

THE LGBT DISCONNECT: POLITICS AND PERILS OF LEGAL MOVEMENT FORMATION

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The LGBT movement is facing a crucial dilemma. Although the movement presents itself as a coalition of gays, lesbians, and transgender individuals, many Americans accept and approve of the former (LG), but not the latter (T). Opponents of LGBT rights have capitalized on this social and political disconnect in local ballot measure campaigns, convincing voters to repeal sexual orientation anti-discrimination laws by highlighting that the statutes also contain gender identity protections. There is thus a sufficiently large gap between the identity categories that lesbian and gay legal victories have not built support for transgender rights, and yet they are integrated enough that one can be deployed against the other.

Drawing on extensive original primary source research—including archival materials, newspaper articles, television advertisements, legislative histories, and court filings—this Article uncovers the debates, conflicts, and decisions that shaped the place of transgender rights within the coalition, and argues that national LGBT rights organizations’ legal strategies unintentionally contributed to this contemporary disconnect. This Article demonstrates why it is so important for LGBT rights groups to address this problem by chronicling anti-transgender rhetoric in local ballot measures, where citizens are increasingly voting to repeal LGBT rights. It concludes by identifying several options for how LGBT rights groups can eliminate the gap between lesbian/gay and transgender, which it uses to develop a taxonomy of social movement mobilization.

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INTRODUCTION

For the majority of Americans, “LGBT” rolls off the tongue, an indication of the acronym’s ubiquitous and unremarkable place in society. However, that linguistic harmony does not reflect a natural affinity between the groups the letters represent, so much as mask the tensions that have marked the coalition movement since its inception. For most of their histories, gays, lesbians, and transgender individuals had a fraught relationship, with members of the identity categories more conscious of their differences than their similarities. This was particularly true in the legal context, as many gay and lesbian rights advocates both identified their struggles as fundamentally distinct from their transgender counterparts, and also believed the shortest path to equality was paved with middle-class respectability and conformity to gender norms. Over the past two decades, national LGBT rights groups have secured victories with an assimilationist strategy, which by emphasizing the ways in which homosexuals were like heterosexuals in all but their sexual partners, unintentionally made transgender individuals appear more deviant. The LGBT movement is comprised of different identity categories with interests that at times overlap, but do not invariably align, and can, in fact, prove contradictory.

At the same time, the rights of lesbians, gays, and transgender individuals have become closely intertwined, with a legal setback for one becoming a defeat for the other. In recent years, opponents of gay and lesbian rights have shifted focus—from targeting gays and lesbians to highlighting the danger associated with transgender individuals. As gays and lesbians gained visibility, acceptance, and approval, religious

conservatives discovered they could convince legislators and voters to repeal sexual orientation anti-discrimination laws by highlighting that the statutes' gender identity provisions created ambiguity about who could access sex-segregated facilities. From municipal ordinances with limited reach to state laws that became national controversies, these campaigns have exploited the anxieties of a public unfamiliar with transgender individuals to attack sexual orientation protections.¹

The political potency of bathroom arguments has broadened the kinds of laws that states and municipalities are enacting. Legislation that directly regulates bathroom access is one type of response, like in Oxford, Alabama, where the city council approved a bill making it a misdemeanor for individuals to use a restroom consistent with their gender identity, rather than their gender at birth.² But the bathroom arguments and anti-discrimination ordinances are intertwined with a larger effort to oppose liberal political projects, with resistance to LGBT rights providing an impetus and rhetoric for the broader laws. North Carolina's H.B. 2 not only preempted local non-discrimination laws and regulated bathroom usage, but also prohibited municipalities from setting minimum wage levels for private employers and limited localities' ability to regulate other labor standards.³ Although North Carolina replaced some parts of H.B. 2, the employment provisions

1. *American Majority Sides with LGBT Rights, Though So-Called "Bathroom Bills" Cause Division*, CISION (Jan. 24, 2017), [https://perma.cc/4U9G-LTF5]; *Gay and Lesbian Rights*, GALLUP, [https://web.archive.org/web/20180322024618/http://news.gallup.com/poll/1651/gay-lesbian-rights.aspx] (presenting statistics about perceptions of the LGBT community and LGBT rights); Emma Green, *Half of Americans Don't Think Transgender People Should be Able to Pick Their Bathroom*, ATLANTIC (Sept. 28, 2016), [https://perma.cc/X548-QJTQ]; Frank Newport, *Disentangling Attitudes Toward Transgender Bathroom Use*, GALLUP (May 20, 2016), [https://web.archive.org/web/20180322024451/http://news.gallup.com/opinion/polling-matters/191774/disentangling-attitudes-toward-transgender-bathroom.aspx].

2. *Alabama City Targets Transgender People with Bathroom Ordinance*, L.A. TIMES (Apr. 28, 2016), [https://web.archive.org/web/20180322025633/http://www.latimes.com/nation/nationnow/la-na-alabama-transgender-bathroom-law-20160428-story.html]. The council repealed the law a week later. Ashley Fantz, *Anti-Trans Bathroom Ordinance Repealed in Oxford, Alabama*, CNN (May 5, 2016, 1:42 PM ET), [https://perma.cc/8TAH-KNPG]. South Dakota's legislature also passed a law regulating bathroom use in public schools, which the governor vetoed. Mitch Smith, *South Dakota Governor Vetoes Restriction on Transgender Bathroom Access*, N.Y. TIMES (Mar. 1, 2016), https://nyti.ms/1ONlrda.

3. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

remain in place.⁴ Mississippi's H.B. 1523, on the other hand, protects the "sincerely held religious beliefs or moral convictions" that marriage should be limited to heterosexual couples, sexual intercourse should only occur within marriage, and biological sex is fixed at birth.⁵

These contests highlight a crucial problem that the LGBT movement is currently facing: lesbian, gay, and transgender rights are sufficiently disconnected that many Americans are willing to accept the former (LG) and not the latter (T), and yet the two are integrated enough that one can be deployed against the other. National LGBT rights organizations are transgender inclusive in their legal goals, and yet their strategies unintentionally created an internal hierarchy of interests, with gender conforming gays and lesbians at the top.⁶ To be clear, this Article does not question that these groups' decision to pursue an assimilationist strategy, which was often the only viable tactic, yielded significant legal benefits, and continues to be representative of many members of the LGBT movement. Rather, its argument is that this approach has given rise to serious consequences that must now be addressed.⁷

Drawing on extensive original primary source research—including archival materials, newspaper articles, television advertisements, legislative histories, and court filings—this Article analyzes how and why this divide between the categories emerged, using the movement's history to explain current legal issues. It uncovers the debates, conflicts, and decisions that shaped the place of transgender rights within the coalition, contributing to the contemporary disconnect between gay and lesbian rights on the one hand, and transgender rights on the other. This Article focuses on the work of national, mainstream LGBT rights organizations, primarily the Human Rights Campaign, National Gay and Lesbian Task Force, American Civil Liberties Union,

4. H.B. 142, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017). Iowa also enacted a minimum wage preemption law in 2017. H.F. 295, 2017 Gen. Assemb., Reg. Sess. (Iowa 2017).

5. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016). A federal court originally enjoined the law, but the 5th Circuit dismissed the injunction. *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017).

6. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136, 153–54 (2015), [<https://perma.cc/U6EQ-9P2T>].

7. Over the course of the twentieth century, rights gains on behalf of one group in the United States have not translated to legal victories on behalf of another. Thus, to the extent Americans see gays, lesbians, and transgender individuals as distinct, legal wins for the former will not inevitably transfer to the latter. See, e.g., SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 1–4, 11–13 (2011); Alok K. Nadig, *Ably Queer: The ADA as a Tool in LGBT Antidiscrimination Law*, 91 N.Y.U. L. REV. 1316, 1320–21, 1343–44 (2016).

and Parents and Friends of Gays and Lesbians, detailing the decisions they made about transgender inclusion in a variety of legal contexts, including federal legislation and local ballot measures. These organizations do not represent the entire LGBT movement, and in fact, many within the movement contest their goals and strategic choices, but their prominence and prestige have made these organizations particularly influential in American law, politics, and society.⁸

These organizations' normalization of gays and lesbians had the unwitting effect of rendering transgender individuals more visible to religious conservatives, creating a space for opposition, retrenchment, and regression. Indeed, recent attacks on transgender rights seem to be as much a function of the displacement of gays and lesbians as a viable political target as they are a parallel rhetoric, and one that the assimilationist strategy seems to have made more feasible.⁹ The recent repeal of sexual orientation protections at the ballot box, which LGBT rights opponents have attained through anti-transgender rhetoric, capitalizes on national LGBT rights organizations' tactical choices. Their decision to follow an assimilationist strategy was a response to legal precedent and social realities, which constrained what arguments lawyers could put forward.¹⁰ However, these groups' marginalization of transgender rights is now proving detrimental to everyone under the LGBT umbrella.

Rights organizations have several options for remedying the disconnect, which include removing transgender rights from their mandate, pursuing an assimilationist transgender rights strategy, or transforming their tactics to emphasize all LGBT individuals' gender non-conformity. This Article analyzes these choices, using them to develop a taxonomy of social movement organizing. Previous rights

8. Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 586–94 (2010); Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107, 120–22, 126–28 (2014).

9. Chase Strangio, Staff Attorney, ACLU LGBT & AIDS Project, Presentation to the Columbia Law Sch. Sexuality & Gender Law Clinic (Apr. 5, 2016).

10. See, e.g., GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 111 (2004); ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS 78 (2015); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 51 (2013); DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 51–52 (2006); William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 245 (2006); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1127–28 (2004).

movements have made decisions along these three axes—abandonment, assimilation, and transformation—in different ways, for varying purposes, and to disparate ends. In considering the costs and benefits of LGBT rights groups’ options, this Article thus also presents broader insights into movement mobilization at times of strategic change.

This Article analyzes the place of transgender rights within LGBT movement strategy, although there is equally important work to be done with respect to bisexual, intersex, and asexual individuals.¹¹ Scholars like Kenji Yoshino have detailed the ways in which bisexuals have been effectively erased from the LGBT movement.¹² “I” and “A” often appear at the end of “LGBT,” yet national legal organizations do not claim to represent intersex or asexual interests, despite the push for a broader LGBTQIA movement.¹³ Taking up transgender rights implicates the larger questions that an analysis of any of these identity categories raises, including what the movement is, who it represents, and what its goals are, which shape both advocacy strategies and lawyers’ professional responsibilities.

Contests over transgender inclusion and LGBT organizational strategy implicate ethical dilemmas for social movement lawyers, who are charged with representing both individual clients and a broader movement.¹⁴ The literature on movement lawyers’ professional responsibilities has highlighted the tensions between acting in the best interests of clients and the larger social good, as well as the difficulties

11. For a discussion of “Q” and genderqueer, see *infra* Part III.B & Part V.

12. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000). See also Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 455 (2012); Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1018–19 (2012). There are a number of parallels between bisexuality and transgender identity, but notable divergences as well. Bisexuality destabilizes the hetero/homosexual binary, much like transgender individuals challenge the sexual binary. However, expressing “bi” sexual desires seems to imply that only two sexes exist, a notion that transgender identity contests. The LGBT movement has historically marginalized both of these identity groups, neither of which fit its assimilationist model; both have recently become much more visible in American society, although bisexuals have not yet formed a cohesive advocacy movement. Bisexuals and transgender individuals claim their identities are immutable, but this is often misunderstood because they make choices about sexual partners or gendered presentations. Glazer, *supra*, at 1016–17; Yoshino, *supra*, at 357, 359, 405–10.

13. For discussions of asexual and intersex legal issues, see JULIE A. GREENBERG, *INTERSEXUALITY AND THE LAW: WHY SEX MATTERS* (2012); Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303 (2014).

14. Michael McCann & Helena Silverstein, *Rethinking Law’s “Allurements”*: *A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261, 265–66 (Austin Sarat & Stuart Scheingold eds., 1998).

in determining what is in the movement's best interest.¹⁵ Movements are multidimensional, with constituencies that have different priorities, interests, and visions of justice.¹⁶ There is also a range of organizations that advocate for LGBT rights, with varied mission statements and goals.¹⁷ This Article's account, which indicates that national LGBT organizations were only able to secure certain gay and lesbian rights through a strategy that ultimately marginalized the interests of transgender individuals, raises the question of whether lawyers could or should have reasonably expected this consequence to arise from their work, as well as what professional obligations attach in such situations. However, since this Article's focus is on the consequences of their strategic decisions, it does not address the professional responsibility element in detail.

This Article makes several important contributions to LGBT rights scholarship. It presents the first history of the LGBT movement's formation, detailing how and why gay, lesbian, and transgender rights advocates identified themselves as sharing common ground in the 1990s and the impact of that decision on movement advocacy in the years since.¹⁸ This inquiry provides insight into the connections between sexual orientation and gender identity in legal doctrine and policy. In addition, this Article provides the first comprehensive analysis of local sexual orientation and gender identity anti-discrimination repeal measures, which have proliferated in the past decade.¹⁹ As part of this project, this Article introduces an exhaustive list of local sexual orientation and gender identity anti-discrimination ballot measures waged over the past twenty years.

15. See, e.g., Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WIS. L. REV. 171, 183 [hereinafter Cummings, *Empirical Studies*]; Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1693–95; Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1307–14 (2012); see also Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CALIF. L. REV. 1829, 1844–45 (2007) (discussing these issues in the context of community lawyering).

16. See, e.g., Arkles et al., *supra* note 8, at 612–13.

17. Compare *The Roadmap to Victory*, FREEDOM TO MARRY, [https://perma.cc/JCL4-723Q], with LAMBDA LEGAL, A VISION FOR THE FUTURE: 2015–2018 STRATEGIC PLAN (2015), [https://perma.cc/VUJ2-KLP9].

18. Scholars have examined specific moments in the movement's history. See, e.g., Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity*, 7 SEXUALITY RES. & SOC. POL'Y 155 (2010).

19. See Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015 (2016) (discussing state preemption laws).

In providing this analysis of the LGBT movement, this Article also intervenes in social movement scholarship. It bridges the literatures on intra-movement dissent and alliance building, as the formation of the LGBT movement is a case study with elements of both. Social movement scholars have produced detailed and nuanced analyses of the ways in which lawyers manage intra-movement conflict, which tends to be fought over goals or tactics, rather than movement membership.²⁰ Recent work on social justice litigation, on the other hand, has emphasized the need to build coalitions between organizations working on different legal issues, both so judges can appreciate the wider consequences of their decisions and because many rights are interconnected.²¹ There is a significant difference, however, between working as allies and joining together as an integrated movement. The LGBT movement's development is in many ways atypical, and yet its struggles are nevertheless instructive since their lessons apply to both conversations.

To present these claims, this Article proceeds in five Parts. Part I sets out the dilemma the LGBT movement is facing, identifying the ways in which opponents have capitalized on the disconnect between LG and T. It analyzes the anti-transgender messaging within bathroom arguments that have led citizens to overturn LGBT movement gains by repealing both sexual orientation and gender identity protections at the local level.

Having set out the problem, the Article then analyzes how the disconnect developed and presents options to remedy the problem. Part II traces divisions between sexual identity groups before the modern LGBT movement's creation, which provide insight into social hierarchies that influenced legal work. Part III examines how and why transgender and gay rights activists were able to form an advocacy coalition in the mid-to-late 1990s, what shifts made the eventual alliance possible, and how that collaboration evolved through the 2000s.

20. See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011); Scott L. Cummings, *How Lawyers Manage Intragroup Dissent*, 89 CHI.-KENT L. REV. 547 (2014); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012).

21. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1292 (2010); Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 COLUM. J. GENDER & L. 1, 14–18 (2015); Burt Neuborne et al., *Achieving Results—Lessons from Civil Rights Movements: Transcript*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 520–21 (2016).

With this background in place, Part IV turns to the current place of transgender rights within the LGBT movement. It identifies the key strategic choices that organizations within the movement made and considers the ways in which they contributed to the gap between gay and transgender rights.

Part V concludes by discussing the movement's alternatives for addressing the disconnect, and using this to develop a taxonomy of social movement mobilization. The three options it identifies, which are abandonment, assimilation, and transformation, parallel the choices that other social movements have made. Although all three have costs and potentially harmful consequences, it is clear that the LGBT movement is at a turning point with respect to transgender rights, such that it must adjust its approach.

In presenting the LGBT movement's history and its contemporary legal battles, this Article demonstrates that the commonplace label "LGBT" conceals complicated internal tensions and divisions that are becoming increasingly important to resolve. Whether gay, lesbian, and transgender rights are connected is a fraught historical question that has only recently been answered in the affirmative. However, anti-LGBT groups have been able to successfully position gender identity protections against gay rights in recent legislative efforts because of the disconnect between the identity categories. The legal strategies that LGBT rights groups pursued contributed to this gap, but there are ways advocates can redress the problem.

* * *

A note on terminology: This Article uses the acronym "LGBT" to refer to the contemporary rights movement. While many communities have embraced a broader membership and vision of rights—such as by including intersex and asexual individuals—the legal movement has remained more limited. As for the word "queer," it is difficult to define, since it has separate historical and contemporary meanings, and it currently can be used to refer to different groups. Although gays, lesbians, bisexuals, and asexuals may self-identify as queer, this Article limits its use of the word to refer to genderqueer individuals. The historical terminology in this Article also requires explanation. When discussing the movement of the 1970s, 1980s, and early 1990s, this Article refers to "gay and lesbian rights" or just "gay rights," as the movement's scope had not yet expanded beyond these categories. It also discusses identities according to the language individuals would

themselves have used in that historical period, such as homosexual, transsexual, and transvestite.²²

I. MOVEMENT PERILS

As Americans have become increasingly supportive and accepting of gays and lesbians, LGBT rights opponents have changed their strategy. Instead of attacking gay rights directly, they have capitalized on Americans' unfamiliarity with transgender individuals and unease with gender non-conformity to counter sexual orientation anti-discrimination laws in ballot measure campaigns. This Part analyzes how opponents have used gender identity protections to overturn LGBT rights advances more broadly, detailing how and why their focused anti-transgender arguments have been successful. These clashes at the ballot box demonstrate that the disconnect between Americans' support for gay and lesbian rights on the one hand, and transgender rights on the other, has been extremely harmful to the LGBT movement as a whole.

A. *Rights by Popular Vote*

Bathroom arguments at the ballot box are only the latest iteration of public contests over LGBT rights, as one of the curious facts of American law is that so many LGBT rights have been decided by popular vote.²³ Between 1974 and 2009, the Religious Right sponsored more than 245 anti-LGBT measures, on subjects that ranged from discrimination protections, adoption rights, school curricular content, domestic partnership registries, and marriage equality.²⁴ LGBT rights have been put on the ballot more often than any other minority group, with voters deciding their fate at the state, county, and city levels.²⁵

22. Steven Epstein, *Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy*, in *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* 30, 50, 66–68, 74–75 (Barry D. Adam et al. eds., 1999); Amy L. Stone, *More than Adding a T: American Lesbian and Gay Activists' Attitudes Towards Transgender Inclusion*, 12 *SEXUALITIES* 334, 335–36, 349 (2009).

23. Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 *MINN. L. REV.* 1730, 1730 (2013) (noting that “popular votes on matters of individual rights are one of the more unique and controversial aspects of American direct democracy”).

24. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* xv, 6 (2012).

25. WILLIAMS INSTITUTE, *Voters' Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination Against LGBT People, 1974–Present*, in

Ballot measures have thus been a constant dimension of the LGBT legal movement, with citizen legislators as important in determining rights as elected representatives.²⁶

Direct democracy proved to be an extremely effective tool for LGBT rights opponents, who have succeeded in repealing and restricting gay and lesbian rights at the ballot box for almost four decades.²⁷ For the first ten of these years, religious conservatives focused on reversing gay and lesbian rights legislative victories through referenda; in the late 1980s these groups turned to initiatives that limited the government's ability to even enact LGBT protections.²⁸ Although their focus shifted to marriage equality bans in 1996, they continued to sponsor ballot measures on anti-discrimination laws, particularly at the local level.²⁹ These organizations were successful in limiting the reach of anti-discrimination laws until the late 1990s, when the tide turned. In the midst of the marriage backlash, as citizens repeatedly voted to limit marriage to same-sex couples at the state level, they also began rejecting efforts to repeal LGBT anti-discrimination laws at the local level.³⁰ As Table 1 indicates, from approximately 1999 until 2012, Americans repeatedly cast their ballots on behalf of sexual orientation and gender identity protections in local ballot measures.³¹

DOCUMENTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 13-1 (2009), [<https://perma.cc/2WAF-6JBS>].

26. DANIEL R. BIGGERS, *MORALITY AT THE BALLOT: DIRECT DEMOCRACY AND POLITICAL ENGAGEMENT IN THE UNITED STATES* 172 (2014).

27. *Id.*

28. STONE, *supra* note 24, at 19–20. Ballot initiatives permit citizens to bypass the legislature and enact legislation through a majority vote, while referenda give the public the opportunity to overturn existing legislation. *Id.* at 2.

29. WILLIAMS INSTITUTE, *supra* note 25, tbls.15-A & 15-C.

30. *Id.*

31. Anti-discrimination referenda and initiatives addressed gender identity as well as sexual orientation beginning in the early 2000s, although most were limited to sexual orientation. *Id.* at tbl. 15-C & Exhibit 15-D.

Table 1: Local LGBT Anti-Discrimination Ballot Measures

Location	Year	Scope ³²	Outcome ³³
Lansing, MI	1996	SO	Lost
Fort Collins, CO	1998	SO	Lost
Fayetteville, AR	1998	SO	Lost
Ogunquit, ME	1998	SO	Lost
Ypsilanti, MI	1998	SO	Won
South Portland, ME	1999	SO	Won
Falmouth, ME	1999	SO	Won
Spokane, WA	1999	SO	Won
Ferndale, MI	2000	SO	Lost
Kalamazoo, MI	2001	SO	Won
Traverse City, MI	2001	SO	Won
Huntington Woods, MI	2001	SO	Won
Ypsilanti, MI	2002	SO & GI	Won
Miami-Dade County, FL	2002	SO	Won
Sarasota, FL	2002	SO	Won
Tacoma, WA	2002	SO & GI	Won
Westbrook, ME	2002	SO	Won
Topeka, KS	2002	SO & GI	Won
Cincinnati, OH	2004	SO	Won
Ferndale, MI	2006	SO	Won
Corvallis, OR	2006	SO & GI	Won
Gainesville, FL	2009	SO & GI	Won
Kalamazoo, MI	2009	SO & GI	Won
Bowling Green, OH	2010	SO & GI	Won
Oak Ridge, TN	2010	SO	Won
Traverse City, MI	2011	SO & GI	Won
Fort Myers, FL	2011	SO	Won
Salina, KS	2012	SO & GI	Lost
Hutchinson, KS	2012	SO	Lost
Anchorage, AK	2012	SO & GI	Lost
Pocatello, ID	2014	SO & GI	Won

32. “SO” indicates the measure only extended protections to sexual orientation, while “SO & GI” indicates the measure included both sexual orientation and gender identity protections.

33. Outcome indicates success (“Won”) or failure (“Lost”) according to the perspective of LGBT rights groups. In some cases, due to the wording of the ballot measure, “Outcome” may differ from the electoral result. For example, if voters enacted a repeal of an anti-discrimination law, the outcome would be designated as a failure.

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Location	Year	Scope ³²	Outcome ³³
Chattanooga, TN	2014	SO & GI	Lost
Fayetteville, AR	2014 (2015)	SO & GI	Lost (Won)
Springfield, MO	2015	SO & GI	Lost
Houston, TX	2015	SO & GI	Lost
Texarkana, AR	2015	SO & GI	Lost

Citizens' willingness to protect their LGBT community members from discrimination at the polls ended in 2012, with voters across the country once again defeating LGBT rights issues. There are many factors that likely contributed to this shift, including backlash to President Obama's re-election, retrenchment in response to increasing numbers of marriage equality victories at the courthouse and ballot box, and the relocation of measures from purple to staunchly red states. However, the campaigns themselves also undertook significant rhetorical changes. As the next section details, these campaigns began focusing on the dangers of gender identity protections, using these provisions to convince voters to cast their ballots against LGBT rights. Opponents used a number of arguments, but transgender rights became increasingly crucial and potent, with claims about bathrooms taking center stage.

Importantly, local governments did not begin including gender identity protections for the first time in 2012. Increasing numbers of municipalities around the country enacted anti-discrimination laws that encompassed both sexual orientation and gender identity in the late 1990s, as the newly expanded gay rights movement lobbied local governments to include both provisions.³⁴ As such, transgender rights became incorporated into municipal politics at the same time as gay rights began winning at the ballot box.³⁵ Between 2001 and 2011, almost half of the local ballot measures involved anti-discrimination laws that included both sexual orientation and gender identity

34. Minneapolis had been the first city to include transgender protections in 1975, but only a handful of jurisdictions followed suit in the late 1970s and 1980s. PAISLEY CURRAH & SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, POLICY INST. OF THE NAT'L GAY & LESBIAN TASK FORCE, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 17, 19 (2000) (on file with Carl A. Kroch Library, Cornell University, National Gay and Lesbian Task Force Records, Collection No. 7301 (NGLTF Records), Box 298, Folder 32), [<https://perma.cc/NKE6-3VYQ>]; *Non-Discrimination Laws that Include Gender Identity and Expression*, TRANSGENDER L. & POL'Y INST. (Feb. 1, 2012), [<https://perma.cc/R5ZT-XWRE>].

35. See CURRAH & MINTER, *supra* note 34, at 17; see also *supra* Table 1: Local LGBT Anti-Discrimination Ballot Measures.

provisions, and voters upheld every one of those comprehensive laws.³⁶ One of the major changes was the way in which opponents campaigned against the laws.

