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REDEFINING IMMUTABILITY: UTAH'S MODEL FOR ADVANCING LGBT RIGHTS

Zachary Herzog¹

In the summer of 2013, Ohioans James Obergefell and John Arthur were legally married in the state of Maryland. Just two years earlier, Arthur had been diagnosed with amyotrophic lateral sclerosis and was declared terminally ill. Shocked by the diagnosis, the couple decided to be married while Arthur still had time. By the time of the wedding, Arthur's health had significantly declined, so the ceremony had to be performed inside a medical transport plane on a Baltimore runway. Arthur passed away just a few months after the wedding.²

Ohio state law prohibited Obergefell to appear on Arthur's death certificate as his surviving spouse. Obergefell then filed a civil lawsuit, and the state fought back. Ohio, however, had a contradictory track record. At the time, state courts were recognizing virtually all out-of-state marriages that were considered legal in the state where they were performed, even if these marriages would not have been legal to perform in Ohio. Some of these marriages even included those of first cousins and minors. The marriage between Obergefell and Arthur, having been performed legally in a different state, met the same qualifications as other previous exceptions to Ohio law. Yet the state continued to fight against Obergefell. Notwithstanding,

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2 *Obergefell v. Wymyslo*, 980 F. Supp. 2d 907, 909-11 (S.Dist. of Ohio 2013).

Obergefell's case reached the Supreme Court where it ultimately succeeded.³

In the Supreme Court's opinion of *Obergefell v. Hodges*, Justice Anthony Kennedy defended sexual orientation as being an immutable right.⁴ In doing this, Justice Kennedy revitalized a legal principle that provides a stronger foundation for advancing lesbian, gay, bisexual or transgender (LGBT) rights.⁵ This article will address the need for states to advance LGBT rights by expanding Justice Kennedy's definition of immutable rights to include gender identity and will present Utah Senate Bill 296 as a model for states to emulate in advancing antidiscrimination policy. While this bill has also gone to certain lengths to protect religious freedoms in conjunction with LGBT rights, we will not discuss the religious freedom aspect of the bill.

Part I of this article will define relevant terms. Part II will discuss parameters for an expanded definition of immutable rights. Part III will discuss current challenges the LGBT community faces and the role that expanding the definition of immutable rights would play in protecting LGBT Americans, primarily LGBT youth. Part IV will discuss recent legislation in Utah that should serve as a model for other states seeking to expand immutable rights and protections.

I. DEFINITIONS OF KEY LGBT TERMS

The following terms play a key role in understanding the implications of Justice Kennedy's opinion, as well as the impact of SB 296 on LGBT rights.

Sexual Orientation: This is one's sexual and emotional attraction to another person as well as the behavior that results

3 *Id.*

4 *Obergefell v. Hodges*, No. 14-556, slip op. at 2 (U.S. June 26, 2015).

5 Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 4-12 (2015) http://www.yalelawjournal.org/pdf/a.2.Clarke.102_soghpowr.pdf.

from that attraction.⁶ Sexual orientation is not limited to just heterosexual or homosexual behaviors; a person can be attracted to men, women, both, neither, etc.⁷

Gender Identity: This is a person's "inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender."⁸ Gender identity is internal, meaning that it is not always visible to others, and may or may not correspond to a person's sex assigned at birth.⁹

Transgender: This is a term used specifically to describe those whose gender identity or gender role or both do not conform to what is typically associated with their sex assigned at birth.¹⁰

Immutable Traits: Though the meaning of "immutability" has evolved overtime, judges consistently recognize that these are traits¹¹ that are central enough to one's personal identity that they cannot be changed, whether it is physically

6 Definitions Related to Sexual Orientation and Gender Diversity in APA Documents, AM. PSYCHOL. ASS'N (2013), <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>. The American Psychological Association (APA) explains that sexual orientation can encompass a number of behaviors, including genderqueer, androgynous, lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others. *Id.*

7 *Id.*

8 *Id.*

9 *Id.* The APA explains here that gender identity, like sexual orientation, has several variations including genderqueer, gender nonconforming, gender neutral, etc.

