

Has the Future Already Been Forgotten? A Post-2007 Transgender Legal History Told Through the Eyes of the Late, (Rarely) Great Employment Non-Discrimination Act

Katrina C. Rose

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NON-DISCRIMINATION ACT

KATRINA C. ROSE*

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* JD, South Texas College of Law; BED, Texas A&M University; MA (History), University of Iowa; currently a doctoral candidate (History), University of Iowa. Though there are some differences, this Article essentially tracks the final two chapters and conclusion of my dissertation: *Forgotten Paths: American Transgender Legal History, 1955–2009*. Special thanks to The Morning Crew: Anthony Peoples, Emily Scarlett, Mike Panicucci, Jordan Ruggles and Chris Langlois.

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INTRODUCTION

A. *Historical Preface*

Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of “sex” in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against “sexual preference.” None have been enacted into law.¹

The course of federal transgender anti-discrimination law over the last quarter of the twentieth century is well-known to practitioners and scholars who focus in the area. Likewise, it would tend to become well-known in the moment to trans people seeking redress in the federal courts that they would find out that there was no avenue of redress.² Success, when it finally arrives, can breed amnesia and an accompanying over eagerness to look forward without caring that the past can be prologue. Perceived success, be it truly nonexistent or simply less than it actually is, can be even more problematic.³

Even dangerous.

1. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977), *overruled in part* by *Schwenk v. Hartford*, 87 F. Supp. 3d 1118–19 (N.D. Cal. 2015).

2. Courtney J. Jefferson, Comment, *Gender Confusion: The Need for Effective Legislation to Protect Against Gender Identity Discrimination*, 39 U. BALT. L. REV. 137, 147 (2009).

3. See Dana Beyer, *Trans Americans Enjoy Robust Bias Protections*, WASH. BLADE (June 28, 2012, 9:02 AM) <http://www.washingtonblade.com/2012/06/28/trans-americans-enjoy-robust-bias-protections> [<http://perma.cc/RU6QLSQ9>] [hereinafter *Trans Americans Enjoy Robust Bias Protections*].

Trans people rightly are afraid of what the Trump Administration will bring; promises of systemic change will be led by anti-LGBT cultural warriors of years past,⁴ and magnified by a younger generation of radical conservatives, some gay and harboring hatred of trans people.⁵ But the first years of the twenty-first century did see a marked shift, judicially and administratively, away from a viciously negative trend which began in the 1970s.⁶ Legislative advancement has, thus far, proven to be more elusive.⁷ This Article is about that lack of advancement during sessions of Congress when such advancement seemed eminently possible—to some, even probable. Any analysis of what has proven to be an era of stagnancy requires an understanding of what trans people saw as the bag they would be left holding should they be left out of federal legislation. And that understanding necessarily begins with a synopsis of how a quarter century of hopelessness gave way to some hope, but nothing concrete.⁸

Holloway v. Arthur Andersen & Co., decided by the Ninth Circuit Court of Appeals a few days before Christmas, 1977, and from which

4. See David Badash, *Trump Head of Domestic Issues Is Senior Fellow at Anti-Gay Group FRC*, THE NEW CIVIL RIGHTS MOVEMENT (Nov. 10, 2016, 5:17 PM), http://www.thenewcivilrightsmovement.com/davidbadash/trump_head_of_domestic_issues_is_family_research_council_senior_fellow [<http://perma.cc/Y5NNSK83>].

5. See Erin Fitzgerald, *Breitbart News Published Slur-Filled Talk Given By Senior Editor Milo Yiannopoulos At The University of Delaware*, MEDIAMATTERS (Oct. 25, 2016, 2:48 PM) <http://mediamatters.org/blog/2016/10/25/breitbart-news-published-slur-filled-talk-given-senior-editor-milo-yiannopoulos-university-delaware/214102> [<http://perma.cc/F4YMVQA7>] (describing Yiannopoulos' speech); see also Lucas Nolan, *Milo Explains Why He'd Probably be Straight if He Could* (Sept. 20, 2016), <http://www.breitbart.com/milo/2016/09/20/milo-i-would-take-a-straight-pill/> [<http://perma.cc/85Z7SMA8>] (identifying Milo Yiannopoulos as homosexual). Though Yiannopoulos has not (yet) landed a position in the Trump Administration, Breitbart's head, Steve Bannon, has. Michael D. Shear et al., *Critics See Stephen Bannon, Trump's Pick for Strategist, as Voice of Racism*, N.Y. TIMES (Nov. 14, 2016), <http://www.nytimes.com/2016/11/15/us/politics/donald-trump-presidency.html> [<http://perma.cc/FL7UJQE4>].

6. See *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000).

7. I refer to federal law. Year 2001 saw other states begin to follow Minnesota's lead of almost a decade earlier. R.I. GEN. LAWS § 34-37-2.3 (West 2001). In 2016, trans-inclusion at the state level is the rule rather than the exception, with only Wisconsin, the oldest state gay rights law, New York, and New Hampshire remaining gay-only. WIS. STAT. ANN. § 111.31 (West 2015); N.H. REV. STAT. ANN. § 354-A:6 (2016); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2016).

8. I do not discuss herein the quasi-successes under the Rehabilitation Act given that whatever precedent they may have established were wiped out by amendments to the Federal Housing Act, the creation of the Americans with Disabilities Act and later amendments to the Rehabilitation Act. See *Blackwell v. U. S. Dep't of Treasury* 639 F. Supp. 289, 290 (D.D.C. 1986), *supplemental op.*, 656 F. Supp. 713 (D.D.C. 1986), *aff'd in part and vacated in part*, 830 F.2d 1183 (D.C. Cir. 1987) (analysing a transvestite individual's claim under the Rehabilitation Act); *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 U.S. Dist. LEXIS 18959 (D.D.C. June 12, 1985) (finding that the plaintiff had a valid claim under the Rehabilitation Act); H.R. 1158, 100th Cong. § 6(b)(3) (1988) (excluding transvestites from the definition of disability); Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12208 (West 1990) (indicating that neither homosexuality nor transvestite characteristics qualify as a disability).

the paragraph at the beginning of this Article is taken, was not the first Title VII transsexual case.⁹ In early 1975, hemodialysis technician, Carol Voyles, had informed her employer, the Ralph K. Davies Medical Center in San Francisco, of her intention to transition from male to female.¹⁰ She was immediately terminated for that reason.¹¹ When she sued later that year, claiming discrimination based on sex, District Judge Spencer Williams, a Nixon appointee, agreed with the medical center's contention that Voyles' claim failed to state a claim upon which the court could grant any relief.¹² Also in 1975, another Nixon appointee, George Barlow, rejected Paula Grossman's Title VII claim in her suit against the New Jersey school district that had employed her.¹³ The majority opinion in *Holloway*, however, authored by still another Nixon appointee, District Judge Leland Nielsen, was the first appellate opinion construing federal sex discrimination law against transsexuals.¹⁴

It would not be the last.

Together with subsequent decisions against Iowa clerical worker, Audra Sommers,¹⁵ and Illinois pilot, Karen Ulane,¹⁶ *Holloway* was

9. Compare *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-62 (9th Cir. 1977), with *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 456-57 (N.D. Cal. 1975).

10. *Voyles*, 403 F. Supp. at 456-57.

11. *Id.*

12. *Id.* at 456.

13. *Grossman v. Bernards Twp. Bd. of Educ.*, 1975 U.S. Dist. LEXIS 16261, *1, *11 (D. N.J. 1975), *aff'd without opinion*, 538 F.2d 319 (3rd Cir. 1976), *cert. denied*, 429 U.S. 897 (1976). A different claim related to her dismissal went through the New Jersey state court system. *In re Grossman*, 127 N.J. Super. 13, 19 (N.J. Super. App. Div. 1974), *cert. denied*, 321 A.2d 253 (N.J. 1974).

14. Nielsen was only a District Judge, but was sitting on the appellate panel by designation. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 659 (9th Cir. 1977). Additionally, Paula Grossman's case had yielded an appellate decision before Ramona Holloway's, therefore actually establishing precedent. *Id.* at 661; Compare *id.* at 659, with *Grossman v. Bernards Twp. Bd. of Educ.*, 1975 U.S. Dist. LEXIS 16261, at *1 (D. N.J. 1975), *aff'd without opinion*, 538 F.2d 319 (3rd Cir.), *cert. denied*, 429 U.S. 897 (1976). It was an affirmance without an opinion, however, and is generally not included in the core group of early anti-transsexual Court of Appeals decisions. *Grossman*, 1975 U.S. Dist. LEXIS 16261, at *10 (affirming the motion to dismiss); see Jefferson, *supra* note 2, at 144-47 (listing *Holloway*, *Sommers*, and *Ulane* as "The Starting Point for Gender Identity Discrimination Claims Under Title VII").

15. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982). Sommers also pursued parallel state claims on both sex and disability grounds. *Sommers v. Iowa Civil Rights Comm'n.*, 337 N.W.2d 470, 471-72 (Iowa 1983). The Iowa legislature added "sex" to the Iowa Civil Rights Act only six years before it enacted a transsexual birth certificate statute; of the legislators who served in both legislative sessions, the overwhelming majority voted in favor of both. See 1970 Iowa Acts 1058 (describing the amendments which included adding the word "sex"). Even so, the Iowa Civil Rights Commission, the Polk County District Court, and the Iowa Supreme Court all refused to entertain any possibility that "sex," as utilized in Iowa law, could encompass transsexuality; the disability claim was also rejected. *Sommers*, 337 N.W.2d at 471-74, 477.

16. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

part of a triumvirate of appellate opinions which effectively closed the federal courts to transgender sex discrimination claims for the remainder of the century.¹⁷ Kristine Holt bluntly assessed the impact of *Holloway* on trans people as “devastating,” setting the terms “transsexual” and “transgender” up to have “a talismanic effect on the courts; once the word is uttered in a complaint, the rule of *Holloway* is too often invoked.”¹⁸ The cases also demonstrate that the price trans people would pay for being excluded from gay rights bills would go far beyond the substantive exclusion *per se*. The bills Williams and Nielsen cited would not have changed the outcomes for Ramona Holloway and Carol Voyles even if one had become law. Irrespective of its lack of trans-inclusive language, purely in terms of chronology, only the earliest federal gay rights bill (Bella Abzug’s H.R. 14752, filed in May 1974),¹⁹ conceivably could have gone into effect by the time of the late-1974 facts of *Holloway* and the early-1975 facts of *Voyles* (and even it would not have applied because the bill did not cover employment).

Nevertheless, those early federal political efforts of gays and lesbians to secure civil rights protections for only themselves instantly became a weapon for employer-defendants to use against trans people. The resulting Title VII decisions foreclosed a judicial avenue to equality for trans people while gays and lesbians were constructing a political path for their equality exclusive of trans rights (and, for the most part, exclusive of trans people). Yet, at the same time, the cases made the connection between gay and trans rights forever undeniable except when expedience demanded it, and when political bullying ensured that expedience would carry the day.

Even after the gender stereotyping reasoning of *Price Waterhouse v. Hopkins* began to have an impact on federal courts (with several explicitly viewing the Supreme Court’s decision as having dispatched the *Holloway-Sommers-Ulane* line of anti-trans holdings),²⁰ it would not be until 2006, after dozens of gay-only federal employment anti-discrimination bills over three decades, but no trans-inclusive ones, that a court would revisit the forgotten possibility of Ramona Holloway’s case.²¹ For there had been a dissent in 1977

17. See Jefferson, *supra* note 2, at 144–47.

18. Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMPLE L. REV. 283, 319 (1997).

19. See Equality Act of 1974, H.R. 14752, 93rd Cong. (1974) (prohibiting discrimination on the basis of sex, marital status, or sexual orientation).

20. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 229 (1989).

21. See Katrina C. Rose, *When is an Attempted Rape Not an Attempted Rape? When the Victim is a Transsexual*—Schwenk v. Hartford: *The Intersection of Prison Rape, Title VII and Societal Willingness to Dehumanize Transsexuals*, 9 AM. U. J. GEN. SOC. POLY & LAW 505, 519 (2001). For the initial pro-trans influence of *Price Waterhouse*, see Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000); see also Rosa v. Park West

from, to be fair to the memory of Richard Nixon, yet another of his appointees. “This is not a ‘sexual preference’ case,” Judge Alfred Goodwin wrote, “[T]his is a case of a person completing surgically that part of nature’s handiwork which apparently was left incomplete somewhere along the line.”²²

Without referencing it explicitly, he seems to have been agreeing with one of the more straightforward arguments put forth by Holloway’s attorney, Howard DeNike. Responding to Arthur Andersen & Co.’s suggestion (which foreshadowed *Goins v. West Group*)²³ and to the implication that even if no absent protection exists during transition, everything would be fine once a trans woman completes genital surgery (and that all employers concerned enough about a trans employee’s genitals to demand to know what they look like would protect trans employees from any internal disparate treatment that might result from the outing that by definition would result from being forced to ‘prove up’ genital acceptability), DeNike illustrated that such reasoning would never be acceptable as to any other Title VII protected classification.²⁴ “By analogy,” he argued, “an employer is not entitled to discriminate against an employee for studying to *convert* to Catholicism or Judaism any more than it is entitled to discriminate against him or her for *being* a Catholic or a Jew.”²⁵

If “religion” includes ‘change of religion,’ then why shouldn’t “sex” include ‘change of sex’? That question, along with its obvious, trans-positive answer, disappeared from Title VII analysis after *Holloway*, and in *Ulane v. Eastern Airlines* the Seventh Circuit went to great

Bank, 214 F.3d 213, 216 (1st Cir. 2000). Neither was a Title VII case, but each involved interpretation of “sex” in a federal remedial statute. *Schwenk*, 204 F.3d at 1192, 1201; *Rosa*, 214 F.3d at 214–15. In *Schwenk*, Judge Stephen Reinhardt was blunt: “The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.” *Schwenk*, 204 F.3d at 1201. For transsexuals, *Price Waterhouse*, and Title VII, see *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).

22. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (Judge Goodwin, dissenting).

23. *Goins v. West Group*, 635 N.W.2d 717, 723 (Minn. 2001) (holding that “the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender.”).

24. Appellee’s Brief at 6, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (No. 76-2248).

25. Appellant’s Rebuttal Brief at 3–4, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (No. 76-2248) (emphasis added). Race is usually left out of this analogy, though DeNike did utilize a hypothetical of an African-American person being forced to endure hair-straightening as a condition of employment. *Id.* It is worth noting that one christianist opponent of the 1981–82 federal gay-only rights bill attempted to make the case that even *race* is a choice, at least in the context of being able to pass as a race other than the person’s legally designated race. *Hearing on Civil Rights Act Amendments of 1981, H.R. 1454 Before the Subcomm. on Emp’t Opportunities of the H. Comm. on Educ. and Lab.*, 97th Cong. 52–53 (1982) (citing a discussion between bill opponent Connie Marshner and Rep. Hawkins).

rhetorical lengths to prevent it from ever reemerging. “After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot’s certificate, it may be that society, as the trial judge found, considers Ulane to be female,” Judge Harlington Wood wrote.²⁶ “But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.”²⁷

Professor Arthur Leonard saw the “main problem” with *Ulane* as being “the failure of the federal appellate courts to take seriously the discrimination and misunderstanding transsexuals suffer.”²⁸ Of at least equal magnitude, was the abject failure of the Seventh Circuit to contextualize transsexuality, either historically or politically, the intersection of which was the court’s failure to properly deal with any of the law involved. The fact that Illinois’ transsexual birth certificate statute predated the Civil Rights Act of 1964, therefore being in play as law that legislators of 1964 (including Illinois’ Everett Dirksen, who ushered the bill to its finish line by moving for final cloture)²⁹ should be presumed to have been aware of, is not something that one would become aware of by reading the *Ulane* opinion.³⁰ That magnitude of erasure was subsequently exceeded by the dishonesty of Eastern’s counsel who, in opposing Karen Ulane’s attempt to get the Supreme Court to hear her case, asserted that had “sexual orientation” ever been successfully added to Title VII, the addition would have benefited Ulane’s case.³¹ None that had been proposed prior to April 24, 1981, the date Eastern terminated her, would have done so.³²

26. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

27. *Id.* It seems likely that that court would have decided the case had the issue been the validity of a marriage by a post-op Karen Ulane to a man given the Illinois Supreme Court’s expansive read of the state’s birth certificate statute. *See City of Chicago v. Wilson*, 389 N.E.2d 522, 523 (Ill. 1978).

28. ARTHUR S. LEONARD, *SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES* 437 (N.Y. and London 1993).

29. *See* 88 Cong. Rec. 110, 13,328 (1964).

30. Even an early trial court ruling in favor of Karen Ulane, which explicitly adopted the reasoning of Judge Goodwin’s *Holloway* dissent, did not broach the subject of whether enacted legislation recognizing change of sex, as opposed to failed gay rights legislation that did not mention trans people, could or should impact judicial construction of statutory usage of the word “sex.” *See Ulane v. Eastern Airlines Inc.*, No. 81 C 4411, 1982 U.S. Dist. LEXIS 13049, at *3 (N.D. Ill. Apr. 21, 1982).

31. Respondent’s Brief in Opposition at 12, *Ulane v. Eastern Air Lines, Inc.*, 471 U.S. 1017 (1985) (No. 84-1238) (using two-word spelling of “Airlines” in original).

32. The 1979 bills’ definition of “affectional or sexual orientation” was only “male or female homosexuality, heterosexuality, and bisexuality by orientation or practice.” Civil Rights Amendments Act of 1979, H.R. 2074, 96th Cong. § 11 (1979); S. 2081, 96th Cong. § 2 (1979). The 1981 House bill was identical as to the lack of possible trans coverage, but it did add a nod to those fearing intergenerational sex by adding the phrase “by and between consenting adults” to the definition. *Compare* Civil Rights Amendments Act of 1981, H.R. 1454, 97th Cong. § 8 (1981), *with* David B. Goodstein, *Private Sex the First*

That *status quo* would hold for more than a quarter-century, but in 2005, the Library of Congress (LOC) yanked a terrorism research analysis position out from under Diane Schroer as unceremoniously as the Ralph K. Davies Medical Center had done with Carol Voyles' medical position three decades earlier, and for the same reason.³³ One difference between the scenarios was that even though Schroer had been hired while still presenting as male, she had not yet formally begun work at LOC.³⁴ During a meeting with a member of the Congressional Research Service (CRS) "to discuss the administrative details of Schroer's start and to introduce her to some of her future colleagues," Schroer revealed that she was in the process of transitioning.³⁵ The next day, the same CRS member suddenly decided that Schroer would not be a "good fit."³⁶ In her resulting employment discrimination suit against the LOC, District Judge James Robertson, a Clinton appointee, was unwilling to accept *Price Waterhouse's* expansive gender stereotyping.³⁷

But Schroer prevailed nevertheless.³⁸

Although referring back only as far as the rejected trial court opinion from the *Ulane* litigation rather than to the *Holloway* dissent, Robertson opined that "it may be time to revisit . . . [the interpretation of Title VII] that discrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of . . . sex.' That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity."³⁹ The *Ulane* trial judge had been unconvinced by the *post hoc* ascribing of anti-transsexual intent to Title VII based not just on gay-only rights bills but their failure to pass. District Judge John F. Grady said, "I think that argument is invalid. There is in the record before us evidence which makes quite clear that there is a distinction between homosexuals and transvestites on the one hand and transsexuals on the other."⁴⁰ Robertson was far more blunt in rejecting what had *not*

Step Only—Porn, Pederasty, OK, But What About Public Sex?, THE ADVOCATE, Apr. 10, 1974, at 43. The other post-*Holloway* proposals included definitions of "affectional or sexual preference" that read "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment." Civil Rights Amendments of 1975, H.R. 451, 95th Cong. § 11 (1977); Civil Rights Amendments of 1977, H.R. 2998, 95th Cong. § 11 (1977).

33. *Schroer v. Billington*, 424 F. Supp. 2d 203, 205–06 (D.D.C. 2006).

34. *Id.* at 206.

35. *Id.*

36. *Id.*

37. *Id.* at 209.

38. *Id.* at 212–13.

39. *Schroer*, 424 F. Supp. 2d at 212 (quoting *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983) (emphasis in the *Schroer* opinion) (internal citations removed)).

40. *Ulane*, 581 F. Supp. 821, 823 (N.D. Ill. 1984).

happened since 1964: “The silence of forty years is simply that—silence.”⁴¹ However, that silence Robertson was observing was not simply the failure of forty years of law to speak for (or against) transsexuals, but also the failure of forty years of Title VII (and, subsequently, employment-only) proposals to address any trans people in any way.

That silence would give way to cacophony in 2007.

B. Mapping Out a Decade

The ensuing intra-community battle in D.C. and across America over the 2007 change from gay-only to trans-inclusivity in a federal gay rights bill⁴² would demonstrate how little *else* had actually changed in the three-and-a-half decades since New York City’s initial attempt to enact a gay rights ordinance which established trans-exclusion as a legislative strategy acceptable to those who would not be negatively affected by it and a politico-economic cancer to those who would be.⁴³ By 2007, several states had followed Minnesota in enacting trans-inclusive civil rights laws; some did so as the back end of ‘incremental progress’ but others *truly* followed Minnesota and did so non-incrementally.⁴⁴ And by 2007, even more states had enacted transsexual birth certificate statutes, legislation which allows trans people to obtain identity documentation that does not out them at every turn; in fact, far more states had enacted such legislation than had approved of same-sex marriage by any means (and more than have ever approved of it legislatively, even following *Obergefell v. Hodges*).⁴⁵ Some previously trans-exclusive organizations, such as the National Gay—Lesbian Task Force (NGLTF), adopted inclusive policies;⁴⁶ the Human Rights Campaign (HRC) even on occasion appeared to move toward inclusivity, but the moves were rarely what they were presented to trans people as being. ‘Incremental progress’—LGB rights secured first and then,

41. *Schroer*, 424 F. Supp. at 212.

42. Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397, 397–99 (2009); ISAAC WEST, *TRANSFORMING CITIZENSHIPS: TRANSGENDER ARTICULATIONS OF THE LAW* 145 (N.Y.U. Press 2014).

43. See *Transvestite Rebuffs “Straight” Gays*, GAYACTIVIST, Dec. 1971–Jan. 1972, at 11.

44. Rose, *supra* note 42, at 409–10.

45. Sadly, some in academia have viewed the success in obtaining such legislation as not being a significant, positive accomplishment as against the government. See Katrina C. Rose, *Is the Renaissance Still Alive in Michigan? Or Just Extrinsic? Transsexuals’ Rights After National Pride at Work*, 35 OHIO N. U. L. REV. 107, 141 (2009).

46. Steve Rothaus, *Just Before Saturday’s Miami Beach Dinner, National Gay and Lesbian Task Force Rebrands Itself National LGBTQ Task Force*, MIAMI HERALD (Oct. 8, 2014), <http://www.miamiherald.com/news/local/community/gay-south-florida/article2583582.html> [<http://perma.cc/LFD7VHU4>].

at some undefined point in time which is always over the horizon, trans rights might have their day—was more than a political strategy; it was nothing short of a religion.

Catholicism, circa 1632—with HRC assuming the role of Pope Urban VIII.

Many trans activists felt forced to spend as much, or even more, energy battling against HRC than proactively lobbying Congress because the two institutional problems came to be a perverse political merry-go-round off of which no one could or would jump: HRC, guided by the view that only a gay-only ENDA could be feasible, secretly lobbying Congress against trans activists' efforts to seek trans-inclusion,⁴⁷ resulting in a Congress that believed only a gay-only ENDA could be feasible, necessitating trans activists lobbying Congress as much against HRC's secret lobbying as for substantive legislative inclusion. And when push came to shove in 2007, trans people were told, as Isaac West summarized the anti-inclusion mantra, that they "had only recently interjected themselves into this legislative struggle and were coming in at the last moment to profit off of the work of others."⁴⁸ As such, per the orthodoxy, there could be no reasonable expectation of having trans issues play any role in substantive national political negotiations—leaving trans people perpetually dependent, never deserving and forever second-class *within* the second class.

This Article analyzes the last decade in the often painful relationship trans people have had with lesbian, gay, and bisexual political activism at the national level, leading up to 2007's Black Wednesday,⁴⁹ the *de facto* removal of trans people from that year's ENDA bill.⁵⁰ Although the story does begin with Bella Abzug's 1974 gay-only rights bill, it was not until LGB and T rights became an issue during late-1980s debates leading to the Americans with Disabilities Act⁵¹ that the ease with which trans people would be thrown under the bus became impossible to ignore.⁵²

47. See Sarah Fox, *The Subversion of the American Transgender Movement*, HRC WATCH, <http://www.gendernet.org/hrcwatch/subvert.htm> [<http://perma.cc/3VVAKAHX>].

48. WEST, *supra* note 42, at 152.

49. It is unclear who first used the phrase "Black Wednesday" to refer to September 26, 2007, though it seems to have been trans activist Autumn Sandeen, in a post at Pam Spaulding's *Pam's House Blend* blog. Autumn Sandeen, *Notes From the ENDA "Sidelines,"* PAM'S HOUSE BLEND (Oct. 4, 2007, 3:33 PM), <https://web.archive.org/web/20101223122306/http://pamshouseblend.com/showDiary.do?diaryId=3163> [<http://perma.cc/6B9CXYBS>].

50. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. §§ 2, 3(a)(6) (2007). It was not technically a removal given that the original inclusive 2007 ENDA bill remained inclusive. It was, however, supplanted by the gay-only H.R. 3685. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. §§ 2, 3(a)(8) (2007).

51. Americans with Disabilities Act of 1990, S. 933, 101st Cong. § 511(b)(1) (1990).

52. See Cliff O'Neill, *AIDS/HIV Anti-Bias Bill Passes Senate: Vote Excludes*

During the next decade, the conservative, corporate nature of D.C.-based gay activism solidified. Apple executive and attorney Elizabeth Birch assumed the leadership of the Human Rights Campaign Fund,⁵³ aiming to make HRCF into “the AARP of the gay community.”⁵⁴ Soon thereafter the “F” disappeared (leaving simply “HRC”) and the organization adopted a logo even less sexuality-referencing than its earlier ‘torch’ logo had been and hardening its resolve to oppose calls by trans people for inclusion in federal gay rights proposals, which by 1994 had been reduced from Bella Abzug’s all-encompassing (albeit gay-only) bills to amend the Civil Rights Act to the employment-only ENDA.⁵⁵

The drafting process for the new ENDA had purposely omitted trans people along with “marital status” because it was felt the two categories would “create additional weight for ENDA.”⁵⁶ But trans people were not just out of the bill, they were out of the conversation, at least as active participants. In 1994, in the first ENDA hearing, the Family Research Council’s Robert Knight regaled the committee with assertions that “a male employee could [one] day come to work in a dress and high heels, stating that this is now part of his identity.”⁵⁷ Right-wing media trumpeted the bill as including “transvestites and persons who have had sex-change operations.”⁵⁸ The first ENDA bill did include the term “identity” as part of the definition of “sexual orientation,” but no precedent existed then (or now) for the claim Knight

“*Homosexuals, Pyromania, Compulsive Gambling*,” *OUTWEEK*, Sept. 24, 1989, at 18, 19 (noting trans people’s exclusion from anti-discrimination bill).

53. Lois Romano, *From Bytes to Rights*, *WASH. POST*, Nov. 22, 1994, at D3.

54. K.C. Swanson, *A Pragmatic Push for Gay Rights*, *NAT. J.*, Mar. 1996, at 659. See also Text of Speech to IBM Diversity Council (Apr. 1998) (transcript available in Box 78, Folder 9, Human Rights Campaign Records, 1975–2005, Coll. No. 7712, Cornell University Library, Division of Rare and Manuscript Collections, Ithaca, N.Y.) [hereinafter CUL] (describing the organization as a kind of hip, “gay AARP”).

55. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149 (John D’Emilio et al. eds, 2000) (explaining the change from Bella to ENDA); Ashley Fetters, *What Happened to Rainbows? Why Facebook Turned Red for Gay Rights*, *THE ATLANTIC* (Mar. 28, 2013), <http://www.theatlantic.com/sexes/archive/2013/03/what-happened-to-rainbows-why-face-book-turned-red-for-gay-rights/274450> [<http://perma.cc/36LJENSE>] (describing the HRC’s 1995 logo change); see also *Why The Transgender Community Hates HRC*, *TRANSGRIOT* (Oct. 8, 2007), <http://transgriot.blogspot.com/2007/10/why-transgender-community-hates-hrc.html> [<http://perma.cc/UN4NEXX2>] (indicating HRC’s position against trans inclusion in 1990s).

56. Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 *N.Y. L. SCH. J. HUM. RTS.* 623, 627 (2000).

57. *Employment Non-Discrimination Act of 1994: Hearing on S. 2238 Before the S. Comm. on Lab. and Hum. Res.*, 103rd Cong. 36–37 (1994) (testimony of Robert Knight, Director of Cultural Affairs, the Family Research Council).

58. *Homosexual Rights Bill on Fast Track in Congress*, *COLO. CHRISTIAN NEWS*, Aug. 1994, reprinted in *PROCEEDINGS FROM THE THIRD INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY* at A-26 (1994).

made.⁵⁹ Attempting to rhetorically situate transsexuality within his own term, “homosexual orientation,”⁶⁰ Knight was walking in the shoes of James A. Stephens, counsel to the Republican minority at the first hearing on a federal gay(-only) rights bill in 1980, who attempted to deploy M*A*S*H’s Corporal Klinger against the bill.⁶¹

Texas trans activist, later judge, Phyllis Frye led the charge on inclusion along with Vermont’s Karen Kerin.⁶² Frye recalled “we could only watch as ENDA was discussed. Transgenders had been omitted, and much of the anti-ENDA attacks were centered around cross-dressing at work.”⁶³ In real time, Frye and Kerin were not allowed to be visible voices in opposition,⁶⁴ either to the legal misrepresentations made by Knight or to the LGB establishmentarian ENDA class definition that, despite Knight’s scare tactics, would not have afforded *any* protections to trans people as trans people had the bill become law. As such, at that first ENDA hearing, the philosophy of trans-exclusion crystallized as both substantive *and* symbolic. It would come to embody the political ‘double bind’ for trans people. Long subject to the paradox of being branded as both too conservative⁶⁵ *and* too radical,⁶⁶ the misrepresentation by the christianist Knight

59. Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. § 18(12) (1994).

60. *Employment Non-Discrimination Act of 1994: Hearing*, *supra* note 57, at 37 (statement by Knight).

61. Civil Rights Amendments Act of 1979, *supra* note 32, at 54–55.

62. Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 451, 462 (John D’Emilio et al. eds, 2000).

63. *Id.* According to Frye, Vermont trans activist Karen Kerin found out about the non-inclusive language from sources within Vermont’s U.S. Senate office after asking to see the bill that those in the office were, in Frye’s words, “excited about.” Phyllis Randolph Frye, *Opinion: If ENDA Had Been TG Inclusive, It Would Have Passed the US Senate Vote, Sept. 12 1996*, in *PROCEEDINGS FROM THE FIFTH INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY* 17 (1996).

64. Frye, *supra* note 62, at 462.

65. Transsexual women who aspired to and achieved normative femininity were derided as “Uncle Toms of the sexual revolution” and elements of the gay community that did accept trans women were hounded by the transphobic elements into abandoning transsexuals. JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 259 (Harvard U. Press 2002); *see* Judy Dlugacz, *If it Weren’t for the Music: 15 Years of Olivia Records*, *HOT WIRE: J. WOMEN’S MUSIC & CULTURE*, July 1988, at 31. Some lesbian separatists later celebrated androgyny *and* painted transsexuality as not merely an end run around homosexuality but also as a patriarchal conspiracy against all women, gay and straight. *See* MEYEROWITZ, at 259; *see also* JANICE G. RAYMOND, *THE TRANSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* 16 (1994); *see also* Susan Stryker, *(De)Subjugated Knowledges: An Introduction to Transgender Studies*, in *THE TRANSGENDER STUDIES READER* 1 (Susan Stryker & Stephen Whittle, eds. 2006); *see also* Victoria A. Brownworth, *Transsexuals in the Lesbian Community: The Ultimate in Male Power-Tripping?* *PHILA. GAY NEWS* (May 29, 1981), <http://www.tsroadmap.com/info/victoria-brownworth.html> [<http://perma.cc/K5XWJSEG>].

66. Transsexuality-infused gender conformity was nevertheless seen as too nonconformist for inclusion in early efforts to pass anti-discrimination laws. PAISLEY CURRAH

demonstrated that trans people would be damned if they weren't included in legislation in the first instance and they also would be damned—held responsible by gay opponents of inclusion for, among so many sins of so many others, conservative perceptions of a gay-only ENDA as covering cross-dressers⁶⁷—for becoming sufficiently politically active in seeking to make real the nonexistent inclusion for which they were already being scapegoated.⁶⁸ What then could ever be trans people's reward for *not* demanding inclusion and demanding it loudly and unceasingly?

A “summit meeting,” as Chai Feldblum describes it, took place in early 1995 between HRCF and trans leaders in an attempt to reach a “resolution” on trans inclusion.⁶⁹ There was no movement to include trans people proactively but HRCF “agree[d] not to oppose any [attempted] amendment[s]” thereafter.⁷⁰ The trans activists were not content to fall limp and play nice, however. A dozen trans leaders met in D.C. to discuss strategy, including consideration of a trans-specific march on Washington because, as Frye said at the time, “obviously we’re being left out of everything.”⁷¹ The immediate task at hand, though, was interaction with members of Congress, but on the trans activists’ terms rather than HRCF’s. The strategy involved not simply asking those who were not then cosponsoring ENDA to do so if trans people were included but asking them specifically to withhold cosponsorship if there was no inclusion.⁷² Working from the prevailing assumption that exclusion happened because of a political calculus indicating that inclusion would cost a certain number of votes, Frye tersely indicated, “we’re going to find [an equal number] that it will cost to leave us out”⁷³ In short, trans people could play the numbers game as well.⁷⁴ After all, what could ever be trans people's reward for *not* refusing to compromise?

& SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICY MAKERS* 20 (2000) (discussing early efforts in Minnesota).

67. *Political Suicide*, WINDY CITY TIMES, Mar. 23, 1995, at 13.

68. As Professor Jill Weiss has phrased it, “[t]ranssexuals violated the tacit social understandings of the homosexual community in the U.S. both by failing to pass and passing too much.” Jillian T. Weiss, *Transphobia In the Gay Community*, BILERICO PROJECT (Dec. 11, 2009), http://www.bilerico.com/2009/12/transphobia_in_the_gay_community.php [<http://perma.cc/3Y3D7G38>].

69. Feldblum, *From Bella to ENDA*, *supra* note 55, at 183.

70. *Id.*

71. Sue Fox, *Transgenders Fight for Inclusion*, WASH. BLADE, Mar. 17, 1995, at 31.

72. *Id.*

73. *Id.* (brackets in original).

74. There was no clear, immediate payoff, but Minnesota Senator Paul Wellstone, in no small part because his state was home to the only trans-inclusive state gay rights law at the time, expressed agreement that ENDA should be trans-inclusive. *Id.* (paraphrasing in original; capitalization not in original).

Compromise, conciliation, and consultation did nothing to secure inclusion in the new ENDA bill introduced in 1995.⁷⁵ At the fourth annual International Conference on Transgender Law and Employment Policy (ICTLEP) in Houston, the power of a new activism tool, the internet, went on display. With most notable trans leaders gathered under one roof, the internet immediately delivered the news that ENDA had been reintroduced, without trans inclusion.⁷⁶ Sarah DePalma downloaded the bill, noticed the still-non-inclusive language and brought it to the attention of the attendees.⁷⁷ As Frye noted at the time it, “[a] collective ‘bomb’ went off”⁷⁸ An impromptu planning session took place which yielded the development of a strategy to protest against HRCF.⁷⁹

“The Internet came to life,” Frye wrote in retrospect, “HRC became the whipping post, and we whipped hard.”⁸⁰ Feldblum has expressed an understanding for the degree of anger that erupted, flowing toward HRCF in general and her specifically.⁸¹ She wasn’t fond of it in the moment but came to believe it was necessary. “I celebrate it for that.”⁸² A press release from the direct action entity Transsexual Menace made it clear that HRCF was the enemy in the battle for inclusion—and that history would be a political weapon, noting that it was “simply beyond belief,” that during the week in which the anniversary of Stonewall was being celebrated, “HRCF has completely forgotten who was at the Stonewall Inn that night 26 years ago.”⁸³

In the years that followed, trans unease with HRC(F) grew into distrust and eventually into open hatred, taking form as trans-led boycotts⁸⁴ and pickets against its D.C. headquarters⁸⁵ as well as

75. Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995).

76. See Frye, *supra* note 62, at 463–64.

77. *Trans Community Protests Human Rights Campaign Fund*, AEGIS NEWS, 1995, at 11.

78. Frye, *supra* note 63, at 18.

79. *Transgender Community Protests Human Rights Campaign Fund*, *supra* note 77, at 11; Transsexual Menace, untitled electronic posting, n.d., Box 17, AEGIS Correspondence, Folder—1995 Jan.–July, National Transgender Library & Archive [hereinafter NTLA], Labadie Collection—University of Michigan, Ann Arbor, Michigan [hereinafter LC-UMI].

80. Frye, *supra* note 62, at 464.

81. Feldblum, *supra* note 56, at 629.

82. *Id.*

83. Press Release, Transsexual Menace, The Transsexual Menace Calls for Protest of HRCF’s Transphobia (June 19, 1995) (available at Box 19, AEGIS Miscellaneous, Folder—1995, NTLA, LC-UMI). Of note, Riki Wilchins was listed as the main Menace contact person. *Id.* Texans Frye and DePalma were listed as “non-Menacing” alternate contacts. *Id.*

84. James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 39 (2001); Crystal Little, *For the Record*, THE FLIP SIDE, Jan. 1998, at 1.

85. The spring 2004 protest was chronicled in the documentary Timothy Watts,

trans groups returning HRC grant money⁸⁶—as the organization not only continued to oppose inclusion in ENDA but regularly displayed contempt for the legitimacy of trans concerns. Even when it appeared to be moving toward inclusiveness, it demonstrated that any statement from it as an organization or from any of its representatives had to be parsed, almost syllable-by-syllable, to determine what the intentions toward trans people being expressed actually were (or even were being portrayed as being). Eventually, even an explicit statement of ENDA-inclusion support in 2007, from Birch's almost-immediate successor, Joe Solmonese,⁸⁷ immediately proved not to be trustworthy. And by the end of the ENDA Crisis,⁸⁸ even the *Washington Blade*, which historically sided with HRC on the issue of 'incremental progress,' seriously questioned the organization's credibility over the results of a suspiciously timed HRC-commissioned poll purporting to show widespread community support for HRC's ENDA stance.⁸⁹

C. Mapping Out the Article

This Article is not simply a look backward which revisits the rancor of 2007. Instead, it plots the trajectory of trans legislative politics at the federal level from 2007 forward, and it uses history to do so. To adequately illustrate what has, and more importantly, what has *not* occurred over the past decade, the substance of the Article necessarily begins with 2007. As such, the Article's introduction has thus far offered a brief synopsis of the seemingly insurmountable wall of case law that the federal courts erected to the detriment of trans people during the time period that an emergent professionalized gay rights movement was pushing forward (almost quixotically given the makeup of Congress) with the first federal gay civil rights bills—also to the detriment of trans people. Part I

Citizen Lobbyist, YOUTUBE (June 7, 2015), <https://www.youtube.com/watch?v=r118ztiIR8I> [<http://perma.cc/V7DVV4XB>].

