

Fired for Being Gay: Should Arkansas Ban This Form of Discrimination?*

I. INTRODUCTION

Picture this—you were offered a new job and prepared to move across the country, only to learn that the job was no longer yours because the company discovered that you are gay.¹ What if you were forced to resign following your wedding celebration because your boss and colleagues did not approve of your new spouse?² Or, what if, while expecting your first child with your lesbian partner, you were dismissed from your job because your colleagues heard the good news?³ In this third scenario, you even consulted an attorney, only to discover that the law would not protect you unless you were pregnant.⁴ However, because your partner was carrying the child, you had no recourse.

These real-world examples demonstrate the missed opportunities suffered by many based simply on their sexual orientation. Further, it is a fate that many Arkansans could face if they reveal their sexual orientation in the workplace.⁵ To prevent this, Arkansas should ban workplace discrimination on

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1. See Sam Dillon, *Marquette Rescinds Offer to Sociologist*, N.Y. TIMES, May 7, 2010, at A16.

2. See David Koon, *Mount St. Mary Academy and the Firing of Tippi McCullough*, ARK. TIMES (Oct. 24, 2013), <http://www.arktimes.com/arkansas/mount-st-mary-academy-and-the-firing-of-tippi-mccullough/Content?oid=3084045>.

3. See Campbell Robertson, *Lesbian Coach Exits, and College Struggles with Image*, N.Y. TIMES, Dec. 18, 2010, at A10.

4. See ARK. CODE ANN. § 16-123-107 (Repl. 2006) (silent as to protection against discrimination based on sexual orientation).

5. See GARY J. GATES & ABIGAIL M. COOKE, ARKANSAS CENSUS SNAPSHOT: 2010, at 1 (2010), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Arkansas_v2.pdf. The 2010 census indicated that there were at least 4,226 same-sex couples living in Arkansas. *Id.* Therefore, as of 2010, more than 8,000 homosexual or bisexual individuals could have faced workplace discrimination based on their sexual orientation.

the basis of sexual orientation as the state strives to achieve full equality.

This comment discusses the recently recognized rights of sexual minorities, both in Arkansas and across the country, and proposes an amendment to the Arkansas Civil Rights Act (ACRA).⁶ The proposed amendment would make freedom from discrimination based on sexual orientation in the workplace a civil right for all Arkansans. Part II identifies the difficulty in defining “sexual orientation,” explores the lack of protection currently provided by the ACRA, and analyzes Arkansas’s failed attempt to add workplace protections. Part III discusses the growing acceptance of the rights of all individuals, independent of their sexual orientation. Finally, Part IV addresses both sides of the debate regarding whether freedom from employment discrimination based on sexual orientation should be made a civil right in Arkansas.

II. BACKGROUND

Historically, “[l]esbians and gay men have been the object of some of the deepest prejudice and hatred in American society.”⁷ Today, this prejudice may legally continue in Arkansas’s workplaces. Before proposing legislation aimed at preventing workplace discrimination on this basis, one must understand the broad definition of “sexual orientation” developed by modern society.

A. Defining Sexual Orientation

Simply defined, “sexual orientation” is “the direction of somebody’s sexual desire, toward people of the opposite sex, or of the same sex, or of both sexes.”⁸ In other words, “sexual orientation” is a person’s predisposition toward heterosexuality, homosexuality, or bisexuality.⁹ Homosexuals are not the only group who may face adverse employment actions because of their sexual orientation—heterosexuals may as well. The

6. See Act 962, 1993 vol. II Ark. Acts 2779 (codified at ARK. CODE ANN. §§ 16-123-101 to -108 (Repl. 2006)) (providing no protection against discrimination based on sexual orientation).

7. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987).

8. ENCARTA WORLD ENGLISH DICTIONARY 1642 (1999).

9. See BLACK’S LAW DICTIONARY 1499 (9th ed. 2009).

definition of sexual orientation does not encompass “transsexual” or “transgender” individuals as these terms do not, in fact, describe a person’s sexual orientation.¹⁰

“Transsexual” is a term used to describe individuals who dress, act, or medically alter their bodies in order to appear as a person of the opposite sex.¹¹ Conversely, individuals who identify as neither male nor female are characterized as “transgender.”¹² These terms refer to an individual’s gender identity and expression, rather than his or her sexual orientation.¹³ Therefore, legislation prohibiting discrimination on the basis of sexual orientation will not protect these individuals and is not within the scope of this comment.

Although many sources define “sexual orientation,” the question of whether an employer may make employment decisions based on an individual’s sexual orientation remains controversial. A major point of discussion is whether sexual orientation is an innate characteristic or a personal choice.¹⁴ Sexual minorities firmly declare that sexual orientation is an inherent human characteristic, not a practice or choice.¹⁵ Others believe it is merely a choice, and an immoral one at that.¹⁶ In

10. See LIZ WINFELD & SUSAN SPIELMAN, *STRAIGHT TALK ABOUT GAYS IN THE WORKPLACE* 8 (2d ed. 2001) (“[T]o be transgendered has nothing to do with sexual orientation.”).

11. See *Transsexual*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/transsexual> (last visited Nov. 10, 2014).

12. See *Transgender*, OXFORD ENG. DICTIONARY, <http://www.merriam-webster.com/dictionary/transgender> (last visited Nov. 10, 2014). The term “transgender” may also describe individuals “whose gender identity or expression is different from those typically associated with the sex assigned to them at birth.” Meghan Stabler, *Transgender FAQ*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/transgender-faq#1> (last visited Nov. 10, 2014).

13. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Nov. 10, 2014).

14. See Marcia Malory, *Homosexuality & Choice: Are Gay People ‘Born This Way?’*, HUFFINGTON POST (Oct. 23, 2012, 8:05 AM), http://www.huffingtonpost.com/2012/10/23/homosexuality--choice-born-science_n_2003361.html (summarizing various studies conducted on the longstanding question of whether an individual’s sexual orientation is biologically assigned at birth or instead a choice made during his or her lifetime).

15. See WINFELD & SPIELMAN, *supra* note 10, at 17.

16. See Melinda Deslatte, *House Committee Rejects Gay Discrimination Ban*, ADVOCATE (May 1, 2013), <http://theadvocate.com/home/5864428-125/house-committee-rejects-gay-discrimination> (“Opponents said [a proposed ban on workplace discrimination based on sexual orientation] would advance a sexual politics agenda and would give special protections to people who choose a lifestyle that violates biblical teachings.”); Nick

response to this debate, a United States Court of Appeals judge posed the following question:

Would heterosexuals living in a city that passed an ordinance burdening those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?¹⁷

The answer to the question posed by Judge Norris should be irrelevant for purposes of creating protection because current anti-discrimination laws prohibit discrimination on the basis of both innate human characteristics, such as race and national origin, and personal choices, such as religion.¹⁸

B. Lack of Protection

The belief that Title VII of the Civil Rights Act of 1964 and state law already forbid discrimination based on sexual orientation is a prominent misconception.¹⁹ The law is well settled—Title VII does not prohibit workplace harassment or discrimination based on sexual orientation.²⁰ Prior to 1993, Arkansas employees relied solely on federal legislation for

Wing, *James Lankford, GOP Rep, Opposes Laws Against Gay Employee Discrimination*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/05/14/james-lankford-sexual-orientation-discrimination_n_1514559.html (last updated May 14, 2012, 6:14 PM) (“You don’t walk up to someone on the street and look at them and say, ‘Gay or straight?’ . . . [I]t’s a choice issue.”).

17. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring).

18. See 42 U.S.C. 2000e-2(a)–(e) (2012); ARK. CODE ANN. § 16-123-107(a) (Repl. 2006). Former Arkansas State Representative Lindsley Smith describes the argument regarding sexuality as a choice a merely a “red herring”:

[E]ven if [sexual orientation] were a choice, it would be irrelevant. Religious faith is the most important choice we Americans make—yet religious affiliation is protected under our state Civil Rights Act. Why? Because no one should be discriminated against on account of their religion. This argument about choice is just a red herring.

Lindsley Smith, *Neoconservative Rhetoric in a Red State Legislature: A Public and Interpersonal Ethnography of Arguments in Arkansas* 35 (unpublished manuscript presented at the 2005 Conference of the National Commission Association) (on file with author).

19. ROBERT K. ROBINSON ET AL., *EMPLOYMENT REGULATION IN THE WORKPLACE: BASIC COMPLIANCE FOR MANAGERS* 140 (2014).

20. See 42 U.S.C. § 2000e-2 (2012); see also *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“The law is well-settled in this circuit and in all others . . . because Title VII does not prohibit harassment or discrimination because of sexual orientation.”).

protection against unfair employment practices and treatment based on personal characteristics. Before then, federal laws provided the only protection, among them Title VII, the Equal Pay Act of 1963,²¹ the Age Discrimination in Employment Act of 1967,²² and the Americans with Disabilities Act of 1990.²³ However, these laws exempt many Arkansas employers from compliance for various reasons, which leaves thousands of Arkansans subject to potential workplace discrimination.²⁴

By 1992, critics began to bemoan Arkansas as one of only two states without state civil rights legislation.²⁵ The next year, the Arkansas General Assembly enacted the ACRA, and, in doing so, created a civil right of actions for citizens injured by civil rights offenses, hate crimes, and other discriminatory treatment.²⁶ However, the legislation failed to provide protection to sexual minorities based on their sexual orientation.

The absence of protection continues to this day, even after the United States Supreme Court recognized “sex stereotyping” and “same-sex” harassment as unlawful forms of sexual discrimination. In *Price Waterhouse v. Hopkins*,²⁷ the Court described “sex stereotyping” as the unlawful evaluation of employees based on the employer’s assumption or insistence that all employees conform to the particular stereotypes associated with their gender.²⁸ The Court acknowledged that employment decisions, such as promotion and retention, cannot rest on the employer’s perception of an employee’s ability to maintain her femininity²⁹ or be made on “a belief that a woman cannot be aggressive.”³⁰ Decisions made based on an

21. See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

22. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012).

23. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (codified as amended at 42 U.S.C. §§ 12101–12213 and 47 U.S.C. § 225).

