

# UNFINISHED BUSINESS: THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) AND THE K–12 EDUCATION COMMUNITY

*Stuart Biegel\**

INTRODUCTION.....	358
I. THE EMPLOYMENT NON-DISCRIMINATION ACT:	
OVERVIEW AND UPDATE .....	367
A. Overview of the Provisions of ENDA .....	369
B. The Recent Inclusion of Gender Identity in ENDA.....	372
C. Contextualizing the Opposition to ENDA.....	377
II. EMPLOYMENT DISCRIMINATION AGAINST LGBTs IN THE K–12 EDUCATION COMMUNITY: A RECENT HISTORY ..	381
A. Deliberate Mistreatment of LGBT Educators: Multiple and Interrelated Levels of Discrimination over Time .....	385
1. <i>Acanfora v. Board of Education of     Montgomery County</i> .....	385
2. <i>Morrison v. State Board of Education</i> .....	387
3. <i>National Gay Task Force v. Board of     Education</i> .....	388
B. Discrimination Targeting Transgender Educators ..	389
C. Hostility of the Courts to LGBT Educator Issues and Concerns .....	391
III. IN THE EYE OF THE STORM: IDENTIFYING AN EXPANDED, MULTI-FACETED ROLE FOR OPENLY LGBT EDUCATORS IN AMERICA’S PUBLIC SCHOOLS .....	393

---

\* Education faculty and law faculty, University of California, Los Angeles. Director of Teacher Education at UCLA (1993–95). Special Counsel, California Department of Education (1988–96). Author of *EDUCATION AND THE LAW* (2nd ed. 2009, 3d ed. forthcoming 2012) and *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA’S PUBLIC SCHOOLS* (2010). I thank Bob Kim, Sheila Kuehl, Brad Sears, Pieter Martin, Vicki Steiner, Christy Mallory, Erika Ithurburn, Martha Kinsella, Jonathan Grady, Rigoberto Marquez, Kevin Kumashiro, Paul Sathrum, and the many LGBT educators who have shared their insights and perspectives with me over the past decade.

A. Current State of U.S. Employment Law Impacting LGBT Faculty and Staff . . . . .	397
B. Prospective Benefits of ENDA for LGBT Educators and School Communities . . . . .	399
1. Reconceptualizing the Role of LGBT Educators in Professional Development . . . . .	404
a. Disseminating Information about the Challenges Faced by LGBT Youth . . . . .	405
b. Disseminating Information about Structural and Institutional Failures within School Communities . . . . .	408
2. The Prospective Role of LGBT Educators in Directly Addressing the Needs of Gay and Gender Non-Conforming Youth . . . . .	409
CONCLUSION: THE PROMISE OF ENDA . . . . .	412

*“The promise of America will never be fulfilled as long as justice is denied to even one among us. The Employment Non-Discrimination Act brings us closer to fulfilling that promise for gay, lesbian, bisexual, and transgender [persons]. I’m proud to join . . . in introducing this important legislation.”*

~ Senator Edward M. Kennedy<sup>1</sup>

#### INTRODUCTION

In June of 1994, during the early years of the Clinton administration, Senator Edward M. Kennedy introduced the Employment Non-Discrimination Act (ENDA), which sought to ban employment discrimination on the basis of sexual orientation.<sup>2</sup> Despite the failure of

1. Press Release, Senator Jeff Merkley, Merkley, Collins, Kennedy, Snowe Introduce Legislation to End Workplace Discrimination (Aug. 5, 2009), <http://merkley.senate.gov/newsroom/press/release/?id=4ec04c19-3a3d-465a-a2a0-fa605c57aaaf>.

2. See Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994) (as introduced in the Senate by Sen. Edward M. Kennedy on June 23, 1994); see also Employment Non-Discrimination Act, H.R. 4636, 103d Cong. (1994) (as introduced in the House of Representatives by Rep. Gerry E. Studds). ENDA was referred to the Senate Labor and Human Resources Committee, which held the first hearing on the issue entitled “Employment Non-Discrimination Act of 1994” on July 29, 1994. See H.R. REP. NO. 110-406, at 5 (2007) (testifying at this first hearing were Sen. Claiborne Pell; Sen. Jeff Bingaman; Cheryl Summerville (a restaurant worker who had been fired for being a lesbian); Ernest Dillon (a postal worker who documented acts of discrimination he had endured as a gay man); Justin Dart, Jr., Chairman, Comm. on Emp’t of People with Disabilities; Warren Phillips, Former Managing Editor, *Wall Street Journal*, and Former CEO and Chairman, Dow Jones & Co., Inc.; Steven Coulter, Vice President, Pac. Bell Tel. & Tel. Co.; Richard Womack, Dir. of Civil Rights, AFL-CIO; Joseph E. Broadus, George Mason Sch. of Law; Robert H. Knight, Dir. of

Congress to pass the act, even as poll data over the next fifteen years began to show that a clear majority of Americans endorsed its goals,<sup>3</sup> Senator Kennedy remained a staunch supporter of this legislation for the rest of his life. Indeed, in August 2009—less than a month before his death—he joined three other senators in introducing a “transgender-inclusive” version of the bill, which would prohibit discrimination on the basis of both sexual orientation and gender identity.<sup>4</sup>

By late 2010, despite the stated commitment of President Barack Obama<sup>5</sup> and the Democratic Party leaders in the House of Representatives,<sup>6</sup> efforts to pass ENDA had stalled again. Although some prominent Republicans became involved in efforts to establish full equality for lesbian, gay, bisexual, and transgender (LGBT) persons<sup>7</sup> through-

Cultural Studies, Family Research Council; and Chai Feldblum, Georgetown Univ. L. Ctr.).

3. In a 2008 Gallup Poll, for example, 89% of Americans polled agreed with the statement that “homosexuals should . . . have equal rights in terms of job opportunities.” Only 8% disagreed. *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx> (last visited July 28, 2009); see also Editorial, *The Rights of Gay Employees*, N.Y. TIMES, Sept. 13, 2009, <http://www.nytimes.com/2009/09/13/opinion/13sun2.html> (“Federal law has lagged behind the reality of American life. There are now openly gay members of Congress from between-the-coasts states like Colorado and Wisconsin. And . . . 85 percent of Fortune 500 companies have policies protecting gay employees from discrimination.”).

4. While the original ENDA addressed only sexual orientation discrimination and not gender identity, a “transgender-inclusive” version (as it came to be known) was introduced in the House of Representatives in 2007, and in the Senate in 2009. See *Timeline: The Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/workplace/5636.htm> (last visited Aug. 28, 2010); see also *infra* note 29 (documenting the history of committee hearings and the controversy regarding the initial inclusion of gender identity). However, a version without the gender identity provisions was ultimately put forth for a vote in the House. No version of ENDA has been put forth for a vote in the Senate since the 1990s. See *generally infra* notes 48–51 and accompanying text. This Article adopts commonly accepted definitions of “sexual orientation” (homosexuality, heterosexuality, or bisexuality) and “gender identity” (a person’s internal self-awareness of being male or female, masculine or feminine, or something in between). See *infra* note 10.

5. See *Civil Rights*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Feb. 9, 2011) (“President Obama also continues to support the Employment Non-Discrimination Act and believes that our anti-discrimination employment laws should be expanded to include sexual orientation and gender identity . . .”).

6. See, e.g., Kerry Eleveld, *Dem Leader: We’re Ready for ENDA*, THE ADVOCATE (Apr. 13, 2010), [http://www.advocate.com/News/Daily\\_News/2010/04/13/Dem\\_Leadership\\_Bullish\\_on\\_ENDA/](http://www.advocate.com/News/Daily_News/2010/04/13/Dem_Leadership_Bullish_on_ENDA/); Jillian T. Weiss, *Jared Polis Says ENDA Will Become Law*, THE BILERICO PROJECT (Mar. 31, 2010, 4:00 PM), [http://www.bilerico.com/2010/03/jared\\_polis\\_says\\_enda\\_will\\_become\\_law.php](http://www.bilerico.com/2010/03/jared_polis_says_enda_will_become_law.php); Jpmassar, *ENDA: The Straight Dope*, DAILY KOS (July 29, 2010, 1:15 PM), <http://www.dailykos.com/story/2010/7/29/888408/-ENDA:-The-Straight-Dope>.

7. This Article uses the acronym most typically employed by those addressing gay and transgender issues, LGBT (referring to lesbian, gay, bisexual, and transgender).

out the country,<sup>8</sup> congressional Republicans appeared to be united in their opposition to the legislation, and not all Democrats could be counted on to support it. ENDA remained, on every level, unfinished business.<sup>9</sup>

Against this backdrop of congressional inaction, employment discrimination directed at gay and gender non-conforming persons<sup>10</sup> continues to be pandemic.<sup>11</sup> Although great progress on behalf of LGBTs is evident on both legal and public policy fronts in many parts of the country, more than half of the states have no explicit prohibitions against discrimination on the basis of sexual orientation,<sup>12</sup> and even

Other acronyms and a range of terms are in use, and definitions can vary considerably. To avoid repetition but maintain stylistic consistency, the Article often uses “LGBT” and “gay and gender-non-conforming” interchangeably, as synonyms for the same groups of people.

8. Among the prominent Republicans working on behalf of equality for LGBT persons in 2010 were former Solicitor General Theodore Olson, former Republican National Committee Chairman Ken Mehlman, Cindy McCain, and the younger Barbara Bush. The Log Cabin Republicans funded a lawsuit in which District Court Judge Virginia Phillips issued an injunction on the grounds that Don’t Ask, Don’t Tell was unconstitutional, thus putting additional pressure on the government to move forward with repeal. *See, e.g.*, Charlie Savage, *Obama Seeks Stay on Don’t Ask, Don’t Tell Ruling*, N.Y. TIMES, Oct. 15, 2010, at A22; Sandhya Somashekhar, *Gay Marriage Gains GOP Support*, WASH. POST, Aug. 28, 2010, at A2; Jon Cowan & Evan Wolfson, *A Quiet Shift in GOP Stance on Gay Marriage*, L.A. TIMES, Oct. 13, 2010, <http://articles.latimes.com/2010/oct/13/opinion/la-oe-cowan-marriage-20101013>.

9. *See, e.g.*, *ENDA Timeline: Broken Promises*, GETEQUAL.ORG (July 22, 2010), <http://getequal.org/2010/07/enda-timeline-broken-promises/>.

10. “Gender non-conforming” is often employed as an umbrella term to refer to persons whose appearance and/or actions do not conform to traditionally accepted gender roles and traditionally expected gender performance. Effeminate men and masculine women are prototypical examples of gender non-conformity. Gender non-conforming persons may be gay, straight, or bisexual. For an excellent overview of perspectives relating to gender variance, see *Understanding Gender*, GENDER SPECTRUM, <http://www.genderspectrum.org/child-family/understanding-gender> (last visited Feb. 23, 2011).

11. *See* M.V. LEE BADGET ET AL., WILLIAMS INST., *BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION* (2007). *See generally* *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, WILLIAMS INST., [http://escholarship.org/uc/search?entity=uclalaw\\_williams\\_enda](http://escholarship.org/uc/search?entity=uclalaw_williams_enda) (last visited Oct. 9, 2010) (providing links to publications documenting discrimination in states throughout the country).

12. *See, e.g.*, Statement of Parents, Families & Friends of Lesbians and Gays (PFLAG) Nat’l to the U.S. Senate Comm. on Health, Educ., Labor & Pensions Regarding the Emp’t Non-Discrimination Act: Ensuring Opportunity for All Americans, PFLAG (Nov. 5, 2009), <http://community.pflag.org/Page.aspx?pid=1205> (“Only 12 states and the District of Columbia currently have laws that specifically ban workplace discrimination based on sexual orientation and gender identity. Another nine states have laws that ban discrimination based on sexual orientation, but don’t include gender identity. This patchwork of laws is inadequate to prevent and remedy the serious discrimination against LGBT employees that takes place across the country.”).

those jurisdictions with such prohibitions may lack viable remedies for aggrieved persons to pursue.<sup>13</sup> Under federal law, the comprehensive statutory scheme established by Title VII of the Civil Rights Act of 1964 has typically been deemed inapplicable to sexual orientation and gender identity discrimination,<sup>14</sup> and Fourteenth Amendment Equal Protection Clause lawsuits remain a daunting option for most litigants, with no guarantee of success.<sup>15</sup>

---

13. See, e.g., Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 160–64 (2004–2005). See generally Pat P. Putignano, Note, *Why DOMA and Not ENDA? A Review of Recent Federal Hostility to Expand Employment Rights and Protection Beyond Traditional Notions*, 15 HOFSTRA LAB. & EMP. L.J. 177 (1997–1998). Putignano explains that:

[E]ven in those states and localities with legislation protecting against sexual orientation discrimination in private employment, an argument can still be made that enforcement of gay and lesbian employment rights is questionable at best. For example, in many of those jurisdictions there is no oversight agency or office, like the Equal Employment Opportunity Commission, that would serve to enforce these statutes at all. . . . Furthermore, even where there is an enforcing governmental agency, only a very small number of complaints are ever filed, principally because filing a sexual orientation discrimination complaint requires the complainant to “out” himself, which may be very risky . . . [and] . . . of those cases that are actually litigated, they are usually decided in favor of the employer even where the facts of the case appear to significantly favor the complainant.

*Id.* at 188–89 (footnotes omitted).

14. While some advocates and scholars have argued that the sex discrimination provision of Title VII can be interpreted to prohibit discrimination against LGBTs, courts have generally been reluctant to vindicate this interpretation. See Note, *Employment Discrimination—Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity*, 123 HARV. L. REV. 1803, 1805–06 (2009) (“[W]hile [Price Waterhouse v. Hopkins, 490 U.S. 288 (1989)] has led some courts to permit sex stereotyping claims by LGBT employees, other courts have refused to do so . . . As a result, LGBT employees—including those employed by state governments—remain largely vulnerable at the workplace. Their sexual orientation and gender identity, alone, can cause them to be terminated . . .”) (footnotes omitted); see also Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*, 24 BERKELEY J. OF GENDER L. & JUST. 166, 171–72 (2009) (determining that “the evolution of Title VII doctrine tells a cautionary tale for efforts to enact an effective federal law prohibiting job discrimination against lesbian and gay workers in the United States” and concluding that “advocates must engage in a more honest assessment of the harms to lesbian and gay people who face prejudice on the basis of gender identity in addition to the threat of sexual orientation discrimination”). But see Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity under Title VII*, 104 NW. U. L. REV. 1147 (2010) (identifying recent instances in which—at least with regard to gender identity discrimination—some federal courts have found that these claims may be viable under Title VII as sex discrimination claims).

