases seeking religious exemptions in public accommodations indicates that this is a likely phenomenon.²⁶⁹

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-

²⁶⁴ See, e.g., INST. OF EDUC. SCIS. 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).

²⁶⁵ See *supra* notes 165–261 and accompanying text.

²⁶⁶ PAYING AN UNFAIR PRICE 2015, *supra* note 139, at 35.

²⁶⁷ *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.").

²⁶⁸ 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>].

²⁶⁹ 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).

tinues today.²⁷⁰ 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.²⁷¹ Religiously-affiliated anti-poverty charities have thus become “an arm of the federal welfare state.”²⁷²

The current wave of religious exemption cases,²⁷³ however, demonstrates that anti-poverty programs delivered via religiously-based organizations funded with federal money may seek to turn LGBT people away.²⁷⁴ 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.²⁷⁵ 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 anti-discrimination laws.²⁷⁶

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

²⁷⁰ See Kelly Riddell, *Catholic Church Collects \$1.6 Billion in U.S. Contracts, Grants Since 2012*, WASH. TIMES (Sept. 24, 2015), <https://www.washingtontimes.com/news/2015/sep/24/catholic-church-collects-16-billion-in-us-contract/> [<https://perma.cc/QL4E-9YME>].

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.²⁷⁷ 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.²⁷⁸ 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."²⁷⁹ 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.²⁸⁰ Invisibility leads to ignorance, which in turn leads to discrimination and the underservicing of LGBT Americans living in poverty.²⁸¹ 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.²⁸² 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."²⁸³

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

²⁷⁷ See, e.g., *Parental Rights with Unmarried Same Sex Couples*, GOOSTREE LAW GROUP (Jan. 25, 2019), <https://www.familydivorcelaw.com/kane-county-divorce-attorney/parental-rights-with-unmarried-same-sex-couples> [<https://perma.cc/WG48-34TM>] ("A non-biological parent who has never legally adopted the child may not have any parental rights or responsibilities after a separation.").

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.

²⁸⁰ See, e.g., Sanford Levinson, "Who Counts?" "Sez Who?," 58 ST. LOUIS U. L.J. 937, 978 (2014).

²⁸¹ See generally Margo Anderson & Stephen E. Fienberg, *The 2000 Census: Litigation, Results, and Implications*, 77 N.D. L. REV. 665, 666, (2001) (discussing the implications of those left out of the Census and how minority groups in particular are left out).

²⁸² See Jeff Krehely, *Critical Government Surveys Omit Gay and Transgender People*, CTR. FOR AM. PROGRESS (Sept. 6, 2012), <https://www.americanprogress.org/issues/lgbt/news/2012/09/06/36134/critical-government-surveys-omit-gay-and-transgender-people/> [<https://perma.cc/TB6M-C47X>] ("[T]he lack of reliable data in policy debates and decisions increases the likelihood that stereotypes and myths will shape policies that impact the gay and transgender population.").

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

²⁸⁴ Hayley Gorenberg, *Gay Rights as Human Rights*, HUFFINGTON POST (Oct. 26, 2010) [hereinafter Gorenberg, *Gay Rights as Human Rights*], https://www.huffingtonpost.com/hayley-gorenberg/gay-rights-as-human-right_b_773641.html [<https://perma.cc/WD3H-8DX7>]. “Indisputably, visibility has been key to the rapid shift in Western culture around the status of homosexuality. And LGBTQ strategists seem to return to visibility tactics when all else fails.” Gorenberg, *supra* note 108 (quoting Professor Marc Poirier).

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”).

²⁸⁶ 478 U.S. 186 (1986) (finding Georgia’s sodomy law constitutional), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

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).

²⁹⁵ See Kellan Baker & Laura E. Durso, *Filling in the Map: The Need for LGBT Data Collection*, CTR. FOR AM. PROGRESS (Sept. 16, 2015), <https://www.americanprogress.org/issues/lgbt/news/2015/09/16/121128/filling-in-the-map-the-need-for-lgbt-data-collection/> [<https://perma.cc/KD8S-RKT8>].