86. Nicholas Boston, *N.J. Trans Group Returns Grant—Group Alleges Human Rights Campaign Ignores Needs of Transgender People*, GAY CITY NEWS, June 17, 2004.

87. Between Birch's eight years in charge and Joe Solmonese assuming control in 2005, former Massachusetts State Senator Cheryl Jacques briefly headed the organization. Lou Chibbaro, Jr., *HRC's Jacques Resigns Under Fire*, WASH. BLADE, Dec. 3, 2004.

88. This is the term utilized by Gunner Scott (and, as he acknowledges, utilized by others). Gunner Scott, *Boston Area Transgender Community Leaders and the "ENDA Crisis": An Oral History Project 5* (Aug. 2009) (unpublished B.A. Thesis, Goddard College). A B.A. thesis might otherwise not be authoritative, but Scott is a longtime Massachusetts trans activist and former head of the Massachusetts Transgender Political Coalition (MTPC). *See id.* at 7–8.

89. *See* Joshua Lynsen, *Experts Question HRC's Controversial ENDA Survey*, WASH. BLADE, Nov. 30, 2007.

does deal with 2007, examining how the first ever trans-inclusive ENDA bill suddenly morphed into a non-inclusive one and how a promise of solidarity vanished into a puff of malconceived revisionist history that not only painted trans people as lazy latecomers who were unworthy of an expenditure of gay political capital, but also denigrated trans legal progress as little more than the delusion of an apolitical Munchkin.

Part II details the successes, and the one notable failure, of the biennium following the 2007 ENDA Crisis. The Democrats still controlled Congress—and now there was a Democratic president as well.⁹⁰ ENDA, which would benefit the vast majority of LGBT people (essentially, all LGBT individuals not of sufficient independent wealth to not have any concern about potential employment discrimination), would have seemed to be *the* top priority of an LGBT rights agenda that had long utilized Spock's chestnut, "the needs of the many outweigh the needs of the few,"⁹¹ to justify not having to make any (much less any *significant*) sacrifice to achieve the goal of an inclusive ENDA. Instead, by the time the Republicans retook control of the House following the 2010 elections,⁹² ENDA was *the* legislative goal that was most firmly shunted off to oblivion. Those victories which did emerge from the 111th Congress, far from actually uniting the LGB and the T, only emphasized the second-class status of trans people within their own civil rights movement.

Part III moves forward through the remainder of the Obama presidency. In 2016, as the sand runs out of the hour glass that was eight years of potential, two different—and insofar as how active trans people live their daily lives—incompatible interpretations of the era are being created for use as LGB(T) history. One privileges above all else the positive developments emanating from *Price Waterhouse v. Hopkins* and demands a total absence of criticism thereof. The other recognizes that even though many trans people have utilized them to better their lives and careers, those *Price Waterhouse* developments nevertheless are nothing that cannot be erased by a majority opinion of a Supreme Court which might negate Justice Brennan's plurality reasoning of a generation ago. It is a view of post-'ENDA Crisis' history which does not let the piece of proposed legislation

90. Elana Schor, *Democrats in Firm Control of Both Houses*, THE GUARDIAN (Nov. 5, 2008, 7:01 PM), <https://www.theguardian.com/world/2008/nov/06/us-elections-2008-democrats-congress-house-representatives> [http://perma.cc/A3QPJGB3].

91. *Star Trek II: The Wrath of Khan*, IMDB, http://www.imdb.com/title/tt0084726/trivia?tab=qt&ref_=tt_trv_qu [http://perma.cc/8STVBX7T].

92. Paul Harris & Ewen MacAskill, *US Midterm Election Results Herald New Political Era as Republicans Take House*, THE GUARDIAN (Nov. 3, 2010, 12:22 PM), <https://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party> [http://perma.cc/2VVEC96M].

which would have benefited the most LGBT individuals become lost in the euphoria of smaller victories. And, due to the empirical reality of there always being more LGBT individuals than LGBT couples, marriage constitutes but one such *smaller* victory.

It is also a view of post-‘ENDA Crisis’ history which questions the degree to which enactment of trans-inclusive hate crimes legislation actually is a victory at all. Unlike anti-discrimination laws which, to some degree, are known to cause those otherwise inclined to refuse to hire members of protected classes to not so refuse, hate crimes laws protect from crime members of protected classes to no greater degree than criminal laws whose convictions are not potentially enhanced by hate crimes provisions. In light of its existence being within the realm of criminal law, the degree to which the hate crimes statute is usable will, absent a federal re-creation of a common law right of private prosecution, always be dependent on the willingness of federal prosecutors to use it. Moreover, as one of the first (and possibly *the* first) opportunities for the law to be used demonstrated, irrespective of any decision to prosecute, there will always be battles over who can claim the dead. As surely as the entirety of the LGBT community can claim the victims of the 2016 Orlando Pulse massacre, the 2009 federal hate crime law just as surely did, and indeed could do, nothing to prevent it. And even if there was some way to use the law as an actual preventative in some manner that the Obama DOJ had overlooked inadvertently, who can believe that the Trump-Pence DOJ, headed by Jeff Sessions, would not act similarly, only purposefully and with animus?

The conclusion points out that, however much things appear to change regarding intra-community roadblocks to inclusion, other critical things stay the same. Words of apologies must be examined syllable-by-syllable to determine whether there is any evidence of substance. Where gay mass media history proves to be questionable, trans mass media history proves to be abominable. And the void left by the absence of an accessible, usable body of transgender legal history is filled by the Styrofoam persona of a reality TV refugee.

I. 2007: AN ILLUSION OF INCLUSIVITY, THE IMPLOSION OF THE ILLUSION, AND THE INTRANSIGENCE OF INSTITUTIONS

A. *The Public Preface*

*Today, we will hear firsthand from individuals who have experienced employment discrimination based on their sexual orientation.*⁹³

93. *Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Emp’t, Lab. and Pensions, of the H. Comm. on Educ. and Lab.*,

On September 5, 2007, a House subcommittee held a hearing on H.R. 2015, the first-ever trans-inclusive ENDA bill.⁹⁴ At the time of the hearing, the general feeling among trans activists was that there would not be a problem in the lower chamber.⁹⁵ Yet, when perusing the transcript of the hearing, one can see subtle signs of the problems to come. The epigraph above is taken from the prepared statement of New Jersey Rep. Rob Andrews, the subcommittee chair.⁹⁶ He and others who spoke and submitted statements did so using the trans-inclusive language of the bill—but with that statement he telegraphed what would become obvious: in one key respect 2007 would be 1994.

The subcommittee would not hear from any people who had suffered from discrimination that would be covered by the new bill but which would not have been covered had any previous version of ENDA become law.⁹⁷ The subcommittee *would* hear from Barney Frank about “the transgender.”⁹⁸ To his credit, Frank offered a positive argument in favor of trans people that trans people themselves frequently make:

No one, I believe, in the history of the world has said, “You know what? Life is too easy. I think, although I was born a woman, I am going to act like a man. I think that would be a real lark. I think I will just go through life that way and invite physical abuse and invite all kinds of ridicule.”⁹⁹

However, Frank also told his colleagues, “I understand that this is a new issue for people.”¹⁰⁰

But what “people” was Frank speaking of? Of the thirteen members of the Democratic majority on the committee, all but Pennsylvania’s Joe Sestak came from states or major cities with pro-trans laws of some variety—either anti-discrimination law or birth

110th Cong. 3 (2007) (statement of Rep. Robert Andrews, Chairman, H. Subcomm. on Health, Emp’t Lab. and Pensions).

94. Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity*, 7 *SEXUALITY RES. AND SOC. POLY* 155, 163 (2010).

95. *Id.* at 163.

96. *Employment Non-Discrimination Act of 2007*, *supra* note 93, at II, 3 (statement of Rep. Robert Andrews).

97. See SUZANNE GOLDBERG, *GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE* 19–36 (2014).

98. *Employment Non-Discrimination Act of 2007*, *supra* note 93, at 12 (statement of Rep. Barney Frank).

99. *Id.* at 13.

100. *Id.* at 12.

certificate statutes.¹⁰¹ Yvette Clark had even been a cosponsor of New York City's 2002 transgender civil rights ordinance.¹⁰² The ten-member Republican minority did contain some of the most socially conservative House members, including North Carolina's Virginia Foxx (who in 2009 would assert on the House floor that Matthew Shepard's murder was a "hoax.")¹⁰³ All but two, though, came from states with some form of statewide pro-trans law; and one of those two, David Davis, represented Tennessee, which stands alone with its specifically anti-transsexual birth certificate statute¹⁰⁴ (which, yes, could imply knowledge *and* a negative attitude—but it would still stand in opposition to Frank's declaration).¹⁰⁵ This is not to

101. In addition to Pennsylvania, the states represented in the majority were New Jersey, California, Oregon, Iowa, Illinois (all with both), Michigan, Massachusetts (both birth certificate), New York (neither at state level, but both N.Y. representatives were from the N.Y.C. area) and Connecticut (which, since 2000, had purported to cover trans people via an expansive interpretation of "gender."). For subcommittee membership, see *Committee: 110th Congress Members & Jurisdiction*, COMM. ON EDUC. & LAB., <http://archives.republicans.edlabor.house.gov/Archive/110th/members.shtml> [<http://perma.cc/29G36TDG>]. For states with anti-discrimination laws, see *Non-Discrimination Laws that include gender identity and expression*, TRANSGENDER L. & POLY INST., <http://www.transgenderlaw.org/ndlaws/index.htm> [<http://perma.cc/FHN92XBY>] (listing New Jersey, California, Oregon, Iowa, Illinois, and New York City). For states with birth certificate laws, see CAL. HEALTH & SAFETY CODE § 103425 (West 1995) (California); 40 ILL. COMP. STAT. ANN. § 535/17(1)(d) (West 2007) (Illinois); IOWA CODE ANN. § 144.23(3) (West 2002); MASS. GEN. LAWS ANN. ch. 46, § 13(e) (West 1998) (Massachusetts); MICH. COMP. LAWS ANN. § 333.2831(c) (West 1997) (Michigan); N.J. STAT. ANN. § 26:8-40.12 (West 1984) (New Jersey). For Connecticut, see *Anti-Discrimination Law in Connecticut*, GLAD, <http://www.glad.org/rights/connecticut/cl/anti-discrimination-law-in-connecticut> [<http://perma.cc/K8V3JBHP>] (last updated Feb. 3, 2015). For Oregon see Or. Rev. Stat. Sec. 147.100, et. seq. For Pennsylvania, see Arli Christian, *Pennsylvania Updates Birth Certificate Gender Change Policy*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Aug. 9, 2016), <http://www.transequality.org/blog/pennsylvania-updates-birth-certificate-gender-change-policy> [<http://perma.cc/FA58XV9B>].

102. See N.Y.C., N.Y. LOCAL LAW No. 3 § 1 (2002).

103. Ryan Grim, *Virginia Foxx: Story of Matthew Shepard's Murder A "Hoax,"* HUFFINGTON POST (May 30, 2009, 5:12 AM), http://www.huffingtonpost.com/2009/04/29/virginia-foxx-story-of-ma_n_192971.html [<http://perma.cc/QK3ANMXP>].

104. TENN. CODE ANN. § 68-3-203(d) (West 1997) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.").

105. In addition to Davis's Tennessee and Texas, the other represented state with no positive law of either variety, the states represented in the majority were Minnesota, California, Washington (all with both), Michigan, Louisiana, Georgia and North Carolina (birth certificate statutes). For subcommittee membership, see *Committee: 110th Congress Members & Jurisdiction*, *supra* note 101. For states with anti-discrimination laws, see *Non-Discrimination Laws that include gender identity and expression*, *supra* note 101. For birth certificate laws, see CAL. HEALTH & SAFETY CODE § 103425 (Westlaw 2011); GA. CODE ANN. § 31-10-23(e) (2006); LA. STAT. ANN. § 40:62(A) (1986); MICH. COMP. LAWS ANN. § 333.2831(c) (Westlaw 1997); N.C. GEN. STAT. ANN. § 130A-118(b)(4) (West 2002); *Amending Minnesota Birth Certificates*, OUTFRONT MINNESOTA, <https://www.outfront.org/library/certificates> [<http://perma.cc/FL4DKVZH>]; *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <http://www>

suggest that the geographic makeup of the subcommittee should automatically translate into easy approval, even by that small body; the existence of pro-trans legislation (particularly the birth certificate statutes) can be obscured by how history is written (and not written). Rather, the makeup of the committee is relevant to suggest that Frank, never enthusiastic about the concept of an inclusive ENDA before or after 2007, may have been “talking down” the inclusive bill, much as George W. Bush had been accused of “talking down” the economy in the early days of his presidency.¹⁰⁶

The subcommittee heard attorney Lawrence Lorber express concerns about the portion of the bill that did cover bathrooms and shower facilities.¹⁰⁷ The statement in opposition to the bill by Diane Gramley, President of the American Family Association of Pennsylvania, focused exclusively on trans bathroom and shower issues.¹⁰⁸ Lou Sheldon and Andrea Lafferty, of the so-called Traditional Values Coalition (TVC), also focused exclusively on the trans aspects of the bill.¹⁰⁹ Interestingly though, it was *here* where the feelings expressed by Phyllis Frye and Karen Kerin in 1994 came home to roost; one of TVC’s key complaints was that no trans people were being allowed to testify for ENDA.¹¹⁰ Not surprisingly given the penchant of opponents of LGBT rights to portray themselves as victims, Sheldon and Lafferty framed this absence as something that was harming the christianist opposition.¹¹¹ They reasoned that any sight of any trans person at the hearing would trigger public opposition to the bill.¹¹²

Trans people would eventually become quite visible during the ENDA Crisis. The crisis, however, did not involve Sheldon and his ilk. Instead, it was precipitated by many who trans people had thought were finally firmly in the inclusion camp.

.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations [<http://perma.cc/X8MU6NE7>] (indicating that sex can’t be amended on an individual’s birth certificate in Texas); *Gender Change on a Birth Certificate*, WASH. STATE DEPT OF HEALTH, <http://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/GenderChange> [<http://perma.cc/58DF27CA>].

106. See PAUL BEGALA, *IT’S STILL THE ECONOMY, STUPID: GEORGE W. BUSH, THE GOP’S CEO 1* (2002) (indicating that President Bush had political incentives for criticizing the country’s economy); see also *Is President Bush Talking Down the Economy and Talking Up an Energy Crisis?*, CNN (Mar. 20, 2001, 7:30 PM), <http://transcripts.cnn.com/TRANSCRIPTS/0103/20/cf.00.html> [<http://perma.cc/853F8LWT>] (stating that President Bush “talked down the economy”).

107. *Employment Non-Discrimination Act of 2007: Hearing*, *supra* note 93, at 35, 38 (statement of Lawrence Z. Lorber).

108. *Id.* at 74 (statement of Diane Gramley).

109. *Id.* at 76–77 (statement of Louis P. Sheldon and Andrea Lafferty).

110. *Id.* at 76.

111. *Id.* at 77.

112. *Id.* at 76.

*B. Before the Hearing**1. Promise*

The promise of what 2007 could have been was on display even before the vote tallies of November 2006 were certified. George W. Bush still occupied the White House and, absent catastrophe or impeachment, was going to do so until January 20, 2009.¹¹³ Yet when Congress convened in January 2007, Democrats would control both houses for the first time in over a decade.¹¹⁴ “Leading gay rights activists, meeting to make post-election plans, have rightly chosen a trans-inclusive Employment Non-Discrimination Act as their top legislative priority,” the *Washington Blade*’s Kevin Naff wrote, not only reflecting the optimism of the moment but also seemingly signaling a move away from Chris Crain’s absolutist opposition to trans-inclusion.¹¹⁵ “ENDA has languished for far too long and polls have consistently shown that Americans are much further down the path of opposing employment discrimination than marriage discrimination.”¹¹⁶ Even the Log Cabin Republicans saw ENDA in 2007 as an easier sell than marriage.¹¹⁷ According to HRC legislative director Allison Herwitz, her organization was planning to give priority to ENDA and the hate crimes bill, and others would not be far behind.¹¹⁸

Even though it would subsist in Bush’s shadow, there was hope nevertheless for 2007–08 to be a “Do Something” Congress.¹¹⁹ But the limitations of 2007 soon became evident. Senator Ted Kennedy, never known to have much to say on trans issues, had been goaded

113. As to the latter, incoming Speaker of the House Nancy Pelosi declared immediately after the election that a Bush impeachment was “off the table.” Margaret Talev & William Douglas, *Election 2006—Pelosi Pledges to Unite Caucus—As the Expected Next Speaker of the U.S. House, Her Management Skills Will Quickly be Put to the Test*, MINNEAPOLIS STAR TRIBUNE, Nov. 9, 2006, at 11A.

114. *See id.*

115. Kevin Naff, *Good Riddance, Rick Santorum*, WASH. BLADE, Nov. 10, 2006 (capitalization altered from original). Crain left the *Washington Blade* and Window Media in 2006, though his anti-inclusion opinions—primarily contextual regurgitations of his ‘trans-jacking’ rants of 2004—would appear in other LGBT media throughout the 2007 ENDA Crisis. Chris Crain, LINKEDIN, <https://www.linkedin.com/in/ccrain> [<http://perma.cc/788XPPAC>].

116. Naff, *supra* note 115.

117. *Barney Frank Confident That ENDA Will Pass*, WEEKLY OBSERVER (TUCSON), Sept. 19, 2007, at 1, 3.

118. *LGBT, HIV/AIDS Bills To Be Considered By New Congress*, WEEKLY OBSERVER (TUCSON), Jan. 3, 2007, at 3.

119. Mark R. Kerr, *A “Do Something” Congress*, WEEKLY OBSERVER (TUCSON), Jan. 10, 2007, at 9.

into expressing amorphous support for trans rights generally during his 2006 re-election campaign—but nothing on ENDA.¹²⁰ By January of the new Congress, the void was on the verge of becoming negatively quantifiable. “We have been trying to get him to change his mind on this,” said Holly Ryan, co-chair of the Massachusetts Transgender Political Coalition (MTPC), but Kennedy’s staff in both D.C. and Massachusetts would not return their calls.¹²¹ ENDA, though, was not yet officially a bill, be it gay-only or trans-inclusive.

When ENDA *was* introduced in the House in April, it was trans-inclusive—a first.¹²² Massachusetts-based Nancy Nangeroni, founder and co-host of the *Gender Talk* radio program, recalled actually having “some misgivings,” wondering whether HRC actually had been pushed too hard and that the bill didn’t have “the grassroots support for inclusion it needed in order to be successful.”¹²³ The bill, though, *was* supported by a wide cross-section of mainstream labor and corporate interests.¹²⁴ HRC mentioned the trans-inclusivity but seemed to go to no great effort to call attention to it.¹²⁵ The hoopla of the bill’s introduction foreshadowed the malleability of rhetoric that would come to be synonymous with the rancor of the fall. Barney Frank invoked the history of the 1982 gay-only Wisconsin law—while nevertheless using trans-inclusive terminology.¹²⁶ Joe Solmonese introduced himself as the president of “the nation’s largest gay, lesbian, bisexual, and transgender advocacy organization” and declared that “nearly 90 percent of Americans believe that *gays and lesbians* should have equal employment opportunities. Furthermore, a healthy majority of Americans support congressional action to pass the Employment Non-Discrimination Act.”¹²⁷

120. Lou Chibbaro, Jr., *Kennedy Mum on New Version of ENDA*, WASH. BLADE, Jan. 19, 2007.

121. *Id.* (stating that, “[t]hey won’t talk to us.”).

122. Mara Keisling, *ENDA 2013: Everything You Need to Know*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/mara-keisling/enda-2013_b_3149607.html [<http://perma.cc/Y4ASFGPA>].

123. Scott, *supra* note 88, at 184 (citing an interview with Nancy Nangeroni).

124. Vitulli, *supra* note 94, at 163.

125. HUMAN RIGHTS CAMPAIGN, *Reps. Barney Frank, Deborah Pryce, Tammy Baldwin, Chris Shays Introduce Employment Non-Discrimination Act* (May 1, 2007), <http://vote.smart.org/public-statement/256295/bipartisan-employment-non-discrimination-act-introduced-in-the-house/?search=None%20-%20.WHsc3VMrKM8#.WIZfUVMrKM8> [<http://perma.cc/B797PWEC>] (indicating that the HRC President supported a bill that also banned discrimination based on gender identity).

126. *Id.*

127. HUMAN RIGHTS CAMPAIGN, *Statements of Support for the Employment Non-Discrimination Act* (Apr. 24, 2007), http://www.hrc.org/Template.cfm?Section=Press_Room&...6496&TEMPLATE=/ContentManagement/ContentDisplay.cfm (no longer active) (available with author) (emphasis added).

What truly mattered, though, were the opinions of a majority—or perhaps even less—of small clusters of individuals in Washington, D.C.

Within Congress.

And within HRC.

2. Assurance

Almost immediately, word began to circulate among rank-and-file trans people that anti-inclusion skullduggery was afoot—not only as to the Senate version of ENDA (which had not yet been introduced)—but also as to the inclusive House version which had been. NCTE's Mara Keisling tried to squelch such rumblings, reminding the participants on one e-mail list that her organization had “played an active part in drafting the new ENDA over the last three years.”¹²⁸ Every LGBT organization whose position she professed to know was, on May 23,

100% behind the bill and our inclusion in it. Congressman Frank is 100% behind the bill in the House. He is an absolute supporter of transgender rights and of our inclusion in ENDA. He is doing spectacular work on behalf of all LGBT people. No one is doing more. Period.¹²⁹

She then relied upon the authoritativeness of her relatively unique status as a trans woman gainfully employed within the cloistered world of professional LGB(T) activism.

Rumors that a non-inclusive ENDA will be introduced in the Senate are unequivocally only rumors that seem to have been started by individuals who appear to be out of the loop. Unfortunately lots of people who heard the rumors have spread them without verification. I cannot promise that an inclusive ENDA will be introduced—that is not up to me—but I will say that everyone in the process is very optimistic. I also will say that the rumors that were started are baseless and, I think, spreading them further would be irresponsible.¹³⁰

By 2007, Keisling's NCTE enjoyed the imprimatur of serious legitimacy that the civil rights establishment never allowed to be conferred upon the more grassroots National Transgender Advocacy

128. Posting of Mara Keisling, to *TGV_Advocacy E-mail List* (May 23, 2007), http://groups.yahoo.com/neo/group/TGV_Advocacy/message/14433 (available with author)

129. *Id.*

130. *Id.*

Coalition (NTAC.)¹³¹ Formed in 1999 by trans activists who saw HRC as not operating in good faith in lobbying Congress on ENDA,¹³² the organization had been on life support since the immediate aftermath of its major visible successes, the protests at HRC headquarters in Washington, D.C., in 2004.¹³³ Even so, NTAC was not yet dead.

NTAC-affiliated trans activists had been doing precisely what the HRC and Barney Frank had long publicly insisted that trans activists do in order to achieve the goal of a trans-inclusive ENDA. They had continued to lobby Congress. Such trans activists, who may never have gained access to the conference rooms in HRC headquarters, had nevertheless made contacts with members of Congress and their staffers. But they who were acting outside of channels approved by the professional advocates to spur action were not viewed as credible when they began to report activity that was making them uneasy.

However, in the spring there were indeed reports that “several” congressional offices were indicating that the language under consideration by Sen. Kennedy for the counterpart bill was not inclusive.¹³⁴ Moreover, “those offices were pretty upset” that the language was different from Frank’s House version.¹³⁵ “[W]hen we hear in 3 different offices that we MAY not be in Kennedy’s final ENDA bill,” A.G. Casebeer wrote, “and when 3 different teams of lobbyists report same, I have to regard that information seriously, and develop lobbying strategies for dealing with it.”¹³⁶ It was earlier in the same online thread, though, that Marti Abernathey looked back on much lobbying and projected the future that the activists seemed to fear that their observations held in store.

The word is that gender identity was written out of the bill. Furthermore, if you notice, HRC is saying they will only support, not

131. Vanessa E. Foster, *Post-Mortem on IFGE Conference*, TRANS POLITICAL (Feb. 12, 2009, 11:22 PM), <http://transpolitical.blogspot.com/2009/02/post-mortem-on-ifge-conference.html> [<http://perma.cc/8VYKHYGU>] (stating that “[w]hile NTAC used to ‘get the time of day’ from GLB groups until 2002, that stopped once Mara hit town.”).

132. E-mail from Vanessa Edwards Foster, to author (Dec. 15, 2015) (on file with author).

133. See Gwen Smith, *‘Equals’ Sign is Only for Some*, WASH. BLADE, May 21, 2004.

134. Posting of Kara Michelle Harkin, to *TGV_Advocacy E-mail List* (May 18, 2007), http://groups.yahoo.com/groups/TGV_Advocacy/message/14368 (available with author).

135. *Id.*

136. Posting of A.G. Casebeer, to *TGV_Advocacy E-mail List* (May 24, 2007), http://groups.yahoo.com/group/TGV_Advocacy/message/14438 (available with author) (emphasis in original). “A fact of the NTAC lobby days is that lobbyists were told in at least 3 offices/3 different sets of lobbyists that Kennedy was not going to produce a T-inclusive ENDA.” *Id.*

actively lobby against. A very real scenario is that HRC could withdrawal [sic] it's support, and the bill passes without us anyway. Then HRC can say, GOSH, WE TRIED . . . sorry. *The real question isn't whether or not they will support a trans-inclusive bill, it's will they actively lobby against passage of a noninclusive bill.*¹³⁷

Indeed, that would prove to be *the* question.

Some, including Ethan St. Pierre, felt it was a question that had been answered even before it eventually was asked publicly. Recalling, for Gunner Scott's oral history project, the NGLTF's National Policy Roundtable Spring 2007 Convocation, St. Pierre said, "[T]he head of another national organization raised his hand and asked a question while looking right to Joe Solmonese and asked the question if gender identity and expression was removed from either Hate Crimes or ENDA would he still support it?"¹³⁸ According to St. Pierre, rather than a congressional vote count, money was the calculus; how much money "might [they] lose by supporting legislation that didn't include gender identity[?]"¹³⁹ A pro-inclusion absolutist, St. Pierre nevertheless says he actually felt sorry for Solmonese when everyone else at the table thereafter went on the attack against the HRC head.¹⁴⁰ *His* sympathy, though, soon gave way to dread. Through eight hours of discussions, all other represented LGBT organizations were clear about being willing to oppose non-inclusive legislation, but Solmonese remained noncommittal.¹⁴¹ "No one ever came out and said we are going to be removed, but I knew it was is [sic] clear."¹⁴²

Somewhat ironically, and probably unintentionally, it was perhaps Keisling herself who, in retrospect, proved to be even more prescient. Responding to the suspicion and anger raging on the TGV_Advocacy e-mail list she expressed bemused disbelief. "All of this is moving exactly as you, me and many others have asked for years. But a few folks' reaction (not most folks, not the trans community) is: yes, but we were screwed several years ago and *we are about to lose again?* I just don't get it."¹⁴³

137. Marti Abernathey, Posting to *TGV_Advocacy E-mail List: The T Isn't Silent, But HRC Is*, YAHOO GROUPS (May 18, 2007), http://groups.yahoo.com/group/TGV_Advocacy/message/14357 (available with author) (emphasis added).

138. Scott, *supra* note 88, at 194 (explanatory brackets in original removed).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Mara Keisling, Posting to *TGV_Advocacy E-mail List*, YAHOO GROUPS (May 24, 2007), http://groups.yahoo.com/group/TGV_Advocacy/message/14434 (available with author) (emphasis added).

Opinions differ among trans activists (and not just those on that list) about just how genuine she was, insofar as her professed belief that things were going to be different in 2007—that Lucy would actually let Charlie Brown kick the football this time. Indeed, opinions even differ as to who should be portrayed as Lucy in that analogy.¹⁴⁴ In time though, some trans activists were willing to cut Barney Frank some slack. “HRC that’s another matter,” International Foundation for Gender Education (IFGE) longtime Executive Director Denise Leclair remarked after the dust settled.¹⁴⁵

I think we are not mad enough at HRC, I think they’re way more clueless than Barney Frank is [and] a lot less repented. He put us in the bill in the first place, HRC didn’t put us in the bill, we owe him something for that, we don’t owe HRC anything.¹⁴⁶

C. *After the Summer*

1. *A Question*

Both HRC and Frank would face quite a bit of anger. But, for lack of a better phrase, as summer began drawing to a close, neither of them had seen anything yet. Indeed, in late summer, expectations actually were high that HRC would demonstrate commitment to trans issues by asking all of the Democratic presidential contenders questions on the topic at a debate forum cosponsored by HRC and the Logo Television Network. Donna Rose,¹⁴⁷ HRC’s only trans board member at the time, proclaimed, “I have been told by people who would know that a decision has already been made that each candidate will be given a ‘T’ question (their words, not mine).”¹⁴⁸ But that did not happen. Only former North Carolina Senator John Edwards received such a question. “I’m disappointed expectations were raised and weren’t met,” trans-activist Autumn Sandeen remarked on Pam Spaulding’s widely read *Pam’s House Blend* blog, “but honestly, I expected nothing better from the HRC—I had a feeling there’d be

144. In a cartoon accompanying a Gwen Smith opinion piece on ENDA during the following Congressional Session, Frank was Lucy’s stand-in. Gwendolyn Ann Smith, *The ENDA Football*, BAYAREAREP. (May 20, 2010), <http://ebar.com/columns/column.php?sec=transmissions&id=137> [<http://perma.cc/K9CC3NJH>].

145. Scott, *supra* note 88, at 201 (interview with Denis Leclair).

146. *Id.*

147. No relation.

148. Donna Rose, *Jan. 1 Thru Dec. 31, 2007*, DONNA’S BLOG (July 27, 2007), http://www.donnarose.com/DonnaRoseOrig/Blog_2007.htm [<http://perma.cc/AR8VNGTJ>].

little follow through on the raised expectations.”¹⁴⁹ Ominously for what was to transpire in the coming weeks, Sandeen surmised, “I think that says more about the HRC than me.”¹⁵⁰

Sandeen saw something else as speaking volumes about HRC. ENDA, of course, would govern employment throughout the nation—but only if it became law. HRC, though, has from day one of its existence been the master of its own employment practices. “It’s pretty notable,” Sandeen remarked, “that if one bills oneself as an LGBT civil rights organization, but has never hired a transwoman in the five or six years since one added the T to the mission statement, there’s almost an empirical conclusion that one can draw about the that [sic] LGBT civil rights organization’s true commitment to diversity.”¹⁵¹ As noted above, Donna Rose was on the HRC Board, but no trans people¹⁵² were at that time being allowed to collect paychecks as employees of HRC.¹⁵³

2. *An Explicit Message*

Joe Solmonese would bring that baggage of internal non-diversity with him to Atlanta, where he would address Southern Comfort, one of the nation’s largest trans conventions.¹⁵⁴ Beforehand, Rose emphasized the positive potential.¹⁵⁵ Afterward, she touted the Solmonese declaration which would quickly find its place in the annals of infamy. His Friday lunch keynote address seemed tailor-made to rebut

149. Autumn Sandeen, Comment to *A Trans Perspective On The HRC/Logo Presidential Forum*, PAM’S HOUSE BLEND (Aug. 10, 2007, 7:28 PM), <http://pamshouseblend.com/diary/2593> (no longer active) (available with author).

150. *Id.*

151. *Id.*

152. Or at least no one out as such. See Monica Roberts, *Why the Transgender Community Hates HRC*, TRANSGRIOT (Oct. 8, 2007), <http://trangriot.blogspot.com/2007/10/why-transgender-community-hates-hrc.html> [<http://perma.cc/66GBFM92>] (stating that HRC didn’t involve transgender workers in any capacity).

153. Shockingly, HRC’s near-total lack of employment of any members of a group it has, since 2001, claimed to represent has escaped mainstream media attention, even where the media covers the subject of transgender employment benefits being offered by LGBT organizations. Several months before the ENDA Crisis, with HRC being touted as one of the few entities that offered transition-related coverage as part of its health plan, the issue of whether HRC actually had any employees who would be utilizing—or even *could* utilize—the coverage was never broached. Wyatt Buchanan, *Few Gay Rights Groups Insure for Sex Changes*, SFGATE (Jan. 31, 2007, 4:00 AM), <http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Few-gay-rights-groups-insure-for-2620685.php> [<http://perma.cc/U79HHX35>]; E-mail from Wyatt Buchanan, to Katrina Rose (Jan. 31, 2007) (on file with author).

154. Rose, *supra* note 148 (Sept. 19, 2007).

155. See *id.* (Sept. 1, 2007) (“We’ve never had an Executive Director from HRC address the community directly, so that in and of itself is significant.”).

Abernathy's concern about what HRC actually had in mind; he proclaimed that not only would HRC only support a trans-inclusive ENDA, HRC would oppose anything else.¹⁵⁶ "That," Rose blogged, "was huge for everyone in attendance to hear."¹⁵⁷

Anyone at that Friday lunch and in possession of the Southern Comfort program book likely would have seen its back cover—a full-page HRC ad, featuring a trans person of color and an organizational claim that HRC now had over 700,000 "members and supporters."¹⁵⁸ The heading of the ad—in large, bold lettering—was the pronouncement "I Am HRC."¹⁵⁹ The reality though, was that Solmonese was HRC. And his precise words that day?

We try to walk a thin line in terms of *keeping everything in play* and making sure that we move forward, but always being clear that *we absolutely do not support, and in fact oppose, any legislation that is not absolutely inclusive*. And we have sent that message loud and clear to the Hill.¹⁶⁰

Internally contradictory (even trying to keep "everything in play" by definition includes at least some potential solutions that would not meet *any* standard of absolutism), it begged not one, but many questions.

What message was HRC was sending to Capitol Hill?
Even if loud, was it actually clear or in code?
And was all of it under the radar?

3. *An Implicit Message*

There was a brief honeymoon of sorts for Solmonese after Southern Comfort. Then, the markup that was supposed to take place, following the September 5th hearing, was postponed.¹⁶¹ And after that, word began to circulate of a meeting between Barney Frank, Tammy Baldwin and Speaker Nancy Pelosi wherein discussion of stripping the bill of trans protections was *the* agenda item.¹⁶²

156. *Id.* (Sept. 16, 2007).

157. *Id.*

158. Marti Abernathy, *It's Put Up or Shut Up Time*, TRANSADVOCATE, http://transadvocate.com/its-put-up-or-shut-up-time_n_194.htm [<http://perma.cc/7J3VD876>].

159. *Id.*

160. Joe Solmonese, Speech Given at Southern Comfort Conference, Atlanta, Ga. (Sept. 14, 2007) (video excerpt available online at http://www.youtube.com/watch?v=_GhTiBO8Cw) (emphasis added).

161. Vitullia, *supra* note 94, at 163.

162. *Id.*

Donna Rose blogged of what would come to be known as Black Wednesday, September 26.¹⁶³ While driving from Rochester to Washington she received word of deal-making between Barney Frank and HRC.¹⁶⁴

I immediately called to get a comment from HRC leadership. Joe called me about an hour later, and said that Democratic leadership had done a “whip count” to identify how many votes they had to pass the inclusive bill. The result was disappointing so Barney Frank would probably decide to remove the gender identity language to make it easier to pass. It was not a pleasant conversation.¹⁶⁵

No ensuing conversation would be any more pleasant. For the next day, the formal vehicle for trans-exclusion emerged: H.R. 3685, a gay-only version of ENDA,¹⁶⁶ along with H.R. 3686, a trans remainder,¹⁶⁷ destined to go nowhere and do nothing for anyone. Both new bills were introduced by Barney Frank.¹⁶⁸ A small group of civil rights organizations signed a letter not only reiterating support for inclusion but pledging to oppose a non-inclusive bill.¹⁶⁹ The notable signatory was Matt Foreman of NGLTF.¹⁷⁰ His support marked a complete reversal of his wholehearted embrace of incrementalism less than five years earlier as head of New York’s Empire State Pride Agenda (ESPA) while the gay-only Sexual Orientation Non-Discrimination Act (SONDA)¹⁷¹ was being shepherded through the New York legislature.¹⁷² The notable non-signatory, but not at all shocking even in light of the SCC speech, was HRC.

That coalition of local and national civil rights groups soon ceased being small. Ultimately, it was a group numbering close to

163. Rose, *supra* note 148 (Sept. 29, 2007).

164. *Id.*

165. *Id.*

166. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 2 (2007).

167. H.R. 3686, 110th Cong. (2007) (summarizing the bill as prohibiting employment discrimination based on actual or perceived gender identity).

168. H.R. 3686, 110th Cong. (2007); H.R. 3685, 110th Cong. (2007).

169. Vitulli, *supra* note 94, at 163.

170. *Id.*

171. N.Y. LAW Ch. 2 (2002).

172. Andy Humm, *Unity Eludes SONDA Advocates—Gender Identity Protection Divides Duane, Pride Agenda*, GAY CITY NEWS (Dec. 13, 2002), <http://infoweb.newsbank.com/resources/doc/nb/news/12E83D4299D53478?p=AWNB> (no longer active) (available with author). According to Denise Leclair, Foreman had had a “Come to Jesus” meeting with the trans community at an NGLTF Creating Change conference after assuming the leadership of the organization. Scott, *supra* note 88, at 182.

300 that spoke out against abandonment of the inclusive bill.¹⁷³ United ENDA, as it came to be known, declared in part: “We oppose legislation that leaves part of our community without protections and basic security that the rest of us are provided.”¹⁷⁴ As Professor Isaac West points out, in that initial statement—directed to the membership of the House of Representatives—United ENDA asserted not only a position on the legislation but also, via strategic deployment of collective pronouns that there was indeed an “indivisible community” that was disavowing the “political expediency” worshipped by HRC.¹⁷⁵ The new entity “enabled these disparate groups to position themselves as a counterbalance to the HRC’s influence in Congress.”¹⁷⁶

“Does HRC have a backbone?” asked Phyllis Frye who, at the time, had made sufficient peace with HRC (one of several times in the years since the activism explosion at the 1995 ICTLEP) to even put an HRC bumper sticker on her cars.¹⁷⁷ Answering her own question, she professed to be “uncertain at this writing.”¹⁷⁸ It was but two weeks after the Solmonese speech. “I hope that HRC signs the letter opposing removal of transgenders from the ENDA Bill,” Frye told her large e-mail list. “Until then, I am removing the ‘=’ bumper stickers from my cars.”¹⁷⁹ Ultimately, she opted instead for turning the stickers ninety degrees, thereby shifting Elizabeth Birch’s prized gay marketing gem from equal to parallel—symbolizing a reality in which the T and the LBG would never substantively intersect.¹⁸⁰

In the two days over which she made that decoration decision, dozens more organizations joined the call to formally demand an inclusive bill or no bill—‘trans or bust’ as the *Washington Blade*’s Chris Crain had earlier derisively termed the notion of sticking with inclusivity on principle.¹⁸¹ Perhaps more significantly, during the same time frame, HRC’s trans defender Donna Rose, began to shift

173. WEST, *supra* note 42, at 150.

174. *Id.* at 151 (quoting the United ENDA communique of Oct. 1, 2007).

175. *Id.*

176. *Id.*

177. Posting of Phyllis Frye, prfrye@aol.com, to TexKatrina@aol.com (Sept. 28, 2007) (on file with author).

178. *Id.* This was twelve years to the day after a pronouncement by Frye that “the war with HRCF may be coming to a close” appeared in print. David Olson, *Transgendered Activists Meet with Local, National Gay Groups*, WINDY CITY TIMES, Sept. 28, 1995 § 1, at 10.

179. Frye, *supra* note 177.

180. *Id.* (Sept. 30, 2007).

