BUREAUCRATIC AGENCY:
ADMINISTERING THE
TRANSFORMATION OF LGBT RIGHTS

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In the 1940s and 1950s, the administrative state served as a powerful engine of discrimination against homosexuals, with agency officials routinely implementing anti-gay policies that reinforced gays’ and lesbians’ subordinate social and legal status. By the mid-1980s, however, many bureaucrats had become allies, subverting statutory bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools. This Article asks how and why this shift happened, finding the answer not in legal doctrine or legislative enactments, but in scientific developments that influenced the decisions of social workers and other bureaucrats working in the administrative state.

This Article explores how changing psychiatric conceptions of homosexuality drove this legal transformation in unexpected ways, focusing on developments in criminal and family law. It traces these scientific evolutions and their impact on law through studies of sexual psychopath statutes, sodomy laws, custody cases, adoption and foster care legislation, and school curricular regulations. By the mid-1980s, mental health organizations had become vocal supporters of gay and lesbian rights, which resulted in bureaucrats undermining laws that contravened these professionals’ expert judgment. The influence of scientific evidence on bureaucrats is not just a phenomenon of the recent past, but continues today with transgender student bathroom access rights. It also has the potential to reshape how law enforcement approaches BDSM practitioners.

This history reveals that science impacts not just through legislation and adjudication, but also by influencing bureaucratic discretion. It also sheds new light on how the administrative branch is an important site of legal norm formation and highlights the dynamic role of bureaucracies. As this Article explains, this mechanism of legal change has significant normative implications: civil servants are hired for their professional expertise, yet are also responsible for complying with potentially opposing legislative mandates, a conflict that raises complicated governance questions. Drawing on administrative constitutionalism scholarship, this Article argues that bureaucratic resistance based on scientific developments can be permissible and desirable despite separation of powers and democratic legitimacy concerns.

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INTRODUCTION

In the story of American society’s dramatic transformation with respect to gay and lesbian rights, in which the country moved from criminalizing consensual sodomy in every state in 1960 to recognizing same-sex couples’ fundamental right to marry in 2015, one of the most startling reversals was in administrative law. In the 1940s and 1950s, the federal administrative state was a powerful engine of discrimination against homosexuals, with immigration, civil service, and military officials all implementing anti-gay policies that reinforced homosexuals’ subordinate social and legal status. The same was true at the state and local levels, with administrative regulations influencing the everyday lives of gays and lesbians. However, by the mid-1980s many bureaucrats had become allies, subverting bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools. In analyzing how and why this shift happened, this Article uncovers a mechanism for legal change that lies not just in legal doctrine or the decisions of legislators, but in the effect of scientific developments on bureaucrats working in the interstices of the administrative state.


Drawing on extensive original archival research and oral history interviews, this Article argues that changing psychiatric conceptions of sexual orientation drove the shift from the government’s mid-century anti-gay administrative operation to the more liberal legal regime of the 1980s. In the 1940s and 1950s, the government relied on psychiatric theories of homosexuality to bar gay men and women from serving in the military, revoke security clearances of employees it suspected of being homosexual, and exclude homosexuals from the country under the Immigration and Naturalization Act. When scientific understandings of homosexuality changed, from identifying same-sex sexual attractions as a sign of psychopathy to one of benign difference, it reframed the legal boundaries around gay and lesbian lives. The theoretical shift, which came from developments within scientific circles as well as from lobbying by gay and lesbian rights advocates, undermined criminal laws. These included sexual psychopath statutes, which had been used to commit gay men to psychiatric institutions, as well as consensual sodomy laws.

Equally important to legal change were shifting theories of the etiology of homosexuality, which contradicted the assumptions underlying the demands of elected officials. While many psychiatrists had once identified childhood molestation as the root cause of homosexuality, scientists increasingly investigated other explanations, including adult role models in children’s lives. This theory, which the Religious Right made a centerpiece of its politics, became central in custody disputes between homosexual parents and their heterosexual ex-spouses, with courts asking what effect gay and lesbian adults would have on the sexual orientation of children. To address the concerns of judges, researchers investigated and published studies that showed no difference between the sexual orientation of children of lesbian mothers, gay fathers, and heterosexual parents. The mental health professions became increasingly vocal in their support of homosexual parents, influencing the decisions of bureaucrats. Social workers in several states defied bans on gay and lesbian foster and adoptive parenting, following scientific consensus that identified homosexual parents as equally fit as their heterosexual counterparts. Similarly, educators working for administrative agencies followed scientific viewpoints when they incorporated gay-inclusive curricular materials in the face of popular and legislative opposition.

The approach to legal change that this Article identifies, in which scientific research influenced bureaucratic administration, is not just a phenomenon of the recent past, but persists in contemporary LGBT

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advocacy as well as that of other sexual minorities. For several decades, transgender rights advocates have collaborated with executive agencies to secure administrative protections, including bathroom access rights. In schools across the country, administrators have promulgated policies affirming the rights of transgender students to use the facilities associated with their gender identity, even in the face of strident public opposition. Like educators who were willing to challenge gay rights opponents on curricular issues in the early 1990s, scientific research is an important element of decisions to support transgender students today. The broader principle this Article identifies, that legal change often depends upon the influence of scientific developments on bureaucrats, may also impact the rights of BDSM practitioners. Until recently, parents who engaged in BDSM routinely lost custody of their children. It was only when advocates succeeded in securing a diagnostic change in psychiatric nosology, and it became clear to courts that BDSM was not a sign of pathology, that these parents’ sexual practices were no longer an absolute bar to custody. This mechanism for legal change has reframed BDSM rights in family law, and could also help BDSM practitioners secure protections from unjust arrest and prosecution.

This Article uses the term “bureaucrat” to refer to those public servants who deliver government services as the frontline staff in public administration. The administrative state’s policies and regulatory apparatuses are often implemented by public employees who are typically committed to serving their communities, such as social workers, teachers,

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4 This Article refers to “gay and lesbian rights” or just “gay rights” advocates when discussing the movement of the 1980s and early 1990s, as the movement’s scope had not yet expanded beyond these categories. It uses the term “LGBT” to refer to the contemporary rights movement. While many communities have embraced a broader membership and vision of rights—including queer, intersex, and asexual individuals within their umbrella—the legal movement, for better or worse, has limited its focus to lesbian, gay, bisexual, and transgender issues. Amy L. Stone, More than Adding a T: American Lesbian and Gay Activists’ Attitudes towards Transgender Inclusion, 12 Sexualities 334, 335–36, 349 (2009); Steven G. Epstein, Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy, in THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT 66–68, 74–75 (Adam et al. eds., 1998).

5 BDSM encompasses a range of sexual activities involving bondage, dominance and submission, and sadomasochism, all of which are conducted with the participants’ express consent. BDSM relationships are governed by an internal “law” that requires explicit consent that is voluntary, knowing, unequivocal, and limited to negotiated parameters. BDSM practices are also limited according to the principles of “safe” and “sane,” to ensure that they are safe, so as to reduce the risk of physical and emotional harm. For a detailed discussion of BDSM, see Margo Kaplan, Sex-Positive Law, 89 N.Y.U. L. Rev. 89, 116 -18 (2014).

6 MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES xi, 3 (reprt. 2010).
and law enforcement personnel. The bureaucrats in this Article are members of professional, knowledge-based communities who share norms and values, and who exercise considerable discretion in their positions. Most citizens’ encounters with government are mediated through these bureaucrats, rather than elected representatives, and the conventional wisdom these interactions has produced is that bureaucrats are myopic, unimaginative, and resistant to change. While there are myriad examples of administrative retrenchment, this Article shows that the opposite is also true, with government administration serving as a site of legal transformation.

In presenting this history, and its contemporary implications, this Article makes four distinct contributions to legal scholarship. First, it reorients the legal history of gay and lesbian rights, which has adopted a Foucauldian model that focuses on the ways in which the administrative state and scientists have foreclosed rights claims. Foucault identified how sex became a matter of governmental concern, with the state deploying scientific evidence to police, administer, and control public life. Foucault’s framework emphasized how social discourse on sexuality not only contributed to the creation of a gay and lesbian identity, but also to the

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7 Id. at 3
8 Id. at 14; Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 YALE INT’L L.J. 1, 3 (1992); see also Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1250–51 (2016). Norman Bowie, citing Abraham Flexner, defined professions as having the following seven characteristics: “(1) possess and draw upon a store of knowledge that was more than ordinarily complex; (2) secure a theoretical grasp of the phenomena with which it dealt; (3) apply its theoretical and complex knowledge to the practical solution of human and social problems; (4) strive to add to and improve its stock of knowledge: (5) pass on what it knew to novice generations not in a haphazard fashion but deliberately and formally; (6) establish criteria of admission, legitimate practice, and proper conduct; and (7) be imbued with an altruistic spirit.” Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 743 (1988); Abraham Flexner, *Is Social Work a Profession?*, General Session Presentation at the Forty-Second Annual Session of the National Conference of Charities and Correction (May 12-19, 1915), http://socialwelfare.library.vcu.edu/social-work/is-social-work-a-profession-1915/; see also Sande L. Bhuahi, *Profession: A Definition*, 40 FORDHAM URB. L.J. 241 (2012) (identifying professions as requiring specialized education, independent judgment, expert knowledge, trust relationships with clients, non-profit maximizing ethos, continuing education requirement, and duty to clients). For a discussion of law enforcement as a profession, see Charles R. Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* 19 (2009); Anna Lyovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. ___ (forthcoming 2017) (on file with author).
9 Id.
social exclusion and legal persecution of homosexual men and women.\textsuperscript{12} This project breaks with this paradigm by demonstrating how the administrative state and scientific researchers also served as a source of liberation.

Second, by analyzing how bureaucrats administered law and resolved competing claims, this Article emphasizes the need to disaggregate the leviathan that is the administrative state. It joins recent work exploring the limits of administrative law scholarship, which foregrounds the external restraints on administrative action, emphasizing political and legal oversight and accountability.\textsuperscript{13} This is particularly problematic since, as Edward Rubin notes, most of the government’s interactions with individuals occur in the implementation of policies.\textsuperscript{14} This Article builds upon his point, identifying not only the value of including administrative governance in scholarship on administrative law, but arguing that the scope of inquiry should also expand beyond the federal and towards the state and local.\textsuperscript{15} The challenge of approaching legal studies through this lens is in the multiplicity of actors and the difficulty of deriving general conclusions from local politics, policies, and regulations. However, municipal laws and local decisions are often more consequential for individuals than federal decisions, and the day-to-day process of legal change unfolds in towns and cities.\textsuperscript{16}

\textsuperscript{12}\textit{Id.} at 43-44. While Foucault’s work identifies both the state and medicine as repressive institutions, he also emphasizes how they are also influenced by the subjects they help produce. \textit{Id.} at 95-97; Felicia Kornbluh, \textit{Queer Legal History: A Field Grows Up and Comes Out}, 36 L. & SOC. INQUIRY 537, 541 (2011).


\textsuperscript{14} Rubin, \textit{Bureaucratic Oppressions}, supra note 13, at 293.

\textsuperscript{15} In adopting this approach, this Article also builds upon the work of scholars like Karen Tani and Sophia Lee, extending their insights on administrative constitutionalism to state and local bureaucracies, as well as beyond constitutional rights. KAREN M. TANI, \textit{STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE} (2016); SOPHIA Z. LEE, \textit{THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT} (2014); see also David Freeman Engstrom, \textit{The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972}, 63 STAN. L. REV. 1071, 1076 (2011) (arguing civil rights groups in the 1940s championed administrative regulation of job discrimination for its benefits over litigation).

Third, this Article sheds new light on how the executive branch is an important site for law reform and legal norm formation. To date, accounts of LGBT rights successes have focused on the courts and lawyers, rather than on administrative agencies or bureaucrats.\(^{17}\) Examining these other actors, and identifying how administrative agencies evolve to protect the rights of stigmatized minorities, highlights other mechanisms of legal change that are important not only for LGBT rights scholarship, but other fields as well. Scientific developments have influenced a wide range of legal issues; in education, for example, policies that once excluded special needs children now affirmatively recognize their rights.\(^{18}\) Likewise, in criminal sentencing, adolescents are no longer subject to the death penalty.\(^{19}\) These diverse areas of law demonstrate the wide applicability of the structural framework that this Article’s historical study uncovers. This underscores the powerful role of science on a cadre of bureaucrats, demonstrating the need to look beyond law’s traditional boundaries to understand change.

Finally, this Article contributes to scholarship on administrative law, which has recently focused on agency resistance when constitutional concerns compete with statutory goals. This Article extends that analysis by applying it to situations where scientific developments and legislative mandates conflict, leaving bureaucrats to decide how to balance two sources of authority that yielded opposite results. In the case of adoption and foster care, for example, the New Hampshire legislature prohibited social workers in the mid-1980s from placing children with gay or lesbian parents. However, the state’s social workers also felt compelled to do what was best for the child, and sometimes a same-sex couple provided the ideal home. In North Carolina today, the legislature has declared that children must use the bathroom of their biological sex, but educators’ associations maintain that transgender children must be allowed to use facilities that accord with their gender identity.\(^{20}\) This Article analyzes the complicated governance


questions that arise from these situations. It argues that, while bureaucrats’
unwillingness to execute legislative enactments raises concerns about the
separation of powers and democratic accountability, bureaucrats’
professional expertise is also a legitimate source of authority that may
provide important benefits. At the same time, civil servants’ subversion is
not always a force for good, and thus resistance based on expertise must be
limited.

Part I traces the evolution of psychiatric theories of homosexuality,
analyzing their influence on the legal regulation of homosexuality. It begins
by examining the psychiatric theories undergirding the sexual psychopath
laws of the 1940s and 1950s, before turning to the scientific studies that led
to consensual sodomy law reform. This discussion emphasizes the key role
of scientific work in legal regimes and legal change. This Part then turns to
the declassification of homosexuality as a mental illness in 1973,
identifying how this effort turned psychiatrists into crucial allies for gay and
lesbian rights. After the declassification, mental health professionals
became key expert witnesses in lesbian mother and gay father custody
cases, with their testimony determinative in many instances. The events in
Part I created the normative change that influenced the bureaucratic action
set out in Part II. Part II examines how administrators became allies,
thereby reversing the Foucauldian framework. It identifies the ways in
which civil servants in the mid-1980s and early 1990s helped promote gay
and lesbian rights in the face of widespread social and political disapproval.
Using case studies of social workers in New Hampshire and educators in
New York City, this Part examines how social science research influenced
their actions. Part III turns to the present, taking up two contemporary
manifestations of the historical study, educational policies for transgender
youth and the rights of BDSM practitioners. Part IV analyzes the normative
implications of this mechanism for legal change, pointing to competing
concerns that render the place of bureaucratic resistance based on scientific
developments particularly fraught, but nevertheless permissible and
possibly desirable.

This Article proceeds with three distinct, but related arguments.
First, bureaucrats are a source of legal change. Second, this reform can
come from scientific developments, which influence how bureaucrats
exercise their discretion. Third, bureaucrats should be permitted to resist
laws that contradict their expert judgment, so long as their decisions are
based on a statutory gap or ambiguity, rooted in firm scientific consensus
and are transparent.

I. SCIENTIFIC INTERVENTIONS
Psychiatric authority was integral to the mid-century administrative state, which both drew from and reflected scientific theories of sexual deviation in its regulations. It crafted policies based on the opinions of scientists, as well as justified its actions by pointing to expert knowledge. Medical theories of homosexuality, which identified same-sex attraction as a form of psychopathy, contributed to discrimination against homosexuals for decades. Given that the medical model of homosexuality undergirded this legal regime, changes in scientific thought about same-sex sexuality had significant legal consequences for administrative law. The origins of this normative change in the scientific community, and its effect on legal institutions, first became evident in the realm of criminal law and were the product of a sociological study. Alfred Kinsey’s mid-century studies on Americans’ sexual habits fostered criticisms of sexual psychopath laws and led to the decriminalization of consensual sodomy in many states. While Kinsey is a well-known figure in American history for revealing that “perverse” sex practices were more common than anyone had suspected, and widely recognized for his influence on American society, his work also had important legal repercussions. His studies also contributed to the American Psychiatric Association’s (APA) decision to declassify homosexuality as a mental illness, which marked a major normative commitment on the part of the psychiatric profession. After the declassification, psychiatrists and other medical professionals became allies in the effort to secure gay rights, fostering the administrative law changes of the mid-1980s. This Part details how Kinsey’s work affected criminal law, as well as the legal impact of the APA’s declassification decision. It analyzes how and why scientific consensus shifted, which had significant consequences for administrative law.

A. Cold War Criminal Law Reform

The legal regime that vilified gays and lesbians was rooted in the idea that homosexuality was an aberrant behavior, the product of a flaw in psychosexual development.21 Alfred Kinsey’s statistics on Americans’ sexual habits, which revealed the prevalence of this “deviance,” thus not only shocked the public, but also had a significant impact on criminal laws. It undermined the scientific assumptions on which the legal regime was based and shaped efforts to reform sexual psychopath and consensual sodomy statutes, both of which targeted gay men. Kinsey’s work and its effects illustrate the clear influence of scientific norms on law reform.

The mid-century federal administrative state both reflected and reinforced homosexuals’ outcast status, as executive agencies often tied their legal regulations to psychiatric theories of sexual deviation. The

Immigration and Naturalization Service excluded and deported homosexuals as “psychopathic personalities,” relying on psychiatric certifications from the Public Health Service, while the Civil Service Commission revoked the security clearances of employees it suspected of being homosexual because of their “emotional instability.”

During World War II, the military attempted to exclude homosexuals from service on the theory that they were mentally ill degenerates who were unable to control their desires and could not adjust to the rigors of military life. After the War, the Veterans Administration denied benefits under the Servicemen’s Readjustment Act, commonly known as the GI Bill, to those homosexual men it had discharged as “undesirable.” In doing so, it excluded them from one of the government’s largest assistance programs and significantly impeded their reintroduction into civilian life. Importantly, while the military issued undesirable discharges for a number of behaviors, their benefits denial policy only applied to homosexuality-based discharges, making clear the anti-gay animus underlying the decision. While the Veterans Administration’s actions seemed aimed at punishing individuals who violated a social norm, the other legal exclusions were based on scientific theories, which cast homosexuals as dangerous predators and social deviants.