24. See Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act of 1993*, 50 ARK. L. REV. 165, 169 (1997).

25. Alabama shared this “dubious honor” with Arkansas. *Id.*

26. See Act 962, 1993 vol. II Ark. Acts 2779, 2779-86 (codified at ARK. CODE ANN. §§ 16-123-105 to -107 (Repl. 2006)). A retaliation cause of action was added to the ACRA in 1995 for actual or threatened discrimination against an individual for complaining about discrimination in the workplace. See Act 480, 1995 Ark. Acts 1995, 1995-2000 (codified at ARK. CODE ANN. § 16-123-108(a) (Repl. 2006)).

27. 490 U.S. 228 (1989).

28. See *id.* at 251.

29. *Id.* at 236.

30. *Id.* at 250.

individual's failure to demonstrate mannerisms consistent with his or her gender are made unlawfully on the basis of sex.³¹

Since *Price Waterhouse*, the momentum for providing protection has continued to build. By the early 2000s, litigants began to creatively plead discrimination based on sexual orientation as sex stereotyping, and with some success. However, much confusion remains. Because employment decisions made on this belief, whether real or mistaken, appear to discriminate based on an individual's sexual orientation, it seems arbitrary that Title VII and the ACRA protect one but not the other, without any clear explanation of the distinction.³² Nevertheless, a homosexual employee brought a sex stereotyping action in *Centola v. Potter*.³³ The plaintiff in *Centola* sued his employer after co-workers placed a sign reading "Heterosexual replacement on Duty" at his work space and taped a picture of Richard Simmons wearing "pink hot pants" to his work station.³⁴ He alleged that these harassing acts were enough for his sex stereotyping claim to survive summary judgment because the behavior demonstrated that "co-workers harassed him because [he] did not conform with their ideas about what 'real' men should look or act like" and "vilified [him] for not being more 'manly.'" ³⁵ The court agreed, and the claim avoided resolution as a matter of law.³⁶

Despite the fact that courts have declined to articulate a basis for permitting claims such as the one brought in *Centola* while foreclosing similar lawsuits alleging discrimination based on sexual orientation, sex stereotyping has become a loophole discrimination claim for otherwise unprotected homosexuals. In *Vickers v. Fairfield Medical Center*,³⁷ the Sixth Circuit noted in dicta that the United States Supreme Court's failure to clearly articulate which discriminatory acts violate Title VII on the

31. *See id.* at 251.

32. Courts firmly hold that an employer engaging in discriminatory practices based on an employee or applicant's sexual orientation is not subject to liability under Title VII. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am., Inc.* 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

33. 183 F. Supp. 2d. 403 (D. Mass. 2002).

34. *Id.* at 407 (internal quotation marks omitted).

35. *Id.* at 410.

36. *Id.*

37. 453 F.3d 757 (6th Cir. 2006).

basis of sex stereotyping allows a plaintiff to disguise his or her claim as sex stereotyping in order to receive Title VII protection.³⁸ Accordingly, the line defining when redress is available has become blurred, and sexual minorities face uncertainty when challenging unfair employment practices.

The United States Supreme Court added to the confusion in *Oncale v. Sundowner Offshore Services, Inc.*,³⁹ a case in which the Court ruled that “same-sex harassment” is another form of unlawful discrimination.⁴⁰ In *Oncale*, a male employee sued his former employer under Title VII for alleged sexual discrimination after sexual assaults, abusive language, and threats by male coworkers led to his resignation.⁴¹ The employer argued that the male plaintiff “ha[d] no cause of action under Title VII for harassment by male co-workers,”⁴² but the Court disagreed.⁴³ Justice Scalia, writing for a unanimous Court, ruled that a prohibition on sex-based discrimination extended to all sexual harassment and noted there was “no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”⁴⁴ The Ninth Circuit reached a similar conclusion in *Rene v. MGM Grand Hotel, Inc.*⁴⁵ In *Rene*, the plaintiff filed suit against his former employer, alleging that male co-workers involuntarily caressed him, grabbed his crotch, and poked him in the anus because he was gay.⁴⁶ The court, sitting en banc, noted that Title VII protected the plaintiff from

38. *Id.* at 762-64. To support this contention, the court quoted case law from the Second Circuit:

When utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality. . . . [W]e have therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.

Id. at 763-64 (first omission in original) (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)).

39. 523 U.S. 75 (1998).

40. *Id.* at 79-80.

41. *See id.* at 77.

42. *Id.* (internal quotation mark omitted).

43. *Id.* at 79-80.

44. *Oncale*, 523 U.S. at 79-80.

45. 305 F.3d 1061, 1063-64 (9th Cir. 2002) (en banc).

46. *Id.* at 1064.

the alleged “physical assault of a sexual nature” and reversed the district court’s grant of summary judgment in favor of the employer.⁴⁷

Not all attempts by homosexuals to plead sex stereotyping and same-sex harassment in discrimination suits against employers have been successful. In *Vickers*, the Sixth Circuit affirmed the district court’s dismissal of a case involving alleged workplace discrimination similar to that seen in *Rene*, *Oncale*, and *Centola*.⁴⁸ After befriending a homosexual co-worker, the plaintiff in *Vickers* endured anti-gay epithets and comments questioning his masculinity.⁴⁹ He also alleged that a male co-worker placed him in handcuffs during a training exercise and “simulated sex” with him as his supervisor took pictures for public display.⁵⁰ The court dismissed the employee’s claim of sex stereotyping, holding that the alleged harassment occurred because of the homosexuality perceived by his co-workers, not his failure to conform to gender-based norms.⁵¹ The court justified this conclusion on the basis that there was no indication that the harassers “acted out of sexual desire.”⁵² Moreover, while the court characterized the lawsuit as a failed attempt at “bootstrapping,” the opinion acknowledged that the employee had no other recourse to resolve the “socially unacceptable and repugnant” harassment he experienced.⁵³

In *Simonton v. Runyon*,⁵⁴ the Second Circuit recognized the same absence of protection despite the “morally reprehensible” conduct of the defendant.⁵⁵ Courts in Arkansas, both state and federal, are likely to reach similar conclusions in cases brought under the ACRA. Judges across the country repeatedly characterize discrimination based on sexual orientation as “repugnant,” “reprehensible,” and “noxious”⁵⁶ but decline to hold employers or co-workers liable for their actions.

47. *Id.* at 1064, 1068.

48. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759-60 (6th Cir. 2006).

49. *Id.*

50. *See id.*

51. *See id.* at 763.

52. *See id.* at 765-66.

53. *See Vickers*, 453 F.3d at 764-65.

54. 232 F.3d 33 (2d Cir. 2000).

55. *Id.* at 35, 38.

56. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1078 (9th Cir. 2002) (en banc) (Hug, J., dissenting) (quoting *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999)).

Additionally, reconciling Supreme Court jurisprudence on sex stereotyping and same-sex harassment with lower courts' interpretations of these theories is no easy task. Regrettably, the "repugnant," "reprehensible," and "noxious" practice of workplace discrimination will continue with frightening regularity until states provide protection or courts clarify existing law.

C. The Previous Attempt to Amend the ACRA

Arkansas's only attempt to prohibit sexual orientation discrimination in the workplace occurred in 2005 when then-State Representative Lindsley Smith introduced House Bill 2751.⁵⁷ She proposed the legislation based on a belief shared by many—"to deny people jobs or homes because of their sexual orientation is just plain wrong."⁵⁸ Unfortunately, Arkansas's homosexual community is all too aware of the current lack of protection offered by Arkansas law.⁵⁹ During the 2005 session, State Representative Smith ultimately withdrew House Bill 2751 before any vote occurred.⁶⁰

This comment relies heavily on the first-hand accounts of State Representative Smith, in which she reflects on the arguments made in support and in opposition of House Bill 2751 during the 2005 session. Despite speculation regarding State Representative Smith's decision to pull the bill before a vote, she has confirmed that the bill was withdrawn because she lacked the quorum necessary to advance the legislation past committee.⁶¹

This lack of interest in voting on the bill may be attributed to the strong opposition made by avid protestors in the days leading up to the hearing. Opponents of the legislation advanced three primary arguments following its introduction:

57. See H.B. 2751, 85th Gen. Assemb., Reg. Sess. (Ark. 2005).

58. Interview with Lindsley Smith, Commc'ns Dir., City of Fayetteville, Ark., in Fayetteville, Ark. (Oct. 16, 2013) (on file with author).

59. For example, during a recent debate over a civil rights ordinance in Fayetteville, Arkansas that protected homosexuals from workplace discrimination on the basis of sexual orientation, a gay resident of the city stated that he and his partner "were concerned that if a person found out we were gay, they would not lease to us." Video tape: City Council Meeting, Aug. 19, 2014, City of Fayetteville, Arkansas: Part 1, at 1:37:30 (Aug. 19, 2014) [hereinafter Video 1] (on file with author).

60. Smith, *supra* note 18, at 36.

61. See *id.*

(1) it created “special rights” for homosexuals;⁶² (2) it increased the likelihood of litigation;⁶³ and (3) it infringed on the rights and religious liberties of others.⁶⁴ These concerns overpowered the hushed supporters of House Bill 2751, and a majority of the legislators apparently became disinterested in the impending vote. Almost a decade later, attitudes toward sexual orientation are changing in workplaces across the nation,⁶⁵ and a similar bill, if proposed today, would have a greater likelihood of being voted upon by Arkansas legislators.

III. RECOGNITION OF RIGHTS PERTAINING TO SEXUAL ORIENTATION

The United States as a whole has come a long way over the last thirty years. Arkansas, once one of the last states without civil rights legislation, saw couples drive hundreds of miles to participate in same-sex marriages in the state during a brief invalidation of the state’s laws banning gay marriage during the summer of 2014.⁶⁶ This Part explores the recent developments in the rights of gay and lesbian Arkansans, discusses arguments raised by opponents with respect to those rights, and analyzes the gradual adoption of sexual orientation-based protections in cities and states across the nation.

62. Former State Representative Timothy C. Hutchinson believed House Bill 2751 “would provide special protections for gays, and he asked why such protection should not be provided for bald, fat, and ugly guys.” *Id.* at 35-36.

63. Hours before the hearing on House Bill 2751, the Arkansas State Chamber of Commerce posted concerns on its website regarding the potential increase in the amount of litigation the legislation could produce. *Id.* at 36.