It is not surprising that battles over LGBT rights are being fought over bathrooms, as these spaces have historically been a flashpoint for civil rights contests, with privacy and safety pitted against equality and dignity. From Jim Crow to the Equal Rights Amendment, to the Americans with Disabilities Act and Don't Ask, Don't Tell, bathrooms have served as a crucible for debates over changing racial, gender, sexual, and political norms.³⁷ Much like in debates over the Equal Rights Amendment, where the Religious Right claimed the constitutional amendment would lead to unisex restrooms, LGBT rights opponents indicate that transgender rights will undermine sex segregation in bathrooms and similar facilities.³⁸ Restroom segregation is not just a social practice, but a legal one as well, with federal, state, and municipal codes that require buildings to include specific numbers of gender-designated restrooms, including those that are single user.³⁹ In 2017, when Yale Law School, at the request of its students and

36. See *supra* Table 1: Local LGBT Anti-Discrimination Ballot Measures.

37. See, e.g., Elizabeth Abel, *Bathroom Doors and Drinking Fountains: Jim Crow's Racial Symbolic*, 25 CRITICAL INQUIRY 435, 440 n.5, 442 (1999); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1228–29 (2017); Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 227–28 (2012); Maria L. La Ganga, *From Jim Crow to Transgender Ban: The Bathroom as Battleground for Civil Rights*, GUARDIAN (Mar. 30, 2016, 7:00 AM EDT), [https://web.archive.org/web/20180323194329/https://www.theguardian.com/world/2016/mar/30/transgender-ban-bathrooms-north-carolina-civil-rights]; see also Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 215–16 (2000).

38. Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 157–60 (2017). For examples of anti-ERA bathroom literature, see ASSOCIATION OF THE W'S: WOMEN WHO WANT TO BE WOMEN, PINK SHEET (1976) (on file with University of Oklahoma, Glenda Mattoon Collection, Box 2, Folder 6) (generally discussing the ERA and its potential negative impacts, including the abolishment of private facilities in government-related establishments); Mike McKeating, *Psychiatric Center Tour Confirms Co-ed Dorms*, reprinted in 10 THE PHYLLIS SCHLAFLY REPORT (Jan. 1977), [https://perma.cc/W2RV-PMQB]; Stop ERA, STOP ERA Pamphlet (n.d.) (on file with Wichita State University, Special Collections, MS 81-07, 20th Century American Political Pamphlets).

39. 29 C.F.R. § 1910.141(c)(1)(i) (2017); Iru Braverman, *Loo Law: The Public Washroom as a Hyper-Regulated Place*, 20 HASTINGS WOMEN'S L.J. 45, 58–61 (2009); Elizabeth Nolan Brown, *The Biggest Obstacle to Gender Neutral Bathrooms? Building Codes*, REASON (Apr. 11, 2014), [https://perma.cc/BM8R-U6FE]; but see N.Y.C., N.Y., Local Law No. 79 (June 28, 2016). Under Title IX, schools may provide separate toilet, shower, and locker rooms, so long as the facilities are comparable for students of both sexes. 34 C.F.R. § 106.33 (2017).

faculty, sought to shift the designation of some of its single-occupancy restrooms from gender specific to gender neutral, the state agency denied its request.⁴⁰ Bathroom usage is thus a legally embedded practice over which larger social debates are waged.

The post-2011 bathroom campaigns have done much more than repeal sexual orientation and gender identity protections, inspiring a host of new laws, including state preemption bills, bathroom ordinances, and measures aimed at attacking a range of progressive legal gains. Although only three states—Arkansas, North Carolina, and Tennessee—prohibit municipal subdivisions from enacting anti-discrimination protections that are more expansive than the state law, six more considered preemption legislation in 2016.⁴¹ North Carolina’s law, H.B. 2, infamous for regulating bathroom usage, also invalidated local minimum wage and other labor laws, and eliminated the right to sue in state court for employment discrimination.⁴² In the outrage over the legislature’s assault on transgender rights, its incursion on the rights of low-income citizens, who are disproportionately people of color, went largely unnoticed in the press.⁴³

Mississippi likewise joined a rollback of LGBT rights with another liberal cause, enacting H.B. 1523, which protected the “sincerely held religious beliefs or moral convictions” that marriage should be limited to heterosexual couples, biological sex is fixed at birth, and sexual intercourse should only occur within marriage.⁴⁴ A similar version was pending before in 2016 Congress, with 172 co-sponsors in the House of Representatives and 37 in the Senate.⁴⁵ President Trump has vowed to

40. Complaint at 2–3, *Yale Univ. v. Conn. State Codes & Standards Comm.*, HHB-CV-17-6038904-S (Conn. Super. Ct. June 23, 2017) (on file with author).

41. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016); S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); H.B. 600, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); TENN. CODE ANN. § 7-51-1802 (2017); Day & Weatherby, *supra* note 19, at 1017.

42. H.B. 2 (N.C. 2016); David Donovan, *HB2 Eliminates Cause of Action for Workplace Discrimination*, N.C. L. WKLY. (Mar. 30, 2016), [<https://perma.cc/D7R9-PBE9>]; Erik Sherman, *NC HB2 Trans “Bathroom” Bill Also Cements Income Inequality*, FORBES (Apr. 4, 2016, 5:30 AM), [<https://www.forbes.com/sites/eriksherman/2016/04/04/nc-hb2-trans-bathroom-bill-also-cements-income-inequality/#7bdb2f095740>].

43. Nina Martin, *Why North Carolina’s New Anti-LGBT Law Is a Trojan Horse*, PROPUBLICA (Apr. 5, 2016, 6:00 AM EDT), [<https://perma.cc/7E7Z-D6RG>].

44. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

45. H.R. 2802, 114th Cong. (2016); S. 1598, 114th Cong. (2016); *Barber v. Bryant*, 3:16-CV-417-CWR-LRA (Miss. 2016) (discussing suit filed to enjoin H.B. 1523 as a violation of the First and Fourteenth Amendments of the United States Constitution).

sign the bill into law if it is reintroduced and passes both chambers.⁴⁶ Other states have simply focused on regulating bathroom usage,⁴⁷ with Virginia considering a bill that would not only require students to use restrooms according to their gender at birth, but would also force school principals to notify parents if their children identified as transgender.⁴⁸

The bathroom argument has thus given rise to a panoply of legislation that curtails not just LGBT rights, but other progressive causes. At the same time, these and the ballot measures have been responses to local LGBT anti-discrimination ordinances, which governments have enacted at the urging of LGBT rights organizations. After the Supreme Court handed down its ruling in *Obergefell v. Hodges*,⁴⁹ the Human Rights Campaign (HRC) announced its new priority would be securing the federal Equality Act, a comprehensive sexual orientation and gender identity anti-discrimination law.⁵⁰ State laws and local ordinances were supposed to be the building blocks towards the federal protections, but the furor over bathrooms upended this plan long before the Trump administration took office.⁵¹ Continued resistance to non-discrimination laws at the state and local level threatens the Equality Act for years to come, as congressional officeholders are unlikely to vote in favor of a bill that their constituents so clearly oppose. In the meantime, members of the LGBT community report disproportionately high rates of discrimination in employment, housing, and public accommodations.⁵²

46. Mary Emily O'Hara, *First Amendment Defense Act Looms over Sessions' Confirmation Vote*, NBC NEWS (Jan. 30, 2017, 12:58 AM ET), [https://perma.cc/R9ME-NF3B].

47. See, e.g., H.B. 106, 2017 Leg., Reg. Sess. (Ky. 2017); S.B. 3, 85th Leg., Reg. Sess. (Tex. 2017).

48. H.B. 1612, 2017 Leg., Reg. Sess. (Va. 2017).

49. 135 S. Ct. 2584 (2015).

50. Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015); Dominic Holden, *Why America's Top LGBT Group Is Losing an Argument over Bathrooms*, BUZZFEED NEWS, (Dec. 22, 2015, 9:55 AM), [https://perma.cc/F267-G32S].

51. Holden, *supra* note 50.

52. CHRISTY MALLORY & BRAD SEARS, EVIDENCE OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008–2014 (2016), [https://perma.cc/WPZ3-74FE]; CHRISTY MALLORY & BRAD SEARS, EVIDENCE OF EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008–2014 (2015), [https://perma.cc/99BM-UGSP]; CHRISTY MALLORY & BRAD SEARS, EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND

The contests thus highlight the push and pull between federal and state, state and local, and citizen and representative, which for over a decade came out in favor of LGBT rights, and for the past five years have shifted in the other direction. The stakes of the bathroom rhetoric are thus much higher than they may initially appear.

B. The Old Made New

These legislative developments, added to the local ballot initiatives that are reversing LGBT movement gains, are in significant part the product of a new bathroom argument that has resonated with the electorate. As this section explains, this bathroom rhetoric is more than a claim about sexual predation—that contention had been part of older campaigns, with organizations arguing that gender identity protections would allow sexual predators access to women’s facilities.⁵³ The new strategy has made bathrooms the centerpiece, and combined the warning about sexual predators with overtly anti-transgender rhetoric.⁵⁴ As a result, the harm these campaigns have identified is no longer run-of-the-mill dangerous men, but sexual deviants.

This strategy applies old anti-gay and lesbian arguments that the Religious Right developed in the 1980s and 1990s and repurposes them into new anti-transgender claims. The prominent, national evangelical political organizations that were involved in those anti-gay campaigns have been providing advice and financing to local contests around the

GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008–2014 (2016), [<https://perma.cc/6GXM-B2W6>].

53. Amanda Erickson, *Transgender Protections Trigger Backlash, Referendum*, CHI. TRIB. (Aug. 3, 2008), [<https://perma.cc/H63S-UHAW>]; GainesvilleCitizen, *Citizens for Good Public Policy – Commercial*, YOUTUBE (June 17, 2008), <https://www.youtube.com/watch?v=ExGBIXKRrYs>; Steve Harrison, *Opponents’ Focus on Bathrooms Changed the Debate over LGBT Rights*, CHARLOTTE OBSERVER (Mar. 31, 2016, 11:35 AM), [<https://web.archive.org/web/20180324181448/http://www.charlotteobserver.com/news/politics-government/article69097577.html>]; City of Tacoma, *Special Election – Initiative No. 1*, in Pierce County, General Election 2002 Voter Pamphlet, at 29, [<https://perma.cc/8S7P-36A7>].

54. In 2002, opponents of Ypsilanti, Michigan’s LGBT anti-discrimination ordinance argued the law’s danger was not that it would permit sexual predators into restrooms, but rather transgender men. It circulated a flyer featuring a photograph of a transgender man with the line: “Will you vote YES to protect *your* daughter...*your* granddaughter...from being forced to use the girl’s bathroom with men like this?” However, most of its literature focused on child protection and preserving marriage for opposite-sex couples. Flyer, Ypsilanti Citizens for Equal Rights Not Special Rights, Vote Yes Privacy Rights for Women and Children Ypsilanti City Charter Amendment, (2002) (on file with Bentley Historical Library, University of Michigan, Ypsilanti Campaign for Equality Records, Collection No. 07129, Box 1).

country, helping grassroots organizations recreate historical narratives.⁵⁵ The bathroom argument is thus the old made new, with familiar tropes used to bound off unfamiliar territory.

Commercials from before and after 2012 demonstrate the tactical shift. Before 2012, one of the most circulated commercials featured a young girl with long, blond hair, sporting a pink shirt and white skirt entering a women's restroom in a park, only to be followed by a man with a scruffy beard, identity obscured by a hat and dark glasses. The words on the TV screen warned viewers that their local government had made the man's actions legal.⁵⁶ Nothing about the man's appearance indicated there was anything atypical about his gender presentation (fig. 1). This ad appeared in both local and state-level

55. For example, Focus on the Family, which was integrally involved in Colorado's 1992 Amendment 2 campaign, has been involved in local campaigns around the country. Zack Ford, *Focus on the Family Doesn't Want Transgender People to Use Bathrooms in Delaware*, THINKPROGRESS (June 6, 2013, 1:35 PM), [https://perma.cc/VA97-P342]; Lee Hill Kavanaugh, *Kansas Towns at Center of Battle Over Gay Rights*, WICHITA EAGLE (Oct. 21, 2012, 7:49 AM), [https://perma.cc/4669-SWWV]; Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 142 (2010); *Our Partners*, MASS. FAMILY INST. (2018), [https://perma.cc/8TEG-99XE]. Many of the national evangelical groups that were active in ballot initiative contests around the country have connections to Focus on the Family. This includes the Alliance Defending Freedom, which Focus on the Family founder James Dobson co-founded to fund precedent-setting cases, as well as the Family Research Council, a D.C. lobbying organization that was once a division of Focus on the Family. *FAQ*, ALL. DEFENDING FREEDOM (2018), [https://perma.cc/PLA6-RXNX]; *History of Family Research Council*, FAMILY RESEARCH COUNCIL (2017), [https://perma.cc/BS4D-WS8C]. Groups such as Christians Uniting for Political Action, the organization spearheading the repeal effort in Springfield, Missouri, received legal assistance from the Alliance Defending Freedom. Vanessa Rodriguez, *Missouri Voters Narrowly Repeal Gay Rights Ordinance Despite Opponent's Scare Tactics*, CHRISTIAN EXAMINER (Apr. 9, 2015), [https://perma.cc/PP7A-5L7Y]; Katy Steinmetz, *Missouri Town Repeals Protections for LGBT Residents*, TIME (Apr. 10, 2015, 2:12 PM ET), [https://web.archive.org/web/20180325161413/http://time.com/3814038/missouri-town-repeals-protections-lgbt-residents/]. The Family Research Council provided funding and organizational support to repeal Fayetteville, Arkansas' non-discrimination ordinance in 2014. Max Brantley, *Fayetteville Vote: Gay Civil Rights Ordinance Repealed*, ARK. TIMES (Dec. 8, 2014, 7:43 PM), [https://www.arktimes.com/ArkansasBlog/archives/2014/12/09/fayetteville-ordinance-early-vote-opposes-repeal-of-gay-civil-rights-ordinance]; Max Brantley, *Hate Group Sponsors Gathering in Advance of Fayetteville Ordinance Vote*, ARK. TIMES (Dec. 1, 2014, 9:12 AM), [https://www.arktimes.com/ArkansasBlog/archives/2014/12/01/hate-group-sponsors-gathering-in-advance-of-fayetteville-ordinance-vote]. The Southern Baptist Convention may also have been involved in supporting the repeal effort. Sunnive Brydum, *Duggars Declare Victory for 'Equality' in Repealing Nondiscrimination Ordinance*, ADVOCATE (Dec. 10, 2014, 4:20 PM EST), [https://perma.cc/XDU4-WPBD].

56. GainesvilleCitizen, *supra* note 53.

contests around the country between 2008 and 2011, from Gainesville, Florida, to Kalamazoo, Michigan.⁵⁷ The 2012 campaign in Anchorage, Alaska, on the other hand, featured a much different version of a man in a women's facility (fig. 2).⁵⁸ Its commercial showed a cross-dressing cartoon man, complete with vivid blue eyeshadow, pink lipstick, and chest hair peeking through a neon green sports bra, demanding the right to enter the women's locker room at "Steve's Gym."⁵⁹ It warned viewers that, if they did not vote against LGBT protections, "Steve will be forced to open the women's locker room to anyone who claims a female identity."⁶⁰ The dangerous man in the Anchorage commercial was not the ominous, yet ordinary, sexual predator of years past, but a deviant man who dressed in women's clothing. The visual comparison of the dangerous protagonists in the two commercials (figs. 1 & 2), illustrates the strategic change.



Fig. 1: Gainesville, 2008



Fig. 2: Anchorage, 2012

That the Anchorage campaign hoped to exploit city residents' lack of familiarity with transgender individuals by equating transgender

57. *Bathroom Bill*, MASS. FAMILY INST. (Jan. 4, 2011), [https://perma.cc/BWB4-BQU4]; Levi & Redman, *supra* note 55, at 142; NoBathroomBill, *NoBathroomBill.com Ad #1*, YOUTUBE (Mar. 17, 2009), https://www.youtube.com/watch?v=GWDA4IGyY-s; *Our Partners*, *supra* note 55.

58. Unlike other campaigns, the Anchorage initiative asked voters to affirmatively enact LGBT protections; the city's assembly had amended the anti-discrimination law to include sexual orientation and gender identity, but the mayor vetoed the bill. LGBT rights activists responded by sponsoring a ballot initiative to obtain the protections by popular vote. Zack Ford, *LGBT Fight Could Return to Anchorage, Making It Another Houston*, THINKPROGRESS (Dec. 11, 2015, 1:17 PM), [https://perma.cc/A2KJ-PQND].

59. AKFamilyAction, *Steve's Gym*, YOUTUBE (Mar. 23, 2012), https://www.youtube.com/watch?v=o8yoAaVgJVo.

60. *Id.* at 0:04-0:10.

identity and cross-dressing in its commercials is evident from its companion ad, “Carol’s Day Care.” In it, another cross-dressing man, this time in a pink dress, red heels, and equally loud makeup, applied for a job at Carol’s Day Care (fig. 3), while the narrator explained that Carol could not “refuse a job to a transvestite who wants to work with toddlers.”⁶¹ The use of the derogatory word transvestite sounds similar to transgender, encouraging viewers to elide the two. The advertisement concerning Carol’s Day Care was more pernicious than just its attempt to equate transgender identity with a sexual fetish, as it also drew from a historical narrative that connected gay identity and pedophilia, and opposition to gay rights as necessary to protect children.⁶² In 1992, when Colorado’s voters enacted Amendment 2, a ballot measure that affirmatively prohibited the state from protecting gays, lesbians, and bisexuals from discrimination on the basis of their sexual orientation, the campaign sponsoring the initiative used child protection as a central theme.⁶³ Like the Anchorage campaign, the Colorado group also used a daycare theme on one of its fliers, which showed a cartoon man seated in front of a door labeled “Day-Care Center,” reviewing a résumé (fig. 4). The caption read: “I’m sorry sir. Your credentials are perfect—but we haven’t filled our quota of homosexuals!”⁶⁴ The materials from the two campaigns both highlight the danger that sexual minorities pose to children, with the Anchorage campaign augmenting viewers’ visceral responses to the issue by depicting a cross-dressing man.

61. AKFamilyAction, *DaycareHD.mp4*, YOUTUBE (Mar. 23, 2010), at 0:06–0:10, <https://www.youtube.com/watch?v=QxqYqY7vwt4>.

62. The Religious Right had used child protection to oppose gay rights since the 1970s. Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 831–38 (2017).

63. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

64. AM. CIVIL LIBERTIES UNION, BRIEFING BOOK: ANTI-GAY BALLOT INITIATIVES (1993) (on file with ONE National Gay and Lesbian Archives, ACLU of Southern California Lesbian & Gay Rights Chapter Records, Collection no. 2007-013, Box 19, Folder 2).



Fig. 3: Anchorage, 2012



Fig. 4: Colorado, 1992.

Image Courtesy of ONE Archives
at the USC Libraries.

Opposition groups weaved additional anti-transgender arguments into bathroom claims, which also drew from established anti-gay rhetoric, such as the claim that gender identity protections constituted a “special right.” In the 2014 contest in Fayetteville, Arkansas, for example, the repeal group ran a bathroom commercial that informed viewers the city’s anti-discrimination law gave “special rights to those with gender identity issues” to appear in women’s locker rooms “naked and fully exposed” to young girls.⁶⁵ It also ran an ad in the *Northwest Arkansas Times* that stated the ordinance “puts our women and children at risk . . . [i]n order to provide special rights to the LGBT community.”⁶⁶ The idea that sexual minorities sought special rights was a rhetorical device that had been extremely successful in anti-gay ballot initiatives in the 1990s, as its language appealed to politically moderate voters by avoiding moralistic rhetoric.⁶⁷ It identified sexual orientation protections as granting unnecessary privileges to gays and lesbians, while casting LGBT rights opponents as the standard-bearers of equality and fairness.⁶⁸ The Religious Right repeatedly emphasized that it respected and sought to protect the rights of what it called “legitimate minorities,” which were characterized by immutable characteristics like race or sex.⁶⁹ Since, in the conception of religious conservatives,

65. Fayette Repeal, *Don't Let Our Daughters Pay the Price*, YOUTUBE (Dec. 8, 2014), at 0:09–0:11, 0:22–0:25, <https://www.youtube.com/watch?v=Oyzk6gzUhT8>.

66. Advertisement, Repeal 119, NW. ARK. TIMES, Dec. 7, 2014, at 3A.

67. AM. CIVIL LIBERTIES UNION, *supra* note 64, at 48–49.

68. *Id.*

69. STONE, *supra* note 24, at 22.

homosexuality is a behavioral choice, it does not deserve legal protections.⁷⁰

The Fayetteville campaign drew on this connected argument that gender identity was a behavioral choice, like sexual orientation, in another advertisement.⁷¹ Michelle Duggar, the matriarch of the hit TLC reality series *19 Kids and Counting*, recorded a “robocall” that warned thousands of Fayetteville residents the ordinance would give men access to women’s restrooms, locker rooms, showers, and unspecified “sleeping areas.”⁷² In it, Duggar explained that this harm came from putting the “preference of an adult over the safety and innocence of a child.”⁷³ The word “preference” came from the phrase “sexual preference,” which the Religious Right used to diminish gays’ and lesbians’ claims of an immutable orientation, thereby identifying transgender identity as a choice. Duggar’s call thus applied the anti-gay and lesbian narrative to transgender rights, folding the objections to gender identity claims into a larger argument about sexual predators.

The Fayetteville campaign was not the only one to utilize the rhetoric of choice, with other groups picking up on this same theme by emphasizing that LGBT individuals did not constitute a minority group that had suffered a history of discrimination. In the 2015 campaign in Springfield, Missouri, Christians Uniting for Political Action aired a commercial featuring Pastor Charles Flowers, an African American man, who combined this message with the one about the danger that LGBT rights posed to women and children. In addition to warning that the city’s law, which included sexual orientation and gender identity protections, “allows biological males to use women’s restrooms, showers, locker rooms,” he described the LGBT anti-discrimination provisions as an “affront to civil rights because there is no comparison to what blacks have suffered in this nation—from slavery, to Dred

70. AM. CIVIL LIBERTIES UNION, *supra* note 64, at 43–45; George, *supra* note 62, at 798; Andrew Gorgey, *Amendment 2: What It Means*, SPRINGS MAG., Feb. 1993 (on file with Denver Public Library, Equality Colorado Records, MSS WH1781 (Equality Colorado Records), Box 15, Folder 3); Freedom Writer, Focus on the Family Fact Sheet (on file at Equality Colorado Records, Box 14, Folder 45).

71. AM. CIVIL LIBERTIES UNION, *supra* note 64, at 43–45; Gorgey, *supra* note 70; Freedom Writer, *supra* note 70.

72. Abby Ohlheiser, *Listen to Michelle Duggar’s Anti-Anti-Discrimination Robocall*, WASH. POST: GOVBEAT (Aug. 19, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/08/19/listen-to-michelle-duggars-anti-anti-discrimination-robocall/?utm_term=.4284e9e1684d.

73. *Id.*

Scott, to lynching, to segregation. That was real discrimination.”⁷⁴ This commercial echoed the ads that the Colorado Amendment 2 campaign developed more than ten years earlier, in which proponents argued that, by claiming the same rights as “legitimate minorities,” gays and lesbians, in fact, minimized the sufferings of African-Americans and detracted from the Civil Rights movement’s hard-fought gains.⁷⁵

Other campaigns expressed this notion of transgender individuals as legally undeserving by focusing on transgender identity as deviant and disordered. The 2015 measure in Houston, which became a media maelstrom after national and local Political Action Committees spent almost five million dollars on the campaign, and everyone from presidential candidates to Hollywood celebrities had weighed in on the law, took this approach.⁷⁶ It circulated two different types of bathroom ads—an updated version of the Gainesville commercial, featuring a menacing man following an innocent young girl into the restroom, as well as Anchorage’s cartoon gym ad.⁷⁷ Supporting the Anchorage commercial, which depicted transgender men as fetishistic cross-dressers, were printed materials, in which Campaign for Houston identified transgender individuals as “troubled men” who did not merit legal protections.⁷⁸ The group admonished that “[a] man who says that he is a ‘transgender female’ is still a man, no matter what he thinks he is. A man dressed as a woman is a man who is engaging in deviant behavior.”⁷⁹

All of these arguments, in which old claims about gays and lesbians have been reconstituted and applied to transgender individuals, reflect a deep discomfort with transgender individuals. This was perhaps exemplified by the statement of one of Campaign for Houston’s

74. YesQuestionOne Springfield, *Yes on Question 1 for Bathroom Privacy & Freedom—Repeal Springfield 6141*, YOUTUBE (Mar. 5, 2015), at 0:18–0:28, <https://www.youtube.com/watch?v=14hAbUgoUHM>.

75. Letter from Danni Lederman, Fund Raising Coordinator of Colo. Legal Initiatives Project, to Colo. Legal Initiatives Project Supporters on CFV Statements (Jan. 15, 1992) (on file with GLBT Historical Society, Phyllis Lyon/Del Martin Papers, Collection No. 1993-13 (Lyon/Martin Papers), Box 98, Folder 1); Gorgey, *supra* note 70; Freedom Writer, *supra* note 70.

76. Russell Berman, *How Bathroom Fears Conquered Transgender Rights in Houston*, ATLANTIC (Nov. 3, 2015), [<https://perma.cc/JSE6-WEVB>]; Holden, *supra* note 50.

77. Ford, *supra* note 58; Campaign for Houston, *Campaign for Houston – TV Spot 1*, YOUTUBE (Oct. 13, 2015), <https://www.youtube.com/watch?v=D7thOvSvC4E>.

78. Mailer, Campaign for Houston, Vote No Houston’s Proposition #1 (2015), [<https://perma.cc/T99G-3LCX>].

79. *Id.*

volunteers, who told the *Washington Post* that transgender women “should stay home until the process is complete,” since “[a]nybody with a penis, I don’t want them in the ladies’ restroom.”⁸⁰ Just below the sexual predator bathroom rhetoric is an overtly anti-transgender claim, which LGBT rights opponents have deployed to reverse LGBT movement gains.

At its heart, the new bathroom argument is a challenge to national LGBT rights organizations’ claim that LGBT individuals are like heterosexuals in every significant way. Instead, the bathroom argument maintains that there is a meaningful difference, one to which Americans should be attuned. By using variations on anti-gay rhetoric to attack transgender rights, LGBT rights opponents are subtly undermining the logic on which the LGBT movement’s arguments are based.