15. The practical challenges involved in bringing an LGBT-related lawsuit under the Fourteenth Amendment include the daunting task of securing legal counsel—either with attorneys who practice in this area or with relevant public interest organiza-

As challenging as circumstances might still be for many LGBT persons in all walks of life, nowhere has the situation been more complex and more challenging than in the military, organized religion, professional sports, and schools. The stigma that has long been associated with homosexuality and gender non-conformity throughout the country remains prevalent in these particular settings, often with grave consequences for those who disclose their LGBT status.<sup>16</sup> Indeed, pur-

---

tions—and the concurrent challenge of doing so if plaintiff’s financial resources are limited. Other barriers include, but are not limited to, the lengthy amount of time that such litigation can consume, the fact that discrimination on the basis of sexual orientation has typically only triggered rational basis review in the past, and the extensive focus in such matters on the plaintiff’s personal affairs, a focus that can reveal facts that persons would best prefer to keep private.

16. See STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION & GENDER IDENTITY IN AMERICA’S PUBLIC SCHOOLS* (2010) (documenting the challenges remaining for LGBT persons in K–12 education settings today, and also highlighting the analogous and interrelated challenges faced by gay and gender non-conforming persons in the military, sports, and organized religion). Indeed, all four institutions serve educative functions, and all are charged with the task of teaching values and molding character. See *id.* In some settings, such as organized religion, LGBTs are often explicitly prohibited from being open about their identities. In other settings, such as public education and organized sports, the pressure to remain closeted is more typically implicit. See *id.*; see also *infra* notes 147–149 and accompanying text (describing the extent to which the pressure on LGBT educators to remain closeted remains a central component of their lives).

In December 2010, the U.S. Congress voted to repeal the seventeen-year-old law known as “Don’t Ask, Don’t Tell,” which enabled gays and lesbians to serve in the military but essentially prohibited them from disclosing their sexual orientation. The legislation adopted by Congress and signed by President Obama required a transition period comprised of several key procedural steps before gays and lesbians would actually be able to serve openly without threat of discharge, which may or may not be completed by the time this issue goes to press. See Sheryl Gay Stolberg, *Obama Signs Away “Don’t Ask, Don’t Tell,”* N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/us/politics/23military.html>. However, although this is a major step forward, many have cautioned that implementation issues remain, and that there is still much work to be done on this front to change the culture of the military in this regard. See Verena Dobnik, *Gays See Repeal as a Civil Rights Milestone*, PITTSBURGH POST-GAZETTE, Dec. 20, 2010, at A6. Transgender persons, it should be noted, were not covered by “Don’t Ask, Don’t Tell,” which was sexual orientation-specific. Indeed, current military regulations effectively prohibit transgender persons from serving. They can be discharged, for example, for being “medically unfit,” either because of a diagnosis of Gender Identity Disorder or because they have had “genital surgery.” See Press Release, Nat’l Ctr. for Transgender Equality, Joint Statement from the Servicemembers Legal Def. Network & Nat’l Ctr. for Transgender Equal. (July 12, 2010), [http://sldn.3cdn.net/ddb5b50d45e33c4042\\_zim6b95zw.pdf](http://sldn.3cdn.net/ddb5b50d45e33c4042_zim6b95zw.pdf); see also *Transgender Issues*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/transgender-issues> (last visited Jan. 3, 2011) (“The military medical system does not recognize the World Professional Association for Transgender Health’s Standards of Care for Gender Identity Disorders and will not provide the medical support necessary for transitioning service members. For service members who are thinking of transitioning while in the military using non-military medical providers, it is important to

suant to either common practices or government-sanctioned policies, such disclosure can lead to dismissal from these institutions and the discrediting of one's professional and personal standing.<sup>17</sup>

As I will discuss below, K–12 public schools are a particularly contested institution for LGBTs. It is here that Senator Kennedy's commitments to both public education and civil rights coincide and are reflected in the promise of ENDA. Many Americans in education settings, including persons who support LGBT equality in principle, still express discomfort at the thought that children might be taught by openly LGBT persons.<sup>18</sup> Such discomfort is frequently accompanied by an often unstated fear that young people might be exposed to gay-positive input or to any suggestion by school personnel, explicit or implicit, that it is "okay to be gay."<sup>19</sup>

---

note that each service branch has 1) specific regulations regarding medical conditions they consider to be 'disqualifying'; 2) regulations regarding members seeking health care from providers outside of the military system which may include reporting requirements; and 3) uniform and grooming standards by gender.”).

17. Some of the most open and egregious discrimination against LGBTs in the history of this country took place in the mid-twentieth century. *See, e.g.,* Hendrik Hertzberg, *Stonewall Plus Forty*, NEW YORKER, July 6, 2009, at 23:

Even in the legendarily liberated nineteen-sixties, mainstream attitudes toward homosexuality were benighted to a degree that is difficult to exaggerate. “Sodomy” between consenting adults was against the law almost everywhere. “Perversion” was a firing offense throughout the federal government, not just in the military. The American Psychiatric Association classified homosexuality as a “sociopathic” mental disorder. In the *Daily News*, gays were “homos.” In 1966, three years before Stonewall, *Time*, then the voice of middlebrow, middle-class respectability, published a long essay on “The Homosexual in America.” The magazine, while acknowledging that “homosexuals are present in every walk of life,” concluded that homosexuality [was “a pathetic little second-rate substitute for reality, a pitiable flight from life,” and “a pernicious sickness.”].

*See generally* DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004) (a landmark study of the dramatic increase in discrimination against gay and gender non-conforming persons during the Post-World War II era and particularly during the McCarthy era).

18. *See infra* notes 161–162 and accompanying text.

19. *See* Brief of Plaintiffs-Appellees at 99–100, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Oct. 18, 2010) (“The purpose of Proposition 8 was to brand gay men and lesbians and their relationships as different and inferior . . . . For example, the official ballot argument in support of Proposition 8 stated that ‘[w]e should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay.’ . . . Even more ominously, other campaign materials suggested that Proposition 8 was necessary to protect children from gay men and lesbians themselves, and even to prevent children from becoming gay.”). For perspectives on the issue of exposure to gay-positive input, see Stuart Biegel, *Bullying, Teen Suicides Out of the Shadows*, HUFFINGTON POST (Oct. 11, 2010, 11:33 AM), [http://www.huffingtonpost.com/stuart-biegel/bullying-teen-suicides-ou\\_b\\_758081.html](http://www.huffingtonpost.com/stuart-biegel/bullying-teen-suicides-ou_b_758081.html) (“There are many within public school communities who still seek to keep any mention of LGBT status or

Evidence of this fear can be found throughout recent history—such as in the rhetoric of the 1978 Briggs Initiative in California, which sought to remove all openly gay and lesbian teachers from the public schools,<sup>20</sup> as well as in recent efforts to ban same-sex marriage and to oppose anti-bullying programs. For instance, the “Yes on 8” campaign in California and the “Yes on 1” campaign in Maine had great success convincing many voters that ballot initiatives regarding same-sex marriage were in fact referenda on parental rights, even though the initiatives had nothing to do with public education. Both the Proposition 8 proponents in the voter information pamphlet<sup>21</sup> and ads that ran in California and Maine argued that unless same-sex marriage was stopped, “gay marriage would be *taught* in the public schools.”<sup>22</sup> Post-election analysis of voting patterns showed that these

---

LGBT issues out of the discourse, whether it be in the classroom, in the hallways, in faculty meetings, or in professional development. Yet not talking about problems only allows them to fester.”); *see also* Stuart Biegel, *The Privacy Conundrum, Public Education, and the Search for an Elusive Middle Ground*, TEACHERS COLL. RECORD (Dec. 1, 2010), <http://www.tcrecord.org/Home.asp> (ID Number 16251) (last visited Feb. 27, 2011) (documenting the fact that both Rutgers freshman Tyler Clementi and those who sought to stream his sexual encounters with another man over the Internet consulted the social networks repeatedly for advice on how to handle the situation, to little or no avail, when they all would have benefited from open dialogue in real time about their respective issues and concerns as they pertained to LGBT issues).

20. For example, in *THE TIMES OF HARVEY MILK* (Black Sand Prods. 1984), the Academy Award-winning documentary that focused to a great extent on the Briggs Initiative, a woman on the street in the Bay Area was particularly frank with regard to how she differentiated between her positive feelings about adult gays in general and her negative feelings about the idea that children might be exposed to them. In response to campaigners who urged her to vote no on the initiative (Proposition 6), she stated unabashedly:

It'd be hard for me, if we're talking about schools, to go along with you. Any other adult thing that you do . . . the decorator, the hairdresser, whom I love, whom I have, I take him on every vacation if I'd had [*sic*] . . . . I don't care what he does.

*Id.*

21. *See* Brief of Plaintiffs-Appellees, *supra* note 19.

22. The 2008 “Yes on 8” ad featuring Pepperdine University law professor Richard Peterson unfolded as follows:

Girl: Mom, guess what I learned in school today?

Mother: What, sweetie?

Girl: I learned how a prince married a prince, and I can marry a princess.

Peterson (voiceover): Think it can't happen? It's already happened. When Massachusetts legalized gay marriage, schools began teaching second graders that boys can marry boys. . . .

Narrator: Under California law, public schools instruct kids about marriage (Video shows California Education Code, §51933[7]: “Instruction and materials shall teach respect for marriage.”).

Narrator: Teaching children about gay marriage will happen here unless we pass Proposition 8. Yes on 8.

arguments resonated greatly among the respective populations, and that in California, as a direct result, married heterosexual couples with children voted overwhelmingly for Proposition 8.<sup>23</sup>

Similarly, anti-bullying initiatives—critical in an era in which bullying in schools is often rampant and out of control—have been derided as covert attempts to advance a “homosexual agenda.” Although anti-bullying campaigns strive to improve the school environment for all students, the disproportionate victimization of gay and gender non-conforming students in public schools—coupled with the increased reporting of teen suicides linked to anti-gay bullying—has led to efforts to curtail homophobia in K–12 settings. Yet those who would oppose any non-condemnatory discussion of homosexuality in schools have expressed the same fears about anti-bullying initiatives that they have articulated with regard to LGBT educators or to the “teaching” of same-sex marriage.<sup>24</sup> In the fall of 2010, for example, both the mainstream media and the online blogs were filled with charges that “liberals and gay rights groups are using the antibullying banner” to pursue their “hidden” agenda, as is evident in the following excerpt:

In tense community hearings, some parents made familiar arguments that innocent youngsters were not ready for explicit language. [Others] . . . saw a darker purpose. . . . Barely heard was the plea of Harlan Reidmohr, 18, who graduated last spring and said he

---

Voteyesonprop8, *Yes on 8 TV Ad: It's Already Happened*, YOUTUBE (Oct. 7, 2008), <http://www.youtube.com/watch?v=0PgcjcgqFYP4>. Ads with similar wording and a virtually identical message ran in Maine on behalf of the 2009 “Yes on 1” campaign. See, e.g., Jim Burroway, *Maine “Yes on 1” Ad Recycles California Ads, Casts Activist as “Teacher,”* BOX TURTLE BULL. (Sept. 22, 2009), <http://www.boxturtlebulletin.com/2009/09/22/14815>; Susan Sharon, *Critics Question Yes on 1 Ad Claims*, ME. PUB. BROAD. NETWORK, Sept. 23, 2009, <http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/9112/Default.aspx> (providing an overview of criticisms put forth by those questioning the claims in the “Yes on 1” ads).

23. See David Fleischer, *The Prop 8 Report: What Defeat in California Can Teach Us about Winning Future Ballot Measures on Same-Sex Marriage*, LGBT MENTORING PROJECT 11 (Aug. 3, 2010), <http://prop8report.lgbtmentoring.org/read-the-report/executive-summary> (“Almost three-quarters of the net movement toward the ban was among parents with kids under 18 living at home . . .”).

24. Over the past decade, many researchers and educational policy makers have identified strategies and developed programs to counter bullying in schools. In response to such efforts, however, certain persons and groups have mounted campaigns to oppose any implementation of anti-bullying policies. Some of the opposition is based on arguments that anti-bullying programs are unnecessary and misguided, because bullying is an immutable fact of childhood, and because traditional discipline offers the best opportunity for keeping things under control. Others, however, actually argue that anti-bullying programs are a subterfuge on the part of gay rights advocates seeking to “promote a homosexual agenda.” See Erik Eckholm, *In Schools’ Efforts to End Bullying, Some See Agenda*, N.Y. TIMES, Nov. 6, 2010, at A21.

was relentlessly tormented and slammed against lockers after coming out during his freshman year. Through his years in the Helena schools, he said at [a] school board meeting, sexual orientation was never once discussed in the classroom, and “I believe this led to a lot of the . . . harassment I faced.”<sup>25</sup>

Thus the right of gay and transgender persons to live their lives openly is highly contested today in America’s public schools. The opposition to anything gay-positive in education settings reflects discomfort with and prejudice against LGBTs. Evidence shows that discomfort and prejudice are especially acute among those who may have had little or no contact with openly LGBT persons throughout their lives. Indeed, polls by the *Los Angeles Times* and the Pew Research Center, for example, have found a direct correlation between people’s comfort level with LGBTs in the K–12 classroom and their personal experiences knowing someone who is gay or lesbian.<sup>26</sup> ENDA promises to address prejudice and discomfort. As a consequence of the broad federal mandate against discrimination that ENDA provides, more people will come in contact with LGBTs on a regular basis, and this contact can go a long way toward confronting the negative stereotypes and defamatory myths that remain.<sup>27</sup>

This Article examines the status of LGBT educators in America’s public schools, contextualizing their experiences as representative of both the extent to which LGBTs are in need of federal anti-discrimination protection in the workplace as well as how passage of the legislation can improve the quality of life for Americans of every sexual orientation and gender identity. Pursuant to this analysis, the Article highlights the extent to which this effort continues the legacy of Senator Kennedy’s commitment to equal opportunity, and the unique and

---

25. *Id.* For additional perspectives on this controversy, see, for example, David J. Hoff, *Texas Quits Group Amid Debate Over Gays*, EDUC. WEEK, Dec. 14, 2005, at 18, 20 (describing the decision of the Texas State Board of Education to quit the National Association of State Boards of Education because of disagreements regarding approaches to bullying).