10 *Id.*

11 To avoid redundancy in this article, we will use the terms "trait," and "characteristic" synonymously.

possible to change them or not.¹² Justice Kennedy applies this definition to sexual orientation in his *Obergefell v. Hodges* opinion.

II. DIFFERENTIATING BETWEEN IMMUTABILITY AND INNATENESS

In order to expand Kennedy’s definition of immutability, there must be parameters set in place to distinguish immutable characteristics from innate traits.¹³ Innate characteristics are generally understood to be those traits inherited at birth, though protecting all innate characteristics from any possible form of discrimination is often not considered an urgent legal need.¹⁴ According to Justice Kennedy, however, the Supreme Court views some innate characteristics to be immutable in nature and therefore worthy of legal protection.¹⁵ Race, color, national origin, sex, and age have traditionally been considered immutable characteristics and have been particularly emphasized in employment discrimination statutes in order to prevent employers from hiring based upon certain social biases.¹⁶ In his opinion, Justice Kennedy emphasizes the importance of rights that protect “personal choices central to individual dignity and autonomy, including intimate choices defining personal identity.”¹⁷ Based on these assertions,

12 *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1988) (Norris, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978); *see Whitewood v. Wolf*, 992 F. Supp. 2d 410, 429 (M.D. Pa. 2014) (holding that sexual orientation is “so fundamental to one’s identity that a person should not be required to abandon [it]” (quoting *Hernandez-Montiel*, 225 F.3d at 1093)).

13 Jessica A. Clarke, *Against Immutability*, 125 *YALE L.J.* 2, 4-12 (2015).

14 *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1988) (Norris, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 429 (M.D. Pa. 2014).

15 Jessica A. Clarke, *Against Immutability*, 125 *YALE L.J.* 2, 4-12 (2015).

16 Sharona Hoffman, *The Importance of Immutability*, 52 *WM. & MARY L. REV.* 1483, 1487 (2011).

17 *Obergefell v. Hodges*, No. 14-556, slip op. at 2 (U.S. June 26, 2015).

gender identity should be granted legal protections equal to those of other immutable rights.

It is clear, however, that not all innate characteristics meet the immutability criteria that Kennedy proposes. Intelligence and beauty, for example, are arguably innate traits, but they are also able to be modified to such an extent that it is difficult to argue that they are a core part of one's personal identity.¹⁸ For this reason, the general definition of *immutable* has come to mean something more than just *unchangeable*.¹⁹ Justice Kennedy's reasoning clearly distinguishes *immutable* from *innate*, thus justifying a need to extend the definition of immutable rights to include gender identity. This suggests that further advancements in LGBT antidiscrimination legislation could soon gain more momentum in US courts.²⁰

III. ESTABLISHING GROUNDS FOR ADVANCING LGBT ANTIDISCRIMINATION LEGISLATION

Recently, some of the strongest advocates for improving rights that protect personal identity have been LGBT Americans. In this section, we will underline current problems faced by LGBT youth and discuss certain legislative measures taken to alleviate tension between LGBT Americans and their non-LGBT peers.

A. Public Schools—A Hostile Environment for LGBT Youth

Americans who identify as LGBT are frequent targets of intense and sometimes violent forms of harassment and discrimination.²¹ This is especially true of LGBT youth in elementary and secondary

18 Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 4-12 (2015).

19 *Id.*

20 *Obergefell v. Hodges*, No. 14-556, slip op. at 8 (U.S. June 26, 2015).

21 Hum. Rts. Campaign, *Growing Up LGBT in America: HRC Youth Survey Report Key Findings*, 16 (2012), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf.

schools.²² In 2011, a case regarding an openly gay middle school student named Seth Walsh gained national attention. Over a span of several months, thirteen-year-old Walsh experienced relentless bullying at school. The abuse started after he came out in the sixth grade.²³ His peers routinely referred to him as faggot, pussy, pansy, and sissy, pushed him into lockers, told him to burn in hell and even to go kill himself.²⁴ Eventually, some of Walsh's peers began following him home and sometimes physically or sexually assaulted him. Just two years after coming out, Walsh took his own life.²⁵