Kinsey’s findings called into question the medical and social understandings of homosexuality and the criminalization of consensual same-sex sexual behavior. The Cold War had exacerbated anxieties about homosexuality, which became even more contentious as homosexual subcultures flourished in the late 1940s. At the same time, the Cold War emphasis on conformity rendered sexual perversity a potential threat to national security and stability. Federal investigations into security risks and disloyalty targeted homosexuals in particular, based on the belief that homosexuals lacked emotional stability and were susceptible to blackmail. The idea that “one homosexual can pollute a Government office” led the federal government to purge massive numbers of suspected homosexual employees from its ranks. News coverage on sexual perversity increased tremendously in the spring of 1950, after a State Department official ...

23 BÉRUBÉ, supra note 3, at 8-12, 15
24 Servicemen’s Readjustment Act, ch. 268, 58 Stat. 284 (1944); BÉRUBÉ, supra note 3, at 164-69, 201-03, 230.
25 CANADAY, supra note 3, at 138.
26 Id. at 151.
29 D’EMILIO, supra note 29, at 42.
30 Id.
revealed that ninety-one homosexuals had been forced out of the State Department as security risks.\textsuperscript{31} This widespread depiction of homosexuals as national security risks and immoral perverts gave police forces around the country a license to harass homosexual men and women throughout the 1950s, which further increased the visibility of homosexuality and rendered the issue of sexual deviance increasingly salient for an anxious public.\textsuperscript{32}

Criminal laws reflected society’s opprobrium, with gays and lesbians subject to a host of penal provisions, primary among which were sodomy laws. In almost every state, consensual sodomy was a felony subject to the same penalties as forcible sodomy, with sentence lengths that reflected extensive social disapproval.\textsuperscript{33} In Georgia and Nevada a conviction for sodomy could result in life imprisonment; in Connecticut and North Carolina the maximum sentences were thirty and sixty years, respectively. Other states, such as Arkansas, Montana, Nevada, and Tennessee, had five-year minimum sentences.\textsuperscript{34} Although pre-war sodomy prosecutions had focused on cases involving force or child victims, this trend shifted in the 1950s to target consensual homosexual conduct, with sodomy arrests targeting consensual homosexual conduct rising dramatically after World War II.\textsuperscript{35} Many homosexuals were also arrested under vagrancy, disorderly conduct, and lewdness provisions.\textsuperscript{36}

During this same period, sexual psychopath laws proliferated, with twenty-nine states and the District of Columbia enacting versions of these statutes between 1939 and 1951.\textsuperscript{37} Under these laws, courts could sentence individuals charged with or convicted of certain crimes, typically sex offenses, to psychiatric institutions.\textsuperscript{38} While the statutes varied widely in terms of the crimes that triggered the laws’ application and in their definitions of sexual psychopathy, they almost always applied to men convicted of consensual sodomy and were used to commit homosexual men

\textsuperscript{31} JOHNSON, supra note 3, at 5.  
\textsuperscript{32} D’EMILIO, supra note 29, at 49.  
\textsuperscript{34} MORRIS PLOSCOWE, SEX AND THE LAW 201 (1951).  
\textsuperscript{36} NEW YORK CITY MAYOR’S COMMITTEE FOR THE STUDY OF SEX OFFENSES, REPORT OF MAYOR’S COMMITTEE FOR THE STUDY OF SEX OFFENSES 66 (1940) [hereinafter NYC COMMITTEE REPORT].  
\textsuperscript{37} Schmeiser, supra note 21, at 219; Denno, supra note 28, at 1354.  
\textsuperscript{38} For a discussion of the different ways in which sexual psychopath laws were structured, see Tamara Rice Lave, Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws, 69 LA. L. REV. 549, 572-73 (2008).
to institutions. Given that these laws were a response to publicity about violent sex crimes committed against children, and that both the medical profession and the public often equated homosexuality with pedophilia, it is not surprising that the statutes contained clear homophobic undertones.

Kinsey’s study undermined the assumptions on which both sexual psychopath and sodomy laws were based. In 1948, he and his colleagues published *Sexual Behavior in the Human Male*, which revealed that a significant number of adult males engaged in same-sex physical intimacy. His data showed that “at least 37 per cent of the male population has some homosexual experience between the beginning of adolescence and old age,” and that “persons with homosexual histories are to be found in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas in the country.” Kinsey reported that thirteen percent of the male population was “predominantly homosexual,” a larger percentage of the American populace than anyone had ever estimated. Kinsey’s stark evidence also undermined the bases for other criminal offenses. Sodomy prohibitions often applied to both homosexual and heterosexual activity, and typically included both anal and oral sex. In addition to his data on homosexuality, Kinsey reported that eleven percent of men engaged in anal sex and almost forty-nine percent had performed cunnilingus during marriage. This demonstrated that the sodomy laws had widespread application but were rarely enforced. Indeed, Kinsey’s estimates about the prevalence of homosexuality showed that an effective application of the sodomy and sexual psychopath laws would have resulted in the institutionalization of approximately 6.3 million men. Kinsey became a vocal opponent of both consensual sodomy laws and sexual psychopath statutes, denouncing both as “completely out of accord with the realities of human behavior.” Other social scientists and jurists agreed, setting in motion efforts to revise sexual psychopath laws and repeal consensual sodomy provisions.

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42 *Id.* at 625, 650.

43 *ESKRIDGE, DISHONORABLE PASSIONS*, supra note 1, at 50-53, 92.

44 *KINSEY, supra* note 41, at 368, 631.

45 *Id.* at 665.

46 *ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 20 (1953).
State commissions that had been established to review sexual psychopath laws began advocating for their reform based on Kinsey’s findings.\textsuperscript{47} Commissions in Illinois, Pennsylvania, Michigan, New Jersey, New York, and Virginia all questioned whether—in light of Kinsey’s findings—criminal laws could effectively be enforced. They urged reform of sexual psychopath statutes and consensual sodomy laws.\textsuperscript{58} In New Jersey, the state commission met with Kinsey before formulating their report, inviting him “to suggest what methods [he] consider[ed] most feasible for the handling of the sex deviate.”\textsuperscript{49} Its report noted that, based on Kinsey’s work, “there are sixty million homo-sexual acts performed in the United States for every twenty convictions in our courts.”\textsuperscript{50} It thus concluded that the state needed to revise its sexual psychopath law to distinguish between homosexuals and dangerous offenders.\textsuperscript{51} The Illinois commission likewise relied heavily on Kinsey’s work, consulting his studies and meeting with Kinsey on three separate occasions.\textsuperscript{52} It ultimately recommended that “punishments for homosexual acts be modified to discriminate between socially distasteful and socially dangerous conduct” and urged the legislature to decriminalize consensual homosexual sodomy committed in private.\textsuperscript{53} In 1955, the legislature amended its sexual

\textsuperscript{50} NEW JERSEY REPORT, supra note 48, at 13, 18.
\textsuperscript{51} Id. at 17.
\textsuperscript{53} ILLINOIS REPORT, supra note 48, at 2.
psychopath law so it would apply only to violent offenses or crimes against children.\footnote{Act of July 7, 1955, 1955 I.L. Laws 1144.} Unlike Illinois and New Jersey, New York did not have a sexual psychopath law, but rather established a Committee on the Sex Offender to draft such a statute. The researchers and lawmakers involved in the effort also consulted Kinsey before preparing their reports and recommendations.\footnote{Letter from David Abrahamsen to Alfred C. Kinsey (Feb. 1, 1949) (correspondence folder labeled “Abrahamsen, David,” Kinsey Institute); Abrahamsen, \textit{supra} note 48, at 31; ESKRIDGE, \textit{DISHONORABLE PASSIONS}, \textit{supra} note 1, at 119.} The law the Committee proposed, which the legislature enacted in 1950, not only excluded consensual sodomy from its purview, but at Kinsey’s urging, also reduced consensual sodomy from a felony to a misdemeanor.\footnote{Law of Apr. 11, 1950, Ch. 525, 1950 N.Y. Laws 1271, sec. 15; ESKRIDGE, \textit{DISHONORABLE PASSIONS}, \textit{supra} note 1, at 119.}

Kinsey’s work had its greatest effect on the American Law Institute’s (ALI) Model Penal Code (MPC), which excluded consensual sodomy. A group of prominent judges, lawyers, and law professors had founded the ALI in 1923 with the purpose of simplifying and clarifying American law, as well as adapting legal codes to meet changing social needs.\footnote{HERBERT F. GOODRICH & PAUL A. WOLKIN, \textit{THE STORY OF THE AMERICAN LAW INSTITUTE}, 1923-1961 at 5-7 (1961); GEOFFREY C. HAZARD, JR., \textit{THE AMERICAN LAW INSTITUTE: WHAT IT IS AND WHAT IT DOES} 3 (1994).} The ALI’s first projects involved restatements of legal subjects to reduce uncertainty among judges and lawyers as to the state of the law. Between 1923 and 1944, the ALI developed restatements for nine areas of law, including contracts, property, torts, and trusts. Thereafter, it continued producing restatements of law, as well as formulating model statutes.\footnote{\textit{Overview: Projects}, \textit{THE AMERICAN LAW INSTITUTE}, http://www.ali.org/index.cfm?fuseaction=about.instituteprojects (last visited Oct. 2014).} In 1950 the ALI, aware of the variation among states’ criminal provisions, turned to criminal law and its administration. It decided to create a model statutory code that would both inspire legislatures to update their penal laws and assist them in their efforts. The MPC, which was promulgated in 1962, became highly influential in legislative efforts to revise state criminal codes, leading twenty-two states to repeal their consensual sodomy statutes by 1978.\footnote{Gerald E. Lynch, \textit{Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part}, 2 \textit{BUFFALO CRIM. L. REV.} 297, 297-98 (1998); Melinda D. Kane, \textit{Timing Matters: Shifts in the Causal Determinants of Sodomy Law Decriminalization, 1961-1998}, 52 \textit{Soc. Problems} 211, 214 (2007); Mary Bernstein, \textit{Nothing Ventured, Nothing Gained? Conceptualizing Social Movement “Success” in the Lesbian and Gay Movement}, 46 \textit{SOCIOLOGICAL PERSPECTIVES} 353, 364 (2003).}

Kinsey’s findings shaped the debate over whether to include consensual sodomy within the MPC. Several members of the Advisory Committee on sexual offenses commented on the ways in which Kinsey’s
work had changed their views of sex offenses, appreciating how his research undermined consensual sodomy laws.\textsuperscript{60} Louis Schwartz, the Associate Reporter responsible for drafting the sex offenses section, wrote to Kinsey requesting his comments and suggestions, emphasizing the ALI’s “indebtedness to [Kinsey’s] researches.”\textsuperscript{61} Schwartz’s initial draft, which the Advisory Committee unanimously approved, consequently excluded consensual sodomy.\textsuperscript{62} However, the Council of the ALI, a volunteer board that reviewed draft sections, balked at the Committee’s decision. It inserted a provision criminalizing consensual sodomy, albeit only as a misdemeanor.\textsuperscript{63} The Council explained that, while some of its members personally agreed with the Committee’s position, they feared that excluding consensual sodomy would be “totally unacceptable to American legislatures and would prejudice acceptance of the Code generally.”\textsuperscript{64} Rather than jeopardize what would ultimately become a decade-long project, the Council opted to include consensual sodomy in the model code. The Council was aware that it would face a battle between scientific evidence and politic exigency. While scientific findings influence law, they are rarely the only consideration. However, the Council did not have the final word.

The ultimate decision on whether to include consensual sodomy rested with the entire ALI membership, who voted to exclude the provision after hearing from Judge Learned Hand. Judge Hand drew from Kinsey’s findings, making his determination based on the high rates of consensual sodomy that went unpunished. As he explained to his fellow ALI members, “criminal law which is not enforced practically, Mr. Chairman, is much worse than if it was not on the books at all.”\textsuperscript{65} Kinsey’s work had called into question why the law criminalized an activity in which so many Americans—homosexual and heterosexual—engaged. The reform the ALI undertook was not a means to protect homosexual citizens, but rather to have the law more accurately reflect victimless social practices.\textsuperscript{66}

Until 1980 almost all sodomy law repeals were the result of states rewriting their entire penal codes, with the MPC influencing every single

\textsuperscript{60} George, \textit{The Harmless Psychopath}, supra note 47, at 253-54.
\textsuperscript{62} Draft of Article 207--Sexual Offenses 134-36 (Jan. 7, 1955) (Box 8, Folder 8, Model Penal Code Records, American Law Institute Archive, University of Pennsylvania Law School Library) [hereinafter MPC Records].
\textsuperscript{63} Council Draft no. 8 of Article 207--Sexual Offenses (Mar. 1, 1955) (Box 5, Folder 6, MPC Records); Model Penal Code Tentative Draft no. 4, at 93 (Apr. 25, 1955) (Box 7, Folder 3, MPC Records).
\textsuperscript{64} Model Penal Code Tentative Draft no. 4, supra note 63, at 276.
\textsuperscript{65} Id. at 129.
\textsuperscript{66} Indeed, the MPC continued to criminalize solicitation to engage in consensual sodomy, a provision that police would use against gay men. ESKRIDGE, DISHONORABLE PASSIONS, supra note 1, at 178.
one of those revisions. Even before the MPC was finished, its drafts served as models for criminal code reform; Illinois became the first law to decriminalize consensual sodomy when it adopted the MPC draft in 1961. Most of the state legislatures that revised their criminal laws according to the MPC’s recommendations did not focus on the absence of a consensual sodomy provision. In fact, two states, Arkansas and Idaho, reinstated their consensual sodomy laws after legislators realized that their new penal codes did not criminalize this conduct. The gay liberation movement deliberately chose to avoid drawing attention to the sodomy law reform of the MPC, recognizing that the ALI’s recommendation was controversial and not readily acceptable for many Americans. Framing the reform as a gay rights issue would have been disastrous for the nascent gay rights movement.

Kinsey’s work made clear that same-sex sexuality was more pervasive than anyone had believed, raising questions about whether homosexuality was truly a deviant behavior. It also influenced legal projects, with jurists questioning why the law criminalized the actions of so many citizens. This sociological study, not gay and lesbian organization, transformed American’s awareness of sexual behavior and jurists’ understandings of criminal law. These events demonstrate the important role of professional communities in legal change, as well as the need to examine reform efforts outside of courts and legislatures. They also marked an easing of the state’s restraints on its gay and lesbian citizens.

B. Diagnosing Change

The power of social science in transforming legal regulations would become more pronounced in the decades that followed, especially after the APA declassified homosexuality as a mental illness. In these later legal efforts, scientists worked with gay rights leaders to instigate change. During the sodomy law debates, social scientists and jurists had been the leaders pushing for reform, but they did not do so as a gay rights measure. It was not until the 1970s that gays and lesbians turned the work of scientists into

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68 Robinson & Dubber, supra note 67, at 326.
69 ESKRIDGE, GAYLAW, supra note 67, at 106.
70 Id. Six other states decriminalized consensual heterosexual sodomy but kept its homosexual counterpart a crime. Id.; ESKRIDGE, DISHONORABLE PASSIONS, supra note 1, at 176-84.
71 Bernstein, supra note 59, at 361.
an explicit tool for legal advocacy. When they did so, it had a profound effect on social norms and the law. This section, which traces the legal impetus for the declassification of homosexuality as a mental illness, as well as its effects on law, focuses on the important and unrecognized place of psychiatrists in law reform, a major shift from the Foucauldian paradigm.

The change was in part a result of a different approach in gay rights organizing and visions of society. At the time of the MPC debates, a cohesive gay rights movement had not yet emerged. The homophile movement, founded in the 1950s, promoted the vision of gays and lesbians as respectable citizens, seeking legal change through educational campaigns.\(^\text{72}\) It was not until the late 1960s that gay liberationists coalesced into a vocal, assertive group that demanded equal rights for gays and lesbians.\(^\text{73}\) Drawing on the African-American civil rights movement, which had become more militant in the 1960s, gay liberationists also adopted an increasingly aggressive posture towards institutions that impeded their push for equality, marking their opposition with rallies, marches, and picket lines.\(^\text{74}\)

One of gay liberationists’ main targets of reform was the APA’s Diagnostic and Statistical Manual (DSM), which classified homosexuality as a mental illness. This designation indicated that homosexuality was a sign of emotional instability, and therefore a security risk.\(^\text{75}\) Throughout the 1950s, federal officials routinely fired gays and lesbians from civil service positions and denied them federal security clearances.\(^\text{76}\) One of the many who had lost their jobs was Franklin Kameny, an astronomer with a PhD from Harvard University, who became a leader in the gay liberation movement.\(^\text{77}\) Kameny identified homosexuality’s status as a mental illness as “the albatross around the neck of the Gay and Lesbian movement,” and devoted his life to legal change.\(^\text{78}\) He thus launched an attack on the classification of homosexuality in the DSM. To get the psychiatric profession’s attention, he led pickets and interrupted the APA’s annual meeting plenary in 1971, announcing: “Psychiatry is the enemy incarnate. Psychiatry has waged a relentless war of extermination against us. You may

\^\text{72} RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 83 (1987); D’EMILIO, supra note 29, at 83.
\^\text{73} D’EMILIO, supra note 29, at 152-53, 173.
\^\text{74} BAYER, supra note 72, at 83, 91; HENRY L. MINTON, DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA 252-53 (2001).
\^\text{75} D’EMILIO, supra note 29, at 154, 162.
\^\text{76} JOHNSON, supra note 3, at 183, 192-95; D’EMILIO, supra note 29, at154, 162.
\^\text{77} JOHNSON, supra note 3, at 179-80.
take this as a declaration of war against you.”