26. See Elizabeth Mehren, *The Times Poll: Acceptance of Gays Rises among New Generation*, L.A. TIMES, Apr. 11, 2004, at A1 (“Almost seven in 10 Americans know someone who is gay or lesbian and say they would not be troubled if their elementary school-age child had a homosexual teacher.”); Shawn Neidorf & Rich Morin, *Four-in-Ten Americans Have Close Friends or Relatives Who Are Gay: Survey Finds Familiarity is Closely Linked to Greater Tolerance*, PEW RESEARCH CTR. (May 23, 2007), <http://pewresearch.org/pubs/485/friends-who-are-gay> (finding that the number of persons who would support the firing of gay and lesbian teachers for no reason other than their sexual orientation dropped by 23% if they had “close friends or family members who are gay”).

27. See *infra* Part I.C (setting forth the arguments typically raised by those opposed to ENDA).

far-reaching societal gifts ENDA could bring in K–12 education settings, not only for LGBT educators, but also for all students in our pluralistic society.

Part I presents an overview of ENDA, its history, basic provisions, and the recent inclusion within the proposed legislation of gender identity as a protected category. Part II documents the mistreatment of LGBT employees in America's public schools over the past seventy-five years, situating these realities within the larger context of ongoing employment discrimination against gay and gender non-conforming persons throughout the country. Part III focuses on the transition period we are experiencing today, analyzing the great progress that has been made in K–12 school districts, but also the discrimination that persists in these institutions, under the law, as a matter of policy, and as common practice. In so doing, Part III identifies both the benefits of ENDA in this environment and the unique and valuable role that openly LGBT educators can play in addressing the mistreatment of gay and gender non-conforming youth. The Article concludes that, while American public education is an arena in which perhaps the most contested set of LGBT issues in the country are played out, effective implementation of ENDA in this environment could further the goals of this legislation in a unique and lasting way.

## I.

### THE EMPLOYMENT NON-DISCRIMINATION ACT: OVERVIEW AND UPDATE

Since the introduction of ENDA by Senator Kennedy in 1994,<sup>28</sup> updated versions have been introduced in every Congress except the

---

28. The history of federal legislation addressing discrimination against LGBTs in the workplace can be traced back to the Equality Act of 1974, introduced on the fifth anniversary of the Stonewall Uprising by New York members of Congress Bella S. Abzug and Edward I. Koch. See Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149 (John D'Emilio et al. eds., 2000). The bill would have amended the Civil Rights Act of 1964 to protect against discrimination on the basis of sexual orientation in employment, housing, and public accommodations. See *id.* at 152–53. For a brief history documenting the political terrain facing Congressional leaders during the early years of the Clinton administration, see *id.* at 182–85; see also Joel Wendland, *A New Beginning for ENDA*, *POLITICAL AFFAIRS* (Apr. 9, 2007, 8:41 AM), <http://www.politicalaffairs.net/a-new-beginning-for-enda/> (providing a brief discussion of the role of the Nat'l Gay and Lesbian Task Force in documenting LGBT discrimination); *Narrative: The Task Force's Commitment to Ending Discrimination against Lesbian, Gay, Bisexual, and Transgender Americans has a Long History*, NAT'L GAY & LESBIAN TASK FORCE, <http://www.thetaskforce.org/issues/nondiscrimination/narrative> (last visited Dec. 15, 2010) (providing additional details about the introduction of the legislation and the role of the newly formed Nat'l Gay & Lesbian Task Force).

109th, but only two floor votes have ever taken place: one in the Senate in 1996 (where the legislation was defeated, 50–49), and one in the House in 2007 (where the legislation passed, 253–184).<sup>29</sup> In 2007 and 2008, President Obama was a vocal proponent of ENDA throughout his campaign, and with a large Democratic majority in both houses, many believed that the historic legislation would soon become the law of the land. Yet two years into the Obama administration, the act appears no closer to passage than it did at several other points in its long history. In fact, in the summer of 2010, Congresswoman Jackie Speier suggested that it might be as long as five more years before ENDA becomes law.<sup>30</sup>

---

29. See *Timeline: The Employment Non-Discrimination Act*, *supra* note 4. Committee hearings on ENDA were only held seven times since the legislation was introduced: four times in the Senate (1994, 1997, 2002, and 2009) and three times in the House (1996, 2007, and 2009). In 2007, the House debate was marked by a volatile debate over whether to include gender identity discrimination in the legislation. Two house bills were introduced, one inclusive of gender identity protection, the other focusing only on sexual orientation discrimination. See *id.* Only the non-inclusive version was brought to a vote, because of the apparent belief that the legislation would not pass if it also addressed transgender issues. See, e.g., Statement of Barney Frank on ENDA, the Emp't Non-Discrimination Act (Sept. 28, 2007), <http://www.house.gov/frank/docs/2007/09-28-07-endastatement.html>:

We are on the verge of . . . the passage for the first time in American history by either house of Congress of legislation declaring it illegal to discriminate against people in employment based on their sexual orientation. Detracting from the sense of celebration many of us feel about that is regret that under the current political situation, we do not have sufficient support in the House to include in that bill explicit protection for people who are transgender.

See also Zak Szymanski, *Trans March Rallies around Inclusion*, BAY AREA REP., July 3, 2008, <http://www.ebar.com/news/article.php?sec=news&article=3128>:

Last year, hundreds of LGBT groups nationwide refused to support ENDA once it was stripped of its gender identity protections, and the theme of this year's march—"Marching for a Gender Inclusive ENDA"—celebrated this act of solidarity.

“When we offered a state law that was an inclusive ENDA, people said we couldn't do it, but we got that signed into law,” said Assemblyman Mark Leno (D-San Francisco) from the Trans March stage. “And we won't stop fighting until we get a federal ENDA that is inclusive.”

The failed effort to pass ENDA has been the subject of extensive commentary over the past seventeen years. See, e.g., William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1 (2002); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment*, 43 U. MICH. J.L. REFORM 713 (2010); Sharon M. McGowan, Recent Development, *The Fate of ENDA in the Wake of Maine: A Wake-Up Call to Moderate Republicans*, 35 HARV. J. ON LEGIS. 623 (1998).

30. See Cynthia Laird, *Speier: 5 Years for ENDA*, BAY AREA REP., July 1, 2010, <http://www.ebar.com/news/article.php?sec=news&article=4891>. According to news sources, Speier's comments were a surprise to LGBTs and their allies, who expected

### A. Overview of the Provisions of ENDA

ENDA would prohibit intentional discrimination on the basis of sexual orientation and gender identity, much like “Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) prohibit other forms of employment discrimination.”<sup>31</sup> As stated in S. 1584 and H.R. 3017 (2009), the Employment Non-Discrimination Act is designed “to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal Government employers . . . [and to create] meaningful and effective remedies for any such discrimination . . . .”<sup>32</sup> In this manner, the bill’s authors have sought to “further the spirit of civil rights law” by extending protections to LGBT workers.

The language at the heart of ENDA addresses the practices of public or private institutions that employ fifteen or more persons and provides in pertinent part:

(a) EMPLOYER PRACTICES.—It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity; or

(2) to limit, segregate, or classify . . . employees or applicants for employment . . . in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual’s actual or perceived sexual orientation or gender identity.<sup>33</sup>

---

the passage of ENDA in 2010. *See id.* Her statement went against the message from Democratic leadership at the time, in that she publicly acknowledged that not only had the efforts to pass ENDA stalled, but that it might be years before the effort might ultimately be successful. *Id.*; *see also* Editorial, *Workplace Inequality*, L.A. TIMES, Sept. 9, 2010, at A26 (urging Congressional leaders not to abandon the effort to pass ENDA).

31. *See* H.R. REP. NO. 110-406, at 11 (2007) (finding that “[t]he legislation would create no ‘special rights,’ but will guarantee equal rights”).

32. *See* Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. § 2(1)–(2) (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 2(1)–(2) (2009).

33. *See* S. 1584, 111th Cong. § 4(a)(1)–(2) (2009). “Covered entities” in the legislation “means an employer, employment agency, labor organization, or joint labor-management committee.” *Id.* § 3(a)(2). “Employment opportunities” addressed under ENDA generally have included firing, hiring, compensation, terms, conditions and privileges of employment or union membership. *See* H.R. REP. NO. 110-406, at 10 (2007).

A noteworthy additional feature of the act is that discrimination on the basis of actual or perceived *association* with LGBTs—present or past—is also considered an unlawful employment practice.<sup>34</sup> The provision recognizes the fact that in too many instances, employers discriminate against even those who have associated with LGBTs.<sup>35</sup>

The act adopts mainstream definitions for the terms “sexual orientation” and “gender identity.”<sup>36</sup> It thereby protects everyone against this type of employment discrimination, since everyone has a sexual

34. S. 1584 § 4(e) provides, in pertinent part: “An unlawful employment practice . . . shall be considered to include an action . . . taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.”

35. Unlike ENDA, Title VII does not explicitly prohibit discrimination based on one’s association with a member of a protected class. However, courts have been increasingly willing to recognize such a cause of action. *See, e.g.,* Barrett v. Whirlpool Corp., 556 F.3d 502, 511 (6th Cir. 2009); Holcomb v. Iona College, 521 F.3d 130, 138 (2d Cir. 2008). *But see* David E. Schwartz & Erik K. Ludwig, *Bias-by-Association Claims Winning Recognition*, NAT’L L.J., Sept. 29, 2008, at S2 (“The courts increasingly are in agreement that Title VII claims may be brought on the basis of interracial spousal, romantic and other familial relationships. However, courts are split as to whether such claims may be brought on the basis of other types of associational relationships, such as friendship.”).

36. S. 1584 § 3(a)(9) defines “sexual orientation” as “homosexuality, heterosexuality, or bisexuality.” S. 1584 § 3(a)(6) defines “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.” Expanded definitions of and further elucidations regarding gender identity have been articulated by legal scholars and activists in this area over the past two decades. “*Gender identity* refers to a person’s internal, deeply felt sense of being male or female (or both or neither)[.] . . . a person’s psychological identification as masculine or feminine. For most people, your gender identity corresponds to your physical body. For transgender people though, this is not necessarily the case.” Jody Marksamer & Dean Spade, *Serving Transgender & Gender Non-Conforming Youth: A Guide for Juvenile Halls, Group Homes, and Other Congregate Care Facilities 5* (2007) (unpublished draft) (on file with the author).

Examples of non-mainstream definitions are those put forth by persons and organizations opposed to the inclusion of “sexual orientation” in anti-discrimination statutes generally. *See, e.g.,* Bob Unruh, *Next on Senate Agenda? ‘Pedophile Protection Act’*, WORLDNETDAILY (May 4, 2009, 9:08 PM), <http://www.wnd.com/?pageId=97115> (“[S]exual orientation is anything to which someone is orientated. That could include exhibitionism, it could include necrophilia (sexual arousal/activity with a corpse) . . . Urophilia (sexual arousal associated with urine), [and] voyeurism.”); *see also* Robert Knight, “*Sexual Orientation*” and *American Culture* (July 10, 2002), <http://www.sosanchorage.org/information/Sexual%20Orientation%20and%20American%20Culture.pdf> (defining “sexual orientation” to include all the *paraphilias* (i.e. sexual disorders) set forth in the Diagnostic and Statistical Manual of Mental Disorders, which include pedophilia and bestiality). Adopting such non-mainstream definitions enables opponents of equal treatment for LGBTs to then assert that prohibiting sexual orientation discrimination is tantamount to protecting necrophiliacs, pedophiles, those practicing bestiality, etc., when this is not in any way either the purpose or the meaning of the legislation. *See* S. 1584 § 3(a)(6)(9).

orientation and everyone has a gender identity. In addition, ENDA extends protection not only to actual but also to perceived orientation and identity,<sup>37</sup> as well as to actual or perceived association with gay and gender non-conforming persons. Indeed, it is important to note that ENDA is designed to protect everyone, because many still view the legislation as entirely about “the gays” and no one else. And it can certainly be argued that if ENDA would come to be viewed as legislation protecting everyone, it would have a much better chance of passing before too long.<sup>38</sup>

ENDA’s proposed enforcement provisions track the procedures and remedies available under federal employment discrimination law. For example, the Equal Employment Opportunity Commission (EEOC) would generally have the same powers to enforce ENDA as it currently has to enforce Title VII. After going through the administrative mechanism of the EEOC,<sup>39</sup> aggrieved plaintiffs may also pursue remedies if the act is violated “to the same extent as the remedies are available for a violation of Title VII.”<sup>40</sup>

At the same time, reflecting both the highly contested nature of many LGBT issues and the struggle within Congress to find enough votes to pass this legislation, the current version of ENDA contains significant limitations that other federal statutes addressing employment discrimination do not typically set forth. Two notable deviations from Title VII, which inevitably limit the ability of aggrieved plaintiffs to prevail, are: (1) punitive damages are not available, and (2) only disparate treatment claims are allowed under ENDA, while disparate impact claims are prohibited.<sup>41</sup> In addition to the above restrictions, the following limitations are included in the 2009 legislation:

---

37. With regard to perceived identity, the stereotypes of lesbian women as masculine and gay men as effeminate are especially persistent. At the risk of stating the obvious, it is important to note that members of LGBT communities are no more monolithic than members of any other recognized group. While many LGBTs are in fact gender non-conforming, many others are not. The transgender umbrella may include FTMs (female-to-male), MTFs (male-to-female), cross dressers, and those who identify as multi-gender or genderqueer. Some have gender re-assignment surgery, but many do not. See BIEGEL, *supra* note 16, at 205 n.1.

38. See *id.* at 76.

39. See H.R. REP. NO. 110-406, at 10 (2007).

40. In general, remedies—both at law and in equity—would be available for a violation of ENDA to the same extent they are available for a violation of Title VII of the Civil Rights Act of 1964 by a private entity, except that punitive damages are not available. Thus, for example, if the plaintiff prevails, he or she may receive injunctive relief, such as reinstatement and/or back pay. See S. 1584 § 10(a) (“Enforcement Powers”); *id.* § 10(b) (Procedures and Remedies).