181. Chris Crain, *‘Trans or Bust’ Still a Bust*, WASH. BLADE (Oct. 14, 2005), http://www.washingtonblade.com/print.cfm?content_id=6734 (no longer active) (on file with author) (accessible via EBSCOhost, Accession No. 18739105 in *LGBT Life with Full Text*).

her tone, from cautious optimism to worry and then to the anger that trans people outside of HRC's orbit had felt was justified all along. "I am tremendously disappointed in HRC for refusing to speak out loudly and publicly, along with the other coalition partners, in OPPOSING this wrong-minded strategy and these bills," she wrote in hopes of defending not just HRC and preserving what she saw as newly mended bridges between trans people and HRC.¹⁸² But even as she typed, she seemed to be growing hopeless. "I am angry at HRC leadership for what I can't help but perceive as lying and deceiving, for betraying my trust, and for putting me in this position. Damage has been done and continues to be done that cannot be repaired."¹⁸³

4. A History Lesson

NTAC's Vanessa Edwards Foster tried to remind the trans community at large of the differences between the trans organization that had been embraced by HRC and the one that was not. Whenever her organization's contacts among congressional staffers suggested HRC was up to its usual tricks, NCTE's Mara Keisling and NGLTF's Lisa Mottet would retort that those particular staffers *must* obviously have had their own agendas, of wanting to take down HRC, Barney Frank, or both.¹⁸⁴ Foster, of course, was offering a lesson in history predating both NTAC and NCTE, of the parallel-path lobbying that non-HRC-affiliated trans activists had been hearing about since the 1990s (some of which had in fact precipitated the formation of NTAC.)¹⁸⁵ In the wake of Black Wednesday Foster observed: "It turns out that everything our Hill contacts said was true. Consistently true, in fact."¹⁸⁶ The NTAC lobbyists were derided as "the 'anti-heroes,' summarily kicked to the curb and discredited for our stodginess, or for our unwillingness to disbelieve our 'unreliable' Hill contacts."¹⁸⁷ Using different words, Foster was telling the world that the damage Donna Rose was shocked at seeing was nothing new.

182. Rose, *supra* note 148 (posted Sept. 29, 2007).

183. *Id.*

184. Vanessa E. Foster, *Hero Worship*, TRANSADVOCATE (Oct. 9, 2007), <http://transadvocate.com/transphobia/hero-worship.htm> [<http://perma.cc/UCV5W26N>] (accessed at <http://web.archive.org/web/20080304223502/http://transadvocate.com/transphobia/hero-worship.htm>).

185. *Id.*; Fox, *supra* note 47.

186. Foster, *supra* note 184.

187. *Id.*

D. Battles

HRC eventually attempted to create the appearance of being, at worst, neutral in the ENDA Crisis.¹⁸⁸ “Since 2004, HRC has had in place a policy that supports only a fully inclusive version of ENDA, and the board of directors voted to reaffirm that position,” Solmonese said following a meeting of the HRC Board on Monday, October 1st.¹⁸⁹ “Therefore, we are not able to support, nor will we encourage members of Congress to vote against, the newly introduced sexual orientation only bill.”¹⁹⁰ That by itself was a retreat from his Southern Comfort speech. Not surprisingly, it led many to question whether the latter statement could be trusted either. As it turns out, it could not. HRC was pushing for the non-inclusive bill even while flying the flag of neutrality.¹⁹¹

In short order, the list of organizations opposing the dual-bill strategy increased and HRC’s thin claim to legitimacy within the trans community plummeted.¹⁹² Donna Rose very publicly resigned from the HRC Board.¹⁹³ In virtually the same breath however, she put her own credibility into question by, in spite of everything she knew then to be transpiring, defending HRC as “*not* simply a cold, calculating political money-making machine as so many seem bent on portraying them to be.”¹⁹⁴ That may have simply reflected the gulf between HRC’s inner circle, viewed as the dark force, and the perceived presence of some lower-level employees who were more supportive.¹⁹⁵ Phyllis Frye went so far as to even place Solmonese among those at HRC who “may be and probably are good folks.”¹⁹⁶

188. WEST, *supra* note 42, at 150.

189. Lou Chibbaro, Jr., *HRC Board Opposes Non-trans Inclusive ENDA*, WASH. BLADE (Sept. 28, 2007), http://www.washblade.com/thelatest/thelatest.cfm?blog_id=14555 (last updated Oct. 2, 2007) (no longer active) (on file with author).

190. *Id.*

191. Vitulli, *supra* note 94, at 163 (citing a personal communication with Lisa Mottet, then of NGLTF).

192. Lou Chibbaro, Jr., *ENDA Creates Rift Among Gays*, WASH. BLADE (Oct. 5, 2007), <http://www.washblade.com/2007/10-5/news/national/11367.cfm> (no longer active) (on file with author) (accessible via EBSCOhost, Accession No. 27067742).

193. *Id.*

194. Rose, *supra* note 148 (Oct. 3, 2007) (emphasis added). She nevertheless was among six trans people who pointedly walked out of a speech by Solmonese at the 2007 Dallas Black Tie Dinner, an event benefiting HRC. John Wright, *Transgender Activists Quit HRC Council*, DALLAS VOICE (Oct. 29, 2007), <http://www.dallasvoice.com/transgender-activists-quit-hrc-council-1023454.html> [<http://perma.cc/HG4TQDJ5>].

195. Gwen Smith told of many HRC employees defying the management line and showing support for the trans picketers in 2004. Gwen Smith, Posting to *TS Menace List: More on HRC Protests, etc.*, YAHOO GROUPS (May 6, 2004), https://groups.yahoo.com/neo/groups/TSMenace_Intl/conversations/topics/6625 (no longer active) (on file with author).

196. Posting of Phyllis Frye, prfrye@aol.com, to TexKatrina@aol.com (Oct. 9, 2007) (on file with author).

Others, however, including NTAC, immediately issued the call to pick up where 2004 had left off: open protest, but this time at HRC's National Dinner, which was rapidly approaching.¹⁹⁷

At that event, Solmonese attempted to diffuse the situation. "There are protesters outside this auditorium who feel great despair. There are people inside this auditorium who feel the same way. Let me just say I welcome their declarations" ¹⁹⁸ Outside were not only trans people affiliated with NTAC,¹⁹⁹ but also the more establishmentarian NCTE,²⁰⁰ who some have seen as having too close of a relationship to HRC.²⁰¹ Many trans people who were inside turned their backs to Solmonese in protest when he spoke.²⁰² The bluntness of NCTE Board member and University of Nebraska–Omaha political science professor Meredith Bacon embodied the feelings of trans people there and elsewhere.²⁰³ "I find it difficult to respect somebody who has promised something to me face-to-face and then seems to be backing away from that promise as fast as he can" ²⁰⁴

Solmonese made a "solemn vow" to the crowd that he would "do everything to harness the power and the passion and energy in order to achieve a fully inclusive ENDA."²⁰⁵ Yet, he had also made it clear that his top priority was access for access's sake, rather than any specific element of progress.²⁰⁶ Asked if opposing a gay-only ENDA would be problematic for HRC's relationships on Capitol Hill, he answered, "Unquestionably. We would absolutely not be at the table, and I am committed to being at that table."²⁰⁷

The internal contradictions of Solmonese's spoken words clearly had not ended in Atlanta.

And the internal contradictions of the movement which Solmonese's words embodied would continue—for the mechanics of

197. Chibbaro, *supra* note 192. Frye had eschewed pickets even while calling for an attack on HRC's bottom line, asking anyone who had donated money to HRC since 2004 to demand a full refund because "they lied." Posting of Phyllis Frye, prfrye@aol.com, to TexKatrina@aol.com (Oct. 3, 2007) (on file with author).

198. *At HRC Gala, Pelosi Shines, While ENDA's On Everyone's Mind*, WEEKLY OBSERVER (TUCSON), Oct. 10, 2007, at 7 (ellipsis in original).

199. Including Ethan St. Pierre, who had been at the forefront of the 2004 protests at HRC headquarters. *Id.*

200. *Id.* at 9.

201. Message from Ethan St. Pierre, HRC Protest Organizer, to Katrina Rose (Sept. 23, 2016, 2:34pm) (on file with author).

202. *At HRC Gala, supra* note 198, at 7.

203. *Id.*

204. *Id.* at 7 (quoting Meredith Bacon).

205. *Id.* at 9.

206. *Id.*

207. *Id.*

the procedural die were cast. It would be the gay-only H.R. 3685 that would receive a favorable committee vote and go to the House floor.²⁰⁸ There, it would be the bill that would receive a thumbs-up from the Democratic majority, allowing it to go into history as the first gay-specific anti-discrimination bill to pass in either chamber of Congress.²⁰⁹ Amendments to quasi-conform the bill to the federal DOMA and to expand religious protections were allowed during floor debate—and they passed.²¹⁰ A third amendment was introduced and withdrawn before a vote could be taken.²¹¹ Wisconsin's Tammy Baldwin engaged in the token gesture—to put trans people back into the bill, though it was little more than an excuse to allow her to talk about the controversy during the debate.²¹² Barney Frank and HRC had won The Battle of ENDA of 2007, but the activities outside of Congress suggested that, even as the vote was being recorded, they had already lost a war.

The majority of that war was waged in the media, much of that in cyberspace, over the course of October. I've liberally quoted herein from Donna Rose's personal blog in no small part because of her unique position as a trans woman HRC insider.²¹³ Others expressed personal thoughts online as well, but significant slices of the anti-inclusion vitriol and the righteous defense of inclusion by trans people and their allies were on display in widely read online venues, many from within the LGB(T) community, but also many outside of it. The *Washington Blade* predictably sided with incrementalism, criticizing "snarky press releases" with a Keven Naff blog post that itself contained its fair share of sarcastic snark. "We all love a protest!"²¹⁴ *Queerty* spared neither the snark nor the transmisogyny in criticizing *L.A. Times*' trans woman sportswriter Christine Daniels' critique of Barney Frank. "Did Daniels get claws implanted, as well?"²¹⁵ Wayne Besen, a former HRC staffer, respectfully took the side of trans people while both personalizing and contextualizing the matter of inclusion.

208. Vitulli, *supra* note 94, at 164.

209. *Id.* at 165.

210. *Id.*

211. *Id.*

212. *Id.*

213. Or, as it turned out, a trans woman who *thought* she was an HRC insider.

214. Kevin Naff, *ENDA Protests Doing More Harm Than Good*, WASH. BLADE (Oct. 5, 2007, 3:50pm), http://www.washblade.com/blog/index.cfm?blog_id=14643 (no longer active) (on file with author).

215. Andrew Belonsky, *Christine Daniels Thinks ENDA Split Foul*, QUEERTY (Oct. 10, 2007), <http://www.queerty.com/christine-daniels-thinks-enda-split-foul-20071010> [<http://perma.cc/4T8SJR95>].

I was fired from a television news-reporting job in Bangor, Maine in 1994. There is nothing more I would like to see than the passage of ENDA, to help people who are now in the situation I once faced. I understand better than most the social and economic consequences of having a career short-circuited because of sexual orientation, with no legal recourse.

But, I also have the memory of working at the Human Rights Campaign's Pride booths each summer at a time when transgender people were excluded from ENDA. Inevitably they would confront us and I would dutifully defend our policy. The more I thought about it, however, the less I could justify my words and I could barely look them in the eyes. We were essentially saying, "stop piggybacking" on the gay rights movement. That is the same self-centered argument that right wing African Americans use today to justify exclusion of gay people from civil rights protections.²¹⁶

Yet Besen also defended HRC, asserting that the organization "cares deeply about transgender people and does want them included."²¹⁷ But the organization has always consisted of its constituent parts and, rhetorically at least, by extension, its former parts. By 2007 Winnie Stachelberg, a corporate-speaking HRC defender during the 2004 confrontations,²¹⁸ also had left the organization. But the non-LGBT-specific Center for American Progress (CAP) provided *her* a platform to defend Frank's incrementalism.²¹⁹ Of course, the defenders were not limited to those with a direct current or former employment history with HRC. Robin Tyler, a lesbian comedian and activist who has defended trans rights in other contexts,²²⁰ seriously reasoned that because *some* transsexuals in *some* states not only were able to legally marry but did not forego such ability, and same-sex couples lacked such rights, trans people should not stand in the way of a gay-only ENDA.²²¹

216. Wayne Besen, *A Drag on ENDA?* WAYNEBESEN.COM (Oct. 1, 2007), <http://www.waynebesen.com/2007/10/drag-on-enda.html> (no longer active) (on file with author).

217. *Id.*

218. Winnie Stachelberg, *HRC Fighting for Trans Rights, Too*, WASH. BLADE (May 28, 2004), http://washblade.com/print.cfm?content_id=3004 (no longer active) (on file with author).

219. Winnie Stachelberg, *One Inch at a Time: On the Employment Non-Discrimination Act*, CTR. FOR AMER. PROGRESS (Oct. 22, 2007, 9:00 AM), <http://www.americanprogress.org/issues/2007/10/enda> [<http://perma.cc/P9XL4FJ6>].

220. Cristan Williams, *That Time TERFs Beat RadFems for Protecting a Trans Woman From Their Assault*, TRANSADVOCATE, http://www.transadvocate.com/that-time-terfs-beat-radfems-for-protecting-a-trans-woman-from-assault_n_14382.htm [<http://perma.cc/8CTFAK22>].

221. See John Aravosis, *The Backlash Begins, Part II*, AMERICABLOG (Oct. 4, 2007,

One of the more high-profile confrontations was on *Salon.com* between trans historian Susan Stryker and gay blogger John Aravosis. Aravosis, an attorney and former staffer for Republican Alaska Senator Ted Stevens, had thereafter crafted plausible, less-conservative bona fides in championing the cause of Cheryl Summerville against Cracker Barrel and in spearheading the fight against the *Dr. Laura* television show.²²² With the rise of the blogosphere, he became ensconced at *Americablog*, which tacitly tolerated the concept of an LGBT community, except when it was inconvenient for gay white men of means, such as himself.²²³

The two online columns served as a *de facto* proxy war between United ENDA and HRC. Stryker's methodical contextualization of the place of trans people in civil rights history challenged, as West described it, Aravosis's "snarkiness and paranoia."²²⁴ In fairness, Stryker served up a bit of the former as well—but out of necessity, countering Aravosis's positioning of non-trans LGBs in the controversy as having had trans people and issues (not the least of which is inclusion in ENDA) inflicted on them from "above," a sentiment

6:41 PM), <http://www.americablog.com/2007/10/backlash-begins-part-ii.html> [<http://perma.cc/CU5LZUF5>] (quoting the text of an e-mail from Tyler). At the time of the ENDA Crisis, Tyler was a plaintiff in the California same-sex marriage case. *In re Marriage Cases*, 183 P.3d 388, 390 (Cal. 2008).

222. Stryker's *Transgender History* would be published a few months after the ENDA Crisis. See Katherine Black, *The Doctor Is (Not) In*, 13 PEACE REV. 411, 411 (2001) (discussing Aravosis' and 'Stop Dr. Laura' campaign). See John Aravosis, *Barney Explains Why Losing a Vote on a Trans-inclusive ENDA Would Be Disastrous*, AMERICABLOG (Oct. 10, 2007, 7:18 PM), <http://www.americablog.com/2007/10/barney-explains-why-losing-vote-on.html> [<http://perma.cc/75U3QA68>] (touting his connection to Summerville). Interestingly, Summerville has pointed out that the Cracker Barrel policy, without explicitly stating so, had actually been intended to target effeminate males working as waiters. Patrick McCreery, *Beyond Gay: "Deviant" Sex and the Politics of the ENDA Workplace in OUT AT WORK : BUILDING A GAY-LABOR ALLIANCE* 31, 44 (Kitty Krupat & Patrick McCreery, eds. 2001).

223. Shortly after the ENDA Crisis he sheepishly removed a particularly arrogant post complaining about his ineligibility for a Bush Administration tax rebate check. See John Aravosis, *The Dems Just Gave Away Your Stimulus Check*, AMERICABLOG (Jan. 24, 2008, 10:23 AM), <http://www.americablog.com/2008/01/dems-just-gave-away-your-stimulus-check.html> (*post removed but mirrored at*, Don Durito, *John Aravosis: Elitist Wanker of the Day (2nd Day in a Row)*), MO BETTA META (Jan. 25, 2008), <http://mobbettameta.blog.spot.com/2008/01/john-aravosis-elitist-wanker-of-day-2nd.html> [<http://perma.cc/UE2JNMHG>]).

224. WEST, *supra* note 42, at 153. For Aravosis's opening shot, see John Aravosis, *How did the T get in LGBT?*, SALON (Oct. 8, 2007, 7:10 AM), <http://www.salon.com/opinion/feature/2007/10/08/lgbt/print.html> [<https://perma.cc/HA5UHWU3>]. For Stryker's response, see Susan Stryker, *Why the T in LGBT is here to stay*, SALON (Oct. 11, 2007, 7:31 AM), <http://www.salon.com/opinion/feature/2007/10/11/transgender/print.html> [<http://perma.cc/F2VBYKBP>].

deserving of a place somewhere between Nixon of the 1960s and Nuremberg of the 1930s.²²⁵ Stryker opined,

Aravosis is in the nosebleed section of the social hierarchy; if he gets any higher up the food chain he should be issued an oxygen mask. Where, pray tell, is this “above” whereof he speaks, peopled with radical transgender revolutionaries? Somewhere in the vicinity of the Jewish international bankers, or the Trilateral Commission?²²⁶

Pro-incrementalism academics attempted to supply the substance that Aravosis’s vitriol lacked. Law professor and Log Cabin Republican stalwart Dale Carpenter invoked the needs of LGBs in non-liberal lands—something more limited, if not nuanced, than Aravosis’s casting of inclusionists as sacrificing all LGBs. Carpenter crafted a more restrained claim: that the inclusionists were sacrificing LGBs in the ‘flyover states.’²²⁷ However, by 2007 not only was incrementalism the minority position among states with gay rights laws, stubborn adherence to a gay-only rights framework was more likely to be found in the liberal northeast rather than in the (allegedly) more conservative middle America.²²⁸

While Carpenter respectfully, albeit rigidly, interacted via comments with those of the inclusionist stance, notably GLAD’s Jennifer Levi, the *Washington Blade* offered Albany Law School professor Stephen Clark a platform for a caustic mix of historical revisionism and legal sophistry. “State and local experience,” Clark wrote, “contradicts” the claim that passage of a gay-only ENDA “would make

225. Aravosis also openly lamented that the movement had come to be known as anything other than “gay,” questioning the need to mention lesbians and challenging the very legitimacy of bisexuals (“only part-time gays”), something he did not actually do regarding trans people despite the ferocity of his opposition to trans people being included with LGBs. Aravosis, *supra* note 224. Predictably, Chris Crain also joined in with his own version of the claim that trans people had far more power than they themselves apparently knew they had. Chris Crain, *T’d Off About ENDA*, SEATTLE GAY NEWS (Nov. 16, 2007), http://www.sgn.org/sgnnews35_46/page5.cfm [<http://perma.cc/2983ZTF8>] (“Trans activists pressured LGB organizations to add Transgender to their mission statements. The idea itself wasn’t objectionable, but it was deeply troubling to see Trans activists argue it was somehow ‘exclusionary’ for Gay people to have any organizations focused solely on sexual orientation issues. Trans folks have their own groups, so why shouldn’t we?”) (emphasis added).

226. Stryker, *supra* note 224.

227. See Dale Carpenter, *Pragmatism, Principle, and Law in ENDA*, VOLOKH CONSPIRACY (Oct. 6, 2007, 3:02 PM), http://volokh.com/archives/archive_2007_09_30-2007_10_06.shtml [<http://perma.cc/3WBAM76X>].

228. Rose, *supra* note 42, at 408. And in 2016, that ratio is still two to one, with the three remaining states with gay-only rights laws being New York, New Hampshire, and Wisconsin. See N.H. REV. STAT. ANN. § 354-A:6 (2015); see also N.Y. EXEC. LAW § 296(1)(a) (McKinney 2016); see also WIS. STAT. ANN. § 111.31 (West 2015).

adding transgender protections later more difficult.”²²⁹ Clark went beyond lauding ‘incremental progress’ to assert that, rather than there being an incrementalism-inclusion *dichotomy*, there was in fact a *third* category of gay rights laws that need to be addressed in any such analysis: trans-inclusive law which came into existence via what he described as “concealment.”²³⁰ That legislative methodology “adds only ‘sexual orientation’ to a civil rights law, but transgender protections are *covertly woven* into the definition of sexual orientation in hopes of enacting them with little notice.”²³¹

As I noted in 2009, overall, Clark’s ENDA argument collapsed under its own weight.²³² And it is difficult to not view the bulk of that weight as being raw, unbridled transphobia.²³³ Discovering that there really was nothing ‘concealed’ in any of the laws would indeed require some minimal effort beyond looking at the fact that a “sexual orientation” category is being proposed for addition to a civil rights law. But how could it have escaped Clark’s notice that all but Minnesota’s 1993 statute were enacted well into the internet era, with legislative text searches at the fingertips of anyone with web access? Professor Jill Weiss has assessed Clark’s creation, and reliance on, a mythical third category of trans-inclusive civil rights laws as “an intellectually disingenuous attempt to justify keeping transgender people in the legal closet.”²³⁴ Arguably, it was an equally disingenuous attempt to ignore a portion of LGB(T) history in which trans women were not seen by heterosexuals as the biggest threat to heteronormative bathroom usage.

And even Barney Frank, to negate the popular support that the inclusionists were gaining (and generating), himself offered an

229. Stephen Clark, *United ENDA’s Flawed Reasoning: Activists, Politicians Overstate Viability of Inclusion and Falsely Defame Incrementalism*, WASH. BLADE (Nov. 23, 2007), <http://www.washblade.com/2007/11-22/view/editorial/11619.cfm> (no longer active) (on file with author) (accessible via EBSCOhost, Accession No. 27693613 in *LGBT Life with Full Text*).

230. *Id.*

231. *Id.* (emphasis added).

232. Rose, *supra* note 42, at 409.

233. The language of concealment is little more than a dogwhistle reference to the notion that trans women, by their very existence, are deceptive. Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L. J. 77, 113 (2014); Meredith Talusan, *The Failed Logic Of “Trans Panic” Criminal Defenses*, BUZZFEED LGBT (Aug. 25, 2015, 8:03 PM), <http://www.buzzfeed.com/meredithtalusan/trans-panic-criminal-defense#.vwbqwPQob> [<http://perma.cc/ZH4549MT>].

234. Jillian T. Weiss, comment dated Nov. 23, 2007, to Katrina C. Rose, *Canard Watch: Queer Channel Media Still Pimping the Incremental “Progress” Lie*, ENDABLOG, Nov 22, 2007, <https://endablog.wordpress.com/2007/11/22/canard-watch-queer-channel-media-still-pimping-the-incremental-progress-lie> [<http://perma.cc/2CYM7CWJ>].

historico-legal vignette, one familiar to trans activists who had challenged his political philosophy on inclusion.²³⁵ He himself had in 1999 attempted to dismiss Minnesota's law with a proto-'concealment' argument.²³⁶ In 2007, it was offered up on the floor of the House—and with a new acidic jab.

[I]f we listen to the most dedicated, most zealous believers in purity and kill this bill that would be such a great advance in civil rights, we will be a long time in getting back to anything. People who think that if they are successful in killing this one and in attacking people and demonizing people who want to deliver, as part of a movement, this big advance that they will then be able to get more than that live in Oz, in not only a fantasy world but a nonexistent fantasy world and a dream. It simply will not happen.²³⁷

The now infamous blanket insult of the inclusionists in an October ninth speech on the House floor may have had a conclusive effect within the halls of Congress, but less so outside.

His invocation of fantasy became ironic when, a week later, he posted on his official website a memo (addressed to "interested parties") recounting that he had been asked "to reflect on what would have been the case if people had been asked to vote against the civil rights bill in 1964 because it excluded gays and lesbians."²³⁸ He accurately noted that this was not a good comparative because "people weren't really thinking about gay and lesbian people at the time."²³⁹ However, as he had in defending gay-only ENDA bills of years prior, he proceeded to suggest that the Equal Rights Amendment *was* a proper vehicle to prove his point—even though it was sent to the states for ratification two years before Bella Abzug introduced that first gay rights bill that garnered no support whatsoever.²⁴⁰ Conflating the federal ERA with equivalent state proposals, he magnanimously claimed that, "as a gay man, along with virtually all of the gay and lesbian groups, I opposed inclusion of explicit protection for gay and lesbian people in equal rights amendments because

235. See Gary Schiff, *Six Minutes With Barney Frank: Openly Gay Congressman Talks About ENDA, Transgender Visibility, and the Bradley/Gore Thing*, LAVENDER 16 (Oct. 22, 1999).

236. *Id.*

237. *Protecting People Against Discrimination Based on Their Sexual Orientation and Gender Identity*, 110 CONG. REC. H11, 388 (2007) (statement of Rep. Barney Frank).

238. Rep. Barney Frank, *Memorandum to Interested Parties* (Oct. 16, 2007), <http://www.house.gov/frank/ENDA/%20memo%20101607.html> (no longer active) (on file with author).

239. *See id.*

240. *Id.*

it would have jeopardized the passage of the [federal] amendment.”²⁴¹ He offered no proof for his assertion; and the proffered rationale certainly did not stop efforts to pass LGB rights statutes (only one of which was successful before the time period for ERA’s ratification expired in 1983).²⁴² Likewise, it never stopped same-sex marriage from becoming part of the discourse surrounding ERA proposals.²⁴³

And ultimately, the troublesomely divisive tone of his remarks did not stop Frank from being able to push through the House the sort of ENDA bill he had introduced for over a decade. But that would not stop the intra-community friction. In fact, it was but the beginning of a new round of spin.

E. A Hole in the Poll

By November 1, HRC’s website included a feature by which users could have HRC send an e-mail in their name to their congressional representatives in support of H.R. 3685.²⁴⁴ The *TransAdvocate* blog alerted its readers to the fact that the HRC e-mail mechanism was describing the gay-only bill as one “that would make it illegal to fire, refuse to hire, or refuse to promote employees simply based on sexual orientation *or gender identity*.”²⁴⁵ The text of the letter as offered by HRC (albeit customizable by the user) was slightly more ambiguous, noting the (differing) numbers of states lacking protections for LGBs and Ts.²⁴⁶ But following that sentence and its accurate differentiations was the more generalized: “In a country founded upon the principle of equal opportunity, it’s time to put an end to this injustice.”²⁴⁷ More disturbingly, invoking the specter of HRC’s 2001 declaration that Maryland, upon passage of a gay-only state gay rights law, would become a discrimination-free zone²⁴⁸—an e-mail sent in support of H.R. 3685 utilizing the exact text proposed

241. *See id.*

242. *Id.*

243. *See ERA and Homosexual “Marriages,”* PHYLLIS SCHLAFELY REPORT, Sept. 1974, at 1; Legislative History of the Iowa ERA (1980), collected in NOW IOWA COLLECTION 1–6, IOWA WOMEN’S ARCHIVES (University of Iowa Library, Box 6, Folder: ERA, Miscellaneous 1979–80).

244. *Pass ENDA Now!*, TRANSADVOCATE, <https://web.archive.org/web/20080508175353/http://transadvocate.com/enda/cache.aspx.htm> [<http://perma.cc/N4VSNKL5>].

245. *HRC’s Bait and Switch*, TRANSADVOCATE (Nov. 1, 2007, 4:52 PM), <https://web.archive.org/web/20080522125349/http://transadvocate.com/hrc/hrc-bait-and-switch.htm> [<http://perma.cc/6XSFB3JC>] (emphasis added).

246. *Pass ENDA Now!*, *supra* note 244.

247. *Id.*

248. Kat, *Exactly Ten Years Ago*, TRANSADVOCATE (Mar. 27, 2001), http://transadvocate.com/exactly-ten-years-ago_n_3165.htm [<http://perma.cc/W3G3T7CV>].

by HRC would conclude with the sentence: “Please support equal employment rights for all Americans.”²⁴⁹

HRC quickly, and silently, removed the evidence that the organization not only was actively soliciting support it claimed it would not countenance, but that it also was doing so in a manner that, whether by design or sloppiness, surely would cause some opponents of the incremental progress strategy to request an e-mail to be sent in support of the gay-only bill. By the time Autumn Sandeen called the matter to the attention of an even wider audience at *Pam’s House Blend*, not only had the e-mail mechanism vanished from HRC’s website but the organization was refusing to respond to inquiries about it.²⁵⁰

Supporters of inclusion were more than willing, however, to utilize the technology unavailable to the generations of trans activists who fought against exclusion in New York City in 1973,²⁵¹ who fought against exclusion in Minnesota in the spring of 1975,²⁵² and who fought against the one-two punch of *The Transsexual Empire*,²⁵³ and the Meyer-Reter ‘study’ in 1979²⁵⁴—a tool trans leaders began putting to use at the 1995 ICTLEP conference.²⁵⁵ Pointing to multiple web cache images of the letter’s HRC web page, Sandeen quipped, “[s]o much for damage control.”²⁵⁶

And from that point, where things could go even further wrong as to the perception of HRC that the organization likely was desiring to cultivate for itself, they did—so much so that, to springboard from Phyllis Frye’s 1995 remark,²⁵⁷ HRC may as well have had a note pinned to its collective back commanding ‘Whip Me.’ For it was also in early November that HRC began circulating the results of a poll it had commissioned, results which, it asserted, showed that the LGBT community overwhelmingly supported the HRC-favored strategy of separate gay-only and trans-only ENDA bills.²⁵⁸ “There

249. *Pass ENDA Now!*, *supra* note 244.

250. Autumn Sandeen, *The HRC’s Bad ENDA Behavior—And a Cover-Up?*, PAM’S HOUSE BLEND (Nov. 5, 2007, 23:45 PM), <http://web.archive.org/web/20090620211848/http://pamshouseblend.com/showDiary.do?diaryId=3509> [<http://perma.cc/8JK67TBS>].

251. See Abby Saypen, *A Little Bit of Our History: An Interview with Lee Brewster*, TV/TS TAPESTRY J., Winter 1995, at 57, 57–58 [hereinafter *A Little Bit of Our History*].

252. Compare Tim Campbell, *Equal Rights for Transsexuals, Transvestites*, MINN. DAILY, Feb. 5, 1976, at 7, with DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 235, 237 (1999).

253. See RAYMOND, *supra* note 65, at xi–xv.

254. Compare *A Great Conspiracy?*, TRANSGENDER TAPESTRY (2002) at 31, with Jon K. Meyer & Donna J. Reter, *Sex Reassignment: Follow-Up*, 36 ARCH. GEN. PSYCH. 1010, 1010 (1979).

255. Frye, *supra* note 62, at 463–64.

256. Sandeen, *supra* note 250.

257. Frye, *supra* note 62, at 464.

258. Kerry Eleveld, *Poll: 70% of LGBT Respondents Support Noninclusive ENDA*,

were so many people out there speaking so emphatically about where the entire community was that I thought maybe we should get a sense of it, and that's why we did the poll," Solmonese said in an article posted on *The Advocate's* website.²⁵⁹ Notably, he added that the results had been in HRC's possession for some time but had not been released because, he asserted, still ongoing efforts to secure votes for an inclusive ENDA would have been undermined.²⁶⁰

NGLTF's Matt Foreman immediately attacked the poll, but only on principle. "Fundamentally, rights are not about popular opinion, and that's why we so vehemently reject voting on the right to marry," he said, reasoning that an opinion poll, even one ostensibly within the community, should not do to trans rights what marriage referenda were doing to same-sex marriage.²⁶¹ "Do you have any idea what kind of message that sends?" Donna Rose joined in.²⁶² "The fact that HRC would do that—would hire people, sit on those results, and then publish them to support dropping us from ENDA is a knife in the back."²⁶³ She added a string of adjectives, "inexcusable, unconscionable, and just plain wrong," but more significantly she made clear the permanent nature of the damage that Solmonese was causing²⁶⁴: "[T]o the day I die I will never forget it."²⁶⁵

Triggering as it was on a purely emotional level, it soon became clear there were far more substantive reasons to question the poll. Prefaced by, "[t]his proposal would make it illegal to fire gay, lesbian, and bisexual workers because of their sexual orientation. This proposal does not include people who are transgender," the question put to participants was, "[w]ould you favor or oppose this proposal moving forward?"²⁶⁶ Seventy percent of a sample of 500 community members surveyed in October answered in favor.²⁶⁷ Only twenty percent favored LGBT groups opposing a gay-only ENDA.²⁶⁸ The poll results were presented as evidence of a shift away from HRC's widely perceived, pro-trans community sentiment of 2004,²⁶⁹ with the poll indicating seventy percent did support trans rights but were also

ADVOCATE (Nov. 7, 2007, 12:00 AM), <http://www.advocate.com/news/2007/11/07/poll-70-lgbt-respondents-support-noninclusive-enda> [<http://perma.cc/M39L9P8D>].

259. *Id.*

260. *Id.*

261. *Id.*

262. Rose, *supra* note 148 (Nov. 6, 2007).

263. *Id.*

264. *Id.*

265. *Id.*

266. Eleveld, *supra* note 258.

267. *Id.*

268. *Id.*

269. *Id.*

supportive of an incremental progress strategy.²⁷⁰ “The direct implication was that United ENDA was a Potemkin village, organized by politically correct activists out of touch with the mainstream they claimed to represent,” Ann Rostow wrote in the *San Francisco Bay Times* a week after the poll was released.²⁷¹ “But the poll, whose participants are still a mystery, were asked questions devoid of nuance almost guaranteeing a majority would support the weak bill.”²⁷²

That mystery eventually became somewhat unshrouded. Five hundred and fourteen people “previously identified [by the pollster’s] background information as gay, lesbian, or bisexual” were winnowed from a group of 1,087 to answer the key question.²⁷³ Almost equally divided overall between males and females, of the 514 only six identified as transgender.²⁷⁴ Of those, only one was male-to-female.²⁷⁵ Never divulged, however, was the number of participants in the poll who were, in October 2007, living without the protection of existing state and/or local LGB(T) employment anti-discrimination laws—the demographic for whom arch-incrementalists such as Dale Carpenter and John Aravosis professed to speak in their online opposition to H.R. 2015.²⁷⁶ Were any at all in Carpenter’s “31 states, including all of the South and most of the Midwest and West [where] there is no statewide protection for gays in private employment[?]”²⁷⁷ Or were all in bastions of gay-only rights laws such as Massachusetts, New Hampshire, Maryland and New York, where, as of 2007, LGBs had turned their eyes to the matter of marriage without ever coming back for trans people, thereby telling trans people that if they did not fight tooth and nail for inclusion in ENDA *now* there would be no *later*? Far from rehashing old state-law battles, the lack of demographic specificity left open the question of whether the poll was actually validating the fears of trans people that a gay-only ENDA would not be an incremental move toward a fully inclusive ENDA but instead an incremental move toward some other gay-specific goal, such as marriage.

270. *Id.*

271. Ann Rostow, *Will ENDA Battle Leave Us Stronger Or Weaker?*, SAN FRANCISCO BAY TIMES (Nov. 15, 2007).

272. *Id.*

273. Memorandum from J. Michael Dennis to Human Rights Campaign (Nov. 8, 2007) (on file with author) (copy also viewable at *HRC’s Leading Poll and Dubious History Lesson—Part 2*, ENDA BLOG (Nov. 10, 2007), <https://endablog.wordpress.com/2007/11/10/hrcs-leading-poll-and-dubious-history-lesson-part-2> [<http://perma.cc/K9NVA4QD>]).

274. *Id.*

275. *Id.*

276. *Id.* (emphasis added).

277. Carpenter, *supra* note 227.

Throughout November, HRC found itself having to defend the poll as well as the ENDA strategy it had been commissioned to, well, defend; even strong supporters of the two-bill strategy questioned the poll.²⁷⁸ The key question which yielded the key result which HRC was peddling was set up for poll respondents to choose one of three options: (a) oppose ENDA 3685 because of trans-exclusion, (b) support ENDA 3685 because it helps LGBs, or (c) remain neutral because of ENDA 3685's trans-exclusion. Option (b), however, contained an explanatory clause.²⁷⁹ The precise wording was "National gay, lesbian, bisexual and transgender civil rights organizations should support this proposal because it helps gay, lesbian and bisexual workers *and is a step toward transgender employment rights.*"²⁸⁰

John Stahura, director of the Purdue University Social Research Institute, described the poll as nothing more than "playing games," saying he would "never" structure a survey to include such an explanatory clause "because what you're asking people to evaluate is the because."²⁸¹ Christopher Barron, a former political director of the Log Cabin Republicans (an organization not known for strong support of trans-inclusion in general) who also performed survey interpretation, called the methodology, "bizarre."²⁸² HRC's Brad Luna offered the rationale that the few hundred survey participants, who his organization was relying upon to justify a devastating policy shift that could (and, as we now know, *did*) have negative ramifications for intra-LGBT-community relations for years to come, were not intelligent enough to answer the question without the guidance of the explanatory phrases.²⁸³ "With complicated proposals such as this, if you don't link opposition to a reason, you might get people opposing for a variety of reasons," Luna said, "[w]e chose this method because we wanted to know specifically if people supported or opposed ENDA because of the transgender exclusion."²⁸⁴

278. See Kevin Naff, *Advocate's Poll Story is Flawed*, WASH. BLADE (Nov. 7, 2007) (webpage unknown; no longer active) (on file with author).

279. *More Details Obtained About HRC's ENDA Poll*, THE ADVOCATE (Nov. 10, 2007), <http://www.advocate.com/news/2007/11/10/more-details-obtained-about-hrcs-enda-poll> [<http://perma.cc/D8UYXZUS>].

280. *Id.* (emphasis added).

281. Joshua Lynsen, *Experts Question HRC's Controversial ENDA Survey*, WASH. BLADE (Nov. 30, 2007), <https://web.archive.org/web/20071204015508/http://www.washingtonblade.com/2007/11-30/news/national/11645.cfm> [<http://perma.cc/4ASEW49Y>].

282. *Id.*

283. See Andrew Belonsky, *HRC's Polls Raise More Questions, Reveals Hubris*, QUEERTY, Nov. 30, 2007, <http://www.queerty.com/hrcs-polls-raise-more-questions-reveals-hubris-20071130> [<http://perma.cc/F64Z5NB7>].

284. Lynsen, *supra* note 281.

As would any organization, HRC could certainly be expected to defend itself, however problematic its position may have been. But there was no rational explanation for how a separate poll funded by HRC and conducted by the same pollster produced a vastly different picture of the LGB(T) community's position on ENDA in 2007. The second poll of 768 LGBs during the last half of November showed that sixty percent felt that "those seeking to pass the law were wrong to remove protections for transgendered people in order to get the votes necessary for passage."²⁸⁵ The primary purpose of the later poll, however, was not an analysis of ENDA strategies but, instead, was to gauge support among LGBs for Hillary Clinton in the 2008 Democratic presidential primaries.²⁸⁶ At *Queerty*, Andrew Belonsky, had trouble seeing the two polls as being able to coexist in the same political space²⁸⁷: "While the polling company may be reputable and respectable, it seems to us they've been helping HRC do their dirty work. How else can one explain such a seismic shift in queer public opinion?"²⁸⁸ Barron told the *Washington Blade* that even though the ENDA-specific poll might actually be legitimate, "there's nothing there that tells us that it is, so you can't assume it's a nationally representative sample."²⁸⁹ Stahura added that he would not be willing to approve such a poll for publication.²⁹⁰ "We wanted to gain an understanding as best we could of where people were on the issue," Luna said, insisting that the poll was a valid, nationally representative sample.²⁹¹ Furthermore, "[a] number of voices were claiming to speak for the LGBT population, but no one in fact had done the research to know."²⁹² In light of the seeming incompatibility between the two polls HRC was involved with, and the disturbing degree of secrecy involving the ENDA-specific poll, it is unclear if anyone ever did the research to find out.