To avoid disruption at the next year’s conference, psychiatrists invited gay activists to appear on a panel with psychiatrists to present their views. At the 1972 convention in Dallas, crowds of attendees gathered to hear a cloaked, wigged, masked psychiatrist known only as “Dr. Henry Anonymous,” who dramatically disclosed his homosexuality to the audience while speaking through a voice-distorting microphone. Audience members were shocked to learn that Dr. Anonymous was only one of several hundred gay psychiatrists, who had been meeting clandestinely during the Association’s annual conventions as the “Gay-PA.”

Although lobbying from gay liberationists was central to pushing the APA’s debates forward, their challenges coincided with shifting views within the psychiatric profession. Kinsey’s work indicated that same-sex sexuality was much more widespread than anyone previously thought, but it did not address whether homosexuals were pathological. Eight years later, Evelyn Hooker completed a study that tackled this issue, revealing not only that homosexuals were well-adjusted, but also that there was no psychological difference between homosexuals and heterosexuals. Hooker presented her results before a packed audience at the 1956 American Psychological Association annual meeting, unsettling her listeners and opening a debate on whether homosexuality indicated a mental illness.

As a result of her pioneering research, the National Institute of Mental Health selected Hooker to head the NIMH Task Force on Homosexuality, which issued its final report in October 1969. The report called for tolerance and argued for the repeal of consensual sodomy laws and an end to employment discrimination; as a result of its controversial conclusions, the Nixon administration buried the report, delaying its publication until 1972. Hooker’s research spurred other mental health professionals to shift their thinking on homosexuality and to voice their dissent, creating a network of scientists who joined gay liberationists in lobbying for the declassification of homosexuality from the DSM.

In pressing for change, gay liberationists emphasized these changes in psychiatric thought, as well as the legal effects of the diagnostic

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79 BAYER, supra note 72, at 105; DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 204 (2013).
80 BAYER, supra note 72, at 109; MINTON, supra note 74, at 258.
81 BAYER, supra note 72, at 110.
83 MINTON, supra note 74, at 228.
84 Id. at 236.
85 Id. at 237.
86 Id. at 234.
Rights groups noted the myriad ways in which homosexuality’s status as a mental illness gave rise to discriminatory practices, particularly in employment. These went far beyond the Defense Department denying security clearances to gays and lesbians because of their supposed mental instability, extending to much less sensitive work. The New York City Taxi Commission, for example, refused to issue a license to a homosexual driver until he had obtained a psychiatrist’s certification of fitness. To maintain his right to operate a taxi, the man had to visit a psychiatrist twice a year to renew the certification.

There were organizational reasons why the APA was receptive to these legal arguments, namely that the organization as a whole was more oriented towards social justice issues than it had been only a decade earlier. In response to the civil rights movement, second-wave feminism, and anti-war protests, a group of psychiatrists formed the Committee for Concerned Psychiatrists (CFCP), to nominate and elect liberals who would involve the organization in social issues. Included on CFCP’s tickets were Alfred Freedman, John Spiegel, and Judd Marmor, all of whom were leaders in the effort to declassify homosexuality from the DSM, and who served as the APA presidents from 1973 to 1976. These psychiatrists wanted science to support social justice whenever it was warranted. Robert Spitzer, a member of the nomenclature committee, later explained his decision to support homosexuality’s declassification in both scientific and legal terms. When framed in terms of how much his reasoning had to do with “true scientific logic,” he answered: “I would like to think that part of it was that. But certainly a large part of it was just feeling that they were right! That if they were going to be successful in overcoming discrimination, this clearly was something that had to change.”

Whether these legal arguments should have had a place in the decision to declassify homosexuality was a matter of debate both among psychiatrists and outside commentators. The APA’s Board of Trustees nevertheless voted on December 15, 1973, to delete homosexuality from the DSM, a decision the Association’s membership approved in a subsequent

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87 BAYER, supra note 72, at 125; Memorandum from Gay Organizations in New York City to Committee on Nomenclature of the American Psychiatric Association (Box 164, Folder 36, Carl A. Kroch Library, Cornell University, National Gay and Lesbian Task Force Records, Collection No. 7301) [hereinafter NGLTF].
88 Memorandum from Gay Organizations, supra note 87, at 10.
89 Id.
90 Jack Drescher, An Interview with Lawrence Hartmann, MD, reprinted in AMERICAN PSYCHIATRY AND HOMOSEXUALITY: AN ORAL HISTORY 50-51 (Jack Drescher & Joseph P. Merlino eds., 2007).
91 Id.
92 Id.
93 Jack Drescher, An Interview with Robert L. Spitzer, MD, reprinted in AMERICAN PSYCHIATRY AND HOMOSEXUALITY, supra note 90, at 100.
referendum. This was an important, but not unequivocal, victory for gay liberationists. At the same time, the Board also introduced a new diagnostic category, “Sexual Orientation Disturbance,” for those homosexuals who were “disturbed by, in conflict with, or wished to change their sexual orientation.” This created a debate as to whether homosexuality was ever a form of pathology, a question that the organization did not resolve until it deleted the residual provision in 1987.

Gay liberationists had identified the declassification as a key tool for legal change and wanted to immediately harness the APA’s authority to promote their goals. Kameny, with the help of gay activist Ron Gold, drafted a resolution for the Association supporting the civil rights of homosexuals, which he circulated while the Board considered the declassification question. Kameny later explained the document as a means of countering the federal government’s anti-gay claims in security clearance cases. In Adams v. Laird, the Department of Defense had successfully justified its revocation of security clearances based on homosexuals’ assumed “emotional instability.” With characteristic flair, Kameny provided the resolution to Robert Spitzer, a member of the Association’s nomenclature committee, at a gay bar in Waikiki during the APA’s 1973 conference. The position paper garnered a great deal of support from psychiatrists who were concerned that the nosology had contributed to discrimination against gays and lesbians. The Board of Trustees consequently adopted the statement, issuing a press release reporting it at the same time as it announced the declassification of homosexuality as a diagnostic category. After the Board of Trustees approved the resolution, the National Gay and Lesbian Task Force immediately used it to argue for

94 BAYER, supra note 72, at 3, 136-37. The APA was the third major psychiatric association to declassify homosexuality as a mental illness. The Group for the Advancement of Psychiatry adopted this position in 1966 and the National Association for Mental Health followed in 1970. However, since the APA published the DSM, its decision had a much greater impact than the declarations of the other societies. Gays Lose “Deviate” Label, Dec. 16, 1973 (APA Subject File, ONE); National Association for Mental Health, Position Statement on Homosexuality and Mental Illness (Sept. 17, 1970) (Psychiatry and Gays Subject File, ONE).

95 BAYER, supra note 72, at 133-34, 137.


97 Note from Franklin E. Kameny (Box 122, Folder 10, Kameny Papers); Letter from Kameny, supra note 78; Adams v. Laird, 420 F.2d 230 (D.C. 1969).

98 Note from Kameny, supra note 97.

99 BAYER, supra note 72, at 129.

100 Note from Kameny, supra note 97; Letter from Ronald Gold to Joseph W. Schneider (Apr. 20, 1979) (Box 164, Folder 40, NGLTF).
the repeal of sodomy laws and the introduction of anti-discrimination laws in states and cities around the country.\textsuperscript{101}

This statement was the first of many resolutions the APA issued in support of gay and lesbian rights throughout the late twentieth century.\textsuperscript{102} Other mental health groups also adopted similar statements in favor of gay and lesbian civil rights, with each of these organizations also weighing in as amici and lending their professional expertise to gay rights cases.\textsuperscript{103} These efforts reflected a burgeoning scientific consensus that eventually developed around gay and lesbian rights, which undergirded the later decisions of bureaucrats in the mental health and associated professions. The scientific viewpoints guiding the actions of bureaucrats were not only the research and debates of scientists, but also the specific statements on gay and lesbian rights that professional associations promulgated.

Even before this scientific consensus developed, and prior to the organizations becoming involved in litigation, the declassification had immediate legal effects. However, they were different than the ones gay liberationists had expected. With respect to federal security clearances and employment discrimination, some changes were already underway when the APA announced its decision. In 1969, the D.C. Circuit ruled in favor of a gay litigant who challenged his termination, ruling that the civil service could not terminate an employee without showing that his private sexual conduct interfered with his work based on the plain text of the statute.\textsuperscript{104} That decision led the Civil Service Commission (CSC) to reconsider its blanket exclusion policy in late 1972, announcing a change to its personnel manual on December 21, 1973, six days after the APA’s decision.\textsuperscript{105} Gays and lesbians could still lose their jobs, but only if their sexual conduct had an impact on their work.\textsuperscript{106} In 1975, the CSC eliminated “immoral conduct” from the list of disqualifications for federal government service.\textsuperscript{107} While

\textsuperscript{101} Press Release, NGLTF, Psychiatric Turnaround (Dec. 15, 1973) (Box 164, Folder 40, NGLTF).

\textsuperscript{102} See AM. PSYCHIATRIC ASSOC., POSITION STATEMENT ON ISSUES RELATED TO HOMOSEXUALITY (2013) (combining policies “previously expressed in twelve separate position statements adopted between 1973 and 2011”).


\textsuperscript{105} Postal Service Dumps CSC’s Anti-Gay Policy, ADVOCATE, Dec. 20, 1972, at 24; Singer v. U.S. Civil Serv. Comm’n, 530 F.2d 247, 254-55 (9th Cir. 1976) (noting changes in the Civil Service personnel manual and civil service regulations).

\textsuperscript{106} Singer, 530 F.2d at 255 n.15.

\textsuperscript{107} Johnson, supra note 3, at 210.
social science was important in changing many legal norms, law reform also came from other sources. In this instance, while the CSC justified its decisions on homosexuals’ supposed emotional instability, psychiatrists were not involved in assessing employees; rather, homosexual conduct served as incontrovertible evidence of the psychiatric condition that did not require diagnosis. Given the severed link between the justification and the action, the shift in scientific views did not have an impact in this area of law.

It initially appeared that the declassification would have a more tangible effect on immigration law. The 1952 McCarran-Walter Act, among other things, barred immigrants suffering from “psychopathic personalities” from entering the country, which included gays and lesbians. In 1979, the Surgeon General announced that the Public Health Service (PHS) would no longer certify gay aliens as psychopathic personalities since homosexuality was no longer a mental illness. However, that did not end the immigration exclusion. In 1983, the Fifth Circuit determined that “psychopathic personality” was “a term of art, not dependent on medical definition,” and thus that homosexuals continued to be barred under immigration law. That same year, in Hill v. INS, the Ninth Circuit ruled that the INS could not exclude homosexuals without a certification from the PHS. The Department of Justice directed the PHS to issue certificates for “self-proclaimed homosexual aliens”—but only within the Ninth Circuit. Everywhere else in the country, PHS refused to be involved with the adjudication of homosexuals, and INS continued to exclude gays and lesbians without a PHS certification. In 1990, Congress finally repealed the psychopath personality provision, eliminating the immigration bar.

Gay advocates had seen the classification of homosexuality as a mental illness as a significant impediment to rights claims. They consequently lobbied for a diagnostic change, mixing scientific evidence and legal arguments in their appeals. While advocates had hoped to reform the federal administrative system that deployed psychiatric theories to circumscribe their rights, the mental health justifications had become

109 Id. at 1451.
110 Hill v. Immig. & Naturalization Serv., 714 F.2d 1470, 1481 (9th Cir. 1983).
detached from their implementation, such that the declassification did not have an impact on these areas of law. However, at the state and local levels, new questions about psychosexual development dominated family law determinations, with scientific research stemming from custody cases that later influenced administrative law determinations.

C. The Custody Crucible

The APA’s decision, while contested, marked the beginning of what became a scientific consensus that gays and lesbians were akin to heterosexuals in all but sexual object choice. Given the civil rights questions motivating the declassification, it is perhaps not surprising that a supposedly neutral and objective scientific profession became so involved in advocating for gay and lesbian rights. The declassification thus did not sever the ties between science and gay and lesbian rights, as new legal questions emerged that would turn on professional research and would require psychiatric expert testimony. This was particularly true in the custody context, as lesbian mothers and gay fathers increasingly sought custody of their children after the APA decision, which removed a barrier that had prevented most homosexual parents from asserting their rights in court. There, the crucial issue became the psychological impact that homosexual adults would have on children’s psychosexual development, with courts questioning whether children raised by gays and lesbians would be able to develop prescribed gender identities and heterosexual orientation. To address these issues, lesbian mothers and gay fathers enlisted the help of psychiatrists and psychologists. These studies were not only determinative in the individual cases, but also created a broader medical consensus that adult homosexuality did not influence the sexual orientation of children and thus that there really was no substantive difference between hetero and homosexuality. This later influenced the work of bureaucrats in the mid-1980s and early 1990s.

Lesbian and gay parents did not begin claiming custody rights solely because of the declassification. If anything, these cases were part of the same impulse to change the social status of homosexuals in America that led to the diagnostic change. The explosion of gay activism in the 1970s not only forced the mental health community to reconsider its position on homosexuality as a mental illness, but also empowered homosexual parents to come out, divorce their spouses, and assert their rights in court.114 Prior to the gay liberation movement, and the increasing acceptance of lesbians

and gays in American society, heterosexual parents often blackmailed their homosexual ex-spouses into relinquishing custody by threatening to disclose the gay parent’s sexual orientation to family, friends, and coworkers. Even as the gay rights movement gained traction, most Americans still viewed homosexuality as incompatible with childrearing, allowing non-gay parents to continue to manipulate their former spouses. The declassification thus provided important support that lesbian mothers and gay fathers used to make their custody claims.

Custody cases produced a new relationship between gay rights and scientists, who became crucial allies in these disputes. Expert testimony became central to custody cases when an increasing number of jurisdictions instituted a “nexus requirement” in the mid-1970s, which required evidence connecting the parent’s homosexuality with harm to the children. This was a shift from a “per se” rule that homosexual parents were inherently unfit, which made it impossible for lesbian mothers or gay fathers to successfully petition for custody or visitation. The nexus requirement came about as a result of the fathers’ rights movement, which challenged the presumption of maternal custody and demanded courts identify specific reasons for denying fathers equal custody rights. Employing the feminist rhetoric of equality that had supported divorce law reform, fathers’ rights groups successfully challenged judicial standards, leading family law courts to base their determinations on the gender-neutral “best interests of the child.” In 1973, a New York Family Court declared the “tender years” presumption unconstitutional, and courts around the country quickly followed suit. Lesbian mothers and gay fathers were consequently fighting for custody during a period of shifting legal and scientific landscapes, creating an opportunity for social science research to effectuate legal change.

115 Rhonda Rivera, Where We Stand: Gay Parent, METRO GAY NEWS, Feb. 1977 (Box 88, Folder 17, NGLTF).
120 Watts v. Watts, 350 N.Y.S.2d 285 (1973); Dinner, supra note 118, at 115 & n.171.
121 Courts are a vital part of the social context of social scientific inquiries, which render certain research questions more salient than others. DAVID S. CAUDILL AND LEWIS H. LARUE, NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN LAW 28, 42 (2006); Jennifer L. Mnookin, Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability, 87 VA. L. REV. 1723, 1744 (2001); SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS 13 (1990).
The declassification had established that gay men and lesbians were not inherently pathological, but the diagnostic change did not address the psychological impact that homosexual adults could have on children’s psychosexual development. This became a crucial issue in lesbian and gay custody cases litigated after 1973, with courts questioning whether children raised by gays and lesbians would be able to develop prescribed gender identities and heterosexual orientations.\textsuperscript{122} As Suzanne Goldberg has noted, courts embracing new normative commitments will often rely upon expert evidence to reject traditional rationales for restricting minority rights.\textsuperscript{123} Scientists often undertook their studies with the express purpose of helping gay fathers and lesbian mothers in their custody battles, skirting the line between neutral science and advocacy. They consequently focused their research on whether a parent’s homosexuality would result in children growing up to be homosexual themselves, one of the most consistently raised objections to lesbian mother and gay father custody claims.\textsuperscript{124} In doing so, their work promoted the rights of gay parents and helped shift scientific consensus and norms.

Several scientists conducted research studies on the impact of parental homosexuality on children, all aimed at addressing judicial concerns. The first was Richard Green, who was also one of the first psychiatrists to publish an article in a peer-reviewed journal arguing for the declassification of homosexuality from the DSM.\textsuperscript{125} Although Green’s research had always focused on sexual orientation and gender roles, he undertook a study of lesbian mothers and their children because of the questions that courts had raised.\textsuperscript{126} In an interview with historian Daniel Rivers, Green acknowledged that, for him, “the struggle to remove homosexuality from the APA’s list of mental disorders was directly linked to the assertion that having lesbian or gay parents was not necessarily


\textsuperscript{124} DONNA J. HITCHENS & ANN G. THOMAS, LESBIAN MOTHERS AND THEIR CHILDREN: AN ANNOTATED BIBLIOGRAPHY OF LEGAL AND PSYCHOLOGICAL MATERIALS i (1980) (Box 123, Folder 12, Phyllis Lyon and Del Martin Papers, Collection Number 1993-13, GLBT Historical Society) [hereinafter Lyon/Martin Papers].

\textsuperscript{125} Telephone Interview with Richard Green (May 31, 2014); BAYER, supra note 72, at 112.