41. Unlike the protections set forth under Title VII, ENDA does not allow an individual to bring a traditional “disparate impact” claim, which challenges a facially

- Affirmative action in hiring cannot be required under the act.<sup>42</sup>
- The act does not apply to benefits for the partners of those in civil unions, domestic partnerships, or same-sex marriages.<sup>43</sup>
- Statistics regarding actual or perceived sexual orientation or gender identity may not be collected by the EEOC or required of covered entities under the act.<sup>44</sup>
- The act may not be employed to require the construction of any new facilities.<sup>45</sup>
- The act does not apply to the military.<sup>46</sup>
- Religious institutions in general are exempted from complying with the act.<sup>47</sup>

### B. *The Recent Inclusion of Gender Identity in ENDA*

The most recent version of ENDA includes a provision for protection on the basis of actual or perceived gender identity.<sup>48</sup> This re-

---

neutral practice of the employer as disproportionately having an adverse effect on persons of a protected class. *See* S. 1584 § 4(g) (“Only disparate treatment claims may be brought under this Act.”).

42. *See id.* § 4(f) (“No Preferential Treatment or Quotas”).

43. *See id.* § 8(b) (“Employee Benefits”) (providing that “[n]othing in this Act shall be construed to require a covered entity to treat an unmarried couple in the same manner as the covered entity treats a married couple for purposes of employee benefits”); *see also id.* § 8(c) (“Definition of Marriage”) (“As used in this Act, the term ‘married’ refers to marriage as such term is defined in section 7 of title I, United States Code (commonly known as the ‘Defense of Marriage Act’).”). It should be noted that the wording of these draft provisions may be challenged in the future. Not only is the definition of marriage itself highly contested in the courts and the legislatures, but also the U.S. District Court of Massachusetts recently found the Defense of Marriage Act (DOMA) unconstitutional, and appeals are pending. *See Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010); *Mass. v. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234, 234 (D. Mass. 2010). In addition, President Obama has promised to overturn DOMA. *See, e.g., Linda Feldmann, Obama Administration Walks Tricky Political Line on Gay Marriage Ban*, CHRISTIAN SCIENCE MONITOR, July 9, 2010, <http://www.csmonitor.com/USA/Justice/2010/0709/Obama-administration-walks-tricky-political-line-on-gay-marriage-ban> (“President Obama has called the law known as DOMA ‘abhorrent’ and pledged to overturn it . . .”).

44. *See* S. 1584, 111th Cong. § 9 (2009) (“Collection of Statistics Prohibited”).

45. *See id.* § 8(a)(4) (“Additional Facilities Not Required”).

46. *Id.* § 7.

47. ENDA provides, in pertinent part, that the act “shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of [Title VII] . . . .” S. 1584 § 6 (“Exemption for Religious Organizations”). The religious discrimination provisions of Title VII cited by the legislation are Section 702(a) and 703(e)(2), 42 U.S.C. 2000e-1(a); 2000e-2(e)(2). *Id.* The religious exemption mirrors the exemption set forth in Title VII, which allows religious institutions to discriminate if they are doing so pursuant to religious doctrine or beliefs. *See id.*

48. Legislation introduced in the House in 2007 originally included such protection, but—pursuant to a highly contested and emotional debate both among political lead-

sponds to a rampant problem among employers, who often rely on negative stereotypes in dismissing or refusing to hire those who identify or are perceived to be identifying under the transgender umbrella. The problem is especially dire due to the fact that states have failed to provide protections against such discrimination. As of 2011, the District of Columbia and less than half of the states prohibit discrimination on the basis of sexual orientation, and even fewer protect against discrimination on the basis of gender identity.<sup>49</sup> In fact, such discrimination is ostensibly allowable under the laws of thirty-eight states.<sup>50</sup>

As is the case with the ENDA provision prohibiting discrimination on the basis of actual or perceived sexual orientation, the addition of “actual or perceived gender identity” language to the legislation also protects everyone. That is to say, the protection not only extends to persons who may or may not identify as transgender, but also to those who may or may not identify as lesbian, gay, or bisexual. Indeed, it protects anyone who is discriminated against on the basis of gender non-conformity. This is significant not only for transgender communities, but also for the rights of gays and lesbians in general. Extensive research has documented the fact that a substantial percentage of all the discrimination against and mistreatment of gays and lesbians targets gender non-conformity above all else. Masculine gay men and feminine lesbians, whose gender performance is seen as “traditional,” often find much greater acceptance in the schools, the workplace, and society as a whole, even among their gay and lesbian peers. On the other hand, those who are intentionally or unintentionally gender-transgressive are most often victimized and shunned.<sup>51</sup>

The lack of employment security for transgender and gender non-conforming people has been widely documented in recent years. Those who seek to transition while on the job—to a different gender

---

ers and within LGBT communities—the gender identity provisions were removed before the House vote. See Kate Linthicum, *Transgender Fight Inches Ahead*, CHI. TRIB., June 1, 2010, at 26.

49. See *Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN (July 26, 2010), [http://www.hrc.org/documents/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf).

50. See *id.*; see also *Transgender Employment Links*, CTR. FOR GENDER SANITY, [www.gendersanity.com/resources.shtml](http://www.gendersanity.com/resources.shtml) (last visited Feb. 23, 2011) (listing resources regarding transitioning on the job and other issues that employers and transgender employees might face). Some federal courts have found that gender identity discrimination claims may be viable under Title VII as sex discrimination claims. See *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005); *Schwenk v. Hartford*, 204 F.3d 1187, 1205 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000).

51. See generally *TRANSGENDER RIGHTS* (Paisley Currah et al. eds., 2006) (documenting the challenges faced by gender non-conforming persons and the highly nuanced nature of the controversies that remain).

than the one they were identified as at birth—face the greatest challenges, with transgender persons often accused of deception in this context, simply because they have not disclosed ostensibly hidden aspects of their gender identity at the outset.<sup>52</sup> In a highly publicized case in Largo, Florida, in 2007, for example, City Manager Susan Stanton (formerly known as Steve Stanton) was fired after announcing that she was transitioning from male to female. Fourteen years as a popular and successful city leader made no difference to the city commission. Suddenly, and for no reason other than her gender identity, she was out of a job.<sup>53</sup>

Comments regarding Stanton's dismissal, both from city commission members and the public at large, were very revealing. According to the *Orlando Sentinel*, for example, those who supported the dismissal insisted that Stanton was fired "not because he was a transsexual but because they questioned his judgment, integrity and ability to lead." And Commissioner Andy Guyette was quoted as saying that "[h]onesty, integrity and trust' are the basis for any relationship between a city commission and city manager. . . . 'Without trust, there's no longer a foundation for any relationship.'" <sup>54</sup>

Jim Robinson, a resident of Largo, wrote in a letter to the editor that Stanton "might have been a good employee of Largo in the past, but with the baggage he is bringing to the workplace and the treatment he has brought to his family, he looks like a poor risk to me."<sup>55</sup> Another resident of Largo, Michelle Keller, wrote that any support that Stanton received was undeserved, and that she was on "an extended ego trip."<sup>56</sup>

---

52. Many people still do not believe that someone who identifies as a different gender from the one assigned at birth should be entitled to keep that to him- or herself. Those who adopt such a position see this as a deception issue, and they view transgender persons as engaged in deceit unless they disclose their gender identity history. See generally MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004) 250–70 (arguing that the "gay panic" and "trans panic" defenses are reminiscent of earlier defenses that were commonly used to justify attacks against Jews, blacks, and other minority groups).

53. See Sue Carlton, *Stanton Firing Still Leaving Ripples*, ST. PETERSBURG TIMES, Apr. 27, 2007, at B1; see also BIEGEL, *supra* note 16, at 182–85 (providing an overview of the highly publicized dismissal of Susan Stanton in Largo, Florida).

54. Jim Stratton, *City Ousts Manager After Sex-Change Announcement*, SUN HERALD, Mar. 25, 2007, at B5. The improper gender designations in these quotations have not been altered.

55. Jim Robinson, Letter to the Editor, *Stanton Is Not Good for Largo*, ST. PETERSBURG TIMES, Mar. 20, 2007, at 2.

56. Michelle Keller, Letter to the Editor, *Stanton's Support Is Undeserved*, ST. PETERSBURG TIMES, Mar. 20, 2007, at 2.

James Anderson, a resident of nearby Palm Harbor, went much further. Anderson wrote, “Stanton can do whatever he wishes on his own time—even negatively affect the lives of his family with his ‘urges’ . . . . He does not have the right, as the non-elected manager of a city with other employees, to manipulate the personnel rules to benefit his ‘transition’ and to protect his job from his negative behavior . . . . Even in our totally liberated, do your own thing world, this is over the top . . . . We can feel sorry for his maladjustment, but don’t allow this to creep into human resources decisions for thousands of other workers and torture them with his oddness.”<sup>57</sup> Taken together, not only are the language, tone, and implicit assumptions in these highly offensive comments reflective of what people are thinking when they condemn transgender persons, but also the intensity of the emotion demonstrates both the nature and extent of the challenges that gender non-conforming persons face today.

The first comprehensive effort to document gender identity-based employment discrimination across all fifty states led to data collection from over 6,000 transgender persons and yielded a compelling picture of day-to-day realities.<sup>58</sup> Findings from the 2011 report *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* showed that 47% of survey respondents experienced an adverse job action because they are transgender, and 26% of the people

---

57. James Anderson, Letter to the Editor, *With No Respect, He Can’t Lead*, ST. PETERSBURG TIMES, Mar. 22, 2007, at 2. Coverage across the nation led to extensive commentary in other cities. At UCLA, for example, many were supportive of Stanton. However, law student David Montoya wrote the following in the *Daily Bruin*:

Stanton’s decision to undergo a sex-change operation marks a huge shift in his values. He is clearly not who the people of Largo voted into office [sic]. The other representatives of Largo have a duty as representatives of their constituents to remove any office holder who has deceived his own people about who he is.

David Montoya, Letter to the Editor, *Discrimination Not an Issue in Stanton Case*, DAILY BRUIN, Mar. 7, 2007. It should be noted that contrary to Montoya’s assertion, Stanton was *hired* to be city manager of Largo—it is not an elected position.

58. See JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011), [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf). For this survey, the National Center for Transgender Equality and the National Gay and Lesbian Task Force interviewed 6,450 transgender people using an extensive questionnaire that covered employment, education, health care, housing, public accommodation, criminal justice, family life, and access to government documents. *Id.* at 2. The final sample included residents of all fifty states, Puerto Rico, Guam, and the U.S. Virgin Islands. *Id.* Data gathered from respondents was compared to U.S. Census Bureau and Department of Labor data. *See, e.g., id.* at 70 nn.3, 7. For purposes of the survey, an “adverse job action” was defined as not getting a job, being denied a promotion, or being fired. *Id.* at 3.

surveyed lost their jobs due to their gender identity/expression.<sup>59</sup> Particularly hard hit were those who were African American (32%) or Multiracial (36%).<sup>60</sup> In addition, 90% of respondents reported that “they had directly experienced harassment or mistreatment at work or felt forced to take protective actions that negatively impacted their careers or their well-being, such as hiding who they were, in order to avoid workplace repercussions.” Mistreatment ranged “from verbal harassment and breaches of confidentiality to physical and sexual assault.”<sup>61</sup> Respondents were also nearly four times more likely to have a household income of less than \$10,000 per year compared to the general population.<sup>62</sup> Studies documenting transgender unemployment in the United States over the past five years report unemployment rates ranging from 20% to 35% or higher.<sup>63</sup> A study conducted in California found that, although transgender Californians are twice as likely as the general population to possess college degrees, their unemployment and poverty rates are twice the state average.<sup>64</sup> Analyzing the circumstances in which gender non-conforming persons find themselves, Professor Dean Spade concludes that the “high levels of unem-

---

59. *Id.* at 3.

60. *Id.* at 4.

61. *Id.* at 56.

62. *Id.* at 2.

63. See, e.g., Jaime Grant, *ENDA Will Provide Critical Employment Protection for Lesbian, Gay, Bisexual, and Transgender Workers*, THE HILL'S CONGRESS BLOG (Nov. 5, 2009, 2:49 PM), <http://thehill.com/blogs/congress-blog/civil-rights/66575-enda-will-provide-critical-employment-protections-for-lesbian-gay-bisexual-and-transgender-workers> (“transgender unemployment is likely to be in the 20 percent range or higher”); see also Gwendolyn Ann Smith, *Amanda's Albatross*, BAY AREA REP. Jan. 14, 2010, <http://ebar.com/columns/column.php?sec=transmissions&article=127> (A 2006 study found the unemployment rate among transgender people to be around 35%).

64. See Lee Romney, *San Francisco Grants Reprieve to Jobs Program for Transgender People*, L.A. TIMES, June 19, 2010, at AA.3; see also Seth Hemmelgarn, *Report: Even with Protections, Transgenders in California*, BAY AREA REP. (Oct. 29, 2009), <http://www.ebar.com/news/article.php?sec=news&article=4306>:

According to “The State of Transgender California Report,” 67 percent of the people who responded to a 2008 survey said they had experienced workplace harassment or discrimination directly related to their gender identity. The survey also found that respondents were twice as likely to live under the \$10,400 poverty line compared with the general population.

See also Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in *TRANSGENDER RIGHTS* 217–41 (Paisley Currah et al. eds., 2006) (exploring at length the economic challenges typically faced by transgender persons).

ployment, homelessness, and poverty in the population” clearly stem “from discrimination and economic marginalization.”<sup>65</sup>

### C. Contextualizing the Opposition to ENDA

Opposition to ENDA can be divided into four categories: (1) religious beliefs and perspectives, (2) misconceptions about the parameters of the legislation, (3) misconceptions about LGBTs generally, and (4) practical concerns about the day-to-day implementation of legislative mandates, particularly as they relate to the unique issues that LGBTs might bring to the workplace.