I. IDENTITARIAN CONFLICTS

The success of the new bathroom argument demonstrates how harmful the disconnect between LG and T rights is for the LGBT movement. However, the disconnect is not new, but rather reflects longstanding tensions and conflicts that have roiled those within the social movement for decades.⁸¹ If anything, collaboration between LG and T is a historical anomaly and division a norm.

This Part details the historical evolution of this self-sorting on the sexual margins, including how internal social hierarchies influenced legal organizing. This Part provides the background necessary to understand the social norms, politics, and cultural shifts that shaped the LGBT movement and national organizations’ legal strategies, including the movement cleavages that the disconnect reflects.

A. Self-Sorting on the Sexual Margins

Those on the sexual margins of American society have long divided themselves based on how closely they hewed to gender norms, with the more transgressive members of the community typically at the bottom of the social hierarchy. In the interwar period, for example, men who engaged in same-sex practices differentiated between effeminate, flamboyant “fairies” and gender-normative, masculine

80. Sandhya Somashekhar, *Gay Rights Battle Flares in Houston Over Nondiscrimination Ordinance*, WASH. POST (Nov. 1, 2015), https://www.washingtonpost.com/national/gay-rights-battle-flares-in-houston-over-nondiscrimination-ordinance/2015/11/01/02282754-7f08-11e5-b575-d8dcfedb4ea1_story.html?utm_term=.afd56a405ce7.

81. Stone, *supra* note 22, at 336.

“queers.”⁸² Queers treated fairies with disdain, offended by their self-presentation.⁸³ As a queer man from Washington D.C., known under the pseudonym Jeb Alexander, wrote in 1927, “effeminacy repels me . . . [h]omosexuality may be curse enough (though it has its wonderful compensations and noble joys) but it is a double curse when one has effeminate ways of walking, talking, or acting.”⁸⁴ Many queers also resented fairies’ flagrant behavior, which they saw as provoking public censure and giving rise to negative stereotypes of all homosexuals.⁸⁵ Gene S., a twenty-five-year-old queer man, stated in the mid-1930s, “I don’t object to being known as a homosexual but I detest the obvious, blatant, made-up boys whose public appearance and behavior provoke onerous criticism.”⁸⁶ As a result, he was adamant that he “[didn’t] begrudge normal people their feelings against homosexuals.”⁸⁷

In the post-war period, lesbians likewise enforced strict gender divisions, with rights advocates ascribing a higher social ranking to feminine-styled femmes than masculine-presenting butches.⁸⁸ The only all-women’s homophile organization, the Daughters of Bilitis (DOB), urged lesbians to assimilate and put particular pressure on butch women to appear more feminine.⁸⁹ However, the DOB’s perspective reflected both its assimilationist politics and its middle-class norms, which working-class lesbians did not necessarily share. For working class lesbians, it was important to adopt either a butch or femme persona, but which one did not necessarily matter.⁹⁰ This gender structure not only framed interactions, but also led lesbians to shape their self-presentations to fit the model available to them. Shirley Willer, who

82. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940*, at 16, 34 (1994).

83. *Id.* at 16, 96. For example, Salvatore N., a queer man, stated that “[m]en who speak with an effeminate voice, who refer to each other as ‘she’ or who make feminine gestures, are repugnant to me. My desire is for virile men who never think of such things” GEORGE W. HENRY, *SEX VARIANTS: A STUDY OF HOMOSEXUAL PATTERNS* 178 (1941). Likewise, when Louis E. met a “very, very feminine” homosexual man on a transatlantic liner, Louis “told him that before I would become like him I would poison myself.” *Id.* at 194.

84. JEB AND DASH: *A DIARY OF GAY LIFE, 1918–1945*, at 91 (Ina Russell ed., 1993) (entry for Feb. 4, 1927).

85. CHAUNCEY, *supra* note 82, at 103.

86. HENRY, *supra* note 83, at 242, 255.

87. *Id.* at 254–55.

88. Elizabeth A. Smith, *Butches, Femmes, and Feminists: The Politics of Lesbian Sexuality*, 1 NWSA J. 398, 401–02 (1989).

89. *Id.* at 402.

90. Natasha Krauss, *Desire Work, Performativity, and the Structuring of a Community: Butch/Fem Relations of the 1940s and 1950s*, 17 FRONTIERS J. WOMEN STUD. 30, 48 (1996).

lived in Chicago in the 1940s, explained that “she became more and more butch to achieve acceptance,” even though she “never desired or approved of” the butch/fem dichotomy.⁹¹ Following these gender roles was so important that lesbian communities often ostracized those who did not consistently follow a butch or femme practice, calling those women “ki-ki,” a pejorative term that meant neither-nor.⁹² Therefore, although lesbian communities policed their members’ gender performances, how they did so depended on class.

The hierarchies became all the more contested in the postwar period, as a new sexual identity category emerged: transsexual. Media accounts of sex reassignment surgeries in Europe led transgendered individuals in America—who, in the language available to them at the time, self-identified as inverters,⁹³ homosexuals, transvestites,⁹⁴ eonists,⁹⁵

91. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 99 (2d ed. 1983); Krauss, *supra* note 90, at 49.

92. Madeline Davis & Elizabeth Lapovsky Kennedy, *Oral History and the Study of Sexuality in the Lesbian Community: Buffalo, New York, 1940–1960*, 12 *FEMINIST STUD.* 7, 22 (1986); Krauss, *supra* note 90, at 48.

93. In the late 19th century, sexologists explained homosexuality as the result of an inversion of gender roles; “[i]nversion . . . leads a person to feel like a person of the opposite sex, and to adopt, so far as possible, the tastes, habits, and dress of the opposite sex” 2 HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX: SEXUAL INVERSION* 1–2 (F.A. Davis Co., 1927) (1897). According to this theory, homosexual men were attracted to other men because they had a female gender identity, a notion that resembles contemporary discourse on transgender identity, which did not exist at the time.

94. Magnus Hirschfeld, a prominent German sexologist, coined the term “transvestism” in 1910 to differentiate individuals with a desire to cross-dress from homosexuals and fetishists. Hirschfeld recognized that his label, which he derived by combining the Latin words for across (trans) and dressed (vestitus) had disadvantages, in that it only described the external manifestation of an internal drive. MAGNUS HIRSCHFELD, *TRANSVESTITES: THE EROTIC DRIVE TO CROSS DRESS* 198, 233 (Michael A. Lombardi-Nash trans., Prometheus Books 1991) (1910). Hirschfeld eventually developed the term “transsexual” for individuals whose gender identity did not conform to their biological sex. However, “transsexual” did not gain popularity until Harry Benjamin employed it in his 1966 book, *The Transsexual Phenomenon*. Vern L. Bullough, *A Nineteenth-Century Transsexual*, 16 *ARCHIVES SEXUAL BEHAV.* 81, 81 (1987); Friedemann Pfäefflin, *Sex Reassignment, Harry Benjamin, and Some European Roots*, 1 *INT’L J. TRANSGENDERISM* (1997), [<https://perma.cc/K6BC-BMG7>].

95. Eonism was the term that English physician and psychological researcher Havelock Ellis adopted as an alternative to “transvestism,” as he considered Hirschfeld’s label unsatisfactory for its focus on the cross-dressing element of the identity category, rather than its psychological impulse. 7 HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX: EONISM AND OTHER SUPPLEMENTARY STUDIES* 12 (F.A. Davis Co., 1928) (1897). Eonism came from the Chevalier D’Eon, a French nobleman and spy, who lived the first half of his life as a man, but assumed the life of a woman after returning to France from political exile in England. When he died, he had lived as

and hermaphrodites—to request medical interventions from their doctors.⁹⁶ As scientists debated whether and when surgical treatment was appropriate, they distinguished this group of patients from other sexual variants by labeling those who sought to change their sex as “transsexual.”⁹⁷ According to the medical diagnostic classification system, sex reassignment surgery was only appropriate for “true” transsexuals, who were defined by their life-long gender-identity dysphoria, strong dislike for their genitalia, persistent desire for sex reassignment surgery, heterosexual sexual orientation, and lack of erotic crossdressing.⁹⁸ Clinical evaluations centered on distinguishing transsexuals from other gender variant individuals, who were ineligible for hormonal treatments or surgical interventions.⁹⁹ Transsexuals were not entirely at the mercy of medical gatekeepers, as they transmitted information to one another on what information they should provide their doctors, as well as what details to withhold, to obtain the remedies they sought.¹⁰⁰

In their social spaces, transsexuals constructed a parallel taxonomy of sexual identities, distinguishing themselves from transvestites and other gender variant social groups in a social process that echoed the classification system of the medical profession.¹⁰¹ Anthropologist Anne Bolin, who conducted fieldwork among a male-to-female transsexual support group called the Berdache Society,¹⁰² discovered that there were

a man for forty-nine years, and as a woman for thirty-four. *Id.* at 1–2; Richard Green, *Mythological, Historical, and Cross-Cultural Aspects of Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 16 (Richard Green & John Money eds., 1969).

96. JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* 16 (2002).

97. *Id.*

98. Anne Bolin, *Transcending and Transgendering: Male-to-Female Transsexuals, Dichotomy and Diversity*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 447, 462 (Gilbert Herdt ed., 1994); Arlene Istar Lev, *Disordering Gender Identity: Gender Identity Disorder in the DSM-IV-TR*, in *SEXUAL AND GENDER DIAGNOSES OF THE DIAGNOSTIC AND STATISTICAL MANUAL (DSM): A REEVALUATION* 35, 43 (Dan Karasic & Jack Drescher eds., 2005).

99. Lev, *supra* note 98, at 43.

100. Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in *BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY* 280, 291–92 (Julia Epstein & Kristina Straub eds., 1991).

101. MEYEROWITZ, *supra* note 96, at 176–77; Bolin, *supra* note 98, at 456.

102. *Berdache* is a third gender category that is neither male nor female, which was documented in over 130 American Indian tribes in the nineteenth century. SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 30 (1985); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 223–27 (1995).

only three social identity options for physical males who cross-dressed: transsexual, heterosexual transvestite, and gay female impersonator.¹⁰³ The group excluded the last category to avoid any confusion as to the difference between transsexuals and drag queens.¹⁰⁴ Transsexuals identified themselves as individuals seeking to express their true feminine gender identity through hormones and surgery; they defined transvestites as those who were not transsexuals, namely cross-dressers who were not committed to surgical solutions.¹⁰⁵ Although many transvestites in the organization disagreed with the mutually exclusive possibilities that transsexuals presented, and instead saw transsexuality and transvestism as distinctions of degree, which existed on a continuum of fluid and plural gender-variant identities, the transsexual dichotomization of identity dominated the Society.¹⁰⁶

Both scientific professionals and transsexuals defined success in terms of the ability to live unobtrusively as a member of the opposite sex, such that the vast majority of post-operative transsexuals focused on assimilating into mainstream society.¹⁰⁷ Few lived as openly transsexual individuals, with one notable exception being Christine Jorgensen, who “made sex change a household term” after the *New York Daily News* announced her sex reassignment in 1952 with the headline “Ex-GI Becomes Blonde Beauty[.]”¹⁰⁸ Both transsexual and transvestite members of the Berdache Society agreed that “the less people knew about them the better,” as educating the public “could only result in making it more difficult for them to pass,” which was an imperative for the identity groups.¹⁰⁹ This is not to say that transsexuals did not advocate for their rights or acceptance, but rather that medical protocols and identitarian imperatives conflicted with this type of mobilization.¹¹⁰ Transsexuals did make claims of middle-class respectability and explained that they upheld social norms of propriety,

103. Bolin, *supra* note 98, at 451; Dallas Denny, *Interview with Anne Bolin, Ph.D.*, 1 *CHRYSLIS Q.* 15, 15, 18 (1993). Bolin was a participant-observer at the Berdache Society from December 1979 to December 1981. ANNE BOLIN, *IN SEARCH OF EVE: TRANSSEXUAL RITES OF PASSAGE* 33, 35 (1988).

104. *See* BOLIN, *supra* note 103, at 79.

105. Bolin, *supra* note 98, at 451–52, 459.

106. *Id.* at 452.

107. Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 *ARCHIVES SEXUAL BEHAV.* 427, 442 (2010).

108. MEYEROWITZ, *supra* note 96, at 1, 51.

109. Bolin, *supra* note 98, at 471.

110. Drescher, *supra* note 107; Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, in *TRANSGENDER RIGHTS* 141, 152 (Paisley Currah et al. eds., 2006).

emphasizing the ways in which their lives were consistent with mainstream American values.¹¹¹

The self-categorization among sexual and gender identity categories was not simply a matter of differentiation, but also creating hierarchies between the groups in an effort to secure rights and social standing. Beginning in the 1950s and continuing from then on, some lifted their own group's social standing by identifying the other categories as socially transgressive.¹¹² Jorgensen, for example, distanced herself from transvestites and homosexuals, whom she implied were abnormal.¹¹³ Other transsexuals in the 1950s explained they wished to live as "normal" women or men, rather than as a "freak" or a "queer," casting sex reassignment as a means of upward mobility.¹¹⁴ Some homosexual men and women likewise engaged in efforts to distance themselves from transsexuals to garner acceptance from heterosexual society.¹¹⁵ Homophile rights groups of the 1950s may have reinforced this strategy, as these organizations sought change through educational campaigns that emphasized gay and lesbian respectability, although they also worked with gender variants who needed assistance.¹¹⁶

These identity politics dissipated to some extent in the 1960s, prompted in part by a counterculture that celebrated and encouraged gender non-conformity among all men and women, as well as a shift in social movement politics.¹¹⁷ The militant gay liberation movement of the 1960s created space for all types of self-presentations, as it identified gender and sexual transgression as socially and culturally linked and argued that both needed to be defended.¹¹⁸ This is why drag

111. MEYEROWITZ, *supra* note 96, at 176–77.

112. *Id.*

113. *Id.* at 183.

114. *Id.* at 184.

115. *Id.* at 179.

116. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 83 (1987); D'EMILIO, *supra* note 91, at 81–83; Martin Meeker, *Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s*, 10 J. HIST. SEXUALITY 78, 91–93 (2001).

117. MEYEROWITZ, *supra* note 96, at 232; Betty Luther Hillman, "The Most Profoundly Revolutionary Act a Homosexual Can Engage In": Drag and the Politics of Gender Presentation in the San Francisco Gay Liberation Movement, 1964–1972, 20 J. HIST. SEXUALITY 153, 157 (2011).

118. ELIZABETH A. ARMSTRONG, *FORGING GAY IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950–1994*, at 102 (2002); D'EMILIO, *supra* note 91, at 233–34; Hillman, *supra* note 117, at 170.

queens¹¹⁹ and transvestites¹²⁰ were central figures in the 1969 Stonewall riots, a series of protests against police harassment that now has a hallowed place in gay and lesbian history as a turning point in the movement's political mobilization.¹²¹ Indeed, Sylvia Rivera, a self-identified drag queen, not only threw one of the first bottles at the police at Stonewall, but also scaled the walls of City Hall in a dress and high heels at the 1971 demonstration for New York's municipal sexual orientation non-discrimination bill, becoming "something of a Rosa Parks figure of the gay rights movement."¹²² It was during this period that the burgeoning gay movement did not just seek to battle discrimination through interest group politics, but also broaden social views of what constituted acceptable expressions of self-identity.¹²³ The diversity of individuals within the gay liberation movement helped promote this second goal, thereby making gender non-conformists key members of the movement.¹²⁴

The moment of unity among the many sexual categories proved short-lived, with factional battles that fractured the umbrella coalition of gay liberation.¹²⁵ For example, lesbian feminists departed from the movement, determining that social separation was necessary to foster a

119. Drag queens were gay male female impersonators. ESTHER NEWTON, *MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA* 3–4, 6–7 (1972). Some drag queens only engaged in female impersonation onstage, as an occupation, while for others, known as "street fairies," the boundary between their everyday and professional lives was more fluid. *Id.* at 8–9.

120. Although transvestites were typically heterosexual men who engaged in cross-dressing for erotic purposes, this group also included homosexual men and men who cross-dressed as an expression of their gender identity. Neil Buhrich & Neil McConaghy, *The Discrete Syndromes of Transvestism and Transsexualism*, 6 *ARCHIVES SEXUAL BEHAV.* 483, 494 (1977); Vern Bullough et al., *A Comparative Study of Male Transvestites, Male to Female Transsexuals, and Male Homosexuals*, 19 *J. SEX RES.* 238, 250–51 (1983).

121. MARTIN DUBERMAN, *STONEWALL* xv, 187–89, 196–98 (1993); MEYEROWITZ, *supra* note 96, at 235.

122. Michael Musto, *Lost in Yonkers*, *VILLAGE VOICE*, May 30, 1995, at 25; Riki Wilchins, *A Woman for Her Time*, *VILLAGE VOICE* (Feb. 26, 2002), [<https://perma.cc/Y38S-LXTD>]; Interview by Leslie Feinberg, *Workers World*, with Sylvia Rivera, (1998), [<https://perma.cc/3XG5-A4NZ>]. That law was Intro 475, which the New York Council introduced in January 1971, but which was defeated in committee one year later. *GAY ACTIVISTS ALL., HISTORY OF INTRO 475* (on file at the New York Public Library, MS Gay Activists Alliance (hereinafter GAA Records), Box 16, Folder 13).

123. ARMSTRONG, *supra* note 118, at 102.

124. *Id.*

125. MEYEROWITZ, *supra* note 96, at 235.

more supportive community for lesbians.¹²⁶ When they did so, they denied male-to-female (MTF) transsexuals' access to their women-only spaces and denied their claims to womanhood, creating another source of friction between the groups.¹²⁷ Those actions were consistent with the feminist movement, which for the most part attacked transsexuality for reinforcing traditional gender roles and thereby "reducing the real female form to an artifact."¹²⁸

What took the place of gay liberation was the gay and lesbian rights movement, which pursued an assimilationist strategy, following an identity politics based on the experiences of its white, middle-class members.¹²⁹ As a result of this shift, drag queens and transvestites were both marginalized and treated as embarrassing impediments to the cause.¹³⁰ For some in the gay community, there was a sense that "transsexuals were not only different from gay people, but somehow inferior as well."¹³¹ As elected officials distinguished between those they identified as legitimate community members and others they viewed as a threat to the social order, gays and lesbians were able to present themselves as respectable citizens and gender non-conformists as the outcasts.¹³² The Gay Activists Alliance (GAA), for example, no longer sought protections for transvestites or drag queens to convince the New York City Council to support a sexual orientation non-discrimination measure, even though advocates like Rivera helped the GAA lobby for that very legislation.¹³³

126. SHANE PHELAN, IDENTITY POLITICS: LESBIAN FEMINISM AND THE LIMITS OF COMMUNITY 59 (1989); Amin Ghaziani et al., *Cycles of Sameness and Difference in LGBT Social Movements*, 42 ANN. REV. SOC. 165, 168 (2016).

127. MEYEROWITZ, *supra* note 96, at 258; Aaron H. Devor & Nicholas Matte, *One Inc. and Reed Erickson: The Uneasy Collaboration of Gay and Trans Activism, 1964–2003*, 10 GLQ 179, 180–81 (2004). The relationship between lesbian-feminists and transsexual women in women-only spaces continued to be contentious through the 1990s. Joshua Gamson, *Messages of Exclusion: Gender, Movements, and Symbolic Boundaries*, 11 GENDER & SOC'Y 178, 188 (1997).

128. JANICE G. RAYMOND, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE 104 (1979); *see also* Raewyn Connell, *Transsexual Women and Feminist Thought: Toward New Understanding and New Politics*, 37 SIGNS 857, 860 (2012).

129. ARMSTRONG, *supra* note 118, at 104, 106, 135.

130. MEYEROWITZ, *supra* note 96, at 258; Devor & Matte, *supra* note 127, at 181.

131. Eliza Gray, *Transitions*, NEW REPUBLIC (June 22, 2011), [<https://perma.cc/F9YQ-MQJE>].

132. *See* TIMOTHY STEWART-WINTER, QUEER CLOUD: CHICAGO AND THE RISE OF GAY POLITICS 130 (2016).

133. SUSAN STRYKER, TRANSGENDER HISTORY 86 (2008); QUEENS LIBERATION FRONT, INTRO 475 AMENDMENT 1, 3 (on file with GAA Records, Box 16, Folder 13); TED RAUCH, TRANSVESTISM AND GAY LIBERATION 1–2 (on file with GAA Records, Box

Despite being excluded, some gender non-conforming individuals nevertheless continued to work with and within national gay and lesbian rights groups, for several reasons. Some identified their interests as aligned and were convinced that fighting for the rights of one would eventually result in the rights of the other.¹³⁴ Additionally, gay and lesbian rights groups promised their gender-non conforming members that, if drag queens and transvestites worked on behalf of sexual orientation protections, the organizations would “come back for” gender identity protections.¹³⁵ Finally, while most transvestites were heterosexual, some were homosexual, such that working on sexual orientation-based protections also promoted their individual interests.¹³⁶ Nevertheless, those who worked within these organizations remarked that they “fe[lt] the cold shoulder of the gay world” and were offended by “‘uptight professional’ gay men who ‘make a point in the media to say that they are not swish, faggoty mad screaming drag queens.’”¹³⁷

The organizational hierarchies of the gay and lesbian rights organizations were such that there was little rights advocacy on behalf of drag queens and transvestites for several decades. Although gay and lesbian rights groups proliferated and became national in scope, legal activism on behalf of gender non-conformists in the 1970s and 1980s remained limited and focused on challenging local laws and municipal regulations, particularly in the Northeast and California.¹³⁸ This work centered on overturning anti-masquerade laws that explicitly criminalized cross-dressing, as well as vagrancy laws that law

18, Folder 10); Gray, *supra* note 131; Monica Roberts, *Why the Transgender Community Hates HRC*, TRANSRIOT (Oct. 8, 2007), [https://perma.cc/A3NW-KK2M]. *But see* GAA, GAA ELECTIONS 2 (1972) (on file with GAA Records, Box 18, Folder 10) (noting that “most candidates [in the 1972 election] acknowledged the need for GAA to relate better to transvestites . . . in the coming year”). A term frequency analysis of GAA’s archival records reveals that GAA’s references to transvestites, transsexuals, and drag queens peaked in 1971; by 1973, there were few references to these identity categories. N.Y. Pub. Library Archives of Sexuality & Gender, Term Frequency Analysis: Number of Documents by Year, 1965–1978 (on file with author).

134. Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 451, 459 (John D’Emilio et al. eds., 2000); Roberts, *supra* note 133.

135. Roberts, *supra* note 133. There was often a long gap between when a group secured sexual orientation and gender identity protections. The District of Columbia, for example, enacted a sexual orientation anti-discrimination law in 1997; it added gender identity protections in 2005. 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. & C.R. L. REV. 397, 410 (2009).

136. Frye, *supra* note 134, at 459.

137. MEYEROWITZ, *supra* note 96, at 235; Musto, *supra* note 122, at 25.

138. Frye, *supra* note 134, at 458–60; Roberts, *supra* note 133.

enforcement officials used to harass and arrest gender non-conforming individuals.¹³⁹ In the mid-twentieth century, the state had similarly used vagrancy laws, along with disorderly conduct, solicitation, and lewdness ordinances, to police gays and lesbians, demonstrating a continuity the regulatory practices applied to those on the sexual margins.¹⁴⁰

One notable exception was during the AIDS crisis, which brought together a diversity of voices to address the government's slow response to the growing public health crisis and increasing discrimination against people with HIV/AIDS.¹⁴¹ Organizations like ACT UP (AIDS Coalition to Unleash Power) and Queer Nation staged confrontational protests, which provoked and parodied, challenging sexual and gender norms.¹⁴² These groups were deliberately inclusive in their practices, welcoming gender non-conformists, as they challenged the notion that their members should try to assimilate to mainstream society.¹⁴³ However, queer activism was short-lived; most of these groups disbanded by the mid-1990s, leaving only professionalized rights organizations that pursued assimilationist strategies.¹⁴⁴

The self-sorting on the sexual margins was both social and political, with hierarchies based on gender conformity that legal groups mirrored. Although gays and lesbians welcomed drag queens and transvestites at specific political moments, the assimilationist groups predominantly excluded gender non-conformists from rights organizing.

139. Frye, *supra* note 134, at 458–59. The origins of these anti-masquerade laws, which were enacted throughout the nineteenth and twentieth centuries, ranged from preventing fraud and aiding in the detection of criminals, to policing sexual, racial, and class boundaries. In the 1950s and 1960s, police used sumptuary ordinances to harass homosexuals; gays and lesbians understood that “they were subject to arrest unless they had on three garments appropriate to their gender,” a requirement detailed in police handbooks, rather than statutes. DUBERMAN, *supra* note 121, at 299 n.39; MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY* 141 (1992); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564 n.85 (1993); Levi & Redman, *supra* note 55, at 152–53.

140. RISA LAUREN GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 46–52 (2016); Christopher Agee, *Gayola: Police Professionalization and the Politics of San Francisco's Gay Bars, 1950–1968*, 15 J. HIST. SEXUALITY 462, 484 (2006); Marie-Amélie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States*, 24 J. HIST. SEXUALITY 225, 236 (2015).

141. Ghaziani et al., *supra* note 126, at 170.

142. *Id.*

143. SUZANNE STAGGENBORG, *SOCIAL MOVEMENTS* 103 (2d ed. 2016).

144. Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655, 675–76.

It was not until the late 1990s that this began to change, as the next section details.

B. Enter Transgender

A key shift to legal organizing on behalf of gender non-conformists came in the 1990s, when transgender emerged as an identity category that realigned conceptions of transsexualism, transvestitism, and cross-dressing. This development is what made possible the eventual coalition between gays, lesbians, and those who had once identified as transsexuals, drag queens, and transvestites.