F. Recovery and Redux

Whatever else might be said about the conflict of the fall, those who asserted that inclusion would be an academic matter because

285. Andrew Belonsky, *Homos Love Hillary*, QUEERTY, Nov. 29, 2007, <http://www.queerty.com/homos-love-hillary-20071129> [<http://perma.cc/4LUBWK8M>].

286. *Id.*

287. Belonsky had used the ENDA Crisis as a vehicle to speculate about what trans woman, Christine Daniels, an L.A. Times sportswriter, had (or had not) gotten implanted during her transition. Belonsky, *Christine Daniels Thinks ENDA Split Foul*, *supra* note 215.

288. *HRC's Polls Raise More Questions*, *supra* note 283.

289. Lynsen, *supra* note 281.

290. *Id.*

291. *Id.*

292. *Id.*

President George W. Bush would veto ENDA were wrong—only because they were not pessimistic enough. The Frank-HRC ENDA went to the Senate where it died without any action being taken on it, either in 2007 or into 2008.²⁹³ But there would be no cessation of disdain, on the part of HRC as an organization, for independent thinking on the part of the trans community. Internally, there was some recognition that while LGBs “won” inclusion in a bill that was going nowhere, HRC was going to be seen as the loser in terms of credibility. In early December, a leaked memo attributed to HRC National Field Director Marty Rouse, indicated that some within the organization were actually seeing what those outside the organization were seeing.²⁹⁴

The first step in rebuilding our trust in HRC must be for HRC to own up to the fact that we were promised one thing and the promise, for whatever reason, was broken. Members of the transgender community I’ve spoken to want an apology and an explanation, and the explanation must be sincere and convincing. They want to see a stop to public announcements that contradict private activity which many believe is still going on. Until that is done, it will be near impossible to get increased participation from the transgender community.²⁹⁵

Some trans activists saw it as a useful, necessary beginning at best, while still feeling resigned to a likely reality of the real powerbrokers within the organization being unwilling to publicly admit any fault.²⁹⁶ A single lonely bullet point in the memo, as published at *Trans-Advocate*, was: “Urging HRC staffers to consider transgender people for job openings.”²⁹⁷ Beyond this, however, the document listed trans people as a group apart from, rather than a part of,²⁹⁸ HRC and it

293. Ed O’Keefe, *ENDA, Explained*, WASH. POST (Nov. 4, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda/?utm_term=.89c2f683ef8c [<http://perma.cc/HX5L3J84>].

294. The target audience of the memo was unclear, but Pauline Park suggested the obvious: Solmonese and/or the HRC Board. Pauline Park, *Leaked HRC Memo Spells Out New Trans Strategy*, 365GAY AGENDA BLOG (Dec. 12, 2007, 12:58 AM), <https://web.archive.org/web/20100306082945/http://www.365gay.com/blog/leaked-hrc-memo-spells-out-new-trans-strategy> [<http://perma.cc/YB4VKTGA>].

295. Marty Rouse, *HRC’s Project Win Back*, TRANSADVOCATE (published before Dec. 4, 2007), <http://www.transadvocate.com/hrcs-project-win-back> [<http://perma.cc/TF6GGQ4A>].

296. Rebecca Juro, *HRC Credibility Crisis: Nobody Trusts a Liar And a Cheater*, BILERICO PROJECT (Dec. 9, 2007, 7:44 PM), http://www.bilerico.com/2007/12/hrc_credibility_crisis_nobody_trusts_a_l.php [<http://perma.cc/LK6QQ7SK>].

297. Rouse, *supra* note 295.

298. “A part of . . . not apart from” was the theme of Houston’s Gay Pride Week celebration in 1982. *The Parade*, MONTROSE VOICE, July 2, 1982, at 1 (ellipsis in original).

saw United ENDA as something to either manage or bypass, for even the somewhat reflective Rouse bluntly asserted, “I believe that only HRC has the resources to help us get the message out to mainstream America.”²⁹⁹

Externally, HRC made a further attempt at damage control by undertaking a ‘listening tour.’ On December 5, at New York City’s Lesbian, Gay, Bisexual and Transgender Community Center, Vice President of Programs David M. Smith and Regional Field Director Sultan Shakir, faced what *Gay City News* described as “withering and often angry questioning about the organization’s shifting positions on ENDA.”³⁰⁰ New York trans activist Pauline Park, who attended the event, predicted that it would “not bear fruit, because HRC seems incapable of offering anything but double-speak and spin. The comments from Smith were dripping with condescension and disdain for members of the audience and members of the LGBT community more generally.”³⁰¹ Outward projection overlapped with internal reflection. “The attitude seemed to be that only HRC knows how to do legislation.”³⁰²

In October Smith had claimed his organization was “baffled” by the sudden decision to ditch trans people.³⁰³ In stark contradiction to Barney Frank’s position that a trans-inclusive hate crimes bill would be easier to pass than a trans-inclusive ENDA,³⁰⁴ Smith opined, “[a]nybody who was afraid of the issue would have been afraid of it on the hate crimes bill.”³⁰⁵ On the ‘listening tour,’ he actually acknowledged the futility of pretending that 2007’s ENDA had any future beyond the floor of the House, something Solmonese had steadfastly refused to do during the ENDA Crisis proper.³⁰⁶ Yet

299. Rouse, *supra* note 295.

300. Duncan Osborne, *No Gotham Welcome Wagon For HRC*, GAY CITY NEWS (Dec. 6, 2007), http://web.archive.org/web/20080609075419/http://www.gaycitynews.com/site/news.cfm?newsid=19091597&BRD=2729&PAG=461&dept_id=569342&rft=6 [<http://perma.cc/9ABND6CJ>].

301. Pauline Park, *HRC Doublespeak Wins No Hearts or Minds*, VISIBLE VOICE 08.COM (Dec. 6, 2007), <http://www.paulinepark.com/2011/03/hrc-doublespeak-wins-no-hearts-or-minds> [<http://perma.cc/E2KALY7R>] (republished on Paulinepark.com from Visible Voice 08).

302. *Id.*

303. Lisa Keen, *ENDA Stirs Fiery Controversy Over Transgender Inclusion, Legal Loopholes*, SEATTLE GAY NEWS (Oct. 5, 2007), http://www.sgn.org/sgnnews35_40/page2.cfm [<http://perma.cc/E42ZWA2P>].

304. See Alex Blaze, *The Big Breaking News About ENDA*, BILERICO PROJECT (Sept. 28, 2007, 12:38 PM), http://www.bilerico.com/2007/09/the_big_breaking_news_about_enda.php [<http://perma.cc/BME2UGMN>].

305. Keen, *supra* note 303. Here, he attributed the action to Frank and “House leadership.” *Id.*

306. At least he refused to do so in any way that was suggestive that sticking with trans-inclusion made sense. “[T]here’s no danger of the President signing the bill. It’s funny.

instead of that leading to viewing the bifurcation strategy as at least contextually wrong, it led to a reiteration not only that the Frank strategy of dumping trans-inclusion was right but that any attempt to add trans people back in would have been bad. According to Smith, a negative vote “would have done enormous harm to the cause of transgender equality for many years to come.”³⁰⁷ Of course, demonstrating that his organization was more concerned with style than substance, despite insisting that the dual-bill strategy was the proper one, Smith suggested that HRC would have engaged in a different strategy had it known what the reaction outside of the beltway was going to be. “We probably would not have played it out the same way,” Smith said when asked what the organization would do if it had the chance for a “do-over.”³⁰⁸

Within a month, the trans community saw that Solmonese’s idea of a “do-over” was to claim he “misspoke” at Southern Comfort.³⁰⁹ That accompanied a private apology to trans activists in San Francisco—an apology that was not fully accepted and was believed to an even lesser degree.

“I’ve had enough of him,” Mikayla Connell, president of the San Francisco LGBT Pride Celebration Committee board, said upon leaving the meeting “It was very unsatisfying. While Joe apologized to the transgender community in private, I didn’t see any change in their strategy regarding a trans ENDA. They continue to support ENDA as it is, which makes the apology very hollow.”³¹⁰

Jamison Green said he was “pissed” and Theresa Sparks, president of the San Francisco Police Commission, returned her 2004 HRC Equality Award, asserting it “no longer symbolized equality.”³¹¹

By February, Solmonese was openly dismissive of those opposing the HRC company line. After seemingly trying to antagonize (or

Some people say to me, ‘My God, if the President’s not going to sign this, why are [sic] doing it?’ and I think just the opposite. If the President’s not going to sign the bill, let’s just go through this and have two or three votes on this and get everything right.” Liz Meyer, *Human Rights Campaign responds to ENDA concerns*, SEATTLE GAY NEWS (Oct. 19, 2007), http://www.sgn.org/sgnnews35_42/page3.cfm [<http://perma.cc/A2YRXFVP>] (quoting Solmonese).

307. Osborne, *supra* note 300.

308. *Id.*

309. Cynthia Laird, *Tense Meeting with HRC Over ENDA*, BAY AREA REP. (Jan. 10, 2008), <http://www.ebar.com/news/article.php?sec=news&article=2589> [<http://perma.cc/X3BCMMV6>].

310. *Id.*

311. *Id.*

at the very least taunt) trans-activists protesting outside a New York City HRC dinner by asserting that they would have no effect on HRC's fundraising, he declared to the attendees that the "complaining" had to stop.³¹² "We must see, instead, the big picture. When did we get so impatient?"³¹³ At the same event a year later the purification process seemed to be complete. Gone was any pretense of organic compassion; in its place was rock-solid Orwellian self-importance. There had never been an official need to try to "win back" any part of the trans community because trans people not only had never been in the game, they had never actually been in the stadium to view any part of the game. A trans-inclusive ENDA in 2009 (and beyond) would *only* be possible precisely *because* HRC had given in during 2007.

Victory through surrender.

Indefatigability through capitulation.

Trans-inclusion through trans-exclusion.

And it would all be "[b]ecause we had the guts and the will to start this fight and we more than any other organization have devoted the resources and the ground troops to finish it, and we will do that this year."³¹⁴ And while HRC was rejuvenating its arrogance mojo, its external apologists not only were counseling trans people to accept their station in the movement but they also were suggesting further that the continuing trans protests against HRC were damaging efforts to stave off what would become Proposition 8.³¹⁵

G. Thought and Afterthought

"In the last few years," Gwen Smith wrote during the 2009–10 Congress, "HRC officials have made it clear that they were absolutely, positively never going to give us up or let us down, only to turn around and claim that their hands were tied and, gosh, they simply had to desert us."³¹⁶ Just with reference to her own life and activism, that was then *fifteen years* of broken promises—and worse.³¹⁷ Her first

312. Trenton Straube, *HRC Gala Raises Money and Ire in New York*, WASH. BLADE (Feb. 29, 2008), <http://web.archive.org/web/20080305155824/http://www.washblade.com/2008/2-29/news/national/12122.cfm> [<http://perma.cc/8MY8KT2L>].

313. *Id.*

314. Paul Schindler, *Pledges On Marriage Equality in NY, NJ & Enthusiastic Embrace of Olbermann*, GAY CITY NEWS (Feb. 8, 2009), http://www.thetaskforce.org/static_html/TF_in_news/09_0209/stories/55_pledges_on_marriage_equality.pdf.

315. Timothy Kincaid, *It's Time to Stop Attacking HRC*, BOX TURTLE BULLETIN (July 26, 2008), <http://www.boxturtlebulletin.com/2008/07/26/2433/2434> [<http://perma.cc/6D7E54AW>].

316. Smith, *supra* note 144.

317. *See id.*

news posting to America Online's Transgender Community Forum, one of the first online centers of trans political activism, had been about the then-HRCF keeping trans people out of ENDA.³¹⁸ And indeed, Solmonese's declaration to the New York gathering would be yet one more promise his organization would not follow through on. This time, however, it would not be only trans people who would be let down.

II. 2009: DIFFERENT ILLUSIONS, NEW BETRAYALS, OLD EXCUSES

A. *The Military Percentage*

After the ENDA Crisis, there would be no further effort to pass ENDA during George W. Bush's presidency. As has been increasingly the case, the only *real* priority during the second year of a congressional session is that year's elections. In 2008, in addition to congressional races there would be a presidential election.³¹⁹ By far, the most significant cultural aspect of Barack Obama's victory over John McCain was America gaining, for the first time, an African-American president. Obama's election also marked another first—perhaps one that was inconceivable to Barney Frank when he lectured Minnesotans on trans political viability nine years earlier: as of January 20, 2009, America would have a president who, as a legislator, had sponsored trans-inclusive civil rights legislation.³²⁰ Even so, the months

318. Gwendolyn Ann Smith, Post to *soc.support.transgendered e-mail list* (Sept. 11, 2001) (on file with the author).

319. FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES (2009) (describing the results of all elections in the 2008 year).

320. ILL. S.B. 101 (2003); *Senator's Bills—Senator Barack Obama (D), 13th District*, ILLINOIS GENERAL ASSEMBLY, <http://www.ilga.gov/Senate/SenatorBills.asp?MemberID=747&GA=100> [<http://perma.cc/F7HZQGEL>] (detailing all bills sponsored by Barack Obama). Ironically, he did not cast a vote for the bill which ultimately became his state's trans-inclusive gay rights law despite it emerging from the Illinois General Assembly during his last term as a state senator. *Obama's Record in the Illinois Senate*, N.Y. TIMES (July 29, 2007), http://www.nytimes.com/imagepages/2007/07/29/us/politics/20070730_OBAMA_GRAPHIC.html?action=click&contentCollection=Politics&module=RelatedCoverage®ion=EndOfArticle&pgtype=article [<http://perma.cc/TK62BEGQ>]. The bill he co-sponsored died early in the session, but subsequent maneuvering put LGBT civil rights language into a different bill, which was approved by both houses during the session's waning days. *Bill Status of SB 3186*, ILLINOIS GENERAL ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3186&GAID=3&DocTypeID=SB&LegID=11145&SessionID=3&GA=93> [<http://perma.cc/M9HGVGJ>] (stating the bill passed both houses). However, that maneuvering—which involved a complete rewrite of a different civil rights bill—took place during the second week of January 2005, still during a session in which Obama had served but after he had resigned to take office in the United States Senate. *Id.* (describing the changes in S.B. 3186 during January 2005). His replacement was Kwame Raoul, who signed on as co-sponsor of the rewritten bill. Cheryl L. Reed,

leading to the election had seen HRC's Joe Solmonese make it clear that in 2009 trans-inclusion, rather than a done deal, would *still* be a bargaining chip toward some sort of ENDA.³²¹ Somewhat ironically, he acknowledged that if the Republican McCain became president and, with a veto for any ENDA thereafter being possible, it wouldn't matter if ENDA was inclusive or not.³²²

Just as had been the case in 2007.³²³

But Obama did win the presidency and the Democrats increased their margin of control in both the House and the Senate, very briefly, to a sixty-vote supermajority in the latter.³²⁴ Unfortunately, the 2009–10 congressional biennium would come to be dominated by the same non-LGBT issue that had dominated 1993–94, the last biennium which had seen a Democratic president have both a House and Senate to work with that were controlled by the Democrats. In the years to come, despite progressive disappointment over single-payer coverage losing out to a system that still privileges private insurers, it is likely that President Obama will be viewed as having 'won' the healthcare battle, with the Affordable Care Act (derided as 'Obamacare,' a name that the law's supporters have ultimately reclaimed as a positive) having survived two trips to the United States Supreme Court. One presented a constitutional challenge and the second challenged linguistic technicality.³²⁵ Of course, while Obama may have won the battle, the Trump Administration may turn the *war* into a loss.

Yet a similar LGB issue arose in both 1993–94 and 2009–10: the ability (or lack thereof) of lesbians, gays and bisexuals to serve openly in the military. As a candidate, President Clinton had promised

Dems Name Obama Replacement—Lawyer, Ex-Candidate Gets State Senate Seat in Time for Veto Session, CHICAGO SUN-TIMES, Nov. 7, 2004, at 8A.

321. Eric Resnick, *Solmonese: HRC May Let TGs be Dropped from ENDA Again*, GAY PEOPLE'S CHRONICLE.COM (Apr. 4, 2008), <http://www.gaypeopleschronicle.com/stories08/april/0404082.htm> [<http://perma.cc/2VBP48CG>].

322. *Id.*

323. *See id.*

324. There was a 'supermajority' only from Al Franken's July 2009 swearing-in until Ted Kennedy's August death, and then again from the September swearing-in of Kennedy's appointed replacement, Paul Kirk, until Republican Scott Brown won the special election to finish out Kennedy's term in February 2010. *See* Jennifer M. Granholm, *Debunking the Myth: Obama's Two-Year Supermajority*, HUFFINGTON POST (Oct. 1, 2012), http://www.huffingtonpost.com/jennifer-m-granholm/debunking-the-myth-obamas_b_1929869.html [<http://perma.cc/X9KT82H5>]. Franken was delayed due to an election challenge from Republican Norm Coleman. *See also* Sheehan v. Franken (*In re*. Contest of General Election), 767 N.W.2d 453, 456 (Minn. 2009).

325. *Patient Protection and Affordable Care Act*, Pub. L. 111-148, 124 Stat. 119 (Mar. 23, 2010); National Federation of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); King v. Burwell, 135 S. Ct. 2480 (2015).

to lift the ban on open service, but his effort to put that promise into action was met a ferocious backlash. Not only could he not keep the promise, but he was politically cornered into signing legislation—known as “Don’t Ask, Don’t Tell” (DADT). Interestingly, HRCF did not have a favorable view of compromise when DADT was poised to be the result. Disagreeing with Barney Frank’s amenability, Executive Director Tim McFeeley said, “[y]ou have to make it clear to [President Clinton] what your bottom line is, and when it isn’t delivered, you have to call him on it. The people who were toughest on this issue got their way.”³²⁶

McFeeley’s negativity was not unjustified. DADT came to be viewed as something less than a compromise,³²⁷ which simply left existing policy in place. Those hostile toward the idea of open service actually *gained* ground in practical terms. The policy was widely viewed as having made the lives of closeted servicemembers worse, eliminating the possibility of quasi-open service under tolerant superiors and giving *de facto* sanction to witch hunts against those suspected of being LGB even though the letter of the law technically prohibited such inquiries.³²⁸

Beyond the direct effect DADT had on the military there also was a negative impact on civilian rights—rights that did not yet even exist. Point ‘A’ may have been DADT but point ‘B’ was gay advocates feeling sufficiently beaten down to retreat on the quest for a civil rights bill—from a comprehensive bill to one only covering employment.³²⁹ Feldblum concedes it is “fair to say” in the wake of DADT in late 1993 that, at the very least, the perception was that a comprehensive bill had no momentum whatsoever on Capitol Hill.³³⁰ That reality led to ENDA, but the healthcare battle, as well

326. Chris Bull, *Broken Promise: Lawsuits, Protests, Confusion, and Condemnation Follow the President’s Compromise on Gays in the Military*, THE ADVOCATE, Aug. 24, 1993, at 24, 25. McFeeley later blamed the White House for giving HRCF bad planning advice on the military issue, adding that he knew of no gay group who actually had military service rights as a priority going into 1993. *Conspiracy Theory*, THE ADVOCATE, Dec. 28, 1993, at 16.

327. *National Defense Authorization Act for Fiscal Year 1994*, Pub. L. 103-160, § 571 (Nov. 30, 1993).

328. For early anticipation of DADT’s shortcomings, see Samuel A. Marcossan, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness*, 64 UMKC L. REV. 59, 61 (1995). For the reality of how the policy negatively impacted servicemembers, see Michael I. Spak, *Don’t Ask (and) Don’t Tell Don’t Work: Now What?* 10 TRANSNAT. L. & CONTEMP. PROB. 107, 112–14 (2000); Fiona Morgan, *Inside a Lesbian “Witch Hunt,”* SALON.COM (June 8, 2000), http://www.salon.com/2000/06/08/lesbians_2 [<http://perma.cc/W3GSSGVR>].

329. Vittulli, *supra* note 94, at 160.

330. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, *supra* note 55, at 178.

as Republican hatred of all that the Clinton Administration represented, spawned the ‘Contract with America’ as a powerful rhetorical weapon going into the 1994 midterm elections.

Just as those elections had seen that Republican wave sweep into control in both houses of Congress, 2010 saw a ‘Tea Party’ wave make substantial gains in both chambers, though only gaining full control in the House. However, the lame duck session of Congress preceding John Boehner’s ascension to the speakership was able to pass legislation repealing DADT.³³¹ By itself, this did not solve everything. Actual repeal of the DADT policy was contingent on formal certification that allowing open service would be “consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces,” which did not happen until the following July.³³² And, of course, even the full, certified repeal did nothing for trans people’s ability to serve openly in the military.³³³ But before either the ACA or the DADT repeal passed, there already had been one positive federal legislative development.

B. Ode to January 20, 2017

On Saturday October 10, 2009, President Obama was the keynote speaker at an HRC dinner in Washington, D.C. Though the HRC crowd and the many D.C. insiders who were in attendance loved the speech, the LGBT rank and file was less enthusiastic. The *Washington Blade*’s Kevin Naff gave the speech a failing grade on all fronts, but was particularly upset that Obama avoided the issue of marriage.³³⁴ HRC itself did little to put the masses at ease with Joe Solmonese having sent out an e-mail the day before the speech cautioning all to not judge the Obama record until 2017. John

331. *Don’t Ask, Don’t Tell Repeal Act of 2010*, Pub. L. 111-321, 124 Stat. 3515 (2010).

332. 124 Stat. 3515, § 2(b)(2)(C); Elizabeth Bumiller, *A Final Phase for Ending “Don’t Ask, Don’t Tell,”* N.Y. TIMES, July 23, 2011, at A13.

333. There have been recent moves toward allowing open trans service. Matthew Rosenberg, *Pentagon Moves to Allow Transgender People to Serve Openly in the Military*, N.Y. TIMES, July 14, 2015, at A14; David McCabe, *Huckabee Decries the ‘Social Experiment’ of Transgender Troops*, THE HILL (Aug. 6, 2015), <http://thehill.com/blogs/ballot-box/presidential-races/250520-huckabee-us-military-is-not-a-social-experiment> [<http://perma.cc/83QNUHJ7>]. Having never been outlawed by statute, this can, at least in theory, be accomplished through administrative action—but if never established through statute, it can subsequently be done away with via administrative action.

334. Kevin Naff, *Obama Speech Gets an “F,”* WASH. BLADE (Oct. 14, 2009), https://web.archive.org/web/20091014090824/http://www.washblade.com/blog/blog.cfm?blog_id=27589 [<http://perma.cc/J7GL9ZCZ>].

Aravosis, ardent defender of HRC in 2007 was horrified. “You don’t telegraph that it’s okay for him to wait until 2017 to keep his promises,” he wrote at *Americablog*, reminding all that such patience can only come with presumptions, namely “if he gets re-elected, if we still control the Congress, if we’re not having more ‘distracting’ wars, if it’s not a close election. . . .”³³⁵ Following the speech, gay conservative Andrew Sullivan chided Obama for saying he planned to repeal DADT while, to that point, having actually “done *nothing*.”³³⁶ The more liberal, North Carolina–based Pam Spaulding observed, “[t]he President mentioned our relationships, but gave no timeline other than ‘You will see a time.’ Well crap, I can say that and be as precise as the President.”³³⁷

Spaulding also stepped back to observe how the speech and its inevitable derivative spin—as well as the criticism of both—exposed that the divide between insiders and those living beyond the Beltway (physically as well as metaphorically) not only had not narrowed in the two years since the ENDA Crisis but that divide was not necessarily limited to the matter of trans-inclusion.

There are two realities, the Beltway reality, a myopic view that is so disconnected from the lives of everyday LGBTs (particularly Ts) that has us setting such low expectations. The reality outside the Beltway doesn’t exist, the focus is on cultivating the relationships with power brokers with the secondary focus on obtaining “what’s possible” politically, which of course is pretty subjective and dependent on whether there is professional peril in rocking any boats.

The reality outside the Beltway is often too impatient about the logistics of moving legislation in many respects, but the impatience is borne of the peril of losing a job, losing custody of children, or myriad other problems that will not be solved in their Red state any time soon.³³⁸

335. John Aravosis, *HRC: Obama Gets Until 2017 to Keep His Promises, and Don’t Criticize Him Until Then*, AMERICABLOG (Oct. 9, 2009), [http://americablog.com/2009/10/hrc-obama-gets-until-2017-to-keep-his-promises-and-don’t-criticize-him-until-then.html](http://americablog.com/2009/10/hrc-obama-gets-until-2017-to-keep-his-promises-and-don-t-criticize-him-until-then.html) [<http://perma.cc/KSA94PF3>] [hereinafter *HRC: Obama Gets Until 2017*] (ellipsis in original).

336. Andrew Sullivan, *Much Worse Than I Expected*, THE ATLANTIC (Oct. 10, 2009), <http://www.theatlantic.com/daily-dish/archive/2009/10/much-worse-than-i-expected/195580> [<http://perma.cc/7P7VGDFP>] (emphasis in original).

337. Pam Spaulding, *On Obama’s HRC Keynote—Plus Watching Our Movement in Flux*, PAM’S HOUSE BLEND (Oct. 10, 2009), <https://shadowproof.com/2009/10/10/on-obamas-hrc-keynote-plus-watching-our-movement-in-flux> [<http://perma.cc/E89VUW8Q>].

338. *Id.*

Obama joked about being Lady Gaga's opening act,³³⁹ receiving applause in return from a privileged, elite audience in a jurisdiction that has had LGB civil rights protections even longer than the state of Wisconsin.³⁴⁰ Naff, though ensconced in Washington at the *Blade*, concluded, "This wasn't so much a policy speech as a recitation of old campaign promises reheated for a breathless audience on its feet."³⁴¹ LGBT people in a majority of the country—watching the speech on CSPAN—were left wondering what was in Obama's speech for them.

C. ENDA 2009

1. Fifteen Years After 1994

Both prongs of Spaulding's analysis played out. The impatience over lack of action on DADT did give way to positive substance in a little over a year; impatience over lack of action on the matter of marriage equality, somewhat more justified, never was met with federal legislative substance but instead pointed toward action by the Supreme Court several years down the line. But ENDA? There was applause when the president said, "[w]e're pushing hard to pass" it.³⁴² However, the push was not hard enough for Republicans to take it seriously.

A month after being an applause line, ENDA's 2009 incarnation was the subject of a hearing in the Senate Health, Education, Labor and Pensions (HELP) Committee.³⁴³ None of the Republicans on the committee attended—and only a handful of Democrats did. *The Advocate*—merely by running a poll question on the acceptability thereof—sparked fears that a move might be afoot to jettison trans people yet again.³⁴⁴ And indeed they were jettisoned—but only from the list of those permitted to testify. As Kerry Eleveld recounts the situation, the organizers of the hearing essentially validated Lou

339. *Remarks by the President at Human Rights Campaign Dinner*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Oct. 11, 2009), <https://obamawhitehouse.archives.gov/the-press-office/2011/10/01/remarks-president-human-rights-campaigns-annual-national-dinner> [<http://perma.cc/EPK49K8Z>].

340. *Compare* 1977 D.C. LAW 2-38, *with* 1982 WIS. ACTS Ch. 112.

341. Naff, *Obama Speech Gets an "F," supra* note 334.

342. *Remarks by the President at Human Rights Campaign Dinner, supra* note 339.

343. Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong., 1st Sess. (introduced Aug. 5, 2009).

344. *Advocate Poll: Would You Support the Employment Non-Discrimination Act if Gender Identity Protections Were Again Taken Out of the Bill?* ADVOCATE.COM (n.d., but on or before Nov. 24, 2009), <https://web.archive.org/web/20091218011541/http://www.advocate.com/poll.aspx?ekfrm=102935> [<http://perma.cc/52NLQ9W8>].

Sheldon's histrionic complaint of two years prior. They were "so afraid of allowing transgender people to testify that they cut them out of the hearing. Instead, members of the transgender community were asked to speak at a press conference before the hearing."³⁴⁵ Of course, given that trans people were in the 2009 bill, a full comparison to what Frye and Kerin experienced in 1994³⁴⁶ would not be accurate.

At least quantitatively.

2. *The Mystery of Change*

Following the November hearing there would be no further action on ENDA during the 111th Congress.³⁴⁷ In fact, those in the know viewed it as being dead at least as early as January 2010.³⁴⁸ As he left Congress, Barney Frank reflected and blamed the failure of ENDA in 2009 on the healthcare bill sucking all of the oxygen out of the same committee that had jurisdiction over ENDA,³⁴⁹ but as soon as the extent of the November electoral carnage was clear, he pronounced it dead for the next session as well.³⁵⁰ 2010 did see protests seeking to bring ENDA to a vote; in response, Speaker Nancy Pelosi proclaimed ENDA to be a "top priority" and later nebulously asserted that there would be a vote "soon."³⁵¹

The negative assessments would carry the day(s), in no small part due to secrecy. In the House, soon has never come. No markup

345. Kerry Eleveld, *View from the Left—Uniting LGBT Activists Against the Bathroom Myth*, DAILY KOS (Nov. 14, 2015), <http://www.dailykos.com/story/2015/11/14/1449692/-View-from-the-left-Uniting-LGBT-activists-against-the-bathroom-myth> [<http://perma.cc/AXL3SCP2>]; see *Employment Non-Discrimination Act of 2007: Hearing*, *supra* note 93, at 76–77.

346. See Frye, *supra* note 62.

347. Barney Frank's House versions, both trans-inclusive and which had already had a hearing several months before Obama's speech, would also see no action in 2010. Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009).

348. Lou Chibbaro, Jr., *Filibuster Threat Makes ENDA Unlikely in 2010*, WASH. BLADE (Jan. 27, 2010), <http://dcagenda.com/2010/01/filibuster-threat-makes-enda-unlikely-in-2010> [<http://perma.cc/X7RHZQ24>].

349. E.J. Graff, *The Legacy of Barney*, THE ADVOCATE (Dec. 1, 2012), <http://www.advocate.com/print-issue/current-issue/2012/12/01/legacy-barney> [<http://perma.cc/73VBZRLK>].

350. Lou Chibbaro, Jr., *Frank: 'Zero chance' for LGBT bills next year*, WASH. BLADE (Nov. 8, 2010), <http://www.washingtonblade.com/2010/11/08/frank-%E2%80%98zero-chance%E2%80%99-for-lgbt-bills-next-year/> [<http://perma.cc/L3MDRRRP>].

351. Chris Johnson, *National News in Brief: Pelosi Expects House Vote on ENDA 'Soon'*, WASH. BLADE (Apr. 22, 2010), <https://web.archive.org/web/20100422133232/http://www.dcagenda.com/2010/04/15/pelosi-expects-house-vote-on-enda-soon> [<http://perma.cc/AL8PTGMZ>]; see also Chris Johnson, *4 Arrested in ENDA Protest on Capitol Hill*, WASH. BLADE (Mar. 18, 2010), <http://www.washingtonblade.com/2010/03/18/four-arrested-in-enda-protest-on-capitol-hill> [<http://perma.cc/T88XVF4K>].

of the 2009–10 bill ever occurred. NCTE’s Keisling asked trans people to go to D.C. to lobby for an ENDA that, if it had moved, would have done so with modified language.³⁵² She made this ask of the community without those modifications being known—or at least disclosed.³⁵³ She tried to minimize any possible changes as merely “language tweaks” that may or may not have involved rights to restroom usage.³⁵⁴ The changes “might be harmless or it might be horrible.”³⁵⁵ Above all else, however, Keisling emphasized her and NCTE’s connection to *the process*.³⁵⁶

Sources available to trans activists outside of the NCTE orbit indicated that the changes being considered were indeed surgery-privileging restroom-use changes, but the secrecy prevented those who would be affected (and those who were asked to lobby for the bill whatever the changes might have been) from knowing.³⁵⁷ Moreso than fear, this began to fuel anger, but this time it was not merely at Frank and HRC. “The logic that Keisling doesn’t know the language, but is ‘working closely’ with Frank, is faulty. It’s more than faulty, it’s a lie,” Marti Abernathy surmised at *TransAdvocate*.³⁵⁸ “Either Keisling knows the language and is lying, or is lying about being in the loop. Both can’t true.”³⁵⁹

Professor Jill Weiss publicly questioned why ENDA was being delayed seemingly to death.³⁶⁰ Her reward was for congressional aides to scold her, telling her “to ‘calm down’ and ‘listen up,’ as if I’m a disrespectful student.”³⁶¹ Particularly frightening was Barney Frank being quoted as saying “transgender people with ‘one set of genitals’ would not be able to go to a bathroom for people with another set of genitals.”³⁶² Weiss had insisted the never divulged

352. Marti Abernathy, *Genital Checking, Bad ENDA Language, and NCTE Lobby Days*, TRANSADVOCATE, <http://www.transadvocate.com/genital-checking-bad-enda-language-nc-te-lobby-days.htm> [<http://perma.cc/52UVL2EZ>].

353. Lisa Keen, *Leaders: ENDA Will Get House Vote this Month*, BAY AREA REP. (Mar. 4, 2010), <http://ebar.com/news/article.php?sec=news&article=4590> [<http://perma.cc/48UQQSUA>].

354. *Id.*

355. *Id.*

356. *Id.*

357. Abernathy, *supra* note 352.

358. *Id.*

359. *Id.*

360. Jillian T. Weiss, *Dems: The Dog Ate My Homework*, BILERICO PROJECT (May 17, 2010), http://www.bilerico.com/2010/05/dems_the_dog_ate_my_homework.php [<http://perma.cc/RPF65CR4>].

361. *Id.*

362. Steven T. Dennis & Tory Newmyer, *Backers Say Gay Rights Bills Will Win in House*, ROLL CALL (May 10, 2010), http://www.rollcall.com/issues/55_129/-46002-1.html (available on Westlaw).

solution language would prevent genital inspections.³⁶³ But, as many in the rank and file recognized, the language intimated by Frank would still immunize employers who might inquire about whether a woman is trans or not.³⁶⁴ Effectively, it would be a double-barreled license: to out trans women merely by asking *the question*, and to stigmatize any woman suspected of being trans merely by asking *the question*.³⁶⁵ “I’ve been subjected to so-called ‘reasonable accommodations’ for restroom usage in the past,” Lisa Harney commented at the *Bilerico Project*.³⁶⁶ “It was inconvenient and problematic, and singled me out for a special kind of treatment for the sake of protecting cis women from my presence”³⁶⁷

D. Legislation for the Dead, Crumbs for the Living

1. Promises

In his 2009 HRC keynote, Obama did tout one piece of pro-LGBT legislation that actually was on the cusp of moving from proposal to statute.³⁶⁸ Several sessions of Congress preceding 2009 had seen proposals to make anti-gay violence prosecutable as a federal hate crime. Though none had become law, the concept did occasionally gain traction. Even the rancorous 2007 session saw a trans-inclusive version of the bill pass in each chamber, though as a stand-alone bill in the House and as an amendment to a defense bill in the Senate.³⁶⁹ Under threat of a Bush veto, no version found its way into any bill that became law during the 110th Congress.³⁷⁰

363. See Jillian T. Weiss, *ENDA Now Ready to Pass*, BILERICO PROJECT (May 11, 2010), http://www.bilerico.com/2010/05/enda_now_ready_to_pass.php [<http://perma.cc/ZG3TMSBZ>]. Cf. Nan Hunter, *Whenda ENDA?* BILERICO PROJECT (Dec. 9, 2009), http://www.bilerico.com/2009/12/whenda_enda.php [<http://perma.cc/8672R93X>]. This rosy assessment came after Weiss had expressed shock that restroom issues were being worked on when Professor Nan Hunter gave it as a reason for ENDA’s lack of movement.

364. Marti Abernathy, *May Flowers and ENDA’s Showers*, TRANSADVOCATE (on or before Apr. 27, 2007), http://www.transadvocate.com/may/flowers-and-endas-showers_n_101.htm [<http://perma.cc/9FRVE85T>].

365. *Id.*

366. Lisa Harney, Comment to *Get the Facts Before You Rant, or: ENDA Will Not Exterminate Trans Women*, BILERICO PROJECT (May 15, 2010, 1:25AM), http://www.bilerico.com/2010/05/get_the_facts_before_you_rant_or_enda_will_not_ext.php [<http://perma.cc/78YBMJS3>].

367. *Id.*

368. *Remarks by the President at Human Rights Campaign Dinner*, *supra* note 339.

369. Lou Chibbaro, Jr., *Hate Crimes Bill Faces Uphill Fight: “Historic” Outcome in House Unlikely to Survive a Bush Veto*, WASH. BLADE (May 11, 2007), <https://web.archive.org/web/20071201045252/http://www.washblade.com/2007/5-11/news/national/10545.cfm> [<http://perma.cc/L8RA8SLC>].

370. OFFICE OF MANAGEMENT AND BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 1592—LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (2007),

Again in the 111th Congress a stand-alone hate crimes bill was introduced, though politics and procedural moves found the proposal as an amendment to one chamber's version of a defense bill while a different form of the bill passed in the other chamber, leading to a conference committee.³⁷¹ That committee kept the hate crimes language in its report, which was approved by the House two days before Obama's speech.³⁷² "The House passed the bill again this week," the President announced to great applause from the HRC crowd, "[a]nd I can announce that after more than a decade, this bill is set to pass and I will sign it into law."³⁷³

This promise was one that he was able to keep in short order.

Even so, his willingness and ability to do so in October had not come without controversy; there were reports—vehemently denied by HRC—of "pro-active lobbying on the hill for Congress *not* to consider" a DADT repeal bill but instead to focus on hate crimes.³⁷⁴ By the end of the month, the Senate had concurred on, and Obama signed, the bill that had come to be named for young, gay Wyoming man, Matthew Shepard, and African-American Texan, James Byrd, Jr., both murdered in 1998.³⁷⁵ In support of the bill, Rep. Mike Honda had invoked the memory of Colorado transgender woman, Angie Zapata, whose 2008 murder was successfully prosecuted as a *state* hate crime,³⁷⁶ but while neither Zapata nor Gwen Araujo,

<https://web.archive.org/web/20070509132516/http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf>.

371. HUMAN RIGHTS CAMPAIGN, *Hate Crimes Timeline*, <http://www.hrc.org/resources/hatecrimetimeline#2009> [<http://perma.cc/4BHSRECU>].

372. *Id.*

373. *Remarks by the President at Human Rights Campaign Dinner*, *supra* note 339.

374. Michelangelo Signorile, *Joe Solmonese Interview: Discusses Obama, Responds to Critics*, THE GIST (June 4, 2009) (quoting Aaron Belkin), <http://www.signorile.com/2009/06/joe-solmonese-interview-discusses-obama.html> [<http://perma.cc/UML8MFKT>]; Jason Bellini, *The Surprising Holdouts on Don't Ask, Don't Tell*, THE DAILY BEAST (June 4, 2009), [http://www.thedailybeast.com/articles/2009/06/04/the-surprising-holdouts-on-don't-ask-don't-tell.html](http://www.thedailybeast.com/articles/2009/06/04/the-surprising-holdouts-on-don-t-ask-don-t-tell.html) [<http://perma.cc/AU6ZG66M>].

375. *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, Division E of *National Defense Authorization Act for Fiscal Year 2010*, Pub. L. 111-84, 123 Stat. 2189 (Oct. 28, 2009) [hereinafter *Shepard and Byrd Hate Crimes Prevention Act*].