64. *See id.* at 34-37 (“[One opponent] argued against the bill because, as she contended, it would restrain religious freedom.”).

65. As of 2014, ninety-one percent of Fortune 500 companies had adopted non-discrimination employment policies that prohibit workplace discrimination on the basis of sexual orientation. HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX 2014: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 6 (2013), available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/CEI_2014_final_draft_7.pdf#__utma=149406063.984540127.1411335859.1411335859.1411335859.1&__utmb=149406063.1.10.1411335859&__utmc=149406063&__utmz=-&__utmz=149406063.1411335859.1.1.utmcsr=google|utmccn=\(organic\)|utmcmd=organic|utmctr=\(not%20provided\)&__utmv=-&__utm=205895315](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/CEI_2014_final_draft_7.pdf#__utma=149406063.984540127.1411335859.1411335859.1411335859.1&__utmb=149406063.1.10.1411335859&__utmc=149406063&__utmz=-&__utmz=149406063.1411335859.1.1.utmcsr=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&__utmv=-&__utm=205895315).

66. *See Arkansas Gay Marriage Ban Struck Down by Federal Judge*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/11/25/arkansas-gay-marriage_n_6222010.html (last visited Nov. 10, 2014).

A. Arkansas

The Arkansas Supreme Court described the police power of the Arkansas General Assembly in *Carter v. State*.⁶⁷ The state legislature is vested with the authority to enact legislation “embrace[ing] maintenance of good order and quiet of the community, and preserv[ing] of the public morals.”⁶⁸ However, “its acts must reasonably tend to correct some evil and promote some interest of the commonwealth.”⁶⁹ When the Arkansas Supreme Court decided *Carter*, one evil in need of correction in Arkansas was the then-called “act of sexual perversion,” and the court ruled that the state’s anti-sodomy law was a legitimate exercise of the legislature’s police power.⁷⁰ The court, however, acknowledged that subsequent social changes in society could render the law unsuitable.⁷¹ In the forty years since *Carter*, Arkansas has experienced significant social changes, and the courts, businesses, and citizens of the state have begun to embrace them.

Seven homosexuals charged with acts of sodomy were at the forefront of change in *Jegley v. Picado*.⁷² In the case, the Arkansas Supreme Court placed the privacy and equality rights of individuals over the condemnation and criminalization of acts of sexual intimacy by the legislative majority.⁷³ The court declared the state’s anti-sodomy law unconstitutional based on the fundamental right to privacy implicit in the Arkansas Constitution.⁷⁴ According to the court, the right to privacy found in the state constitution protected consenting adults from state intrusion upon private acts of sexual intimacy.⁷⁵ Further, legislators intended for Arkansas’s Equal Rights Amendment to protect minorities from the majority,⁷⁶ and the court held that “the police power should properly be exercised to protect each

67. 255 Ark. 225, 500 S.W.2d 368 (1973).

68. *Id.* at 231, 500 S.W.2d at 372.

69. *Id.* (emphasis omitted).

70. *See id.* at 230-31, 500 S.W.2d at 372.

71. *See id.* at 230, 500 S.W.2d at 371.

72. 349 Ark. 600, 80 S.W.3d 332 (2002).

73. *See id.* at 637-38, 80 S.W.3d at 353-54.

74. *See id.* at 632, 80 S.W.3d at 350.

75. *Id.*

76. *See* ARK. CONST. art. 2, § 18 (“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”).

individual's right to be free from interference in defining and pursuing his own morality."⁷⁷

1. *Marriage and Parental Rights*

After the Arkansas Supreme Court invalidated the state's anti-sodomy law, the Arkansas General Assembly failed to quickly change its position towards same-sex marriage or adoption by same-sex couples. In 1997, legislators codified the definition of "marriage" through Act 144, in which they defined the relationship as "only between a man and a woman."⁷⁸ In 2004, voters passed amendment 83 by ballot initiative, which defined marriage in similar terms and banned the state from recognizing same-sex marriages validly entered under the laws of other jurisdictions.⁷⁹ On May 9, 2014, however, Pulaski County Circuit Court Judge Chris Piazza struck down these laws in *Wright v. Arkansas*.⁸⁰ The Arkansas Supreme Court stayed Judge Piazza's ruling after the State appealed.⁸¹ Even though the court quickly stayed the ruling, over 400 same-sex couples obtained marriage licenses in the state during the seven days that same-sex marriage was legalized.⁸²

Judge Piazza ruled that the Arkansas General Assembly overstepped its authority by imposing a constitutional ban on a "morally disliked" subset of individuals based on personal animus rather than a legitimate state interest.⁸³ He characterized this abuse of power as "traditional," as it arose from long-term disapproval of minorities dating back to the interracial marriages once banned on the basis of morality:

Just as the tradition of banning interracial marriage represented the embodiment of deeply-held prejudice and

77. *Jegley*, 349 Ark. at 637, 80 S.W.3d at 353 (quoting *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980)).

78. *See* Act 144, 1997 Ark. Acts 825, 826 (codified at ARK. CODE ANN. § 9-11-109 (Repl. 2009)).

79. *See* ARK. CONST. amend. 83.

80. *See* 60CV-13-2662, slip op. at 13 (Ark. Cir. Ct. May 9, 2014).

81. *Wright v. Smith*, No. CV-14-427 (Ark. May 16, 2014) (order granting appellants' motion for stay). The case was restyled *Wright v. Smith* on appeal to the Arkansas Supreme Court.

82. *See* Kevin Conlon & Greg Botelho, *Court Halts Arkansas Same-sex Marriages*, CNN.COM, <http://www.cnn.com/2014/05/16/justice/same-sex-marriage/> (last updated May 16, 2014, 7:32 PM).

83. *See Wright*, 60CV-13-2662, at 4, 9.

long-term racial discrimination in *Loving*, the same is true here with regard to Arkansas's same-sex marriage bans and discrimination based on sexual orientation. . . . And, as Justice Scalia has noted in dissent, "preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."⁸⁴

Judge Piazza's statements are consistent with the Arkansas Supreme Court's dicta in *Carter*—that as society changes, laws should evolve to recognize those changes.⁸⁵ The comparison drawn by Judge Piazza between interracial marriage and discrimination based on sexual orientation demonstrates the changes in the perception of morality among Arkansans. The ruling relied heavily on *Loving v. Virginia*,⁸⁶ a case decided by the United States Supreme Court in 1967. In *Loving*, an African American woman challenged the constitutionality of a state statute that criminalized interracial marriage.⁸⁷ The Court invalidated the law and reversed the convictions.⁸⁸ In *Wright*, Judge Piazza found that Act 144 and amendment 83 presented similar issues and, accordingly, invalidated both.⁸⁹

Judge Piazza compared the fears, concerns, and resentment faced by those in interracial marriages during the 1950s and 1960s with those faced by sexual minorities in today's society.⁹⁰ The Judge concluded eloquently:

It has been over forty years since Mildred Loving was given the right to marry the person of her choice. The hatred and fears have long since vanished and she and her husband lived full lives together; so it will be for the same-sex couples. It is time to let that beacon of freedom shine brighter on all our brothers and sisters. We will be stronger for it.⁹¹

84. *Id.* at 9-10 (citations omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting)).

85. *See Carter v. State*, 255 Ark. 225, 230, 500 S.W.2d 368, 371 (1973).

86. 388 U.S. 1 (1967).

87. *Id.* at 2-3.

88. *See id.* at 12.

89. *See Wright*, 60CV-13-2662, at 13.

90. *See id.* at 8-10.

91. *Id.* at 13. As of publication, the state of same-sex marriage in Arkansas remains in limbo. In addition to Judge Piazza's ruling, United States District Judge Kristine Baker also invalidated Arkansas's ban on same-sex marriage in November 2014. *See Jernigan v. Crane*, No. 4:13-cv-00410 KGB, 2014 WL 6685391 (E.D. Ark. Nov. 25, 2014). An appeal

In addition to *Carter* and *Wright*, Arkansas courts have considered other cases involving the rights of Arkansas's gay and lesbian residents. The Arkansas Department of Human Services (DHS) has twice argued before the Arkansas Supreme Court that same-sex couples should be prohibited from serving as parental guardians.⁹² In the first case, the plaintiffs challenged a state regulation that functioned as a blanket restriction on homosexuals seeking to become foster parents.⁹³ The arguments in support of the regulation mirrored those raised in 2005 against House Bill 2751: "(1) same-sex relationships are wrong, (2) homosexual behavior is a sin, (3) homosexuality violates . . . biblical convictions, (4) adults who have same-sex orientation should remain celibate and (5) [Child Welfare Review Board member Rebecca Woodruff] would not be a proponent of her children spending time with openly gay couples."⁹⁴

In its brief and at oral arguments, DHS failed to persuasively support the use of sexual orientation as a proper ground for foster-parent ineligibility.⁹⁵ Because the Arkansas Supreme Court found that the regulation merely reflected DHS's contempt for sexual minorities, the court found the regulation unconstitutional.⁹⁶ According to Justice Brown's concurring opinion, the fact that a majority of state residents view a particular practice as immoral is an insufficient constitutional basis for upholding a law.⁹⁷

In the second case, which involved the parental rights of homosexuals, the Arkansas Supreme Court scrutinized the Arkansas Adoption and Foster Care Act of 2008. The law,

of Judge Piazza's ruling is currently pending before the Arkansas Supreme Court. See *Wright v. Smith*, No. CV-14-427 (Ark. filed May 10, 2014). In December 2014, outgoing Arkansas Attorney General Dustin McDaniel filed a notice of appeal in the federal proceeding with the Eighth Circuit. Kelly P. Kissel, *Dustin McDaniel: Appeal Coming in Gay Marriage Case*, ARK. BUS. (Dec. 23, 2014, 2:07 PM), <http://www.arkansasbusiness.com/article/102608/dustin-mcdaniel-appeal-coming-in-gay-marriage-case>.

92. See Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145, at 2-3, 380 S.W.3d 429, 431-32; Dep't of Human Servs. v. Howard, 367 Ark. 55, 58, 238 S.W.3d 1, 3 (2006).