Transgender identity developed in response to the widespread closing of gender identity clinics in the early 1980s, as those clinics' diagnostic models had helped shape gender-variant identities.¹⁴⁵ From 1966, when Johns Hopkins opened the first gender identity clinic offering sex reassignment surgery, medical professionals' goal was for their post-operative patients to blend into mainstream society and "pass" as genetic members of the opposite sex.¹⁴⁶ Notably, Johns Hopkins both opened the door to sex reassignment surgeries and closed it. From the beginning, internal tensions roiled the Johns Hopkins Clinic, ultimately leading the medical center to terminate its surgery program.¹⁴⁷ However, the Clinic's director, Jon Meyer, announced the decision at the same press conference where he revealed the results of his study concluding that sex reassignment surgery did not provide long-term benefits to MTFs, thereby suggesting the two were linked.¹⁴⁸ The publicity surrounding the Hopkins Clinic's closure, and the scrutiny surrounding the efficacy of the surgeries, led all but three of the country's more than forty gender identity clinics to shutter their doors.¹⁴⁹ These closings left a treatment vacuum that transsexuals filled by communicating with one another, which had been difficult under the medicalized regime both because of the clinics' confidentiality concerns and because the clinics had insisted that post-operative transsexuals

145. Bolin, *supra* note 98, at 463.

146. *Id.* at 453; Dallas Denny, *A Selective Bibliography of Transsexualism*, 6 J. GAY & LESBIAN PSYCHOTHERAPY 35, 37, 39 (2002); Margaret Nichols, *Dreger on the Bailey Controversy: Lost in the Drama, Missing the Big Picture*, 37 ARCHIVES SEXUAL BEHAV. 476, 477 (2008).

147. MEYEROWITZ, *supra* note 96, at 266–67.

148. *Id.* at 266.

149. *Id.* at 269; Denny, *supra* note 146, at 39; Jon K. Meyer & Donna J. Reter, *Sex Reassignment: Follow-Up*, 36 ARCHIVES GEN. PSYCHIATRY 1010, 1015 (1979).

“blend into society and disappear.”¹⁵⁰ Conferences that began in the mid-1980s increasingly welcomed both transsexuals and transvestites, and in the process, the groups began questioning their own descriptive terminology and the medical profession’s diagnostic labels.¹⁵¹

From these debates came a new identity paradigm, one that placed transsexuals, transvestites, and cross-dressers on a continuum of gender variance, rather than conceptualizing each as separate identity categories.¹⁵² Holly Boswell articulated the idea in 1991 that transvestites and transsexuals had a transgender essence and were often more comfortable inhabiting the space between the socially constructed categories of male and female.¹⁵³ That is, rather than being forced to live in their natal or sex-reassigned gender, they should be able to identify and live as transgendered individuals.¹⁵⁴ The term “transgender” was not Boswell’s, but rather one that had appeared in print more than twenty years earlier; Virginia Prince used it to describe someone who, like herself, lived as a woman, identified as a man, and had no desire to undergo genital surgery.¹⁵⁵ The transgender identity category both deemphasized the gender binary and opened new possibilities for gender variant expressions, making it extremely appealing. Consequently, the shift from the dichotomized medical classification to the transgender model was extremely rapid and pervasive.¹⁵⁶ When Bolin revisited the Berdache Society in the early 1990s, ten years after she published her initial study, she found the group had changed profoundly, allowing its members to adopt a wide range of self-identities along the transgender continuum.¹⁵⁷

150. Denny, *supra* note 146, at 40; Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in *TRANSGENDER RIGHTS* 179–80 (Paisley Currah et al. eds., 2006).

151. Denny, *A Selective Bibliography of Transsexualism*, *supra* note 146, at 40; Denny, *Transgender Communities of the United States in the Late Twentieth Century*, *supra* note 150, at 179–80.

152. Nichols, *supra* note 146, at 477.

153. Denny, *supra* note 146, at 42.

154. *Id.*

155. *Id.*; Virginia Prince, *Change of Sex or Gender*, *TRANSVESTIA*, Dec. 1969, at 53, 65 (using the term “transgenderal”); *see also* Virginia Prince, *Men Who Choose to be Women*, *SEXOLOGY*, Feb. 1969, at 441, 443–44 (on file with Cal. State University, Northridge Special Collections & Archives). As Prince’s statement indicates, people identified in ways that—from today’s vantage point—would be considered transgender long before Boswell’s 1991 article. However, before the early 1990s, the term transgender did not denote a specific social identity. In the early 1990s, people began to self-identify as transgender, and that social category had a recognizable meaning to others.

156. Lev, *supra* note 98, at 45.

157. Bolin, *supra* note 98, at 461.

The transgender model encompassed many identities and lifestyles, including individuals who did not want to identify as either male or female, or who saw themselves as both.¹⁵⁸ For those who sought medical intervention, fully transitioning was no longer the expectation, and there was a wide variation in the kind, permutation, and combination of hormone treatments and surgeries those individuals desired.¹⁵⁹ This proliferation was evident in a survey from the mid-1990s of 339 gender-variant respondents, which generated more than forty different self-identities.¹⁶⁰ The survey creators offered check boxes for transsexual, transgender, cross-dresser, and other, providing a blank space for the last category.¹⁶¹ Of the eighty-seven (25.7%) who elected “other,” the respondents’ identities included “female-bodied man,” “testicular feminization,” “bigendered,” “androgynous,” “don’t know,” and “uncertain.”¹⁶²

The transgender model created a national community of gender-variant individuals, forging a larger movement from what had been smaller identity groups. Whereas previously, transsexuals, transvestites, and gay cross-dressers had focused on their differences, the transgender identity category emphasized their commonalities and offered new opportunities for members of each group.¹⁶³ These new communities made national legal mobilization possible, leading to a sustained effort to have established gay and lesbian organizations incorporate transgender rights into their agendas.¹⁶⁴ However, leaders of the new transgender movement had difficulty convincing these groups to consider transgender issues coequal with gay and lesbian rights. In 1993, the organizing committee of the March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation refused to amend the name of the March to include “transgender,” although transgender issues were included in the event’s “purposes and goals.”¹⁶⁵

Gays and lesbians responded differently when asked whether they wanted to open up their social, political, and legal movement to

158. Lev, *supra* note 98, at 46; Nichols, *supra* note 146, at 477.

159. Lev, *supra* note 98, at 44; Nichols, *supra* note 146, at 477.

160. Dallas Denny & Jan Roberts, *Results of a Questionnaire on the Standards of Care of the Harry Benjamin International Gender Dysphoria Association*, in *GENDER BLENDING* 320, 326–27 (Bonnie Bullough et al. eds., 1997).

161. *Id.* at 326.

162. *Id.* at 326–27.

163. Denny, *supra* note 150, at 181.

164. Vitulli, *supra* note 18, at 161.

165. Dallas Denny, *You’re Strange & We’re Wonderful: The Gay/Lesbian and Transgender Communities*, in *BOUND BY DIVERSITY* 47, 48 (James T. Sears ed., 1994); Devor & Matte, *supra* note 130, at 182; Frye, *supra* note 134, at 460.

transgender individuals. In a 1999 poll conducted by the *Advocate*, a gay and lesbian magazine, forty-eight percent answered “no” to the question: “Should transgendered people be a part of the gay rights movement?”¹⁶⁶ For many gays and lesbians, the two groups had little in common; while both were identity categories, one was based on gender identity and the other was defined by sexual desire.¹⁶⁷ Others who saw the connection nevertheless objected that transgender individuals were “riding on the coattails of the gay-rights movement” and feared that including transgender individuals would jeopardize the gains the movement had made by appealing to the mainstream.¹⁶⁸ As one lesbian activist told the *Boston Globe*, “as much as I hate to say it, there is a freak factor with transgendered individuals that sets us back as a movement.”¹⁶⁹ The concerns that gender-conforming gays and lesbians had about being identified with those on the outer edges of the sexual margins, which had led to the factionalism of the 1970s, had not dissipated, but rather only grown as gays and lesbians had secured rights.

For other gays and lesbians, it was obvious that the groups formed one community.¹⁷⁰ Both sets of sexual minorities faced similar rejection and abuse from common oppressors, for whom homophobia and transphobia were indistinguishable.¹⁷¹ All were discriminated against for failing to conform to social expectations, and most gays and lesbians were singled out when they transgressed gender norms, thereby demonstrating the strong link between anti-gay and anti-transgender bias.¹⁷² As a result, combatting anti-gay and anti-transgender discrimination constituted the same work. As Dana Rivers, a transgender rights activist, explained, “[i]t’s unfortunate, but in the end, we are defined by our opposition. . . . They don’t make distinctions and neither can we afford to. As long as any of us are

166. 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, 35 (2001); Chryss Cada, *Issue of Transgender Rights Divides Many Gay Activists, Transgender Activists Seek a Greater Voice*, BOS. GLOBE, Apr. 23, 2000, at A8.

167. Libby Adler, *T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 599–600 (2010); Cada, *supra* note 166, at A8.

168. Minter, *supra* note 110, at 153; Cada, *supra* note 166.

169. Cada, *supra* note 166.

170. Minter, *supra* note 110, at 142. Transgender rights leaders had to overcome some internal homophobia, particularly from heterosexual cross dressers. Denny, *supra* note 165, at 49; Cada, *supra* note 166.

171. Minter, *supra* note 110, at 142, 158.

172. *Id.* at 142; Holly Devor, *Who Are “We”? Where Sexual Orientation Meets Gender Identity*, 6 J. GAY & LESBIAN PSYCHOTHERAPY 5, 9 (2002).

repressed, all of us are.”¹⁷³ Another argument in favor of transgender inclusion was that everyone in the LGBT community would benefit from a more progressive political atmosphere, and as such, each benefited from advocating on behalf of the more vulnerable members of the group.¹⁷⁴

For transgender rights activists, there were additional, practical reasons for being part of a larger coalition. The gay rights movement was not only larger, but had political clout that the transgender community would not attain on its own.¹⁷⁵ This became evident in efforts to amend the federal Employment Non-Discrimination Act (ENDA) to include gender identity protections, as transgender rights advocates were unable to convince legislators to act without the support of prominent national gay and lesbian rights organizations. As the next Part discusses, the debates over ENDA made transgender rights advocates aware of the acute need for an LGBT coalition.

It is possible that, at this point, transgender rights advocates could have instead pressed for inclusion in the women’s rights movement. Beginning in the early 1990s, feminist scholars began to develop a new relationship with transgender identity, arguing that transsexuality showed how both gender *and* sex were socially constructed.¹⁷⁶ This opened the door to legal arguments challenging discrimination based on women’s biological differences, as well as a changed political logic that increasingly accepted the significance of gender plurality.¹⁷⁷ However, as commentators soon noted, these efforts focused on the subversion of gender norms through the appropriation of transgender experience, rather than improving the lives of transgender individuals.¹⁷⁸ At the same time, other feminists continued to resist transgender inclusion in the women’s movement, making the same arguments they had since the 1970s—that transsexualism reinforced, rather than undermined, gender

173. Cada, *supra* note 166, at A8.

174. Devor, *supra* note 172, at 18; Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOC. POL’Y 53, 53 (2008).

175. Gray, *supra* note 131.

176. See, e.g., JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 177–80 (1990); BERNICE L. HAUSMAN, CHANGING SEX: TRANSSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER 72–109 (1995).

177. Connell, *supra* note 128, at 862; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995).

178. Viviane Namaste, *Undoing Theory: The “Transgender Question” and the Epistemic Violence of Anglo-American Feminist Theory*, 24 HYPATIA 11, 15–21 (2009).

norms.¹⁷⁹ The feminist movement was thus divided, much like the gay and lesbian one. Given that transgender individuals had historically tended to identify more closely with the gay and lesbian community, it is perhaps unsurprising that transgender rights advocates focused their efforts on building an LGBT coalition.

The transgender community's demand for inclusion within the mainstream, national gay and lesbian movement, and the ambivalent response it received, was par for the historical course. For decades, those on the sexual margins had divided themselves, and created hierarchies, based on how closely they hewed to gender norms, with claims to rights intertwined with assertions as to middle-class respectability. As the next Part discusses, this began to change in the mid-1990s, as transgender advocacy around ENDA led to the creation of the LGBT movement.

II. CREATING A COALITION

In the early 1990s, transgender advocates lobbied to be included in mainstream gay and lesbian rights organizing, ultimately forging the LGBT movement. During those decades of advocacy, debates focused on both what connections existed between gays, lesbians, and transgender individuals, as well as what strategies best served sexual minorities in America, and how those issues should be decided. What rights organizations determined was that they should include transgender rights in their mandates, but they never resolved the other questions.

A. *Getting to LGBT*

Transgender rights advocates sought gender identity protections in ENDA, but were unable to convince members of Congress to introduce a bill that extended beyond sexual orientation. They consequently focused their attention on persuading national gay and lesbian rights organizations to commit to the transgender rights cause, realizing that an LGBT rights coalition would exert pressure on Congress to enact a comprehensive ENDA. Thus, the battle for ENDA became part of a larger campaign for an LGBT coalition.

ENDA originated as a comprehensive "gay rights bill," entitled the Equality Act, which Representative Bella Abzug introduced in

179. Cressida J. Heyes, *Feminist Solidarity After Queer Theory: The Case of Transgender*, 28 *SIGNS* 1093, 1102–04 (2003); Myra J. Hird, *Unidentified Pleasures: Gender Identity and its Failure*, 8 *BODY & SOC'Y* 39, 51 (2002).

1974.¹⁸⁰ The Act would have amended the Civil Rights Act of 1964 to add sex, sexual orientation, and marital status as protected categories, thereby extending anti-discrimination coverage in employment, education, housing, and public accommodations.¹⁸¹ The proposal gained little traction for decades, and in 1993, after President Clinton was unable to deliver on his campaign promise to withdraw the ban on gay and lesbian service members, gay and lesbian rights organizations reassessed the bill in light of their diminished political influence.¹⁸² Given that national polls consistently showed a majority of Americans supported sexual orientation anti-discrimination laws, the Human Rights Campaign (HRC) winnowed the Equality Act to its employment provisions.¹⁸³ The result was ENDA, which had bi-partisan support when its Congressional sponsors introduced in June 1994.¹⁸⁴ Within a year, almost one-third of the members of both Congressional chambers had joined as co-sponsors, and President Clinton endorsed the pending legislation.¹⁸⁵

The widespread media attention that ENDA received galvanized transgender activists, who were furious that they had been excluded from the law and immediately worked to remedy that omission.¹⁸⁶ Phyllis Frye and Karen Kerin, two transgender rights advocates, traveled to Washington to speak at the July 1994 Senate Hearings on ENDA, but were not permitted to do so.¹⁸⁷ During that trip, however, they learned the coalition responsible for ENDA was led by HRC,

180. Vitulli, *supra* note 18, at 159.

181. H.R. 14752, 93d Cong. (1974).

182. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149, 178 (John D’Emilio et al. eds., 2000).

183. *Id.* at 178–79; Sample Letter to Representative (May 21, 1995) (on file at ONE Gay and Lesbian Archives, ENDA Subject File).

184. Feldblum, *supra* note 182, at 179–80.

185. S. 932, 104th Cong. (1995) (30 co-sponsors); H.R. 1863, 104th Cong. (1995) (142 co-sponsors); *Congress Profiles: 104th Congress (1995–1997)*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, [<https://perma.cc/EYP5-SKG9>] (identifying 435 representatives); *see also* Presidential Statement on the Proposed “Employment Non-Discrimination Act,” 33 WEEKLY COMP. PRES. DOC. 577 (Apr. 24, 1997).

186. Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623, 629 (2000); Frye, *supra* note 134, at 462.

187. Email from Phyllis Randolph Frye, Reply to Chai Feldblum Statement, Int’l Conference on Transgender Law and Emp’t Policy, Inc. (Aug. 12, 1995, 11:52 EDT) (on file with Carl A. Kroch Library, Cornell University, PFLAG Records, Collection No. 7616 (PFLAG Records), Box 55, Folder 36).

which had made the decision to exclude transgender protections from ENDA.¹⁸⁸

To say that HRC purposefully excluded gender identity from ENDA might be overstating the matter. At the time HRC drafted ENDA, it is more likely that no one in the organization seriously considered including protections for transgender individuals.¹⁸⁹ HRC had become the largest gay and lesbian lobbying organization in large part because of its “successful marketing of a particular kind of gayness,” one that emphasized white, middle-class respectability.¹⁹⁰ The group, which launched in 1980, quickly grew in political influence. In 1997, when Bill Clinton became the first President to address a gay and lesbian organization, he chose HRC as his audience.¹⁹¹ Time seemed to have validated the decisions of assimilationist gay and lesbian rights organizations, which had jettisoned gay liberation’s call for unity in favor of appealing to the political mainstream.

When transgender individuals objected to gender identity’s exclusion, HRC had two concerns that reflected the organization’s approach and worldview. As a strategic matter, HRC’s drafting group did not believe that elected representatives—who might be willing to prohibit sexual orientation discrimination—would also extend those protections to gender identity.¹⁹² At the same time, they considered discrimination against transgender individuals to be conceptually different, as one was based on sexual partner, and the other based on gender expression.¹⁹³ HRC’s drafters thus did not identify the two groups as sufficiently similar as to warrant inclusion in the same law.¹⁹⁴

188. *Id.*

189. Feldblum, *supra* note 186, at 627–28.

190. Joshua Gamson, *Whose Millennium March?*, NATION (Mar. 30, 2000), [<https://web.archive.org/web/20180329134511/https://www.thenation.com/article/whose-millennium-march/>].

191. James Bennet, *Clinton Is Greeted Warmly as He Speaks to Gay Group*, N.Y. TIMES (Nov. 9, 1997), <http://www.nytimes.com/1997/11/09/us/clinton-is-greeted-warmly-as-he-speaks-to-gay-group.html>; *HRC Story*, HUM. RTS. CAMPAIGN, [<https://perma.cc/G5FR-LSD8>]. HRC now has more than 3 million members and supporters; it has an operating budget of approximately forty million dollars per year. *Id.*; GELMAN, ROSENBERG & FREEDMAN, COMBINED FINANCIAL STATEMENTS: HUMAN RIGHTS CAMPAIGN, HUMAN RIGHTS CAMPAIGN FOUNDATION 4 (2016), [<https://perma.cc/HW7Q-RXAK>].

192. Memorandum from Martha Fitzwater, Human Rights Campaign Bd. of Governors, to Kay Longcope, Tex. Triangle Publisher (July 21, 1995) (on file with Carl A. Kroch Library, Cornell University, Human Rights Campaign Records, Collection No. 7712 (HRC Records), Box 116, Folder 11).

193. *Id.*

194. Human Rights Campaign Internal Confidential Memorandum from KP to EB et al. (May 4, 1997) (on file with HRC Records, Box 54, Folder 26).

Transgender advocates saw the issue quite differently and also argued that ENDA, as written, would inadequately protect effeminate gay men and butch lesbians who were discriminated against based on their gender non-conformity.¹⁹⁵ Accordingly, they explained, “gender expression is often a *manifestation* of sexual orientation,” such that the two were intertwined.¹⁹⁶ As a result, ENDA needed to include both sexual orientation and gender identity protections to properly protect gays and lesbians, as well as transgender individuals. HRC’s lawyers disputed this interpretation, although these arguments eventually convinced ENDA’s lobbyists that gender identity protections belonged in a bill alongside sexual orientation.¹⁹⁷

For transgender rights advocates, it was crucial to obtain HRC’s endorsement of a transgender-inclusive ENDA. At the time, HRC was “America’s largest gay and lesbian organization” and had more political clout than any other rights group.¹⁹⁸ Thus, the two groups, after a meeting that attendees on both sides described as “long and acrimonious” and “anger-filled,” came to a sort of compromise: HRC agreed that it would not oppose any gender identity amendments that Congressional sponsors introduced, but that the organization also would not recommend such a change.¹⁹⁹ Likewise, HRC would continue to support the sexual orientation-only version of ENDA if representatives proved unwilling to expand the bill.²⁰⁰ Transgender rights advocates set to work drafting a new version of ENDA and lobbying on its behalf, but the bill’s original sponsors refused to consider the amendments—as HRC had anticipated.²⁰¹

According to transgender rights advocates, HRC continued to serve as an impediment to gender identity’s inclusion in ENDA. During the lobby days that transgender rights advocates organized on Capitol Hill, they learned that HRC had preempted their arrival. These advocates maintained HRC asked Congressional staff to communicate to transgender lobbyists that it would not be possible to include gender identity in ENDA; however, representatives were willing to expand

195. Feldblum, *supra* note 186, at 633.

196. *Id.*

197. *Id.* at 630, 633–34, 634 n.21.

198. Devor, *supra* note 172, at 6; Donovan, *supra* note 166, at 38; Vitulli, *supra* note 18, at 161.

199. Feldblum, *supra* note 186, at 630–32; Frye, *supra* note 134, at 464; Email from Phyllis Randolph Frye et al. to All Staff (Sept. 17, 1995, 23:45 EDT) (on file with HRC Records, Box 116, Folder 112).

200. Feldblum, *supra* note 186, at 630–32.

201. *Id.* at 637–38; Frye, *supra* note 134, at 465–66.

hate crimes protections to be transgender-inclusive.²⁰² For transgender rights activists, HRC's actions were infuriating not just because of their hypocrisy, but also due to their coercive force. HRC was a large, professional organization, with paid lobbying staff, while a national transgender rights movement was only just emerging. As a result, the first organized transgender lobbying effort, in 1995, only involved six individuals who went to the offices of representatives from four states.²⁰³ In 1997, when HRC began making preemptive rounds to Congressional offices, the number of transgender advocates attending the lobby day had grown—to twenty.²⁰⁴ At the same time, HRC's leadership became known for opposing transgender-inclusive anti-discrimination laws. In 1995, Elizabeth Birch, who was then HRC's Executive Director, reportedly said that gender identity protections in ENDA would become a legislative priority “over [her] dead body.”²⁰⁵ Four years later, HRC board member Dianne Hardy-Garcia led the lobbying effort behind the James Byrd Hate Crime Bill in Texas. Under her direction, advocates cut gender identity protections from the proposed law; despite this sacrifice, the state Senate nevertheless voted down the bill.²⁰⁶

Although HRC seemed at best ambivalent about gender identity protections, other national gay and lesbian rights groups were becoming transgender-inclusive and pressuring HRC to do the same. The National Gay and Lesbian Task Force (NGLTF) was one of the first major

202. Roberts, *supra* note 133. An email exchange from 1997 provides insight into HRC's perspective. According to a transgender advocate present for the 1997 lobby day, an HRC representative had asked a Congressional staffer for the Representative's support, but specifically requested that the Congresswoman not seek transgender inclusion as this would “kill” the bill. Email from Cathy Wood to Kris Pratt, Human Rights Campaign Staff Member (July 30, 1997, 6:36 PM) (on file with HRC Records, Box 54, Folder 26). In his response to the advocate, the HRC lobbyist explained that lobbyists simply “do not go in to offices asking people to not support trans inclusion” as this “would be illogical.” Instead, they ask elected representatives to support the bill as written, particularly when they have not yet made a decision on the proposal, as in the case of the Congresswoman. He further noted that, earlier in the year, he had gone with members of GenderPAC to “friendly” offices to ask about including gender identity in ENDA, but that was a different situation. Email from Kris Pratt, Human Rights Campaign Staff Member, to Cathy Wood (July 31, 1997, 10:23 AM) (on file with HRC Records, Box 54, Folder 26).

203. Frye, *supra* note 134, at 463.

204. *Id.* at 465.

205. Audrey Bergquist, *The Four Most Important Things I Learned During My First Year of Transition*, LGBTQ NATION (Oct. 5, 2013), [<https://perma.cc/5KVE-J3AD>]; Roberts, *supra* note 133.

206. H.B. 938, 76th Leg. (Tex. 1999); Paul Duggan, *Texas Hate-Crimes Bill Dies*, WASH. POST, May 15, 1999, at A2; Roberts, *supra* note 133.

organizations to shift its stance on ENDA. The group's anti-violence project drew attention to hate crimes against transsexuals and transvestites in the early 1990s, demonstrating its willingness to work beyond gay and lesbian rights.²⁰⁷ By 1996, the organization's annual conference not only included a number of workshops on transgender issues, but was also the site of the first-ever meeting between representatives of the bisexual and transgender communities and a White House representative to discuss discrimination, violence, and inclusion in President Clinton's Administration.²⁰⁸ It was thus unsurprising that, when the Board of Directors undertook a comprehensive review of the organization in 1997 to prepare for the group's twenty-fifth anniversary, the new mission statement it adopted included transgender rights.²⁰⁹ More remarkable was that, the following year, the group elected a transgender person to its Board, and in 1999, declared it could not endorse ENDA since the bill did not include gender identity.²¹⁰

Parents and Friends of Lesbians and Gays (PFLAG) changed its mission statement and its stance on ENDA around the same time as NGLTF, at the request of its members. In 1995, a group of transgender activists, parents, and friends formed PFLAG's Transgender Special Outreach Network (T-SON) at the organization's national convention in Indianapolis.²¹¹ Within a few years, T-SON had recruited hundreds of regional coordinators to educate local chapters and ensure they were transgender-inclusive; it also published a booklet, *Our Trans Children*,

207. KEVIN BERRILL, NGLTF POLICY INST., MAKING INJUSTICE VISIBLE: DOCUMENTING BIAS-MOTIVATED EPISODES 16, 20 (1992) (on file with NGLTF Records, Box 287, Folder labeled "Organizing Against Violence Manual").

208. Dawn Leach, *Transgenders Come to the Front at NGLTF Convention*, GAY PEOPLE'S CHRON., Nov. 22, 1990 (on file with NGLTF Records, Box 293); NGLTF, *9th Annual Creating Change Rallies Activists Nationwide*, TASK FORCE REP., Spring 1997, at 3.

209. Denise Woods & Zachary Green, *Crafting a Mission Statement: Defining Our Reason for Existence* (May 17, 1997) (on file with NGLTF Records, Box 292); Press Release, NGLTF, *New NGLTF Mission Statement Adopted; New Board Co-Chairs and New Board Members* (Sept. 19, 1997) (on file with NGLTF Records, Box 293); NGLTF, *Minutes of the September 12 & 13, 1997 NGLTF/NFLTF PI Board of Directors Meeting 1-2* (1997) (on file with NGLTF Records, Box 293); NGLTF, *Minutes of the November 10, 1996 NGLTF/NGLTF PI Board of Directors Meeting 6* (1996) (on file with NGLTF, Records Box 293).

210. Press Release, NGLTF, *NGLTF Supports Transgender Inclusion in Employment Non-Discrimination Act* (June 16, 1999) (on file with HRC Records, Box 38, Folder 38).