376. *People v. Andrade*, No. 09CA1310, 2011 Colo. App. LEXIS 1304 (Colo. App. Aug. 11, 2011). See also Chris Johnson, *Activists, Family Hope Good Can Come from Zapata's Death*, WASH. BLADE (May 1, 2009), <https://web.archive.org/web/20090509184419/http://washblade.com/2009/5-1/news/national/14456.cfm> [<http://perma.cc/9B2XXMB7>]; *Justice Served for Angie*, GREELEY TRIBUNE, Apr. 24, 2009, <https://1.next.westlaw.com/Document/I88a8169030b311de92c2b99a298475aa/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6ad3c00000159eda271f57e1c81a2%3FNv%3DNEWS%26fragmentIdentifier%3DI88a8169030b311de92c2b99a298475aa%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=31779bda6b93c3dd37fa1448e44a0134&list=NEWS&rank=1&sessionScopeId=ba49ea19562aea833a4ad5040>

murdered in 2002, became memorialized in the bill's title the enacted bill was trans-inclusive, marking the first time that positive federal legislation clearly included trans people.³⁷⁷

2. *Reflections on Ratios*

The 110th Congress, under Democratic control but with a Republican president ready and willing (histrionics of LGB Bush supporters notwithstanding) to veto any LGB and/or T civil rights measure it might pass, saw the LGBT community implode. The combined practicalities of no ENDA having any chance of being signed (or enacted over a veto), and an overwhelming display of community support for trans-inclusion, were sacrificed on the altar of incremental progress theory.³⁷⁸ And as they had for the three decades preceding, when bills did not even go through the perfunctory exercise of being inclusively introduced only to be later de-transed, the needs of the many LGBs were said to have outweighed the needs of the purportedly few Ts.

The 111th Congress, also under Democratic control but now with a Democrat in the White House, not only privileged the needs of the few LGBs who desired a career in the military over the needs of all LGBTs in the civilian employment arena but also privileged symbolism and prosecutorial authority over the ability of private individuals to initiate challenges to workplace discrimination. Barney Frank, ever willing to remove all traces of humanity from the analysis put it simply, “[w]e had three items and there was only room for two.”³⁷⁹ There was room for LGB soldiers, but not for the LGB civilians in states without gay rights laws—the same LGBs whose employment concerns were the collective bloody shirt waved by gay incrementalists, both left and right, so often but most angrily in 2007. Professing rare agreement with John Aravosis back in 2007 over ENDA incrementalism, the homocon *Gay Patriot* had seen “little reason why movement forward for homosexuals should be stymied by something that only a few seem to find reason for.”³⁸⁰ In the end, those concerns indeed were sacrificed in favor of the employment-arena

37456c85ea32afe05ea9acc47c7a6e1a5de2bd3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29.

377. 111 Cong. Rec. E1004 (April 28, 2009) (remarks of Rep. Honda).

378. John Aravosis, *How Did the T Get in LGBT?*, SALON (Oct. 8, 2007, 7:10 AM), <http://www.salon.com/opinion/feature/2007/10/08/lgbt/print.html> [<http://perma.cc/S6PM2LR2>].

379. Graff, *supra* note 349.

380. Average Gay Joe, *About that "T" in GLBT*. . . , GAY PATRIOT (Oct. 9, 2007, 5:24 PM), <http://gaypatriot.net/2007/10/09/about-that-t-in-glbt> [<http://perma.cc/9S4CPEE7>].

goal of a group much smaller than the LGB whole—but not that of civilian trans people.

3. *Protection of Stratification*

The Shepard-Byrd Act made certain acts into offenses that previously were not.³⁸¹ Paradoxically, it also made *no* acts criminal that were not already so.³⁸² Assault was still assault and murder still murder. The Act did establish new funding and new avenues for federal authorities to step in where local law enforcement officials might refuse or actually be unable to do so, but the substantive crimes committed against Matthew Shepard and James Byrd, Jr. already constituted first-degree criminal offenses in 1998—as evidenced by the convictions, death sentences, and life terms that resulted.³⁸³ But in 1998, instead of murdering Shepard, had Aaron McKinney and Russell Henderson committed acts of employment discrimination against him, those acts would have gone unpunished—both civilly and criminally.³⁸⁴ And such acts would remain beyond the reach of federal law even after President Obama signed the Shepard-Byrd Act.

During its first month what the new law could and could not do would become clear. Sadly proving one of the conservative arguments against federal hate crime legislation, despite the presence of the word “prevention” in the Act’s name it indeed was “not going to prevent anything.”³⁸⁵ That is an argument not unknown even within the LGBT community and not without reason. As mentioned earlier, the Act did not prevent the Orlando Pulse massacre in 2016.³⁸⁶ Seven years earlier, the Act did not prevent the murder of

381. *Shepard and Byrd Hate Crimes Prevention Act*, *supra* note 375.

382. *Id.*

383. See *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000); *Berry v. State*, NO. 09-00-061 CR, 2001 Tex. App. LEXIS 4362 (Tex. App. Beaumont June 27, 2001). See also *Justice wins swiftly as jasper saga ends*, SAN ANTONIO EXPRESS-NEWS, Nov. 23, 1999; *Jasper Verdict: King’s conviction begins long road back*, DALLAS MORNING NEWS, Feb. 24, 1999; Kevin McCullen, *Gay Student’s Parents OK Deal to Spare Killer—McKinney Gets Two Life Sentences for Wyoming Murder*, ROCKY MOUNTAIN NEWS, Nov. 5, 1999, at 7A; Kevin McCullen, *Shepard Suspect Pleads Guilty—Henderson Admits Role in “Senseless, Brutal” Killing of Student, Gets Two Life Terms*, ROCKY MOUNTAIN NEWS, April 6, 1999, at 5A.

384. Aravosis, *supra* note 378.

385. Timothy Lynch, *Mr. President, Get Ready for Another Veto*, NATIONAL REVIEW (May 3, 2007, 6:30 AM), <http://www.nationalreview.com/article/220810/hate-timothy-lynch> [<http://perma.cc/U4GYKZJ7>] (writing about the 2007 bill). See also Katrina C. Rose, *On A Clear Day You Can See Why Some People Have Given Up on the LGRL Forever*, TEXAS TRIANGLE, May 31, 2001, <http://www.txtriangle.com/archive/934/vp1katrose.htm> [<http://perma.cc/DA8WHBNS>] (critiquing the 2001 Texas hate crime law); Andrew Sullivan, *What’s So Bad About Hate*, N.Y. TIMES MAG. (Sept. 26, 1999), <http://www.nytimes.com/1999/09/26/magazine/what-s-so-bad-about-hate.html> [<http://perma.cc/K3Q354YB>].

386. Randall Jenson, *Our Pulse: On Residual Trauma Facing LGBTQ Latinx Communities*, OUT MAGAZINE (June 21, 2016, 8:00), <http://www.out.com/out-exclusives/2016>

Jorge Steven Lopez Mercado in Puerto Rico.³⁸⁷ And it could not prevent a clash over who could claim Mercado as one of their own, trans people or cis gay men. Puerto Rico native Pedro Julio Serrano, NGLTF's communications manager, was adamant that Mercado was not, never was and could not in death be trans—facts be damned.³⁸⁸

Much has been said about hate crime victim Jorge Steven López possibly being trans, but I want to make it clear: he wasn't. But he was very comfortable in his own skin, he loved to cross gender boundaries and he was accepted as such by his friends, his partner and his own parents. His mom, Miriam Mercado, knowing that his <sic> son used hair extensions as part of his look, even told the press in Puerto Rico, “[b]ehind that wig and those boots, there was a human being, a very much loved son, a brother and a friend.

He was a young gay man, who like many others, used to do drag for special occasions such as Halloween or LGBT Pride parades. It's like many gay men who go to Fire Island to compete in drag races and do drag just for a race.

I understand the politics behind identifying a hate crime victim as trans when part of his or her expression does not conform to his or her sex, but sometimes we must bend the rules to accommodate the cultural and societal differences.³⁸⁹

Every word Serrano typed in his blog post regarding the specific life activities of Mercado *could* have been accurate. But whether or not Mercado's murder could be prosecutable as a federal hate crime under the law that he just barely lived to see—a law he possibly never even knew about—would not be determined by the unwritten rules of Puerto Rico's culture and society (much less Serrano's musings thereon) but, rather, by the text and legislative history of law being utilized in federal court by prosecutors.

Initial reports indicated that the killer thought Mercado was a woman when soliciting Mercado for sex in an area known for prostitution.³⁹⁰ Per the killer's confession the murder occurred upon

/6/21/our-pulse-residual-trauma-facing-lgbtq-latinx-communities [http://perma.cc/78KH72GW].

387. Victoria Law, *Anti-Transgender Violence: How Hate-Crime Laws Have Failed*, THRUTHOUT (Sept. 18, 2011), <http://www.truth-out.org/news/item/3320:antitransgender-violence-how-hatecrime-laws-have-failed> [http://perma.cc/C8QR6ZEA].

388. Pedro Julio Serrano, *Jorge Steven Was Not Trans, But . . .*, PEDROJULIOSERRANO.COM (Nov. 27, 2009), <http://pedrojuloserrano.com/2009/11/27/jorge-steven-was-not-trans-but> [http://perma.cc/L2T8EYXQ].

389. *Id.*

390. Michael K. Lavers, *Activists, politicians, urge Puerto Rican authorities to*

discovery that Mercado was male.³⁹¹ A “gay panic” defense seemed to be the likely defense strategy.³⁹² Even taking that into account, the confession was not good enough for Serrano. “None of Jorge Steven’s friends, and I’ve spoken to many of them, knew anything about his ever having engaged in sex work, not his family, and not the police,” Serrano told Doug Ireland of *Gay City News*.³⁹³ “Nor was he known as a cross-dresser. He identified and lived as a very proud gay man, he was very genuine and authentic. He was just very fashion-oriented and what you could call a gender-bender, but not in a transgendered way.”³⁹⁴ Again, Serrano’s analysis of Puerto Rico’s culture may well have been spot on, and his efforts to fashion an explanation of Mercado’s existence adequate for white, mainland understandings of LGB and T simply may have been as quixotic as cross-generational, trans terminological praxis often proves to be. But where a hate crime law being deployed is limited in scope, for purposes of that law Serrano’s words would be homonormative gibberish, actually worthy of “argle-bargle” sneer should such a scope-centric argument ever come before a justice even more enamored of textualism than was Antonin Scalia.³⁹⁵

Had all of the facts underlying the case transpired not in Puerto Rico but instead in another American jurisdiction with a large Hispanic population—namely Texas—Serrano could have issued all of the protestations he desired, but Mercado’s life and death would not have fallen under the auspices of Texas’s 2001 hate crime statute.³⁹⁶ Recall that the deal struck in 1999 during George W. Bush’s second term as governor—a deal that held together into Rick Perry’s first—resulted not only in a rhetorical jab which turned “sexual orientation” back into “sexual preference,”³⁹⁷ but also in that resultant term having “the following meaning *only*: a preference for heterosexuality, homosexuality, or bisexuality.”³⁹⁸ Mercado’s life and death could not

prosecute López murder as hate crime, EDGEMEDIANETWORK (Nov. 18, 2009), <http://www.edgemedianetwork.com/news//99187> [<http://perma.cc/PNN7VDFC>].

391. *Id.*

392. *Id.*

393. Doug Ireland, *Confession Questioned in Puerto Rico Slaughter*, GAY CITY NEWS (Nov. 25, 2009), http://www.gaycitynews.com/articles/2009/11/25/gay_city_news/news/doc4b0d46b089fc0263838761.txt (on file with author).

394. *Id.*

395. *United States v. Windsor*, 133 S.Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

396. Philip Parker, *House Gives Tentative Approval to Hate Crime Bill*, AMARILLO GLOBE-NEWS (Apr. 28, 1999), http://amarillo.com/stories/1999/04/28/tex_171-5955.001.shtml [<http://perma.cc/UCM2XSE5>].

397. *Id.*

398. TEX. CODE CRIM. PROC. ANN. art. 42.014(c) (2014) (emphasis added). *See also* Vanessa Edwards Foster, *Equality Is Less Than Egalité: Texas Lobby Days Wrap*, QUEER TODAY.COM (Mar. 6, 2009, 10:30 AM), <http://transpolitical.blogspot.com/2009/03/equality-is-less-than-egalite.html> [<http://perma.cc/YN98WACZ>].

be encompassed by ‘only homosexuality.’ But both applicable hate crime statutes—Shepard-Byrd and Puerto Rico’s own 2002 law—were trans-inclusive.³⁹⁹ So, irrespective of spin, the text and intent of the laws *did* envision Mercado’s life and death.⁴⁰⁰

No argle.

No bargle.

4. *Remembrance*

Some could not envision the idea that anyone would look upon the dead Mercado as anything but a homonormative gay man. At a vigil for him, New York City Council Speaker Christine Quinn, formerly the executive director of the New York City Gay and Lesbian Anti-Violence Project, referenced both the anti-gay and anti-trans aspects of the murder.⁴⁰¹ But still there were efforts to erase any connection between Mercado’s life, Mercado’s death and “trans.” And while the proximity between the passage of the Shepard-Byrd Act and Mercado’s murder stood to emphasize why the Act was necessary (in much the same way that the attack on Chrissy Polis in a Maryland McDonald’s following failure of a trans rights bill in that state illustrated how much such a law—particularly one which covered public accommodations, something the bill proposed in 2011 had not—was needed),⁴⁰² Mercado’s murder stood in even closer proximity to the annual Transgender Day of Remembrance.

Going in to the weekend vigils in memory of Mercado, trans anger—both at perceived erasure *and* over-emphasis on one victim of violence—was palpable.⁴⁰³ And as if on cue, HRC again showed what many trans people believe to be its true colors by not mentioning, in its press release about the murder, that Puerto Rico’s hate

399. See Gunner, *Obama Signs Trans-Inclusive Hate Crimes Law*, MASSACHUSETTS TRANSGENDER POLITICAL COALITION (Oct. 28, 2009), <http://www.masstpc.org/massachusetts/transgender/political-coalition/praises-federal-hate-crimes-law-signing> [<http://perma.cc/ZH4XNMJA>]; Paulc, *Murders of Trans People in Puerto Rico Go Unrecorded* (Nov. 28, 2011), <http://www.care2.com/causes/murders-of-trans-people-in-puerto-rico-go-unrecorded.html> [<http://perma.cc/P4JU2CN2>].

400. Puerto Rico’s 2002 hate crime statute does not define “gender identity” but nevertheless does include the category along with “sexual orientation.” 34 A.L.R.A. App. II, Rule 171(b)(1)(R) (2004).

401. See Andy Humm, *Slain Puerto Rican Teen Mourned*, GAY CITY NEWS (Nov. 25, 2009), <http://gaycitynews.nyc/slain-puerto-rican-teen-mourned/> [<http://perma.cc/93MBXDKX>].

402. See Andrea Appleton, *Anti-Discrimination Bill Threatens Transgender, LGBT Alliances*, CITY PAPER (June 15, 2011), <http://citypaper.com/news/transgender-gap-1.1161742> [<http://perma.cc/2DSG7PZ9>]. See also H.B. 235 (Md. 2011).

403. See Ethan St. Pierre, *My Statement Regarding the Vigils on Sunday for Jorge Steven Lopez Mercado*, SHADOW PROOF (Nov. 23, 2009), <http://www.pamshouseblend.com/diary/14224/ethan-st-pierre-my-statement-regarding-the-vigils-on-sunday-for-jorge-steven-lopez-mercado> [<http://perma.cc/Q48WQLW2>].

crime statute includes “gender identity” as well as “sexual orientation.”⁴⁰⁴ Doubtlessly, some will see my remembrance of this omission to be petty, nothing but a two-word misstep that should calmly be weighed against all of the good that the organization inevitably claims that it does for trans people. But continual omissions add up to a historical record, a record that translates omissions into substantive absence, an absence that is readily available for one generation to easily repeat for a future generation, a future generation that will teach as fact that there was nothing in the first instance to omit and, therefore, nothing for the omitted to complain about.

5. Prosecuting Expendability

The Puerto Rican government eventually gave in to demands to investigate the murder as a hate crime pursuant to the Commonwealth’s hate crime law, but there were also loud calls, including from Serrano, for U.S. Attorney General Eric Holder to christen the Shepard-Byrd Act with a prosecution in the Mercado murder.⁴⁰⁵ However, no trial came to pass; likewise, neither did an immediate test of the Shepard-Byrd Act’s vitality and definitional parameters. A guilty plea by Juan Martinez Matos led to a ninety-nine-year prison term.⁴⁰⁶ Justice was served—to any extent that it can be, short of bringing Mercado back to life—but so little was solved. The intracommunity discord over how to even acknowledge—much less embrace—the undisputed fact of Mercado’s gender variance demonstrated how little had changed in the four decades since Stonewall, the revolutionary spark ignited in part by another gender nonconforming Puerto Rican teenager, Sylvia Rivera.⁴⁰⁷

Omission and erasure were both not just alive, but were well—and still acceptable. But at the same time, much actually *had* changed. Rivera and the trans activists of the Stonewall generation ran headlong into a brick wall of gay resistance to expending political capital on the legal needs of trans people and gender nonconformists. By the time of Mercado’s murder, despite some very visible and

404. 34 A.L.R.A. App. II, Rule 171(b)(1)(R) (2004); *id.* at Sandeen preface.

405. Arthur Brice, *Suspect Arrest in Brutal Slaying of Gay Man in Puerto Rico*, CNN (Nov. 17, 2009, 5:23 PM), <http://www.cnn.com/2009/CRIME/11/17/puerto.rico.hate.crime> [<http://perma.cc/5TUKYFER>].

406. See Andy Towle, *Killer of Gay Puerto Rican Teen Jorge Mercado Pleads Guilty, Gets 99 Years in Prison*, TOWLEROAD (May 12, 2010, 3:15 PM), <http://www.towleroad.com/2010/05/killer-of-gay-puerto-rican-teen-jorge-mercado-pleads-guilty-gets-99-years-in-prison> [<http://perma.cc/RD33NVYE>].

407. For example, the *Washington Blade*’s item on the plea deal was completely devoid of any reference to Mercado’s gender nonconformity. *Puerto Rican Man Pleads Guilty in Killing of Gay Teen*, WASH. BLADE (May 20, 2010, 6:01 PM) (on file with author).

painful exceptions—including, of course, the 2007 ENDA Crisis—that brick wall had for the most part been demolished. Legislative trans-inclusion was more the norm than the exception, but the presence of trans employees in the ranks of Gay, Inc. organizations was still the exception rather than the rule. And the action and inaction of Congress in 2009 demonstrated that more than just the needs of trans people were expendable in favor of (relatively) quick, symbolic victories; the needs of the majority of LGBs were as well. And the reactions to the trans community merely attempting to point out the obvious gender nonconformity in the stories of Mercado's life that immediately entered cultural circulation demonstrated that the presence of trans concerns in a community that had seemed to have evolved from the mindset that led it to side with Jean O'Leary on the fourth anniversary of Stonewall was now at the pleasure of O'Leary's descendants, not by any right held by the descendants of Sylvia Rivera and Lee Brewster.⁴⁰⁸

Ethan St. Pierre is not only a trans man, and one of those who twice protested at HRC headquarters in 2004.⁴⁰⁹ He is also the nephew of a trans woman who died in a hate crime murder.⁴¹⁰ St. Pierre offered what *should* have been an uncontroversial encapsulation of Mercado's murder:

Jorge was decapitated, dismembered and his/her body burned at the hands of a killer whose only defense is that Jorge was wearing woman's clothing and he believed Jorge to be a woman.

Jorge may have been a gay man or may have been a transgender woman. Either way Jorge was clearly a victim of anti-transgender bias and Jorge paid for that gender expression with his/her life.⁴¹¹

The pushback against it and other substantively equivalent interpretations of the disseminated facts evidence fear of acknowledgment—not of perhaps incorrectly acknowledging how Mercado's life was lived or of buried gender nonconforming thoughts and desired in the hearts and minds of those who cannot bring themselves to

408. See Saypen, *A Little Bit of Our History*, *supra* note 251, at 56–59; *Behind the Lines on Gay Pride Sunday*, GAY, Aug. 1973 at 3 [hereinafter *Behind the Lines on Gay Pride Sunday*].

409. NTAC Media, *Unprecedented week of Transgender Activism in Nation's Capital*, PITTSBURGH INDEPENDENT MEDIA CENTER (May 25, 2004, 6:17 PM), <http://pittsburgh.indymedia.org/news/2004/05/14199.php> [<http://perma.cc/EN68NJSD>].

410. Anna Wipfler, *What Does Transgender Day of Remembrance Mean to You—Q&A with Ethan St. Pierre*, GLAAD (Nov. 20, 2009), <http://www.glaad.org/2009/11/20/what-does-transgender-day-of-remembrance-mean-to-you-qa-with-ethan-stpierre> [<http://perma.cc/477KZ4FL>].

411. St. Pierre, *supra* note 403.

present as anything but gender normative, but of acknowledging that expelling trans matters and gender variance from the gay rights movement in the wake of Stonewall may have been wrong when the expulsion took place.

E. Disappearance

The fervor and energy of 2007 could have gone toward making a true statement of momentum on a trans-inclusive ENDA—an outward, directionally positive display of unity for the entire nation to complement the Bush veto that likely would have been the procedural end of the bill’s rainbow. Instead, by necessity, that fervor and energy had to turn inward, to fight an old battle that some (but not all) had been convinced was over, resolved in favor of trans people, trans issues, trans inclusion and a unified LGBT community. In fact, not only was the battle not over, it quickly became clear that those willing to sacrifice trans people had stepped up their game. Gone were the substanceless platitudes of the Elizabeth Birch era.⁴¹² In their place was an unabashed willingness to lie to the collective face of the trans community, to deceive those within the trans community who had at great reputational risk to themselves taken up for HRC, and to generate and distribute pro-incrementalism propaganda to convince those willing to consume it that all was well in incremental progress land.

The year 2009 saw the addition of a Democratic president to the mix. A federal LGB bill passed and became law.⁴¹³ And even a federal LGBT bill passed and became law.⁴¹⁴ But it was not ENDA. For ENDA in 2009, things did not get better; things got worse. Problematic as 2007 was, the H.R. 2015 ENDA bill existed—in theory and reality.⁴¹⁵ In 2009, ENDA not only went nowhere but that all-but-secret journey to nowhere generated almost as much fear, loathing and suspicion as the open betrayal of 2007 did.⁴¹⁶

412. See *Why the Transgender Community Hates HRC*, TRANSGRIOT (Oct. 8, 2007), <http://transgriot.blogspot.com/2007/10/why-transgender-community-hates-hrc.html> [<http://perma.cc/66N3677Y>].

413. See Jesse Lee, *The President Signs Repeal of “Don’t Ask Don’t Tell”: “Out of Many, We Are One”*, THE WHITE HOUSE (Dec. 22, 2010, 12:35 PM), <http://www.whitehouse.gov/blog/2010/12/22/president-signs-repeal-don-t-ask-don-t-tell-out-many-we-are-one> [<http://perma.cc/7YWK79Z3>].

414. Margaret Talev, *Obama Signs First Major Federal Gay-Rights Law*, MCCLATCHYDC (Oct. 28, 2009, 5:30 PM), <http://www.mcclatchydc.com/news/politics-government/article/24561835.html> [<http://perma.cc/FTA4HPWZ>].

415. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007), <http://www.congress.gov/bill/110th-congress/house-bill/2015/text> [<http://perma.cc/UG6TELCJ>].

416. John Arvosis, *ENDA, We Hardly Knew Ya*, AMERICABLOG (June 11, 2014, 8:00 AM), <http://americablog.com/2014/06/enda-hardly-knew-ya.html> [<http://perma.cc/D3G2LF3W>].

And then came the Tea Party.
And then ENDA was gone.

III. PIECES OF FORGETFULNESS

A. A Phantom ENDA and a Phantom Denial

*Unfortunately, we tend to forget about all the progress we have made. We concentrate too much on our failures and inadequacies.*⁴¹⁷

“Gone” was not “gone” in every sense of the word, but by 2014, the prospects for ENDA becoming law during the Obama Administration had in fact decreased from slim to none. Obama’s impact on the EEOC, perhaps most notably his appointment of Chai Feldblum,⁴¹⁸ had led administrative rulings favorable to trans,⁴¹⁹ and subsequently LGB, employment.⁴²⁰ But the astroturfed backlash to Obamacare had led to the Democrats losing the majority in the House in 2010; the intense gerrymandering which followed, aided by the free flow of dark money consecrated by Supreme Court in the *Citizen United* decision,⁴²¹ only made the partisan divide worse following the 2012 elections, even with Obama managing to win a second term. Nevertheless, in the Congress which those elections yielded, ENDA did for the first time pass in the Senate.⁴²² 2013 was not 2007, and this time it was a *trans-inclusive* ENDA that received the favorable full-chamber vote.⁴²³

417. Lenny Giteck, *Is This Any Way to Run a Movement? Six National Gay Leaders Respond*, THE ADVOCATE, June 10, 1986 at 42, 49 (quoting Tom Stoddard) (emphasis omitted) [hereinafter *Is This Any Way to Run A Movement?*].

418. See Lou Chibbaro, Jr., *Obama approves lesbian nominee in recess appointment*, DC AGENDA, at 10 (Apr. 2, 2010).

419. Chris Johnson, *HISTORIC: EEOC Ruling Protects Trans Workers from Discrimination*, WASH. BLADE (Apr. 24, 2012), <http://www.washingtonblade.com/2012/04/24/historic-eeoc-ruling-protects-trans-workers-from-discrimination> [<http://perma.cc/L67X4SXU>].

420. See Chris Johnson, *Feldblum Explains New Gay Employment Protections*, WASH. BLADE (July 20, 2015), <http://www.washingtonblade.com/2015/07/20/feldblum-explains-it-all-on-gay-employment-protections> [<http://perma.cc/R9W54PL7>].

421. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

422. See Jim Becker, *Senate Passes Employment Non-Discrimination Act*, BALTIMORE OUTLOUD 1 (Nov. 15, 2013), http://www.baltimoreoutloud.com/pdf/Baltimore-Outloud_11.15.13.pdf.

423. *Employment Non-Discrimination Act of 2013*, S. 815, 113th Cong., 1st Sess. (passed by Senate, Nov. 7, 2013), <http://www.congress.gov/bill/113th-congress/senate-bill/815?q=7B%22search%22%3A%5B%22s+815%22%5D%7D&r=2>; *Senate Passes Employment Non-Discrimination Act*, *supra* note 422, at 1.

Chris Crain was no longer at the *Washington Blade* to declare that, somehow, even *passage* of a trans-inclusive bill was harmful to non-trans LGBs.⁴²⁴ Barney Frank was no longer in Congress to oppose a trans-inclusive ENDA irrespective of what any whip count might actually have been.⁴²⁵ And the vote was a real-time vindication of Isaac West's assessment of the true impact of United ENDA's actions. Merely because the Frank-HRC version of ENDA carried the day in 2007, United ENDA was not actually the loser. For despite the shenanigans of 2009–10, United ENDA had pushed the needle far enough toward inclusivity that a repeat of 2007 was not an option.⁴²⁶

At least it was not an option in another biennium in which the Democrats did not control the presidency and both the House and Senate. Passed by the Senate, that 2013 ENDA bill was still dead on arrival in the lower chamber, with Republican leadership there refusing to allow action on it.⁴²⁷ Florida Republican Ileana Ros-Lehtinen, an ENDA cosponsor, refused to sign a discharge petition which could have bypassed her party's leadership to allow a floor vote.⁴²⁸ She stood 'athwart' ENDA, yelling "Stop!" not because of trans inclusion—she's the accepting mother of a trans son—but because she viewed the use of the discharge petition to be overly partisan on the part of the Democratic minority.⁴²⁹ LGBT matters aside, the irony of a member of the House Republican majority in the 113th Congress complaining about partisanship on the part of the Democratic minority cannot go without mention.⁴³⁰

424. Crain, *supra* note 181.

425. See Abby Goodnough, *Barney Frank to Quit House After 30 Years*, N.Y. TIMES (Nov. 28, 2011, 10:42 AM), http://thecaucus.blogs.nytimes.com/2011/11/28/barney-frank-to-quit-house-after-30-years/?_r=0 [<http://perma.cc/EL2AFFPS>].

426. WEST, *supra* note 42, at 157–58.

427. Chris Johnson, *House Panel Rejects Last-Ditch Effort to Pass ENDA*, WASH. BLADE (Dec. 3, 2014), <http://www.washingtonblade.com/2014/12/03/house-panel-rejects-last-ditch-panel-pass-enda> [<http://perma.cc/B8KZC9BH>].

428. See Chris Johnson, *Ros-Lehtinen Won't Sign ENDA Discharge Petition*, WASH. BLADE (May 9, 2014), <http://www.washingtonblade.com/2014/05/03/ros-lehtinen-throws-cold-water-enda-discharge-petition> [<http://perma.cc/ZMH842Q5>].

429. See *id.* See also William F. Buckley, Jr., *Our Mission Statement*, NAT'L REV. (Nov. 19, 1955, 8:00 AM), <http://www.nationalreview.com/article/223549/our-mission-statement-william-f-buckley-jr> [<http://perma.cc/TL4U72Q8>].

430. By the time Ros-Lehtinen issued her refusal declaration, the House had already made nineteen attempts to repeal Obamacare just during the 113th Congress (following 35 during the previous Congress). Ed O'Keefe, *The House Has Voted 54 Times in Four Years on Obamacare. Here's the Full List*, WASH. POST, Mar. 21, 2014, <http://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list> [<http://perma.cc/A8MF7P69>]. See also H.R. 45, 113th Cong., 1st Sess. (as passed by the House, May 16, 2013).

With ENDA lying dead in the House, HRC should have positioned itself to make up for its trans-related mistakes from Joe Solmonese on back to the organization's founder Steve Endean but instead to solidify its reputation for a brand of tone-deaf arrogance that can—and so often does—negate any good that it might appear actually to accomplish. Solmonese's successor, Chad Griffin, came to HRC from the American Foundation for Equal Rights (AFER), which was formed for the specific purpose of taking down California's Proposition 8.⁴³¹ By definition then, the "Equal Rights" of that organization's name was equal *marriage* rights, and all other aspects of inequality were invisible to it.⁴³²

By almost all measures, AFER was successful.⁴³³ It brought together the opposing lead attorneys from the nationally divisive *Bush v. Gore*, Democrat David Boies and Republican Ted Olson, to work for marriage equality.⁴³⁴ AFER's court challenge to Proposition 8 put anti-equality forces in the position for the first time of having to defend their assertions about same-sex marriage with competent evidence rather than bare rhetoric.⁴³⁵ And the anti-equality forces failed miserably.

Much like the party-opposite attorneys challenging Proposition 8, California governors of opposing parties—Republican Arnold Schwarzenegger and his successor Democrat Jerry Brown—favored marriage equality.⁴³⁶ They refused to defend Proposition 8.⁴³⁷ The non-governmental christianist right proponents of the measure were forced to attempt their own defense, the validity of which, rather

431. *About Us*, AMER. FOUNDATION FOR EQUAL RIGHTS, <http://afer.org/about/the-foundation> [<http://perma.cc/866M76PE>].

432. *Id.*

433. *See, e.g.*, Dale Carpenter, *On the Legal Front Lines of Same-Sex Marriage*, N.Y. TIMES (June 29, 2014), <http://www.nytimes.com/2014/06/30/books/redeeming-the-dream-by-theodore-b-olson-and-david-boies.html> [<http://perma.cc/F388XFQJ>].

434. *Id.*

435. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931–32 (N.D. Cal. 2010), *aff'd sub nom, Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

436. Schwarzenegger often had a curious way of showing it, vetoing marriage equality legislation, ostensibly because it would be in conflict with law that came into existence via citizen initiative. *See* Jill Tucker, *Schwarzenegger Vetoes Same-Sex Marriage Bill Again: State Court Plans to Examine Legality of 2000 Measure*, SFGATE (Oct. 12, 2007, 14:00 AM), <http://www.sfgate.com/bayarea/article/Schwarzenegger-vetoes-same-sex-marriage-bill-again-2497886.php> [<http://perma.cc/Q7VG58QS>]. Nevertheless, he did oppose the subsequent Proposition 8, refusing to defend it in court and ultimately praising the U.S. Supreme Court's decision which fully legalized same-sex marriage. *See also* Jen Yamato, *Arnold Schwarzenegger Applauds SCOTUS Gay Marriage Ruling: 'The Right Way to Go'*, THE DAILY BEAST (June 26, 2015, 2:42 PM), <http://www.thedailybeast.com/articles/2015/06/26/arnold-schwarzenegger-applauds-scotus-gay-marriage-ruling-the-right-way-to-go.html> [<http://perma.cc/Y35VLY7U>].

437. *See* George Skelton, *Brown and Schwarzenegger Don't Have to Defend Prop. 8—But They Should*, LATIMES (Aug. 26, 2010), <http://articles.latimes.com/2010/aug/26/local/la-me-cap-20100826> [<http://perma.cc/82LKPJ5R>].

than the actual question of marriage equality, pushed the matter up to the United States Supreme Court.⁴³⁸ And by the time the high court decided *Hollingsworth v. Perry* (on the same day it decided *Windsor v. United States*) in 2013, Griffin had parlayed his AFER experience into the top spot at HRC.⁴³⁹ He famously received a congratulatory phone call from President Obama on camera during a live interview on MSNBC with the *Perry* plaintiffs.⁴⁴⁰

When Griffin assumed control of HRC, it became indistinguishable from the marriage equality movement—a fully valid and moral movement in its own right and one which in theory overlaps with many non-marriage LGB and T concerns, yet also one which came to subjugate, and even ignore, LGB and T needs not directly solvable by marriage.⁴⁴¹ A glowing *Washington Post* feature on Griffin quickly pointed out that HRC was the “nation’s largest gay rights organization” but only made token reference to the widespread perception of the organization as one primarily for “tuxedo gays.”⁴⁴² Even more problematic as to the historical baggage Griffin was inheriting, the only mention of trans people or issues whatsoever came in a quote from Harvey Milk associate Cleve Jones about those outside of that “tuxedo gay” class who legitimately feel “completely abandoned and ignored and really disrespected by this organization.”⁴⁴³ Reflecting illusory unity, neither “LGBT” nor “GLBT” can be found before the beginning of the online comments section.⁴⁴⁴

438. Couples seeking marriage equality brought the case. The state refused to defend Proposition 8, but its proponents did—and thereafter appealed the ruling against the initiative. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). At the U.S. Supreme Court, the issue was those proponents’ standing to maintain the case in federal court. Standing, Chief Justice Roberts wrote, “requires, among other things, that [a party] have suffered a concrete and particularized injury. Because we find that [the proponents of Prop 8] do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.” *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2659 (2013). That denial of standing left the trial court decision overturning the initiative in place. With that, Prop 8 was effectively dead.

439. Chris Johnson, *A New Era Begins for HRC Under Chad Griffin*, WASH. BLADE (June 7, 2012, 7:00 AM), <http://www.washingtonblade.com/2012/06/07/a-new-era-begins-for-hrc-under-chad-griffin/> [http://perma.cc/SY74JDVX].

440. Emma Margolin, *Watch: Obama Calls to Congratulate Prop 8 Plaintiffs*, MSNBC (June 26, 2013, 12:08 PM), <http://www.msnbc.com/thomas-roberts/watch-obama-calls-congratulate-prop-8-pla> [http://perma.cc/F5DR3HXF].

441. Robin Shahar’s loss of employment precisely *because* of a lack of recognition of same-sex marriage is by far the exception rather than the rule. *Shahar v. Bowers*, 114 F.3d 1097, 1097 (11th Cir. 1997), *reh’g denied*, 120 F.3d 211 (11th Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998).

442. Ned Martel, *New Head of Human Rights Campaign Aims to Stop Losing Streak for Gay Marriage*, WASH. POST (July 25, 2012), http://www.washpost.com/politics/new-head-of-human-rights-campaign-aims-to-stop-losing-streak-for-gay-marriage/2012/07/25/gJQARmNt9W_story.html [http://perma.cc/XCH2PSN4] (emphasis added).

443. *Id.*

444. *Id.*

The *Post* feature made it clear that Griffin's immediate goal was to stop the gay marriage ballot box losing streak—again, in and of itself a laudable goal for any LGBT organization but one that does little of substance for unpartnered LGBTs.⁴⁴⁵ Going into 2012, gay marriage had been zero-for-forever against state electorates.⁴⁴⁶ The degree to which HRC can legitimately take credit for ending that losing streak in 2012 is unclear. Nevertheless, along with President Obama, marriage did carry the day on November 6; attempts to ban and repeal failed and Maine's measure to positively enact marriage equality via the popular ballot succeeded.⁴⁴⁷ Even the attempt to remove a fourth *Varnum v. Brien*⁴⁴⁸ signatory from the Iowa Supreme Court failed (three having been denied retention in 2010),⁴⁴⁹ essentially ratifying the 2009 marriage-recognition decision by preventing Republican Gov. Terry Branstad from appointing a conservative majority to the court that conceivably could have undone *Varnum*.⁴⁵⁰

The Defense of Marriage Act's ban on federal recognition of same-sex marriage would fall at the Supreme Court in 2013.⁴⁵¹ But 2014 would see the publication of a very questionable tome on the rapid reversal of marriage fortunes.⁴⁵² Accusations of the "marriage-jacking" of a comprehensive civil rights movement were nothing new (certainly not among trans people), but Jo Becker's *Forcing the Spring* was almost universally panned both as pro-HRC hagiography and as propaganda designed to promote the notion of marriage

445. *Id.*

446. Technically, in 2006 Arizona was the first state to defeat such a measure. However, the 2006 defeat is generally credited to extremely broad wording that caused many unmarried and retired couples to fear the proposal would negatively affect their relationships along with those of same-sex couples. In 2008 a ban clearly only targeting same-sex relationships passed easily. *Four Anti-G/L Measures Approved by Voters*, WEEKLY OBSERVER 1 (Nov. 12, 2008), <http://www.tucsongaymuseum.org/ObserverArchives/2008/11/12.pdf>; Mark R. Kerr, *A Post-Election Primer, Episode Three*, WEEKLY OBSERVER 8 (Nov. 22, 2006), <http://www.tucsongaymuseum.org/ObserverArchives/2006/11/Nov%2022.pdf> (no longer active) (available with the author).

447. Steve Charing, *History Made in Marry-Land*, BALT. OUTLOUD, 1 (Nov. 16, 2012), http://baltimoreoutloud.com/pdf/Baltimore-Outloud_11.16.12.pdf. HRC was given much credit in the successful effort to fight off the attempt to repeal the marriage equality bill passed by the legislature earlier in the year. Steve Charing, *Winning Question 6*, BALTIMORE OUT LOUD 9 (Nov. 16, 2012), http://baltimoreoutloud.com/pdf/Baltimore-Outloud_11.16.12.pdf.

448. 763 N.W.2d 862 (Iowa 2009).

449. See TOM WITOSKY & MARC HANSEN, EQUAL BEFORE THE LAW: HOW IOWA LED AMERICANS TO MARRIAGE EQUALITY 186 (2015).

450. Chad Nation, *Wiggins Wins Retention*, DAILY NONPAREIL (Nov. 8, 2012, 12:00 AM), http://www.nonpareilonline.com/news/wiggins-wins-retention/article_0d0a92b8-dec2-51ec-987b-92fd37b3ba6.html?mode=jqm [<http://perma.cc/HU4RRQEY>].

451. *United States v. Windsor*, 133 S.Ct. 2675, 2675 (2013).