\textsuperscript{126} Interview with Green, supra note 125; Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 AM. J. PSYCHIATRY 6, 92 696 (1978).
contrary to the ‘best interests of the child.’” 127 Psychiatrist Martha Kirkpatrick likewise published a study identifying no difference between the future sexual orientation of children of heterosexual and homosexual women, citing lesbian custody cases as a primary motivator for undertaking the research. 128

The scholarly inquiry moved beyond psychiatrists into other academic disciplines, creating broader conversations about this question. In 1981, Ellen Lewin, an anthropologist at the University of California at Berkeley, published her comparison of eighty divorced lesbian and heterosexual mothers, concluding that both reflected “fairly traditional notions about family” and sought to provide male role models for their children, typically the children’s fathers. 129 Lewin also cited “the questions that the judicial system has raised” in lesbian custody cases to explain her research agenda, entitling her preliminary report Lesbianism and Motherhood: Implications for Child Custody. 130 Lewin began her research in 1977, after hearing about Mary Jo Risher and Jeanette Jullion’s custody battles, with the “fantasy that [she] would be called upon to be an expert witness in some of these cases.” 131 In the United Kingdom, Susan Golombok began her career with a study of lesbian mothers after reading an article about lesbian custody disputes in the feminist magazine Spare Rib, which called for social science research to support these mothers’ claims. 132 Golombok conducted the initial research as her master’s thesis; when renowned child psychiatrist Michael Rutter learned of Golombok’s work, he offered to find funding so she could expand her work as a doctoral dissertation project. Rutter had testified as an expert witness in a number of lesbian mother custody cases and recognized the need for social science research to support lesbian mother claims. 133 Lesbian mothers in the United States drew upon all of these studies, all of which concluded that a parent’s sexual orientation did not have any influence on children, in asserting custody rights. 134

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127 RIVERS, supra note 10, at 69.
128 Martha Kirkpatrick et al., Lesbian Mothers and Their Children: A Comparative Study, 51 AM. J. ORTHOPSYCHIATRY 545, 545 (1981); Telephone Interview with Martha Kirkpatrick (June 16, 2014).
130 Ibid., 6.
131 Ibid., interview by author, September 19, 2014; Ellen Lewin, email message to Joanne Meyerowitz, August 19, 2014, author’s possession.
133 Skype Interview with Susan Golombok (Aug. 28, 2014).
Gay rights groups and movement lawyers recognized the key role of psychiatric testimony, repeatedly commenting on its crucial nature and disseminating information about experts and useful scientific studies to lesbian and gay parents. The National Gay Task Force (NGTF), one of the first organizations to take up the issue of homosexual parents, prepared a *Gay Parent Support Packet* that contained statements from ten nationally recognized experts, including Drs. Richard Green, Evelyn Hooker, John Money, Wardell Pomeroy, Judd Marmor, and Benjamin Spock.\(^{135}\) Spock, who the *New York Times* described as “arguably the most influential pediatrician of all time,” was the author of *Baby and Child Care*, the world’s second-best-selling book (after the Bible) for five decades.\(^{136}\) The packet also provided statements of support from leading mental health organizations and listed relevant psychiatric studies that concluded that a parent’s homosexuality would not negatively impact his or her children.\(^{137}\) First published in 1973, the NGTF re-issued the packet in 1979 to provide more up-to-date information for homosexual parents. Other gay and lesbian rights litigation groups emphasized the importance of psychological studies to custody cases, including the ACLU, Lesbian Mothers National Defense Fund (LMNDF), Lesbian Rights Project (LRP), and Lambda Legal Defense & Education Fund.\(^{138}\) The attorneys at LMNDF and LRP drafted manuals otherwise were the work of controversial psychologist Paul Cameron, who the American Psychological Association expelled in 1983 following an ethics investigation. Letter from Max Seigel to Paul Cameron (Dec. 2, 1983) (on file with author). Using data from a survey he administered in 1983 and 1984, Cameron published a series of articles arguing that gays and lesbians were more likely than heterosexuals to molest children and commit incest. Paul Cameron et al., *Child Molestation and Homosexuality*, 58 *PSYCHOLOGICAL REPS.* 327, 328 (1986); Paul Cameron & Kirk Cameron, *Does Incest Cause Homosexuality?*, 76 *PSYCHOLOGICAL REPS.* 611, 614 (1995); Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 *ADOLESCENCE* 757, 759 (1996). Although a number of scholars critiqued Cameron’s methodology and conclusions at length, the majority of the scientific community ignored his work, since his articles were published in low-ranked and non-peer reviewed journals. Gregory M. Herek, *Bad Science in the Service of Stigma: A Critique of the Cameron Group’s Survey Studies*, *in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS* 245-47 (Gregory M. Herek ed., 1998); Todd G. Morrison, *Children of Homosexuals and Transsexuals More Apt to be Homosexual: A Reply to Cameron*, 39 J. BIOSOCIAL SCI. 39 153, 153-54 (2007). For more details on Cameron’s research, see Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 32 L. & HIST. REV. 487, 520-23 (2016).

\(^{135}\) National Gay Task Force, Gay Parent Support Packet (1973) (Box 105, Folder 7, NGLTF).

\(^{136}\) Id.; Jane E. Brody, *Final Advice from Dr. Spock: Eat Only All Your Vegetables*, N.Y. TIMES, June 20, 1998.


\(^{138}\) Telephone Interview with Marilyn Haft (June 26, 2014); HITCHENS & THOMAS, *supra* note 124; DONNA J. HITCHENS, LESBIAN MOTHER LITIGATION MANUAL (1982) (Box 124, Folder 3, Lyon/Martin Papers); Maureen Downey, *Custody Battle Illuminates Courts’ Bias:*

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**DRAFT - DO NOT CITE OR CIRCULATE**
for lesbian mothers that emphasized the role of expert testimony and
highlighted the importance of psychiatric studies in custody
determinations.\textsuperscript{139}

These pro-gay parenting studies, however, were a double-edged
sword. Although they were crucial for lesbian and gay men to obtain
custody, they tacitly promoted the idea that homosexuality was undesirable.
By emphasizing that children raised in gay and lesbian households were not
more likely to grow up to be homosexual, researchers “implicitly accept[ed]
a view of homosexuality as a negative outcome of development.”\textsuperscript{140} In one
sociological study, an interviewee perceptively noted, “in order to keep my
children I’ve had to agree to bring them up to be heterosexual, whatever that
means, and I ask myself what does that say about being gay, which I am.”\textsuperscript{141}
Thus, while researchers’ work constituted a rights-promoting measure that
cut against stereotypes, it nevertheless reinforced the notion of
homosexuality as an aberration that should be avoided.\textsuperscript{142}

Over the course of the three decades, social scientists had introduced
a radically new vision of homosexuality. Kinsey’s work revealed the extent
to which deviant behavior was in fact quite common, spurring changes in
criminal law. When the APA declassified homosexuality as a mental illness,
mental health professionals became allies in efforts to secure custody rights
for gay and lesbian parents. The studies they developed helped create
a scientific consensus that parental homosexuality did not influence the
sexual orientation of children, which would guide the work of civil servants
in the administrative state. These normative shifts within the mental health
professions had a profound impact on law, first in the courts and later by
influencing the exercise of bureaucrats’ discretion.

\section*{II. ADMINISTRATIVE ALLIES}

While psychiatrists urged courts to grant custody to lesbian mothers
and gay fathers, arguing that scientific studies showed their sexual
orientation would not influence that of their children, political battles waged

\textsuperscript{139} HITCHENS \& THOMAS, supra note 124; HITCHENS, supra note 138.
\textsuperscript{140} Diane Richardson, Lesbian Mothers, in THE THEORY AND PRACTICE OF
\textsuperscript{141} Id.
\textsuperscript{142} In critiquing the methodology and conclusions of these research studies, sociologists
Judith Stacey and Timothy Biblarz recognized that researchers who acknowledged
differences between the children raised in heterosexual and homosexual households, given
that this information could result in gay parents losing custody of their children. Judith
Stacey \& Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66
over the same issues, with Americans unconvinced of homosexuality’s benign nature. In the 1970s, religious conservatives argued that the state could and should deny rights to gays and lesbians, lest they serve as role models to impressionable children who would then choose to become homosexual themselves. This Part provides a brief overview of this political context to explain the extent to which bureaucratic decisions deviated from the popular baseline, such that their influence on administrative actors would create a contest between regulators, legislators, and voters. It then provides case studies of social workers in New Hampshire and educators in New York City, demonstrating how these bureaucrats relied on scientific evidence in utilizing their discretion, and doing so countermanded legislative mandates and popular will.

A. Political Context

The Religious Right became increasingly influential in local, state, and federal governments in the late 1970s, creating a precarious political environment for gay rights advocates.143 The Religious Right’s roots can be traced back to the genesis of Protestant fundamentalism in the early twentieth century, whose adherents focused on keeping evolution out of the nation’s classrooms and returning Americans to the “fundamentals” of the Christian faith.144 Christian conservatism gained new life in the context of Cold War politics and Barry Goldwater’s 1964 run for president, which created a conservative bloc that led to Richard Nixon’s presidency.145 However, a growing coalition of evangelicals and other conservative Christians became a newly visible and influential national political force in the 1970s, galvanizing in response to a variety of issues including Roe v. Wade,146 the Equal Rights Amendment, and the gay liberation movement, all of which seemed to attack traditional gender roles and the primacy of the

146 410 U.S. 113 (1973).
nuclear family. As Robert Self has carefully detailed, many of the political battles of the 1970s were waged around ideas of the family, with “conservative evangelicals creat[ing] a furor over the state of the American family without precedent in the twentieth century.” The 1976 presidential campaign, which drew increased attention to the role of Evangelicals in politics and the nation’s religious resurgence, led Newsweek to declare 1976 “The Year of the Evangelical.” Evangelicals’ emphasis on “traditional family values” became part of the national political conversation, shaping debates for decades to come.

The anti-gay activism of the Religious Right became a hallmark of its politics in 1977, when Anita Bryant launched the Save Our Children voter referendum campaign to overturn Miami’s recently enacted gay rights law. That ordinance amended the city’s anti-discrimination law to include protection based on “sexual or affectional preference.” The fear of homosexual role models was a central part of Bryant’s campaign, which conservatives described as necessary to counter “role modeling homosexuals, the ones who aren’t openly recruiting, but who don’t stay in the closet,” identifying the problem as “the homosexual who is blatant in his profession of his preference and who gives the impression to young people that this lifestyle is not odd or to be avoided, but just an alternative.”

This rhetoric, which emphasized the danger that gays and lesbians posed to children, resonated with more than just Miami residents. After almost seventy percent of that city’s voters approved the law’s repeal, other conservative groups launched ballot initiatives around the country. Voters in Wichita, Kansas; Eugene, Oregon; and St. Paul, Minnesota overturned their gay rights ordinances the following year. In California, state senator John Briggs announced a statewide referendum, known as Proposition 6, to bar gay men and women from teaching in public schools. While Briggs’ initiative was unsuccessful, it contributed to a national anti-gay atmosphere, reinforced the political reach of the Religious Right, and taught future...

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148 Self, supra note 114, at 349.

149 Kenneth L. Woodward et al., Born Again!, NEWSWEEK, Oct. 25, 1976, at 68; see also Dochuk, supra note 145, at 365.

150 Frank, supra note 147, at 141.


154 See Fejes, supra note 152, at 183.
conservative leaders, like Jerry Falwell and Louis Sheldon, how to run ballot measure campaigns.\textsuperscript{155}

Religious conservatives deployed child protection rhetoric in their opposition to gay rights for decades to come. For much of the twentieth century, medical, social, and political discourse equated homosexuality with pedophilia, identifying child molestation as both the root cause and the product of same-sex sexual attraction.\textsuperscript{156} The Religious Right repackaged and modernized these claims, arguing that the danger was not physical, but rather psychological.\textsuperscript{157} According to this theory, gay and lesbian adults would role model their sexual orientation, which children would unwittingly adopt.\textsuperscript{158} This was a fear of indoctrination that presented homosexuality as a choice, one that children would elect if they were not taught that homosexuality was both dangerous and socially unacceptable.\textsuperscript{159} Jerry Falwell, the founder of the Moral Majority, explained that allowing gays and lesbians to teach “might be an open invitation for [homosexuals] to subvert our young and impressionable children into their lifestyle.”\textsuperscript{160} Likewise, Beverly LaHaye, who founded the national lobbying group Concerned Women for America, warned that “every homosexual is potentially an evangelist of homosexuality, capable of perverting many young people to his sinful way of life.”\textsuperscript{161} As a result, religious conservatives argued, it was important for the state to oppose gay rights, lest children mistakenly believe that homosexuality was an acceptable alternative they should adopt. The Religious Right’s anti-gay activism gained newfound cultural salience as a result of the AIDS crisis, which popularly became known as the “homosexual plague.”\textsuperscript{162}

As the Religious Right came to national prominence, gay and lesbian families were becoming more visible. Not only were more lesbian mothers seeking custody of their children from previous heterosexual relationships, but same-sex couples also began forming families through

\textsuperscript{155} See STONE, supra note 145, at 14–15.
\textsuperscript{156} Schmeiser, supra note 21, at 220-21; Denno, supra note 28, at 1339, 1341-42; Freedman, supra note 40, at 103.
\textsuperscript{158} Rosky, supra note 157, at 608; Eskridge, supra note 157, at 1328.
\textsuperscript{159} Rosky, supra note 157, at 508; Melissa Murray, Marriage Rights and Parental Rights: Parents, the State, and Proposition 8, 5 STAN. J. C.R.-C.L. 357, 359 (2009); Eskridge, supra note supra note 157, at 1328; see also Clifford J. Rosky, No Promo Hetero: Children’s Right to be Queer, 35 CARDOZO L. REV. 425 (2013).
\textsuperscript{160} IRVINE, supra note 143, at 173.
\textsuperscript{161} TIM & BEVERLY LAHAYE, THE ACT OF MARRIAGE 261 (1976).
alternative reproductive technology. The Lesbian Rights Project of San Francisco received few calls from lesbians interested in donor insemination in the 1970s. By 1984, however, the group received an average of thirty-five calls a month from lesbians seeking this information. By 1989, that number had quadrupled. The Sperm Bank of Northern California in Oakland doubled the number of its self-identified lesbian clients between 1982 and 1989. When lesbian rights attorney Roberta Achtenberg held workshops on the legal implications of donor insemination, hundreds of women attended. Similarly, the Lesbian Mothers’ National Defense Fund in Seattle received requests for information about alternative reproduction from women all over America. As a result of the growing numbers of gay and lesbian families, parental and domestic rights became a central focus of the LGBT rights movement in the late 1980s and early 1990s. The National Gay and Lesbian Task Force (“NGLTF”) responded to this change by starting its Families Project in the late 1980s. Also contributing to this shift was the HIV/AIDS crisis of the early 1980s, during which hospitals denied same-sex partners of those with HIV/AIDS access to their loved ones and prohibited same-sex partners from participating in the medical decision-making process. These medical exclusions rendered the questions of marriage and family more salient to the LGBT community as a whole, helping these issues become a focal point of rights advocacy.

Gays and lesbians were thus increasingly visible as parents when religious conservatives, with their focus on child protection, were gaining power in American society. This created a political firestorm that waged around the country over foster care and adoption policies, as well as school curricula, making the decisions of bureaucrats all the more important.

B. Agency Resistance

Debates over gay and lesbian foster and adoptive parenting became a national political issue in the mid-1980s. As elected officials promulgated bans on gay and lesbian foster and adoptive parenting, social workers subverted the policies, creating gay- and lesbian-headed families. These

164 See RIVERS, supra note 10, at 174–75.
165 See id at 175.
166 See id.
167 See id.
168 See id.
169 See id. at 193; KLARMAN, FROM THE CLOSET TO THE ALTAR, supra note 114, at 51.
170 See RIVERS, supra note 10, at 193.
civil servants went against popular sentiment and their legislative mandate, demonstrating the power of scientific paradigms on law. In doing so, they identified gays and lesbians as fit parents deserving of respect.

The culture wars reached a fever pitch as the foster care system was in crisis. In the 1970s, the foster system had been so overburdened that children languished in temporary homes, neither being returned to their families nor placed with adoptive parents. Mounting criticism produced Congressional action. In 1980, Congress passed the Adoption Assistance and Child Welfare Act, which emphasized the need for stability for foster children and provided financial incentives for state agencies to develop permanent placement plans for each of their wards. In immediately after the law’s implementation, the number of foster care children dropped sharply, and the median length of stay in foster care declined. However, this change was short-lived. By the mid-1980s, as families felt the effects of a stagnant economy and the crack cocaine and HIV/AIDS epidemics, the number of children in foster care was again on the rise, as was the average length of stay. By 1992, there were fifty-four percent more children in foster care than there had been just six years earlier.

Social workers, who had been struggling to find homes for children, began placing their wards in the homes of gay and lesbian parents. In doing so, they were following the consensus of the mental health professions. In 1976, several years before researchers began publishing studies on the effects of adult homosexuality on children, the American Psychological Association admonished that the “sex, gender identity, or sexual orientation of natural[] or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or

173 See id.
174 Social workers around the country had placed self-identified gay teenagers in the homes of gays and lesbians since the early 1970s. In the mid-1980s, those placements expanded to include heterosexual and young children. Marie-Amélie George, Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents, 51 HARV. C.R.-C.L. L. REV. __ (forthcoming 2016).
175 Social workers have a close historical association with psychiatrists and psychologists, which explains why these bureaucrats were so responsive to scientific developments. REGINA G. KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945, at 115, 151–52, 169 (1993) (detailing how social work obtained professional legitimacy by employing psychological techniques and rhetoric).
placement cases.” In 1980, the National Association of Social Workers (NASW) issued a code of ethics that prohibited discrimination on the basis of sexual orientation. The APA followed the trend in 1986, affirming that homosexuality should not be a bar for foster parenting and citing the “wide body of clinical experience” and research studies that showed parental homosexuality did not influence child development. By 1987, the NASW had committed itself to “working for the adoption of policies and legislation to end all forms of discrimination against gays and lesbians at the federal, state, and local levels in all institutions.” Social workers thus followed scientific consensus and the dictates of their profession, both of which ran counter to popular opinion: only twenty-nine percent of Americans supported gay and lesbian foster and adoptive parenting in 1992.

These placements thus spurred controversy, leading to legislative bans and executive prohibitions on gay and lesbian foster and adoptive parenting that government bureaucrats resisted. In 1985, after the Boston Globe reported that two young boys had been placed with a gay couple, Massachusetts Governor Michael Dukakis instituted a hierarchy for prospective foster parents that gave preference to “traditional family settings.” The policy did not explicitly exclude gays or lesbians, but officials in the Dukakis administration stated that such placements were “highly unlikely” and the regulation became known as a ban on gay foster and adoptive parents. Civil servants, particularly social workers, vocally denounced the policy, criticizing it at public forums and lobbying Dukakis to eliminate the hierarchy.