93. See *Howard*, 367 Ark. at 57-58, 238 S.W.3d at 3.

94. *Id.* at 65, 238 S.W.3d at 8.

95. See *id.*

96. See *id.* at 66, 238 S.W.3d at 8 ("[T]he Board's enactment of Regulation 200.3.2 was an attempt to legislate for the General Assembly with respect to public morality.").

97. See *id.* at 70, 238 S.W.3d at 11 (Brown, J., concurring).

passed in 2008 by ballot initiative, prohibited individuals seeking to adopt or serve as foster parents if they cohabitated with a sexual partner outside of a valid marriage under Arkansas law.⁹⁸ A state trial court judge found that the valid-marriage requirement demonstrated the law's true intent and purpose—to discriminate against homosexual couples.⁹⁹ To reach this conclusion, the court noted that heterosexual cohabitating couples could marry to circumvent the Act's requirements, while homosexual couples could not.¹⁰⁰ The court concluded that DHS had “specifically targeted [homosexuals] for exclusion by the Act.”¹⁰¹ On appeal, the Arkansas Supreme Court echoed the “right to privacy” argument articulated in *Jegley* and held that the Act unconstitutionally burdened an individual's “right to engage in private, consensual sexual activity.”¹⁰²

In 2011, Arkansas's high court permitted a same-sex partner to obtain *in loco parentis* status.¹⁰³ Before the ruling, some argued that homosexuals should not be eligible to raise children absent the legalization or recognition of same-sex marriage in Arkansas—to do so threatened to “open the floodgates” to allow anyone to seek visitation with, or custody, of a minor child.¹⁰⁴ The Arkansas Supreme Court summarily dismissed this argument based on the specific facts of the case.¹⁰⁵

2. Employment Non-Discrimination Policies

Despite the failed attempt to amend the ACRA, the rights of Arkansas's homosexuals and bisexuals have been gradually recognized in a piecemeal fashion. Numerous businesses have stepped forward and supported homosexual and bisexual rights by expanding non-discrimination and equal opportunity

98. See ARK. CODE ANN. § 9-8-304 (Repl. 2009), *repealed by* Act 1152, 2013 Ark. Acts 4654; *see also* Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145, at 3, 380 S.W.3d 429, 431 (describing the law).

99. See Cole v. Ark. Dept. of Human Servs., No. 60CV-08-14284, 2010 WL 6451863, at *2 (Ark. Cir. Ct. Apr. 16, 2010). Notably, Judge Piazza also presided over this case. *See id.*

100. *See id.*

101. *Id.*

102. See Cole, 2011 Ark. 145, at 11, 380 S.W.3d at 435.

103. See Bethany v. Jones, 2011 Ark. 67, at 14, 378 S.W.3d 731, 739.

104. *See id.* at 13-14, 378 S.W.3d at 738-39.

105. *See id.* at 14, 378 S.W.3d at 739.

employment policies to include protection for applicants and employees based on their sexual orientation. In fact, five of the six Fortune 500 companies headquartered in Arkansas have adopted such policies—Walmart,¹⁰⁶ Tyson Foods,¹⁰⁷ Murphy Oil,¹⁰⁸ Dillard's,¹⁰⁹ and Windstream.¹¹⁰ J.B. Hunt, the sixth Fortune 500 company headquartered in the state, does not appear to prohibit such discrimination.¹¹¹

Other Arkansas businesses and organizations, such as Acxiom,¹¹² the University of Arkansas,¹¹³ and the Little Rock School District,¹¹⁴ have also expanded their non-discrimination

106. See WAL-MART STORES, INC., STATEMENT OF ETHICS 12 (2008), available at http://az301759.vo.msecnd.net/statementofethics/pdf/U.S_SOE.pdf (“Walmart will not tolerate discrimination in employment, employment-related decisions, or in business dealings on the basis of . . . sexual orientation.”).

107. See *Sustainability Report: 3.2-Our Workforce*, TYSON, http://www.tysonustainability.com/2012/Section-3/3_2.aspx (last visited Nov. 10, 2014) (“We maintain a strict policy prohibiting any kind of unlawful harassment and discrimination, such as that involving . . . sexual orientation . . .”).

108. See *The Murphy Culture*, MURPHY OIL CORP., <http://www.murphyoilcorp.com/Careers/Why-Murphy/> (last visited Nov. 10, 2014) (“We employ and promote persons in all positions without regard to . . . sexual orientation . . .”).

109. See DILLARD'S, SOCIAL ACCOUNTABILITY POLICY 2 (n.d.), available at <http://files.shareholder.com/downloads/DDS/3034913116x0x151143/f6cfd04a-1a50-478b-83ac-697177e491bc/DillardsSocialAccountabilityPolicy-11-6-07.pdf> (“Workers should not be discriminated against in hiring, remuneration, access to training, promotion, termination or retirement based on . . . sexual orientation . . .”).

110. See *Join the Team!*, WINDSTREAM, <http://windstreamtalent.com/apply-now/> (last visited Nov. 10, 2014) (“We are committed to reviewing the talents and experience of each job applicant compared to the specific job opening, without regard to . . . sexual orientation.”).

111. See J.B. HUNT TRANSP. SERVS., INC., CODE OF ETHICAL & PROFESSIONAL STANDARDS FOR DIRECTORS, OFFICERS AND EMPLOYEES 7-8 (2010), available at http://www.jbhunt.com/files/code_of_ethical_and_professional_standards.pdf. The company's policy states as follows: “J.B. Hunt will not tolerate discrimination in employment on the basis of race, sex, age, religion, protected veteran's status, color, national origin, disability, or other legally protected status.” *Id.* Not only is “sexual orientation” noticeably absent, but it also cannot be considered a “legally protected status.” See *supra* Part II.B.

112. See *Code of Ethics*, ACXIOM, <http://acxiom.com/about-acxiom/codes-of-ethics/> (last visited Nov. 10, 2014).

113. See UNIV. OF ARK., FAYETTEVILLE POLICIES AND PROCEDURES: NON-DISCRIMINATION 1 (2014), available at <http://vcfa.uark.edu/Documents/2141.pdf>.

114. *LRSD Notice of Non-Discrimination*, LITTLE ROCK SCH. DISTRICT, <http://www.lrsd.org/drupal/?q=content/lrsd-notice-non-discrimination> (last visited Nov. 10, 2014). The LRSD amended its policy in 2005, the same year State Representative Smith proposed House Bill 2751. Jennifer Barnett Reed & Max Brantley, *Protection for Sexual Orientation: School Board Expands Anti-Discrimination Policy*, ARK. TIMES (Dec. 01,

policies in a similar manner. The adoption and expansion of these policies, however, was not an easy process for all. For example, Alltel Wireless, from which Windstream spun off in 2006, discussed a proposal to amend the company's policy during its annual shareholders' meeting in 2003.¹¹⁵ When a similar proposal was made in 2004, company leadership felt that current policies were sufficient and urged shareholders to dissent.¹¹⁶ The proposal again failed, but the company's board of directors amended the policy later that year, without being mandated to do so.¹¹⁷ The directors may have made this unilateral decision in response to the adoption of similar policies by the company's competitors, which presumably placed Alltel at a competitive disadvantage in attracting and retaining talented employees.¹¹⁸ Another plausible reason for the change was the fact that the company operated in several states that prohibited workplace discrimination on the basis of sexual orientation,¹¹⁹ and the company made the change in order to comply with the laws of other states.

3. City Resolutions

As of 2009, protected status on the basis of sexual orientation was virtually nonexistent in Arkansas cities, aside

2005), <http://www.arktimes.com/arkansas/protection-for-sexual-orientation/Content?oid=862377>.

115. See ALLTEL CORP., 2003 PROXY STATEMENT 18 (2003), available at http://media.corporate-ir.net/media_files/NYS/at/reports/2002proxy.pdf (including "Alltel Sexual Orientation Nondiscrimination Policy").

116. See *Alltel Bars Discrimination Based on Sexual Preference*, ARK. BUS. (Dec. 8, 2004, 11:42 AM), <http://www.arkansasbusiness.com/article/52109/alltel-bars-discrimination-based-on-sexual-preference>.

117. Rodd Cayton, *Alltel Adds Sexual Orientation Discrimination Ban*, JOURNALSTAR.COM (Dec. 12, 2004, 6:00 PM), http://journalstar.com/business/alltel-adds-sexual-orientation-discrimination-ban/article_b26b6c4d-c8ee-5cdc-83e0-0a08ca5e5beb.html.

118. The company's proxy statement noted this concern prior to the shareholders meeting in 2003. See ALLTEL CORP., *supra* note 115, at 18 ("ALLTEL will enhance its competitive edge by joining the growing ranks of companies guaranteeing equal opportunity for all employees.").

119. Compare *Alltel Wireless Coverage*, MAPS WORLD, <http://www.mapsofworld.com/usa/cellular-coverage/alltel-wireless-coverage-map.html> (last visited Nov. 10, 2014) (showing the states in which Alltel provided wireless coverage prior to its dissolution), with HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES 1 (2014), available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/statewide_employment_10-2014.pdf (showing the states that prohibit discrimination based on sexual orientation and gender identity).

from a select number of municipalities. By late 2014, little had changed. In 1990, Washington County amended its county personnel policy to provide protection on the basis of sexual orientation,¹²⁰ presumably based on the model adopted by the University of Arkansas years earlier. This protection was successfully retained until July 1998, when it was quietly removed by the county's quorum court.¹²¹

The state has one notable outlier. The City of Eureka Springs openly embraces its status as an LGBT-friendly municipality.¹²² The city motto, "Eureka Springs, Arkansas: Where Even the Streets Aren't Straight,"¹²³ reflects the city's inclusive personality. This welcoming atmosphere is quite beneficial for the city, and in 2007, Eureka Springs became the first Arkansas city to create a Domestic Partnership Registry open to all couples, regardless of sexual orientation.¹²⁴ Since the registry's creation, 736 couples¹²⁵ have registered as domestic partners, a lucrative service that has generated over \$22,000 for the city.¹²⁶

In 1998, the City of Fayetteville passed a short-lived "Human Dignity Resolution."¹²⁷ The resolution declared that the city would be an equal opportunity employer and would not discriminate against any applicant for a city job on the basis of sexual orientation.¹²⁸ The resolution also called on the city to

120. See Memorandum from the Williams Inst., UCLA Sch. of Law 4 (Sept. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Arkansas.pdf>.