452. See JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 4 (2014).

being *the* singular goal of the movement.⁴⁵³ The book received its harshest criticism, however, over the author's comparison of Griffin, born but four years after 1969's Stonewall, to Rosa Parks.⁴⁵⁴ Griffin did eventually disavow Becker's canonization of him,⁴⁵⁵ but the apparent gesture of humility seemed more like a hollow public relations ploy, disturbingly reminiscent of 2010 Delaware Republican senatorial candidate Christine O'Donnell's being cornered into opening a television campaign ad with the supernaturally Nixonian "I'm not a witch."⁴⁵⁶ There was little indication of any understanding of why even the people his organization claims to represent would be horrified at seeing such a comparison. And there was even less indication that under Griffin the organization was going to be any different than it had been under Joe Solmonese.

The June victories at the Supreme Court were a positive for HRC in 2013, but they bookended an incident which only hardened the view of the organization by trans people—and many LGBs—as being out of touch at best and blatantly transphobic at worst. When in Washington, D.C., for Obama's first inauguration in 2009, former HRC board member Donna Rose came to the conclusion that "HRC really isn't interested in rebuilding the relationship with the broader trans community. Sure, they'll take it if they can get it but they're not willing to do anything to earn it. Rather, they've got a small group of transpeople who provide the illusion of inclusion and that's as far as they'll go."⁴⁵⁷ As Obama's second term got under way four

453. For use of the term "marriage-jacking," see Monica F. Helms, "Marriage-Jacking" *the GLBT Agenda*, SOUTHERN VOICE (Aug. 11, 2006), http://www.sovo.com/print.cfm?content_id=5794 (last visited Aug. 11, 2006).

454. See Andrew Sullivan, *Jo Becker's Troubling Travesty of Gay History*, THE DISH (Apr. 16, 2014, 2:00 PM), <http://dish.andrewsullivan.com/2014/04/16/jo-beckers-troubling-travesty-of-gay-history> [<http://perma.cc/CLD2KZ2W>]. The irony of Becker's invocation of the African-American civil rights pioneer is that if there is anyone in HRC's organizational history who might be worthy of comparison to Parks, it would be the organization's founder, Steve Endean. I do feel the need to make it clear that I am not actually embracing that comparison. Still, Endean, problematic as his record is regarding trans equality, clearly was a gay rights activist in an era when it was not all that safe to be so—and he was making great strides for gay(-only) rights in Minnesota during the year that Griffin was born. See Lars Bjornson, *Republicans Back Minnesota Law Reform*, THE ADVOCATE, April 11, 1973, at 22.

455. See Chad Griffin, *Op-ed: Standing on the Shoulders of Giants*, THE ADVOCATE (Apr. 23, 2014, 7:49 PM), <http://www.advocate.com/commentary/2014/04/23/op-ed-chad-griffin-controversial-marriage-equality-book> [<http://perma.cc/9PAJS4BR>].

456. For purposes of this Article, I presume O'Donnell's assertion to be somewhat more truthful than either Nixon's or Griffin's. See Elyse Siegel, *Christine O'Donnell in New Ad: 'I'm not a Witch'*, HUFFINGTON POST (Oct. 4, 2010, 8:26 PM), http://www.huffingtonpost.com/2010/10/04/christine-odonnell-witch-ad_n_750140.html [<http://perma.cc/GS6WM6B4>].

457. *I Hate to Say 'I Told You So' . . . But I've Been Saying So For More than a Decade*, ENDABLOG (Jan. 28, 2009, 2:20 AM) (quoting Donna Rose, *The Illusion of Inclusion*),

years later, Maryland's Dana Beyer saw things not only as having not improved, but as having regressed.⁴⁵⁸ "HRC has no trans staffers and only one trans board member. Worse, it has rarely been any better than that"⁴⁵⁹

For years, seemingly all conservative elements of the movement—including but not limited to HRC—had told trans people that marriage equality was a trans issue, too (but not, of course, vice versa.)⁴⁶⁰ With that as intra-community backdrop, in March the trans-less HRC had taken upon itself the role of deciding how marriage equality would be celebrated at the Supreme Court on the day of oral arguments in the *Perry* and *Windsor* cases.⁴⁶¹ At the ostensibly celebratory event, an HRC staffer prevented a group of trans community members from placing a transgender flag alongside an array of American flags outside the court.⁴⁶² HRC did issue a vague implicit admission of guilt in having made a decision that trans people would themselves have no decision about whether to claim their symbolic place in a fight that supplanted the needs of more trans people than it would likely ever help.⁴⁶³

It was agreed that featuring American flags at our program was the best way to illustrate this unifying issue which is why when

<https://endablog.wordpress.com/2009/01/28/i-hate-to-say-i-told-you-sobut-I've-been-saying-so-for-more-than-a-decade> [<http://perma.cc/AK9XZQAJ>] (emphasis removed).

458. See Dana Beyer, *Time for a Rapprochement Between the Trans Community and HRC*, HUFFINGTON POST (Mar. 29, 2013, 7:03 PM), http://www.huffingtonpost.com/dana-beyer/time-for-a-rapprochement-between-the-trans-community-and-hrc_b_2980936.html [<http://perma.cc/5F937FK8>].

459. *Id.* Allyson Robinson, the trans woman reflexively hired—with consultation from a “diversity action team”—in the wake of the 2007 debacle, had recently left for an ill-fated position with an LGBT military organization. At the time of the flag incident HRC had no known trans employees. Autumn Sandeen, *More than Detente Needed Between HRC and the Trans Community*, LGBT WEEKLY (Apr. 4, 2013), <http://lgbtweekly.com/2013/04/04/more-than-detente-needed-between-hrc-and-the-trans-community> [<http://perma.cc/VK3PM4ZQ>].

460. Compare Paul Varnell, *Editorial: Trans Marriage: No Gain for Gays*, BAY WINDOWS (Feb. 27, 2003), <http://www.baywindows.com/smallieditorial-small-i-trans-marriage-no-gain-for-gays-67410> [<http://perma.cc/FDD9GHYD>] (explaining cases in which trans individuals were granted family rights based on the court finding a heterosexual marriage), with Trudy Ring, *Marriage Equality is a Trans Issue, Too*, THE ADVOCATE (Jan. 9, 2012, 4:00 AM), <http://www.advocate.com/print-issue/advance/2012/01/09/marriage-equality-trans-issue-too> [<http://perma.cc/AM46QC3M>] (presenting cases such as one in which a trans woman became an advocate for marriage equality after her marriage to her husband was invalidated even despite having undergone gender reassignment surgery prior to marrying).

461. See Matt Comer, *HRC Denies Wrongdoing in Alleged Transgender Flag Incident at Supreme Court*, QNOTES (Mar. 28, 2013), <https://goqnotes.com/21794/hrc-denies-wrongdoing-in-alleged-transgender-flag-incident-at-supreme-court> [<http://perma.cc/EG6Z6Y52>] (emphasis added).

462. *Id.*

463. See *id.*

managing the area behind the podium, several people were asked to move who were carrying organizational banners, pride flags or any other flag that was not an American flag. Several people refused and they were allowed to stay. The coalition welcomed the variety of signs and flags that were throughout the plaza that demonstrated the wonderful diversity of our community.⁴⁶⁴

In passive voice, HRC erected a veneer of apologia while nevertheless flatly denying the underlying accusation of forcing, or at least attempting to force, the removal of the trans flag.

In the 1990s there had seemed to be eyewitnesses to the assertions of HRC's lobbying in a manner contrary to its public position on trans issues (at the time, one of neutrality—not supporting inclusion but allegedly not opposing it either), of what came to be known within the trans community as 'pre-lobbying' of key members of Congress to sabotage trans-led efforts to counter HRC's gospel of 'incremental progress.' But creatively worded denials by HRC muddied the intra-community political waters, leading not to critical examination of HRC's tactics but instead to further marginalization of trans people other than the handful (mostly connected to GenderPAC) who were privileged with occasional access to HRC's inner circle.⁴⁶⁵

For example, in 1999 an NTAC founder received an e-mail from HRC's Kris Pratt asserting that "the lobbyists (I can't speak for our membership that lobbies) do not go in to offices asking people to not support trans inclusion."⁴⁶⁶ She followed by saying such "would be illogical" given that trans people were not yet in ENDA.⁴⁶⁷ But of course, if HRC's *actual* intent had been to keep trans people out of ENDA, by no means would it have been illogical. Most damning, though, was a passage (well after her linguistic confinement of 'lobbying' to 'lobbyists') in which she freely admits that she and others with HRC had earlier in the year gone with GenderPAC's Riki Wilchins and Dana Preising "to a variety of the more 'friendly' offices to ask about including Ts in ENDA."⁴⁶⁸ It is possible that all

464. *Id.* (quoting HRC Communications Director Michael Cole-Schwartz).

465. GenderPAC January 2000 Newsletter, owner-newsletter@gpac.org to newsletter@gpac.org (Jan. 3, 2000, 2:11PM) (available with author) (trumpeting Riki Wilchins' access to HRC and its Boards of Directors and Governors, specifically referring back to events of May 1999).

466. Cathryn Platine, *Pre-Lobbying Rep. Deborah Pryce* (quoting E-mail from Kris Pratt to Cathy Platine) (July 31, 1997, 10:23 AM), in HRC WATCH, *The Subversion of the American Transgender Movement: A Report From HRC Watch*, <https://endablog2.files.wordpress.com/2013/03/hrc-watch-report.pdf>.

467. *Id.*

468. *Id.*

of those from HRC and GenderPAC to whom she was referring may have had the best intentions on ENDA and it is possible that none may have been operating under institutional parameters which defined their congressional conversations as “lobbying.” But to trans people not privileged with employment as paid lobbyists, that was lobbying—and it occurred in advance of the lobbying in which the trans people, many unemployed or underemployed, had to pay (via travel and lodging) for the privilege of engaging.

In short, *it was pre-lobbying*.

And its existence was being admitted even while it was being denied.

The specific e-mail happened well before the Clinton impeachment, but in late 1999 America—not just its LGB and T components—was recovering from an unsuccessful attempt by the Republican-controlled Congress to depose an elected president. The lead-up to the impeachment featured a deposition which included President Clinton’s now infamous word-parsing as to “what the meaning of the word ‘is’ is.”⁴⁶⁹ Communications from HRC which seemed to have employed non-traditional—and ever-morphing—definitions of key substantive terms such as “lobbying” and “not support” only hardened the anti-HRC feelings. The intervening years did nothing in the way of softening those feelings. But the years also produced not enough in the way of hard proof of trans activists’ allegations of HRC ‘dirty tricks.’ The report NTAC had assembled was always easily dismissed as having come from NTAC and not one of the institutionally palatable trans advocacy groups such as Wilchins’ GenderPAC or Keisling’s NCTE.

In 2013 however, there were eyewitnesses—non-trans eyewitnesses who were willing to go on the record regarding what they had seen. “I was there. I saw this happen,” said Jerame Davis, a non-trans gay man who, though supportive of trans-inclusion generally, has expressed support for the House leadership’s position on the gay-only ENDA of 2007. At the time of the flag incident, he was the executive director of National Stonewall Democrats, and he wrote: “[i]t was only the HRC reps asking for the trans flag to be moved. If they’d only asked once, I’d have given them a pass, but they continued to harass this person over a flag.”⁴⁷⁰

469. Timothy Noah, *Bill Clinton and the Meaning of “Is,”* SLATE (Sept. 13, 1998, 9:14 PM), http://www.slate.com/articles/news_and_politics/chatbox/1998/09/bill_clinton_and_the_meaning_of_is.html [<http://perma.cc/A7G4AMWZ>].

470. Comer, *supra* note 461 (quoting a Facebook post by Davis). For Davis’s support of Speaker Pelosi’s decision to move forward with the Frank-HRC ENDA, see Jerame Davis, Facebook comment dated Oct. 9, 2015 (available with author) (“I support the decisions Nancy made.”).

Eventually HRC did stop denying the undeniable. The organization, and even the HRC staffer at the center of the controversy, admitted the incident had occurred.⁴⁷¹ But regional field director Karin Quimby would only go as far as to say she “might have told” the man with the flag that marriage equality “is not *specifically* a transgender issue.”⁴⁷² Bryan Ellicott, the trans man who was trying to claim a place for the trans flag, had a different remembrance of what Quimby had been willing to partially admit to.⁴⁷³ “This [rally] is about marriage equality, this is not about the trans community,” Ellicott asserted Quimby had said, before initially walking away.⁴⁷⁴ A few minutes later, according to Ellicott, she came back to where he was standing and continued, “[y]ou know what, you guys need to focus on what you need to do. We [HRC] are the organization that makes things happen.”⁴⁷⁵

Perhaps what stands out most in Ellicott’s own time line of the flag incident is the aftermath of *the aftermath*—after HRC had to admit that the trans version of events was far more accurate than the version HRC had tried to sell. Ellicott noted that he had received an apology via phone from Quimby.⁴⁷⁶ Subsequently, though, he also received a Facebook message from her, asking if he “would make this all stop.”⁴⁷⁷ Much simpler in a purely physical sense, and with far fewer legislative ramifications than the 2007 clash, this dispute over what is, after all, itself a symbol came to symbolize not only trans exclusion but, more generally, everything negative that HRC had been to the trans community for decades, everything that the trans community had been demanding HRC to stop doing.

And *not* doing.

B. A Phantom Promise

And so the relationship between HRC and the trans community would be as it hurtled toward the fall of 2014. There was no hope whatsoever, even if HRC put all of its political muscle and every available dollar from every conceivable “tuxedo gay” behind the

471. See Bryan Ellicott, *Op-Ed: My Supreme Court Marriage Rally Transphobic Experience from Hell*, THE NEW CIVIL RIGHTS MOVEMENT (Apr. 8, 2013), http://www.thenewcivilrightsmovement.com/op_ed_my_supreme_court_marriage_rally_transphobic_experience_from_hell [http://perma.cc/DDB99V2Y].

472. *HRC Official Discusses Trans Flag Controversy with SAGA*, Q SAN ANTONIO (Apr. 5, 2013) (emphasis added), <http://qsanantonio.com/quimby.html> [http://perma.cc/2HHEZJMS].

473. Ellicott, *supra* note 471.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.*

effort, of pushing ENDA through the House before what was already shaping up to be yet another disastrous midterm election for the Democrats. Seven years after Solmonese's infamous speech, however, Griffin would travel to Southern Comfort in Atlanta to address the trans community.

In addition to the specter of the looming elections, the timing would mark a full two decades since the trans community began standing up to HRC's political "message control" that always had some unverifiable justification for placing trans-inclusion on the outside of ENDA looking in toward a hermetically sealed Beltway.⁴⁷⁸ In 1994, trans-inclusive state law was a minority of one (out of eight). In 2014, gay-only state laws were a minority of 3 1/3 (out of twenty-three), with only Wisconsin, New York, and New Hampshire (and the one-third representing public accommodations in Massachusetts, still lacking in the aftermath of trans employment and housing protections being enacted twenty-two years after the state's gay-only rights law)⁴⁷⁹ remaining as state-level jurisdictions in which trans people still faced structural, intra-community inequality resulting from LGB-supported anti-discrimination legislation.⁴⁸⁰ HRC had, somewhat silently, added a handful of trans employees since the flag incident. Even so, Griffin would be facing a Southern Comfort gathering of people still angered by his predecessor's 2007 misrepresentations. He also would be facing a trans community at large watching from afar that was largely unwilling to believe new words from a new HRC voice would actually add up to anything new of positive substance for trans people.⁴⁸¹

Griffin told the SCC crowd of being at an HRC event at the Ohio State University Student Union a few months earlier and being shocked to learn that a major trans conference was taking place in the same building at the same time.⁴⁸² "I had no idea the

478. *HRC Official Discusses Trans Flag Controversy with SAGA*, *supra* note 472. The phraseology of "message control" was what Karin Quimby fell back upon to justify the context of the flag incident at the U.S. Supreme Court in 2013, where the rally's organizers had decided to emphasize "that marriage equality was an American issue." *Id.*

479. Two more years would pass before public accommodations protections would materialize in Massachusetts. An Act Relative to Transgender Anti-Discrimination, 2016 Mass. Acts. Ch. 134.

480. Technically, at the time of Griffin's speech it was 4 1/3. But Maryland's trans-inclusion law, passed and signed by Gov. Martin O'Malley would not take effect until October 1, 2014. *Fairness for All Marylanders Act of 2014*, 2014 MD. LAWS Ch. 474, 478. For Massachusetts, see M. Barusch & Catherine E. Reuben, *Transgender Equal Rights In Massachusetts: Likely Broader Than You Think*, 56 BOSTON B.J. 14, 16 (2012).

481. See Katrina C. Rose, *The Irony*, ENDABLOG 2.0 (Sept. 6, 2014), <https://endablog2.wordpress.com/2014/09/06/the-irony> [<http://perma.cc/7DFGSWX4>].

482. Chad Griffin, *Speaking at Southern Comfort 2014*, HRC (Sept. 5, 2014), <http://www.hrc.org/blog/entry/speaking-at-southern-comfort-2014> [<http://perma.cc/MXU7YWMM>].

conference was happening before that night,” Griffin recalled. “And instead of all of us working together, taking stock of all of our progress and the challenges ahead, and finding comfort in each other’s company, ‘they’ were upstairs, and ‘we’ were downstairs.”⁴⁸³ By going upstairs to engage with the trans conference attendees, Griffin made the first move. Despite not having been in charge of HRC during any of the painful events preceding the flag incident, he confessed to feeling “like the biggest jerk in the world, because I knew that gesture wasn’t nearly enough.”⁴⁸⁴ And Griffin did go further with his words:

We all know why that divide between the trans community and HRC exists, and taking a big step toward closing it is my responsibility.

So I am here today, at Southern Comfort, to deliver a message. I deliver it on behalf of HRC, and I say it here in the hopes that it will eventually be heard by everyone who is willing to hear it.

HRC has done wrong by the transgender community in the past, and I am here to formally apologize.⁴⁸⁵

Even elements of the trans community who did not wholly accept the speech at face value were nevertheless impressed with what he had been willing to say.⁴⁸⁶ The community that so often had been thrown under the bus by HRC was, for all practical purposes, witnessing its current president throw his predecessors under a bus traveling in the opposite direction.

Or so it seemed.

C. A Phantom Report

Within a year of his SCC speech, one of the trans employees whose presence at HRC Griffin had trumpeted (as well as another not specifically called out) were gone—even more silently than he had been hired *and* on the heels of a leaked internal report about what life is like within HRC for people other than affluent white cis gay men.⁴⁸⁷ Established gay media, most conspicuously the *Washington*

483. *Id.*

484. *Id.*

485. *Id.*

486. *See, e.g.,* Rose, *supra* note 481.

487. Deputy Chief of Staff Hayden Mora was mentioned in the speech; field organizer Allison VanKuiken was not. Mora’s LinkedIn page indicates he left HRC in June 2015, after one year and one month. Hayden Mora, LINKEDIN, <http://www.linkedin.com/in>

Blade, largely ignored the story but *BuzzFeed* published the report and the *Advocate* publicized the image of HRC it conveyed.⁴⁸⁸ “One of the most frequent concerns that rose was the sense of an organizational culture rooted in a white, masculine orientation which is judgmental of all those who don’t fit that mold,” the summary read. “[T]here is a sense that if you operate outside of that orientation, you will not be successful at HRC.”⁴⁸⁹

The organizations that grew directly out of the energy and anger of Stonewall quickly demonstrated that the issue-in-common of being gay would not, even within the confines of gay activism, erase broader societal patterns of oppression as between men and women.⁴⁹⁰ A generation later the focus on AIDS, and the perception of that as a uniquely men’s issue which detracted from lesbian issues, also caused friction.⁴⁹¹ More recently, however, sexism and racism has become less talked about; the ongoing friction between trans people (including the usually few trans employees of major gay organizations) and non-trans staff at gay organizations has received more attention. One comment included in the report summed up the perception that, within HRC, little had changed over the decades. “There is still a great deal of sexism, racism, classism, ageism, and other biases in this organization,” the employee noted. “This is true for many organizations across the country, but when you claim to be the largest LGBT non-profit in the nation, you may want to improve how you treat your employees and how much you

/hayden-mora-60768a3 [http://perma.cc/8ECU285J]. VanKuiken’s indicates an exit date of April 2015, after one year and four months. Allison VanKuiken, LINKEDIN, <http://www.linkedin.com/in/allison-vankuiken-a462aa9a> [http://perma.cc/Q5QBDTAC].

488. Chris Geidner, *Internal Report: Major Diversity, Organizational Problems at Human Rights Campaign*, BUZZFEED (June 3, 2015), https://www.buzzfeed.com/chrisgeidner/internal-report-major-diversity-organizational-problems-at-h?utm_term=. [http://perma.cc/E99HUBHJ]; Yezmin Villarreal, *5 Most Disappointing Things We Learned About HRC’s ‘White Men’s Club,’* THE ADVOCATE (June 4, 2015), <http://www.advocate.com/human-rights-campaign-hrc/2015/06/04/5-most-disappointing-things-we-learned-about-hrcs-white-mens-cl> [http://perma.cc/TUL4YJ6C].

489. Geidner, *supra* note 488 (quoting PIPELINE PROJECT REPORT (on file with author)).

490. For a particularly noxious example of misogyny in early LGB activism on the part of Dick Leitsch, head of the New York Mattachine Society at the time of Stonewall, see CLENDINEN & NAGOURNEY, *supra* note 252, at 26.

491. In 1986, NGLTF director of administration and finance, Rosemary Kuropat, resigned, asserting that the organization had essentially become a single-issue, AIDS-lobbying organization that was neglecting the significant concerns of lesbians. Peter Freiberg, *Kuropat Resigns NGLTF Position: Charges Levi, Board with Poor Leadership and Business Practices*, THE ADVOCATE, April 29, 1986, at 13. When confronted with such concerns, NGLTF head Jeff Levi justified the resource-diversion by asserting that AIDS is “a metaphor for what all gay people—men and women—face.” Gil Gerald rationalized it by viewing “a lot of” the resources then targeting AIDS as “new resources” that were not previously available for the people and issues that were then feeling neglected. Giteck, *Is This Any Way to Run A Movement?*, *supra* note 417, at 45–46.

honor intersectional identities.”⁴⁹² Of those employees, 100% of those identifying as trans felt victimized by bias in some form.⁴⁹³ Despite it being known to be a derogatory term, non-trans staffers would use the term “tranny.”⁴⁹⁴ Mis-gendering was frequent—even after requests to correct.⁴⁹⁵ And dress codes were seen as ‘not inclusive’ of trans needs.⁴⁹⁶ The perception of tokenization was rampant—more than a little ironic given that HRC’s first hire of a trans woman,⁴⁹⁷ suspicious as it was coming in the immediate wake of the 2007 debacle, was for the position of Associate Director of Diversity.⁴⁹⁸

The pro-HRC spin on the disclosure is that it was the result of a survey initiated by the organization at Griffin’s direction.⁴⁹⁹ Unquestionably, he certainly should receive all due credit for such an undertaking. And he quickly (though seemingly reluctantly) both acknowledged the shortcomings the report exposed and divulged a long list of actions his organization was taking in response.⁵⁰⁰ Placed

492. THE PIPELINE PROJECT, Detail Report: Focus Group and Survey Findings 11 (on file with author).

493. *Id.*

494. *Id.* at 12.

495. *Id.* at 9.

496. *Id.*

497. Marti Abernathy, HRC’s Project Win Back, Part II, THE BILERICO PROJECT (July 19, 2008), http://www.bilerico.com/2008/07/hrcs_project_win_back_part_ii.php [<http://perma.cc/L692FATP>].

498. *Id.* Allyson Robinson was brought in, not from among the ranks of known trans activists and advocates, but from the world of religion. A West Point graduate, the years when GenderPAC and the Transexual Menace were beginning the fight against a trans-exclusive ENDA were spent by Robinson in the military. She left the Army in 1999 to become a preacher. *The HRC Story: Allyson Robinson*, <https://web.archive.org/web/20111106130231/http://www.hrc.org/staff/profile/allyson-robinson> (no longer active) (available with author). Robinson is rumored to have sought the top job at HRC upon Joe Solmonese’s departure but instead became head of the entity which resulted from the merger of two military-specific LGBT organizations, OutServe and the Servicemembers Legal Defense Network (SLDN). Chris Johnson, *Trans Advocate Picked to Lead LGBT Military Group*, WASH. BLADE (Oct. 31, 2012), <http://www.washingtonblade.com/2012/10/31/trans-advocate-picked-to-lead-lgbt-military-group> [<http://perma.cc/DRF9YQ4M>]. However, funds for military concerns all but dried up after the repeal of DADT, leaving trans military service to be the major remaining non-marriage issue related to LGBT military service. Touted at the time as the first trans person to head a national non-trans-specific organization, Robinson nevertheless soon was forced out in a coup by the combined OutServe-SLDN board, a development relegated to page eight of the issue of the *Washington Blade* whose front-page feature was the *Windsor* and *Perry* Supreme Court decisions. *OutServe-SLDN Remains in Turmoil* 8, WASH. BLADE (June 28, 2013), <https://www.scribd.com/document/150393335/Washingtonblade-com-Volume-44-Issue-26-June-28-2013> [<http://perma.cc/TK2BUQ3X>].

499. See Jorge Rivas, *After Damning Diversity Report, Human Rights Campaign Says It’s Proud of Staff*, FUSION (June 4, 2015), <http://fusion.net/story/144918/human-right-campaign-says-its-proud-of-70-percent-white-staff> [<http://perma.cc/BX4FL4N7>].

500. See Villarreal, *supra* note 488.

alongside his SCC speech, even the most jaded observers of the relationship between trans people and HRC can see someone far more willing to acknowledge the existence of a substantive problem in the relationship—and to place at least some blame squarely and publicly on HRC—than anyone to previously hold any position of real authority with the organization. Recall that Marty Rouse’s “Project Win Back” assessment of HRC in the wake of the 2007 ENDA Crisis ultimately resulted in nothing other than a single, transparently token hire of a trans woman by HRC—which in turn accomplished nothing other than burnishing that woman’s résumé.

The more recent internal report (and the need for it) also must cause one to look back toward Griffin’s SCC speech with a critical eye. As an acknowledgment, “[w]e all know why that divide between the trans community and HRC exists”⁵⁰¹ was not an admission to anything specific. Saying “we’re not perfect, and you’re not wrong”⁵⁰² was not an admission to anything specific. Expressing sorrow “for the times that the transgender community has been underrepresented or unrepresented by this organization,”⁵⁰³ was closer, but it still lacked substantive specificity. Did the representation remark encompass the feelings of many that in years past the organization’s staff makeup lacked trans people not by chance but by discriminatory design? And did it encompass the ongoing recognition by many non-trans people that the dearth of trans employees within the ranks of HRC (as well as other organizations), irrespective of discriminatory employment intent, had come to have a very real, very negative impact on legislators’ willingness to enact trans-inclusive anti-discrimination law?⁵⁰⁴ Did “you’re not wrong” encompass the years of reports back from Capitol Hill of HRC staffers actively lobbying members of Congress *against* the lobbying efforts of NTAC, GenderPAC and others? And do “we all know” the true extent to which, in advance of his 2007 SCC speech, Solmonese knew what was to come regarding not just the ENDA bill but also HRC’s position(s) on it?

If the internal report accurately represents HRC at the middle of the second decade of the 21st century—two decades after “more education is necessary” became the incrementalists’ amulet of choice—then what must the culture within the organization have been during the Solmonese era? Or the Birch era? Or the McFeeley

501. Griffin, *supra* note 482.

502. *Id.*

503. *Id.*

504. See Bill Browning, *Naked Emperor Alert: Trans Employment Rights*, THE BILERICI PROJECT (Apr. 18, 2011), http://www.bilerico.lgbtqnation.com/2011/04/naked_emperor_alert_trans_employment_rights.php [<http://perma.cc/297D8BEH>].

era? The time frame of the report prevents it from providing the answer quantitatively. But it did not really need to do so. To any degree that the perception-as-reality view of HRC by the trans community is *inaccurate*, the organization can only have itself to blame. Griffin's 2014 speech was indeed an apology, but the trans community really does not know for what. And that will be the case when next there is a dispute between the organization and the trans community. Those complaining—citing the historical record as evidence—can count on being told that all of that is in the past and it should not be held against the HRC of the present whenever in the future that present might be.

An apology was made after all.

But an apology for what?

Generations of trans activists have sacrificed themselves in one form or another to reclaim the place from which they were excluded in the immediate wake of Stonewall (exclusion which, to be fair, does predate the HRC entity, although founder Steve Endean engaged in trans-exclusion in his home state before graduating to the national stage).⁵⁰⁵ But when HRC decided to present itself to a national—even global—audience as an employer of a trans woman in the summer of 2016, was she presented one any of the middle-aged women who spent what should have been the best years of their professional lives fighting a necessary fight against HRC's institutionalized transphobia? Women for whom Griffin's 2014 apology might have taken the form of substantive, if belated, employment? Instead, it was a telegenic, well-connected twenty-something from a family of means.⁵⁰⁶

The toll the fight against trans-exclusionism took on Sylvia Rivera can be seen in the black-and-white video of the 1973 Pride confrontation.⁵⁰⁷ For others, known and unknown, the effects are less obvious, hidden from the historical record. On the same 1973

505. *Why the Transgender Community Hates HRC*, TRANSGRIOT (Oct. 8, 2007), <http://transgriot.blogspot.com/2007/10/why-transgender-community-hates-hrc.html> [<http://perma.cc/W3AJKZCZ>].

506. See Chris Johnson, *Sarah McBride Takes Convention Stage as 'Proud Transgender American'*, WASH. BLADE (July 28, 2016), <http://www.washingtonblade.com/2016/07/28/mcbride-dem-convention-proud-transgender-american> [<http://perma.cc/57T9S7G5>] (covering Sarah McBride and her convention speech); see also Dawn Ennis, *Sarah McBride is Becoming the Face of HRC Since the Election of Donald Trump*, LGBTQ NATION (Nov. 15, 2016), <http://www.lgbtqnation.com/2016/11/sarah-mcbride-becoming-face-hrc-since-election-donald-trump> [<http://perma.cc/6NB82AAE>].

507. See VITO: THE LIFE OF GAY ACTIVIST VITO RUSSO (Automat Pictures 2011), <http://vitorussomovie.com>. The black-and-white video recording of the events has appeared, in part, elsewhere but is nevertheless not in widespread circulation. Rivera's appearance is currently available at *Sylvia Rivera NYC Pride 1973*, <https://vimeo.com/78764004> [<http://perma.cc/2D4CMKUA>].

day that Rivera exploded in righteous anger, Lee Brewster, equally angry but far more eloquently, exited stage left from all but the T of LGBT.⁵⁰⁸ Houston attorney, Phyllis Frye, weathered the storm after taking on the Houston anti-crossdressing ordinance and later HRC,⁵⁰⁹ but what became of Philadelphia attorney Leslie Phillips after butting heads with a local strain of Janice Raymond-ism?⁵¹⁰

It is reasonable to ask how many others, having seen that any fight for trans rights would not merely be a fight against state power (daunting enough) but also a fight against superiority-minded sexual minorities who should have been trans people's most reliable allies, subsequently never set foot on the stage at all. Same-sex marriage champions Jack Baker and Mike McConnell burned out on activism but never fully disappeared—and, after decades in the shadows, emerged triumphantly to reflect on their lives and what will come from *Obergefell v. Hodges*.⁵¹¹ In fact, many who are not celebrated in the same-sex marriage victories spent much (even most) of their lives semi- or fully closeted, out—and activists—to no greater degree than the transsexuals, so many of whom are implicitly vilified for having taken advantage of the life possibilities that fading into the woodwork afforded. Certainly, the stealth-privileging heteronormativity preached by many of the early gender identity programs played a role in some trans people never setting foot on stage. But trans people (definitely those who read Brewster's *Drag*) saw what was happening in the 1970s, and it must be presumed that what they saw happening led some who otherwise might have been inclined to follow in the political footsteps of Brewster or Rivera to engage in the same acts of personal and professional self-preservation practiced by more than a few LGBs of the era.⁵¹²

508. VITO, *supra* note 507.

509. Deborah Sontag, *Once a Pariah, Now a Judge: the Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015), https://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html?_r=0 [http://perma.cc/9WNDQV68].

510. Compare Leslie Phillips, *Transsexuals in Our Community: How Dare We Exclude?* PHILADELPHIA GAY NEWS, Aug. 20, 1981, at 22, 24, with Victoria A. Brownworth & J. Michael Bailey (May 31, 2015), <http://www.tsroadmap.com/info/victoria-brownworth.html> [http://perma.cc/CC9DX4WP] (reprinting Brownworth article *Transsexuals in the Lesbian Community: The Ultimate in Male Power-Tripping?*, PHILA. GAY NEWS (May 29, 1981)), and PGN STAFF, *Editorial: In Response to Brownworth Trans Series*, PHILA. GAY NEWS (July 4, 2013), <http://www.epgn.com/opinion/op-ed/6126-23040824-in-response-to-brownworth-trans-series> [http://perma.cc/FV4ZTWE7].

511. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Erik Eckholm, *Same-Sex Marriage? Done That, Back in 1971*, N.Y. TIMES (May 16, 2015), <https://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html> [http://perma.cc/JM6ZC3GP].

512. There was, after all, a reason that even after he attained elected office in 1977 Harvey Milk needed to implore people to come out.

The epigraph which opens this section comes not from a trans person or even from someone known to support trans inclusion. The words were uttered by Tom Stoddard, mere months after playing a critical role in ensuring that trans people could, for the better part of two decades, only view New York City's civil rights as being inadequate for them.⁵¹³ That contextualization of the breadth of the 1986 ordinance may seem ironic given the sentiment of positivity Stoddard seems to have been attempting to convey.

It is.

But the irony does not end there. As co-author he played a role in the readers of two editions of ACLU gay rights handbooks⁵¹⁴ being unable to learn from those handbooks of “all the progress” in trans law from the success of Minneapolis—which resulted from trans people fighting back against a local gay incrementalist power structure—to the early 1990s and trans people coming together to fight back against a national gay power structure that at best was benignly incrementalist and at worst was malignantly exclusionary.⁵¹⁵

513. CLENDINEN & NAGOURNEY, *supra* note 252, at 529.

514. See THOMAS B. STODDARD, E. CARRINGTON BOGGAN, MARILYN G. HAFT, CHARLES LISTER & JOHN P. RUPP, *THE RIGHTS OF GAY PEOPLE* (1983) (the cover of the book lists Stoddard last, but the interior title page lists him first, which tends to be how the book is catalogued); NAN D. HUNTER, SHERRYL E. MICHAELSON & THOMAS B. STODDARD, *THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* (3d ed. 1992).

515. See Rose, *supra* note 42, at 422–23 n.139 (noting (1) that the 1983 edition, while addressing trans law as part of the book's scope nevertheless included the text of the out-of-date, non-trans-inclusive Minneapolis Civil Rights Ordinance rather than the trans-inclusive version then in force, and (2) that the 1992 edition omitted trans law entirely).

In the 1970s and 80s, the ACLU handbooks provided the education on LGB(T) issues that many law schools were not yet providing. One of the few sounds to pierce the silence for William B. Rubenstein at Harvard Law School was “a dog-eared and defaced first edition of the ACLU's handbook, *The Rights of Gay People*.” William B. Rubenstein, *My Harvard Law School*, 39 HARV. C.R.-C.L. L. REV. 317, 319 (2004). The handbooks were familiar to at least some authors whose work appeared in Harvard's scholarly legal publications in the 1980s. See, e.g., *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1537 n.128 (1989); *Leading Cases*, 100 HARV. L. REV. 100, 220 n.60 (1986); Robert G. Bagnall, Patrick C. Gallagher and Joni L. Goldstein, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 527–28 n.118 (1984). In fact, references to the first and second editions can be found in a wide range of legal scholarship from the 1970s and 80s. Charles Whitman, *On Being a Gay Law Student*, 4 STUDENT LAW 39 (1975); Ralph Slovenko, *The Homosexual and Society: A Historical Perspective*, 10 U. DAYTON L. REV. 445, 445 n.1 (1985); Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 U. DAYTON L. REV. 575, 579 n.37 (1985); Roger J. Magnuson, *Civil Rights and Sexual Deviance: The Public Policy Implications of the Gay Rights Movement*, 9 HAMLINE J. PUB. L. & POL'Y 217, 219 n.12 (1989); Mary N. Cameli, Note, *Extending Family Benefits to Gay Men and Lesbian Women*, 68 CHI.-KENT L. REV. 447, 447 n.2 (1989); Michael F. Merra, Comment, *Bob Jones University v. United States: The Emergence of IRS Quasi-Legislative Authority*, 19 NEW ENG. L. REV. 917, 936 n.146 (1984); Annamay T. Sheppard, *Lesbian Mothers II: Long Night's Journey into Day*, 8 WOMEN'S RTS. L. REP. 219, 224 n.37 (1985); Arthur S. Leonard, *Employment*

From the 1990s on through the ENDA Crisis of 2007 and even in spite of what Isaac West sees as United ENDA having scored an ultimate victory, inevitably when there is any shakiness about inclusion in a proposed law—federal, state or local—voices can be heard to suggest that trans exclusion is a compromise that *must* be on the table. Those same voices set forth a purported record of “failures and inadequacies” on the part of trans people to achieve sufficient success to warrant inclusion. Whether it is an assertion in 1995 that trans-inclusion is “trendy” and “hip” but nevertheless “political suicide,”⁵¹⁶ a claim in 1998 that trans people had not “made the case” for inclusion,⁵¹⁷ assertions in 2002 that the trans movement was still in its “infancy” and that trans issues were “difficult for most people to understand,”⁵¹⁸ the declaration in 2007 that trans people should not expect inclusion on par with LGBs until expending “nearly 40 years” of “time and patience,”⁵¹⁹ or the nine-years-*post hoc* rationalization that the *real* reason trans people did not deserve to be in ENDA in 2007 was that we “already had more employment discrimination protection than gays,”⁵²⁰ the calls for trans people to

Discrimination against Persons with AIDS, 10 U. DAYTON L. REV. 681, 702 n.84 (1985); James W. Meeker et al., *State Law and Local Ordinances in California Barring Discrimination on the Basis of Sexual Orientation*, 10 U. DAYTON L. REV. 745, 756 n.82 (1985); Marion Halliday Lewis, Note, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures*, 7 J. L. & POL. 133, 138 n.18 (1990); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part I*, 10 U. DAYTON L. REV. 459, 463 n.15 (1985); Samuel M. Silvers, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 309 n.108 (1984); Barbara J. Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choices of Intimate Relationship*, 8 ST. LOUIS U. PUB. L. REV. 299, 310 n.44 (1989); Joni N. Gray & Gary B. Melton, *The Law and Ethics of Psychosocial Research on AIDS*, 64 NEB. L. REV. 637, 656 n.132 (1985); Vada Berger, *Domestic Partnership Initiatives*, 40 DEPAUL L. REV. 417, 418 n.17 (1991); Beth Bergman, *AIDS, Prostitution, and the Use of Historical Stereotypes to Legislate Sexuality*, 21 J. MARSHALL L. REV. 777, 829 n.292 (1988). Far from merely being an excuse to tack on a string of citations to old law review articles, the reality underlying reliance on the ACLU handbooks stands in contrast to how the ACLU presented the publication of the 1983 edition. Norman Dorsen wrote, “[T]hese handbooks [gay rights as well as women’s and prisoners’ rights manuals] play a central role in the ACLU education program by encouraging people to understand [their rights].” American Bar Association, *Common Ground*, HUMAN RIGHTS, Winter 1984 2, 8. But reliance on them would not have resulted in a complete or adequate understanding of trans law—up to and including the mere fact of its existence.

516. *Political Suicide*, *supra* note 67, at 13.