178 Board Discusses Treatment Book, Prospective Payment, PSYCHIATRIC NEWS, Aug. 1, 1986, at 8.
179 NAT’L ASS’N OF SOC. WORKERS, supra note 177.
180 CHAUNCEY, supra note 2, at 150.
182 Id.
joined a lawsuit challenging the ban; Dukakis revised the regulation in 1990 to settle the case.\textsuperscript{184}

A similar contest broke out in New Hampshire that same year, but in that case bureaucrats resisted enforcing the ban with which they disagreed.\textsuperscript{185} Like Massachusetts, the question of gay foster and adoptive parenting became a subject of debate after a local paper reported that the state’s child welfare agency had knowingly licensed a gay man as a foster parent.\textsuperscript{186} The state House of Representatives quickly began debating a bill to bar “admitted homosexuals” from adopting a child or receiving foster care licenses.\textsuperscript{187} The proposed law also prohibited licensing a home with any gay household members.\textsuperscript{188} Rep. Mildred Ingram, the bill’s sponsor, argued that homosexuals were more likely to molest children than heterosexuals and claimed that gays and lesbians would model homosexuality, passing it on to their children. In rhetoric that echoed Anita Bryant, Ingram stated: “‘The only way for homosexuals to carry on their lifestyle is to proselytize.’”\textsuperscript{189} However, after receiving assurances from the Judiciary Committee that the Division of Children, Youth and Families (“DCYF”) would stop placing children in the homes of gays and lesbians, and would address the issue through rulemaking procedures, the House voted down Ingram’s proposal.\textsuperscript{190} Despite legislators’ views and expectations, the rules that DCYF proposed two and a half months later did not ban homosexual foster parents. The new rules only required foster parents to provide “a safe, nurturing, and stable family environment which

\textsuperscript{184} Complaint, Babets v. Dukakis, C.A. No. 81083 (Mass. Super. Ct.) (Ricketts Papers, Box 1, Folder 11); see also Press Release, Mass. Chapter of the Nat’l Ass’n of Soc. Workers, Statement on Proposed New DSS Foster Care Regulations (Nov. 25, 1985) (Ricketts Papers, Box 1, Folder 11); Press Release, Gay & Lesbian Advocates & Defenders, Massachusetts Changes Foster Care Regulations (Apr. 4, 1990) (NGLTF, Box 88, Folder 44); Kay Longcope, Foster-Care Ban on Gays is Reversed, BOS. GLOBE, April 5, 1990, at 1.

\textsuperscript{185} At that time Florida was the only state with a law prohibiting gays from adopting children, although North Dakota prohibited placements with unmarried couples. Sandor Katz, Fostering Equality, OUTWEEK, Aug. 22, 1989 (Ricketts Papers, Box 1, Folder 1). Four states—New York, New Jersey, New Mexico, and Vermont—had agency regulations or policies prohibiting discrimination on the basis of sexual orientation. Id.

\textsuperscript{186} See Paul R. Lessard, Sexuality Issue Raised in Foster Child Care Case, UNION LEADER, June 19, 1985, at 1.

\textsuperscript{187} Donn Tibbetts, Rep. Files Bill to Ban Homosexuals from Running Foster Homes, UNION LEADER, July 4, 1985, at 1.


\textsuperscript{189} Id.

is free from abuse and neglect.”

The Director of DCYF, David Bundy, disagreed with the legislature’s views on gay and lesbian foster parents, and wanted to maintain flexibility in child placements. Jack Lightfoot, an attorney for Child and Family Services who helped with the drafting, later explained that the rules did not mention sexual orientation “because the professionals didn’t think it was an issue.”

In the battle over gay and lesbian foster and adoptive parenting, it appeared that agency officials had won. However, this was a short-lived victory. The legislature responded by re-introducing a ban on gay and lesbian foster and adoptive parents. Arguments on the proposed ban framed the bill as a child protection measure, with supporters explaining “that the association of children with homosexuals in a social setting could turn these children into homosexuals.” One speaker, former state Supreme Court Justice Charles Douglas, best encapsulated this perspective when he stated: “A friend tells me that if you speak French at home around young children, they grow up learning how to speak French . . . . I think that same principle applies to young children who are raised by foster parents or who are in day care centers run by homosexuals.” Senator Jack Chandler framed the issue more dramatically, analogizing child placements with gay and lesbian parents to “putting a pound of roast beef in a cage with a lion. You know it’s going to get eaten.” The statement drew on the decades-long stereotype of gays as predators and child molesters, which the role modeling theory of homosexuality had not entirely displaced. Both chambers of the legislature approved the ban, which the Governor signed into law.

Despite the new statute, civil servants continued to approve gays and lesbians as foster parents, subverting the statute because they believed doing

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192 Telephone Interview with David Bundy (Sept. 24, 2014);
195 Distaso, supra note 195.
196 Clay Wirestone, In 1987, the New Hampshire Legislature Targeted Gay People as Unfit for Parenting, CONCORD MONITOR, June 30, 2013. On the same day the Senate passed the ban, it also rejected legislation making Martin Luther King Day a state holiday, with one member denouncing King as an “evil” and “immoral” man. Steve Sakson, King Holiday Falls 5 Votes Short in Senate: Bill to Ban Gay Foster Parents OK’d, NASHUA TELEGRAPH, Mar. 13, 1987, at 1, 12.
so best served the needs of New Hampshire’s children. Practical considerations played an important role in social workers’ decisions. After the legislature approved the ban, DCYF circulated questionnaires to foster parents about their sexual orientation; however, ten percent of recipients refused to answer, objecting to the intrusion on their privacy.¹⁹⁹ Since New Hampshire was facing a “critical shortage of foster homes,” Bundy announced that the state would not remove children from the homes of the foster parents who had declined to sign the form inquiring about their sexuality.²⁰⁰ Instead, social workers would only take action if they learned of a foster parent’s homosexuality.

The legislature did not respond to the agency’s announcement, and thus bureaucrats continued to resist the statute. There was “no support for the law” among DCYF employees, and thus social workers did not ask prospective foster parents about their sexual orientation when conducting home studies.²⁰¹ As Bundy later described the situation, “we came up with don’t ask don’t tell way before Clinton.”²⁰² Few gays or lesbians in New Hampshire were open about their homosexuality in the mid-1980s; passing was a common aspect of LGBT life, despite gay liberationists’ call to come out of the closet.²⁰³ As a result, those who wanted to foster or adopt children simply remained silent about their sexual orientation.²⁰⁴ Social workers’ disobedience allowed gay men and women to become parents, albeit at the cost of hiding their sexual identity. The state’s official policy condemned gays and lesbians as improper role models and harmful to children—an idea that social workers countered with individual placements.²⁰⁵ Civil servants in other states with anti-gay policies, such as California and Florida, likewise undermined their bans, helping gays and lesbians around the country to become parents.²⁰⁶

These bureaucrats followed the letter, but not the spirit, of the law, raising important questions about the proper actions of professionals within the administrative state. Given that the role of the executive branch is to implement the law, not challenge or change it, the contest between a

²⁰¹ Interview by Wendell Ricketts with Ellen Musinsky, at 2 (Aug. 9, 1988) (Ricketts Papers, Box 2, Folder 12).
²⁰² Telephone Interview with Bundy, supra note 192.
legislative mandate and professional expertise seems to have a clear answer. At the same time, these professionals were employed specifically to use their knowledge as to child welfare. This Article will take up the governance question of whether the social workers were justified in resisting the legislature’s goals in Part IV. That they subverted the law, with scientific principles shaping their discretion, demonstrates the powerful role of scientific developments in administrative law. It also illustrates how science and the administrative state moved towards a new role of supporting gays and lesbians in their struggle for legal rights.

C. Breaching the Schoolhouse Doors

Much like the adoption debates, the fear of child indoctrination pervaded efforts to update school textbooks to incorporate materials on gays and lesbians, which became increasingly contested in the late 1980s and early 1990s. Also, like the adoption context, many of these debates involved a divide between elected representatives and professionals within executive agencies, with the administrative state more responsive to the claims of gays and lesbians. Where these case studies diverge is that the professionals in the curricular context were educators, not members of the mental health community, and thus were at a further remove from social science research and developments. However, educators are also knowledge-based profession, which may explain why they were so responsive to scientific developments on gays and lesbians, especially emerging research on gay and lesbian youth welfare.207

Educators’ associations recognized that sexual minority youth faced significant hurdles in education, and that it was essential for teachers to create inclusive environments that protected their welfare. In 1987, the American Federation of Teachers enacted a resolution calling for equal educational opportunities for gay and lesbian students, a principle the National Education Association (NEA) endorsed the following year.208 Research data emerged soon after showing educators needed to act quickly, both to meet the needs of their gay and lesbian students, as well as to provide their heterosexual pupils with the education they required to live in a pluralistic society. In 1989, the federal Department of Health and Human

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207 Haupt, Professional Speech, supra note 8, at 1250. Teachers also tend to be motivated by professional norms and codes of ethics that include respect for diversity, an impetus towards inclusion, and a concern for the welfare of their students. Carol A. Bartell, A Normative Vision of Teacher as Professional, 25 TEACHER EDUC. Q. 24, 29 (1998); see also Association of America Educators, Code of Ethics for Educators, https://www.aateachers.org/index.php/about-us/aae-code-of-ethics (visited Aug. 15, 2016).

Services (HSS) published a report that revealed exceptionally high rates of suicide among LGBT youth, which experts attributed to social marginalization, family rejection, and harassment in schools by peers. At the same time, data demonstrated that schools’ failure to educate young people about gays and lesbians contributed to homophobia and discrimination. Indeed, most acts of violence against gays and lesbians were committed by teenagers and young adults. These research studies reinforced gay and lesbian rights advocates’ calls for inclusive curricula that emphasized tolerance for sexual minorities.

One of the most contentious battlegrounds over instructional materials was New York City in 1991, where a first grade multicultural teacher’s guide became a national symbol of the country’s culture wars. The city created the Children of the Rainbow curriculum, which contained lessons on gay and lesbian families, after a group of white teenagers killed a black high school student in Brooklyn in 1989. To promote tolerance and appreciation of cultural diversity, the New York City Board of Education adopted a resolution calling for the creation of a multicultural education curriculum focused on tolerance based on race, religion, national origin, sex, age, physical handicaps, and sexual orientation. Part of the reason the Rainbow guide that came out of this multicultural effort became so contentious was because of NYC’s educational administrative structure. The Board of Education, which had two members appointed by the Mayor and five by each of the borough presidents, was responsible for setting high school policies and overseeing the city’s educational system. The actual drafting fell to the Schools Chancellor Joseph Fernandez and his staff at the Department of Education, but the decision to use the materials was in the hands of the thirty-two district school boards, whose members were appointed by the Mayor and each of the borough presidents.

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212 New York City Board of Education, Statement of Policy on Multicultural Education and Promotion of Positive Intergroup Relations (Nov. 9, 1989) (Box 4, Folder 215, Lesbian Gay Teachers Association Records, NYC LGBT Community Center) [hereinafter LGTA].

213 Stanley S. Litow et al., *Problems of Managing a Big-City School System*, in BROOKINGS PAPERS ON EDUCATION POLICY 188-89 (1999). The Mayor appointed two members; each of the borough presidents appointed one. Id.
popularly elected for three-year terms. As a result, the policy and the actual documents were created by administrative agencies, while the approval depended on quasi-legislative bodies.

None of the administrative agency staff expected the vitriolic opposition to the guide, which only referenced gays and lesbians on three of its 443 pages. The guide urged teachers to discuss the value of every type of family household, “including two-parent or single-parent households, gay or lesbian parents, divorced parents, adoptive parents, and guardians or foster parents.” The guide also emphasized the need for teachers to help children develop a positive attitude towards gays and lesbians, to forestall later homophobic discrimination and violence. Included in its list of recommended readings were three books that became a focal point of the controversy—Heather Has Two Mommies, Daddy’s Roommate, and Gloria Goes to Gay Pride—for their depiction of loving gay parents.

While polls showed that seventy percent of New York City parents initially supported the Rainbow curriculum, a vocal contingent of parents and school board members attacked the guide, accusing the Board of Education of indoctrinating students and supporting immorality. Four of the city school boards voted to reject the pages of the guide that addressed gays and lesbians. Parents took to the streets, participating in six public demonstrations, including a rally outside the Department of Education that drew 2,000 attendees. Mary Cummins, president of Queens School Board 24, sent a letter to the district’s 22,000 parents accusing the curriculum’s supporters of “proselytizing” homosexuality and asserting: “We will not

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215 While school boards are part of the executive branch, operating under education department officials, they are elected by voters. School boards are thus a hybrid legislative and administrative body.

216 Memorandum from New York City Public Schools to Reporters et al. 4 (Sept. 8, 1992) (LGTA, Box 4, Folder 217).


218 Id. at 372.


220 IRVINE, supra note 143, at 154; Myers, supra note 211.

221 Steven Lee Myers, Schools Find that Diversity Can Place Values in Conflict, N.Y. TIMES, Oct. 6, 1992, at A20.


DRAFT – DO NOT CITE OR CIRCULATE
accept two people of the same sex engaged in deviant sex practices as ‘family.’”  

Other opponents also made recruitment rhetoric a central part of their campaign, depicting reformers as opening the door to homosexual indoctrination. They disseminated videos, posters, and pamphlets identifying the curriculum as a “gay recruitment campaign.” This argument proved effective, with parents expressing their fears that teaching anything about gays and lesbians would predispose their children toward homosexuality. Barbara Kay, a mother of three, was concerned that the Rainbow curriculum would encourage her children to be gay: “They’re trying to confuse [children] and make them accept it for themselves.” Another New Yorker explained his opposition similarly: “It was the first time that someone was probably trying to woo our children into a [gay] lifestyle.” Some of the arguments were more extreme, with Rainbow opponents creating a video that claimed the gay movement’s goal was to “sodomize your sons.” This argument drew upon the notion that homosexuality was the cause and product of childhood sexual molestation, and thus raised the specter of children’s indoctrination as much as their abuse.

What was particularly striking about the tenor of the debate and its vitriolic rhetoric is that the Rainbow curriculum was a purely advisory document—and a teacher’s guide at that. None of its pages would be handed to children, nor were teachers required to use it as a manual for classroom activities. The Rainbow curriculum was written to help districts implement the Board of Education policy, which school boards were required to follow. Under the regulation, teachers had to provide multicultural instruction that promoted tolerance for gays and lesbians; the only question was how and when they would do. The vast majority of districts were willing to incorporate discussions about gays and lesbians in

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223 Steven Lee Myers, Schools Find that Diversity Can Place Values in Conflict, N.Y. TIMES, Oct. 6, 1992, at A20.
224 IRVINE, supra note 143, at 174.
227 Byron, supra note 226.
228 IRVINE, supra note 143, at 174.
229 Minkowitz, supra note 222, at 902; IRVINE, supra note 143, at 156; Adam Entous, Christian Right Targets 20 City School Boards, NEW YORK OBSERVER, Mar. 8, 1993.
230 Id.
231 Id.
232 Id.
later grades, demonstrating the extent to which their quarrel centered on what information should be provided to young children. The fear the debate revealed was that these children, exposed to homosexuality at too early an age, would grow up to be gay themselves. It was this anxiety that gay and lesbian rights advocates had to address, in these and other rights battles.

School boards around the country responded to the dangerous precedent of the *Rainbow* curriculum, mobilizing to prevent gay-positive information from breaching their schoolhouse doors. Although they organized at all levels of government, most of the activity took place in small towns and counties. In Merrimack, New Hampshire, the school board passed a sweeping policy that banned any activity or instruction that had “the effect of encouraging or supporting homosexuality as a positive lifestyle alternative.” Chris Ager, the board’s chairman, described the policy as a means “to keep our Merrimack schools free from promoting homosexuality.” Ager explained that the small town, which had a population of 22,000, needed to prevent materials like *Children of the Rainbow* and *Heather Has Two Mommies* from being introduced in schools. To avoid violating the ban, teachers removed canonical works, including *Twelfth Night*, from the curriculum; eliminated instructional materials, such as one that referenced Walt Whitman’s homosexuality; and stopped teaching students about AIDS prevention. School boards in towns from Anoka Hennepin, Minnesota, to East Allen County, Indiana, enacted similar measures.

Some of these legislative actions had consequences that most people would now identify as absurd; however, they provide an insight into the extensive fears surrounding child indoctrination. In Elizabethtown, Pennsylvania, the school board approved a policy affirming that the district would never tolerate or accept “pro-homosexual concepts on sex and family.” One of the board members, Thomas A. Bowen, another Elizabethtown board member, explained that the resolution was necessary in light of the *Rainbow* curriculum: “I think parents in New York wish they’d taken preemptive action before the superintendent introduced

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textsbooks that present homosexuality as an approved alternative lifestyle.”239 As a result of the resolution, the town’s administrators and music teachers prohibited the school band from performing “YMCA,” as both the song and the Village People were “associated with the gay lifestyle.”240 The 1979 hit was not the only pop culture casualty in the fight to keep homosexuality out of schools. In Sawyers Bar, California, the school principal had to review episodes of Sesame Street before they could be shown to kindergarten classes after a parent objected that Bert and Ernie “promote homosexuality.”241 Questions about the fuzzy puppets’ sexuality generated so much attention that the show’s producers eventually issued a press release denying that Bert and Ernie were dating.242 These cultural flashpoints underscore the deep fears around homosexuality and its effects on children, as well as why teachers’ countervailing norms were so consequential.