121. Richard Drake, *The Night That Washington County Robbed Gay Employees of Their Job Protections*, ARK. TIMES (Apr. 25, 2011, 9:21 AM), <http://www.arktimes.com/StreetJazz/archives/2011/04/25/the-night-that-washington-county-robbed-gay-employees-of-their-job-protections>.

122. The city was recently listed as one of the country's top small destinations for LGBT vacations. See Kevin Burra, *10 LGBT Vacation Destinations: Small Cities and Towns*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/08/28/10-lgbt-vacation-destinations_n_1747775.html (last updated Aug. 28, 2012, 9:29 AM).

123. See *id.*

124. See Eureka Springs, Ark., Ordinance 2052 (May 14, 2007).

125. Telephone Interview with Ann Armstrong, City Clerk, City of Eureka Springs (Nov. 15, 2013) (on file with author).

126. This amount reflects the total collection of fees by all couples registered at \$35 per couple, the current registration fee. See Eureka Springs, Ark., Ordinance 2052 (May 14, 2007).

127. See Richard Drake, *Fayetteville Crosses the Rubicon: A Look Back at the War Over the Human Dignity Resolution*, ARK. TIMES (Nov. 30, 2010, 8:35 AM), <http://www.arktimes.com/StreetJazz/archives/2010/11/30/fayetteville-crosses-the-rubicon-a-look-back-at-the-war-over-the-human-dignity-resolution>.

128. See *id.*

serve as a “model for the community and encourage all other institutions, organizations, and businesses in the city to conduct their institutional behavior in a manner that promotes the values represented by the spirit of this resolution.”¹²⁹ Opponents voiced great concern over the resolution’s promotion of homosexuality,¹³⁰ and then-Mayor Fred Hanna vetoed the legislation two weeks later.¹³¹ Mayor Hanna believed it was unnecessary for the city to meet “the higher standards of the University of Arkansas and the public schools because they ha[d] already gone there.”¹³²

In 2014, the Fayetteville City Council passed a new ordinance, styled as Ordinance 5703, that not only met, but exceeded, the policy in place at the University of Arkansas.¹³³ The ordinance sought to “safeguard the right and opportunity of all persons to be free from unfair discrimination based on real or perceived . . . gender identity, gender expression, . . . [and] sexual orientation.”¹³⁴ The ordinance also promoted the health and welfare of Fayetteville residents by ensuring that all “ha[d] equal access to employment, housing, and public accommodations.”¹³⁵

By passing Ordinance 5703, the Fayetteville City Council further demonstrated the changing society acknowledged by the Arkansas Supreme Court in *Carter*. The meeting at which the Fayetteville City Council adopted the ordinance lasted over ten hours, and many city residents, business owners, and religious leaders voiced their support of the measure. Evan McDonald, co-owner of a local brewpub and employer of several sexual minorities, had the following to say in support of the measure:

129. See CITY OF FAYETTEVILLE, ARK., MAY 5, 1998 CITY COUNCIL MINUTES 6 (1998) (internal quotation mark omitted).

130. Drake, *supra* note 127 (noting criticisms of several Northwest Arkansas residents).

131. *Id.*

132. CITY OF FAYETTEVILLE, ARK., APRIL 21, 1998 CITY COUNCIL MINUTES 17 (1998). The University of Arkansas had previously adopted a policy “committed to providing equal opportunity for all students and applicants for admission and for all employees and applicants for employment regardless of . . . sexual orientation.” See UNIV. OF ARK., *supra* note 113, at 1.

133. See Fayetteville, Ark., Ordinance 5703 (Aug. 20, 2014) (repealed 2014).

134. See Fayetteville, Ark., Ordinance 5703. The Ordinance also afforded protected status based on other characteristics, such as race, national origin, and socioeconomic background. See Fayetteville, Ark., Ordinance 5703.

135. See Fayetteville, Ark., Ordinance 5703.

Our employees work hard for us and for themselves, reaping the benefits that come from hard work and good service. These employees deserve the security of knowing that their employment is based on their ability to do their job and nothing else. Our businesses are meritocracies and while it's foolish to assume that all aspects of life will be based on merit we can at least hope that our local government will join us in this moment to show that fairness and tolerance are the tools to a brighter future for the town that we love so dearly. Security and productivity will move us forward, not bigotry and intolerance. We ask the council to join us in choosing merit over arbitrary guidelines to help give their citizens and our employees [the] security that they deserve.¹³⁶

By focusing on the work ethic of his employees and promoting tolerance and equality in the workplace, McDonald stated that he was able to retain hard-working employees that provided good service, which allowed his business to succeed beyond his “wildest dreams.”¹³⁷ Other local business owners echoed this sentiment; supporters also believed that a vote for the ordinance was a vote “against discrimination.”¹³⁸

Opponents advanced two primary arguments against adoption: (1) the ordinance ambiguously created criminal liability for violations; and (2) the ordinance inhibited the religious freedoms of individuals by giving protected status to homosexuals.¹³⁹ Some believed that the prohibition against discrimination on the basis of sexual orientation represented

136. Video tape: City Council Meeting, Aug. 19, 2014, City of Fayetteville, Arkansas: Part 2, at 2:22:30 (Aug. 19, 2014) [hereinafter Video 2] (on file with author).

137. *Id.*

138. For example, University of Arkansas Law Professor Laurent Sacharoff stated:

[T]he problem remains that minorities that have been traditionally discriminated against face terrible odds when it comes to democracy. Gay people in particular. Lesbian people in particular. Throughout the country, not just in the South. The North has its share of discrimination, too. It has its share of laws and all discrimination is done through democracy. That's how discrimination happens. So I would just urge the council members who are in favor . . . vote for that ordinance. Vote against discrimination.

Video 1, *supra* note 59, at 1:59:26.

139. One Fayetteville resident concerned about the religious freedoms threatened by the ordinance stated, “there are several religions that oppose this lifestyle in their belief system and to force religions in general to practice their religion only within the confines of their property is very disturbing to me.” See Video 2, *supra* note 136, at 0:33:33.

“anti-Christian” beliefs¹⁴⁰ or a “war with God.”¹⁴¹ These statements resembled those raised in 2005 against House Bill 2751. Fayetteville City Attorney Kit Williams addressed these concerns in a matter-of-fact manner. He stated, “I believe that this ordinance has no effect whatsoever on someone’s freedom of speech or religion.”¹⁴² This was a well-founded belief given the ordinance’s religious exemption,¹⁴³ a feature commonly inserted into similar laws in order to quell concerns over religious freedom. After much debate, which persisted for months following enactment, Fayetteville voters repealed Ordinance 5703 by a narrow margin in December 2014.¹⁴⁴ The passage of the ordinance reflects the progress made in Arkansas in recent years, but its repeal will serve as a painful reminder of the progress yet to be achieved.

B. Across the Country

Across the nation, various actors, both public and private, have rapidly started to recognize the rights of the LGBT community. The United States Armed Forces serves as one of the best examples of this progress. Between 1948 and 2010, all branches of the military were free to discharge any homosexual or bisexual servicemember.¹⁴⁵ Before 1993, homosexuality was also an automatic disqualification from military service.¹⁴⁶ In November 1993, President Clinton implemented the policy commonly known as “Don’t Ask, Don’t Tell” (“DADT”), which allowed those previously disqualified due to their sexual orientation to serve in the military unless and until they

140. Video tape: City Council Meeting, Aug. 19, 2014, City of Fayetteville, Arkansas: Part 4, at 0:35:22 (Aug. 19, 2014) [hereinafter Video 4] (on file with author).

141. *Id.* at 1:06:47.

142. *Id.* at 0:58:01.

143. See Fayetteville, Ark., Ordinance 5703 (Aug. 20, 2014) (repealed 2014).

144. See Lance Turner, *Fayetteville Voters Repeal Anti-Bias Ordinance*, ARK. BUS. (Dec. 10, 2014, 9:38 AM), <http://www.arkansasbusiness.com/post/102352/fayetteville-voters-repeal-anti-bias-ordinance> (repealed by a 52% to 48% vote).

145. See 10 U.S.C. § 654(a)(13) (2006) (repealed 2010); see also *Key Dates in U.S. Policy on Gay Men and Women in Military Service*, U.S. NAVAL INST., <http://www.usni.org/news-and-features/dont-ask-dont-tell/timeline> (last visited Nov. 10, 2014) (providing a history of policies related to homosexual members of the military).

146. See 10 U.S.C. § 654(b) (2006) (repealed 2010); *Key Dates on Gay Men and Women in Military Service*, *supra* note 145.

manifested some homosexual conduct.¹⁴⁷ Congress subsequently repealed all prohibitions on service by gays and lesbians in 2010.¹⁴⁸ Following repeal, all servicemembers dishonorably discharged due to the discovery of their sexual orientation under DADT may have their discharge upgraded to “honorable” status.¹⁴⁹

In the days following repeal, President Obama and Vice President Biden demonstrated their complete support. Vice President Biden stated that DADT “violate[d] the fundamental American principle of fairness and equality.”¹⁵⁰ President Obama believed that repeal would create a stronger military, focused more on an individual’s skills, bravery, and zeal rather than his or her sexual orientation.¹⁵¹

Sporting organizations have also taken a proactive stance toward equality by prohibiting discrimination based on sexual orientation.¹⁵² In 2013, Major League Baseball Commissioner Bud Selig announced that the league had adopted “a zero tolerance policy for any form of harassment or discrimination based on sexual orientation.”¹⁵³ New York Attorney General Eric Schneiderman praised the league’s decision and noted that players “should [not] have to sit on the sidelines or hide out of

147. See Dep’t of Def. Directive No. 1394.26 (Dec. 21, 1993) (“Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual.”).

148. Pub. L. No. 111-321, 124 Stat. 3515 (2010); see also Press Release, White House, Remarks by the President and Vice President at Signing of the Don’t Ask, Don’t Tell Repeal Act of 2010, (Dec. 22, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a>.