517. *Trans Leaders Haven't Made Case for Changing HRC's Mission*, HOUSTON VOICE, Oct. 23, 1998, at 20A.

518. Jonathan Capehart, *New Twist in Old Gay Rights Debate*, N.Y. DAILY NEWS (Dec. 11, 2002), <http://www.nydailynews.com/archives/opinions/new-twist-old-gay-rights-debate-article-1.503294> [<http://perma.cc/H9X9UPLC>].

519. *A Civil Rights Law*, WASH. POST (Sept. 28, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/27/AR2007092701820.html> [<http://perma.cc/PAF84MVW>].

520. Shannon Gilreath, *The Politics of the Single-minded: Lessons from North Carolina's "Bathroom Bill"*, HUFFINGTON POST (Mar. 28, 2016), <http://www.huffingtonpost.com>

wait our turn ignore what we've done while standing in line, while being forced by necessity to form and maintain our own line while not being allowed to get in the main line—and, yes, in some cases, while wanting nothing to do with any line. Could it be that in 2009 we saw—or at least strongly suspected—that the Obama years would give way to “whitelash,”⁵²¹ which would almost assuredly erase anything LGB and/or T that was not hardwired into the U.S. Code?

Barney Frank was not impressed with Chad Griffin's 2014 SCC apology, but not because of a lack of specificity. In fact, Frank is not even impressed with Griffin himself.

Chad Griffin's one of those people whose political judgment seems to be off. The fact is that HRC and I and everybody else were for an inclusive bill in 2007. The issue was we did not have the votes for an inclusive bill. It wasn't a failure of will. Then the question was, was something better than nothing? Was it better to pass a bill that was protective of lesbian, gay and bisexual people or pass nothing? We tried very hard.

People have this mistaken view of the civil rights movement and say, “Well the black people never compromised, they got the whole thing.” That is just silly nonsense. The first civil rights bill that was passed in '57 was fairly moderate but it had some good things, and then one passed in '60, and then one passed in '64.⁵²²

And so, yet again, even after leaving his formal Congressional trappings behind, Frank was playing Three-card Monte with the historical record, essentially taking up where Winne Stachelberg had left off seven years earlier with her mixing-and-matching of people and occupations to justify the gay-only ENDA.⁵²³ In all of the laws about which Frank was opining, *all* of “the black people” *as black people* were included—not just the ‘talented tenth’ and not just those who could (or could not) pass the paper sack test.⁵²⁴

/shannon-gilreath/the-politics-of-the-singl_b_9558682.html [http://perma.cc/ZAL3DMV7] [hereinafter *The Politics of the Single-minded*].

521. With or without daring to be sufficiently cynical to imagine that the same rabid hatred which bred the Tea Party subsequently would give the nation's presidency to Donald Trump. *CNN's Van Jones on Election Results: 'This Was a Whitelash'*, VARIETY, <http://www.variety.com/2016/tv/newscnns-van-jones-on-election-results-this-was-a-white-lash-1201913362> [http://perma.cc/K6RJA7XX].

522. Patrick Saunders, *Barney Frank Opens Up on Politics and Married Life*, GA. VOICE (Sept. 26, 2014), <http://thegavoice.com/barney-frank-opens-life-politics-married-life> [http://perma.cc/HH7K3C9V].

523. See Winnie Stachelberg, One Inch at a Time, CTR. FOR AM. PROGRESS (Oct. 22, 2007), <https://www.americanprogress.org/issues/lgbt/news/2007/10/22/3610/one-inch-at-a-time> [http://perma.cc/QR3W59QD].

524. See ZACHERY R. WILLIAMS, IN SEARCH OF THE TALENTED TENTH: HOWARD UNIVERSITY PUBLIC INTELLECTUALS AND THE DILEMMAS OF RACE, 1926–1970, 1 (2010);

The transgender community had this mistaken view that if Nancy Pelosi waved a magic wand, transgender would be included. And we were insisting to them that, look we don't have the votes, help us lobby. Instead of trying to put pressure on the people who were against them, they thought they could just insist that we do it. We said, "We're trying, but we need your help."

It's also the case that in 2007, transgender made people [sic] a lot of people nervous, they didn't know about it.⁵²⁵

Patrick Saunders prefaced the transcript of the interview by proclaiming that "Barney Frank had left the building." Physically that might be true. Denise Leclair and some other trans people may be willing to place a greater percentage of the blame for 2007 on HRC,⁵²⁶ but the ill will toward the congressman from Massachusetts seems unlikely to dissipate—certainly until he ceases his spin and revisionism.

Jill Weiss⁵²⁷ and Denise Brogan-Kator,⁵²⁸ attorneys and educators as well as activists, each independently decried Frank's claim of a lack of lobbying by trans people as "BS." But Frank was dictating a chapter of victor's history, erecting on the fly a bulwark against mass acceptance of West's assessment of United ENDA. Saunders, Frank's scrivener in the endeavor, did not pose a follow-up question; those familiar with the decade-plus of intense trans lobbying that preceded 2007 were left to shout online. HRC's long-forgotten first trans employee, Kylar Broadus, was diplomatically charitable, only calling Frank "confused."⁵²⁹ Typically, the establishment-leaning Mara Keisling did similarly, giving Frank a pass as to any malignant intent but suggesting, "I don't think Congressman Frank yet understands what happened and why in 2007."⁵³⁰ Middle Tennessee State University history professor Marissa Richmond offered a full encapsulation of what the *Georgia Voice's* readers were not given to allow them to balance Frank's version of history:

see also AUDREY ELISA KERR, *THE PAPER BAG PRINCIPLE: CLASS, COLORISM AND RUMOR AND THE CASE OF BLACK WASHINGTON* 25, xi–xx D.C. (2006).

525. Saunders, *supra* note 522.

526. Scott, *supra* note 88, at 205–06.

527. See Jillian Weiss comment to Saunders, *supra* note 522 (Sept. 28, 2014) (comment below article text).

528. See Denise Brogan-Kator, FACEBOOK (Sept. 29, 2014) (specifically reacting to the Frank interview as quoted in Nick Duffy, *Barney Frank: Transgender People Don't Have Rights Legislation Because they Wouldn't Help Lobby*, PINK NEWS (Sept. 27, 2014), <http://www.pinknews.co.uk/2014/09/27/barney-frank-transgender-people-don't-have-rights-legislation-because-they-wouldnt-help-lobby> [<http://perma.cc/DQD3WJUA>]).

529. Kylar Broadus, FACEBOOK (Sept. 30, 2014) (comment to a Sept. 28, 2014, posting of the *Pink News* item on Mara Keisling's Facebook wall) (available with author).

530. Mara Keisling, FACEBOOK (Sept. 28, 2014) (comment to a Sept. 28, 2014, posting of the *Pink News* item on her own Facebook wall) (available with author).

For the past 20 years, dating back to 1994, scores of trans activists of all stripes have been lobbying members of Congress from all 50 states. We started with the introduction of a non-inclusive ENDA, and we have fought consistently over the years with a message of full inclusion and equal rights for all. Even prior to 2007, there have been organized Lobby Days that have produced over 100 participants in a given year. These Lobby Days have been organized by several groups, including, but not limited to, ICTLEP, IFGE, ITA, GenderPAC, NTAC, NCTE, NGLTF, and many local and state organizations. Even when individuals could not travel to DC, Lobby visits were often organized all around the country within each state and many House District [sic]. We most certainly have been lobbying well before 2007. *If the support was not there, it was because of transphobia from many claiming to be our “friends,” not from a lack of commitment from the trans community.*⁵³¹

Gunner Scott’s interviews with trans activists in the aftermath of the ENDA Crisis showed that there may be differences of opinion within the trans community about who was more to blame for the fate of H.R. 2015 as well as how effective trans lobbying efforts had been. But as against the repeated depiction by Frank and other incrementalists of an unwillingness on the part of trans people to lobby, one thing is clear: trans people have their own claim to being able to cast aspersions regarding who actually was a resident of Oz during the ENDA Crisis.⁵³²

D. How History Becomes a Phantom

“Transgender history,” asserts Bambi Lobdell, “is also the history of transphobia.”⁵³³ She made that observation while chronicling the life of one of her distant relatives, Joseph Israel Lobdell, who in the early nineteenth century was designated female at birth and named Lucy.⁵³⁴ However, Joseph, by the standards of his era, lived an unconventional life—much of it in a relationship with a woman and much of it presenting and living as a male.⁵³⁵ His reward was to be legally declared insane and to die in an insane asylum.⁵³⁶ The incompetency action was brought in New York by his brother—only a year after

531. Marissa Richmond, FACEBOOK (Sept. 28, 2014) (comment to a Sept. 28, 2014, posting of the *Pink News* item on Mara Keisling’s Facebook wall) (available with author) (emphasis added). “ITA” refers to “It’s Time America!”

532. See 110 CONG. REC. H11383 at 11383–84 (daily ed. Oct. 9, 2007) (statement of Rep. Barney Frank).

533. BAMBIL LOBDELL, “A STRANGE SORT OF BEING”: THE TRANSGENDER LIFE OF LUCY ANN / JOSEPH ISRAEL LOBDELL, 1829–1912 86 (2011).

534. See *id.* at 2–3.

535. See *id.* at 85.

536. *Id.* at 8, 139.

the Illinois Supreme Court had recognized⁵³⁷ (implicitly at least) as opposite-sex the marriage between Louis Piepho and his asylum-bound wife Elizabeth, who Louis had tried to claim was living in a manner inconsistent with the gender norms of the era.⁵³⁸

Bambi Lobdell was not acting purely as biographer, but her aforementioned invocation of the concept of transphobia was a defense of her biographical subject, contextualizing Joseph among “historic nineteenth-century trans-anxieties and the fear-driven need to reestablish social order through policing the construction of gender, and male and female spheres, by punishing transgressive nonconformists.”⁵³⁹ In that sense her *A Strange Sort of Being* fits well with Clare Sears’s *Arresting Dress*, which documents how anti-crossdressing laws of the same era were used to that same end.⁵⁴⁰ But it bears mentioning in this Article because it is not the first analysis of Joseph’s life. Other than a sexological analysis of Joseph’s life—published during his lifetime—all have managed to wedge Joseph into the category of “lesbian.” Even the contemporary work similarly categorizes Joseph, but Bambi is careful to point out that its author could be excused to a degree; he was, after all, utilizing the terminology of his day. Moreover, Dr. P.M. Wise provides the wording which should have guided those who came after him—those who had different terminologies but also different agendas—to not classify him as such. Joseph, Wise wrote in 1883, “considered herself a man in all that the name implies.”⁵⁴¹

Bambi does not limit her critique to the matter of the naming of Joseph’s gender of identity. “Civilization was savage,” to Joseph.⁵⁴² He was “attacked, mistreated, and stripped of his identity by the law,

537. *Peipho v. Peipho*, 88 Ill. 438 (Ill. 1878). Apart from citations to the opinion itself, as published, I spell the surname with the “i” and “e” transposed. Based on court and census documents, it appears as though the proper spelling of the name is “Piepho” and the Illinois Supreme Court utilized the different spelling—but only in the opinion. *That*, however, is what must be searched for in LEXIS or Westlaw.

538. Joseph Lobdell was well-known prior to his family’s effort to take control of his life. See *Narrative of Lucy Ann Lobdell, the Female Hunter of Delaware and Sullivan Counties, N.Y.*, in LOBDELL, *supra* note 533, at 155–83, 178 (orig. pub. 1855). Moreover, Bambi Lobdell had access to far more information regarding her ancestor’s incarceration than I have been able to uncover regarding Elizabeth Piepho. As such, I am unable to say whether the gender nonconformity alleged by Louis Piepho in the couple’s divorce action—that she was a “hermaphrodite” or possibly even a man—played any role in Elizabeth’s commitment. Brief of Petitioner at 1, 7–8, *Piepho v. Piepho*, 88 Ill. 438 (1878). Being transgender does not mean that one is mentally ill but nevertheless, as many of those who encountered the late Angela Douglas can attest, there actually are gender variant people who do have severe mental issues. SUSAN STRYKER, *TRANSGENDER HISTORY* (2008) at 88–89.

539. LOBDELL, *supra* note 533, at 86.

540. CLARE SEARS, *ARRESTING DRESS: CROSS-DRESSING, LAW AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO* 63–67 (2015).

541. LOBDELL, *supra* note 533, at 135.

542. *Id.* at 126.

the general population, his own family, psycho-medical professionals, and writers—both informal and scholarly—of the past 120 years.”⁵⁴³ Most importantly however, Bambi Lobdell categorizes all of that treatment—the physical and the rhetorical—as “transphobic violence.”⁵⁴⁴

Just as transphobic and just as violent toward historical trans law, existing trans law and the possibilities of future trans law are ongoing misstatements as to trans political accomplishments, negations and minimizations of the existence of positive trans law, and representations of history (both informal and scholarly) which merge the T into the LGB in tokenisms of inaccuracy and/or delete the T from LGBT where such recognition would make for historical accuracy. Over the decades, some in a position to act inclusively may have acted otherwise with no *animus* whatsoever and, indeed, with heartfelt regret due to a genuine belief that there were no resources available to address trans issues.⁵⁴⁵ Some of the voices which have railed against trans inclusion can only be characterized fairly as ferociously bigoted; no degree of trans success or even immersion in the histories thereof would ever placate a Chris Crain,⁵⁴⁶ who doesn't believe the T has any connection to the LGB and who openly derides trans-inclusion even when it succeeds, or a Stephen Clark, who seeks

543. *Id.*

544. *Id.*

545. A professed lack of resources does not, of course, negate the fact that exclusion should not have occurred in the first place. A 1978 letter from Bruce Voeller to Mary Johnson of Prospect Heights, Illinois, does not inherently counter the prevailing notion of the era that anti-crossdressing laws were ‘not a gay issue,’ but it also is by no means as dismissive as the view offered by William Thom following *Mayes v. Texas*, 416 U.S. 909 (1974).

NGTF has consistently opposed laws relating to cross dressing and solicitation, but we have limited resources and limited income, and have focused on the principle objectives of the gay movement, which include repeal of sodomy laws, passage of fair employment practice laws, and housing laws, and in working with the media. I personally have great respect for transvestites and transexuals, and believe that the need for public and the laws to be changed in outlook to all people who happen to differ from the General Motors model of what you're supposed to be as a standardized human being [sic]. However, there's a limit to the scope of the arenas that we can actively work in, and we have cut down to the bone our own work, because of the risk of being spread too thin. There are a great many areas that we simply cannot be active in, although when the opportunity affords itself, we certainly speak out in. But we do not enter into the gay social services area, much as we will support and approve of all the work that is being done by people in that sphere, with VD, with counseling, and so forth, and a wide range of other areas. We have very limited resources as a national organization.

Bruce Voeller to Mary Johnson, May 31, 1978, NGLTF Records, Box 156, Folder 36, CUL (Johnson's letter not in file; notation written on the carbon copy of Voeller's response is “transvestism”; single “s” variant of “transsexual” in original). For the Thom comment, see *Supreme Court Upholds Drag Ban*, THE ADVOCATE, Apr. 24, 1974, at 10 [hereinafter *Supreme Court Upholds Drag Ban*].

546. Crain, *supra* note 225.

to contort trans-inclusive success into irrelevancy and expresses rage over the rare recent instance of the trans increment preceding the LGB.⁵⁴⁷ But some believers in incremental progress may have only adopted the strategy as a political philosophy—and steadfastly adhered to it as the only possible choice—because they did not mature into LGB(T) activists while benefiting from the knowledge that, running parallel to the more visible LGB progress, there was a robust line of actual trans politico-legal success.

Trans people may well bear some of the blame for not having been sufficiently zealous guardians of our own history to fully ward off bigotry, intellectual dishonesty and political expediency.

But not all of it.

And though it may be impossible ever to quantify, I assert that trans people are not responsible even for a majority of it. As I willingly concede, particularly in the case of the flawed 1980 effort to revise the Minneapolis Civil Rights Ordinance which almost erased existing trans-inclusion language, the averted tragedy could have been merely a series of accidents.⁵⁴⁸ There may be a lack of (evidence of) specific intent on the part of all non-trans participants in some instances. But there is never a lack of an antecedent legitimacy of exclusion. And there rarely is a lack of repetition of inaccurate characterizations and false silences. For all of the accurate remembrances—overly laudatory and otherwise—of Bella Abzug for her quixotic early federal gay(-only) rights bills, how much mention is there of the fact that the Republican she defeated to first gain a seat in Congress openly endorsed trans rights alongside gay rights?⁵⁴⁹

547. See Stephen Clark, *United ENDA's Flawed Reasoning*, WASH. BLADE (Nov. 23, 2007), <http://www.washblade.com/2007/11-22/view/editorial/11619.cfm> (last visited Nov. 23, 2007) (no longer active); Stephen Clark to Jillian Weiss, FACEBOOK (Dec. 1, 2014).

548. Rose, *supra* note 42, at 422–23 n.139.

549. During the primaries, many of the candidates were freaked out by homosexuals asking their positions on matters concerning homosexuality. Not me. I welcome this chance to state my position. Our society has decided that racial, ethnic, and religious minorities deserve full equality, full participation in the community. If that is true, and I believe it is and should be, then the same must apply to sexual minorities. I don't limit my concern to homosexuals, but include all sexual minorities: transvestites, transsexuals, sado-masochists, the whole lot. There are three ways of handling sexual desires. One is to fantasize them; the second is to dramatize them with consenting adult partners, and the third is to live out the fantasy by inflicting it on unwilling parties. Society has a stake in the last, but the first two should be perfectly permissible.

Barry Farber, *Prefatory Remarks, The Major Candidates on HS Civil Liberties*, Mattachine Society of New York Records, Series 1, Box 5, Folder 10—Political Campaigns 1969–70, New York Public Library (via Archives of Sexuality and Identity online database). Farber ran on both the Republican and Liberal tickets, but lost to Abzug. Richard L. Madden, *Lowenstein Loses Seat in Congress*, N.Y. TIMES (Nov. 4, 1970) [<http://perma.cc/N32D-BLR2>]; *Farbstein v. Suchman*, 260 N.E.2d 817, 818 (N.Y. 1970) (allowing Farber to appear on the Liberal line).

When Minnesota enacted positive legislation in 2013 recognizing same-sex marriage, it could not have been surprising that MSNBC's Rachel Maddow mentioned the milestone on her primetime show. Her regular viewers probably should not have been surprised that she devoted a full segment of her show to it, providing historical context above and beyond mere mention that the legislation marked a full reversal of policy from the state's previous legislative session, which had sent to the voters a proposal for a constitutional amendment to ban same-sex marriage—a proposal rejected by voters in November 2012.⁵⁵⁰ The life and legacy of Allan Spear comprised much of that context. After noting how he very publicly came out to his colleagues and constituents during his first term in the Senate, Maddow mentioned that during Spear's twenty-eight years in that body, Minnesota, in no small part due to his leadership, saw "landmark achievements in gay rights," including the 1993 amendment to Minnesota Human Rights Act.⁵⁵¹

An NBC News web feature did delve into the history of the Minneapolis ordinance, in 2016 with North Carolina's H.B. 2 as the contextual provocation,⁵⁵² but in 2013 there was no mention by Maddow that the 1993 law actually was a landmark achievement in LGBT rights, the first state gay rights law to be trans-inclusive.⁵⁵³ If Maddow had limited herself to the state's turnaround on same-sex marriage, then her lack of any mention of trans issues would not have been problematic. The Minnesota story in the spring of 2013 was, after all, about same-sex marriage, not trans inclusive anti-discrimination statutes or anti-discrimination statutes of any variety. But Maddow told the 2013 story through the eyes of Allan Spear.⁵⁵⁴ I assert that, even where the actual story is solely about same-sex marriage, if one goes to the trouble of contextualizing Minnesota's "landmark achievements in gay rights," and in so doing mentions the 1993 law, one creates an obligation. It is an obligation grounded in historical debt and intellectual honesty. And, on MSNBC on the evening of May 14, 2013, that obligation was to point out that the law, to which she gave Spear ample and deserved credit, was a

550. *The Rachel Maddow Show* (MSNBC television broadcast May 14, 2013).

551. *Id.*; *An Act Relating to Human Rights*, 1993 MINN. LAWS 121.

552. Emma Margolin, *How Minneapolis Became First U.S. City to Pass Trans Protections*, NBC OUT (June 3, 2016, 10:28 AM), <http://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291> [<http://perma.cc/H56Q2FG7>].

553. *See, e.g.*, Katrina Rose, *Extremely Saddened by Rachel Maddow*, ENDABLOG 2.0 (May 15, 2013), <https://emdablog2.wordpress.com/2013/05/15/extremely-saddened-by-rachel-maddow/> [<http://perma.cc/CE2RM9RG>] (noting Maddow did not mention the achievement of the 1993 law).

554. *See The Rachel Maddow Show* (MSNBC television broadcast May 14, 2013).

“[L]andmark achievement[] in gay rights” not because it was the first state gay rights law (it wasn’t; and, to be clear, [Maddow] didn’t say it was) and not because it was the first one in the Midwest (it wasn’t; and, to be clear, [Maddow] didn’t say it was) but, instead, was a “landmark achievement[] in gay rights” because it was something that Allan Spear had actually opposed in 1975, the first time that a state gay rights bill entered the Minnesota legislative fray after his coming out.⁵⁵⁵

Maddow need not have dwelled upon or even mentioned the friction of 1975 or Spear’s evolution on ‘all or nothing’ gay rights bills, but there was a need to merely do as little as to add the modifier ‘transgender inclusive.’

My formal educational background is in history and law, with side forays into illustration and photography. But I do also have some experience in broadcasting—on radio behind the microphone and in television behind the camera. That experience gives me a real-life appreciation for the time (and other) constraints involved in a live television broadcast. I have professional experience which causes me to appreciate that, even with the latitude Maddow has in her show’s format to provide a degree of context that few television or radio programs which purport to be ‘news’ ever give to any story, she undoubtedly had some time constraints that evening. Still, I ask readers to utter the phrase ‘transgender inclusive’ to themselves silently or out loud. The key, though, is not volume, but time. How long did it take? Surely no more than two or three seconds. Consequently, time cannot be a legitimate reason for those two words—with nothing else expanding the transgender aspect of the Minnesota story—not to have been uttered.

Spear was indeed a monumental figure in the realm of LGBT rights about whom more people should be aware.⁵⁵⁶ Maddow is an out lesbian who holds a doctorate in political science from Oxford.⁵⁵⁷ She did not simply *not* provide her viewers that evening with two seconds of the proverbial ‘more education’ on trans issues that incessantly is alleged to be needed for full inclusion. She provided her viewers with no education at all—no relevant trans context within a segment that itself was almost purely context—context which in turn was almost pure Allan Spear, by then dead almost five years. But no viewer of Maddow’s show that evening who did not already know would have

555. Rose, *supra* note 553.

556. And I must confess that I do regret not taking the opportunity to meet him during the time I lived in Minnesota.

557. See Maddow’s Biography at *Rachel Maddow*, MSNBC (2014), <http://www.msnbc.com/the-rachel-maddow-show/rachel-maddow-biography> [<http://perma.cc/PS5NAQTE>].

come away with any knowledge that the trans-inclusivity of the 1993 Minnesota gay rights law happened.

And the erasive beat goes on.

CONCLUSION

A. Reflection

*“They told me if I voted for Goldwater, we’d be at war in six months, and by golly, I voted for Goldwater and we were.”*⁵⁵⁸

Obergefell v. Hodges likely will seduce many into believing that the law of post-transition identity recognition is moot. In fact, I recall sitting in the audience at a panel on same-sex marriage at the 2004 Lavender Law conference in Minneapolis, a decade before *Obergefell*, and being completely flabbergasted when I heard another audience member make the declaration that once same-sex marriage is achieved, nothing else will matter. I have always assumed that the woman who made the remark was an attorney. I feel even more confident in assuming that she was not a trans person. For no one who has ever had to worry about having her legal sex status questioned when attempting to use a public restroom would utter something so preposterous—particularly in a city that effectively gave birth to trans-inclusive anti-discrimination law,⁵⁵⁹ and where, during the years immediately post-9/11, that law found itself being eviscerated based on obscenely ahistorical readings of transgender law.⁵⁶⁰

Obergefell v. Hodges happened. But it did not stop an anti-trans variant of Jesse Helms’ notorious ‘white hands’ ad,⁵⁶¹ the main weapon utilized in the defeat of a trans-inclusive anti-discrimination ordinance in Houston.⁵⁶² And it is not stopping legislative

558. WILLIAM SAFIRE, *SAFIRE’S POLITICAL DICTIONARY* 753 (2008) (quoting Pierre Rinfret, economist, quoting an unnamed woman) (emphasis added).

559. See CURRAH & MINTER, *supra* note 66, at 19–22 (describing a history of Minnesota laws).

560. *Goins v. West Group*, 635 N.W.2d 717, 722 (Minn. 2001) (finding the law permitted an employer to restrict restroom use based on “biological gender”); *Doe v. City of Minneapolis*, No. C2-02-817, 2002 Minn. App. LEXIS 1388, at *8–*9 (Minn. Ct. App. Dec. 17, 2002) (finding employers were not required to accommodate employees based on sexual orientation).

561. Lee Fang, *RNC Adviser Alex Castellanos Admits That His Infamous Jesse Helms Ad Hurt Race Relations*, THINKPROGRESS (Dec. 4, 2009), <http://thinkprogress.org/politics/2009/12/04/72291/castellanos-hands-admit> [<http://perma.cc/47YRE86N>].

562. Dominic Holden, *This Ad Claims Men Will Follow Girls Into Restroom Stalls If Houston Upholds Nondiscrimination Law*, BUZZFEED (Oct. 19, 2015), <http://www.buzzfeed.com/dominicholden/this-ad-claims-men-will-follow-girls-into-restroom-stalls-if> [<http://perma.cc/J6Q4V6GW>].

attempts to turn trans people into non-persons for purposes of public restroom use.⁵⁶³

The transsexual birth certificates happened.⁵⁶⁴ They are still needed.⁵⁶⁵ And they do still exist, even while under attack.⁵⁶⁶ The transsexual birth certificate statutes have a collective history,

563. See An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations, H.B. 2, 2016 N.C. Sess. Laws. 2016-3 (commonly referred to by its bill designation: H.B. 2).

564. Act of 1915, sec. 1, § 13(d), 1955 Ill. Laws 1026, 1026; An Act Relating to Vital Statistics, ch. 3, sec. 2, § 36-326, 1967 Ariz. Sess. Laws 459, 468; Act No. 611, sec. 1, § 336(A), 1968 La. Acts 1397, 1397; Act 39, sec. 1, § 338(c), 1973 Haw. Sess. Laws 50, 51; An Act to Amend G.S. 130-60 to Authorize Issuance of a New Birth Certificate After Sex Reassignment Surgery, ch. 556, sec. 1, § 130-60(a)(4), 1975 N.C. Sess. Laws 602, 602; An Act Enacting Section 26-1-16.5 Providing for Amended Birth Certificates for Persons with Name or Sex Changes, ch. 64, sec. 1, § 26-15-16.5, 1975 Utah Laws 221, 222; An Act to Provide for Change of Sex on Birth Certificates, ch. 1111, sec. 2, § 144.24, 1976 Iowa Acts 238, 238; An Act to Add Article 9 (commencing with Section 10475) to Chapter 8 of Division 9 of, the Health and Safety Code, Relating to Vital Records, ch. 1086, sec. 2, art. 9, § 10475, 1977 Cal. Stat. 3492, 3493; Act 368 of 1978, § 333.2831, 1978 Mich. Comp. Laws 54, 54; An Act to Amend the Code of Virginia by Adding A New Title Numbered 32.1, ch. 711, sec. 646, § 32.1-269, 1979 Va. Acts 1035, 1094; An Act Amending Certain Sections in Chapter IV of Title X of the Government Code Relevant to Vital Statistics, sec. 9, § 9320(5), Guam Pub. L. 15-90 149, 151 (1980); An Act Relating to Sex Change, ch. 221, sec. 1, ch. 432, 1981 Or. Laws 236, 236; Arkansas Vital Statistics Act of 1981, § 12(b)(3)(d), 1981 Ark. Acts 250, 264; An Act Relating to Vital Statistics, ch. 309, sec. 19, § 24-14-25, 1981 N.M. Laws 1521, 1540; Vital Records Act of 1981, 28 D.C. Reg 3271 (July 24, 1981); An Act Further Regulating the Registration of Births, Deaths, Marriages and Divorce Records or Reports, ch. 684, sec. 10, ch. 46 § 13, 1981 Mass. Acts 994, 999; Georgia Health Code Amended, sec. 1, § 88-1723(e), 1982 Ga. Laws 723, 742; Vital Statistics Act of 1984, ch. 206, sec. 12, § 25-2-115, 1984 Colo. Sess. Laws 742, 748; Uniform Vital Statistics Law, sec. 1, § 193.215, 1984 Mo. Laws. 486, 493; An Act Concerning Amended Certificates of Birth and Supplementing Chapter 8 of Title 26 of the Revised Statutes, ch. 191, § 26:8-40.12, 1984 N.J. Laws 986, 986; Wisconsin Act 315, sec. 7, § 69.15, 1985 Wis. Sess. Laws 1387, 1395; An Act Relating to Vital Statistics, ch. 369, § 23(5) 1990 Ky. Acts 797, 807; Act No. 92-607, § 19(d), 1992 Ala. Laws 1255, 1274; An Act Relating to Vital Statistics, § 4, 1994 Neb. Laws 593, 593; An Act Concerning Vital Statistics and Records, for the Purpose of Providing the Processing of Certain Vital Records and Data; Clarifying Certain Actions; Defining Certain Terms and Revising Certain Terms; and Generally Relating to Vital Records, ch. 97, sec. 1, § 4-214(b)(5), 1995 Md. Laws 1442, 1451; An Act Relative to Vital Records Administration, ch. 268, § 5-C:87(V.), 2005 N.H. Laws 540, 594; Vital Statistics Act of 2006, § 20(d), 2006 N. Mar. I. Pub. L. 1, 19; Act No. 35, An Act Relating to Insurance Coverage for Midwifery Services and Home Births, ch. 104, sec. 4, § 5112, 2011 Vt. Acts & Resolves 86, 90–91.

565. Perversely, North Carolina's transsexual birth certificate statute was relied upon by H.B. 2's supporters to make themselves appear somewhat reasonable. See Rep. Dan Bishop, *House Chamber Audio Archives*, N.C. GEN. ASSEMBLY (Mar. 23, 2013), <http://www.ncleg.net/DocumentSites/HouseDocuments/2015-2016%20Session/Audio%20Archives/2016/03-23-2016.mp3> [<http://perma.cc/K3TFFD33>] (during H.B.2 floor debate).

566. Year 2016 saw a Virginia proposal which sought to undo the state's 1979 transsexual birth certificate statute. Compare Proposed House Bill No. 431, § 32.1-269, 2016 Va. Acts 220, with An Act to Amend the Code of Virginia by Adding A New Title Numbered 32.1, ch. 711, sec. 646, § 32.1-269(E), 1979 Va. Acts 1035, 1094.

somewhat muddy in places,⁵⁶⁷ but a history nevertheless. A few were synthesized collaborative efforts among LGBs, trans people and friendly straights.⁵⁶⁸ A few others sprung forth from the happenstance of legislative inertia unrelated to the matter of transition.⁵⁶⁹ Still others however, would not have happened but for the help of supporters of trans rights who either were not similarly inclined to support gay rights or were flat out hostile toward gay rights and overall gender equality.⁵⁷⁰

Those paradoxes happened. And the hostility prong of those paradoxes, openly referenced by the anti-transsexual lesbian feminists of the 1970s, still silently forms the core of the derision exhibited by those LGBs who either do not want the T connected to the LGB at all or, if willing to so tolerate, never on equal terms.⁵⁷¹ Why are the laws which came into existence via collaboration with those who understood transsexuality (at least to the degree necessary to vote yes on a birth certificate bill) but had, to use Jonathan Capehart's 2002 phraseology, "no similar enlightenment" on gay issues *not* regarded to be the political equals of federal, state and local gay rights bills about whose LGB backers asserted a sufficient lack of "similar enlightenment" to consider trans inclusion viable?⁵⁷² Are they not examples of the same willingness to embrace Republicans that, when the issue is anti-discrimination law, is worshipped with a fervor that has demanded the sacrifice of transgender equality?

Make no mistake. I am not arguing that one justified the other. Rather, I am suggesting that the earlier trans-specific successes were never even remotely considered by the promoters of the later

567. See Rose, *supra* note 45, at 141.

568. For trans efforts toward California's 1977 birth certificate statute, see Joanna Clark to Assemblyman Barry Keene (Dec. 29, 1976), Jude Patton to Assemblyman Barry Keene (Jan. 10, 1977), and Carol Lynn Katz to Assemblyman Barry Keene (Jan. 6, 1977), microformed on Assembly Health Committee File, AB 385, microfilm roll MF 1:2 (7), California State Archives, Sacramento, California [hereinafter CA-SA]. For non-trans involvement in securing passage of the bill, see Paul Perdue to Sen. Alfred Song (May 6, 1977), microformed on Senate Judiciary File, AB 385, microfilm roll MF 1:5 (12), CA-SA; Anne Steele to Assemblyman Barry Keene (March 1, 1977), microformed on Assembly Health Committee File on AB 385, microfilm roll MF 1:2 (7), CA-SA.

569. Missouri's 1984 statute came in via enactment of the Model State Vital Statistics Act, which was "mainly supported by the Funeral Directors' Association." SB 574 memo, Apr. 18, 1984, Office of the Governor, RG-003, Christopher S. Bond, 1981–1985, Legislative Files (House and Senate Files), Box 25 (1984—SB 451—SB 608), file SB 574, Missouri State Archives, Jefferson City, Missouri.

570. See Rose, *supra* note 45, at 115–16; Catherine Kunkel Watson, *Transsexual Marriages: Are They Valid Under California Law?*, 16 SW. U. L. REV. 505, 527 (1986).

571. See, e.g., David Marcus, *Exclusive: Gay Man Explains His Petition To Drop The T In LGBT*, THE FEDERALIST (Nov. 9, 2015), <http://thefederalist.com/2015/11/09/exclusive-gay-man-explains-his-petition-to-drop-the-t-in-lgbt> [<http://perma.cc/42BBM9XH>].

572. Capehart, *supra* note 518.

gay-only efforts either as an avenue to make any such measure fully inclusive or even to legitimize the presence of trans people and issues within the confines of LGB() advocacy. Transphobia cannot be totally discounted as a reason (nor should it be). But neither should genuine ignorance, borne of a lack of an accurate and accessible inclusive historical record.

The commonality is toxicity.

A transsexual birth certificate statute in Louisiana in 1968⁵⁷³ indeed is not the same as a gay(-only) rights law in Wisconsin in 1982.⁵⁷⁴ Proponents of ‘incremental progress’ may love to cling to (and indeed gleefully spout) the ‘rising tide lifts all boats’ aphorism.⁵⁷⁵ But the rising tide of birth certificate conformability in Louisiana during the waning months of Lyndon Johnson’s presidency did not then lift the boat of any non-trans LGB person at either end of the Mississippi River.⁵⁷⁶ Similarly, the rising tide of a gay(-only) rights law in Wisconsin during the early days of the Reagan Administration did not lift the boat of any transsexual person at either end of the Mississippi River.⁵⁷⁷ Wisconsin did soon follow suit with a transsexual birth certificate statute,⁵⁷⁸ but there has never been any serious effort to eliminate the state law black hole which actually allows those covered by the groundbreaking 1982 anti-discrimination law to themselves discriminate against anyone who might use (or might be presumed to have used) the 1986 transsexual birth certificate statute.

Indeed, all of the transsexual birth certificate statutes happened—not just Louisiana’s and Wisconsin’s.⁵⁷⁹ They have allowed

573. Act No. 611, sec. 1, § 336, 1968 La. Acts 1397; Rose, *supra* note 45, at 116.

574. Ch. 12, 1981 Wis. Sess. Laws, 901 (published Mar. 2, 1982).

575. *Cf. LGBT Community*, DEMOCRATS.ORG, <https://www.democrats.org/people/lgbt-community> [<http://perma.cc/J5TTZZAJ>] (quoting President Obama saying that progress is incremental).

576. *See* Act No. 611, sec. 1, § 336, 1968 La. Acts 1397.

577. *See, e.g.*, Wisconsin Act 348, sec. 4, § 939.645, 1987 Wis. Sess. Laws 1232, 1233.

578. Wisconsin Act 315, sec. 7, § 69.15, 1985 Wis. Sess. Laws 1387, 1395.

579. *See* Act of 1915, sec. 1, § 13(d), 1955 Ill. Laws 1026, 1026; An Act Relating to Vital Statistics, ch. 3, sec. 2, § 36-326, 1967 Ariz. Sess. Laws 459, 468; Act 39, sec. 1, § 338(c), 1973 Haw. Sess. Laws 50, 51; An Act to Amend G.S. 130-60 to Authorize Issuance of a New Birth Certificate After Sex Reassignment Surgery, ch. 556, sec. 1, § 130-60(a)(4), 1975 N.C. Sess. Laws 602, 602; An Act Enacting Section 26-1-16.5 Providing for Amended Birth Certificates for Persons with Name or Sex Changes, ch. 64, sec. 1, § 26-15-16.5, 1975 Utah Laws 221, 222; An Act to Provide for Change of Sex on Birth Certificates, ch. 1111, sec. 2, § 144.24, 1976 Iowa Acts 238, 238; An Act to Add Article 9 (commencing with Section 10475) to Chapter 8 of Division 9 of, the Health and Safety Code, Relating to Vital Records, ch. 1086, sec. 2, art. 9, § 10475, 1977 Cal. Stat. 3492, 3493; Act 368 of 1978, § 333.2831, 1978 Mich. Comp. Laws 54, 54; An Act to Amend the Code of Virginia by Adding A New Title Numbered 32.1, ch. 711, sec. 646, § 32.1-269, 1979 Va. Acts 1035, 1094; An Act Amending Certain Sections in Chapter IV of Title X of the Government Code Relevant to Vital Statistics, sec. 9, § 9320(5), Guam Pub. L. 15-90 149, 151 (1980); An Act Relating to Sex Change, ch. 221, sec. 1, ch. 432, 1981 Or. Laws 236, 236; Arkansas Vital

trans people to live lives that they could not have otherwise lived: reasonably free from being outed any time they had to produce a copy of their birth certificate or driver's license for identification purposes. Most anti-crossdressing ordinances were repealed and/or overturned—often with trans agitation.⁵⁸⁰ Contrary to the obnoxiously dismissive 1974 assessment of them by Lambda Legal's William Thom as “not a gay issue,”⁵⁸¹ their elimination has benefited many gay men and lesbians who may never have identified with the trans label but whose existence and/or occasional activities would open them up to harassment and/or prosecution.⁵⁸² The earliest trans-inclusive civil rights ordinances occurred because trans people (along with supportive LGBs and heterosexuals) refused to accept the revealed wisdom of a handful of (semi-)professional gay activists who, by chronological definition, could have had no more than three or four years more experience than the unpaid trans activists of the day.⁵⁸³ Just as many of the birth certificate statutes would not have happened without Republican support,⁵⁸⁴ the 1975 Minnesota triumph occurred precisely because a handful of Republicans refused to listen to a Democratic majority.⁵⁸⁵

Statistics Act of 1981, § 12(b)(3)(d), 1981 Ark. Acts 250, 264; An Act Relating to Vital Statistics, ch. 309, sec. 19, § 24-14-25, 1981 N.M. Laws 1521, 1540; Vital Records Act of 1981, 28 D.C. Reg 3271 (July 24, 1981); An Act Further Regulating the Registration of Births, Deaths, Marriages and Divorce Records or Reports, ch. 684, sec. 10, ch. 46 § 13, 1981 Mass. Acts 994, 999; Georgia Health Code Amended, sec. 1, § 88-1723(e), 1982 Ga. Laws 723, 742; Vital Statistics Act of 1984, ch. 206, sec. 12, § 25-2-115, 1984 Colo. Sess. Laws 742, 748; Uniform Vital Statistics Law, sec. 1, § 193.215, 1984 Mo. Laws. 486, 493; An Act Concerning Amended Certificates of Birth and Supplementing Chapter 8 of Title 26 of the Revised Statutes, ch. 191, § 26:8-40.12, 1984 N.J. Laws 986, 986; An Act Relating to Vital Statistics, ch. 369, § 23(5) 1990 Ky. Acts 797, 807; Act No. 92-607, § 19(d), 1992 Ala. Laws 1255, 1274; An Act Relating to Vital Statistics, § 4, 1994 Neb. Laws 593, 593; An Act Concerning Vital Statistics and Records, for the Purpose of Providing the Processing of Certain Vital Records and Data; Clarifying Certain Actions; Defining Certain Terms and Revising Certain Terms; and Generally Relating to Vital Records, ch. 97, sec. 1, § 4-214(b)(5), 1995 Md. Laws 1442, 1451; An Act Relative to Vital Records Administration, ch. 268, § 5-C:87(V.), 2005 N.H. Laws 540, 594; Vital Statistics Act of 2006, § 20(d), 2006 N. Mar. I. Pub. L. 1, 19; Act No. 35, An Act Relating to Insurance Coverage for Midwifery Services and Home Births, ch. 104, sec. 4, § 5112, 2011 Vt. Acts & Resolves 86, 90–91.