211. T-SON, *OUR TRANS CHILDREN* 15 (1998) (on file with PFLAG Records, Box 43, Folder 35).

which sold out its run of 13,000 copies within one year.²¹² In 1998, following a motion from T-SON and its coordinators, PFLAG changed its mission statement to include transgendered individuals, their families, and friends.²¹³ The next year, after lobbying by transgender members, PFLAG announced it would only support an inclusive ENDA.²¹⁴

Other national organizations quickly followed suit, such that by the time HRC changed its mission statement to include transgender rights in 2001, most LGBT rights organizations had announced they would only support a transgender-inclusive ENDA.²¹⁵ HRC had become one of the lone holdouts on an inclusive ENDA, and the disconnect between its position on ENDA and its mission statement provided additional fodder for transgender lobbying efforts.²¹⁶ Transgender rights advocates began protesting HRC fundraising dinners to draw attention to what they called “the hypocritical nature of the relationship between HRC and the transgender community.”²¹⁷

On August 7, 2004, transgender advocates’ strategy paid off when HRC announced it would only support ENDA “if it is inclusive of sexual orientation and gender identity and expression.”²¹⁸ In explaining the organization’s policy, Christopher Labonte, HRC’s legislative director, stated that gender identity protections would make the law stronger for gays and lesbians, who were sometimes discriminated against because of their gender expression rather than their sexual orientation.²¹⁹ Rea Carey at NGLTF concurred: “We can all point out examples of butch women and feminine men, regardless of sexual

212. Letter from Mary M. Boenke, T-SON Chair, to PFLAG Board et al. (Feb. 1999) (on file with PFLAG Records, Box 43, Folder 35); T-SON, *OUR TRANS CHILDREN*, *supra* note 211.

213. Letter from Nancy Sharp & Mary M. Boenke, T-SON Co-Chairs, to Nancy McDonald, PFLAG President (Dec. 4, 1997) (on file with PFLAG Records, Box 43, Folder 35); *Welcoming Transgendered People to PFLAG’s Family*, PFLAG (n.d., ca. 1998) (on file with PFLAG Records, Box 55, Folder 34).

214. Vitulli, *supra* note 18, at 161–62; T-SON, Letter from Mary M. Boenke, *supra* note 212; Memorandum from Mary Boenke, T-SON Chair, & Nancy Sharp, T-SON Advocacy Comm. Chair, to PFLAG National Board of Directors (Feb. 8, 1999) (on file with PFLAG Records, Box 43, Folder 35).

215. *ENDA: An 800-Pound Transgender Elephant—With Issues—In the Room*, DALL. VOICE (Feb. 15, 2011), [<https://perma.cc/H4EN-ZMTK>] [hereinafter *ENDA: An 800-Pound Transgender Elephant*].

216. Vitulli, *supra* note 18, at 162.

217. Roberts, *supra* note 133; see Lou Chibbaro, Jr., *ENDA Hits Snag over Transgender Inclusion*, WASH. BLADE, Sept. 26, 2007.

218. Stefen Styrsky, *HRC Embraces Transgender Rights*, GAY CITY NEWS (Aug. 12–18, 2004), [<https://perma.cc/Q74D-FBGW>].

219. *Id.*

orientation, who were targets of harassment because they violated gender roles. These protections will benefit the majority, even straight people.”²²⁰ The arguments transgender advocates had made to HRC for including gender identity in ENDA almost ten years earlier became the explanations for why sexual orientation and gender identity belonged in the same law.

By 2004, the gay and lesbian rights movement had become an LGBT coalition, with national organizations all publicly behind an inclusive ENDA, but the place of transgender rights continued to be contested. The addition of “transgender” to the agendas of formerly gay and lesbian rights organizations was often little more than a semantic shift, with few resources allocated to transgender-specific issues, minimal transgender representation on organizations’ staff, and no consensus that gay, lesbian, and transgender individuals were part of a shared community.²²¹ How committed organizations were to transgender inclusivity was unclear, and put to the test when the House of Representatives debated ENDA in 2007, as the next section discusses.

B. ENDA’s Test

Although LGBT organizations were in agreement that ENDA should encompass sexual orientation and gender identity protections, it took several years before Congress would consider an inclusive version of the bill.

In 2007, the House of Representatives for the first time considered an inclusive ENDA, which offered protections against discrimination based on both sexual orientation and gender identity. That bill defined sexual orientation as “homosexuality, heterosexuality, or bisexuality”²²² and gender identity as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”²²³ Congress had only voted on ENDA once before, in 1996; at that time,

220. *Id.*

221. Amy L. Stone, *Like Sexual Orientation? Like Gender? Transgender Inclusion in Nondiscrimination Ordinances*, in *QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW* 142, 145 (Scott Barclay et al. eds., 2009); Vitulli, *supra* note 18, at 161.

222. H.R. 2015, 110th Cong. § (3)(a)(9) (2007).

223. *Id.* § 3(a)(6).

it failed to pass the Senate by one vote.²²⁴ Advocates believed that, this time, the bill would pass both chambers of Congress, but that President Bush would likely veto the law.²²⁵ They nevertheless saw the bill clearing both chambers as a key stepping stone in the fight for federal protections, and an important expressive signal on the part of lawmakers.²²⁶

Gender identity protections proved easier for House Democrats to accept in theory than in practice. In September 2007, after the Committee on Education and Labor held hearings on ENDA, Democratic leaders learned a growing number of their colleagues planned to switch their votes as a result of its transgender rights provision.²²⁷ A whip count revealed ENDA would lose by forty to fifty votes, approximately thirty of which came from new members of Congress who were preparing for their first re-election campaigns and feared voter backlash if they supported transgender rights.²²⁸ Barney Frank (D-MA), one of ENDA's original sponsors and one of only two openly gay members of Congress, had agreed to introduce the inclusive ENDA only with the understanding that, if he later needed to divide the sexual orientation and gender identity provisions into two bills, he would do so.²²⁹ Frank consequently urged House Speaker Nancy Pelosi to move a sexual orientation-only version of ENDA to the House floor

224. Employment Non-discrimination Act of 1996, S. 2056, 104th Cong. (1996); Roll Call Vote 104th Congress, 2nd Session, Measure Number S. 2056, U.S. SENATE, [<https://perma.cc/DS7Z-2N8S>].

225. See Lou Chibbaro, Jr., *ENDA Creates Rift Among Gays*, WASH. BLADE, Oct. 5, 2007 (discussing strong support for a trans-inclusive ENDA in the House, but also fear that the bill might be defeated; this resulted in moving forward with a “sexual orientation only” version). President Bush’s advisors issued a statement indicating that he would likely veto the bill due to religious freedom concerns; the Office of Management and Budget issued a similar statement. David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007; Dale Carpenter, *Bush to Veto ENDA?*, VOLOKH CONSPIRACY (Oct. 23, 2007, 11:00 PM), [<https://perma.cc/YU9A-8H4P>].

226. George, *supra* note 62, at 826–27 (discussing the expressive function of the lawmaking process); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 (1995) (noting that legislative consideration of a bill demonstrates an approval of the values the proposed law contains).

227. Chibbaro, Jr., *supra* note 217; Kerry Eleveld, *ENDA to Be Separated into Two Bills: Sexual Orientation and Gender Identity*, ADVOCATE (Sept. 29, 2007, 12:00 AM EDT), [<https://perma.cc/TWZ5-EWBV>].

228. Ethan Jacobs, *ENDA Vote Postponed*, BAY WINDOWS (Oct. 4, 2007), [<https://perma.cc/V9SM-9NEB>]; Cynthia Laird, *Tense Meeting with HRC over ENDA*, BAY AREA REP. (Jan. 10, 2008), [<https://perma.cc/F9RB-LEHB>].

229. Vitulli, *supra* note 18, at 163. Tammy Baldwin (D-WI) was the other openly gay member of Congress at the time. Chibbaro, Jr., *supra* note 217.

for a vote, introducing the more limited bill to Congress on September 27, 2007.²³⁰

Frank knew that his legislative maneuver would be controversial for LGBT rights advocates, but hoped to convince them that dividing ENDA into two separate bills—one that addressed sexual orientation and would presumably pass, and the other gender identity, which would surely fail—was not a jettisoning of efforts to protect transgender individuals from discrimination.²³¹ Instead, he identified enacting the more limited ENDA as a step in the right direction, framing it as akin to past civil rights work that incrementally built on victories to extend protection to others.²³² However, LGBT rights advocates at the state level had learned how difficult it was to amend anti-discrimination laws to incorporate gender identity once a state already protected sexual orientation.²³³ In three states known for their progressive politics—Massachusetts, New York, and Maryland—advocates had been unable to convince legislators to add gender identity protections to anti-discrimination laws that already contained sexual orientation provisions.²³⁴ Given this fact, and that successful efforts took years or even decades, state and local strategies had shifted to only supporting comprehensive bills.²³⁵

Frank had another pragmatic point that he hoped would persuade advocates: pushing the inclusive version to a vote would make it more difficult to enact later, as this would require asking members of Congress to switch their votes, rather than to vote in favor of the law in the first instance.²³⁶ The 2004 presidential election, in which George W. Bush's campaign had pilloried Democratic nominee John Kerry as a “flip-flopper” for changing his vote on funding for the Iraq War, made it clear how much taking a different position could cost candidates.²³⁷ Indeed, Frank's proposal to divide the bill was at its heart about

230. H.R. 3685, 110th Cong. § 2 (2007); Chibbaro, Jr., *supra* note 217. Barney Frank later claimed that the “overwhelming majority” of the gay and lesbian community supported his decision to divide ENDA into two bills. Stephen Marc Beaudoin, *Frankly Speaking*, JUST OUT, May 2, 2008, at 14–15.

231. See Eleveld, *supra* note 227.

232. Chibbaro, Jr., *supra* note 217.

233. Jacobs, *supra* note 228.

234. Beaudoin, *supra* note 230, at 14–15.

235. See Jacobs, *supra* note 228.

236. Eleveld, *supra* note 227.

237. See, e.g., John F. Harris, *Despite Bush Flip-Flops, Kerry Gets Label*, WASH. POST, Sept. 23, 2004, at A01; Judy Keen, *Bush: Kerry Repeatedly Flip-Flops on Iraq War*, USA TODAY, Aug. 10, 2004, at 8A.

political realities—the sexual orientation-only version could pass, while the inclusive one would not.

These practical arguments did not convince many LGBT rights leaders, as they seemed a veil for a more pernicious anti-transgender sentiment on Frank's part. It was evident that Frank had never been eager to incorporate transgender rights into ENDA; in 2004, he told *Gay City News* that ENDA would “never pass with trans-inclusive language while the Republicans are in control of Congress. They always scare people with stories about people with penises going into women's showers.”²³⁸ More problematically, in arguing in favor of a sexual orientation-only ENDA, Frank framed the issue not simply as being unwilling to forgo a law that would protect millions of gay and lesbian Americans, but also in terms of transgender advocates being undeserving of this sacrifice.²³⁹ In his view, a gay and lesbian rights bill had been pending before Congress for over thirty years, during which time advocates had worked to educate House members about sexual orientation-based employment discrimination, thereby making the law viable.²⁴⁰ By contrast, the transgender community had only begun lobbying around ENDA in the last few years, and those efforts were “terrible.”²⁴¹ In an interview after the ENDA controversy, Frank cast transgender rights advocates as freeloaders on the gay and lesbian rights movement, stating: “They seem to think that all they had to do was to get the gay and lesbian community to say ‘OK.’ I think they thought that this was a train, and that they were a car on the train.”²⁴² These statements may have been a function of anti-transgender views, but they just as likely reflected frustration on the part of a legislator who had spent decades working on behalf of a bill he was never able to pass.

Frank's ultimate point was that there were places where gay, lesbian, and transgender rights diverged. Frank argued transgender rights leaders needed to tackle the heart of representatives' discomfort with gender identity protections—how to handle spaces where individuals were in various states of undress, including showers, restrooms, and locker rooms—which they repeatedly failed to do.²⁴³ For

238. *ENDA: An 800-Pound Transgender Elephant*, *supra* note 215.

239. Eleveld, *supra* note 227.

240. Eleveld, *supra* note 227; Jacobs, *supra* note 228.

241. Beaudoin, *supra* note 230, at 14–15; Eleveld, *supra* note 227; Jacobs, *supra* note 228.

242. Beaudoin, *supra* note 230, at 14–15.

243. Kerry Eleveld, *Barney Frank ENDA Committee Vote in February*, ADVOCATE (Jan. 13, 2010, 5:50 PM EST), [<https://perma.cc/WDS8-NZ3R>]. Frank had refused to support transgender inclusion in ENDA for years because of this issue. *See*

example, Mara Keisling, the executive director of the National Center for Transgender Equality, stated she did not believe ENDA needed to address bathrooms,²⁴⁴ even though opponents of the ENDA specifically raised concerns about restrooms in the committee hearing.²⁴⁵ Frank claimed to have shouldered the burden of tackling this issue on behalf of transgender rights advocates, emphasizing that he “spent more time on that [topic] than any other witness” at the hearing before the Education and Labor Committee on ENDA.²⁴⁶ This was technically true, but Frank’s entire testimony on the issue of changing facilities and showers consisted of four sentences, which noted that bathrooms could be segregated, but that showers were “a little difficult”; the bill remedied the issue by providing that “[p]eople don’t have the right to go into open places where people are unclothed in a way that is going to embarrass people.”²⁴⁷ Given this paltry testimony, and his long history of opposition to transgender inclusion in ENDA, Frank’s portrayal of himself as an avid defender of transgender rights rang false to transgender advocates.

As soon as Frank introduced the sexual orientation-only version of ENDA, LGBT rights organizations around the country mobilized to oppose the bill. Nine national LGBT rights groups, including NGLTF, PFLAG, Pride at Work, and the National Center for Lesbian Rights, immediately issued a statement denouncing the removal of gender identity protections and demanding more time to lobby for the comprehensive law.²⁴⁸ Two days later, more than 100 organizations had joined together to form United ENDA, a coalition with the single purpose of enacting the gender-identity inclusive bill.²⁴⁹ Within two weeks, the Equality Federation, a national coalition of state-based LGBT rights organizations, had mobilized its members in forty-three states, generating thousands of e-mails, a deluge of phone calls, and ever-important Congressional visits to express opposition to the new

Letter from Barney Frank to Elizabeth Birch (June 4, 2003) (on file with HRC Records, Box 54, Folder 33).

244. Eleveld, *supra* note 243.

245. *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. & Labor*, 110th Cong., 74, 76 [hereinafter *Hearing on H.R. 2015*]; Eleveld, *supra* note 243.

246. Eleveld, *supra* note 227.

247. *Hearing on H.R. 2015*, *supra* note 245, at 13.

248. Vitulli, *supra* note 18, at 163; Jacobs, *supra* note 228.

249. *Banding Together*, ADVOCATE (Oct. 17, 2007, 12:00 AM EDT), [<https://perma.cc/MGT3-TETH>].

ENDA.²⁵⁰ By mid-October, over 300 organizations had formally opposed the proposed anti-discrimination law because it omitted gender identity protections.²⁵¹

One organization was notably absent from this flurry of legislative opposition: HRC.²⁵² Given that LGBT rights groups had been unable to convince Congressional sponsors to even consider an inclusive ENDA without HRC's backing, it seemed unlikely that representatives would stand fast on a comprehensive bill without HRC's support.²⁵³ The organization's failure to sign onto the letter that other national groups circulated was conspicuous, if not ominous.²⁵⁴ Several days after Frank introduced the new ENDA, HRC announced that it would not support the sexual orientation-only ENDA, but neither would it work to defeat the law.²⁵⁵ The group argued this decision was a reaffirmation of its prior policy of only supporting an inclusive ENDA, since it was not advocating for the limited version.²⁵⁶ The organization explained its decision in much the same terms as Frank; that an incremental strategy was the quickest way to ultimately secure gender identity protections.²⁵⁷ Other LGBT and civil rights groups took the same stance, including the Leadership Conference on Civil Rights, the nation's largest and oldest civil rights coalition—of which HRC was a member—which urged representatives to support the narrowed ENDA, reasoning that “each legislative breakthrough has paved the way for additional progress in the future.”²⁵⁸ For HRC, the decision was also a matter of maintaining its professional relationships on Capitol Hill. After spending more than

250. H.R. REP. NO. 110-406, pt. 1, at 45 (2007); *Banding Together*, *supra* note 249.

251. H.R. REP. NO. 110-406, pt. 1, at 45; *Banding Together*, *supra* note 249. Although United ENDA included a number of prominent organizations, many of the groups were obscure local and state associations. The list also contained both national groups as well as some of their state and local chapters, thereby inflating some of the organizational numbers. Dale Carpenter, *Check the Numbers: Does United ENDA Represent the Community?*, OUTSMART MAG. (Dec. 2007), [<https://perma.cc/6HTB-TUNH>].

252. Jacobs, *supra* note 228.

253. *ENDA: An 800-Pound Transgender Elephant*, *supra* note 215.

254. *See id.*

255. Jacobs, *supra* note 228.

256. *ENDA: An 800-Pound Transgender Elephant*, *supra* note 215.

257. Lou Chibbaro, Jr., *Activists Seek Reconciliation, Renewed Push for ENDA*, WASH. BLADE, Feb. 21, 2008, at 10-11; Gray, *supra* note 131, at 17; Laird, *supra* note 228.

258. Chibbaro, Jr., *supra* note 257; Letter from the Leadership Conference on Civil Rights to the U.S. House of Representatives (Nov. 6, 2007), [<https://perma.cc/9CQQ-Z39C>].

a decade lobbying members of Congress to support ENDA, HRC was unwilling to ask those same representatives to vote against the law.²⁵⁹

As much as HRC's staff protested that they never had "an[y] intention of throwing transgender people under the bus," this was difficult for many transgender advocates and their allies to square against the long struggle to get HRC on board with an inclusive ENDA and the organization's outlier status in supporting the stripped-down version of the bill.²⁶⁰ Additionally, like Frank, HRC's statements and actions had led many to question its commitment to transgender rights.²⁶¹ In 2005, one year after the group resolved to only support an inclusive ENDA, HRC invited Donna Rose to serve on its board, making her its first transgender member.²⁶² On the board materials, however, HRC marked Rose's gender as "other," a designation that highlighted how little the organization understood about transgender identity.²⁶³ Many of the individuals Rose worked with at HRC expressed to her their discomfort with transgender issues; whether this reflected or reinforced the group's resistance to transgender rights is impossible to say.²⁶⁴ Given this organizational culture, HRC's decision to back the sexual orientation-only version of ENDA seemed to have more to do with anti-transgender bias than practical politics aimed at promoting movement goals.

In this divided landscape, the House of Representatives voted in favor of the sexual orientation-only ENDA on November 7, 2007.²⁶⁵ Despite its efforts, United ENDA ultimately had little influence on House members, convincing at most seven previously-supportive representatives to vote against the bill because it lacked gender identity protections.²⁶⁶ Although United ENDA represented a large number of organizations, few of them had a presence on Capitol Hill or engaged

259. Chibbaro, Jr., *supra* note 258.

260. Gray, *supra* note 131, at 17.

261. Rebecca Juro claims that, in 2004, although HRC had publicly claimed it would only support a comprehensive ENDA, a staffer for then-Representative Christopher Shays (R-CT) told a transgender lobbyist that it would be much easier to introduce gender identity protections in ENDA "if HRC were onboard with it." However, Juro's meeting with Shays occurred on May 7, 2004, and HRC did not announce its support for an inclusive ENDA until September 2004. Rebecca Juro, *Even After All These Years, HRC Still Doesn't Get It*, HUFFINGTON POST BLOG (Apr. 1, 2013, 7:55 PM), [<https://perma.cc/A4HM-PU2A>]; *see also* Rebecca Juro, *If Not Now, When???*, LOSTKIDZ (May 7, 2004, 9:46 AM), [<https://perma.cc/F8DN-WJ7E>].

262. Gray, *supra* note 131, at 17.

263. *Id.*

264. *Id.*

265. Chibbaro, Jr., *supra* note 258.

266. *Id.*

in active lobbying.²⁶⁷ The petition the coalition circulated to House members thus did not carry the same weight as requests from HRC, making HRC's position so devastating to the cause of an inclusive ENDA.²⁶⁸ The Senate never took the bill up, leaving the divisive proposal to languish until the Congressional term expired.²⁶⁹

The 2007 effort to enact an inclusive ENDA is often remembered for its acrimony and failure. That narrative is in many ways accurate, as HRC, the primary LGBT lobbying organization in Washington, D.C., did reverse its stance on only supporting a comprehensive ENDA. In the aftermath of HRC's announcement, transgender rights advocates were frustrated by the organization's decision, which National Transgender Advocacy Coalition Chair Vanessa Edwards Foster characterized as: "HRC decides who, HRC decides when, HRC decides what policy and priorities, and we're expected to quietly go along for the ride."²⁷⁰ Many transgender individuals had worked to support gay causes for decades, with the promise that gay and lesbian rights groups would "come back" for transgender rights.²⁷¹ HRC's actions seemed to indicate how little had changed among national rights groups, and that transgender rights continued to be deprioritized within the LGBT movement.

Contributing to transgender individuals' sense of marginalization were articles by prominent gay journalists and bloggers, who both excoriated national LGBT rights groups for lobbying against the limited version of ENDA, and questioned the notion that gays, lesbians, and transgender individuals should be linked in one movement. Writing in *Salon*, John Aravosis argued that:

[O]ver the past decade the trans revolution was imposed on the gay community from the outside, or at least above, and thus it never stuck with a large number of gays who weren't running national organizations, weren't activists, or weren't

267. Jacobs, *supra* note 228.

268. Chibbaro, Jr., *supra* note 258.

269. *All Bill Information (Except Text) for H.R. 3685 – Employment Non-Discrimination Act of 2007*, CONGRESS.GOV, [https://perma.cc/VCT6-SVVC]. Edward Kennedy, the lead Senate sponsor, had expressed concerns about adding transgender protections and likely would only have introduced the limited version. Lou Chibbaro, Jr., *Kennedy Mum on New Version of ENDA*, WASH. BLADE, Jan. 19, 2007.

270. Susan Jones, *Homosexuals Debate What to Do About Transsexuals*, CNSNEWS.COM, (July 7, 2008, 8:05 PM EDT), [https://perma.cc/YP2F-2E9Z].

271. Roberts, *supra* note 133.

living in liberal gay enclaves like San Francisco or New York.²⁷²

Andrew Sullivan explained this argument when he wrote that “[m]any transgender people are heterosexual; most gay people have no internal conflict with their own gender. It remains important to insist that, just because so many in the gay world have been browbeaten into repeating the concept of an ‘LGBT community,’ that doesn’t mean it exists.”²⁷³ Rex Wockner, another gay journalist, put the issue more bluntly, asking “What do I have in common with a guy who wants to remove his willy, grow breasts, become a woman and get married to a man? From where did this relatively new concept of ‘the LGBT community’ come?”²⁷⁴

As for the wider LGBT community itself, the responses ranged. HRC commissioned a survey of LGBT individuals in which seventy percent preferred passing a non-inclusive ENDA rather than forgoing the law entirely.²⁷⁵ However, in another HRC-funded survey conducted one month later, sixty percent responded it was “wrong” to remove transgendered people from ENDA.²⁷⁶ Whether the different results were the product of people changing their minds upon learning more about the subject, dissemblance, or faulty data-gathering is impossible to

272. John Aravosis, *How did the T get in LGBT?*, SALON, (Oct. 8, 2007, 6:10 AM), <https://www.salon.com/2007/10/08/lgbt/>.

273. Andrew Sullivan, *The LGBTQRSTZ “Community,”* ATLANTIC: THE DAILY DISH, (Nov. 9, 2007), [<https://perma.cc/94R7-VF4D>] [hereinafter Sullivan, “Community”]. Andrew Sullivan is a conservative political commentator and identifies as a member of the gay bear community. ANDREW SULLIVAN, *THE CONSERVATIVE SOUL: FUNDAMENTALISM, FREEDOM, AND THE FUTURE OF THE RIGHT* (2007); Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 22; Andrew Sullivan, *I Am Bear, Hear Me Roar!*, SALON (Aug. 1, 2003), <http://www.salon.com/2003/08/01/bears/>.

274. Sullivan, “Community,” *supra* note 273. Aravosis also criticized national rights groups’ decision to lobby against the limited version of ENDA, likening NGLTF to James Dobson, Lou Sheldon, and Pat Robertson, leading figures in the Religious Right who had lobbied extensively against gay rights for decades. He denounced the strategy for holding twenty-five million gays and lesbians hostage until the country was ready to enact protections for between “tens of thousands and a few hundred thousand transgender people.” John Aravosis, *House Committee Passes ENDA*, 27-21, AMERICABLOG (Oct. 18, 2007, 12:40 PM), [<https://perma.cc/G96V-M8FS>]; John Aravosis, *Just In: Pelosi Agrees to Hold Vote on Trans-Inclusive ENDA When It Has the Votes, Will Move Ahead with GLB ENDA Next Week*, AMERICABLOG (Oct. 12, 2007, 7:04 PM), [<https://perma.cc/N6VU-U7AW>].

275. *Poll: 70% of LGBT Respondents Support Noninclusive ENDA*, ADVOCATE (Nov. 7, 2017, 12:00 AM EST), [<https://perma.cc/XCG6-SCNN>].