Religious beliefs underlie much of the opposition to LGBT rights in this country,<sup>66</sup> despite the fact that there are significant differences among various religious denominations with regard to this issue.<sup>67</sup> The Religion Clauses of the First Amendment generally prohibit the government from acting on the basis of perceived religious dictates,<sup>68</sup> but since ENDA also addresses the private sector, concerns about religious freedom have understandably been an aspect of the debate. In response to these concerns, supporters of ENDA have included the aforementioned religious exemption in proposed drafts of the bill, which mirrors the exemption that is included in Title VII and currently applies to employment discrimination directed at persons on the basis of race, color, religion, sex, or national origin.<sup>69</sup>

---

65. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 757 (2008); see also Shannon H. Tan, *When Steve Is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 581 (2008) (making the case for greater protection for transgender persons in the workplace).

66. See, e.g., Laurie Goodstein, *Christian Leaders Unite on Political Issues*, N.Y. TIMES, Nov. 20, 2009, at A22.

67. See BIEGEL, *supra* note 16, at 17.

68. See, e.g., *McCreary County v. ACLU*, 125 S. Ct. 2722, 2746–47 (2005) (O’Connor, J., concurring):

Together with the other First Amendment guarantees . . . the Religion Clauses . . . embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct. . . . Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders’ plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat.

69. Some Republican members of Congress have pushed for a broader religious exemption. For example, in the 2007 hearings of the Committee on Education and Labor, an amendment was offered by Representative Pete Hoekstra (R-MI) that would have expanded the religious exemption to include institutions that maintain a faith-based mission. The amendment was defeated by a vote of twenty-seven to twenty-one. See H.R. REP. NO. 110-406, at 9–10 (2007). In response to these efforts, supporters of

A second category of opposition to ENDA is based on misconceptions about the legislation and includes beliefs that it provides “special rights” for LGBTs. Stemming from the false belief that LGBTs have a greater propensity than do others to engage in sexual misconduct and inappropriate sexual expression in the workplace, many fear that protections for gay and gender non-conforming persons will undeservedly shield them from punishment for such impropriety. In response, supporters of ENDA have emphasized that the U.S. Supreme Court’s decision in *Romer v. Evans*<sup>70</sup> addresses the “special rights” allegation by rejecting a similar argument in an LGBT rights context. After enumerating the range of rights that would be denied to gays and lesbians if Amendment 2—the Colorado law challenged in this case—was upheld,<sup>71</sup> and explicitly referencing employment as one of these rights,<sup>72</sup> Justice Kennedy wrote:

We cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of *special rights*. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint . . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protec-

---

ENDA continue to emphasize that the federal legislation “adopts Title VII’s definition of a religious organization and thereby imports longstanding existing law on who is or is not a religious organization. The scope of its religious exemption is to those organizations who are covered by Title VII’s exemption, no more and no less.” *Id.* at 10. All states that have adopted provisions prohibiting discrimination in the workplace on the basis of sexual orientation have provided “an exemption for religious organizations”:

Though the religious exemption language varies from state to state, most states have exemptions that are broad in scope. Under these broad exemptions, religious organizations are permitted to give preference to individuals of the same religion or to those people whose employment is in accordance with the tenets of their particular religion.

*See id.* at 22–23.

70. 517 U.S. 620 (1996). The *Romer* decision invalidated a Colorado constitutional provision that would have prevented gays and lesbians from being able to obtain explicit protection against discrimination in that state, as violative of the Equal Protection Clause of the Fourteenth Amendment.

71. Amendment 2 was added to the Colorado Constitution by the voters in 1992. The impetus for the statewide ballot initiative came in large part from ordinances that local Colorado municipalities had passed that banned discrimination on the basis of sexual orientation. Not only did Amendment 2, “in explicit terms,” repeal or rescind these provisions, it also prohibited “all legislative, executive or judicial action at any level of state or local government . . . whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.” *Id.* at 624.

72. *Id.* at 629.

tions against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.<sup>73</sup>

Similarly, with regard to the allegation that employers would not be able to discipline LGBTs for inappropriate behavior on the job, ENDA does not state this at all. “Neither,” Pat Putignano writes, “does the legislative history of ENDA indicate that gay and lesbian employees may engage in sexually explicit behavior at work with impunity. Rather, ENDA merely states that the employer cannot invoke different standards or treatment on the basis of sexual orientation,” meaning that gays and straights must be treated equally in the workplace.<sup>74</sup>

Misconceptions about LGBT persons include negative stereotypes and defamatory myths, such as the canards that they are weak and unreliable or that they are hyper-sexualized predators who cannot be trusted.<sup>75</sup> Opposition based on these misconceptions is not often publicly stated at this point in time. Nonetheless, supporters of ENDA have sought to dispel these myths by emphasizing the overwhelming

73. *Id.* at 631 (emphasis added).

74. See Putignano, *supra* note 13, at 195–96.

75. Exemplary of the myth that gay men are weak is former California Governor Arnold Schwarzenegger’s use of the term “girlie men” to denigrate his political opponents. For instance, referring to a budget battle among California legislators, which at the time included five LGBTs, he said, “They cannot have the guts to come out there in front of you . . . I call them girlie men.” He later used the same term twice in reference to the same legislators and did not apologize or backtrack from the comments when questioned about them. Peter Nicholas, *Schwarzenegger Deems Opponents “Girlie-Men,”* L.A. TIMES, July 18, 2004, at B1.

With regard to the “lack of trustworthiness” myth, see, for example, RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY 4 (1993):

The military’s policies have had a sinister effect on the entire nation: Such policies make it known to everyone serving in the military that lesbians and gay men are dangerous to the well-being of other Americans; that they are undeserving of even the most basic civil rights. Such policies also create an ambience in which discrimination, harassment, and even violence against lesbians and gays is tolerated and to some degree encouraged.

Comments by young Marines in the aftermath of the vote by Congress to repeal “Don’t Ask, Don’t Tell” in December 2010 demonstrate the extent to which the “weakness” myth is still present. See James Dao, *Backing “Don’t Ask” Repeal, With Reservations,* N.Y. TIMES, Dec. 20, 2010, at A1. With regard to the predator myth, few invoke it openly at this point in time, but it is clear that in private many still believe it. See, e.g., April Bethea, *Critics Call for Reprimand of James for Anti-Gay Remarks,* CHARLOTTE OBSERVER, Dec. 31, 2010, at 1B (describing the outraged reactions of many in North Carolina and throughout the country upon publication of Mecklenburg County Commissioner Bill James’ statement, in an e-mail exchange with other commissioners, that “[h]omosexuals are sexual predators,” and that “allowing them to serve in the US military . . . ignores a host of serious problems.”).

findings that a person's sexual orientation or gender identity has nothing to do with his or her ability to perform a job in the workplace.<sup>76</sup>

Practical concerns about implementation in recent years have focused on the prospective impact of civil unions and same-sex marriages on employment benefits requirements and on what changes to the physical setting (such as restrooms and locker room facilities) might be required in order to prohibit discrimination on the basis of gender identity.<sup>77</sup> In the spirit of compromise, authors of the legislation have added language explicitly stating that no benefits to same-sex partners or spouses would be required under ENDA and that construction of new facilities could not be mandated under the act.<sup>78</sup>

In sum, an overwhelming percentage of Americans agree that gays and lesbians should not be discriminated against in the workplace, and state laws have moved from anti-LGBT to supportive of equal treatment in this regard. The experiences of states that have added non-discrimination provisions can dispel misconceptions, and as more LGBTs come out and more people work with LGBTs and get to know them, myths and fears have proven to fall by the wayside. Yet many political leaders representing more conservative areas of the country still oppose ENDA outright or have sought to limit the legislation's protections. In addition, reflecting the persistent misunderstanding—documented above—of the challenges faced by those whose appearance and/or actions do not conform to traditionally expected gender performance, some continue to express an unrelenting disapproval of equal rights for transgender persons.

---

76. See, e.g., *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Lab.*, 111th Cong. 47 (2009) (statement of R. Bradley Sears, Exec. Dir., Williams Inst. on Sexual Orientation Law and Pub. Pol'y, UCLA Sch. of Law); see also Peter Freiberg, *President's Order Protects Workers: Anti-Gay Discrimination Banned in Civilian Jobs*, WASH. BLADE, June 5, 1998, at 1 ("President Clinton urged Congress 'to pass . . . [ENDA in order to] extend these basic employment protections to all Gay and Lesbian Americans. Individuals . . . should not be denied a job on the basis of something that has no relationship to their ability to perform their work.'").

77. See, e.g., Carlos A. Ball, *Why Bathrooms Are a Civil Rights Issue*, HUFFINGTON POST (Sept. 7, 2010, 5:04 PM), [http://www.huffingtonpost.com/carlos-a-ball/why-bathrooms-are-a-civil\\_b\\_707376.html](http://www.huffingtonpost.com/carlos-a-ball/why-bathrooms-are-a-civil_b_707376.html).

78. See *supra* notes 42–45 and accompanying text. Gender non-conforming persons' concerns over restrooms are important, and this is a matter that cannot and should not be ignored. See *Schools, Restrooms and Gender Non-Conforming Students*, GENDER SPECTRUM, [http://www.genderspectrum.org/images/stories/Restrooms\\_and\\_schools.pdf](http://www.genderspectrum.org/images/stories/Restrooms_and_schools.pdf). Many strategies regarding restroom accessibility are available to employers, strategies that require neither new construction nor additional expense. These include recognizing the right of transgender persons to use a restroom that corresponds to their gender identity and also designating certain restrooms as gender-neutral facilities. See *id.*

## II.

EMPLOYMENT DISCRIMINATION AGAINST LGBTs IN THE  
K–12 EDUCATION COMMUNITY:  
A RECENT HISTORY

Many scholars have concluded that the most egregious levels of discrimination against LGBTs in U.S. history took place from the 1940s through the 1960s.<sup>79</sup> President Eisenhower’s executive order banning “homosexuals” from employment by the federal government exemplifies the discrimination.<sup>80</sup> Historical documents reveal that the policy reflected the influence of defamatory myths familiar to us even today, according to which gays and lesbians were classified as “per-

---

79. See, e.g., JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 40–53 (1983); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2159–69 (2002).

80. See Exec. Order No. 10,450, § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1949–1953); see also Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035 (2000) (reviewing William N. Eskridge, Jr., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)):

The repression of gays in the 1950s was more far-reaching in its impact than were the anti-Communist witch-hunts of the same period. “In 1951 the State Department fired 119 employees for homosexuality, and only 35 as other security risks (Communists); the figures were 134 and 70, respectively, in 1952.” In 1953, President Eisenhower issued an executive order that officially added “sexual perversion” to the federal loyalty-security program’s list of grounds for investigation and dismissal. During the next two years, more than 800 federal employees lost their jobs because of mere charges of loitering, solicitation, or disorderly conduct—the charges that police typically brought against gays. A subsequent order extended coverage to private employers who held federal contracts, barring gays from more than two million nongovernment jobs. The military collected the names of more than 12,000 “known or alleged homosexuals,” and police vice squads had their own lists. The FBI, which acted as a clearinghouse, shared police and military records with private employers. As a result, those who lost federal jobs often found themselves blacklisted in the private sector as well. Similar witch-hunts took place at the state level.

*Id.* at 2039–40 (citations omitted).

The word “homosexual,” when used as a noun, is often viewed as an anachronistic and inappropriate term. See, e.g., Sean Lund, *The ‘H’ Word*, HUFFINGTON POST (July 25, 2007 12:04 PM), [http://huffingtonpost.com/sean-lund/the-h-word\\_b\\_57773.html](http://huffingtonpost.com/sean-lund/the-h-word_b_57773.html) (discussing the “deeply problematic connotation” of the word because of its association with the now-discredited diagnosis of a “psychological disturbance” and its preferred use in an anti-gay context by those who see an LGBT identity as only about sex). It is employed as a noun in this Article only when it appears within a quote or has been employed in a directive.

verts,”<sup>81</sup> categorized as mentally ill,<sup>82</sup> and seen as threats to order and stability.<sup>83</sup> Government-mandated discrimination was also fueled by the military’s aggressive attempt to ban all gays and lesbians from serving their country<sup>84</sup> and by Senator Joseph McCarthy’s persistent effort to characterize “homosexuals” as a paramount threat to U.S. security.<sup>85</sup> In addition, it was exacerbated by police harassment and

---

81. As captured in a scene from the Arthur Dong film *COMING OUT UNDER FIRE* (Deep Focus Prods. 1994), a 1950 newspaper headline read, “3750 Perverts Hold U.S. Jobs in Capital, Senate Probers Say.”

82. See ALAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 11–15, 128 (1990) (detailing the way in which homosexuality was defined as a mental illness in military screening procedures and noting that this belief was present throughout World War II). In the Americans with Disabilities Act of 1990, “homosexuals” are included on a list along with pyromaniacs and kleptomaniacs as examples of people whose conditions are not covered by the new law, continuing this association. See Beth Haller, *AIDS as a Legally Defined Disability: Implications from News Media Coverage*, in *POWER IN THE BLOOD: A HANDBOOK ON AIDS, POLITICS, AND COMMUNICATION* 270 (William N. Elwood ed., 1998); Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 *COLUM. L. REV.* 1451, 1473–75, 1479–93 (1994) (referencing the exclusion of “transvestites, transsexuals, homosexuals, exhibitionists, voyeurs, and pedophiliacs” from the ADA and discussing the implications of this legislative decision, which resulted in large part from the efforts of North Carolina Senator Jesse Helms).

83. As recently as 2007, Arizona Senator John McCain issued a statement in which he said that gay troops pose “an intolerable risk” to national security. Barbara Wilcox, *McCain: Gay Troops Pose “Intolerable Risk”*, *ADVOCATE.COM* (May 4, 2007, 12:59 PM), <http://www.advocate.com/printArticle.aspx?id=39455>.

84. Historical documents reveal, for example, that the U.S. military, troubled by the large number of veterans who returned from World War I with mental and emotional disabilities reflecting their highly traumatizing experience with trench warfare, aggressively and mistakenly sought to limit the manifestation of such disabilities in World War II by ferreting out gays and lesbians, both at the outset during the initial medical examination and throughout the war pursuant to intensive monitoring. These exceedingly discriminatory and harmful policies were based entirely on negative stereotypes and defamatory myths that included the highly offensive canard that gays were invariably weak, unstable, mentally ill, and perverted. See BÉRUBÉ, *supra* note 82.