580. Nancy Ford, *'Cross-Dressing' Ordinance Repealed 30 Years Ago*, OUTSMART (Aug. 1, 2010), <http://www.outsmartmagazine.com/2010/08/%E2%80%98cross-dressing%E2%80%99-ordinance-repealed-30-years-ago> [<http://perma.cc/H9ZPLXHT>].

581. *Supreme Court Upholds Drag Ban*, *supra* note 545, at 10.

582. Ford, *supra* note 580 (noting the Houston ordinance was used to arrest lesbians wearing fly-front pants).

583. Nicole Pasulka, *Ladies in The Streets: Before Stonewall, Transgender Uprising Changed Lives*, NPR (May 5, 2015, 4:52 PM), <http://www.npr.org/sections/codeswitch/2015/05/05/404459634/ladies-in-the-streets-before-stonewall-transgender-uprising-changed-lives> [<http://perma.cc/5VBU44NV>].

584. See Katrina C. Rose, *Our Past Must Be Our Present (To Ourselves): How Transsexuals Can Survive Proposition 8*, 5 TOURO J. RACE GEN. & ETHNICITY 57, 86 (2010).

585. See *supra* notes 66 and 518.

The first gay histories pretended that trans people did not exist as trans people.⁵⁸⁶ The gay histories which followed did not give trans people positive credit for their political and legal achievements or for the alliances underlying them. Far too many gay activists and politicians have denigrated trans people while painting pictures of us and our issues as being too much for conservatives.⁵⁸⁷ If that was in fact true in 2007, then for trans people, Dan Savage's now-catchy mantra 'It Gets Better' is something far less than a universal truism. After all, some of those conservatives were the very people whose aid trans people were able to enlist on their own—back when trans people were being formally shunned by gay activists and lesbian separatists being *too conservative* and *too conformist*.

It gets better?

Which came first?

The Massachusetts transsexual birth certificate statute or the Massachusetts gay-only rights law? *Obergefell v. Hodges* or North Carolina's H.B. 2?

B. Observation

If the summer of 2016 was the Summer of Sarah McBride,⁵⁸⁸ then the summer of 2015, for better or worse, may one day be looked back upon as the Summer of Caitlyn.⁵⁸⁹ A very public transition for the 1976 Olympic decathlon gold medal winner quickly led to ESPN conferring upon Jenner the Arthur Ashe Courage Award.⁵⁹⁰ Naturally, the usual anti-LGBT suspects took issue with such a high-profile recognition of a gender transition.⁵⁹¹ Some with no real stake in the

586. Compare JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS & GAY MEN IN THE U.S.A.* 183–84 (1992), with MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* 252 (1996).

587. See Jillian T. Weiss, *Transphobia in the Gay Community*, THE BILERICO PROJECT (July 20, 2010, 11:30 AM), http://bilerico.lgbtqnation.com/2010/07/transphobia_in_the_gay_community.php [<http://perma.cc/F3WHBRMP>].

588. See Johnson, *supra* note 506.

589. This should not be read to suggest any feeling on my part that the mass shooting at the Emanuel AME Church in Charleston, South Carolina—and the resulting successful outcry against official usage of the Confederate flag—should be relegated to a position of lesser importance than Caitlyn Jenner's transition. See *generally* Act No. 90, § 2, 2015 S.C. Acts. For purposes of this Article, however, I find myself forced to surrender to the self-sustaining media monster that is so-called reality television. By the end of the summer, though the Confederate flag had been removed from the capitol grounds in Charleston, the media had returned to more sensationalistic stories, with Jenner ultimately only being supplanted by Donald Trump. And we know where that led.

590. See Mark Skousen, *Should ESPN Give Bruce Jenner an Award for Courage?*, TOWNHALL (June 5, 2015), <http://townhall.com/columnists/markskousen/2015/06/05/should-espn-give-bruce-jenner-an-award-for-courage-n2008447> [<http://perma.cc/J8ZXUSCU>].

591. See, e.g., *id.*; Diana Falzone, *Anger over Caitlyn Jenner being chosen over Lauren Hill for ESPY courage award*, FOX NEWS (June 3, 2015), <http://www.foxnews.com/enter>

culture wars, however, questioned ESPN's decision to give such an award to Jenner—or, at least, to Jenner alone.⁵⁹² After all, in 1976, the cover of the August 9 issue of *Sports Illustrated* indeed featured Jenner, celebrating Olympic victory.⁵⁹³ But a month later the magazine ran an article (albeit not the cover feature) about an athlete who had just recently transitioned from male to female—not Jenner of course, but Renée Richards.⁵⁹⁴

Richards has had an uneasy relationship with the trans community over the years,⁵⁹⁵ and Jenner has quickly followed in Richards' footsteps in that respect. Even before some rather awkward statements to Ellen Degeneres about same-sex marriage and remarks to *Time* about trans people in general that an overwhelming majority of the community found to be hyper-elitist, Jenner had begun to rub some within the trans community the wrong way via a second coming out—as a Republican.⁵⁹⁶ What is not fully clear is whether Jenner leans right politically purely for the atavistic reasons associated with the Club for Growth and the Tea Party or for the less-remembered notion of the socially moderate Republican⁵⁹⁷—a type of politician that was not unknown in the era in which Jenner was

tainment/2015/06/03/anger-over-caitlyn-jenner-being-chosen-over-lauren-hill-for-espys-courage-award [http://perma.cc/Y8SH6GJ8].

592. See, e.g., Bud Poliquin, *ESPN Knows Caitlyn Jenner is no Renee Richards*, SYRACUSE.COM (June 3, 2015), http://www.syracuse.com/poliquin/index.ssf/2015/06/caitlyn_jenner_may_have_been_a_long-tortured_soul_but_she_never_was_renee_richard.html [http://perma.cc/4ZQP5QD3].

593. Almost 40 years later Jenner did so on the cover of a 'Where are They Now?' edition of the magazine. SPORTS ILLUSTRATED, July 4, 2016, at cover.

594. Ray Kennedy, *She'd Rather Switch—And Fight*, SPORTS ILLUSTRATED, Sept. 6, 1976, at 17–19 (an altered digital copy is available at <http://www.si.com/vault/1976/09/06/614056/shed-rather-switchand-fight> [http://perma.cc/LMA9VMBA]).

595. For example, she sided with the LPGA against the quest by golfer Mianne Bagger to play on the women's pro tour. *Transgender Golfer Still Faces Barriers*, ABC NEWS (July 27, 2005), <http://abcnews.go.com/Primetime.Health/story?id=99025> [http://perma.cc/2EVPVNMCI].

596. J. Bryan Lowder, *Caitlyn Jenner vs. "the Community"*, SLATE (Sept. 9, 2015), http://www.slate.com/blogs/outward/2015/09/09/caitlyn_jenner_gay_marriage_and_the_halloween_costume_respectable_trans.html [http://perma.cc/Q7NLM8UC]; Nicholas Hautman, *Caitlyn Jenner Apologizes for "Man in a Dress" Comments Amid Backlash*, US WEEKLY (Dec. 14, 2015), <http://www.usmagazine.com/celebrity-news/news/caitlyn-jenner-people-get-uncomfortable-if-you-look-like-a-man-in-a-dress-w159616> [http://perma.cc/5Q3HRZVD].

597. Well after the Republican field of contenders established its anti-LGBT, anti-worker *bona fides*, Jenner made it clear that she would be voting for the Republican nominee, whoever it might be. Stephen Battaglio, *John Dickerson keeps Democratic debate on track despite last-minute shuffle*, L.A. TIMES (Nov. 15, 2015), <http://www.latimes.com/entertainment/tv/la-et-st-cbs-debate-20151116-story.html> [http://perma.cc/M3KNTBAT]. Being all but a complete outsider to the non-Hollywood trans community, Jenner professed a willingness to believe that Donald Trump is neither anti-woman nor anti-LGBT. Nico Lang, *Caitlyn Jenner: Donald Trump is a Champion for Women and LGBT People*, THE ADVOCATE (June 29, 2016), <http://www.advocate.com/election/2016/6/29/caitlyn-jenner-donald-trump-champion-women-and-LGBT-people> [http://perma.cc/P4G9R2HK].

gearing up to represent America at the Montreal Olympics. Gerald Ford, the Republican who occupied the White House while Jenner was winning the gold medal, had, as a member of Congress, voted in favor of submitting the Equal Rights Amendment to the states for ratification.⁵⁹⁸ Republican Representative Arne Carlson first placed Tim Campbell's trans-inclusion language into the Minnesota legislative record on May 8, 1975.⁵⁹⁹ Republican Alderman Walter Rockenstein was responsible for that language first becoming law,⁶⁰⁰ helping it to be added to Steve Endean's gay-only 1974 Minneapolis Civil Rights Ordinance as 1975 came to a close.⁶⁰¹ And in neighboring Iowa it was Republican Governor Robert Ray who signed Iowa's transsexual birth certificate statute—a law that went into effect on the first day of the month that would conclude with Jenner winning the Olympic decathlon.⁶⁰²

Yet even after the 'Summer of Caitlyn,' it is sadly not all that shocking to see an article in a mainstream newspaper—the largest mainstream newspaper in Oregon in fact—offhandedly declare that legislators “weren't talking about” transsexual women in 1980, mere

598. A ratification process that was never completed, but one that Ford nevertheless championed while president. Women's Equality Day, 1975, Proclamation No. 4383, 89 Stat. 1284 (Aug. 26, 1975).

599. H.F. No. 536, § 29, 1975 Minn. H.J. 2460, 2461 (May 8, 1975); see also Tim Campbell, *Equal Rights for Transsexuals, Transvestites*, MINNESOTA DAILY, Feb. 5, 1976 at 7; Tim Campbell, Prepared Statement to the House Judiciary Committee 1 (Mar. 24, 1975), in Allan Spear Legislative Records, Gay Rights Bill (Coleman/Tomlinson Bill), Box 9, Folder '75-SF 595', MINN. STATE HISTORICAL SOC'Y, St. Paul, Minnesota.

600. MINNEAPOLIS, MINN., CIVIL RIGHTS ORDINANCE § 1 (1974).

601. Minneapolis, Minn., Ordinance § 2 (1975), *codified at* MINNEAPOLIS, MINN., CODE ORD. § 139.20 (1975) (since modified). M. Howard Gelfand, *Council Strengthens Rights Law, Takes Rights-Chief Approval Power*, MINNEAPOLIS TRIBUNE, Dec. 31, 1975. This Article referred only to “a package of changes in a civil-rights ordinance designed to strengthen antidiscrimination efforts.” Rockenstein had proposed several technical amendments to the existing ordinance in November. However, the initial list did not include the trans-inclusion language. It is not clear when, prior to Dec. 30, that the inclusion language became part of the package. MINNEAPOLIS, MINN., An Ordinance Amending Chap. 945 of the Minneapolis Code of Ordinances Related to Civil Rights, Draft (Nov. 26, 1975).

602. Frank Litsky, *Jenner Triumphs in Decathlon, Breaks World Mark*, N.Y. TIMES, July 31, 1976 at 33; An Act to Provide for Change of Sex on Birth Certificate, ch. 1111, sec. 2, § 144.24, 1976 IOWA ACTS 238, 238; IOWA CONST. art. III, § 26. *The Advocate*, interestingly, made no mention of the new Iowa transsexual birth certificate statute when it tried to convince its readership to “take a closer look at the Grand Old Party” during the 1976 elections, while touting Ray's support for the overhaul of the Iowa Penal Code which deleted the state's sodomy law. Sasha Gregory-Lewis, *The Republicans: Embracing Homophobes & Gay Rights Backers*, THE ADVOCATE, Oct. 6, 1976 at 7, 8. Ironically, the same issue did include a sympathetic, yet somewhat condescending, article on the transition process. It focused on the Stanford program, concluding with admonitions that legal rights varied substantially from state to state and suggesting the Erickson Educational Foundation as a source for information. Mark Thompson, *Transsexuals Looking for an Honest Reflection*, THE ADVOCATE, Oct. 6, 1976, at 14–16.

months before a Republican governor of that state signed a transsexual birth certificate bill into law.⁶⁰³ Even that, however, is not as frightening as a pro-transgender editorial in the *New York Times* touting Governor Andrew Cuomo's decision to issue administrative regulations to bypass the state Senate's refusal to concur in a bill, repeatedly passed by the Assembly in recent years, to rectify the trans-exclusion of 2002's SONDA.⁶⁰⁴ The headline, "New York Leads the Way on Transgender Rights," was perhaps the *only* headline that the newspaper could *not* have accurately used—either to describe Cuomo's action or the state's history of trans rights preceding it.⁶⁰⁵ Unfortunately, Sylvia Rivera and Lee Brewster were not around to offer words considerably more contrarian than Melissa Sklarz's conciliatory view of Cuomo's action as "sweet."⁶⁰⁶

Between 1969 and 1999, much was lost—not just in the way of political opportunities, but the history of the good as well as the bad. At Stonewall, all except the most privileged and closeted joined together in battle. As the century drew to a close, an inordinate amount of time and energy could be expended—by people who most outsiders would see as having more enemies in common than not—on the question of whether the T could (or should) actually fit together with the LGB to form a coherent whole or whether the T could only be an 'ally,' never an equal but merely an outsider, to be, at the whim of the insider, welcomed or unwelcomed.⁶⁰⁷

603. Casey Parks, *Oregon legislator hadn't met a transgender person—until now*, THE OREGONIAN (Oct. 8, 2015), http://www.oregonlive.com/politics/index.ssf/2015/10/representative_carl_wilson_tra.html [<https://perma.cc/C5R38L6Y>].

604. Act 4558-B, § 1, 2015 N.Y. Sess. Laws 1, 2 (passed 90–52 in the Assembly, Feb. 3, 2015).

605. Editorial Board, *New York Leads the Way on Transgender Rights*, NY TIMES (Oct. 23, 2015), https://www.nytimes.com/2015/10/24/opinion/new-york-leads-the-way-on-transgender-rights.html?_r=0 [<http://perma.cc/QU4V5Q8F>].

606. Paul Schindler, *Cuomo Employs State Regs to Provide Anti-Bias Protections to Transgender New Yorkers*, GAY CITY NEWS (Oct. 24, 2015), <http://gaycitynews.nyc/cuomo-employs-state-regs-provide-anti-discrimination-protections-transgender-new-yorkers> [<http://perma.cc/GY3K3QE8>]. Subsequently, Sklarz has vociferously defended New York's Empire State Pride Agenda in the wake its decision to cease operations after concluding that the regulations were sufficient to bring the rights of trans New Yorkers up to par with those of LGBs. Paul Schindler, *Citing Win on Cuomo's Trans Rights Directive, Pride Agenda Folds Up Tent*, GAY CITY NEWS (Dec. 12, 2015), <http://gaycitynews.nyc/citing-win-cuomos-trans-rights-directive-pride-agenda-folds-tent> [<http://perma.cc/MS85FQ9F>] [hereinafter *Citing Win on Cuomo's Trans Rights Directive, Pride Agenda Folds Up Tent*]; Paul Schindler, *ESPA Leadership Pushes Back on Charge They've Declared "Mission Accomplished,"* GAY CITY NEWS (Dec. 13, 2015), <http://gaycitynews.nyc/espaleadership-pushes-back-charge-theyve-declared-mission-accomplished> [<http://perma.cc/2KX5MTJJ>].

607. Anita Renteria, *Addressing the Chamber's inclusiveness*, HOUSTON VOICE, Apr. 30, 1999.

The new century saw some changes which appeared to be substantive, but too often they became indistinguishable from recycled mirages, which themselves frequently were marketed as substantive change. And in 2015, when the self-congratulation of the Summer of Caitlyn gave way to the anger of the November of Houston,⁶⁰⁸ there was an ever-so-predictable reaction from some corners of the LGB community: a formal (or as much as there can be such on the internet) petition to jettison trans people from the movement.⁶⁰⁹ In fairness to HRC, it was among those who quickly denounced the petition.⁶¹⁰ And in 2016 it vocally denounced North Carolina's H.B. 2.⁶¹¹

Of course, it is impossible not to remember that HRC *also* denounced a gay-only ENDA.

Until it didn't.

C. A Forward-Looking Lamentation

In the decades following Stonewall something was lost, a loss not quantitatively offset by Laverne Cox's 'tipping point' or the Summer of Caitlyn or *Transparent*. After all, most trans people (and most people in general) are not in show business. True enough, from the time of the enactment of the first transsexual birth certificate statute—well over a decade before Stonewall⁶¹²—to the infancy of the Obama presidency much was gained by and for trans people. But there were key instances where much more could have been gained, and those with the power to do so chose expediency over inclusion, even where there was no chance whatsoever for a given embodiment of exclusion to actually become law. The power to decide

608. Monica Roberts, *Anatomy of a Losing HERO Campaign*, THE ADVOCATE (Nov. 11, 2015), <http://www.advocate.com/election/2015/11/11/anatomy-losing-hero-campaign> [http://perma.cc/4YTCHQ56].

609. Dana Beyer, *Gay Transphobia, 2015 Style*, HUFFINGTON POST (Nov. 12, 2015, 2:01 PM), http://www.huffingtonpost.com/dana-beyer/gay-transphobia-2015-styl_b_8546278.html [http://perma.cc/2X96GB3A].

610. Sunnive Brydum, *LGBT Groups Respond to Petition Asking to 'Drop the T'*, THE ADVOCATE (Nov. 6, 2015), <http://www.advocate.com/transgender/2015/11/06/lgbt-groups-respond-petition-asking-drop-t> [http://perma.cc/2VSFAQYW]. Soon thereafter HRC even took a conspicuous role in a new Transgender Equality Task Force. Chris Johnson, *Congressional forum focuses on anti-trans violence*, WASH. BLADE (Nov. 17, 2015, 11:42 PM), <http://www.washingtonblade.com/2015/11/17/Congressional-forum-focuses-on-anti-trans-violence> [http://perma.cc/FHS27GNG].

611. Chris Johnson, *McCrory meets with Griffin, trans advocate over anti-LGBT law*, WASH. BLADE (Mar. 31, 2016), <http://www.washingtonblade.com/2016/03/31/mccrory-meets-with-lgbt-advocates-over-anti-lgbt-law> [http://perma.cc/5YHAY2CS].

612. Act of 1915, sec. 1, § 13(d), 1955 Ill. Laws 1026; *Sex Change Bill Passed*, L.A. TIMES, June 3, 1955, at 27.

who was not equal operated as a self-contained means to its own end. And it conveyed a message that something else—something beyond inclusion in a failed ENDA or a successful SONDA—had not been gained in the years since Illinois enacted its transsexual birth certificate statute in 1955.⁶¹³ That something has been a means to dispel, in starkly political and legal terms, the ‘trans people just showed up five minutes ago’ myth—a myth that lurked just beneath the surface during the remarkable cultural pushback against North Carolina’s H.B. 2.⁶¹⁴

For even if one is willing to accept the thoroughly disproven notion that Sylvia Rivera had no connection to Stonewall, only a mind clouded by poisonous transphobic disingenuousness could lead one to conclude that she and others were not agitating for legislative inclusion in New York City at the earliest opportunity.⁶¹⁵ But the early trans advocates were then forced out.⁶¹⁶ Those who did the forcing—and their successors-in-interest—long benefited from a historical narrative which pretends that none of it happened and, concurrently, pretends that in the succeeding decades other trans people accomplished nothing because they did nothing and, in turn, are owed nothing. A toxic combination of erasure and exclusion has for too long been able to hide in plain sight by calling itself ‘principled opposition’ or ‘pragmatism’ or ‘incremental progress.’ Those euphemisms connote respectability and legitimacy but, in practice, have merely served to further segregate a portion of a second-class citizenry into third-class status.

Most of the people who will be in a position to make future decisions will be not of my generation but of the next—or perhaps the one after that. The systematic exclusion of trans women of my generation from the ranks of the gainfully employed within professionalized LGB() rights circles perhaps is, in retrospect, the LGB() rights industry’s biggest success. The fact that there were not already out, visible trans women employees at HRC and NGLTF when I immersed myself in trans activism while still in law school two decades ago is an atrocity—an atrocity that is never permitted to be spoken of in proper civil rights company. Trans people are left to sit and wonder how and why NGLTF, which long positioned itself in the trans-inclusion wars as ‘good cop’ to HRC’s ‘bad cop,’ hired and long employed one of the signatories to the infamous 1977 ‘Open

613. Act of 1915, sec. 1, § 13(d), 1955 Ill. Laws 1026, 1026.

614. Gilreath, *The Politics of the Single-minded*, *supra* note 520.

615. Leo Skir, *The Hearings on Intro. 475: Part III*, GAY, Jan. 24, 1972, at 4.

616. Saypen, *A Little Bit of Our History*, *supra* note 251, at 56; *Behind the Lines on Gay Pride Sunday*, *supra* note 408, at 3.

Letter to Olivia' which can be characterized in no other way as a demand for discrimination against trans women.⁶¹⁷

Younger activists, policy experts and legal professionals—and trans people in general⁶¹⁸—should use a critical look backward not only to press forward to secure new civil rights victories but also to ask why little or none of the rich history of past legal success was ever taken into account by the decision-makers who anointed 'incremental progress' as the unquestionable default stance on the matter of trans inclusion. That history far too often is still ignored. Unfortunately, in 2016 'trans people just showed up five minutes ago' gave way not to peace and equality as between the T and the LGB but instead to a "national narrative that the job is done" in the aftermath of a national gay marriage ruling and intermittent non-statutory trans equality measures.⁶¹⁹

In light of the degree to which trans people have been betrayed politically by many of those who should have been our natural allies, concentrating too much on failures and inadequacies is understandable, even if it can be problematic at times. Remembering the progress we actually have made is laudable, even if it is sometimes an elusive goal.⁶²⁰ Celebrating it too heartily is arrogant. Believing that

617. Although directly aimed at one specific trans woman, the letter, signed by Sue Hyde and 21 others, must be read as a demand for the same sort of employment discrimination against all trans women. Marti Abernathy, *Transphobic Radical Hate Didn't Start With Brennan: The Sandy Stone—Olivia Records Controversy*, TRANSADVOCATE, http://transadvocate.com/transphobic-radical-hate-didnt-start-with-brennan-the-sandy-stone-olivia-records-controversy_n_4112.htm [<http://perma.cc/F4BSN55S>] (citing D.A. 'Ollie' Oliveira et. al., *Open Letter to Olivia*, SISTER: WEST COAST FEMINIST NEWSPAPER, July–June 1977, at 6). See also Marti Abernathy, *Radical Lesbian Separatism in LGBT Activism: Hyding in Plain Sight?*, TRANSADVOCATE (Aug. 25, 2011), http://transadvocate.com/radical-lesbian-separatism-in-lgbt-activism-hyding-in-plain-sight_n_4117.htm [<http://perma.cc/BK6X8EWU>].

618. After all, it is the activists of the generation that forced HRC and other gay rights organizations to at least pay lip service to trans rights who paid the career price. Few have ever been allowed inside the doors of such organizations as employees to earn a paycheck engaging in the advocacy that they long proved they were willing to do for free. And that paid advocacy has been a conduit to legal academia for many LGBs, but the employment practices which, by happenstance or design, operated against trans people (particularly trans women) to an obscenely negative extent ensured that it was a conduit all but inaccessible to trans women. See KATRINA C. ROSE, *OUT AND ABOUT: THE LGBT EXPERIENCE IN THE LEGAL PROFESSION* 106–07, 108 (2015). Many of that generation are no longer with us, but many more are.

619. Schindler, *Citing Win on Cuomo's Trans Rights Directive, Pride Agenda Folds Up Tent*, *supra* note 606 (quoting former ESPA executive director Matt Foreman on the organization's decision to shut down after achieving marriage equality and some palliative trans anti-discrimination remedies via administrative means but before securing *statutory* protections for trans people).

620. Giteck, *Is This Any Way to Run A Movement?*, *supra* note 417, at 49 (quoting Tom Stoddard).

equality has been achieved when it has not been is dangerous.⁶²¹ Believing the elements of equality that have been achieved to be untouchable was delusional even before the election of Donald Trump as president. Twisting history to convince a new generation of the rightness of a flawed ‘job is done’ status quo would be as criminal as convincing past waves of LGB activists that the ‘trans people just showed up five minutes ago’ mindset has proven to be. For if it happens, another generation of trans people will be forced by necessity—instead of merely by academic curiosity—to further sort out a lost history instead of living a well-earned future.

Almost a decade after ‘Black Wednesday,’ academia-ensconced defenders of the Frank-HRC strategy can still be heard to place all blame on trans people for the lack of success of any ENDA in 2007.⁶²² The better view, however, is that, even while being able to point to some things that the pro-inclusion side could have done better, it actually was trans people who both came to and emerged from the 2007 battle with clean hands. There can be little question that what occurred in 2007 was a disaster for all concerned. By far, however, trans people paid the heavier price—but it essentially was a price trans people already had been paying for decades by *not* being as outspoken as they were in 2007.⁶²³ The positive judicial and administrative developments in sex discrimination law have allowed inclusion opponents—both inside and outside of the LGBT establishment—to declare that all civilian trans civil rights concerns have been solved when, in fact, there is nothing emanating from *Price Waterhouse v. Hopkins* (up to and including the EEOC’s formal interpretation of Title VII) that cannot be erased by a one-vote-rightward shift away from the composition of the Supreme Court which saw Anthony Kennedy as a frequent swing vote.⁶²⁴ While, strictly speaking,

621. See, e.g., Dana Beyer, *LGBT people get job protection, too*, WASH. POST (Jan. 4, 2016), https://www.washingtonpost.com/opinions/lgbt-people-get-job-protection-too/2016/01/04/ec601794-b0b0-11e5-b281-43c0b56f61fa_story.html [<http://perma.cc/3GG584Q9>].

622. One has accused trans people of “[h]aving grabbed trans protection under Title VII for themselves alone after sabotaging ENDA with purity demands and hypocritical whining about solidarity.” Clark, *supra* note 547. Shannon Gilreath’s hyperbolic revisionism essentially was a different version of the same song. Gilreath, *The Politics of the Single-minded*, *supra* note 520. Thus far, the irony of their complaining has escaped serious analysis. Each laments an alleged overage of employment protections for trans people—as opposed to LGBs—with those lamentations being issued from comfortable perches in legal academia, which for decades has showered non-trans LGBs with tenured teaching positions. To say that it has yet to do so on equal terms for trans people—particularly trans women—would be a gross understatement.

623. This should not be read to discount those LGBs whose primary civil rights needs were not solved by the specifics of military service equality legislation or the Supreme Court decisions on marriage equality.

624. 490 U.S. 228 (1989). At this writing, the vacancy left by the death of Antonin Scalia has not been filled.

the same is true for the 2009–10 statutes⁶²⁵—statutes born of political expediency which privileged the career aspirations of military-minded LGBs and governmental discretion in criminal prosecution over the basic economic needs of all LGBTs—it would take far less in the way of intra-court energy (much less politics) to ‘clarify’ part of all of the *Price Waterhouse* trans legal foundation out of existence than it would to wipe out the DADT repeal statute and/or the Shepard-Byrd Act.

As the Obama Administration winds down, there is no version of the Employment Non-Discrimination Act up for discussion at all. A much ballyhooed replacement harkens back to Bella Abzug’s first bill—in name,⁶²⁶ though not limitation. The twenty-first-century Equality Act actually is trans-inclusive. But in a Congress whose House membership did not view Speaker John Boehner as being conservative *enough*—essentially forcing him out in favor of failed 2012 vice-presidential nominee Paul Ryan—the new Equality Act is on all fours with Abzug’s in one key respect: it was dead even before it was introduced. In 2009, Joe Solmonese deployed January 20, 2017 as a political cudgel in an attempt to silence the majority of those who the organization he then headed claimed to speak for;⁶²⁷ in the aftermath of the 2016 elections, that real-life date rapidly approaches. And when the clock reaches noon on Inauguration Day, it will be Donald Trump, Mike Pence and an administration full of alt-right radical conservatives who take over.

The non-legislative progress during the Obama Administration—overwhelmingly creditable to Obama’s appointment of Chai Feldblum to the EEOC—is indeed positive. Stated differently: *Macy v. Holder*⁶²⁸ exists. Trans people *have* utilized it and other favorable judicial and administrative rulings. And many others will.

Macy v. Holder will exist—until it doesn’t.

Which may be rather soon after January 20, 2017.

Above and beyond negative outcomes which might result from actuarial shift(s) on the Supreme Court, the assertions of the existence of vast, unclaimed trans rights often do more harm than good. They inherently brand trans people as slackers to the same degree that ‘concealment’ and the trans-panic defense brands trans people as

625. After all, with *Shelby County v. Holder*, the Roberts Court demonstrated that not even civil (in *Shelby*, voting specifically) rights statutes are safe. 133 S. Ct. 2612, 2631 (2013).

626. Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015).

627. Aravosis, *HRC: Obama Gets Until 2017*, *supra* note 335.

628. *Macy v. Holder*, No. 0120120821 (Equal. Emp’t Opportunity Comm’n, Apr. 20, 2012).

deceptive. Moreover, such assertions, when coming from conservative Republicans, act as a mask of reasonableness to coerce a gullible mainstream media; coming from certain political elements of LGB activism, they act as a different sort of mask of reasonableness: to coerce a gullible LGB media—and LGB(T) people at large. Both ends of that political spectrum have asserted the existence of non-statutory trans anti-discrimination protections as justification for excluding trans rights from the statutory agenda. Out of fairness to Michigan conservatives who recently did so, they at least *appear* to have relied on the known, provable (even if inconsistent) developments in federal law.⁶²⁹ Prominent Maryland LGB activists, however, long relied on largely mythical state counterparts to *Price Waterhouse*—based reasoning to justify the othering of trans rights.⁶³⁰

629. Jonathan Oosting, *LGB not T? Bolger questions need to add transgender protections to Michigan anti-discrimination law*, MLIVE (Sept. 22, 2014, 11:54 AM), http://www.mlive.com/lansing-news/index.ssf/2014/09/lgb_not_t_bolger_questions_nee.html [<http://perma.cc/8ATQDSN3>].

630. Shannon Avery, now a judge, has long painted the outcome of a gubernatorial commission, on which she served and which was a springboard for passage of Maryland's gay-only rights law in 2001, as a win for trans people, characterizing herself and the other participants as having been “on the cutting edge in 2001 when they used alternative strategies to fight for the rights of transgender and gender-nonconforming people.” Aaron S. Merki, Shannon Avery, and Anne Blackfield, *The Future of LGBT Civil Rights and Equality in Maryland*, 44 U. BALT. L.F. 43, 59 (2013); see INTERIM REPORT OF THE SPECIAL COMMISSION TO STUDY SEXUAL ORIENTATION DISCRIMINATION IN MARYLAND 22 (2000). But the commission's *Interim Report* resulted in no formal judicial decision or opinion, no formal administrative ruling, and no public declaration of any kind; in short, unlike the statute's prohibition against discrimination based on sexual orientation (ch. 340, § 19(a), 2001 Md. Laws 2118), which most if not all employers, proprietors and landlords who might otherwise be predisposed to engage in such discrimination would become aware of and likely obey in spite of opposing the statute, the purported trans protections not only were nowhere to be found in readily accessible statutory law or formal administrative regulations, they never saw the light of day as informal, yet public, discourse as part of the Commission's final report—because the Commission issued no final report other than a letter to Gov. Parris Glendening. Kara Fox, *Maryland Commission Composes Letter*, WASH. BLADE, July 6, 2001, <http://www.washblade.com/local/010706d.htm> (on file with author). The honor of touting the gay-only rights law to the state's legal practitioners fell to a notoriously vicious opponent of true trans equality. Dawn Ennis, *Lesbian Feminist Cathy Brennan Sues After Ellen for Defamation*, THE ADVOCATE (Aug. 27, 2015, 8:12 PM), <http://www.advocate.com/feminism/2015/08/27/cathy-brennan-sues-after-ellen-defamation> [<http://perma.cc/U282QX5P>]; Cristan Williams, *TERF supports anti-gay activist group*, TRANSADVOCATE (Oct. 16, 2013), http://www.transadvocate.com/terf-supports-anti-gay-activist-group_n_10335.htm [<http://perma.cc/L9VBBHCP>]. In her 2002 article in the *Maryland Bar Journal*, Brennan wrote of the concrete statutory protections for gays, lesbians, bisexuals (and heterosexuals). And while a third of the article actually was devoted to trans matters, there were only elucidations upon how transsexuals “may” be protected if perceived to be gay, “may” be protected under disability theory and “may” be protected under gender discrimination theory, there were no citations to any Maryland decisions. Catherine M. Brennan, *Banning Discrimination Based on Sexual Orientation: A Primer on Maryland's New Civil Rights Law*, MD. BAR J. 50, 53–54 (2002). Any practical relevance to her assertions was negated by the reality of

In 2007 trans people fought back against a bill which would have done to trans people throughout America what the 2001 gay-only law did to trans people in Maryland. The forces of ‘incrementalism’ prevailed in the House, but the bill got no closer to becoming law. Hence, 2016 for America is not an analogue to the Maryland of 2010; the nation is not nearing completion of a decade of a gay-only rights statute. And yes, one can accurately state that, via various interpretations of “sex” (which should have been firmed up decades earlier), trans people in one sense hopped ahead of LGBs as to federal anti-discrimination law. It is also accurate to state that this was not the first instance of the trans increment hopping ahead of the LGB.⁶³¹ And it is also accurate to say that in spite of the number of individuals whose lives were positively enriched by the trans-first incrementalism, the realities underlying those legal victories rarely acted to the benefit of trans people as a whole.

I have devoted much of my scholarly research to promoting appreciation of a time line which places the transsexual birth certificate statutes on equal footing with sodomy law repeals and marriage equality recognition. With few exceptions, the transition-recognition statutes came first—going back to Illinois enacting pro-transsexual identity legislation in 1955, six years before the repeal of its sodomy law.⁶³² But it took an angry new generation of trans activists in the 1990s to proclaim that enough was at long last enough when it came

them merely being “emerging legal theories” that lawyers “should be mindful of.” *Id.* at 50, 54. Cheered on by Avery, Brennan had touted ethereal trans rights during the 2001 legislative session—again to justify not making trans people statutorily equal to lesbians, gays and bisexuals. Cathy Brennan, *Grave Disservice*, WASH. BLADE, Jan. 5, 2001, at 27; Shannon E. Avery, *Meaningless Effort*, WASH. BLADE, Jan. 19, 2001, at 27. During the 2011 Maryland legislative session, when repeatedly asked to provide any citation to anything in Maryland *state* law that would support the Commission’s excessively over-optimistic assessment of trans legal protections, Brennan referred to *Price Waterhouse* and a string of federal decisions based thereon—none from Maryland or even from the federal Fourth Circuit. Cathy Brennan, Comments to *Come to Think of it, I’ve Never Seen Morgan Meneses-Sheets and Cathy Brennan in the Same Room at the Same Time*, ENDABLOG (Feb. 17, 2011, 2:58 PM), <https://endablog.wordpress.com/2011/02/17/come-to-think-of-it-i-ve-never-seen-morgan-meneses-sheets-and-cathy-brennan-in-the-same-room-at-the-same-time> [http://perma.cc/Q8ERRBKK] Not until April 10, 2014 would a court in Maryland issue a published decision favorable to a trans person in a case applying a *Price Waterhouse* analysis to Maryland sex discrimination law. *Finkle v. Howard County*, 12 F. Supp. 3d 780, 788 (D. Md. 2014). By then, a bill to actually add trans people to state law had been passed by both houses of the Maryland General Assembly and was only awaiting Gov. Martin O’Malley’s signature. See *Fairness for All Marylanders Act of 2014*, Ch. 474, sec. 2, § 20-101(E), 2014 Md. Laws 1, 2.

631. *M.T. v. J.T.*, 355 A.2d 204, 210–11 (N.J. Super. App. Div. 1976) (recognizing a marriage between a transsexual woman and a non-trans man).

632. *Compare* Act of 1915, sec. 1, § 13(d), 1955 Ill. Laws 1026, 1026 (transsexual birth certificate statute), *with* Criminal Code of 1961, 1961 Ill. Laws 1983 (elimination of sodomy law).

to being left out of substantive, remedial civil rights legislation that was being crafted by people (and the successors in interest of the people) who—some negligently, some intentionally—created a political civil rights universe in which trans people were, when acknowledged at all, seen as third-class hangers-on.

Make no mistake: I discourage no one from utilizing the *Price Waterhouse*–centric administrative and judicial avenues of redress—while they still exist. Likewise, despite my negative view of the privileging of the specific desire for military career above the employment anti-discrimination needs of all LGB and T people, I discourage no trans person who actually does desire a career in the military from making use of the military’s recent trans-positive shift—before it shifts back.⁶³³ But calling recent pro-trans non-statutory gains “robust” is spin which can easily lull the still-internally disfavored element of the LGBT populace into an extreme false sense of security. In fact, I’ll go further: it is a lie.⁶³⁴ It allows the present to be mythologized (often online in real time), the past to be forgotten and the future to be dictated by those who have profited from decades of professionalized incrementalist policymaking and who have no vested interest in expending any time, energy, funding or political capital to bring about the true structural change necessary to alleviate the inequality between the T and the LGB—change that must occur before alleviation of the inequality between the LGBT and the rest of the populace can occur. For just because 2015’s dead-on-arrival Equality Act bills were trans-inclusive there is no guarantee that the recovery from the addiction to incrementalism which seems to have taken place after 2007 will not give way to a relapse.

Overly pessimistic?

Perhaps.

But being overly pessimistic is far preferable to being completely blindsided—yet again.

633. See, e.g., Andrew Tilghman, *Five things to watch for in the Pentagon’s new transgender policy*, MILITARY TIMES (June 29, 2016), <http://www.militarytimes.com/story/military/2016/06/29/military-transgender-policy-ash-carter/86476604> [<http://perma.cc/E44VZ6MN>].

634. Beyer, *Trans Americans Enjoy Robust Bias Protections*, *supra* note 3.