In New York, the bitter dispute ended when the Department of Education proposed a modified curriculum that still included gays and lesbians. By softening controversial passages and agreeing that school districts could wait until sixth grade to address families headed by same-sex couples, the administrative agency was able to defuse the rancor, calm anxieties, and reach a compromise with the objecting school boards.243 Gay rights advocates decried these changes, seeing them as a capitulation to intolerance.244 Although these advocates did not win the battle over the first grade curriculum, they succeeded in changing the debate’s baseline in New York, from one that asserted that information on gays and lesbians did not belong in schools, to one that asked when those lessons should be taught. In doing so, they challenged the notion that the state should protect children from learning about gays and lesbians, taking on the Religious Right’s primary argument for opposing gay rights.

By incorporating information on gay and lesbian parents in the Rainbow curriculum, the Board of Education and the educators on its

240 Wilson, supra note 238.
242 Al Kielwasser, Muppet Love, BAY AREA REPORTER, Jan. 6, 1994 (PERSON Project, Box 6, Folder labeled PA Action Alerts).
administrative staff identified these types of families as an ordinary element of American life, a view that many in their community contested—and that four school boards initially refused to endorse. In making this claim, these educators were presenting the scientific consensus that children’s exposure to information on homosexuality was irrelevant to the development of future sexual orientation. Which source of administrative authority—the bureaucrats’ knowledge, training, and skills as professionals, or the dictates of elected representatives—should govern when the two conflict is a fraught question that this Article will take up in the next Part.

In both instances, scientific consensus conflicted with popular beliefs, leading to contests between civil servants and elected officials. This marks a sharp contrast to the mid-century administrative state, in which regulators and legislators concurred on anti-gay policies. This change underscores the importance of looking outside of courthouses and legislatures to understand the mechanisms of law reform. This is true not only in the context of LGBT rights, but in all legal fields.

III. PAST AS PROLOGUE

Changes in scientific viewpoints around sexual orientation had a profound impact on how professionals working in administrative bureaucracies implemented the law, with executive agencies more sympathetic to the claims of gays and lesbians than legislators. This dynamic is not just a historical phenomenon, but one that continues today. In debates over transgender bathroom access rights, some administrative agencies have been more responsive to transgender rights claims than legislators. Much as in the gay rights context, these divergent reactions are due to the structural differences between the branches, with scientific consensus providing important support for administrators. However, because of other political, social, and legal changes, scientific evidence is no longer the sole or even main source of bureaucratic resistance, as it was in the 1980s or 1990s. This does not mean that science is irrelevant, only that it is one among many factors.

This Part will detail agency responses in schools, where a number of educators have followed medical guidelines in protecting the rights of transgender students, much as their colleagues did in supporting gay-inclusive curricula in the early 1990s. It also discusses how changes in scientific consensus have influenced BDSM rights, with new diagnostic categories making it significantly more likely for BDSM practitioners to secure custody of their children, and how this could influence the work of bureaucrats addressing BDSM practitioners. This shows how the broader structural mechanism this Article has identified, wherein scientific
developments contribute to bureaucratic resistance, is manifesting itself today.

A. Transgender Students

The contest over transgender bathroom access rights is in many ways unfolding in parallel to the debates over gay and lesbian rights, at least in terms of the tension between legislatures and bureaucracies. Elected officials around the country have made opposition to transgender rights a central part of their legislative agenda, with bathroom access a focal point of this effort. In the first two months of 2016, legislators filed forty-four anti-transgender bills in sixteen states. North Carolina drew widespread attention when it enacted H.B. 2, a law that instructs public agencies to “require every multiple occupancy bathroom or changing facility” to be “designated for and only used by persons based on their biological sex.” North Carolina’s law was not the first time that bathroom access had become a political flashpoint in LGBT rights. In 2015, for example, voters repealed Houston’s Human Rights Ordinance after opponents claimed that its gender identity protection would allow men to use the women’s bathroom. The Department of Justice responded to H.B. 2 by issuing letters to public agencies and officials, asserting that North Carolina’s statute violated three federal civil rights laws. H.B. 2 has spurred national controversy, with companies and celebrities announcing boycotts of the state until legislators repeal the law.

Despite the increasingly hostile debates over transgender bathroom access in legislatures, educators within the administrative agencies have been quietly securing necessary accommodations for transgender students, much like teachers did for gay-inclusive curricula. In eight states and the

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245 This is of course not true of every legislature. In 2013, California enacted a statute requiring schools to allow pupils 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.” A.B. 1266, 2013-2014 Reg. Sess. (Cal. 2013).

246 HUMAN RIGHTS CAMPAIGN, ANTI-TRANSGENDER LEGISLATION SPREADS NATIONWIDE, BILLS TARGETING TRANSGENDER CHILDREN SURGE (2016).


249 Complaint for Declaratory Relief, Berger v. U.S. Dep’t of Justice, No. 5:16-cv-00240-FL, 20016 WL 2642261 (E.D.N.C. May 9, 2016).


District of Columbia, departments of education have promulgated policies to support and protect transgender students. These address a range of issues, including updating school records, using appropriate pronouns, ensuring access to the sex-segregated activities and facilities that align with the student’s gender identity, accommodations to dress codes, respecting transgender students’ privacy, and fostering a respectful school community. School districts in another seven states have also adopted similar guidelines, and school sports leagues governing five states have announced that transgender students may play on the sports team of their gender identity. Of course, not all school personnel have welcomed transgender students or respected their gender identities. However, the legal landscape became much clearer when the Department of Education issued an interpretive guidance in 2015 that affirmed schools “must treat transgender students consistent with their gender identity,” which it reinforced in 2016. That the federal government issued this guidance for promoting the rights of transgender students. These efforts to promote the rights of transgender students are part of a decades-long collaboration between transgender rights advocates and administrative agencies. Gabriel Arkles et al., The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change, 8 SEATTLE J. FOR SOC. JUST. 579, 620-21 (2010); Law Reform and Transformative Change: A Panel at CUNY L. REV., 14 CUNY L. REV. 21, 36 (2010).


256 U.S. Department of Education, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (Dec. 1, 2014) (on file with author); Letter from U.S. Department of Justice to Colleagues 3 (May 13, 2016) (on file with author). In August 2016, a Texas District Court issued an injunction after determining the Department of Justice failed to follow the APA before issuing its
demonstrates the extent to which factors other than science are motivating bureaucratic resistance. In 2015, the NEA, which is the largest association of professional educators, co-authored a guidebook identifying the ways in which educators may best support transgender students.\textsuperscript{257} It emphasized that transgender students must be granted access to the restrooms and locker rooms that accorded with their gender identity, and that students who were uncomfortable with using facilities with a transgender student should be given the option of using a private facility, such as the bathroom in the nurse’s office.\textsuperscript{258} This ensured that transgender students were not set apart from their peers or marked as different.

Before the Department of Education issued its guidance, administrative agencies and democratically elected school boards sometimes took opposing sides, creating a contest much like the curricular battle over curricula in New York City. In \textit{Grimm v. Gloucester County School Board}, school officials were supportive of the student’s transition and ensured teachers and staff would treat the student as a boy.\textsuperscript{259} In addition to changing school records to reflect the student’s new male name, the guidance counselor contacted teachers to explain that the student should be addressed with his new name and gender pronoun.\textsuperscript{260} School officials allowed the student to use the boys’ restroom until the school board, responding to community member complaints, adopted a policy restricting the use of school restrooms and locker rooms to students with “the corresponding biological genders.”\textsuperscript{261} The public hearings on the policy were replete with hostile vitriolic rhetoric; one speaker called the student “a ‘freak’ and compared him to a person who thinks he is a ‘dog’ and wants to urinate on fire hydrants.”\textsuperscript{262} The Fourth Circuit held that the student had a right to use the boys’ restroom, giving deference to the Department of Education’s interpretation of Title IX.\textsuperscript{263}

Similar contests are continuing, with the Department’s guidance helping some schools resolve the competing claims of its transgender students and parents who object to students using the facilities associated with their gender identities. In Manchester, Michigan, the Board of Education maintained its non-discrimination policy in the face of a standing-room only crowd of angry parents, who had gathered in response to a transgender student using the girls’ restroom, citing its legal

\textsuperscript{257} \textsc{Nat’l Educ. Ass’n et al.}, \textit{supra} note 20, at 1-3.
\textsuperscript{258} \textit{Id.} at 25.
\textsuperscript{259} \textit{G.G. ex rel. Grimm v. Gloucester County Sch. Bd.}, No. 15-2056, 2016 WL 1567467, at *1 (4th Cir. Apr. 19, 2016)
\textsuperscript{260} \textit{Id.} at *16.
\textsuperscript{261} \textit{Id.} at *2.
\textsuperscript{262} \textit{Id.} at *2.
\textsuperscript{263} \textit{Id.} at *8.
obligations. The school superintendent told parents that if any children “felt uncomfortable or threatened” by the transgender student, they could use the staff restrooms. This statement indicated that students who did not want to share facilities with their transgender peers should be seen as the minority, and that the majority supported transgender bathroom rights. This discursive shift is quite similar to debates over gay-inclusive education materials; when educators introduced comprehensive curricula, religious conservatives responded that these materials should not be in schools. To allay their concerns, school districts did not eliminate the offending lessons, but rather allowed individual students to opt out, turning vocal objectors into silent minorities.

These educators have been willing to support transgender students in the face of considerable opposition in part due to scientific standards for the care of youth with gender dysphoria. The consensus among medical professionals is that adolescents with gender dysphoria should have their gender identity affirmed, as gender dysphoria at this age typically persists into adulthood. Treatment for these adolescents includes medical interventions, such as hormone suppressants to delay the onset of puberty, as well as social affirmations of gender identity. According to scientific research, is best when families and communities identify adolescents with gender dysphoria according to their gender identity, indicating that teachers’ failure to do so could cause psychological harm. Scientific consensus makes it clear to educators what course of action is in the best interests of these adolescents.

The psychological community is divided, however, with respect to what constitutes optimal treatment for pre-adolescent children, as studies have shown that gender dysphoria in childhood often does not persist through adolescence. In longitudinal studies of children treated in clinics for gender dysphoria, only six to twenty-three percent of pre-adolescent

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264 Nathaniel Siddall, Transgender Student’s Use of School Restroom Sparks Debate in Manchester, DAILY TRIB., Feb. 19, 2015.
265 Id.
267 Am. Psychological Ass’n, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 AM. PSYCHOLOGIST 832, 842 (2015).
268 Id. at 842, 846.
269 Id.
270 Id. at 841-42; Jack Drescher & Jack Pula, Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children, in LGBT BIOETHICS: VISIBILITY, DISPARITIES, AND DIALOGUE S17 (2014); World Professional Association for Transgender Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7, reprinted in 13 INT’L J. TRANSGENDERISM 165, 172 (2011).
boys, and twelve to twenty-seven percent of girls, later identified as transgender adults. Thus, while transgender adults have stable and permanent gender identities, the same is not always true of pre-pubertal children, leading to divisions among psychologists as to whether it is better to affirm these children’s asserted gender identity, or rather to work to decrease their cross-gender identification. Those clinicians who adopt the affirmative approach appear to be in the majority, and their position is based on the notion that the immediate benefits of affirming the child’s gender identity outweigh the possible distress the child might later face if he or she later transitions back. Practitioners who attempt to keep the child in his or her natal gender role, on the other hand, want to forestall the child’s later difficulty of a second transition. The most prominent advocate of this treatment method, psychologist Kenneth Zucker, who led the Child Youth and Family Gender Identity Clinic in Toronto, was recently dismissed amid allegations that his clinic shamed and traumatized children. Unlike in the gay and lesbian context, scientists have not reached a consensus on pre-pubescent children with gender dysphoria, although there is a growing commitment to gender identity affirmation, which will support the recent guidelines from the NEA.

Scientific views as to best treatment practices for gender dysphoria has shaped the administrative responses to transgender student rights, much as they did in gay rights issues this Article detailed. Although the historical and contemporary accounts parallel one another in many ways, there is an important difference between the two. In the debates over gay rights, the focus was on the effect that gay and lesbian adults might have on children. Under sexual psychopath statutes, gay men were seen as physical threats; after the declassification of homosexuality from the DSM, the concern then

271 Drescher & Pula, supra note 270, at S17. Most of the children in these studies whose gender dysphoria desisted later identified as gay or lesbian. Id. at S18; WPATH, supra note 270, at 172.
272 Drescher & Pula, supra note 270, at S17; Am. Psychological Ass’n, Guidelines, supra note 267, at 842; WPATH, supra note 270, at 176.
273 Drescher & Pula, supra note 270, at S18; WPATH, supra note 270, at 176.
274 WPATH, supra note 270, at 176. Other proponents of this approach have identified adult transgender identity as an undesirable outcome due to the social stigma associated with transgender identity and the invasive medical procedures that transgender individuals often undertake. Drescher & Pula, supra note 270, at S18; Kenneth J. Zucker et al., A Developmental, Biospsychosocial Model for the Treatment of Children with Gender Identity Disorder, 59 J. HOMOSEXUALITY 369, 391 (2012).
275 Jesse Singal, How the Fight Over Transgender Kids Got a Leading Sex Research Fired, N.Y. Mag., Feb. 7, 2016. His ouster was linked to efforts to ban conversion therapy, a practice intended to manage, reduce, or eliminate a person’s same-sex sexual attractions. Id.; Jack Drescher, Controversies in Gender Diagnoses, 1 LGBT HEALTH 10, 11 (2014). For a more recent example of this controversy, see Dawn Ennis, Human Rights Campaign Sets Sights on John Hopkins After Controversial Trans Report, NBC, Sept. 1, 2016; see also LAWRENCE S. MAYER & PAUL R. MCHUGH, SEXUALITY AND GENDER: FINDINGS FROM THE BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL SCIENCES 105-08 (2016).
became the psychological impact of a gay or lesbian role model. In both, children were neutral objects who might improperly be influenced as a result of the adults in their lives. By contrast, transgender children, not adults, are the agents driving the contests over their place in schools. The question might be how adults should respond to the children’s behavior, but not whether the gender identity expression is inherent to the child. In that regard, the terms of the debate have changed to which children’s welfare to prioritize, with educators emphasizing the needs of transgender children. It is not yet clear if and how this will change the advocacy strategy or the legal results, but it is a shift worth noting.

When school boards issue policies and legislatures enact laws that teachers defy, this creates a governance problem much like the situation in New Hampshire. The motivation for resistance is important, as expertise is an important source of authority for teachers, who are hired for their special training as educators; at the same time, they are entrusted with inculcating community values. This Article will explore the legal values that are at issue in these circumstances in Part IV.

B. Custody Meets Kink

Although there are many factors involved, educators’ insistence on the rights of transgender students to use gender-congruent facilities is one manifestation of a larger structural paradigm, in which scientific developments have and continue to shape legal debates. In the history of LGBT rights, this has often been evident within administrative bureaucracies, although changes in scientific theories of homosexuality have also influenced decisions of the judiciary. Indeed, one of the first areas of law to change in response to the declassification and the studies it inspired were gay and lesbian custody rights. Outside of the LGBT context, another group of sexual minorities, BDSM practitioners, have used this overarching framework to effectuate change. By working with psychiatrists, BDSM rights advocates were able to secure a diagnostic change that influenced custody determinations, much like gay rights advocates in the 1970s. Bureaucrats have not yet engaged in any known acts of subversion to protect the rights of BDSM practitioners. However, this section explores how bureaucratic resistance in the context of criminal law enforcement could promote BDSM practitioner rights. It identifies BDSM rights as a potential future iteration of the phenomenon this Article presents.

For many decades, parents who engaged in BDSM often lost custody and visitation rights as a result of their sexual relationships and A similar example of this is in debates over anti-bullying policies. Daniel B. Weddle & Kathryn E. New, *What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 325, 325-27 (2011).
practices. In 2009, 132 people contacted the National Coalition for Sexual Freedom (NCSF), a group that advocates for consenting adults in the BDSM, fetish, leather, swing, and polyamory communities, for help with divorce and child custody issues that arose because of their sexual practices. In 2008, that number was 157. NCSF estimates that between 1997 and 2010, when the APA changed the diagnostic definition of paraphilic disorders, eighty percent of parents who sought legal assistance from the NCSF lost their custody battles. In contentious divorces, BDSM practices were powerful weapons that ex-spouses could and did wield. In one case, a court considered terminating a father’s parental rights after his ex-wife argued: “though you are not engaging in any sexual act with [our 12-year-old daughter], you are exercising your sadomasochistic behavior towards her in every other way,” before describing herself as an “unwilling yet compliant participant” in the BDSM activities her husband enjoyed. In another, involving a thirty-five-year-old woman from Seattle named Khaos W., Khaos’ ex-husband alleged that Khaos molested her five- and seven-year-old sons. When the Child Protective Services agent came to Khaos’ home, she saw a flogger and restraints in the master bedroom drawer. Although the bedroom was latched and the lock was out of reach of the children, this evidence was sufficient for the judge, who placed the children in foster homes.