149. See Quil Lawrence, *An Honorable Last Wish for a Dying Marine*, NPR (Jan. 6, 2014, 3:01 AM), <http://www.npr.org/2014/01/06/260020686/an-honorable-last-wish-for-a-dying-marine>.

150. Press Release, White House, *supra* note 148.

151. See *id.*

152. See, e.g., Lynn Zinser, *The Fifth Down; Seeking A Stronger Stand*, N.Y. TIMES (March 15, 2013), <http://query.nytimes.com/gst/fullpage.html?res=9A00E2DF1E38F936A25750C0A9659D8B63> (noting the anti-discrimination statement in the National Football League Players’ Association Collective Bargaining Agreement); see also Steve Keating, *NHL Ready for Arrival of First Gay Player*, CHI. TRIB. (Apr. 30, 2013), http://articles.chicagotribune.com/2013-04-30/sports/sns-rt-us-nba-gay-nhlbre93t182-20130430_1_nhl-commissioner-gary-bettman-nhlpa-sexuality (noting a similar provision in the National Hockey League Players’ Association Collective Bargaining Agreement).

153. See *MLB’s Anti-Discrimination Policy*, MLB.COM (July 16, 2013), <http://m.mlb.com/video/v28927175/schneiderman-selig-on-antidiscrimination-measures>.

fear of being mistreated because of their sexual orientation.”¹⁵⁴ The United States Olympic Committee also expanded its non-discrimination policy in 2013 by providing protection based on sexual orientation.¹⁵⁵ By expanding protection to their “employee” athletes, these high-profile organizations illustrate the growing support for the notion that an individual’s sexual orientation does not affect his or her value as an employee.

1. *Employment Non-Discrimination Act*

The Employment Non-Discrimination Act of 2013 (ENDA) would have amended Title VII by making discrimination on the basis of “sexual orientation” or “gender identity” an unlawful employment practice.¹⁵⁶ The legislation passed in the Senate with almost two-thirds support, but failed in the House.¹⁵⁷ This represented a significant step, as previous attempts to pass similar legislation have been unsuccessful, especially when it came to protection in the workplace.¹⁵⁸ Similar legislation has failed to make its way through Congress in every session since 1994.¹⁵⁹

Despite the failed attempts of ENDA to become federal law, President Obama signed Executive Order 13672 on July 21, 2014.¹⁶⁰ The Executive Order amended federal equal opportunity employment policies by prohibiting discrimination on the basis of sexual orientation or gender identity.¹⁶¹ President Obama justified executive action in order “to promote

154. *Id.*

155. *United States Olympic Committee Adds Sexual Orientation to Policy*, ESPN.COM (Oct. 11, 2013, 9:49 PM), http://espn.go.com/olympics/story/_id/9807761/usoc-adds-sexual-orientation-conduct-code. Notably, this policy was enacted in advance of the 2014 Olympic Winter Games in Sochi, Russia. *See id.*

156. *See* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

157. Ed O’Keefe, *Senate Votes to Ban Discrimination Against Gay and Transgender Workers*, WASH. POST (Nov. 7, 2013), http://www.washingtonpost.com/politics/senate-set-to-approve-gay-rights-bill/2013/11/07/05717e4a-47c1-11e3-a196-3544a03c2351_story.html.

158. Emma Bennett-Williams, *South Carolina Workplace Fairness Act*, EXAMINER (Nov. 7, 2013, 8:27 AM), <http://www.examiner.com/article/south-carolina-workplace-fairness-act>.

159. *Id.*

160. *See* Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

161. *See* Exec. Order No. 13,672, §§ 1-2, 79 Fed. Reg. 42,971, 42,971.

economy and efficiency in Federal Government procurement.”¹⁶²

2. Statewide Prohibitions

Across the nation, there are millions of individuals working without protection from sexual orientation-based discrimination.¹⁶³ Southern legislators demonstrated unwillingness to even consider sweeping protections for gays and lesbians until 2013, when elected officials in Louisiana, North Carolina, and South Carolina proposed legislation forbidding discrimination on the basis of sexual orientation in the workplace.¹⁶⁴

Louisiana’s House Bill 85 failed to pass, but equality activists noted that the proposal represented a “significant step” toward equal rights and demonstrated that Louisiana was a state where employees could be treated fairly.¹⁶⁵ Louisiana’s experience shows that equality might best be achieved in a piecemeal fashion, and the Arkansas General Assembly should consider this when drafting new legislation. Supporters of full protection for all sexual minorities, such as those offered by the most recently proposed version of ENDA, generally agree that gradual progress is the path of least resistance to full rights for the LGBT community.

3. City Ordinances

In some states that have declined to protect employees based on their sexual orientation, a number of cities have created such protection. In fact, municipal protections are becoming increasingly commonplace. By August 2014, the Human Rights Campaign, an organization that advocates for LGBT rights, had

162. See Exec. Order No. 13,672, 79 Fed. Reg. 42,971, 42,971.

163. See HUMAN RIGHTS CAMPAIGN, *supra* note 119. As of October 2014, only twenty-one states and the District of Columbia prohibited discrimination based on sexual orientation. *Id.*

164. See H.B. 85, 2013 Leg., Reg. Sess. (La. 2013); H.B. 647, 2013 Leg., Reg. Sess. (N.C. 2013); H.B. 4025, 120th Gen. Assemb., Reg. Sess. (S.C. 2013).

165. Matthew Patterson, *Why Louisiana Needs an ENDA*, EQUALITY LA. (April 22, 2013), <http://equalityla.org/why-louisiana-needs-an-enda/>.

identified over 200 cities and counties that prohibit employment discrimination on the basis of sexual orientation.¹⁶⁶

Many cities throughout the South have also adopted this form of local legislation despite the lack of protection offered by the state. In 1999, New Orleans added sexual orientation as a protected status to the city's employment non-discrimination ordinance.¹⁶⁷ Fourteen years later, the Shreveport City Council passed an ordinance making it illegal to discriminate on the basis of sexual orientation or gender identity in city employment, housing, or public-accommodation decisions.¹⁶⁸

Atlanta adopted similar protections in 2000, forbidding discrimination in employment,¹⁶⁹ housing,¹⁷⁰ and public accommodation¹⁷¹ on the basis of sexual orientation or gender identity. Similar ordinances prohibiting discrimination in various situations have been enacted in all of the major Texas cities,¹⁷² and in both Columbia and Charleston, South Carolina.¹⁷³ In early 2014, the small city of Starkville in deeply conservative Mississippi condemned discrimination on the basis of sexual orientation or gender identity as "anathema to the

166. See *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Nov. 10, 2014). Policies that protect on the basis "gender identity" necessarily also afford gays and lesbians protected status. See, e.g., CITY OF SAN ANTONIO, NON-DISCRIMINATION ORDINANCE FACTS 2 (n.d.), available at <https://www.sanantonio.gov/Portals/0/Files/NDO/ndo-fact-sheet.pdf> (noting that the city's proposed non-discrimination ordinance "[e]xpands the City's current non-discrimination policy to prohibit discrimination on the basis of sexual orientation, gender identity, and veteran status").

167. See NEW ORLEANS, LA., CODE OF ORDINANCES ch. 86, art. IV, § 22 (2014).

168. See SHREVEPORT, LA., CODE OF ORDINANCES ch. 39, art. I, § 2 (2014).

169. See ATLANTA, GA., CODE OF ORDINANCES ch. 94, art. IV, § 112 (2014).

170. See ATLANTA, GA., CODE OF ORDINANCES ch. 94, art. IV, § 94 (2014).

171. See ATLANTA, GA., CODE OF ORDINANCES ch. 94, art. IV, § 68 (2014).

172. See AUSTIN, TEX., CODE OF ORDINANCES § 5-3-1 (2014); DALL., TEX., CODE OF ORDINANCES ch. 46, art. II, § 6 (2014); EL PASO, TEX., CODE OF ORDINANCES § 6.1-11 (2014); FT. WORTH, TEX., CODE OF ORDINANCES ch. 17, art. I, § 1 (2014); HOUS, TEX., CODE OF ORDINANCES ch. 17, art. I, § 1 (2014); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. X, § 550 (2014); see also CITY OF SAN ANTONIO, *supra* note 166 (noting that before the city enacted its ordinance, "San Antonio [was] the only major city in Texas not to include protections for LGBT residents in the city code").

173. See Julie Bolcer, *South Carolina City Adopts Non-Discrimination Ordinance*, ADVOCATE (Mar. 15, 2012, 5:25 PM), <http://www.advocate.com/news/daily-news/2012/03/15/south-carolina-city-adopts-non-discrimination-policy>.

public policy of the City.”¹⁷⁴ Starkville Mayor Parker Wiseman stated that a resolution was necessary to inform residents that everyone deserves equality.¹⁷⁵ In addition to Starkville, at least seven other cities in Mississippi have passed resolutions supporting protection.¹⁷⁶

Multiple cities in West Virginia have also banned sexual orientation-based discrimination in the workplace.¹⁷⁷ In 2004, local officials in Charleston, West Virginia, decided to include protection by amending the city’s human-rights laws.¹⁷⁸ The legislation authorizing the amendment stated, in part, “the City of Charleston continues to strive to be an inclusive City, where people can live and work without fear of discrimination.”¹⁷⁹ The authorizing legislation further announced the city’s intent to “eliminate barriers to recruiting a talented workforce” because “jurisdictions around the country [had] ma[de] a commitment to end discrimination based on sexual orientation . . . [and] businesses [had] recognize[d] the importance of providing a workplace free from fear and ha[d] included sexual orientation and gender identity in their employment nondiscrimination policies.”¹⁸⁰

Although this comment focuses on employment discrimination, additional protections have been created by cities and states across the country based on an individual’s sexual orientation. These statutory protections typically divide neatly

174. See CITY OF STARKVILLE, MISS., OFFICIAL AGENDA OF THE MAYOR AND BOARD OF ALDERMAN: RECESS MEETING OF TUESDAY, JANUARY 21, 2014, at 94 (2014), available at <http://www.cityofstarkville.org/documentcenter/view/1656>.

175. See Dan Rafter, *Starkville Becomes First City in Mississippi to Pass Resolution Recognizing LGBT-Inclusive Resolution*, HRC BLOG (Jan. 21, 2014), <http://www.hrc.org/blog/>.