85. For example, transcripts from secret hearings conducted in 1953 and 1954 by Senator McCarthy and his chief counsel Roy Cohn during their investigation of anti-American activities of those in public service revealed many direct interrogations of gay men who had public service positions and were goaded into outing others. See, e.g., Mark Goebel, *Transcripts Confirm McCarthy Gay-Baiting*, *GAY.COM/PLANETOUT.COM NETWORK* (May 7, 2003, 7:52 PM), available at <http://strangetalk.net/viewtopic.php?f=4&t=42042>. An analysis of the reasons behind Senator McCarthy’s persistent demonization of gays is beyond the scope of this Article. However, historians analyzing this dynamic have concluded that not only did McCarthy likely accept the prevalent view within the military, the FBI, and apparently within the Eisenhower administration generally that gays were weak, unreliable, unstable, and not to be trusted, but that he focused in on scapegoating an “easy target”: an already marginalized and disenfranchised group of people who were seen at the time as outside the bounds of “normal society.” See, e.g., BÉRUBÉ, *supra* note 82; DAVID K.

judicial mistreatment of gays in every walk of life, professional as well as personal.<sup>86</sup> Careers were ruined, and lives were shattered.<sup>87</sup>

The efforts of many gay and lesbian rights activists to counter this discrimination led to the American Psychiatric Association's vote to remove homosexuality from its Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973<sup>88</sup> and to dramatic changes in the

JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 1–14 (2004).

In an interview with the University of Chicago Press, Johnson illuminated additional aspects of this dynamic:

The Lavender Scare helped fan the flames of the Red Scare. In popular discourse, communists and homosexuals were often conflated. Both groups were perceived as hidden subcultures with their own meeting places, literature, cultural codes, and bonds of loyalty. Both groups were thought to recruit to their ranks the psychologically weak or disturbed. And both groups were considered immoral and godless. Many people believed that the two groups were working together to undermine the government.

Much of the extension and strengthening of the national loyalty/security system in this period, I argue, was motivated as much by the perceived need to ferret out homosexuals from the government as it was by the pressure to remove communists. We cannot understand the Red Scare unless we also understand the Lavender Scare.

Interview by University of Chicago Press with David K. Johnson, <http://www.press.uchicago.edu/Misc/Chicago/404811in.html> (last visited Jan. 23, 2011).

86. See WILLIAM N. ESKRIDGE, *GAYLAW* 98–101 (1999) (Eskridge notes that, as recently as the early 1960s, gays and lesbians were “smothered by law.” He goes on to explain that people during that era risked “arrest and possible police brutalization” even for such things as possessing a publication that addressed gay issues, or for writing about homosexuality without disapproval).

87. See BÉRUBÉ, *supra* note 82; Interview with David K. Johnson, *supra* note 85. See generally JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001) (documenting the legal battles at the U.S. Supreme Court throughout the second half of the twentieth century); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799 (1979) (a comprehensive and wide-ranging overview of the mid-century legal terrain); Rhonda R. Rivera, *Our Straight-Laced Judges: Twenty Years Later*, 50 *HASTINGS L.J.* 1179 (1999) (reflecting on her earlier article and on developments in the twenty years after her original publication).

88. The Diagnostic and Statistical Manual of Mental Disorders (DSM) codifies psychiatric conditions and is used as a key reference work across the globe. See Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, *N.Y. TIMES*, Dec. 16, 1973, at A1 (documenting the American Psychiatric Association (APA) trustees' 13–0 decision); Harold M. Schmeck, Jr., *Psychiatrists Approve Change on Homosexuals*, *N.Y. TIMES*, Apr. 9, 1974, at A12 (reporting on the referendum vote by the entire membership, with 58% voting to approve the decisions). Journalist and historian Charles Kaiser, writing about the APA decision to remove homosexuality from the DSM list of psychiatric disorders, called December 15, 1973 “the best day of the [twentie]th century for every lesbian and gay man in America.” He explained:

relevant legal frameworks in recent decades.<sup>89</sup> However, the shadow cast by the draconian crackdown on LGBTs in the mid-twentieth century was long, and harassment, mistreatment, and loss of employment have continued to the present day.<sup>90</sup> Indeed, even where no written documents mandated such discrimination, unchecked, private anti-gay biases have destroyed the careers of thousands of LGBT workers across the country.<sup>91</sup>

---

[F]or gay people who came of age after the 1970s, it is almost impossible to imagine what it had been like to live in an era when every official body (as well as most liberal lobbying groups, including the American Civil Liberties Union) classified your orientation as an illness or a crime. As Judd Marmor, one of the APA officers who engineered the change in the association's official doctrine, told me, the board of trustees concluded there was 'no reason why . . . a gay man or woman could not be just as healthy, just as effective, just as law abiding, and just as capable of functioning as any heterosexual.' That was an entirely revolutionary notion in 1973, and without its formal articulation none of the progress of the next three decades would have been possible.

Charles Kaiser, *The APA Decision*, THE ADVOCATE, NOV. 12, 2002, at 46.

89. See generally BIEGEL, *supra* note 16, ch. 1–4 (setting forth a detailed overview of the dramatic changes in LGBT-related law over the past several decades).

90. See, e.g., *Shermer v. Illinois Dep't of Transp.*, 171 F.3d 475 (7th Cir. 1999); *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), *vacated en banc*, 114 F.3d 1097 (11th Cir. 1997); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981). In *Shermer*, a building tradesman for the Illinois Department of Transportation was subjected to a constant barrage of offensive homophobic comments at his workplace. The plaintiff filed suit in federal court, alleging a hostile environment under Title VII of the Civil Rights Act of 1964. However, the Seventh Circuit upheld the decision of the lower court to deny James Shermer relief, because the harassment was based on sexual orientation and not prohibited by Title VII. *Shermer*, 171 F.3d at 476–77. In the events that led up to the *Shahar* suit, Attorney Robin Joy Shahar's employment was terminated at the Georgia attorney general's office when her employer discovered that she was a lesbian and had held a private religious commitment ceremony with her partner. Attorney General Michael Bowers personally wrote to Shahar to inform her that he could not continue to employ her because—in his opinion—her life did not reflect appropriately on the attorney general's office. Plaintiff brought a constitutional challenge in the federal courts but was ultimately unsuccessful in getting reinstated. See *Shahar*, 70 F.3d at 1220–22. In *Childers*, the U.S. District Court for the Northern District of Texas upheld the decision of the Dallas Police Department to deny the plaintiff a job—apparently because of his sexual orientation—even though he earned the highest score of any candidate who took the civil service examination for that position. During the relevant job interview, the police department official with sole authority for hiring for that particular opening asked Childers various questions intended to determine Childers' sexual orientation. At the conclusion of the interview, the interviewer told Childers, "I think you should know there are a lot of cops who like to bust fags." *Childers*, 513 F. Supp. at 137–38.

91. See, e.g., S. REP. NO. 107-341, at 10 (2002) (concluding that "the existence of sexual orientation discrimination in American employment represents the sum of half a century's worth of severe anti-gay bias in State-sanctioned, as well as private employment contexts"); see also David Alan Sklansky, *Privacy, Policing Homosexuality, and Enforcing Social Norms—'One Train May Hide Another'*: Katz, Stonewall,

A. *Deliberate Mistreatment of LGBT Educators: Multiple and Interrelated Levels of Discrimination over Time*

Within the education community, the public record over the past five decades is filled with examples of discriminatory treatment of gay and gender non-conforming teachers, both in state laws that sanction inequitable practices and on the part of state officials who interpret regulations and statutes in a discriminatory manner.<sup>92</sup> Three prominent court decisions focusing on teacher licensing at the state level reflect the persistence and consistency of the discrimination: the *Acanfora* case in Maryland,<sup>93</sup> the *Morrison* case in California,<sup>94</sup> and the *National Gay Task Force* case in Oklahoma.<sup>95</sup> All three cases involved teachers who were mistreated in the workplace for no reason other than their actual or perceived sexual orientations.

I. *Acanfora v. Board of Education of Montgomery County*

In the *Acanfora* case, the Fourth Circuit upheld a school district's refusal to renew the contract of LGBT educator Joseph Acanfora III, who had contested LGBT-related discrimination on four occasions during his college and early professional career.<sup>96</sup> In his first legal action challenging LGBT mistreatment, Acanfora and other members of a fledgling gay student group at Penn State successfully challenged the university's denial of official recognition for the student group.<sup>97</sup> In a second case, when "his public acknowledgement of homosexuality ultimately led to his suspension from a student teaching assignment," he obtained a state court order that he be reinstated.<sup>98</sup> In the third case, he argued in front of a special six-member panel during an administrative hearing that his openly gay identity should not preclude him from being granted certification as a teacher by the state of Penn-

---

*and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 906–07, 911 (2008) ("The terror and cruelty of a charge of homosexuality, the way such a charge could destroy, in a blow, a man's reputation and livelihood, his family life and his place in the community—all of this was well known to Americans regardless of their own sexual practices, and witnessed repeatedly, often close at hand.").

92. See E. EDMUND REUTTER, JR., *THE LAW OF PUBLIC EDUCATION* 657 (4th ed. 1994) (documenting instances in which LGBT educators have lost their jobs because of their sexual orientation).

93. *Acanfora v. Bd. of Educ.*, 491 F.2d 498 (4th Cir. 1974).

94. *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969).

95. *Nat'l Gay Task Force v. Bd. of Educ.*, 33 Fair Empl.Prac.Cas. (BNA) 1009, 1982 WL 31038 (W.D. Okla. 1982).

96. *Acanfora*, 491 F.2d at 499–500.

97. See *id.*

98. See *id.* at 500.

sylvania.<sup>99</sup> State Secretary of Education John Pittenger ruled in favor of Acanfora. When the Montgomery County School District learned of its teacher's gay identity from public statements by Pittenger and Acanfora, the district suspended him from his teaching position and ultimately refused to renew his contract. Acanfora thus began his fourth effort to gain equal treatment for LGBTs.<sup>100</sup>

Acanfora sued for reinstatement, contending that the district's refusal to employ or retain him as a teacher violated the First and Fourteenth Amendments.<sup>101</sup> After the trial, the judge found that Acanfora's recent public statements about the outcome of his earlier legal victory exhibited "an indifference to the bounds of propriety governing the behavior of teachers" and that the refusal to reinstate him was "neither arbitrary nor capricious."<sup>102</sup> The Fourth Circuit upheld the ruling, but on different grounds. The panel found that the public statements outside of the workplace were protected by the First Amendment, but that his failure to disclose his membership in his undergraduate gay student organization when he first applied for the teaching job precluded him from raising a claim of unconstitutional employment discrimination, even though district officials acknowledged that he was suspended not because of any alleged deception on his part, but rather because they learned that he was gay.<sup>103</sup>

---

99. After the hearing, at which Acanfora "explained the professional relationship necessary between student and teacher, the intention never to discuss or encourage homosexuality, and the belief that homosexuals should gain legal rights and be free from specific hatred and fear," the panel split evenly and turned the matter over to Pennsylvania Secretary of Education John Pittenger. *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 845 (D. Md. 1973).

100. *Acanfora*, 491 F.2d at 500.

101. *Id.* at 501.

102. *Id.* at 500–01.

103. *See id.* School officials admitted that if Acanfora had revealed his affiliation with the gay student organization they would not have employed him. But they asserted that Acanfora's "intentional omission of his connection . . . bars his attack on the constitutionality of the . . . employment policy." *Id.* at 501. The Fourth Circuit agreed:

Acanfora purposely misled the school officials so he could circumvent, not challenge, what he considers to be their unconstitutional employment practices. He cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. "When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction."

*Id.* at 504 (citations omitted).

## 2. Morrison v. State Board of Education

Marc Morrison was a fully credentialed educator in southern California with an unblemished record, having been employed as a teacher by the Lowell Joint School District “for a number of years prior to 1964.”<sup>104</sup> During one week in early 1963, he and a male colleague “engaged in a limited, non-criminal physical relationship.”<sup>105</sup> When this fact was reported to school officials by the colleague, Morrison was apparently pressured to resign from the district, and the State Board of Education revoked his teaching credential after concluding that “the incident” constituted “immoral and unprofessional conduct and an act involving moral turpitude,” a charge that “warrant[ed] revocation of life diplomas” under the California Education Code.<sup>106</sup>

Morrison contested this revocation, arguing that his actions did not constitute immoral and unprofessional conduct within the meaning of the statute. The lower state courts ruled against him, but he won the right to retain his teaching credential in a 4–3 decision by the California Supreme Court. Morrison’s prevailing argument was that what he had done did not warrant revocation of his teaching credential, because it had nothing to do with his fitness to teach.<sup>107</sup> He did not receive this remedy, however, until five years after he lost his job and endured the stigma accompanying the disclosure of the relationship with the other teacher.<sup>108</sup>

Despite the just outcome, both Justice Tobriner’s majority opinion in *Morrison* and the two dissents reflect a discriminatory mindset with regard to the question of whether gays and lesbians were “fit” to

---

104. *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 375–77 (Cal. 1969).

105. *See id.* at 377–78.

106. *See id.* at 378–79.

107. *Id.* at 386, 391–92. The *Morrison* decision ultimately proved to be a landmark case, followed by courts throughout the country. It stands for the proposition that government officials seeking to terminate teachers or revoke their credentials because of state education code mandates regarding “immoral and unprofessional conduct” must be able to demonstrate the impact of the alleged conduct on a person’s ability to teach. The California Supreme Court, for example, in noting the nebulousness and variability of the terms “immoral and unprofessional conduct” over time, stated, “A recent study by the State Assembly reported that educators differed among themselves as to whether “unprofessional conduct” might include ‘imbibing alcoholic beverages, use of tobacco, signing petitions, revealing contents of school documents to legislative committees, appealing directly to one’s legislative representative, and opposing majority opinions.’” *Id.* at 383.