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.²⁹⁷ 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.”²⁹⁸ 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.²⁹⁹

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.”³⁰⁰

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.³⁰¹ 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.³⁰² 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.

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.³⁰³ 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.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶

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.³⁰⁷ At the state level, twenty-six states lack such laws.³⁰⁸ 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.”³⁰⁹ The omis-

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).

³⁰⁷ Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/> [<https://perma.cc/HQA3-NFC9>].

³⁰⁸ See *Equality Maps: Non-Discrimination Laws*, *supra* note 92.

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.”³¹⁰ Opponents of regressive and transphobic “bathroom bills” would benefit from knowing just how many transgender people reside in their districts; wielding 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.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.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.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.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.

³¹³ See David M. Fox, *The Differential Undercount: When Government Disclosures of Census Data Undermine Constitutional Guarantees*, 18 CONN. PUB. INT. L.J. 131, 142–43 (2019).

³¹⁴ See generally Kellan E. Baker et al., *How to Collect Data About LGBT Communities*, CTR. FOR AM. PROGRESS (Mar. 16, 2016), <https://americanprogress.org/issues/lgbt/reports/2016/03/15/133223/how-to-collect-data-about-lgbt-communities/> [<https://perma.cc/W7X8-4LFM>] (outlining specific considerations for collecting SOGI data).

The lack of government SOGI data means that LGBT people are “forced to go without funding for real, everyday services and remain virtually nonexistent 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

³¹⁵ See, e.g., *New 2010 Census Data Released on Married Same-Sex Couples*, NAT’L LGBTQ TASK FORCE, <http://www.thetaskforce.org/new-2010-census-data-released-on-married-same-sex-couples/> [https://perma.cc/DRW3-685A].

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 End 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 Polices: 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.

Inga T. Winkler et al., *Treasuring What We Measure and Measuring What We Treasure: Post-2015 Monitoring for the Promotion of Equality in the Water, Sanitation, and Hygiene Sector*, 32 WIS. INT’L L.J. 547, 559–60 (2014) (footnotes omitted).

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.³²⁰ 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.³²¹

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.³²² Additionally, several agencies, including a committee of the U.S. Senate,³²³ HUD,³²⁴ HHS,³²⁵ and the DOJ³²⁶ have written letters to the Census Bureau requesting the collection of SOGI data and explaining the programmatic needs for such data collection.³²⁷ 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.³²⁸

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.

³²⁴ See Letter from Julian Castro, Dir., Dep't of Hous. & Urban Dev., to John H. Thompson, Dir., U.S. Census Bureau (June 30, 2016), <https://assets.documentcloud.org/documents/3868940/HUD-to-Census-2016-06-30.pdf> [<https://perma.cc/2CPB-DJ8W>].

³²⁵ See Letter from Arthur E. Gary, Gen. Counsel, U.S. Dep't of Justice, to Barry K. Robinson, Chief Counsel of Econ. Affairs, U.S. Dep't of Commerce (Mar. 7, 2017), <https://www.harris.senate.gov/imo/media/doc/2017-05-22-carper-harris-letter-to-census-bureau-re-new-subjects-press-.pdf> [<https://perma.cc/VWM6-W4UB>].

³²⁶ See Letter from Arthur E. Gary, Gen. Counsel, U.S. Dep't of Justice, to John H. Thompson, Dir. of Econ. & Statistics Admin., U.S. Census Bureau (Nov. 4, 2016), <https://www.harris.senate.gov/imo/media/doc/2017-05-22-carper-harris-letter-to-census-bureau-re-new-subjects-press-.pdf> [<https://perma.cc/H4G4-EAU8>].

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).

³²⁸ See, e.g., Census Equality Act, S. 3314, 115th Cong. (2018); LGBT Data Inclusion Act, H.R. 3273, 115th Cong. (2017); LGBT Data Inclusion Act, S. 1570, 115th Cong. (2017); LGBT Data Inclusion Act, H.R. 5373, 114th Cong. (2016). In a nod to concerns about privacy and confidentiality—

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 givens 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.