176. See Hayley Fox, *Tired of the Bad Rap, 8 Mississippi Cities Are Fighting the State’s Anti-LGBT Law*, TAKEPART (June 4, 2014), <http://www.takepart.com/article/2014/06/04/pro-lgbt-mississippians-fight-public-image> (“[T]he capital city of Jackson became the eighth and largest city to pass an antidiscrimination resolution protecting the rights of all citizens, including LGBT individuals.”).

177. See CHRISTY MALLORY ET AL., EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN WEST VIRGINIA 3 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/WestVirginiaNDRReport-Dec-2013.pdf> (“Five West Virginia localities – Charleston, Morgantown, Lewisburg, Harpers Ferry, and Buckhannon – have local ordinances that prohibit discrimination based on sexual orientation and/or gender identity.”).

178. See CHARLESTON, W. VA., CODE OF ORDINANCES ch. 62, art. III, § 81 (2014).

179. See Charleston, W. Va., Bill No. 7275 (Aug. 20, 2007).

180. See Charleston, W. Va., Bill No. 7275.

in two: (1) laws that create a civil cause of action for intimidation or threats based on an individual's sexual orientation and (2) statutes that criminalize similar intimidation or threats. In thirty states, this conduct constitutes a hate crime.¹⁸¹ The ACRA provides a civil action for a "hate offense,"¹⁸² but current law only permits recovery for "acts . . . motivated by racial, religious, or ethnic animosity."¹⁸³ Accordingly, a hate offense cannot occur in Arkansas if the hateful conduct was motivated solely by the injured party's sexual orientation. Only thirteen other states lack similar protections.¹⁸⁴ Should the proposal proposed in Part IV of this comment be accepted, the Arkansas General Assembly would ideally, and gradually, extend protections to the LGBT community under the hate offense statute and the rest of the ACRA, which encompasses much more than just employment discrimination.¹⁸⁵

IV. THE ARKANSAS GENERAL ASSEMBLY SHOULD AMEND THE ACRA

President Clinton, Arkansas's "Native Son," declared in his 1999 State of the Union address that freedom from discrimination based on sexual orientation should be "the law of the land."¹⁸⁶ Fifteen years later, this has yet to become a reality in President Clinton's home state. Given the absence of protection currently afforded to the LGBT community in

181. See HUMAN RIGHTS CAMPAIGN, STATE HATE CRIMES LAWS 1 (2013), available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/hate_crimes_laws_022014.pdf.

182. See ARK. CODE ANN. § 16-123-106 (Repl. 2006).

183. See ARK. CODE ANN. § 16-123-106(a).

184. See HUMAN RIGHTS CAMPAIGN, *supra* note 181, at 1.

185. The ACRA recognizes the following additional civil rights:

- (1) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
- (2) The right to engage in property transactions without discrimination;
- (3) The right to engage in credit and other contractual transactions without discrimination; and
- (4) The right to vote and participate fully in the political process.

ARK. CODE ANN. § 16-123-107(a)(2)–(5) (Repl. 2006).

186. Press Release, White House, President William Jefferson Clinton State of the Union Address (Jan. 19, 1999), available at <http://clinton4.nara.gov/WH/New/html/19990119-2656.html> (referring to ENDA).

Arkansas, which runs squarely contrary to the strides made by courts, companies, and local and state governments across the nation, this comment urges the Arkansas General Assembly to amend the ACRA. Just as civil rights have been recognized throughout history in a piecemeal fashion, the protections offered by the ACRA may be expanded in the same manner. A logical first step would be to prohibit sexual orientation discrimination only in the workplace, as many employers have already done so. This may also prove to eliminate the confusion created by the United States Supreme Court in *Price Waterhouse* and *Oncale* with respect to the circumstances in which sexual minorities are protected under Title VII.¹⁸⁷ An amendment to include this protection could be drafted in the following manner:

16-123-102. Definitions.

(7) “Perceived sexual orientation” means presumption of heterosexuality, homosexuality, or bisexuality, regardless of whether the presumption is correct.

(10) “Sexual orientation” means heterosexuality, homosexuality, or bisexuality.¹⁸⁸

16-123-107. Discrimination offenses.

(a)(1) The right to obtain and hold employment without discrimination because of:

(A) Any civil right declared in subsection (a) of this section;
or

(B) A person’s sexual orientation or perceived sexual orientation.

This definition of “sexual orientation” is pivotal to the proposed amendment’s intended goal of reducing or eliminating discrimination based on sexual orientation in Arkansas’s workplaces. Notably, the proposal encompasses individuals discriminated against because of their “perceived sexual

187. See *supra* notes 27-56 and accompanying text.

188. State Representative Lindsley Smith proposed this same definition in her failed attempt to pass House Bill 2751. See H.B. 2751, 85th Gen. Assemb., Reg. Sess. (Ark. 2005).

orientation.” Year after year, legislators in Washington draft ENDA using a similar definition in order to “ensure[] that ENDA’s prohibitions reach all discriminatory actions of an employer, regardless of whether the assumptions upon which the employer bases his or her discrimination are accurate.”¹⁸⁹ Congress employed a similar strategy when it enacted the Americans with Disabilities Act of 1990¹⁹⁰ by expanding the definition of “disability” to include protection for individuals discriminated against because they were “regarded as” having a disability.¹⁹¹ This inclusive definition has extended protection to individuals who did not meet the steep requirement of having a “substantially limiting” impairment by affording them with protection if an employer believed they had a disability and treated them as such.¹⁹² These individuals would otherwise be fully capable of performing their duties.

As drafted, the proposed amendment does not provide protection for transgender and transsexual employees based on their gender expression and identity. While this may not be “ideal . . . [it] nonetheless would represent a significant step forward for equality” and show current and future residents that Arkansas “is a place where we treat our [employees] fairly.”¹⁹³

A. Promotion of Equality

Arkansas should amend the ACRA to become a more inclusive state, which would eliminate many of the barriers that cause discrimination. Doing so will ensure that Arkansas becomes a place where heterosexuals, gays, lesbians, and bisexuals can productively work together. The current reality, which allows applicants and employees to be judged and penalized based on their sexual orientation rather than “on their

189. See S. REP. NO. 113-105, at 7 (2013).

190. See Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

191. 42 U.S.C. § 12102(1)(C) (2012).

192. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999) (“[I]ndividuals who are ‘regarded as’ having a disability are disabled within the meaning the ADA.”); see also *Román-Oliveras v. P.R. Elec. Power Auth.*, 655 F.3d 43, 49 (1st Cir. 2011) (listing the general requirements to establish a “regarded as” claim).

193. These were the arguments advanced by supporters of the failed measure in Louisiana. See *Committee Hearing on House Bill 85*, F. FOR EQUALITY BLOG (May 1, 2013), <http://forumforequality.wordpress.com> (statement of Louisiana Trans Advocates President Elizabeth Jenkins).

professional credentials and the caliber of their work,” violates basic fairness principles.¹⁹⁴ One supporter of Fayetteville’s since-repealed ordinance succinctly summarized this notion: “Laws are needed now. A champion that addresses such injustices that take place outside of the public eye is needed now. Security and dignity are not things that anyone should have to wait for, and anyone who needs or has needed this protection should wait no longer.”¹⁹⁵

The Arkansas Supreme Court has recognized that sexual orientation carries no weight in determining whether an individual can serve as a quality parent,¹⁹⁶ and President Obama has already mandated that federal employers and contractors no longer discriminate on the basis of sexual orientation or gender identity.¹⁹⁷ Additional protection in the workplace may decrease the likelihood that an individual would need state benefits to support his or her family because he or she could no longer be fired due to his or her sexual orientation.

Further, the Arkansas Constitution underscores the profound importance of affording equal rights to all Arkansans:

All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; . . . reputation; and of pursuing their own happiness.¹⁹⁸

These same rights should apply to the acquisition and retention of employment, regardless of one’s sexual orientation. In her concurring opinion in *Lawrence v. Texas*, Justice O’Connor found a right to freedom from discrimination based on sexual orientation founded in the Fourteenth Amendment’s Equal Protection Clause.¹⁹⁹ Her rationale was likely prescient—modern courts have invalidated laws that unduly discriminate against the LGBT community much more frequently than even a decade ago.

194. See Editorial, *Beyond Basketball and Bigotry*, N.Y. TIMES, May 11, 2013, at A18.

195. Video 1, *supra* note 59, at 2:29:02 (statement of Justin Fletcher).

196. See *Bethany v. Jones*, 2011 Ark. 67, at 14, 378 S.W.3d 731, 739.

197. See Exec. Order No. 13,672, 79 Fed. Reg. 42,971, 42,971 (July 23, 2014).

198. ARK. CONST. art. 2, § 2.

199. See 539 U.S. 558, 579 (2003) (O’Connor, J., concurring).

B. Implications for the State

1. *Impact on Religious Beliefs*

Before amending the ACRA, supporters must address the concerns commonly voiced by opponents to previous attempts to promote the rights of Arkansas's sexual minorities. One such concern involves the ability of an employer to exercise his or her religious freedom.²⁰⁰ This issue may spark the played-out debate over whether sexual orientation is an inherent characteristic or instead an individual choice. Although the answer may be important to sexual minorities, the difference is essentially irrelevant for employers. Inherent characteristics, such as an individual's race or national origin, are already protected under the ACRA and cannot be considered in employment-related decisions.²⁰¹ However, some may consider their religion to be an inherent characteristic. Accordingly, a Christian may feel that he or she would be forsaking God if a law required him or her to partake in the homosexual "sin." However, for the purposes of employment, an individual's sexual orientation should have no bearing on his or her experience and ability, just like race and national origin cannot.

Religious beliefs, however, are an individual choice nonetheless protected from discrimination in the workplace just as a female's choice to become pregnant may be.²⁰² To date, employers have managed to accommodate these choices, regardless of any personal objections. Failing to do so would otherwise create civil liability.²⁰³ Therefore, it may be logically assumed that employers could approach an expansion in the rights of homosexual employees in a similar manner. Moreover,

200. See *Dep't of Human Servs. v. Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 8 (noting this concern held by a supporter of an Arkansas law which banned an individual from serving as a foster parent if an adult homosexual resided in the same household); Smith, *supra* note 18, at 36-37 (noting that critics of State Representative Lindsley Smith's failed legislation believed that "it would restrain religious freedom").