BDSM practitioners were able to reverse this trend after they worked with medical professionals to change the APA’s diagnostic codes. The process began in 1987, when the APA published the DSM-III-R, which identified BDSM and kink as paraphilias, or atypical sex practices, that indicated mental illness. Race Bannon, a community organizer, and his partner Guy Baldwin, a therapist, launched the “DSM Revision Project” and began lobbying for a diagnostic change, asking

277 Kaplan, supra note 5, at 116.
279 Id. at 1230.
280 Paraphilias are atypical sexual practices. Paraphilic disorders are paraphilias that either cause a person distress or involve non-consensual sexual desire or behavior. AM. PSYCHIATRIC ASS’N, PARAPHILIC DISORDERS (2013), http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf; Mark Moran, DSM to Distinguish Paraphilias from Paraphilic Disorders, PSYCHIATRIC NEWS, May 3, 2013.
284 Id.
285 Gerson, supra note 281.
286 Id.
mental health professionals to write to the DSM committee requesting revisions.\textsuperscript{287} When Susan Wright, the founder of the NCSF, took over the Project, she developed a dialogue with Richard Krueger, an expert on sexual disorders and a member of the APA’s paraphilias committee.\textsuperscript{288} Wright explained to Krueger that “the DSM manual caused harm to BDSM people because it perpetuated the stigma that we were mentally ill,” which Krueger attested was not the DSM’s intent.\textsuperscript{289} Like the gay liberationists of the 1970s, Wright combined arguments about science and law, emphasizing the discriminatory effects of the diagnostic category. After Krueger put Wright in contact with the APA’s paraphilias committee, Wright provided the group with documentation about the legal consequences of the DSM on BDSM practitioners, answering their questions and providing suggestions on how to word the provisions.\textsuperscript{290}

In 2006, an influential medical article reinforced Wright’s claims by framing them in terms of scientific principles. Interestingly, that article rooted its arguments in not only the lack of scientific rigor underlying the categories, but also the legal discrimination the paraphilias engendered.\textsuperscript{291} It stated: “The confusion of variant sexual interest with psychopathology has led to discrimination against all ‘paraphiliacs,’ Individuals have lost jobs, custody of their children, security clearances, become victims of assault, etc., at least partially due to the association of their sexual behavior with psychopathology.”\textsuperscript{292} The similarity between the situation of BDSM practitioners and gays and lesbians was not lost on the authors, who noted that “[t]he situation of the Paraphilias at present parallels that of homosexuality in the early 1970s.”\textsuperscript{293}

The change the APA made to the DSM-V, which it announced in 2010, was to distinguish between paraphilias and parophilic disorders.\textsuperscript{294} Engaging in atypical sexual practices, in and of itself, no longer indicated a mental illness. The APA disclaimed that this diagnostic change was a function of the legal effect the DSM had on BDSM practitioners, but its decision had a significant impact on BDSM practitioners.\textsuperscript{295} The percent of parents seeking legal assistance from the NCSF who lost their custody cases dropped from eighty to ten percent.\textsuperscript{296} Reports of discrimination against

\textsuperscript{287} Id.

\textsuperscript{288} Id.

\textsuperscript{289} Id.

\textsuperscript{290} Id.; Susan Wright, \textit{Archives of Sexual Behavior (letter to the editor), NAT’L COALITION FOR SEXUAL FREEDOM} (July 16, 2010), https://ncsfreedom.org/component/k2/item/522.html.


\textsuperscript{292} Id.

\textsuperscript{293} Id. at 94.

\textsuperscript{294} AM. PSYCHIATRIC ASS’N, PARAPHILIC DISORDERS, supra note 280.

\textsuperscript{295} Id.

\textsuperscript{296} Gerson, supra note 285.
BDSM practitioners also decreased, from more than 600 in 2002 to 200 in 2015.\textsuperscript{297} A custody case from 2010 demonstrates the direct legal effect of the APA’s decision, as the difference between the two versions of the DSM proved determinative. The caseworker for the Department of Social Services (DSS) questioned whether the mother, who engaged in BDSM, could separate her “alternative lifestyle . . . from her parenting” given the DSM-IV-TR’s definition of sexual sadism as a mental illness.\textsuperscript{298} At the final hearing on the case, the mother’s lawyer provided the judge with the proposed DSM-V revisions, asking the court to re-evaluate the case.\textsuperscript{299} The next month, the judge awarded the mother custody.\textsuperscript{300} He also rebuked DSS for its failure to stay apprised of new diagnostic criteria, noting this was troubling given that the DSM definition was so consequential to the custody decision.\textsuperscript{301}

The new DSM categorization has helped many BDSM practitioners secure custody, although courts still consider BDSM a negative factor in weighing custody determinations. Despite the diagnostic change, an Illinois court in 2012 denied a father’s petition for custody after finding that the father’s BDSM practices meant that the “mental-health factor” favored the mother.\textsuperscript{302} In the same decision, it noted that the mother’s lesbian relationship was not a factor in the decision, as the state’s “approach to child custody determinations is sexual orientation neutral.”\textsuperscript{303} This was an interesting reflection of the fact that, while same-sex sexuality has become accepted in much of the country, many categories of deviance remain outside of the mainstream.

For BDSM rights advocates, one of the major challenges is around law enforcement, which presents two problems. The criminal justice system does not always protect those whose rights have been violated, and may render consensual sexual expression a crime. BDSM practitioners follow a credo of “safe, sane, and consensual,” with a “safe word” to ensure participants do not suffer unintentional harm.\textsuperscript{304} BDSM relationships are structured to ensure those principles are followed—limits are negotiated at the beginning, encounters are carefully planned, and the submissive party is

\textsuperscript{297} Id.
\textsuperscript{298} Wright, Depathologizing Consensual Sexual Sadism, supra note 290, at 1229.
\textsuperscript{299} Id. at 1230.
\textsuperscript{300} Id. The mother received custody of three of the four children; the father retained custody of the fourth due to issues concerning health insurance coverage. Id.
\textsuperscript{301} Id.
\textsuperscript{303} Id.
\textsuperscript{304} Monica Pa, Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex, 11 Tex. J. Women & L. 51, 61 (2001). Some outliers in the BDSM community do not use a safe word.
always in control.\textsuperscript{305} However, almost one third of those responding to the NCSF’s 2012 survey of BDSM practitioners stated that their partners had either violated their pre-negotiated limits or ignored their safe word.\textsuperscript{306} These individuals may be reluctant to turn to law enforcement for assistance, as practitioners who report nonconsensual sexual violence have had to deal with police responses that range from incredulous to hostile.\textsuperscript{307} These victims of sexual crimes are thus denied recourse through the criminal justice system.

Over-enforcement is as much of a problem, as BDSM practitioners have been prosecuted for engaging in entirely consensual activities.\textsuperscript{308} Nineteen percent of those the NCSF surveyed know of BDSM practitioners who have been prosecuted in their community as a result of their sexual practices, and twenty eight percent personally fear prosecution.\textsuperscript{309} Sixty-two percent expressed concern about the lack of resources available should they be arrested for BDSM-related activities.\textsuperscript{310} In most states, consent to a crime that “causes or threatens bodily injury” is a defense that applies to injuries that are “not serious.”\textsuperscript{311} BDSM sexual activities involve the eroticization of violence, but most do not, as a practical matter, rise to such a level of injury as to preclude a consent defense.\textsuperscript{312} However, as Margo Kaplan has noted, courts have rejected consent defenses for minor BDSM-induced injuries, at times identifying “pain itself” as the serious bodily injury that precludes the accused from claiming consent.\textsuperscript{313} Setting aside the anomaly of interpreting pain inflicted for pleasure as a serious injury, these decisions are troubling because they effectively criminalize all BDSM activity.\textsuperscript{314} Defendants have challenged their convictions on constitutional grounds, but appellate courts have rejected their arguments, citing dicta in \textit{Lawrence v. Texas} counseling the state against “attempts . . . to define the meaning of the relationship or to set its boundaries absent injury to a person.”\textsuperscript{315}

\begin{footnotesize}
\begin{enumerate}
\item[306] NCSF, Consent Counts Survey, \textit{supra} note 282.
\item[307] Kaplan, \textit{supra} note 5, at 116, 121-22.
\item[310] NCSF, Consent Counts Survey, \textit{supra} note 282.
\item[311] Model Penal Code \textsection{} 2.11 (AM. LAW INST. 2015); Kaplan, \textit{supra} note 5, at 121 (most states have adopted the Model Penal Code definition).
\item[313] Kaplan, \textit{supra} note 5, at 121-22.
\item[314] Id.
\end{enumerate}
\end{footnotesize}
BDSM practitioners come to the attention of law enforcement in myriad ways. Often, witnesses see bruises on an individual, hear noises coming from a home, or catch a glimpse of a BDSM scene, and call the police. The problem for BDSM practitioners is that their sexual practices intersect with laws aimed at protecting individuals from domestic abuse. Most states mandate arrest in cases of violence between intimate partners, and many jurisdictions also adopt “no-drop” prosecution policies. While states define assault, battery, and domestic relationships differently, BDSM practitioners often fall within these categories and are swept up within laws that were enacted to protect women, whose injuries at the hands of their partners were all too often ignored by police officers. By eliminating discretion, battered women’s rights advocates and legislators hoped to ensure women’s safety, stop violence, hold perpetrators accountable, and send a broader message that domestic violence is not a private matter, but rather a public crime. Consensual sexual activities would seem outside the purview of these statutes; however, BDSM practitioners have been arrested and successfully prosecuted for engaging in entirely consensual sex.

BDSM practitioners are not a politically powerful group, and as such they are unlikely to convince legislatures to amend the laws so as to explicitly exclude BDSM. A more fruitful option may be to convince police to approach BDSM-related scenarios differently from the non-consensual intimate partner violence the laws were meant to address. Police officers are professionals whose education, training, and skills incorporates scientific research. If law enforcement officers were to understand that BDSM is a normal expression of sexuality, rather than an expression of violence, this could lead police to realize that BDSM does not fit the statutory definition of crime, and thus would respond differently from sexual assault, domestic

316 NCSF, Consent Counts Survey, supra note 282. Other frequent scenarios include professional dominants who are also arrested for prostitution and individuals arrested for assault after police raid private clubs. Id.
318 See sources cited supra note 317.
319 Houston, supra note 317, at 219; Goodmark, supra note 317, at 4;
320 NCSF, Consent Counts Survey, supra note 282.
violence, and battery calls. As part of this, officers would need to know how to alter their protocols. In practical terms, police officers would ask victims who report abuse in a BDSM relationship what the safe word had been and whether they had used it, as well as the other ways in which the encounter had been designed, so that those officers would be better able to judge whether a crime had been committed.\(^{322}\) If the partners had not respected the norms of BDSM practitioners and thus did not have consent during the encounter, they should be held accountable.

Women’s rights advocates spent decades establishing domestic violence as a crime and convincing legislatures to enact mandatory arrest statutes, so suggesting that police officers should in fact exercise discretion in BDSM situations is problematic.\(^{323}\) However, BDSM relationships are not domestic violence. A different concern might be that perpetrators would claim that they are in a BDSM relationship to mask domestic violence. Having law enforcement personnel understand the specifics of what it means to be involved in BDSM would help ensure that the individuals truly are in this type of partnership, rather than using BDSM as an excuse for violence.\(^{324}\) The argument here is not that police officers should exercise discretion in domestic violence cases, but rather, it is that law enforcement officers need to consider whether BDSM falls within the statutory definition of a crime. While arguing that police officers should introduce discretion even in this limited way is undoubtedly controversial, it is equally concerning that adults are being arrested, convicted, and sentenced for engaging in entirely consensual sexual activities with other adults. This is a space where the resistance of bureaucrats could help protect the rights of an unrepresented minority.

As in the historical gay rights context, changes in scientific viewpoints have the potential to influence legal rights by impacting the work of civil servants. In pressing for a diagnostic change, BDSM practitioners sought to remove a scientific impediment to custody. In doing so, they were engaging in a mechanism for change that gay and lesbian

\(^{322}\) Some outliers in the BDSM community do not employ safe words. Safe words serve as strong evidence of a negotiated substitute to the word “no”; those outliers would need to provide equally robust, reliable evidence of a negotiated substitution. Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev 51, 136 (2002).

\(^{323}\) Miccio, supra note 317, at 277-79. Commentators have criticized mandatory arrest laws for disempowering women and subjecting women to increased state regulation, while others have argued that any grant of discretion would be exercised too liberally, leading law enforcement to take domestic violence less seriously. \textit{Id.} at 296-98; Goodmark, \textit{supra} note 317, at 31-32; Erin L. Han, Note, Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases, 23 B.C. Third World L. J. 159, 186 (2003). As a result, some commentators have argued for policies of “presumptive arrest” to allow victims decision-making authority. Bardavid, \textit{supra} note 317, at 230-31.

\(^{324}\) See Van, 688 N.W.2d at 608-09 (noting that the defendant and victim had entered into a relationship with no limit and had not selected a safe word).
rights advocates had employed forty decades earlier. The possibility that this process could change how police address BDSM-related offenses highlights the extent to which this approach to legal change is not only a historical phenomenon, but an ongoing dynamic.

IV. THE GOVERNANCE PROBLEM

Psychiatric theories of sexuality have had a profound impact on the law, affecting not only what regulations are promulgated but also how the law is implemented. Changing scientific understandings of sexual orientation, identity, and behavior have influence how bureaucrats executed the law. Bureaucrats thus have an important role in lawmaking and in the process of law reform, a fact that many legal scholars have not yet appreciated.\textsuperscript{325} Examining law as it is applied reveals a process of legal change that raises profound governance questions, demonstrating the importance of studying law in action. The social workers and educators in these accounts responded to scientific developments that either conflicted with legislative mandates or popular opinion, raising questions of democratic and constitutional legitimacy. This Part analyzes the normative implications of bureaucratic resistance to identify the boundaries of permissible bureaucratic dissent, arguing that professional expertise based on scientific consensus can serve as a legitimate source of authority for resistance, so long as bureaucrats are transparent about their actions. It then applies this framework to the examples of New Hampshire’s social workers in the mid-1980s, contemporary educators addressing the needs of transgender students, and police officers addressing BDSM practitioners.

A. Bureaucratic Resistance

Bureaucratic dissent is not an anomaly in the legal system, which creates room for resistance across the levels and branches of government. Scholars of federalism have noted that states contest federal laws, sometimes by exploiting gaps in the statutes or, more controversially, through outright refusals to enforce legal provisions.\textsuperscript{326} Resistance that the legislature can overcome through compromise may be preferable to defiance. A similar dynamic occurs in judicial review; courts enforce the Constitution not only by invalidating statutes, but also through resistance norms, such as the constitutional avoidance canon and the clear statement

\textsuperscript{325} But see EPP, supra note 8; Ming Hsu Chen, \textit{Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights}, 49 HARV. C.R.-C.L. L. REV. 291 (2014).  
Resistance norms serve as a soft judicial limit on government authority to act that “mak[es] it harder—but not impossible—to achieve certain legislative goals” that may encroach on constitutional principles. Thus, courts will accept a limit on federal jurisdiction, but only when Congress has made its intent clear. Legislatures may find themselves unable to resolve a contentious issue, and therefore compromise by adopting an ambiguous statute. Proponents of limiting jurisdiction cannot later use this compromise to impose limits, but rather must, as a result of resistance norms, amass sufficient support and demonstrate an unequivocal consensus to make the restrictions clear. Resistance norms allow courts to prevent legislative enactments from infringing on other normative commitments, while at the same time ensuring judicial respect for duly enacted laws that are unambiguous in intent. Ultimately, by applying a resistance norm, the judiciary is not restraining Congress so much as enforcing Article III.

Resistance in the administrative context takes a range of forms, falling on a spectrum from calculated non-compliance to covert expressions of disagreement. Bureaucrats are able to express their dissent in all areas in which they exercise discretion, which includes a wide variety of activities. As they determine how to allocate resources, prioritize tasks, and interpret statutory obligations, bureaucrats are able to infuse their dissent into those decisions. For example, Joseph Landau has identified the ways in which immigration officials undermined the Defense of Marriage Act (DOMA), which limited marriage for federal purposes to opposite sex couples, through exercises of discretion. Because of DOMA, many gay and lesbian foreign nationals in relationships with U.S. citizens and permanent residents could not obtain family-based immigration status. To remedy the harm the statute imposed on these couples, immigration officers moved to administratively close pending cases or granted deferred action status to prevent citizens and permanent residents from being separated

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328 Id. at 1596.
329 Id. at 1552.
330 Id. at 1597.
331 Id. at 1598.
332 Id. at 1552.
334 Id. at 643, 645.
336 Landau, Bureaucratic Administration, supra note 335, at 1199.
from their loved ones. Resistance thus may not always be visible, but rather dissent may be cloaked under the guise of discretion.

Professional expertise can drive resistance, as they provide a source of authority that may conflict with legislative mandates. Governments hire certain bureaucrats, delegate tasks to them, and ask them to utilize discretion because of their professional training, which give them the specialized knowledge and skills they need to carry out their work. This is true of the bureaucrats in this Article, namely the social workers, educators, and police officers who use their education and training when exercising discretion. These bureaucrats derive authority on the job from their status as professionals, and they are charged with using their education and outlook on a daily basis.

Legislatures realize that they need bureaucrats with expertise in many instances, but at the same time, knowledge is not value neutral or apolitical. Science cannot be separated from its social context, which renders certain research questions particularly salient and consequently yields certain normative stances. Psychiatrists, for example, took up the classification of homosexuality as a mental illness in the early 1970s because of gay liberation protests. During the debate, doctors were cognizant of the legal consequences of their decision, but the decision turned on the state of scientific research and the studies’ methodology. Scientific communities have their own norms and values about the proper modes of decision-making, leading to results with political implications. Relying on experts thus both benefits and limits legislatures; it has the same effects on bureaucrats, who may feel compelled to follow scientific

337 Id. at 1202-04.
341 JASANOFF, supra note 121, at 13; Caudill & LaRue, JASANOFF, supra note 121, at 28, 42. In terms of gay and lesbian rights, psychiatrists considered whether to continue classifying homosexuality as a mental illness at the urging of activists, who lobbied scientists because of the effects the diagnostic category had on the law. This does not mean that the research studies the APA considered in coming to its decision were invalid, as they followed accepted methodologies, but rather that the issue became a point of debate because of a political movement.
342 Susan Stefan, Leaving Civil Rights to “Experts”: From Deference to Abdication Under the Professional Judgment Standard, 102 YALE L.J. 639, 656-58 (1992). For example, the ways in which psychiatrists have addressed the needs of transgender pre-adolescent youth reflects their conceptualization of gender dysphoria; additionally, although recommending that patients live according to their gender identity has significant political implications, this does not make the instruction a political act.
consensus in the face of opposing laws and policies, as the social workers and educators in this Article did.\footnote{See Lipsky, supra note 6, at 189-90; Kunzel, supra note 175, at 170. In some situations, not following scientific consensus could create tort liability concerns. Government employees do not stop being members of their professions, and in fact continue to be held to the standards of their profession during their employment. Claudia E. Haupt, Unprofessional Advice, 19 U. Pa. J. Const. L. __ (forthcoming 2017) (on file with author).}

There is an important gap between the positive claim that bureaucrats have the ability to exercise resistance and the normative argument that they should express their dissent. Emerging literature on administrative constitutionalism, which refers to efforts by agencies to interpret, apply, and elaborate constitutional principles, has set out the competing concerns at issue when bureaucrats act beyond their legislative mandates that also apply to resistance based on scientific developments.\footnote{Tani, supra note 15; Lee, supra note 15; William N. Eskridge Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution (2010); Bertrall L. Ross II, Embracing Administrative Constitutionalism, 95 B.U. L. Rev. 519, 522 (2015); Jeremy K. Kessler, The Administrative Origins of Modern Civil Liberties Law, 114 Colum. L. Rev. 1082 (2014); Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897, 1900, 1916-17 (2013); Gillian E. Metzger, Ordinary Administrative Law as Constitutional Common Law, 110 Colum. L. Rev. 479, 483-84 (2010); Anuj C. Desai, Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy, 60 Stan. L. Rev. 553 (2007).}
The three main challenges to administrative constitutionalism’s legitimacy are rooted in the separation of powers, democratic legitimacy, and pragmatism. Not only do these objections apply to resistance based on bureaucratic expertise, but the counterarguments that support administrative constitutionalism also demonstrate the value of bureaucratic dissent based on professional judgment.