276. *Hunter College Poll Finds Clinton Has Support of 63% of LGB Likely Voters*, HUNTER COLLEGE (Nov. 29, 2007), [<https://perma.cc/5FY7-PZH5>].

know. What is clear is that gays and lesbians who could not identify commonalities between the identity categories were ambivalent about the coalition and the place of transgender individuals in it.²⁷⁷ The disconnect originated in part with gays and lesbians who considered themselves to be very gender conforming, and more like mainstream Americans than transgender individuals.²⁷⁸ That group of gays and lesbians understood the movement connection as based on common discrimination, rather than the gender non-conformity that had led national organizations to incorporate transgender rights into their mission statements.²⁷⁹

The debates over ENDA revealed the fault lines that ran among gay, lesbian, and transgender individuals, as well as the advocacy coalitions that represented them. However, the process of lobbying for ENDA turned gay and lesbian rights organizations into the LGBT movement, with groups changing their mission statements and legislative approaches. Coalitions formed around the notion that transgender rights needed to be incorporated into movement advocacy, although it was not clear at the time what this meant beyond ENDA's inclusion of gender identity language.²⁸⁰ Nevertheless, LGBT rights groups around the country castigated HRC, such that the beleaguered organization ultimately released a statement in 2009 affirming that its 2007 decision was a "one time exception" to its policy of only supporting an inclusive ENDA and that the group "will not support such a strategy again."²⁸¹

Although the 2007 fight over ENDA is generally considered a moment of fracture within the LGBT coalition, gay, lesbian, and transgender rights advocates, in fact, joined together as a movement around this piece of legislation.²⁸² The ENDA controversy did bring to the forefront longstanding debates about transgender inclusion, but they were a manifestation of a larger shift from the paradigm of gay and lesbian rights to the LGBT movement.

277. Stone, *supra* note 22, at 344; Matt Foreman, *ENDA as We've Known It Must Die*, EMPTY CLOSET, Sept. 2004, at A8; Aravosis, *supra* note 272; Jones, *supra* note 270.

278. Feldblum, *supra* note 186, at 623.

279. Stone, *supra* note 22, at 344; Cada, *supra* note 166, at A8. One notable exception was those who linked butch and trans identities. Stone, *supra* note 22, at 342.

280. *Banding Together*, *supra* note 249.

281. *ENDA: An 800-Pound Transgender Elephant*, *supra* note 215.

282. Vitulli, *supra* note 18, at 163.

III. MOVEMENT POLITICS

Since 2007, transgender individuals have not become equal partners in the fight for LGBT equality. Both the national organizations' goals and strategies had the unintentional effect of keeping transgender individuals on the margins, contributing to the divide between gay, lesbian, and transgender rights and setting the stage for today's anti-discrimination repeal measures. This Part examines the current place of transgender rights within national LGBT rights groups, explaining both how and why the legal and social gap between the identity categories has widened.

A. (De)Prioritizing Representation

Although the ENDA debates resolved the question of whether the movement would be transgender-inclusive, it did not address what that would mean in terms of agenda-setting or strategy. In the wake of the ENDA battles, LGBT rights groups continued to struggle with whether and how much to prioritize transgender-specific issues, leading many within the transgender community to criticize national organizations for failing to live up to their inclusive mission statements.²⁸³

Social movement scholars have noted that legal movements make important decisions at those two levels—goals and strategies—both of which can produce internal dissent.²⁸⁴ The goals a movement elects implicates fundamental normative questions. For example, the Civil Rights movement's push for desegregation instead of uniform funding for schools prioritized equality over equity.²⁸⁵ Likewise, the LGBT rights movement's pursuit of marriage equality rather than non-marital recognition appeared, for many, to elevate equality over liberty.²⁸⁶

Once the goal is chosen, the next source of conflict is the strategy, which can occur over the threshold questions of whether to seek legislative, administrative, or judicial remedies, or later issues of what

283. *ENDA: An 800-Pound Transgender Elephant*, *supra* note 215.

284. Cummings, *supra* note 20, at 552; William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1633 (1997).

285. Cummings, *supra* note 20, at 552; *see* DERRICK BELL, SILENT COVENANTS, *BROWN V. BOARD OF EDUCATION* AND THE UNFILLED HOPES FOR RACIAL REFORM 15 (2004).

286. Cummings, *supra* note 20, at 552. Douglas NeJaime has identified ways in which marriage litigation transformed the law of parenthood, and as such attained more than formal equality. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016).

remedies to accept.²⁸⁷ In the years leading up to *Roe v. Wade*,²⁸⁸ for example, reproductive rights advocates debated whether to pursue change through state-level legislation or litigation.²⁸⁹ In school desegregation cases, many parents disagreed as to whether integration was the only acceptable remedy, as this meant that their children would have to be bused to neighboring districts.²⁹⁰ Another source of dissent as to strategy has to do with plaintiff and case selection. Movement lawyers choose sympathetic plaintiffs, rather than representative ones, which can sow dissent.²⁹¹ They may also choose to portray plaintiffs in ways that appeal to middle-class norms. For example, when Roberta Kaplan agreed to represent Edie Windsor, one of the ground rules she set was that Windsor could “not to talk publicly about sex,” since Kaplan did not want “Antonin Scalia reading about Edie and Thea’s butch-femme escapades.”²⁹² In terms of case selection, supporters of the ACLU have been divided as to whether the organization’s defense of free speech should extend to protecting the rights of neo-Nazis and white supremacists to march in public spaces.²⁹³

For the LGBT movement, decisions at both of these levels implicated the question of whose rights would be prioritized in the movement’s advocacy work. As an umbrella coalition, the LGBT movement encompasses a broad range of identities; however, over the course of the 2000s, many LGBT rights groups, constrained by limited resources and political capital, prioritized gay and lesbian-specific concerns.²⁹⁴ There were many practical reasons for this, including that organizations were working within legal and political structures that were hostile to transgender rights, and thus focused on the changes they

287. Cummings, *supra* note 20, at 552.

288. 410 U.S. 113 (1973).

289. See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions about Backlash*, 120 YALE L.J. 2028, 2047 (2011); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 406–07 (2007).

290. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 489–90, 511 (1976).

291. Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 32–33 (2005); Godsoe, *supra* note 6, at 150.

292. Ariel Levy, *The Perfect Wife*, NEW YORKER (Sept. 30, 2013), <https://www.newyorker.com/magazine/2013/09/30/the-perfect-wife>.

293. Anthony D. Romero, *Equality, Justice and the First Amendment*, ACLU: SPEAK FREELY (Aug. 15, 2017, 6:00 PM), [<https://perma.cc/J5TR-RDNR>].

294. Jami K. Taylor & Daniel C. Lewis, *The Advocacy Coalition Framework and Transgender Inclusion*, in *LGBT Rights Activism*, in TRANSSEXUAL RIGHTS AND POLITICS 108, 110, 116 (Jami K. Taylor & Donald P. Haider-Markel eds., 2014).

were most likely to effectuate.²⁹⁵ However, some elements of transgender marginalization were less benign. State-level organization directors readily admitted that legal issues affecting gays and lesbians received the lion's share of the attention and resources because transgender individuals were "sometimes still not viewed as a primary constituency of LGBT rights groups."²⁹⁶ In Maryland, for example, the governor and Senate leadership indicated that only one LGBT rights bill would advance during the 2002 session.²⁹⁷ The state had an anti-discrimination law that included sexual orientation, but not gender identity, and transgender rights advocates hoped changing this would be the legislative priority. However, Equality Maryland opted to advance a marriage rights bill.²⁹⁸ The functional effect of this decision was to obscure transgender legal issues, thereby blocking an important means of educating the public about transgender individuals and the discrimination they faced.

In more recent years, LGBT rights groups have become consistently transgender-inclusive in the legislation they pursue, like protections against employment discrimination and hate crimes; however, these are not the priorities of transgender people themselves. When asked to rank policy preferences, what transgender individuals put at the top of the list are violence against transgender people, followed by insurance for transgender-related health care.²⁹⁹ At the bottom are marriage recognition, parenting and adoption rights, access to military service, prohibitions on conversion therapy, and protections against HIV/AIDS-based discrimination, all of which form the core of LGBT rights organizations' legal agendas.³⁰⁰ By devoting resources to issues that impact gays and lesbians more than transgender individuals, LGBT rights groups implicitly exclude their transgender constituents.³⁰¹

There are several reasons why transgender rights have taken a backseat in the work of national LGBT rights organizations, despite LGBT rights groups having supplanted their gay and lesbian rights

295. *Id.* at 122.

296. *Id.* at 120; *see also* Leachman, *supra* note 144, at 676.

297. Taylor & Lewis, *supra* note 294, at 121.

298. *Id.* Maryland had banned same-sex marriages since 1973. Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165 (2005).

299. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 239 (2016), [<https://perma.cc/YV3F-CPBH>].

300. *Id.*

301. Dean Spade & Rori Rohlf, *Legal Equality, Gay Numbers and the (After?)Math of Eugenics*, 13 SCHOLAR & FEMINIST ONLINE (2016), [<https://perma.cc/DHT5-DLYC>].

predecessors.³⁰² A complaint that has plagued the LGBT coalition since its inception is that transgender individuals benefit disproportionately from their alliance with gays and lesbians. Although LGBT rights groups have not focused on the topics of primary importance for transgender individuals, their work has expanded transgender rights, from marriage to anti-discrimination protections. Transgender individuals are now able to marry whomever they choose, as before the marriage equality campaign some courts invalidated the unions of post-operative transgender individuals on the basis that they constituted same-sex marriages.³⁰³ Gender identity protections are now the law in many jurisdictions as a result of lobbying on behalf of gay and lesbian rights.³⁰⁴ Since legislatures are often not receptive to transgender rights arguments, advocates have found the most successful strategy is to include gender identity in anti-discrimination laws that concurrently add sexual orientation protections; they then frame the bill as necessary to protect the gay and lesbian community.³⁰⁵ Thus, without gays and lesbians, legislatures likely would not be enacting transgender rights protections.

On the other hand, the benefit that gays and lesbians obtain from a transgender-inclusive movement is indirect, but no less important. The anti-discrimination legislation the movement secures by arguing on behalf of normative gays and lesbians is an important achievement, as formal equality is a necessary first step for any rights group.³⁰⁶ However, the assimilationist strategy appears to have facilitated tolerance rather than acceptance, since sexual and gender non-conformity continues to be cast as deviant rather than merely

302. Taylor & Lewis, *supra* note 294, at 112–13.

303. See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re Estate of Gardiner*, 42 P.3d 120, 136–37 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999); but see *M.T. v. J.T.* 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976). These cases involved MTFs and cisgender (non-transgender) males.

304. See *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Feb. 26, 2018), [<https://perma.cc/TVR8-E4X5>].

305. Taylor & Lewis, *supra* note 294, at 122. New anti-discrimination laws that extend protections to heterosexual citizens likewise provide an opportunity to incorporate gender identity protections without requiring legislators to affirmatively vote on behalf of transgender rights. See *id.*; c.f. Emens, *supra* note 13, at 362–64 (discussing how New York’s Sexual Orientation Non-Discrimination Act came to define sexual orientation as “heterosexuality, homosexuality, bisexuality, or asexuality” so as to convey that the law protected everyone, not just gays).

306. See Trina Jones, *Title VII at 50: Contemporary Challenges for U.S. Employment Discrimination Law*, 6 ALA. C.R. & C.L. L. REV. 45, 68–69 (2014).

different.³⁰⁷ This is because gays and lesbians defy stereotypical gender roles, as a recent study of heterosexuals' attitudes to bi/gay male penetrative preferences shown. That research established that individuals favor known "tops," or those who assume the sexually "masculine" role, indicating that discrimination against LGB individuals depends in large part on gender normativity.³⁰⁸

Title VII jurisprudence likewise demonstrates the extent to which gays and lesbians are discriminated against based on their gender non-conformity. Since the Supreme Court ruled in *Price Waterhouse v. Hopkins*³⁰⁹ that gender stereotyping constituted discrimination on the basis of sex,³¹⁰ only gay and lesbian plaintiffs who could prove they were discriminated against because of their gender non-conformity—rather than their sexual orientation—have been able to seek relief in court.³¹¹ This created an imbalance, whereby only those who physically manifested their sexual orientation, whether through dress, mannerisms, or speech, were protected from discrimination.³¹² Gays and lesbians who were discriminated against because their coworkers knew about their sexual orientation were unable to recover;³¹³ although courts recognized that stereotypes about appropriate behavior for men and women "will often necessarily blur into ideas about heterosexuality and homosexuality," they also maintained that "a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."³¹⁴

More recently, these disparate strands of Title VII jurisprudence have begun to merge, as authorities are increasingly recognizing that all sexual orientation discrimination claims are based on gender stereotyping. In 2015, the EEOC determined that all types of sexual orientation discrimination constituted sex discrimination in part because

307. TOM WAIDZUNAS, *THE STRAIGHT LINE: HOW THE FRINGE SCIENCE OF EX-GAY THERAPY REORIENTED SEXUALITY* 240–41 (2015); SUZANNA DANUTA WALTERS, *THE TOLERANCE TRAP: HOW GOD, GENES, AND GOOD INTENTIONS ARE SABOTAGING GAY EQUALITY* 2–3, 248 (2014).

308. Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under Price Waterhouse*, 123 YALE L.J. 713, 745–46 (2013).

309. 490 U.S. 228 (1989).

310. *Id.* at 251.

311. *Hively v. Ivy Tech. Cmty. Coll.*, 830 F.3d 698, 704–11 (7th Cir. 2016), *rev'd en banc* 853 F.3d 339 (7th Cir. 2017) (collecting cases).

312. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 748–55 (2014).

313. *Id.* at 755–60.

314. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (internal quotations omitted).

“it necessarily involves discrimination based on gender stereotypes.”³¹⁵ Although the paradigmatic form of gender stereotyping occurred when harassers singled out effeminate gay men or masculine lesbians, it also took place when discrimination served to reinforce the notion that “real” men and women dated individuals of the opposite sex.³¹⁶ In 2017, the Seventh Circuit, in an *en banc* ruling, held that discrimination on the basis of sexual orientation constituted a form of sex discrimination.³¹⁷ The panel court’s decision had provided a comprehensive review of Title VII sexual orientation cases, concluding that there was an “odd state of affairs in the law in which Title VII protects gay, lesbian, and bisexual people, but frequently only to the extent that those plaintiffs meet society’s stereotypical norms about how gay men or lesbian women look or act.”³¹⁸ The *en banc* ruling took this juridical illogicality as its starting point, finding that the panel “described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.”³¹⁹

What this doctrinal shift demonstrates is that the assimilationist strategy, while extremely successful for securing formal rights, is nevertheless limited, and that including transgender individuals would help produce a thicker set of rights by challenging anti-LGBT assumptions and stereotypes, especially social norms about how men and women should be. As a result, protections for gays and lesbians would not be limited to those hewing to a limited vision of homonormative identity, providing a more robust approach to rights than the assimilationist strategy.³²⁰

An additional reason to promote transgender rights is that minority groups tend to fare better in societies that address the needs of its most marginalized members. Legal scholar Dean Spade articulated this

315. *Baldwin v. Foxx*, EEOC Decision No. 2012-24738-FAA-03, 2015 WL 4397641, at *7 (July 15, 2015). In 2017, the Department of Justice took the position that discrimination based on sexual orientation does not constitute sex discrimination under Title VII. Brief for the United States as Amicus Curiae at 1–2, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017). The Second Circuit nevertheless ruled that sexual orientation discrimination was a subset of sex discrimination under Title VII. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113–14 (2d Cir. 2018) (*en banc*).

316. *Baldwin*, 2015 WL 4397641, at *8.

317. *Hively*, 853 F.3d at 341.

318. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 711 (7th Cir. 2016).

319. *Hively*, 853 F.3d at 346.

320. Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 395 (2001).

concept as a trickle-up theory of social justice, explaining “social justice doesn’t trickle down . . . [but] it does trickle up.”³²¹ Accordingly, addressing the needs of a community’s more privileged members does not help those who are further down on the social ladder, while assisting those at the bottom benefits everyone else.³²² Put another way, promoting transgender rights creates a more inclusive society that inures to the benefits of all sexual minorities. However, as gay and lesbian rights have gained legal, political, and cultural ground, this argument may appear less salient to homonormative members of the LGBT community.

Beyond the issue of who benefits from movement advocacy, there are other, institutional reasons for transgender marginalization, which are connected to the demographics of the transgender community. Its small size limits transgender representation on boards, in staffing, and among volunteers.³²³ Gays and lesbians provide most of the labor for LGBT rights groups, which likely influences group decision making.³²⁴ At the same time, gays and lesbians provide the majority of funds to state and national organizations, giving them greater control over the agenda-setting process.³²⁵ The disparity in financial contributions is unsurprising, given that transgender individuals are disproportionately affected by poverty, a product of employment discrimination that renders transgender individuals three times more likely to be unemployed as cisgender (non-transgender) adults.³²⁶

The contribution disparity influences policy priorities in a number of different ways, including by reinforcing an institutional bias towards advancing issues that benefit a certain cadre of gays and lesbians. As sociologists have shown, advocacy organizations provide significantly more attention and resources to issues that primarily affect more privileged group members than they do to those that impact less

321. Barnard Ctr. for Research on Women, *Dean Spade: Trickle-Up Social Justice*, YOUTUBE (May 7, 2009), <https://www.youtube.com/watch?v=0i1fREeZXPI>.

322. *Id.*

323. Taylor & Lewis, *supra* note 294, at 118.

324. *Id.* at 118, 120. Transgender rights advocates have criticized LGBT rights organizations for failing to hire transgender individuals and make their workplaces transgender-friendly. Mananzala & Spade, *supra* note 174, at 53–54; Katrina C. Rose, *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*, 23 WM. & MARY J. WOMEN & L. 527, 605–07 (2017).

325. Taylor & Lewis, *supra* note 294, at 118, 120.

326. JAMES ET AL., *supra* note 299, at 145, 155.

privileged members.³²⁷ Although this type of research has focused on groups representing racial and ethnic minorities, women, and low-income communities, the few studies on the LGBT movement confirm this trend.³²⁸ In one empirical study, only one-third of those surveyed felt represented by mainstream movement organizations, with respondents pointing to their race, ethnicity, social class, or gender identity as the reasons for their exclusion.³²⁹

Transgender individuals are thus only one of a number of constituencies whose interests national organizations have marginalized, with legal priorities reflecting the interests of wealthier gays and lesbians.³³⁰ Upper-middle class gays and lesbians are more likely to feel that the LGBT movement represents them than their working class and middle-class counterparts, as the account of Lillian Dominguez's experience at an HRC dinner exemplifies.³³¹ Dominguez, a Latina bisexual woman who identified as middle-class, could only afford to attend the event because her partner received complimentary tickets.³³² She described it as "totally inaccessible" because "[it] was all about money. Large money, and how we can raise more money."³³³ Transgender individuals, who are disproportionately more likely to be poor,³³⁴ are likely to experience this relegation to the sidelines due to both their class and gender identity.

One oft-cited example of the national organizations' race and class biases in agenda setting was their decision to prioritize marriage equality.³³⁵ In one of the only studies of LGBT community attitudes on national advocacy organizations, the majority responded they wanted the movement to focus on marriage; however, a substantial number

327. CATHY J. COHEN, *THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS* 63–64 (1999); DARA Z. STROLOVITCH, *AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS* 8 (2007).

328. See, e.g., Kathleen E. Hull & Timothy A. Ortyl, *Same-Sex Marriage and Constituent Perceptions of the LGBT Rights Movement*, in *THE MARRYING KIND?* 67, 96–97 (Mary Bernstein & Verta Taylor eds., 2013).

329. *Id.* at 82.

330. Although there are important parallels, national organizations' treatment of transgender rights is also substantively different than how these groups failed to address the needs of economically marginalized, disabled, or gays and lesbians of color. Decisions that deprioritize transgender legal interests reflect tensions over how transgender fits within the LGBT movement itself.

331. Hull & Ortyl, *supra* note 328, at 84.

332. *Id.*

333. *Id.*

334. JAMES ET AL., *supra* note 299, at 145.

335. See, e.g., Leachman, *supra* note 144, at 60; Russell K. Robinson, *Marriage Equality & Postracialism*, 61 *UCLA L. REV.* 1010, 1038–39 (2014).

preferred expanding the categories of legally recognized families rather than opening marriage to same-sex couples.³³⁶ Marriage equality was bound in class and race politics, as those who live in non-marital families are disproportionately more likely to have lower education levels, be lower income, and be non-white.³³⁷ Marriage is no longer universal, but rather “has emerged as a marker of the new class lines” with stable unions becoming “a hallmark of privilege.”³³⁸ This is just one way that, in agenda setting, national LGBT rights groups have put the interests of a specific class of gays and lesbians at the top, leaving a number of its constituents—including transgender individuals—unrepresented.

In addition to institutional priorities are individual donor preferences, which influences how groups allocate their resources, and not all contributors support using organization funds for transgender rights. In a study of state-level LGBT rights organizations, a board member of a North Carolina-based group told political scientists, Jami Taylor and Daniel Lewis, that “our major donors are gay and many of them are ambivalent about transgender rights.”³³⁹ Notably, staff and directors typically work to counteract these objections, as professionals within LGBT rights organizations are strongly committed to transgender inclusion in their work.³⁴⁰ These donors’ views are nevertheless reflected in organizational priorities, albeit indirectly. State-level LGBT rights groups are typically only able to focus on one policy goal each legislative session; they generally choose a topic that is a priority for gays and lesbians, who are both their largest constituency and their biggest donors.³⁴¹

This is not to say that national LGBT rights groups have excluded transgender-specific rights from their litigation and lobbying agendas, which have ranged from pursuing Title VII claims on behalf of transitioning clients to securing protections for transgender inmates

336. Hull & Ortyl, *supra* note 328, at 92; *see generally* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 88–90 (2008).

337. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 445–46 (2017).

338. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014).

339. Taylor & Lewis, *supra* note 294, at 120.

340. *Id.* at 124. Indeed, many commentators on the ENDA debates complained that LGBT organizations were overly committed to transgender inclusion. *See supra* Part II.B.

341. Taylor & Lewis, *supra* note 294, at 120.

under the federal Prison Rape Elimination Act.³⁴² Additionally, national LGBT rights groups have become increasingly attentive to transgender marginalization and expanded their representation of transgender issues in recent years.³⁴³ However, there is a significant difference between arguing on behalf of a single plaintiff, or before an administrative agency, and the large-scale, media-intensive work of the anti-sodomy or marriage equality movement. This account is also not meant to diminish this important work, but rather to explain why it has been relatively sparse.

B. Strategic Exclusions

In addition to marginalizing transgender individuals when setting legal goals, national LGBT rights organizations' legal strategies have made it more difficult to attain transgender rights. This is because LGBT groups attained their legal victories through an assimilationist strategy that emphasized the ways in which gays and lesbians are like heterosexuals in all but the gender of their sexual partner.³⁴⁴ Organizations adopted this approach after other, more inclusive options failed, rendering homonormativity one of the few viable strategies for attaining rights.³⁴⁵ Homonormativity was extremely effective, and did, in fact, represent many of the organizations' constituents. However, one of its unintended consequences was to exclude transgender individuals and make them appear more deviant in the process.

In achieving legal gains, litigators had to promote a limited vision of gay and lesbian identity that emphasized love, dignity, and family, rather than liberty, equality, and rights, primarily because of the doctrinal, political, and social constraints in which they operated.³⁴⁶ As a result, they adopted this strategy even when the facts of the case did

342. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007); *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008); National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37135, 37153–55, 37182 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

343. See, e.g., *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730–31 (4th Cir. 2017) (Davis, J., concurring).

344. LISA DUGGAN, *THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 50 (2003).

345. Lisa Duggan defined homonormativity as “a politics that does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them, while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.” *Id.*

346. ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 8–12 (2005).

not match their arguments' lofty rhetoric. In 1987, the Supreme Court rejected a privacy-based Due Process challenge to Georgia's sodomy law in *Bowers v. Hardwick*,³⁴⁷ deriding the claim as "facetious" after identifying homosexuality as a matter of conduct, rather than identity. Lawyers had to litigate around *Hardwick*, which they did by reframing sexual orientation as an expression of immutable identity.³⁴⁸ Thus, when Lambda Legal argued *Lawrence v. Texas*,³⁴⁹ the group stressed that the two men arrested for violating Texas's sodomy law were engaging in a physical act like any other loving couple, despite the fact that the men were mere acquaintances.³⁵⁰ This strategy proved extremely effective; the Court's opinion overruling sodomy laws transformed gays and lesbians from people who engaged in homosexual sex to homosexual individuals, *tout court*.³⁵¹

A similar process, whereby LGBT rights groups' strategies became winnowed down to homonormativity, occurred in the context of marriage equality. Notably, although the campaigns eventually characterized marriage as a central, positive, and desirable force in American life, they did not begin this way. For more than two decades, national LGBT rights groups debated "whether same-sex marriage was a worthy normative priority for the LGBT movement," questioning the effect of bringing marriage claims precisely because of their assimilationist effects.³⁵² National groups did not bring, and in fact discouraged, the first marriage lawsuits, albeit for fear of creating negative precedent as much as ideological reasons.³⁵³ When they became involved, LGBT rights groups initially framed their messages in terms of civil rights, but their consistent losses produced research showing that heterosexual voters did not respond to these types of

347. 478 U.S. 186, 194 (1986).

348. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1640–41 (1993); Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1, 54–56 (2003).

349. 539 U.S. 558 (2003).

350. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 45 (2012); Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, NEW YORKER (Mar. 12, 2012), <https://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick>.

351. 539 U.S. 558, 567–68 (2003).

352. Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 382 (2009); see, e.g., Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 14–17; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9–13.

353. KLARMAN, *supra* note 10, at 55.

arguments.³⁵⁴ It was only then, after years and several million dollars of research, that the themes of “love, commitment, and family” came to dominate marriage equality messaging.³⁵⁵ Marriage equality litigation likewise highlighted homonormative families, emphasizing the ways in which the gay and lesbian couples were like their heterosexual counterparts, complete with children, pets, and picket fences.³⁵⁶ The opinions in the lawsuits reflected these arguments, with rulings that emphasized how the state’s denial of marriage rights imposed harms not only on the adults, but also their dependents—even in one case where the litigant did not have any.³⁵⁷

The end result was that homonormative strategies became embedded in American society, reflecting the dialectic relationship between law and social norms. The connection between the two is particularly strong in the context of LGBT rights; although there are many different constituencies that make up the LGBT movement, the largest and most well-known organizations are lawyer-led litigation groups.³⁵⁸ Moreover, LGBT rights litigation has garnered extensive media coverage.³⁵⁹ As a result, only a small segment of the gay and lesbian population—predominantly white, middle class, and gender-conforming—gained visibility, political legitimacy, and widespread social acceptance.³⁶⁰ These were the types of gays and lesbians typically represented in the media, transmitted to living rooms across the country

354. GASH, *supra* note 10, at 78; Carrie Wofford, *Why Equality is Winning: Two Factors Caused Public Opinion on Gay Rights to Shift So Quickly*, U.S. NEWS & WORLD RPT. (Mar. 26, 2014, 1:00 PM), [<https://perma.cc/4JS2-RYM2>]; Nathaniel Frank, *How Gay Marriage Finally Won at the Polls*, SLATE (Nov. 7, 2012, 2:00 AM), [<https://perma.cc/8R7M-QN4E>].