108. *Id.* at 394–95 (Justice Tobriner declaring that this conclusion “affords no guarantee that petitioner’s life diplomas cannot be revoked. If the board of education believes that petitioner is unfit to teach, it can reopen its inquiry into the circumstances surrounding and the implications of the 1963 incident with Mr. Schneringer”).

be teachers. For example, Justice Tobriner described Morrison's testimony in front of the State Board of Education in terms that paint homosexuality as "a problem" and implicitly reject the concept of a gay identity, characterizing the entire set of feelings as nothing more than a fleeting urge or inclination.<sup>109</sup> Even though he ruled in favor of the plaintiff in this particular dispute, Justice Tobriner warned that "[w]e do not, of course, hold that homosexuals must be permitted to teach in the public schools of California."<sup>110</sup>

### 3. National Gay Task Force v. Board of Education

In the late 1970s, Oklahoma State Senator Mary Helm introduced a bill, similar in wording to the aforementioned Briggs Initiative, that passed the Oklahoma legislature overwhelmingly. The law provided that K-12 public school teachers could be fired or suspended for "public homosexual conduct," which was broadly defined as including the "advoca[cy of] . . . homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."<sup>111</sup> The law remained on the books for years. In 1982, it was upheld in its entirety by the U.S. District Court for the Western District of Oklahoma, which rejected the plaintiff's allegations that the statute was unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.<sup>112</sup> In 1984, however, the Tenth Circuit Court of Appeals struck down portions of the law relating to "advocacy," on the grounds that the statute was overbroad and violative of the First Amendment.<sup>113</sup> But by that time, lives had been transformed, and LGBT teachers had undoubtedly left the profession or moved to another state.

Also in 1983, the West Virginia attorney general issued an opinion for his state, holding that school districts could fire gay and lesbian teachers under a state law that authorized school officials to fire teach-

---

109. See *id.* at 378 ("Petitioner there testified that he had had *some undefined homosexual problem* at the age of 13, but that, with the sole exception of the Schneringer incident, he *had not experienced the slightest homosexual urge or inclination* for more than a dozen years.") (emphasis added).

110. *Id.* at 394.

111. 70 OKLA. STAT. tit. 70, § 6-103.15(A)(2) (repealed 1989).

112. Nat'l Gay Task Force v. Bd. of Educ., 33 Fair Empl.Prac.Cas. (BNA) 1009, 1982 WL 31038 \*2 (W.D. Okla. 1982). Plaintiffs alleged "that the statute is unconstitutional because: it interferes with plaintiff's members right of free speech; it is vague and overbroad; it interferes with plaintiff's members right of privacy; it violates the equal protection clause; and it violates plaintiff's right to freedom of religion." *Id.*

113. Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1270-72 (10th Cir. 1984).

ers for “immorality.”<sup>114</sup> Even though the state had decriminalized consensual same-sex relations in 1976, he declared homosexuality to be immoral in West Virginia.<sup>115</sup> He wrote that a causal relationship had to be established between homosexuality and a person’s unfitness to teach, but he concluded that “unfitness” could be shown by nothing more than evidence that the teacher was “publicly known to be homosexual.”<sup>116</sup>

### B. *Discrimination Targeting Transgender Educators*

The Dana Rivers case is a widely publicized example of discrimination against a highly effective educator, solely because of her gender identity.<sup>117</sup> Rivers had an impressive resume when she was hired by a suburban Sacramento school district to teach history and journalism at Center High. Known then as David Warfield, she had been an electronics expert in the United States Navy, a political consultant, a school board member in Huntington Beach, California, a baseball coach, and a whitewater rafting instructor. In Sacramento, she proved to be a highly successful teacher at Center High throughout the 1990s. Over a nine-year period, students often called Warfield one of the best teachers they ever had, and many remembered her as a major influence on their lives.<sup>118</sup>

When the teacher revealed in a spring 1999 letter to colleagues that she was transitioning from male to female, would be undergoing gender-reassignment surgery, and planned to return to school as an MTF (male-to-female) transgender person named Dana Rivers, it was not long before she was removed from her teaching position.<sup>119</sup> A successful career that included acclaim and honors at all levels of the education system ground to an abrupt halt, and instead of support from

---

114. 60 W. Va. Op. Att’y Gen. 46, 1983 WL 180826, at \*1, \*7 (Feb. 24, 1983).

115. *Id.* at \*1.

116. *Id.* at \*4.

117. See Evelyn Nieves, *After Sex Change, Teacher Is Barred From School*, N.Y. TIMES, Sept. 27, 1999, at A12. According to the *Times*, Warfield developed a program to improve the academic success of unmotivated students, which became the award-winning Media Communications Academy. She was the recipient of an \$80,000 grant for the program, won the school’s Stand and Deliver award for the teacher who most inspires students, and received a standing ovation from the district’s staff at its annual meeting in late 1998.

118. See *id.*

119. See *id.*; see also Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 466–67 (2001) (discussing employment discrimination against transgender individuals generally and focusing on Dana Rivers’ case as an example).

her employers, she was condemned by them and ultimately fired for being a transgender person.

Represented by private counsel, but also in consultation with the ACLU, Dana Rivers challenged her termination as a violation of her First Amendment rights<sup>120</sup> and as discriminatory under California law.<sup>121</sup> Within a few months, she won a \$150,000 settlement from the school district.<sup>122</sup> Yet the extent to which her life was turned upside down by these events, and the amount of personal trauma to which she was subjected as a result, may never be fully known.<sup>123</sup>

---

120. See, e.g., Robert Kim, *Transgender Teacher Comes Under Fire*, ACLU NEWS 16–18 (May/June 2000), [http://www.aclunc.org/news/print\\_newsletters/asset\\_upload\\_file832\\_4426.pdf](http://www.aclunc.org/news/print_newsletters/asset_upload_file832_4426.pdf) (addressing the First Amendment issues and providing context for the defense of Dana Rivers against attempts to revoke her teacher credential after a settlement had been reached with the school district). Kim explains that both “the teaching career and the medical autonomy” of the California high school teacher came under fire, even as she “responsibly addressed the visible effects of her treatment for gender dysphoria” by explaining to her students what had transpired. In its letter to the Commission on Teacher Credentialing, the ACLU strongly contended “that any change in Rivers’ teaching credential would unquestionably violate her First Amendment rights.” In this case, Kim asserts, Rivers’ announcement to her students that she was transitioning from male to female “actually facilitated school operations. Her speech was designed to prevent further confusion and disruption among the students and restore an appropriate learning environment.” *Id.* at 16–17.

121. Rivers alleged discrimination under California law, and in particular under Labor Code §§ 1101 and 1102, as construed by the California Supreme Court in *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979). The Labor Code at the time prohibited discrimination on the basis of interference “with the political activities of their employees,” and the court determined that the term “political activities” should be construed broadly, “to include the espousal of a candidate or a cause, and some degree of action to promote the acceptance thereof by other persons. . . . Measured by these standards, the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity.” See *id.* at 609–11. In Rivers’ case, the plaintiff alleged that the same reasoning was applicable to her case as a transgender person, and that her struggle for equal rights in the area of employment was similarly protected by California law. Telephone Interview with Margaret A. Geddes, Senior Counsel, Beeson, Tayer & Bodine, and former attorney for Dana Rivers (Jan. 27, 2011).

122. See Cynthia Hubert, *Sex-Change Teacher Reaches Pact, Resigns*, SACRAMENTO BEE, Nov. 16, 1999, at B1.

123. The two major challenges Rivers faced were her transition as a transgender person, which was necessarily also a very public coming-out, and the abrupt loss of employment through the actions of school board members who suddenly gave her no credit for stellar job performance, which had both occurred and been recognized over a substantial period of time. Either of these situations could be devastating to a person, and in Rivers’ case she was attempting to deal with both simultaneously. See Nieves, *supra* note 117 (“‘If there was a way that I could have gone on the way I was, believe me, I would have, because this is the hardest thing I have ever done,’ [Rivers] said.”); see also Helen Y. Chang, *My Father Is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents under the Guise of the Best Interests of the Child*, 43 SANTA CLARA L. REV. 649, 653 (2002–2003) (clarifying another dimension of this challenging process, which arises

C. *Hostility of the Courts to LGBT Educator Issues and Concerns*

The persistent discrimination against actual and perceived LGBT educators documented in the previous pages has for the past five decades been endemic to not only statutory schemes and public officials' practices but also the writings of judges at every level of the judicial system.<sup>124</sup> For instance, while serving on the Court of Appeals for the D.C. Circuit in 1965, former Chief Justice Warren Burger authored an opinion that exemplifies the legal and public policy terrain of the era. Rejecting the argument of a gay plaintiff that his sexual orientation should not disqualify him for employment, Burger dismissed "homosexuals" as "sex deviates" who suffered from infirmities analogous to those of chronic alcoholics and former felons.<sup>125</sup>

Other examples of judicial hostility toward LGBT litigants—particularly at the state court level—include the Washington state *Gaylord* case<sup>126</sup> and the *Gish* case in New Jersey.<sup>127</sup>

---

when transgender persons have children); Cynthia Hubert, *Sex Change Puts Future of Star Teacher in Doubt*, SACRAMENTO BEE, Sept. 19, 1999, at A1 ("Men who suffer from gender dysphoria . . . suffer from a lot of denial and repression of who they are," [the psychologist] said. "Most try to play a supermacho role so no one knows their secret. It's a very lonely life."); Kim, *supra* note 120 ("At the heart of this matter is the fact that Rivers' [circumstances are] unavoidably public by [their very] nature. . . 'Implicated [here] are controversial questions of identity, society and science. To undertake that process within the context of a school community requires sensitivity to the questions and fears of students. It mandates an open communicative process to promote mutual understanding.'").

124. See, e.g., Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2316–20 (1997) (providing both a historical and cultural context for the various opinions in *Romer v. Evans*); see also BARBARA PONSE, *IDENTITIES IN THE LESBIAN WORLD: THE SOCIAL CONSTRUCTION OF SELF* (1978) (analyzing the extent to which a lesbian identity during the post-Stonewall era has been shaped by the widely prevalent stigma that many LGBTs faced); Robert G. Bagnall, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 515–46 (1984) (focusing primarily on state court rulings in its analysis of the challenges faced by gay and lesbian parents who wished to maintain custody of their children during the first three decades following World War II).

125. *Scott v. Macy*, 349 F.2d 182, 190 (D.C. Cir. 1965) (Burger, J., dissenting); see also Laura S. Fitzgerald, *Towards a Modern Art of Law*, 96 YALE L.J. 2051, 2059 (1987) ("In the existing legal reality, the relationship of the heterosexual majority to the homosexual minority is characterized by discrimination and disrespect."). Writing during the aftermath of *Bowers v. Hardwick*, the 1986 U.S. Supreme Court decision that upheld the constitutionality of a Georgia statute criminalizing consensual sodomy between adults, Fitzgerald documented the legal terrain faced by LGBT persons in the post-World War II era and highlighted decisions that exemplified the state of the law during that forty-year period.

126. *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (en banc).

127. *Gish v. Bd. of Educ.*, 366 A.2d 1337 (N.J. Super. Ct. App. Div. 1976).

In *Gaylord v. Tacoma School District No. 10*, the Washington State Supreme Court upheld the dismissal of a veteran public school teacher when school officials learned of his openly gay identity in 1972.<sup>128</sup> The lower court had concluded that, despite an impeccable twelve-year teaching record, James Gaylord was “properly discharged for immorality because he was homosexual, and as a known homosexual [*sic*], his ability and fitness to teach was [*sic*] impaired with resulting injury to the school.”<sup>129</sup> In a lengthy discussion of immorality, the state supreme court found that homosexuality was indeed immoral, relying in part on a definition from the 1967 edition of the *New Catholic Encyclopedia*.<sup>130</sup> The court concluded that, for this reason alone, public knowledge of his gay identity impaired his ability to teach, and he could be discharged.<sup>131</sup> Over thirty years later, this case is still on the books. Although it may come to be viewed as having been repealed by the state’s 2006 law prohibiting discrimination on the basis of LGBT status,<sup>132</sup> it has not been expressly overruled.

In *Gish v. Board of Education*, a New Jersey high school English teacher, John Gish, played a key role in organizing the Gay Teachers Caucus of the National Education Association (NEA) in 1972, and he was also active in the Gay Activists Alliance, staging public events to increase awareness of discrimination. When school board members learned about his activism on behalf of gay and lesbian communities, they ordered him to undergo a psychiatric examination.<sup>133</sup> Upon his refusal, the board removed him from his teaching duties and prohibited him from having any contact with present or former students. In 1976, the Superior Court of New Jersey upheld the school district’s

---

128. *Gaylord*, 559 P.2d 1340.

129. *See id.* at 1341.

130. *See id.* at 1343. It should be noted in this context that, while the court cited several examples of “observations and definitions of homosexuality” in support of its conclusion that “homosexuality is immoral,” this characterization from the *New Catholic Encyclopedia* was referenced first, and was the only one that was actually quoted. *Id.* at 1343–44. Such a prominent reliance on a religious characterization of homosexuality to decide a central question that had been put forth in this case arguably raises Establishment Clause concerns, in retrospect.

131. *See id.*

132. *See* WASH. REV. CODE ANN. §§ 49.60.030–49.60.040 (West 2008 & Supp. 2011).

133. *Gish*, 366 A.2d at 1337. The court explained that the reasons that caused school board to seek the psychiatric examination “revolve around appellant’s undisputed activities in the Gay Activists Alliance. Included in those activities was his encouragement of a ‘Hold Hands Demonstration’ on the George Washington Bridge on May 6, 1973 . . . . [T]he reasons do not include a single instance of any undue conduct or actions in the classroom or out of the classroom with respect to a particular student.” *Id.* at 1341.

order that Gish undergo a psychiatric examination, determining that the teacher's "actions in support of 'gay' rights displayed evidence of deviation from normal mental health," and therefore finding no violation of his constitutional rights.<sup>134</sup>

Courts' hostility toward LGBT educators has continued into the twenty-first century. Justice Antonin Scalia, for example, dissenting in *Lawrence v. Texas*, unapologetically aligned himself with those who oppose allowing openly LGBT educators to work with young people when he insisted that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools . . . ." <sup>135</sup> Chief Justice Rehnquist and Justice Thomas joined Scalia's opinion.<sup>136</sup> Thus, even though the majority opinion evidenced great progress regarding equal treatment for LGBTs, the fact that three Supreme Court justices still felt justified in employing such language on the record indicates that the struggle for LGBT rights is far from over.