Research conducted recently on LGBT public school students shows that stories like Walsh's are not uncommon. The Gay, Lesbian & Straight Education Network (GLSEN) conducted a survey recently that has illuminated many real and imminent dangers to LGBT public school students stemming from harassment and discrimination.²⁶ Out of the 7,898 LGBT students surveyed, 74.1 percent were verbally insulted or threatened because of their sexual orientation and 55.2 percent because of their gender expression; 16.5 percent were punched, kicked, or injured with a weapon because of their sexual orientation and 11.4 percent because of their gender expression.²⁷

Further, increased absenteeism, lower grades, and reduced interest in pursuing post-secondary education were found to be common among most LGBT students who took part in the survey.²⁸ This underlines the notion that the public school environment is often more

22 *Id.*

23 *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1112 (E.D. Cal. 2011).

24 *Id.*

25 *Id.*

26 Joseph G. Kosciw et al., *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, Gay, Lesbian & Straight Educ. Network, at xvi (2014), http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

27 *Id.*

28 *Id.*

hostile toward LGBT students than it is to their non-LGBT peers.²⁹ Aside from lower levels of academic performance, LGBT students are twice as likely to be verbally harassed or physically assaulted,³⁰ and they face higher suicide rates than their peers.³¹

The American public has recently grown more accepting of LGBT traits, which is partially because these traits have, over time, been understood to be immutable characteristics.³² Notwithstanding, federal and state courts have not yet agreed on what should be considered sex discrimination.³³ Courts will have to accept Justice Kennedy's reasoning regarding immutable rights before certain states can begin advancing antidiscrimination statutes for many LGBT Americans.³⁴ One possible way to reconcile the different courts' views is to link gender-based discrimination to sex discrimination. This will be done if gender-related rights are protected under the umbrella of Title IX.

B. Title IX—Strengths and Limitations

Title IX of the Education Amendments of 1972 (Title IX) plays an essential role in protecting youth from sex discrimination. In

29 *Id.*

30 Hum. Rts. Campaign, *Growing Up LGBT in America: HRC Youth Survey Report Key Findings*, 16 (2012), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf.

31 See, e.g., Jesse McKinley, *Suicides Put Light on Pressures of Gay Teenagers*, N.Y. TIMES (Oct. 3, 2010), <http://www.nytimes.com/2010/10/04/us/04suicide.html>.

32 Changing Attitudes on Gay Marriage, Pew Res. Ctr. (July 29, 2015), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage>; Jesse Lee, President Obama & the First Lady at the White House Conference on Bullying Prevention, White House (Mar. 10, 2011, 1:05 PM), <https://www.whitehouse.gov/blog/2011/03/10/president-obama-first-lady-white-house-conference-bullying-prevention>.

33 Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2009-20 (2016).

34 *Id.*

the past, it has typically been known for granting certain rights to women's high school and collegiate-level sports programs³⁵ and for containing statutes guiding states to implement legislation that protects other public school programs from sex discrimination.³⁶ The text contains the following stipulations regarding discrimination:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.³⁷

Title IX is somewhat limited in the sense that it must remain broad enough to protect the widest possible range of rights within educational programs and activities.³⁸ This prevents it from being able to address some specific forms of discrimination head on.

However, Title IX's broad interpretation of discrimination may also be an advantage for civil rights advocates. Because of Title IX's ability to absorb broader forms of sex discrimination, and because sex-based and gender-based discrimination sometimes overlap, there is certainly room for Title IX to expand in order to protect gender identity as an immutable right.³⁹ This means that if transgender students are harassed by their peers for not conforming to sex-related

35 Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 99 (2010).

36 CAL. EDUC. CODE § 221.5 (West 2014). California recently amended the state's education code to protect gender identity by prohibiting sex discrimination. The section states that "[a] pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."

37 20 U.S.C. § 1681 (2016).