355. Frank, *supra* note 354.

356. See Bonauto, *supra* note 291, at 32–33 (describing plaintiff selection for the Massachusetts marriage equality litigation).

357. *United States v. Windsor*, 133 S.Ct. 2675, 2694 (2013); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015); *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456, 472–74 (9th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1226 (10th Cir. 2014); *Griego v. Oliver*, 316 P.3d 865, 888 (N.M. 2013); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 474–75 (Conn. 2008); *Lewis v. Harris*, 908 A.2d 196, 453 (N.J. 2006); *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 956–57 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999).

358. Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1672–73 (2014); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 677–78 (2012).

359. See Leachman, *supra* note 358, at 1672–73; NeJaime, *supra* note 358, at 689.

360. Vitulli, *supra* note 18, at 156; see also Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 L. & INEQ. 117, 123 (2012).

in weekly *Will and Grace* episodes.³⁶¹ In the campaign for marriage equality, LGBT rights groups also aired commercials that gave Americans a very specific—and narrow—vision of what it meant to fall under the rainbow flag.³⁶²

The causal relationship between the assimilationist legal strategy and social change is difficult to pinpoint with certainty, as multiple elements contributed to homonormative gays' and lesbians' growing integration into American society.³⁶³ As a logical matter, assimilationism was a pervasive legal strategy, but it also reflected the lived reality of many gays and lesbians. Likewise, the precarious place of transgender rights within LGBT advocacy reflected ambivalence among movement actors as well as external factors that limited tactical options. Legal strategies were thus one part of the larger landscape. At the same time, scholars such as Gwendolyn Leachman and Doug NeJaime have demonstrated that litigation strategies had a significant impact on popular and political support for gay and lesbian rights.³⁶⁴ Their findings indicate that the assimilationist strategy reached far beyond the courtroom walls; a reasonable inference is that the tactic contributed to American society's homonormative vision of gay and lesbian rights.

The assimilationist approach was a winning strategy in many important respects, but it also meant that Americans became significantly more comfortable with gays and lesbians than transgender individuals.³⁶⁵ Researchers have found that heterosexuals who accept gays and lesbians rights “draw the line” at transgender rights, in part because transgender individuals seem to violate fundamental social

361. KLARMAN, *supra* note 10, at 73; Kathleen Battles & Wendy Hilton-Morrow, *Nobody Wants to Watch a Beacon: Will & Grace and the Limits of Mainstream Network Television*, in 1 QUEERS IN AMERICAN POPULAR CULTURE 187, 204–05 (2010).

362. GASH, *supra* note 10, at 78; Evan Wolfson, Exec. Dir., Freedom to Marry, Keynote Address at Lavender Law Conference & Career Fair: The Scary Work of Winning (Oct. 4, 2004), [<https://perma.cc/2DN4-UG6R>] (describing the educative process of the marriage equality movement).

363. The methodological approach for doing so is also far from clear, given that legal scholars and empiricists actively debate how to measure law's impact on society. Cummings, *Empirical Studies*, *supra* note 15, at 186.

364. Leachman, *supra* note 358, at 1672–75; Douglas NeJaime, *Convincing Elites, Controlling Elites*, 54 STUD. L. POL. & SOC'Y 175, 186–87 (2011).

365. Daniel C. Lewis et al., *Degrees of Acceptance: Variation in Public Attitudes Towards Segments of the LGBT Community*, 70 POL. RES. Q. 861 (2017), [<https://perma.cc/7HVQ-55SV>]; Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 SEX ROLES 738, 749–50 (2013).

norms in a way gays and lesbians do not.³⁶⁶ Indeed, by reinforcing gender conforming gays and lesbians, whose only violation of middle class norms was in the gender of their sexual partner, transgender individuals may have appeared even more deviant than before the marriage equality effort. It is perhaps not entirely a coincidence that LGBT anti-discrimination laws began losing at the ballot box the same year that gays and lesbians won marriage equality by popular vote.³⁶⁷

Many transgender individuals simply do not meet the assimilationist norm that national groups propounded to secure gay and lesbian rights, as more than one-third of the transgender community does not fit within the neat lines that the titles “male” and “female” denote.³⁶⁸ Transgender is and has always been a multidimensional category that includes more than male-to-female and female-to-male transsexuals. Indeed, although popular understandings, discussions, and representations of transgender people are often limited to those who transition from one sex to the other,³⁶⁹ a significant part of the

366. Norton & Herek, *supra* note 365, at 750.

367. In 2012, voters in Maine, Maryland, and Washington approved ballot measures establishing same-sex marriage in their states. Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1753 (2013). Voters in Minnesota also voted down a constitutional amendment limiting marriage to opposite-sex couples in 2012, although they were not the first to vote down an anti-marriage ballot measure—Arizona citizens had that honor, in 2006. *Id.* at 1753 & n.141; Initiative & Referendum Inst., *Same-Sex Marriage: Will Voters Break the Firewall?*, BALLOTWATCH (Sept. 2012), [<https://perma.cc/33A8-XDKQ>].

368. In the most recent U.S. Transgender Survey, thirty-five percent identified as non-binary or genderqueer. JAMES ET AL., *supra* note 299, at 45.

369. Caitlyn Jenner, a former Olympic decathlon gold medalist, graced the cover of *Vanity Fair* attired in a satin, corseted bathing suit, with a classic pin-up pose reinforcing her femininity. Cover, VANITY FAIR, July 2015. *Vogue*’s article on Chelsea Manning, the army intelligence analyst best known for leaking classified information, likewise photographed her in a 1950s style swimsuit that left no question she had undergone genital surgery. Nathan Heller, *Chelsea Manning Changed the Course of History. Now She’s Focusing on Herself*, VOGUE (Aug. 10, 2017, 7:00 AM), [<https://perma.cc/W2JE-LS3Q>]. On television, *Orange Is the New Black* and *I am Jazz* both feature cast members who have either transitioned or are undergoing the process of transitioning. Debra Birnbaum, *Laverne Cox Talks “Doubt,” “Orange Is the New Black” and Making History*, VARIETY (Feb. 20, 2017, 9:28 AM PT), [<https://web.archive.org/web/20180401142111/http://variety.com/2017/tv/news/laverne-cox-doubt-orange-is-the-new-black-1201992395/>]; Dave Quinn, *Jazz Jennings Gets Real About the “Complications” Delaying Her Bottom Surgery: It’s a “Very Serious Procedure,”* PEOPLE (June 20, 2017, 11:24 AM), [<https://web.archive.org/web/20180401144254/http://people.com/tv/jazz-jennings-transgender-bottom-surgery-complications/>]. This trend may change; *Transparent* portrays a range of transgender experiences and Showtime recently introduced the first non-binary role on an American television series. Scott Collins, *Asia Kate Dillon on “Billions,” Acting and Non-Binary Choices*, VARIETY (June 6, 2017, 11:30 AM PT),

transgender community consists of those who today self-identify as genderqueer.³⁷⁰ Genderqueers either do not, or do not always, categorize themselves either male or female, although they may live consistently as one or the other.³⁷¹ Some may live one day as a woman and the next as a man, while others reject the sexual binary, identifying as between or beyond the two genders.³⁷² Genderqueers express their gender identity through non-medical transformations, such as by using cosmetics, binding their breasts, and donning wigs.³⁷³

Given the normative expectations that national LGBT rights groups have set, transgender individuals appear particularly transgressive, which may explain why they experience extremely high rates of discrimination.³⁷⁴ Half of the 27,715 transgender respondents to the U.S. Transgender Survey, the largest survey of transgender experiences in the United States, reported suffering rejection from their immediate family when they came out as transgender.³⁷⁵ Societal discrimination is rampant; harassment begins in schools, with ubiquitous verbal taunts that all too often progress to physical assaults.³⁷⁶ At work, the vast majority of transgender individuals report attempting to hide their gender identity. This is perhaps a necessary decision, given that thirty percent have suffered some type of employment discrimination for being transgender.³⁷⁷ Discrimination, combined with a lack of social support, explains why almost one-third of transgender individuals live in poverty, a rate that is more than twice the national average.³⁷⁸ Those within the LGBT community recognize that American society is much

[<https://web.archive.org/web/20180401144955/http://variety.com/2017/tv/awards/asia-kate-dillon-billions-acting-non-binary-choices-showtime-1202454977/>]; Ali Liebegott, “Can A TV Show Save Lives?,” ATLANTIC (Sept. 28, 2014), [<https://perma.cc/MVG4-JMET>].

370. Sonia K. Katyal, *The Numerous Clausus of Sex*, 84 U. CHI. L. REV. 389, 422 (2017); Shawn Thomas Meerkamper, Note, *Contesting Sex Classification: The Need for Genderqueers as a Cognizable Class*, 12 DUKEMINIER AWARDS J. 1, 4 (2013); Julia C. Oparah, *Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN’S L.J. 239, 240 (2012).

371. JAMES ET AL., *supra* note 299, at 47; Meerkamper, *supra* note 370, at 4.

372. JAMES ET AL., *supra* note 299, at 47; Meerkamper, *supra* note 370, at 4.

373. Katyal, *supra* note 370, at 410, 421.

374. JAMES ET AL., *supra* note 299.

375. *Id.* at 4, 21, 65.

376. Fifty-four percent reported being verbally harassed as K–12 students; twenty-four percent were physically attacked. *Id.* at 131.

377. *Id.* at 148.

378. *Id.* at 140.

more accepting of gays, lesbians, and bisexuals than transgender individuals, a disconnect that LGBT rights opponents have captured.³⁷⁹

National LGBT organizations' legal strategies have compounded, or at least not helped to resolve, the demographic problem behind transgender rights advocacy. Americans are much more likely to know gays and lesbians than transgender individuals, and personal contact influences support for legal rights.³⁸⁰ Gays and lesbians constitute approximately 3.5 percent of the population, while transgender individuals make up 0.6 percent of Americans.³⁸¹ As a result, although almost ninety percent adults in the United States report knowing someone who is gay or lesbian, only thirty percent know a transgender person.³⁸² That percentage drops significantly for older Americans and those who are religiously affiliated.³⁸³ Given that transgender individuals appear to be so different than gays or lesbians, the good will associated with knowing the latter does not translate to the former; in ballot measures, unfamiliarity seems to have bred contempt, or at least an unwillingness to protect transgender rights.³⁸⁴

The assimilationist strategy has contributed to a growing divide between gay and lesbian rights on the one hand, and transgender rights on the other, but it is not clear that organizations could have anticipated this particular consequence—or whether they should have changed their strategies if they had. Between 1998 and 2011, citizens in all of the thirty-two states that voted on marriage equality rejected it, demonstrating a deep antagonism to the rights project.³⁸⁵ Given this context, it seems unlikely that anyone involved in the marriage equality movement anticipated the degree to which assimilationist arguments

379. *A Survey of LGBT Americans*, PEW RES. CTR. (2013), [<https://perma.cc/EWK8-9A7S>].

380. David Broockman & Joshua Kalla, *Durably Reducing Transphobia: A Field Experiment on Door-to-Door Canvassing*, 352 SCI. 220 (2016).

381. ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016), [<https://perma.cc/7U68-ENNY>]; GARY J. GATES, LGBT DEMOGRAPHICS: COMPARISONS AMONG POPULATION-BASED SURVEYS 4 (2014), [<https://perma.cc/S7P4-9RK6>].

382. *Vast Majority of Americans Know Someone Who Is Gay, Fewer Know Someone Who Is Transgender*, PEW RES. CTR. (Sept. 28, 2016), [<https://perma.cc/8ZWY-W5LR>].

383. *Id.*

384. Jay Barth et al., *Community Context, Personal Contact, and Support for an Anti-Gay Rights Referendum*, 62 POL. RES. Q. 355 (2009). Many Americans distinguish between sexual orientation and gender identity anti-discrimination protections, and are more likely to support the former than the latter. Lewis et al., *supra* note 365, at 871.

385. *Ballot Measures Have Historical Results on Same-Sex Marriage and Legal Marijuana*, PBS (Nov. 7, 2012, 1:28 AM), [<https://perma.cc/F87P-FYQH>].

would convince skeptics, let alone how quickly the movement's fortunes would turn. It is true that social movement lawyers are conscious that their wins are often eroded through backlash and counter-mobilization, and thus consider the different ways in which opponents will respond to their victories.³⁸⁶ Practitioners and scholars warned of the possible harms of assimilationist arguments, including the ways in which it silenced diverse voices and rejected transgression in favor of conformity.³⁸⁷ However, knowing this is not the same as predicting anti-transgender legal mobilization, arguments, and rhetoric. Lawyers may have anticipated attacks on members of the LGBT community who did not fit the assimilationist narrative, but may not have known in what form it could take.

Additionally, it seems clear that lawyers could not have attained their legal goals using other strategies. Consequently, the ethical dilemma for national LGBT rights groups was whether to pursue their goals—and those of individual clients—at the potential cost to others in the movement.³⁸⁸ Whether lawyers carefully considered the options and their costs is beyond the scope of this Article, which focuses on the consequences of the strategic decisions. Nevertheless, this ethical question is important to raise, as this situation is not the only instance in which national LGBT organizations have promoted the rights of one sub-group at the cost of another, and is particularly fraught given the history of transgender marginalization within the broader movement.³⁸⁹ There is no easy answer to the question of how to balance movement interests, only to recognize the perils of any social justice efforts, where reform is unstable and successes often transform into the next battlefield.

Legal victories have reshaped themselves into a paradox, with the agendas and strategies of national LGBT rights groups contributing to the current situation. Although the LGBT movement identify gay, lesbian, and transgender rights as connected, many members of the American public are willing to support the former but not the latter.

386. Cummings, *Empirical Studies*, *supra* note 15, at 190–91.

387. See, e.g., Ettelbrick, *supra* note 352; Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309 (2005).

388. Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2113–14 (2014).

389. See, e.g., Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1335 (2011).

IV. STRATEGIC REALIGNMENTS

Advocates need to affirmatively address transgender rights to resolve the LGBT disconnect and prevent voters from repealing anti-discrimination laws at the ballot box. This Part discusses the options available, which include abandoning transgender rights from their mandate, pursuing an assimilationist transgender rights strategy, and/or transforming their tactics to emphasize all LGBT individuals' gender non-conformity. These categories of choices—abandonment, assimilation, and transformation—parallel decisions other rights movements have made, such that it is possible to identify a broader taxonomy of social movement mobilization. Some of these strategies can operate simultaneously, providing different solutions depending on the legal context.

A. Abandonment

One possibility is for national LGBT rights organizations to abandon their representation of transgender individuals, thereby disaggregating gay and lesbian rights from their transgender counterpart. Commentators have called for the coalition's dissolution for years, claiming that LG and T rights are different as both a conceptual and practical matter.³⁹⁰ More recently, these demands have focused on national LGBT rights groups' efforts to secure transgender bathroom access rights, using these legal battles to emphasize that the identity categories have distinct legal issues to address.³⁹¹ At the same time, by highlighting the amount of time and capital that bathroom rhetoric consumes, these commentators imply that LGBT rights groups are ignoring their gay and lesbian constituents.

Many social movements have fractured, since coalitions often become unsustainable over time.³⁹² Sometimes this happens because a portion of the group gains rights while others remain excluded; this occurred in the nineteenth century, when some female members of the

390. Aravosis, *supra* note 272; Sullivan, *supra* note 273.

391. Joseph R. Murray II, *Gay, Transgender Movements Need a Divorce*, USA TODAY (Feb. 28, 2016, 3:06 PM ET), [<https://perma.cc/CQ2F-EJET>]; *see also* Walt Heyer, *Drop the T from LGBT*, FEDERALIST (Apr. 21, 2016), [<https://perma.cc/B5CL-HXUH>].

392. This is also true of political movements, which subdivide, as well as religious groups, which splinter over doctrinal interpretation. *See, e.g.*, JAMES C. BURKEE, *POWER, POLITICS, AND THE MISSOURI SYNOD: A CONFLICT THAT CHANGED AMERICAN CHRISTIANITY* (2011); Alan I. Abramowitz, *Grand Old Tea Party: Partisan Polarization and the Rise of the Tea Party Movement*, in *STEEP: THE PRECIPITOUS RISE OF THE TEA PARTY* 195, 205, 209 (Lawrence Rosenthal & Christine Trost eds., 2012).

suffrage movement opposed the Fifteenth Amendment because it enfranchised African-American men, but did not give women the right to vote.³⁹³ Additionally, social movements have expelled their more radical members because those individuals imposed costs that were too high for the larger movement to bear. In the 1950s, for example, the NAACP avowed that it was “unequivocally” anti-Communist, and attempted to purge local chapters that had ties to Communism, after spending years challenging the Red-baiting that hampered its work.³⁹⁴ Alternatively, advocates working on more contested rights issues may prefer to work outside of mainstream rights organizations, such that more conservative or liberal members may splinter or abandon the main movement. In 1992, the director of the ACLU’s Reproductive Rights Project left to form the Center for Reproductive Rights, which quickly became the leading pro-choice litigation group.³⁹⁵

These historical examples of social movement fracture demonstrate that separation is not anomalous, nor is it necessarily harmful for the groups that divide. However, since there are more gays and lesbians than transgender individuals, and gays and lesbians as a whole have greater social, political, and financial resources, disaggregation would effectively mean abandoning transgender, rather than merely separating.³⁹⁶ Additionally, since gay and lesbian rights groups affirmatively expanded to include transgender individuals, abandonment has a qualitatively different cast than in might in other situations.

Abandoning transgender may have short-term benefits for gays and lesbians, including by making it easier to secure anti-discrimination laws, but it also has important limitations. It is based on the notion that the assimilationist strategy that has secured rights will continue to do so, and that this is the best approach going forward. However, as discussed above, the assimilationist strategy has in many ways produced a thin set of rights, where gays and lesbians who fail to conform to gender norms continue to be discriminated against. Excising transgender rights may entrench current goals and strategies, even

393. ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848–1869*, at 163 (1978).

394. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 220 (2007).

395. Karen O’Connor & Alixandra B. Yanus, *Where Have All the Pro-Choice Lawyers Gone? An Analysis of Post-Roe Reproductive Rights Lawyering*, 29 L. & POL’Y 368, 373 (2007).

396. This does not mean that transgender rights advocates are only organized within the LGBT rights movement; quite the opposite. There are a number of transgender-specific rights groups that address issues that national LGBT rights organizations do not, such as the Sylvia River Law Project, Transcend Legal, Transgender Legal Defense and Education Fund, and Trans United.

though it has marginalized the needs of gender non-conforming gays and lesbians, as well as those who are low-income and racial minorities. As a result, basing disaggregation on current opposition to transgender deviance may have long-term, harmful consequences that are impossible to foresee.³⁹⁷

Additionally, abandonment assumes that individuals fit into the categories of LG or T, but there are many points of overlap between the identities, as all three are capacious categories that not only have porous boundaries, but multifaceted members that connect across identity lines.³⁹⁸ Some individuals identify as both transgender as well as gay, lesbian, or bisexual.³⁹⁹ Circumstances may also give rise to cross-identifications. For example, a butch lesbian who is required to meet feminine grooming standards at work may have a great deal in common with a transgender individual who cannot wear clothing appropriate to their gender identity at school.⁴⁰⁰ A gender conforming gay man's experiences in prison may be similar to those of an incarcerated transgender individual.⁴⁰¹ A masculine-appearing lesbian who is asked to leave a restroom because she is mistaken for a man seems to share more, in that moment, with a transgender person than a feminine-appearing lesbian.⁴⁰² A gay cross-dresser may sometimes identify closely with transgender individuals. A lesbian leather-fetishist may feel she faces similar social opprobrium as a genderqueer individual, both of whom feel much more stigmatized than a gay father of two.⁴⁰³ Given that the categories can be expansive, with experiences of gender and sexual non-conformity that bind lesbians, gays, and

397. Cf. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 39–40 (2012) (describing black support for mandatory minimum sentences for drug offenses in the 1980s, which contributed to the contemporary problem of mass incarceration).

398. See, e.g., Robinson, *supra* note 389, at 1335 (discussing how race and class influences individuals' sexual identity).

399. JAMES ET AL., *supra* note 299, at 59.

400. Gender-specific grooming codes do not constitute sex discrimination. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

401. Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011).

402. Rachel Vorona Cote, *Police Refuse to Believe Lesbian Is a Woman, Force Her Out of Bathroom*, JEZEBEL (Apr. 28, 2016, 11:00 PM), [<https://web.archive.org/web/20180331191328/https://jezebel.com/police-refuse-to-believe-lesbian-is-a-woman-force-her-1773733431>]. See also Alison Bechdel, *Perils of a Midtown Dyke: A True and Cautionary Tale*, in DYKES TO WATCH OUT FOR 10 (1986).

403. See Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 115–16 (2014).

transgender individuals, disaggregation may only be a useful solution for a limited set of rights claims and arguments.

Moreover, abandonment assumes that opposition to transgender rights will continue, unabated, for the foreseeable future. LGBT rights opponents have rallied against transgender rights, but targets shift regularly in America's social, cultural, and political wars. The rhetoric that once applied to gays and lesbians, and is now being used against transgender individuals, may transfer again onto another category of outliers. Americans are responding to transgender individuals and rights differently; while voters have rescinded transgender rights protections across the country, residents of Virginia's Thirteenth District elected Danica Roem to their House of Delegates in November 2017, making her one of the first openly transgender elected officials.⁴⁰⁴ Abandonment implies that transgender rights are on a downward trajectory across the country, when there is variation and fluctuation.

Finally, although abandonment is an option, it may not be the optimal one given the life cycle of LGBT rights groups. That is, abandonment appears to be a course of action for relatively weak organizations, and signals a lack of resources—financial, political, and social—to continue on the current course. The groups that have elected abandonment, like gay and lesbian rights organizations did to transvestite interests decades ago, or the NAACP to communists, seems to be a decision that less established social movements adopt.⁴⁰⁵ Abandonment may be counterproductive for gay and lesbian rights, as transgender rights opponents would likely understand abandonment as a retreat from LGBT rights organizations' claimed ethos of inclusion, equality, and liberty, and as such would be emboldened. At the same time, abandonment may create potentially paralyzing internal dissent. Members of the LGBT movement have been working towards intersectionality, and as such separating LG from T would deny the complicated identities within the movement, and appear to reinforce the homonormative vision that many gays and lesbians reject. Thus, while abandonment has practical appeal for some, it would repulse others.

404. Antonio Olivio, *Danica Roem of Virginia to be First Openly Transgender Person Elected, Seated in a U.S. Statehouse*, WASH. POST (Nov. 8, 2017), https://www.washingtonpost.com/local/virginia-politics/danica-roem-will-be-vas-first-openly-transgender-elected-official-after-unseating-conservative-robert-g-marshall-in-house-race/2017/11/07/d534bdde-c0af-11e7-959c-fe2b598d8c00_story.html?utm_term=.6737daad987a.

405. See *supra* note 115 and accompanying text.

B. Assimilation

A second option would be for national LGBT rights organizations to continue on their current path, but to prioritize transgender rights advocacy within its legal agenda. Their current transgender rights approach has been an assimilationist strategy that mirrors its tactics for gay and lesbian rights. That is, groups have emphasized the ways in which transgender men and women are like their cisgender counterparts. If the gay and lesbian version is a homonormative approach, then the transgender one could best be called “transnormative.”

Assimilationist strategies provide useful inroads for social movements, appealing to mainstream values so as to minimize how movement claims destabilize dominant paradigms. Sometimes this tactic has been a matter of physical presentation, as in the case of homophile picketers, who followed strict dress codes, including ties for men and dresses for women, to emphasize their conformity to gender norms when demanding rights for gays and lesbians.⁴⁰⁶ In doing so, they followed the lead of the Civil Rights movement’s lunch counter sit-in protestors, who wore suits and dresses as they integrated public spaces.⁴⁰⁷ The assimilationist imperative can also limit group membership; Betty Friedan, the founder of the National Organization for Women, termed lesbians a “lavender menace” because she believed they would alienate mainstream society from feminism.⁴⁰⁸

In many instances, assimilationist strategies are akin to pursuing a measured course of action, but what is moderate for a movement may change over time. In the 1940s, the NAACP struggled to find plaintiffs willing to integrate facilities; the assimilationist remedy for Jim Crow was to equalize facilities, while integration was a radical option.⁴⁰⁹ By the 1960s, Black Power’s calls for political self-determination, economic independence, racial pride, social autonomy, armed self-defense, and Black nationalism made the Civil Rights movement’s non-

406. MARC STEIN, *CITY OF SISTERLY AND BROTHERLY LOVES: LESBIAN AND GAY PHILADELPHIA, 1945–1972*, at 248 (2000).

407. Sascha Cohen, *Why the Woolworth’s Sit-in Worked*, TIME (Feb. 2, 2015), [<https://web.archive.org/web/20180401152542/http://time.com/3691383/woolworths-sit-in-history/>].

408. ROSEMARIE TONG, *FEMINIST THOUGHT: A MORE COMPREHENSIVE INTRODUCTION* 26 (4th ed. 2014).

409. MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 108–09 (1987).

violent protests seem much more restrained.⁴¹⁰ Additionally, assimilationist arguments can be used in conjunction with other claims. The suffrage movement included equality-based and maternalist arguments, which were claims that women needed the vote because they had special interests as wives and mothers.⁴¹¹

Assimilationist strategies are a particular kind of tactic, in which rights claims depend on individuals conforming to middle-class norms and values. Although social movements have to make their claims intelligible, they can do so in ways that are not assimilationist or identity-based. For example, in the late 1980s, AIDS advocates convinced the Food and Drug Administration to offer parallel clinical trials for promising new drug treatments.⁴¹² The winning arguments were based on scientific principles and the mounting death toll, not the victims' personal characteristics.⁴¹³ Likewise, lawyers challenging prison conditions in the 1970s did not focus on the prisoners themselves, who violated middle class norms by virtue of their criminal convictions. Instead, these advocates' efforts emphasized correctional officers' failure to abide by constitutional requirements and the prisons' own regulations.⁴¹⁴ Thus, appeals to accepted principles and assimilationist arguments are not synonyms.