201. See ARK. CODE ANN. § 16-123-107(a) (Repl. 2006).

202. See ARK. CODE ANN. § 16-123-102(1) (Repl. 2006) (including pregnancy as a gender-related characteristic); ARK. CODE ANN. § 16-123-107(a) (Repl. 2006) (prohibiting discrimination based on gender and religious beliefs).

203. See, e.g., *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1340 (8th Cir. 1995) (noting an employer's statutory obligation to make reasonable accommodations for religious beliefs).

concerns over religious freedom are already addressed by the ACRA's broad exemption for religious entities.²⁰⁴

In addition, supporters must address the concern of whether a prohibition on sexual orientation-based discrimination is any different than a prohibition on discrimination on the basis of religion. One opponent of the Fayetteville ordinance claimed the law would ignite a "war against God" because of the religious condemnation of the homosexual lifestyle, and he believed that the Fayetteville City Council could not unilaterally require citizens to "defend" those partaking in that lifestyle.²⁰⁵ These arguments are misguided for two reasons: (1) religious entities will remain exempted under an amended ACRA and (2) the proposed amendment simply mandates tolerance for homosexual employees in the same manner as required for individuals with different religious beliefs under the ACRA.

Recent controversy best illustrates this point. Administrators at Little Rock's Mount Saint Mary's High School forced English teacher Tippi McCullough to resign after she married her long-time partner.²⁰⁶ Under the amendment to the ACRA proposed in this comment, McCullough faces the same outcome because religious entities, such as parochial schools, are free to discriminate against employees based on their sexual orientation.²⁰⁷ However, nearly every other school in the state would be legally obligated to ignore McCullough's sexual orientation, regardless of whether the school viewed it as an inherent characteristic or a personal choice.

Shortly after McCullough's termination, she was hired to teach at Little Rock's historic Central High School.²⁰⁸ There, she would be protected under the proposed amendment, but because the Little Rock School District already had adopted a non-discrimination policy encompassing sexual orientation, she will be protected.²⁰⁹ Other Arkansans whose sexual orientation is exposed may not be as lucky in the absence of a statewide prohibition on discrimination based on sexual orientation.

204. See ARK. CODE ANN. § 16-123-103(a) (Repl. 2006).

205. See Video 4, *supra* note 140, at 1:09:27.

206. See Koon, *supra* note 2.

207. See ARK. CODE ANN. § 16-123-103(a) (Repl. 2006).

208. Telephone Interview with Renee Kovach, Dir. of Certified Staff, Little Rock Sch. Dist. (Nov. 13, 2013) (on file with author).

209. See *LRSD Notice of Non-Discrimination*, *supra* note 114.

2. Affirmative Action Plans Not Required

Some may also argue that the proposed amendment will require employers to implement sweeping affirmative action plans and to “delve into the private lives of employees to determine the sexual orientation of the decision maker and the affected employee.”²¹⁰ Fortunately, no such determination is necessary. If the ACRA prohibited discrimination based on sexual orientation in the workplace, an employer could only violate the law if he or she made an employment decision based on the sexual orientation or perceived sexual orientation of an employee or applicant. If an employer does not know, or does not inquire into, the sexual orientation of the individual, then he or she could not have made any unlawful decision on that basis.

Further, any belief that the proposed amendment will force employers to adopt affirmative action plans is similarly unfounded.²¹¹ Affirmative action plans were developed to remedy “the differences in rights and opportunities defined by that color line” during a time in America when employers refused to hire minorities.²¹² No such claim is being made here. Yes, some employers refuse to hire sexual minorities, but, unlike race, an individual’s sexual orientation is not always known during the hiring process. Consequently, many sexual minorities work in Arkansas in a constant fear of being “outed,” which could affect their current and future employment prospects. No affirmative action plan will solve this problem. This comment does not claim that all employers are currently making employment decisions based on sexual orientation, and the proposed amendment will not affect the status quo for these employers. However, the proposal promises equality for heterosexuals, homosexuals, and bisexuals in all of Arkansas’s workplaces, and it provides a civil right of action should discrimination occur.

Others may contend that the change is unnecessary because “current policies and practices [already] achieve the objectives,”

210. Smith, *supra* note 18, at 35.

211. This argument was raised by at least one opponent of State Representative Lindsley Smith’s failed attempt to extend protections to gay and lesbian Arkansans in 2005. *Id.* at 36.

212. *The Beginning*, in *THE AFFIRMATIVE ACTION DEBATE* 1, 1 (George E. Curry ed., 1996).

of equality²¹³ and that added protection will produce additional litigation.²¹⁴ The actual number of gay and lesbian Arkansans currently affected by potential discrimination in the workplace cannot be readily ascertained. Opponents to the proposed amendment may assert this demonstrates that discrimination does not exist because it cannot be quantified.²¹⁵ Accordingly, these critics believe that the proposal represents a solution to a problem that does not presently exist. Two problems lie in that conclusion. First, the current lack of protection deters many from stepping forward out of fear that doing so could cost them their jobs.²¹⁶ Second, if no problem exists, then there could be no increase in litigation following the enactment of the proposal. Similar arguments were likely made in opposition of the ACRA before its enactment in 1993, but few actions were brought under the Act during the three years following its passage.²¹⁷ The same could be expected here.

3. *Economic Benefit for the State*

The proposed amendment also promises to promote the economy in one of the country's poorest states. In 2013, Arkansas's top economic official, Grant Tennille, announced that "in the area of high tech, high skilled, knowledge-based jobs, the companies look for locations where all of their employees can be welcomed . . . [and] the first state in the South that moves in that direction will have a leg up."²¹⁸ Arkansas could be this state. The flood of same-sex couples that descended upon the state in the week following Judge Piazza's decision in *Wright* illustrates Tennille's point.²¹⁹

Any increase in the number of new jobs created would necessarily increase state tax revenue, as individuals are

213. Alltel leadership made this argument prior to a shareholder vote on the company's proposed equal employment opportunity policy. See *Alltel Bars Discrimination Based on Sexual Preference*, *supra* note 116.

214. See Smith, *supra* note 18, at 35.

215. See *id.* at 34.

216. See *id.*

217. Beiner, *supra* note 24, at 165 (noting only five reported cases in the three years following enactment).

218. Andrew DeMillo, *AEDC Chief Grant Tennille Backs Gay Marriage*, ARK. BUS. (Jul. 8, 2013, 11:26 AM), <http://metro.wf.flex360.com/post/93419/aedc-chief-grant-tennille-backs-gay-marriage>.

219. Conlon & Botelho, *supra* note 82.

required to pay taxes regardless of sexual orientation. Businesses bring workers, families, and customers into a state, all of which lead to an increase in earnings, spending, and, most importantly for the state of Arkansas, an increase in tax revenue. Further, by allowing employees to no longer live in a constant state of fear, they may be more likely to reach their full potential. Finally, citizens drawn to Arkansas for their careers will continue to contribute and spend money in the state—a strategy already successfully utilized by the City of Eureka Springs.²²⁰

Critics may claim that an expansion of employee rights threatens the at-will employment doctrine in the state. Employment at-will allows an employer to fire an employee at any time and for any reason, so long as the termination does not violate federal or state law. Currently, at-will employment allows for the termination of an employee if he or she is gay, lesbian, or bisexual. While it is true that the proposed amendment would limit an employer's ability to fire an employee because of his or her sexual orientation, many employers, both large and small, public and private, have already relinquished such authority through their non-discrimination policies. Moreover, many Arkansas employers likely believe that such a practice is already discouraged in their workplace, or that it is not a problem at all. Therefore, the amendment would merely function as a formality that holds employers accountable for what they claim is already happening or is not a problem.

Finally, any argument that the proposed amendment could create a slippery slope for future expansion of protection for other groups may be quickly dismissed. A court or legislature is unlikely to ever extend protection to categories such as the “bald, fat, and ugly guys” described by former State Representative Timothy C. Hutchinson.²²¹ First, such categories are subjective and highly dependent upon on what an individual employer believes to be “fat” or “ugly.” This lies in stark contrast to characteristics such as sexual orientation, national origin, and gender, which are objectively ascertainable. Further, highly subjective classes should never attain protected status

220. See *supra* notes 122-26 and accompanying text.

221. See Smith, *supra* note 18, at 36.

because their protection is not needed to maintain good order, preserve public morals, correct an evil, or promote an interest of the state.²²² The Arkansas Supreme Court has made clear that the Arkansas General Assembly only possesses the authority to enact legislation aimed to achieve these objectives.²²³ Adding “bald,” “fat,” or “ugly” as a protected classes under the ACRA would not promote any of the objectives articulated by the state’s high court in *Carter*. Prohibiting discrimination based on sexual orientation, on the other hand, arguably achieves all four.

V. CONCLUSION

A review of this state’s history and recent court opinions demonstrates the great strides employers, cities, and states across the country have taken towards equality. Protecting employees from discrimination on the basis of sexual orientation can now be accomplished in short order. Arkansas is continuing to alter its view of society’s perception on discrimination while also fostering the promotion of equality. Recent recognition of this equality by courts illustrates the newfound rights of sexual minorities. Before dismissing the amendment proposed by this comment, legislators should ponder the following statement made by Rector Lowell Grisham in support of the Fayetteville ordinance:

“I’m old enough to remember the segregation days, and when desegregation happened in Mississippi, good people, the parents of all my friends, were so afraid, and the three things they were afraid of? Interracial romance, swimming pools, and restrooms. How familiar these fears sound today? People who had those fears now are a little embarrassed by them.”²²⁴

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222. See *Carter v. State*, 255 Ark. 225, 231, 500 S.W.2d 368, 372 (1973) (“[The legislature’s] acts must reasonably tend to correct some evil and promote some interest of the commonwealth not violative of any direct, positive or necessarily implied constitutional mandate, or opposed to natural right and fundamental principles of civil liberty.”).

223. *Id.*

224. Video tape: City Council Meeting, Aug. 19, 2014, City of Fayetteville, Arkansas: Part 3, at 1:49:30. (Aug. 19, 2014) (on file with author).