38 *Id.*

39 Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. Dep't Educ. (Feb. 9, 2017), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [hereinafter *Bullying DCL*].

stereotypes, such harassment will likely qualify as sex discrimination under Title IX.⁴⁰

Not all forms of gender identity are yet specifically protected under Title IX, so cases proposing more legal protections for those who do not identify with the gender assigned at birth must be considered carefully. The Supreme Court's recent interest in addressing transgender issues, however, suggests that Title IX could be expanded to include protections from all gender-related forms of discrimination—or at least more than are currently in effect. Nevertheless, whether or not Title IX is expanded, it is still possible for states to begin recognizing and protecting gender identity as an immutable right.⁴¹

IV. THE “UTAH COMPROMISE”: PROTECTING GENDER IDENTITY UNDER SB 296

Recent legislation in the state of Utah protects both sexual orientation⁴² and gender identity⁴³ from certain forms of discrimination. In 2015, the state legislature voted to amend both the Antidiscrimination Act and the Utah Fair Housing Act to include the two terms among other immutable characteristics protected from discrimination and by doing so greatly advanced LGBT rights within the state.⁴⁴ While the word *immutable* is not actually used in the text,

40 See Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. Dep't Educ., v (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (explaining that gender-based harassment may be covered by Title IX, though this type of harassment is not covered by the Guidance).

41 *How Utah's Compromise Could Serve As A Model for Other States*, NAT'L PUB. RADIO (June 1, 2016), <http://www.npr.org/2016/06/01/480247305/how-the-utah-compromise-could-serve-as-a-model-law-for-other-states>.

42 UTAH CODE ANN. § 34A-5-102(o)(2015).

43 *Id.* § 34A-5-102(z).

44 *How Utah's Compromise Could Serve As A Model For Other States*, NAT'L PUB. RADIO (June 1, 2016), <http://www.npr.org/2016/06/01/480247305/how-the-utah-compromise-could-serve-as-a-model-law-for-other-states>.

the bill certainly suggests that sexual orientation and gender identity require the same legal protections as other immutable characteristics like sex and race.⁴⁵ The amendment (also known as SB 296) explicitly states an aim to minimize or eliminate discrimination in employment because of sexual orientation or gender identity.⁴⁶ Further, SB 296 ensures that no individual will be denied housing on the grounds of any of those characteristics.⁴⁷ The text maps out several stipulations:

It is a discriminatory housing practice to make a representation orally or in writing or make, print, circulate, publish, post, or cause to be made, printed, circulated, published, or posted any notice, statement, or advertisement, or to use any application form for the sale or rental of a dwelling, that directly or indirectly expresses any preference, limitation, or discrimination based on . . . sexual orientation, or gender identity, or expresses any intent to make any such preference, limitation, or discrimination.⁴⁸

SB 296's success is largely attributed to its ability to simultaneously advance the interests of both the LGBT community and other state demographics.⁴⁹ Utah's ability to make advancements in LGBT rights while securing the interests of its many other demographics certainly makes it a compelling model for other states to emulate, especially those states that contain certain demographics that have expressed resistance to LGBT antidiscrimination policies in the past.⁵⁰

45 UTAH CODE ANN. § 34A-5-104(2)(i).

46 *Id.* § 34A-5-104(f)(ii).

47 *Id.* § 57-21-5(1).

48 *Id.* § 57-21-5(2).

49 W.W. Chattanooga, *Must Religious Bakers Bake Cakes for Gay Weddings?*, THE ECONOMIST (July 16, 2015), <http://www.economist.com/blogs/democracyinamerica/2015/07/gay-rights-and-religious-freedom>.

50 *How Utah's Compromise Could Serve As a Model For Other States*, NAT'L PUB. RADIO (June 1, 2016), <http://www.npr.org/2016/06/01/480247305/how-the-utah-compromise-could-serve-as-a-model-law-for-other-states>.

V. CONCLUSION

States should expand Justice Kennedy's definition of immutable rights to include gender identity. Doing so might require a modification of Title IX and cooperation of US courts, but this will increase protections for members of the LGBT community as well as the demographics surrounding them. A great example of how to link gender identity to Justice Kennedy's definition of immutable rights is Utah SB 296. This amendment is one of the best state models for expanding LGBT rights while simultaneously protecting the interests of key demographics rooted in that state. If states choose to emulate the measures implemented in SB 296 in such a way that uniquely caters to the needs of their own key demographics, it will likely lead to decreased discrimination and increased tolerance on both a state and national level.