Despite these alternative strategic options, assimilationist arguments are ubiquitous, and LGBT rights organizations have secured many—if not most—of their victories on behalf of gays and lesbians through assimilationist claims. It is therefore not surprising that, the first time an LGBT rights campaign faced the new bathroom rhetoric in Anchorage in 2012, it adopted a transnormative approach. That campaign, One Anchorage, answered its opponent's cartoon ads with

410. ROBERT O. SELF, *AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND* 219–20, 225–27 (2003); Hasan Kwame Jeffries, *What's Old is New Again: Recentring Black Power and Decentering Civil Rights*, 1 J. CIV. & HUM. RTS. 245, 246 (2015).

411. Miriam Cohen, *Women and the Progressive Movement*, HISTORY NOW, <https://www.gilderlehrman.org/history-by-era/politics-reform/essays/women-and-progressive-movement>.

412. STEVEN EPSTEIN, *IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE* 236–40 (1996).

413. *Id.*

414. HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY* 24–25 (2016); Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 L. & SOC'Y REV. 731, 738 (2010).

its own video featuring transgender activist Drew Phoenix (fig. 5).⁴¹⁵ Phoenix explained to viewers that he was born female, but had lived “fully as a man for many years” and that it was “offensive when people like me are portrayed as a cartoon or worse yet, as someone to be feared.”⁴¹⁶ What ended up being remarkable about the One Anchorage campaign was that it addressed the bathroom issue at all, as later pro-LGBT rights groups avoided it entirely, and minimized anti-discrimination laws’ gender identity protections.⁴¹⁷ In the Houston campaign in 2015, for example, LGBT rights groups aired two commercials that mentioned a range of characteristics the law protected.⁴¹⁸ Neither ad included gender identity.



Fig. 5: Anchorage, 2012

The transnormative strategy is also how the ACLU approached its challenge to North Carolina’s H.B. 2.⁴¹⁹ In that litigation, the ACLU

415. OneAnchorage, *Yes on Proposition 5—One Anchorage | Anchorage Municipal Election | Real Faces—Drew*, YOUTUBE (Mar. 28, 2012), https://www.youtube.com/watch?v=BKGwPQmC_tc.

416. *Id.*

417. Dan Durning, *The Defeat of Fayetteville’s Ordinance Prohibiting Anti-LGBT Discrimination: Was it Fair to Have Polling Places in Churches?*, ECLECTIC (AT BEST) (Mar. 5, 2015), [<https://perma.cc/N97F-ELDA>]; Dominic Holden, *After Winning Marriage, the LGBT Movement Faces an Unexpectedly Tough Battle in Houston*, BUZZFEED NEWS (Nov. 2, 2015, 5:26 PM), [<https://perma.cc/762A-TTGY>]; Holden, *supra* note 50.

418. *Breaking: Latest Ad Buy of the YES on Prop 1 Campaign is Live, Highlighting the Diversity of Houstonians Protected Under HERO*, HOUS. UNITES (Oct. 27, 2015), [<https://perma.cc/BP77-YE72>]; *Faith Leaders Take a Stand for HERO in Campaign’s First TV Ad*, HOUSTON UNITES (Sept. 24, 2015), [<https://perma.cc/JLP6-WKEB>].

419. Brief of Plaintiffs-Appellants, *Carcaño v. McCrory*, No. 1:16-cv-00236-TDS-JEP (4th Cir. 2016) (No. 16-1989).

selected conventionally attractive plaintiffs who had all but fully transitioned,⁴²⁰ reinforcing their argument that transgender men are men and transgender women are women by including photographs of the plaintiffs in its appellate brief (one is reproduced as fig. 6).⁴²¹ This visual evidence draws upon expectations of what men and women look like, as well as who belongs in which sex-segregated facility. Thus, when the ACLU explained that “although Mr. Carcaño and Mr. McGarry are men, they are barred from men’s facilities,” it was difficult to imagine them using the women’s restroom.⁴²²



Fig. 6: ACLU appellate brief, 2016

Popular protests of H.B. 2 also adopted a transnormative approach, with transgender men and women emphasizing how incongruous their presence would be in the restroom of their biological sex.⁴²³ One tweet, from James Parker Sheffield, a thirty-six-year-old transgender man, to North Carolina’s Governor Pat McCrory, went viral.⁴²⁴ It featured an image of Sheffield, bearded and stern-faced, with

420. The law did not apply to post-operative transgender individuals who had changed the gender designation on their birth certificates. *Carcaño v. McCrory*, F. Supp. 3d 615, 644 (M.D.N.C. 2016).

421. Brief of Plaintiffs-Appellants, *Carcaño v. McCrory*, at 1, 5.

422. *Id.* at 21.

423. Alex Mierjeski, *Trans People Are Destroying North Carolina’s New Anti-Trans Bill on Twitter*, ATTN: (Mar. 24, 2016), [<https://perma.cc/59R9-CHY6>].

424. Curtis M. Wong, *Trans Man Demolishes NC Gov’s Insanely Bigoted Logic with Just One Tweet*, HUFFINGTON POST (Mar. 23, 2016, 12:10 PM ET), [<https://perma.cc/U76V-8D7B>].

the line “It’s now the law for me to share a restroom with your wife.”⁴²⁵

The transnormative strategy is effective in highlighting the absurdity of the bathroom laws, but it is nevertheless extremely problematic.⁴²⁶ First, this approach ignores the substantial percentage of the transgender community who are genderqueer, and whose presence in sex-segregated facilities does not create the same cognitive dissonance as male-to-female (MTF) or female-to-male (FTM) transgender individuals. Access to restrooms, locker rooms, or similar spaces should not depend on anyone’s ability to pass as male or female.⁴²⁷ By reinforcing the gender binary,⁴²⁸ the transnormative strategy renders the presence of genderqueers more fraught, making sex-segregated spaces more dangerous for those who do not read as male or female. In short, the assimilationist approach makes it more difficult to be genderqueer in a cisgender world.

Second, the transnormative strategy reinforces a legal hierarchy between genderqueer and transsexual individuals. The legal system generally ignores genderqueers, bestowing rights on transgender individuals based on a medical model.⁴²⁹ Evidence of sex reassignment surgery is required to modify the gender listed on many government identity documents, particularly birth certificates, which determines which facility a transgender person must use under bathroom laws like North Carolina’s H.B. 2.⁴³⁰ Prison housing assignments for transgender individuals overwhelmingly depends on whether they have had genital

425. James Parker Sheffield (@JayShef), TWITTER (Mar. 23, 2016, 8:37 PM), [<https://perma.cc/L6PC-QG3M>].

426. See Adler, *supra* note 167, at 606–09.

427. Transgender individuals frequently avoid using public restrooms for fear of being verbally or physically harassed, to the point of limiting the amount of food or drink they consume. JAMES ET AL., *supra* note 299, at 225.

428. This appears to cut against sex equality jurisprudence, which has moved to limit sex stereotyping. However, as Kimberly Yuracko notes, employment discrimination case law is “something of a muddle” with respect to “garden-variety gender benders” who “object to some but not all of the conventions associated with their biological sex.” KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* 6 (2016).

429. Katyal, *supra* note 370, at 410. The medical model itself is limited and does not adequately protect those who fall under its ambit. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & C.R. L. REV. 651, 664–65 (2009).

430. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 627 (M.D.N.C. 2016); Jonathan L. Koenig, Note, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 634–35 (2011); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 771 (2008).

surgery, despite federal regulations to the contrary.⁴³¹ As a result, transgender prisoners are substantially more likely to be sexually assaulted while incarcerated.⁴³² In the employment context, gender variants who are not planning to transition often find themselves unable to recover under Title VII.⁴³³ Transsexual has thus become the legal standard by which transgender is judged, even though the former is a subset of the latter, and gender dysphoria and gender non-conformity are not synonyms.⁴³⁴

Finally, the transnormative approach undermines transgender as an identity category. Transgender emerged in the early 1990s to encompass all kinds of gender variance, replacing the earlier model that had circumscribed individuals to transsexuals and transvestites. Thus, although scholars have criticized the LGBT movement's assimilationist model for its homogenizing effect on gays and lesbians, the transnormative strategy is even more detrimental for transgender individuals.⁴³⁵ Reducing the category to MTFs and FTMs does violence to the very concept of transgender. Indeed, the recent effort to expand LGBT to LGBTQ, which is often done to explicitly recognize genderqueer, is a testament to how narrow the transgender category has become.⁴³⁶

The transnormative strategy has clear costs, but is often a viable strategy to entrench a legal movement. In this way, transgender rights advocacy is similarly situated to the gay and lesbian rights movement of

431. Janei Au, Comment, *A Remedy for Male-to-Female Transgender Inmates: Applying Disparate Impact to Prison Placement*, 24 AM. U. J. GENDER SOC. POL'Y & L. 371, 375–76 (2016); *Does a Policy that Houses Transgender or Intersex Inmates Based Exclusively on External Genital Anatomy Violate Standard 115.42(c) & (e)?*, NAT'L PREA RES. CTR. (Mar. 24, 2006), [https://perma.cc/628B-PDQR].

432. Oparah, *supra* note 370, at 261–63.

433. Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399, 401, 404, 420 (2012).

434. See Katyal, *supra* note 370, at 422; Oparah, *supra* note 370, at 246. This differential treatment exacerbates the problem of class- and race-based access to resources within the transgender community. Oparah, *supra* note 370, at 246.

435. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 59–61, 79–80 (2000); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414–15 (2004); Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 45–47 (2011).

436. Rebecca Isaacs, *Why We're Adding the Q to LGBT*, HUFFINGTON POST (Nov. 11, 2015, 11:06 PM ET), [https://perma.cc/9C77-KSDB]. Thus, although including Q is a move towards inclusion, it simultaneously reduces T to transsexual, which transgender rights advocates have always resisted. Q can also mean questioning or queer more broadly defined to reference anyone not heterosexual. Lori Grisham, *What Does the Q in LGBTQ Stand For?*, USA TODAY (June 1, 2015, 2:00 AM ET), [https://perma.cc/3PPR-79KZ].

the 1980s, which debated whether to pursue a politics of sameness or difference, and ultimately adopted assimilationist tactics.⁴³⁷ By securing rights for binary transgender people, LGBT rights groups could then build towards protections for non-binary individuals. At the same time, assimilationist and other strategies are not mutually exclusive. The Civil Rights movement's push for equality and Black Power's call for liberty coexisted.⁴³⁸ Likewise, Second Wave feminists simultaneously sought solutions for women's rights through formal equality, substantive equity, and radical feminist anti-subordination approaches.⁴³⁹ What these historical examples show is that transnormativity may be a beneficial strategy in certain circumstances, but that LGBT rights advocates could combine it with other approaches.

C. Transformation

A third option would be to more fully integrate the LGBT rights movement by emphasizing the ways in which gays, lesbians, and transgender individuals are connected through their gender non-conformity. That is, national LGBT rights groups would return to the reasons the movement originally coalesced, using this basis for its organizing. This would require advocates to highlight the modes around which its members defy gender and sexual norms, rather than trying to erase them. The benefit of this shift is that, instead of trying to analogize transgender individuals to cisgender people, as in transnormativity, LGBT rights groups could compare transgender individuals to gays and lesbians. The gulf between genderqueer and cisgender seems much wider than between a genderqueer individual and a gay man or lesbian; this strategy could thus help make transgender individuals legible to judges, legislators, administrative officials, and the voting public to secure their rights without adopting an assimilationist framework. Ultimately, this approach would transform both national LGBT organizations' strategies and American society.

437. Zachary Herz, *The Marrying Kind*, 83 TENN. L. REV. 83, 153–54 (2015).

438. ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND 219–20, 225–27 (2003); Hasan Kwame Jeffries, *What's Old is New Again: Recentring Black Power and Decentering Civil Rights*, 1 J. CIV. & HUM. RTS. 245, 246–47 (2015).

439. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 308–09 (1995); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 804 (1990); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 1 (1992).

Many movements transform over time, changing both their tactics and goals. Sometimes this was a response to external forces, with movements becoming more radical in the face of political apathy or antagonism. Suffragists' progress was slow until they adopted more militant strategies, including picketing and parades,⁴⁴⁰ while sit-down strikes reinvigorated the beleaguered labor movement of the 1930s and secured the passage of the National Labor Relations Act.⁴⁴¹ Others transformed as a result of internal politics, which reshaped the priorities and outlook of the movement. Radical feminists' emphasis on women's sexuality, for example, made this topic a central focus of Second Wave feminism.⁴⁴² Likewise, the Religious Right transformed abortion politics in the late 1970s, helping to polarize the debate by marginalizing the moderate groups that had worked with feminists to support employment protections for pregnant women, government funding for day care centers, and federal child healthcare initiatives.⁴⁴³ Transformation can thus be radicalizing in both liberal and conservative directions, or it can simply be a matter of adopting a different approach.

For the LGBT movement, transformation would do more than just benefit transgender individuals; it would also expand the movement for those who do not currently fit within the current homonormative model. Those gays and lesbians who have been excluded from national rights groups' homonormative vision include individuals who do not want monogamous relationships, nuclear family structures, or conventional sex; find so-called respectable behavior confining and false, choosing instead the liberation of camp, cross-dressing and confrontation; and question the neoliberal assumptions that do not reflect the lived reality of the working poor or people of color.⁴⁴⁴ Organizational projects could

440. Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, 24 J.L. & POL. 339, 367–68, 410–16 (2008).

441. Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 L. & HIST. REV. 45, 104–07 (2006); Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 16–24 (2010).

442. JANE GERHARD, *DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT, 1920 TO 1982*, at 3–5, 102–03, 152 (2001).

443. MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 193–96*, 201–03 (2015).

444. LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 162 (2006); JOSÉ ESTEBAN MUÑOZ, *DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS* x–xii (1999); ERIN J. RAND, *RECLAIMING QUEER: ACTIVIST AND ACADEMIC RHETORICS OF RESISTANCE* 17–18

range from defending sexual privacy to protecting alternative family structures, as well as to moving away from the medical model for transgender rights and challenging unnecessary gender-based designations.⁴⁴⁵

There is reason to think that this strategy, which advocates never had the chance to explore previously, will work today, given generational changes in perspectives on gender. There is more documentation and awareness of gender fluidity today than ever before, a trend that is likely to continue since younger generations express more tolerance and acceptance of sexual and gender non-conformity than their older counterparts.⁴⁴⁶ Indeed, millennials are twice as likely as other age groups to identify as LGBT.⁴⁴⁷ Major social institutions reinforce the view of gender and sexuality as a spectrum. Facebook offers fifty pre-populated gender identity options and a custom field for users to better express their identities.⁴⁴⁸ The popular online dating site OkCupid likewise provides users over twenty gender identity terms to choose from, as well as more than a dozen ways to describe their sexual orientation.⁴⁴⁹

(2014); Jeffrey Escoffier & Allan Bérubé, *Queer/Nation*, 11 OUT/LOOK 12, 13–14 (1991).

445. See David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1054–61 (2002) (arguing gender designations on identification documents are unnecessary); Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 807 (2015) (discussing widespread bias against non-marital families); Kaplan, *supra* note 404, at 115–25 (detailing the criminalization of BDSM practices); Koenig, *supra* note 430, at 644 (identifying the limits of the medical model); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1239 (2016) (noting legal order's retreat from protecting alternative family structures); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 591–97 (2016) (describing state regulation of the private sexual conduct of military personnel and public employees). This would align with efforts to expand Title VII protections cisgender workers challenging sex-based grooming codes. YURACKO, *supra* note 428, at 139.

446. See *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), [<https://perma.cc/VY9Z-V56U>]; *Vast Majority of Americans Know Someone Who Is Gay*, *supra* note 382.

447. Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, GALLUP (Jan. 11, 2017), [<https://web.archive.org/web/20180331194709/http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx>].

448. *Facebook Diversity*, FACEBOOK (Feb. 26, 2015), [<https://perma.cc/4QYG-PUJN>]; *Facebook Expands Gender Options: Transgender Activists Hail “Big Advance,”* GUARDIAN (Feb. 14, 2014, 3:45 EST), [<https://perma.cc/TQU2-J5UK>].

449. *Identity*, OKCUPID (2017), [<https://perma.cc/6DU8-JSXB>]; Curtis M. Wong, *OKCupid Begins Rolling Out New Gender, Sexuality Options*, HUFFINGTON POST (Dec. 6, 2017), [<https://perma.cc/Z9YM-GFB3>].

Recent media reports on transgender children, while often alarmist, have helped connect the dots between lesbian, gay, and transgender identity.⁴⁵⁰ It is clear that adolescents who identify as transgender should have their gender identity affirmed, as gender dysphoria at this age typically persists into adulthood.⁴⁵¹ Treatment for these adolescents includes medical interventions, such as hormone suppressants to delay the onset of puberty, as well as social affirmations of gender identity.⁴⁵² However, studies have shown that gender dysphoria in childhood often does *not* continue through adolescence.⁴⁵³ In longitudinal studies of children treated in clinics for gender dysphoria, only 6–23% of pre-adolescent boys, and 12–27% of girls, later identified as transgender adults.⁴⁵⁴ Most of the other children later identified as gay or lesbian.⁴⁵⁵ These children's experiences highlight how lesbian, gay, and transgender identity may exist on a spectrum, connected by gender roles.

Thus, this may be the right time for LGBT rights groups to stress the connections between the identity categories and reshape their strategies. In terms of ballot measure campaigns, this would change LGBT rights groups' approach in several ways. Rather than highlighting the laws' general application, the campaigns would need to focus on their sexual orientation protections. Those arguments would emphasize that gays and lesbians are discriminated against as much for their transgression of social norms as for their sexual orientation.⁴⁵⁶

450. Kristina Olson & Lily Durwood, *Are Parents Rushing to Turn Their Boys Into Girls?*, SLATE: OUTWARD (Jan. 14, 2016, 4:40 PM), [<https://perma.cc/UG7K-4QJS>]; Debra W. Soh, *The Transgender Battle Line: Childhood*, WALL ST. J. (Jan. 4, 2016, 7:13 PM ET), [<https://perma.cc/5UBX-S6NH>]; Eric Vilain & J. Michael Bailey, *What Should You Do If Your Son Says He's a Girl?*, L.A. TIMES (May 21, 2015, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-vilain-transgender-parents-20150521-story.html>.

451. Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 842 (2015).

452. *Id.* at 842, 846.

453. *Id.* at 841–42; E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, reprinted in 13 INT'L J. TRANSGENDERISM 165, 172 (2011); Jack Drescher & Jack Pula, *Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children*, in LGBT BIOETHICS: VISIBILITY, DISPARITIES, AND DIALOGUE S17 (2014).

454. Drescher & Pula, *supra* note 453, at S17.

455. *Id.* at S18; E. Coleman et al., *supra* note 453, at 172.

456. In 2013, when the New York Times noted that “[t]he big wins of the L.G.B.T. movement have been for lesbians, gays and bisexuals, more than for trans people,” and asked whether their goals were “still aligned,” transgender advocate and

Therefore, when a gay man is fired for being effeminate or a lesbian is discriminated against because she is married to a woman, this is all connected to gender norms as much as sexual orientation.⁴⁵⁷ The discourse around the laws, including in campaign commercials, would also be clear that the bathroom rhetoric is as much an attack on gays and lesbians as it is transgender individuals. One way to do this is by highlighting how bathroom bills have resulted in masculine-appearing lesbians being ejected from women's bathrooms, to reinforce how these laws are about gender policing, not safety.⁴⁵⁸ At the same time, rather than ignoring transgender rights, campaigns would instead put transgender individuals front and center—including genderqueers—so the American public comes to know the people at the center of the debate.⁴⁵⁹ Likewise, litigation challenging the measures might feature genderqueer individuals, so that media reports include representations of different types of transgender people.⁴⁶⁰

However, this strategy may not resolve the debate over bathrooms, as emphasizing gender non-conformity erodes some of the boundaries between male and female. Indeed, since it questions the logic of sex-segregated facilities, this approach could give rise to more fervent

actress Laverne Cox argued that discrimination against everyone in the LGBT movement stemmed from their gender non-conformity:

When kids are bullied and called anti-gay slurs, it's rarely because the victim seemed to be attracted to members of the same sex. It's because the child did not conform to gender expectations based on the sex they were assigned at birth. The bullies might yell 'gay,' but it's about gender expression.

Laverne Cox, *The Bullies Don't Draw a Distinction*, N.Y. TIMES (Oct. 15, 2013, 5:06 PM), [<https://perma.cc/7PFB-SHWU>].

457. *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

458. Janet A. Laylor, *The Battle Over Bathrooms: A Solution Without a Problem*, 106 AM. J. PUB. HEALTH 1349, 1349 (2016); Cote, *supra* note 402.

459. Commercials like the one that Trans United Fund devoted in the wake of the H.B. 2 controversy, which featured parents asking viewers to “meet” their children, and which then identified the negative health outcomes associated with discrimination against transgender individuals are an improvement over previous advertisements. However, this advertisement only featured assimilationist transgender individuals. Katy Steinmetz, *Transgender Advocates Want to Win Your Heart With New Ad*, TIME (May 6, 2016), [<https://perma.cc/D74E-3RLF>]; Trans United Fund, *Meet My Child: Parents of Transgender Kids Speak Out—Trans United Fund*, YOUTUBE (May 5, 2016), https://www.youtube.com/watch?time_continue=1&v=k_lGK7d5HbA.

460. This would not change the substantive legal arguments, as the preliminary injunction and Equal Protection standards would remain the same, but it would impact the litigators' rhetoric. See generally Brief of Plaintiffs-Appellants, *Carcaño v. McCrory*, No. 1:16-cv-00236-TDS-JEP (4th Cir. 2016) (No. 16-1989).

opposition.⁴⁶¹ At the same time, taking a gender non-conformity approach in ballot measure campaigns assumes that Americans will continue to support gay rights even if gays and lesbians are recast in a non-assimilationist manner. Although the LGBT movement has made immense strides, such that the majority of Americans support gay and lesbian rights, there is a dedicated opposition that this strategy might invigorate.⁴⁶² It is thus possible that highlighting gay and lesbian gender and sexual non-conformity will undermine the movement's gains on behalf of gays and lesbians, thereby backfiring. Whether the edifice on which gay and lesbian rights has been built is secure may depend on the Supreme Court's composition in coming years.⁴⁶³

* * *

All three of these strategic realignments for LGBT rights organizations offer the possibility of remedying the current disconnect between gay, lesbian, and transgender, but each comes with its own costs. Other social movements have made similar choices, making it clear that there is a taxonomy of abandonment, assimilation, and transformation from which movements chose when making strategic shifts.

In practice, each of the options could yield dramatically different results; how lawyers would approach altering gender designations on identity documents provides a useful example. Under abandonment, gay and lesbian rights groups would not take such cases, but rather refer individuals seeking this type of assistance to transgender rights organizations. LGBT rights lawyers employing an assimilationist strategy would lobby for simple procedures that permit transgender individuals to change their gender designation from male to female, and vice versa, without undergoing genital surgery. Lawyers following the transformative strategy would argue that many identity documents do not need gender markers, and thus advocate for their removal.⁴⁶⁴

461. *C.f. Carcaño v. McCrory*, 203 F. Supp. 3d 615, 641 n.31 (M.D.N.C. 2016) (discussing how plaintiffs' arguments about gender identity, taken to their logical conclusion, would render sex-segregated bathrooms unconstitutional).

462. *See Gay and Lesbian Rights*, *supra* note 1.

463. Justice Kennedy, who has written every opinion in the Supreme Court's "gay rights canon," and cast the deciding vote in several of those cases, is considering retirement. Nina Totenberg, *Justice Neil Gorsuch Votes 100 Percent of the Time with Most Conservative Colleagues*, NPR (July 1, 2017, 12:25 PM ET), [<https://web.archive.org/web/20180331200251/https://www.npr.org/2017/07/01/535085491/justice-neil-gorsuch-votes-100-percent-of-the-time-with-most-conservative-collea>].

464. Telephone Interview with Rose Saxe, Staff Attorney, ACLU LGBT Rights & HIV/AIDS Project (Aug. 31, 2017).

Should that fail, their next best solution would be a gender-neutral option for their clients.

These examples illustrate the options, but do not provide guidance as to what LGBT rights organizations should do, as they demonstrate that opposite choices can both yield positive results. Assimilationist and radical strategies have produced legal victories; abandoning allies can work, just as a coalition might be productive. It is also possible for organizations to elect assimilationist approaches in some legal settings and transformative ones in others, as one strategy might not be effective in all situations. What is clear is that national LGBT rights organizations must adopt a new approach to transgender rights, as the current divide between LG and T impedes the movement's progress.

CONCLUSION

The LGBT movement came together after long debates over whether and how lesbian, gay, and transgender interests were aligned, as well as the practical repercussions of joining forces. Although many understood the argument that both transgressed gender norms, transgender individuals did not fit into the assimilationist strategy of gay and lesbian rights organizations, which stressed respectability and conformity to middle-class norms. The 2007 debate over whether to forgo a sexual orientation-only version of ENDA highlighted the extent to which the organizations continued to be divided over the questions of movement goals, strategies, and priorities.

National LGBT rights groups never fully resolved these tensions, pursuing legal agendas that prioritized the concerns of gays and lesbians and waging battles that predominantly employed an assimilationist strategy. Although not purposeful, these decisions contributed to a growing disconnect between LG and T that movement opponents exploited to inflict losses at the ballot box. The success these opponents have had in repealing anti-discrimination laws demonstrates that national LGBT rights groups need to reconsider their approach with respect to transgender rights.

Ironically, transphobic bathroom rhetoric may, for the first time, make it so that national LGBT rights organizations will have to resolve the conflict between their stated goals and actual strategies. The only question remaining is what approach they will adopt.