The separation of powers concerns in administrative constitutionalism arises from the fact that administrative agencies do not have any inherent or independent authority to act, but rather can only implement what the legislature has authorized.\footnote{See Metzger, Administrative Constitutionalism, supra note 343, at 1917-18; Jerry L. Mashaw, Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Statutory Interpretation, 57 Admin. L. Rev. 501, 508 (2005).}

By resisting the legislature, administrators are not only substituting their opinions for those charged with enacted the law, but are also usurping the role of the judiciary in reviewing statutes’ constitutionality.\footnote{Metzger, Administrative Constitutionalism, supra note 343, at 1920.}

Thus, the idea of agencies as fostering new normative commitments challenges the structure of the constitutional system that vests judicial power in courts and lawmaking authority in the legislative branch.\footnote{Metzger, Administrative Constitutionalism, supra note 343, at 1920.} In many ways, “[t]he challenge to administrative constitutionalism’s legitimacy . . . bears a close connection to the charge that the modern administrative state as a whole is at odds with
basic features of the Constitution. An agency’s exercise of discretion in contravention of legislative enactments extends the concern about the place of the administrative state in the constitutional order one step further, as the administrative agency is no longer exercising the authority it has been delegated. Instead, it has gone rogue.

Administrative constitutionalism scholars argue that agencies are nevertheless acting in a permissible manner, despite the separation of powers concerns, because bureaucrats’ primary obligation is not to legislators or the public, but to the Constitution, which governs all governmental action and which bureaucrats take an oath to uphold. As a result, bureaucrats have a separate source of authority that may supersede a legislative grant of discretion. Despite not fitting into the strict constitutional framework, their resistance is constitutionally supported. This argument does not map neatly onto dissent and contestation based on expertise. However, simply because bureaucratic resistance is not based upon constitutional doctrine does not mean that administrators are not promoting larger values underwriting the legal system. Through their resistance, bureaucrats are providing room for a diversity of viewpoints, which may give voice to politically powerless minorities. For that reason, Heather Gerken has argued that government actors who defy laws with which they disagree are furthering democracy, as their actions serve as “an alternative strategy for institutionalizing channels for dissent within the democratic process.” Applying Gerken’s theory to bureaucrats who resist based on scientific developments, these administrators are promoting democratic legitimacy insofar as they create room for dissenting viewpoints to be voiced within the government. At the same time, the misgiving based on separation of powers may not apply with equal force when dissent is the product of expertise, as the bureaucrats deploying these norms are hired specifically for that reason. They are thus exercising a permissible form of authority, thereby alleviating those concerns.

Bureaucratic resistance also raises democratic legitimacy concerns, much like other areas of administrative law. As Sidney Shapiro and his

347 Id.
348 DANIEL L. FELDMAN, ADMINISTRATIVE LAW: THE SOURCES AND LIMITS OF GOVERNMENTAL AGENCY POWER 19 (2016); JOHN A. ROHR, ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES 69, 76 (2d ed., 1989); Metzger, Ordinary Administrative Law, supra note 343, at 522.
350 Gerken, Dissenting by Deciding, supra note 349, at 1749.
351 Political process theorists, who argue that corrections to lawmakers should be concerned with ensuring participation rather than the substantive merits of the political choice, would disagree with Gerken. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980); but see Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1073-74 (1980).
352 Id. at 1901.
colleagues wryly commented, “[t]he history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.”

However, resistance amplifies the democratic legitimacy concerns underlying the administrative state more generally. Not only are bureaucrats unelected government agents who create laws through administrative processes, but by not enforcing legislative enactments they are also nullifying the power of the legislature. At the same time, resistance can be self-aggrandizing, increasing administrators’ authority at the expense of the legislature.

Finally, there are practical issues involved in resistance. The concern in administrative constitutionalism is that agency officials are not selected for their knowledge of constitutional principles, such that there is no reason to think they are particularly suited to apply constitutional doctrine. They are also not necessarily the best judges of when and to what extent constitutional doctrines should be expanded. A related concern arises in resistance based on professional expertise. Although the resistance in this Article is rooted in a national scientific consensus, reached after decades of debate and evident from the position statements of prominent professional organizations, individual bureaucrats could claim that their decisions reflect an emerging scientific fact, raising questions about how to cabin this type of discretion.

Administrative constitutionalism literature responds to these critiques by noting several advantages to agencies’ application and interpretation of constitutional norms, some of which support the principle of bureaucratic resistance based on scientific developments. This scholarship argues that, because of agencies’ expertise in the areas they regulate, they are both better at integrating constitutional concerns and more likely to recognize the constitutional significance of their actions. When bureaucrats resist the law based on scientific developments, they too are in a better position to understand the effects of the legislative action on the individuals with whom they interact.

355 Metzger, *Administrative Constitutionalism*, supra note 343, at 1918.
356 *Id.* at 1920-21.
Administrative law scholarship emphasizes there is a difference between resistance based on administrative constitutionalism and ordinary policymaking, one of which is constitutionally permissible and the other not, although it recognizes that it can be difficult to distinguish between the two.\(^{359}\) In the spectrum of administrative dissent, there is a clear disparity between bureaucratic resistance based on self-serving, power-preserving retrenchment and dissent due to good-faith, merit-based constitutional arguments.\(^{360}\) Scientific authority does not fall on either end of this range, but rather occupies a middle ground. It can be a source of legitimate authority for bureaucrats, yet it does not rise to the level of constitutional principle. Scientific authority thus demonstrates that there is not just a line dividing constitutionalism and policymaking, but rather a tranche of other factors that may be permissible considerations in resistance.

Given the difference between professional expertise and constitutionalism, transparency is particularly imperative in the context of bureaucratic resistance based on scientific consensus. Gillian Metzger has identified the benefits and pitfalls in requiring transparency for administrative constitutionalism, noting that “[a]dministrative constitutionalism may well flourish best in the shade.”\(^{361}\) The same may well be true of bureaucratic resistance based on expertise. However, since professional expertise, unlike the Constitution, are not the highest authority under which government officials function, it seems all the more necessary for bureaucrats resisting based on their expertise to be transparent in their actions. Given the middle ground that bureaucratic expertise occupies, administrators should be candid about their actions. Like judicial resistance norms, bureaucratic resistance based on expertise should not make it impossible for legislatures to achieve their ends unless the Constitution prohibits the statutory scheme.

The arguments for administrative constitutionalism demonstrate that bureaucratic resistance based on expertise is not only a possibility, but can also be legitimate. Much like the administrative constitutionalism context, bureaucratic dissent is “not simply inevitable, it also offers several potential benefits,” and thus may be a valuable feature of administration.\(^{362}\) However, since professional expertise is not a constitutional trump, there are important limits to this type of bureaucratic resistance, which renders transparency essential.

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\(^{361}\) Id. at 1931.

\(^{362}\) Metzger, *Administrative Constitutionalism*, supra note 343, at 1929.
B. Legitimate Resistance

The bureaucrats in this Article demonstrate how administrators respond when they are torn between two competing sources of authority: their expertise and legislative mandates. These examples show that there is room for resistance based on expertise that is transparent, such that the legislature could override the bureaucratic dissent if it so chose. When bureaucrats openly resist ambiguous legislation based on expertise, their transparency in doing so helps to grant their decisions legitimacy. They are acting based on considerations the legislature has authorized—their expertise—and their openness permits elected officials to reverse the bureaucrats’ decisions. However, there are often other factors involved, including political expediency, raising the question of how to identify permissible resistance. Analyzing the benefits and limitations of the bureaucratic resistance examples in this Article helps clarify these governance problems.

Bureaucratic resistance in New Hampshire exploited a statutory gap, responded to scientific consensus, and was transparent, providing an example of when bureaucratic resistance is at its most legitimate. When New Hampshire enacted its ban on gay and lesbian foster and adoptive parents, all of the major mental health professional organizations had issued position statements against this type of legislation. The legislature thus created a situation in which bureaucrats had to choose between their professional judgment, which provided the basis for their authority as social workers, and a law that countermanded that same expertise. As a result, social workers in New Hampshire complied with the letter of the law insofar as they did not license “admitted homosexuals,” but they did not enforce the ban more broadly. The legislature may not have realized that it had enacted a statute with room for resistance, but when the agency’s director announced that the state’s shortage of foster homes had reached critical levels, such that DCFY could not enforce the ban, the legislature could have acted to clarify the prohibition and remove the ambiguity that made dissent possible. By exploiting a statutory gap, these bureaucrats found a means to balance their two sources of authority. The legislature had the opportunity to weigh in on the social workers’ decisions, but chose not to do so. Although this fell short of a silent endorsement, it nevertheless allowed the social workers’ expertise to determine policy.363

The example of educators resisting laws and policies that restrict the rights of transgender students is more complicated, given the political context influencing the bureaucrats’ decisions and scientific debates around transgender identity. For example, the University of North Carolina (UNC)

has resolved the issue much like New Hampshire’s social workers, by taking advantage of a statutory gap. UNC is subject to H.B. 2, which requires North Carolina’s agencies to limit access to bathrooms and changing facilities to individuals based on biological sex. UNC’s President, Margaret Spellings, explained that the University is required under the law to label multiple-occupancy bathrooms with single-sex signage and providing notice of the law to students and employees. However, the law does not require the University to change its non-discrimination policies. As a result, should any transgender students or employees be forced to use restrooms inconsistent with their gender identity on campus, UNC would investigate those complaints as violations of the school’s non-discrimination policy.

In making these announcements, Spelling is contesting the legislature’s decision by creating an interstitial space between the statute and the University’s policies. The University is complying with the minimum requirements of the law, but not acquiescing in the legislature’s aims. Spelling’s actions make clear that the legislature must enact a stronger statute to compel strict compliance.

However, Spelling’s resistance is likely motivated by a desire to avoid legal liability rather than scientific consensus, rendering this unlike the situation in New Hampshire. The UNC president initially reported that the school would comply with H.B. 2, but changed her response after the federal government and the ACLU filed lawsuits against UNC. The fact that she is not basing her decision on scientific consensus, which maintains that transgender adults should live in accordance with their gender identity, but rather that her resistance coincides with it, seems to reduce its validity. It thus may be sufficient that bureaucrats could justify their decisions on their expertise, even if that is not their actual reason, since other educators around the country are resisting laws and policies due to scientific consensus.

Complicating the example of educators forced to contend with anti-transgender bathroom laws is the fact that there is no scientific consensus with respect to how to approach pre-adolescent children with gender dysphoria. There is a majority opinion, but this raises the question of how much scientific evidence is sufficient to justify resistance. It typically takes decades of research and debate for scientific consensus to emerge, based on

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364 Memorandum from Margaret Spellings to UNC Chancellors at 1-2 (Apr. 5, 2016) (on file with author).
365 UNC Defendants’ Brief in Response to Plaintiffs’ Motion for Preliminary Injunction at 6, 15, Carcaño v. McCrory, 1:16-cv-00236 (M.D.N.C. June 9, 2016) (on file with author); Declaration of President Spellings at 4, Carcaño v. McCrory, 1:16-cv-00236 (M.D.N.C. May 26, 2016) (on file with author).
shared reasoning, standards, and notions of validity. While there may be individual dissenters, or even vocal groups of outliers, the statements that professional associations of scientists issue indicate scientific orthodoxy, and thus provide a standard by which to judge whether bureaucrats are indeed exercising legitimate expertise. Until that consensus coalesces, the decision to follow majority scientific opinion, in the absence of other justifications, does not appear sound. In the case of transgender bathroom access rights, it seems that educators are motivated by a mixture of scientific principles and constitutional arguments.

Police officers addressing the rights of BDSM practitioners are also a complex example of bureaucratic resistance based on expertise, given that they are not an academic profession, unlike social workers and educators. While law enforcement officers are professionals, with specialized training and education, their connection to science is much more attenuated than the other bureaucrats in this Article. The diagnostic changes with respect to BDSM practitioners may, however, help police officers better identify whether a crime has taken place at all. This scientific change might allow police to determine that the events do not fit the statutory definition of a crime, such that the mandatory arrest statutes should not apply. In this situation, scientific developments would not form the basis of the officers’ expertise, but rather provide necessary information so the police may exercise their lawful discretion. In this situation, the use of science seems appropriate to the type of expertise involved. However, police officers would have to be transparent about their actions to render their resistance legitimate.

These examples make clear that there are number of concerns in this area of bureaucratic resistance that extend beyond the issues that administrative constitutionalism literature has identified. The actual motivations of the bureaucrats, and whether their expertise is serving as a mask for political decision-making, is one consideration. Another is that science is a field that is often in flux, making it difficult to ascertain when a consensus has in fact formed. Finally, the type of expertise has to be appropriate to the bureaucrat, and fall within that civil servant’s professional ambit. While in theory, expertise is a legitimate exercise of discretion, examining how it is used in practice demonstrates a much more complicated situation.

Despite these governance concerns, there are benefits to bureaucratic resistance that may make it normatively desirable for administrators to express their dissent within the gaps of statutes.

367 Haupt, Unprofessional Advice, supra note 342.
368 Id.
369 In terms of theoretical justifications, professional expertise is also not equivalent to the considerations in administrative constitutionalism, as only constitutional commitments can trump legislative enactments.
Bureaucratic resistance may at times introduce the views of unrepresented, politically powerless minorities who would not otherwise be heard. Those perspectives may in turn become accepted more broadly, as in the case of gay and lesbian rights. Scholars have noted that “much of the law that constitutes our government and establishes our rights derives from legal materials outside the Constitution itself,” such as legislative enactments and administrative agencies’ interpretations of law.\(^\text{370}\) In their accounts, administrative officials have transformed how legislators, courts, and the American public understand individual rights and the government’s responsibilities under the constitution.\(^\text{371}\) In the context of social workers in New Hampshire, the majority of Americans ultimately came to agree with that gays and lesbians were fit parents, which ultimately supported marriage equality and other rights claims, because an impetus that came from outside of the law.\(^\text{372}\) This example shows that it is not just legal materials that same understandings of the constitution, but also that expertise that can play a transformative role.

This is not to say that scientific developments will always result in changes to legal norms, or that we necessarily want them to. Science is not neutral, and history does not always prove it right. For example, scientists and social workers were integrally involved in eugenics programs, which targeted low-income women and women of color for sterilization, and scientific projects justified racial oppression and sex-based discrimination more generally.\(^\text{373}\) The LGBT movement continues to contest scientific viewpoints on different issues, including whether individuals can alter their


\(^\text{371}\) Metzger, Administrative Constitutionalism, supra note 343, at 1905-06; see sources cited supra note 343.


same-sex sexual attractions.\footnote{1} It is for that reason that resistance based on professional expertise should be transparent, so that dissent can be evaluated and then accepted or rejected.

Bureaucratic resistance based on expertise has a limited, but important place in the administrative state. At its most beneficial, that professional expertise will help lawmakers, lawyers, and judges better understand the Constitution’s commitments and guarantees. In this way, bureaucratic resistance based on expertise may overlap with administrative constitutionalism, with one reinforcing the other to create a more just outcome.

CONCLUSION

Bureaucrats came to identify gays and lesbians in a new way over the course of the twentieth century as a result of shifting scientific theories of homosexuality. As psychiatric understandings of same-sex sexual attraction changed, administrative agents went from being significant sources of oppression to allies who supported gay and lesbian parenting and households headed by same-sex couples. These changes in scientific views as to the causes and consequences of homosexuality had a profound impact on how bureaucrats implemented regulations, influencing the decisions of social workers and educators. Teachers today may increasingly find themselves in similar positions as their historical counterparts, particularly as a growing number of legislatures consider laws limiting bathroom access according to biological sex.

These changes outside of the law had a significant impact on how bureaucrats approached their legal obligations, revealing a mechanism of law reform that occurred at a far remove from courts and legislatures. This conceptualization of administrative actors reframes traditional conceptions of the executive, which does not just implement law, but also introduces legal change. As such, questions of governance are as important for scholars of LGBT rights as they are administrative law theorists.

Complicated questions arise when bureaucrats’ expertise conflict with legislative preferences. While bureaucratic resistance implicates separation of powers and democratic legitimacy concerns, these civil servants are hired to use their professional judgments, and thus their reliance on their expertise is appropriate. It may be permissible for bureaucrats to resist legislative enactments that contradict their professional judgment, so long as they do so in a transparent way. Much like judicial resistance norms, this provides an opportunity for legislative override, while creating room for minority viewpoints that might otherwise not be heard.

The popular image of bureaucracy is a place where innovation takes a number, only to languish in the waiting room. The account this Article presents, however, identifies the administrative state as a dynamic locus of contestation and change. Bureaucracy is more than the means by which law is implemented, and in fact administrators can lead legal transformations.