³⁴⁰ See Hansi Lo Wang, *Judge Orders Trump Administration to Remove 2020 Census Citizenship Question*, NPR (Jan. 15, 2019), <https://www.npr.org/2019/01/15/671283852/judge-orders-trump-administration-to-remove-2020-Census-citizenship-question> [<https://perma.cc/PRY5-M8SE>].

³⁴¹ See Complaint at 1, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y.), *aff’d in part, rev’d in part, remanded sub nom.* *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 1:18-cv-2921).

³⁴² Vann R. Newkirk II, *The Weaponized Census*, THE ATLANTIC (Mar. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/03/the-weaponized-Census/556592/> [<https://perma.cc/774H->

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

TZ5X] (stating that “[p]roviding data at the block level would allow ICE to locate unauthorized immigrants with greater ease”).

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”).

³⁴⁴ See Wang, *supra* note 340. The Trump Administration has asked the U.S. Supreme Court to consider the case. See Robert Barnes, *Trump Administration Asks Supreme Court to Quickly Take Up Census Citizenship Question*, WASH. POST (Jan. 22, 2019), https://www.washingtonpost.com/politics/courts_law/trump-administration-asks-supreme-court-to-quickly-take-up-census-citizenship-question/2019/01/22/93734014-1e73-11e9-8e21-59a09ff1e2a1_story.html [<https://perma.cc/XN6Y-6CY3>]. Ultimately, the Trump Administration decided to withdraw the citizenship question from the 2020 census. See generally Michael Wines, *2020 Census Won’t Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html> [<https://perma.cc/R3YF-6FEA>] (discussing the Administration’s decision to abandon the addition of the question despite having embarked on an extensive effort to add it).

³⁴⁵ See, e.g., Deborah Barfield Berry, *Census Deadline Looms for Public to Comment on Adding Citizenship Question*, USA TODAY (Aug. 7, 2018), <https://www.usatoday.com/story/news/politics/2018/08/07/citizenship-question-2020-census-stirs-protests-and-comments/924713002/> [<https://perma.cc/L2Q7-BKR3>] (“The debate over adding the question has stirred protests and letter-writing campaigns. It has also been the subject of congressional hearings, legislation and lawsuits.”).

³⁴⁶ See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (upholding anti-sodomy laws); Carpenter & Marshall, *supra* note 143 (highlighting a history of bias from law enforcement toward the transgender community); Woods, *supra* note 10 (discussing inequities for LGBT individuals within the criminal justice system).

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.

³⁵⁷ See generally Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 4 (1993) (discussing the importance of numerical standards in determining representation and in the background of the one person/one vote jurisprudence).

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.³⁷³ Eventually, almost 112,000 Japanese Americans were rounded up and interned by using Census data.³⁷⁴ 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.”³⁷⁵ 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.³⁷⁶ 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.”³⁷⁷ 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.³⁷⁸

Professor Spade conceptualizes and describes the result of governmental construction of identities as “administrative systems that govern the distribution of life chances.”³⁷⁹ 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-

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.

³⁷⁶ See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 139–43 (Robert Hurley trans., Pantheon Books 1978), <http://home.ku.edu.tr/~mbaker/CSHS503/FoucaultHistorySex.pdf> [<https://perma.cc/R8GX-QQJ4>].

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.”³⁸⁰ The Census and ACS are “population-level interventions” that depend on state-created identity categories.³⁸¹ 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.³⁸² 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.³⁸³ As a result, “population-level care-taking programs always include population surveillance as a core function of their work.”³⁸⁴

* * *

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.”³⁸⁵ 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.³⁸⁶ 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

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:

- Age³⁸⁹
- Hispanic origin³⁹⁰
- Race³⁹¹
- Relationship³⁹²
- Sex³⁹³
- Tenure, which means how the respondent occupies his or her residence³⁹⁴
- Operational questions³⁹⁵

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.