### III.

#### IN THE EYE OF THE STORM: IDENTIFYING AN EXPANDED, MULTI-FACETED ROLE FOR OPENLY LGBT EDUCATORS IN AMERICA'S PUBLIC SCHOOLS

Three major developments have had a dramatic impact on LGBT concerns over the past decade: the Supreme Court's decision in *Lawrence*, the legal recognition of same-sex relationships in at least four-

---

134. *See id.* at 1340–43.

135. *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting).

136. *Id.* The accompanying language in the Scalia dissent—which references ENDA—reads as follows:

It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as 'discrimination' which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream'; that in most States what the Court calls 'discrimination' against those who engage in homosexual acts is perfectly legal; that proposals to ban such 'discrimination' under Title VII have repeatedly been rejected by Congress . . . .

*Id.* (internal citations omitted).

teen states and the District of Columbia,<sup>137</sup> and the efforts of opponents of marriage equality to contextualize the issue as one that is primarily about children in the public schools. As a result, we are in an unprecedented transition period in which law and policy are volatile and unpredictable, particularly in the context of K–12 schools.

In *Lawrence*, the Court held that laws prohibiting consensual relations between people of similar gender in the privacy of their own homes (typically by criminalizing oral sex and anal sex) violated the Fourteenth Amendment. At the time *Lawrence* was litigated, thirteen states still had laws prohibiting such conduct, four of which “enforce[d] their laws only against homosexual conduct.”<sup>138</sup> The Texas statute at issue in *Lawrence*, Penal Code Section 21.06(a), made sodomy a crime only if committed between same-sex partners.<sup>139</sup>

Justice Kennedy, writing for the majority, located the privacy right at stake in *Lawrence* at the intersection of the Due Process Clause (liberty interest) and the Equal Protection Clause (equality interest): “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>140</sup> Building on privacy-related precedents in this area, the Court concluded that the government has no place interfering with the private consensual conduct of adults in the privacy of their own homes. “Petitioners,” Justice Kennedy wrote, “are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private . . . conduct a crime.”<sup>141</sup>

---

137. See *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last visited July 27, 2010).

138. *Lawrence*, 539 U.S. at 573.

139. *Id.* at 581 (O'Connor, J., concurring) (“The statute at issue here makes sodomy a crime only if a person ‘engages in deviate sexual intercourse with another individual of the same sex.’ Sodomy between opposite-sex partners, however, is not a crime in Texas.”) (citation omitted).

140. *Id.* at 575.

141. *Id.* at 578. Although the right to sexual autonomy applies to all adults, the Court explicitly extended the right to privacy in same-sex relations. Acknowledging that many people still have “profound and deep convictions” based on interpretations of certain “moral principles” that lead them to disapprove of “homosexual conduct,” Kennedy explained that “the issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code.” Justice O'Connor, concurring in the decision, provided even stronger language. “Moral disapproval of this group,” she wrote, “is . . . insufficient . . . . We have never held that moral disapproval, *without any other asserted state interest*, is a sufficient rationale to justify a law that discriminates among groups of persons.” *Id.* at 582

*Lawrence* removed the presumption of criminality that shadowed LGBT persons until 2003 and had severely impacted their right to be “out.” Prior to this decision, it was virtually impossible for many LGBTs to be open about their identities if basic expressions of same-sex love remained illegal. Not only might coming out lead to their being perceived as criminals and thus unfit to work with young people, but also in the states where such acts were prohibited, coming out could actually put gays and lesbians at an increased risk of being arrested and prosecuted.

Some states have gone further than *Lawrence* in extending equal rights to LGBTs. Since 2000, for example, same-sex marriage has been legalized in five states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) and Washington, D.C., and approximately 18,000 same-sex couples remain legally married in California.<sup>142</sup> Mar-

---

(emphasis added). Moreover, the majority opinion in *Lawrence* noted the many ways that U.S. law has stigmatized gays and lesbians, and concluded that this could not continue. It also addressed the dignity of individuals, within the context of equal treatment and equal worth. The Court explained that when “homosexual” conduct is criminalized, it “demeans the lives of homosexual persons . . . . The stigma this statute imposes, moreover, is not trivial . . . . [I]t remains a criminal offense with all that it imports for the dignity of the persons charged.” *Id.* at 575.

142. In the fall of 2008, opponents of marriage equality in California sought to pass Proposition 8, which was designed to take away the right of gays and lesbians to marry the persons they loved, a right that had been recognized by the California Supreme Court six months earlier. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Between June and November of that year, over 18,000 same-sex couples were married in California, but further same-sex marriages were halted after the controversial ballot initiative was approved by the voters, 52%–48%. See M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 *DRAKE L. REV.* 1081, 1104 (2010); *California Results: Proposition 8*, *L.A. TIMES*, Nov. 4, 2008, <http://www.latimes.com/news/local/la-2008election-california-results,0,3304898.htmlstory> (last visited Feb. 12, 2011). The constitutionality of this initiative process, whereby voters were able to take away a right from a traditionally disenfranchised minority group, was challenged under state law, but it was upheld by the California Supreme Court. At the same time, the court ruled that the more than 18,000 same-sex couples had entered into legal marriages, and that they remained married under state law. See *Strauss v. Horton*, 207 P.3d 48, 77–78 (Cal. 2009). However, were any of them to get divorced, they would not be allowed to remarry a same-sex partner. See, e.g., Joe Gandelman, *Quote of the Day: Ted Olson on “The Conservative Case for Gay Marriage,”* *THE MODERATE VOICE* (Jan. 11, 2010) <http://themoderatevoice.com/59047/quote-of-the-day-ted-olson-on-the-conservative-case-for-gay-marriage/> (“[T]here are now three classes of Californians: heterosexual couples who can get married, divorced, and remarried, if they wish; same-sex couples who cannot get married but can live together in domestic partnerships; and same-sex couples who are now married but who, if they divorce, cannot remarry . . .”).

An unprecedented new lawsuit was then brought in federal court, challenging the constitutionality of California Proposition 8 under the Fourteenth Amendment. Plaintiffs argued that the ballot initiative must be examined under strict scrutiny, because it both impairs a fundamental right and discriminates on the basis of sexual orientation.

riages performed in states where gay marriage is legal are also recognized in several other states. In addition, nine states have in place some form of civil union or domestic partnership for same-sex couples, and eighteen states offer benefits for same-sex partners of state employees.<sup>143</sup> While these dramatic developments were taking place in the United States, ten countries across four continents legalized same-sex marriage (Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, Spain, South Africa, and Sweden).<sup>144</sup>

As will be recalled, marriage equality has been stalled in other states due in part to highly successful ad campaigns in which same-sex marriage has been recast as a public education and parents' rights issue.<sup>145</sup> In light of this dynamic, LGBT issues underwent greater scru-

---

At the same time, plaintiffs also asserted that Proposition 8 does not even withstand rational basis review, let alone strict scrutiny. *See* Plaintiffs' Notice of Motion and Motion for a Preliminary Injunction, and Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction, *Perry v. Schwarzenegger*, No. 09-CV-2292 2-3 (N.D. Cal. May 27, 2009). In August 2010, U.S. District Court Judge Walker ruled on behalf of the plaintiffs:

Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8.

*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). The judgment was stayed pending appeal, and in December 2010 an expedited oral argument was held before a Ninth Circuit panel. The results of this and any subsequent appeals are pending. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Jan. 4, 2011).

143. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 137.

144. All ten countries that legalized same-sex marriage did so via legislation, although legislative votes in two countries—Canada and South Africa—were preceded by court decisions, which essentially directed those two countries to enact the legislation. *See, e.g.,* Dan Fastenberg, *A Brief History of International Gay Marriage*, TIME, July 22, 2010, <http://www.time.com/time/world/article/0,8599,2005678,00.html>; *see also* Elizabeth Davies, *Top Court's Ruling Clears Way for Gay Marriage in South Africa*, NAT'L POST, Dec. 2, 2005, at A20 (documenting the South African Supreme Court's role); Doug Struck, *Canada's Top Court OKs Gay Marriage*, WASH. POST, Dec. 10, 2004, at A1 (describing the dynamic that led to same-sex marriage in Canada).

145. In one "Yes on 8" ad, Law Professor Richard Peterson asserts that "[w]hen Massachusetts legalized gay marriage, schools began teaching second graders that boys can marry boys. The courts ruled parents had no right to object." The ad then flashes the phrase "No Legal Right to Object," and the name of the case "Parker v. Hurley" and its citation appear on the screen. *See* YOUTUBE, *supra* note 22 and accompanying text. Contrary to the assertion in the *Yes on 8* ad, the First Circuit Court of Appeals never ruled that the parent plaintiffs had no legal right to object. Not only is this language nowhere to be found in the decision, but the court made clear that parents are not powerless. *See Parker v. Hurley*, 514 F.3d 87, 107 (1st Cir. 2008) ("Public schools often walk a tightrope between the many competing constitutional

tiny, especially in K–12 communities. Thus, while the *Lawrence* decision and the legal recognition of same-sex relationships have had a significant and positive impact on the lives of gay and gender non-conforming persons generally, LGBTs in many school communities have experienced a level of regression, because “homosexuals” continue to be characterized by certain persons and groups as harmful to children.<sup>146</sup> Given these developments, it is especially important to focus on solutions to improve the state of affairs for LGBT educators, LGBT students, and the children of LGBT parents in education settings.

A. *Current State of U.S. Employment Law Impacting LGBT Faculty and Staff*

Although LGBT persons have won the right to engage in intimate associations, their lives remain precarious in the absence of protection of their right to pursue vocations, particularly in K–12 public schools. Indeed, the cases surveyed above are by no means relics of an earlier time. Disclosure of a person’s sexual orientation or gender identity in many K–12 institutions can still lead to the loss of employment opportunities and the discrediting of one’s professional and personal standing. All too often, LGBT educators today are confronted with the message that they had better remain as closeted as possible. If they do

---

demands made by parents, students, teachers, and the schools’ other constituents. . . . The balance the school struck here does not offend the Free Exercise or Due Process Clauses of the U.S. Constitution. We do not suggest that the school’s choice of books for young students has not deeply offended the plaintiffs’ sincerely held religious beliefs. If the school system has been insufficiently sensitive to such religious beliefs, the plaintiffs may seek recourse to the normal political processes for change in the town and state.”). In addition, the appellate panel did identify the parameters of an “indoctrination” analysis that might be employed by future litigants. However, the panel concluded that under the facts of this particular case, no constitutional violation occurred. *See id.* at 100–07.

146. For example, following the spate of highly publicized suicides linked to peer harassment and mistreatment of gay and gender non-conforming youth in 2010, renewed efforts to combat bullying were met with criticism of a more strident and explicitly anti-gay tone. *See, e.g.,* Electa Draper, *Focus Points to Bully Pulpit: The Ministry Says Schools’ Policies are Quietly Promoting a Gay Agenda*, DENVER POST, Aug. 31, 2010, at B1 (quoting Focus on the Family Education Expert Candi Cushman: “We feel more and more that activists are being deceptive in using anti-bullying rhetoric to introduce their viewpoints, while the viewpoint [*sic*] of Christian students and parents are increasingly belittled.”); *see also* Andrew Harmon & Julie Bolcer, *Franken Takes on Bullying*, ADVOCATE.COM, Oct. 5, 2010, [http://www.advocate.com/News/Daily\\_News/2010/10/05/Franken\\_Takes\\_on\\_Bullying/](http://www.advocate.com/News/Daily_News/2010/10/05/Franken_Takes_on_Bullying/) (“Minnesota Family Council president Tom Prichard . . . said that ‘homosexual activists’ were manipulating media attention of multiple suicides this past year in the Anoka-Hennepin school district in the Minneapolis area to further an agenda.”).

not heed this message, they can be made to feel so uncomfortable by administrators, parents, or other members of the school community that they choose to leave K–12 education.<sup>147</sup>

A principled reading of constitutional legal doctrine reveals that all persons have a right to openly express fundamental aspects of identity, personhood, and group affiliation. This right to be “out” reflects a classic combination of First Amendment and Fourteenth Amendment principles. It is both a right to express an identity and a right to be treated equally while expressing this identity.<sup>148</sup>

Yet the “subtle pressure and express admonitions that together limit the ability of K–12 educators to be open about who they are” continue to be reflected in “job placement and promotion decisions” that favor those whose identities appear to conform to mainstream norms.<sup>149</sup> In addition, there is much more employment discrimination against LGBT education employees than the reported cases and administrative complaints would indicate, because many still fear the consequences of disclosing their identities, seek to cover their identities, and/or sought remedies before administrative agencies and courts that were hostile to their claims. Indeed, while the courtroom victories have increased, not every LGBT educator has been victorious in this context.<sup>150</sup> And when plaintiffs do prevail in the courtroom, the process is inevitably accompanied by massive disruptions in people’s lives, loss of jobs, loss of stature in the community, the development of physical and/or psychological maladies, and changes in circumstances that cannot simply or easily be rectified by the legal victories.<sup>151</sup>

In response to these realities, a growing number of states and municipalities now prohibit LGBT-related employment discrimination. As of 2011, twelve states and the District of Columbia explicitly

---

147. See *infra* note 161 and accompanying text.

148. See STUART BIEGEL, *Conceptualizing the Parameters of the Right to Be Out, in EDUCATION AND THE LAW* 169–86 (2d ed. 2009).

149. See BIEGEL, *supra* note 16, at 47–50.

150. See, e.g., *Milligan-Hitt v. Bd. of Trs.*, 523 F.3d 1219, 1219–20 (10th Cir. 2008) (concluding that a rural Wyoming school district’s demotion of two principals who were living together as a lesbian couple was not discriminatory under the law that existed at the time, despite anti-gay animus in the evidence); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 946 (7th Cir. 2002) (finding no Fourteenth Amendment violation in the case of a veteran Ohio teacher with an impeccable record who was badly mistreated by students, parents, and school officials after he came out as gay).

151. See, e.g., *Acanfora v. Bd. of Educ.*, 491 F.2d 498, 500 (4th Cir. 1974) (experiencing disruption, loss of job, changes in circumstances); *Glover v. Williamsburg Local Sch. Dist.*, 20 F. Supp. 2d 1160, 1176 (S.D. Ohio 1998) (developing physical and psychological maladies); *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 378–79 (Cal. 1969) (suffering disruption, loss of job, loss of stature in the community).

prohibit workplace discrimination on the basis of both sexual orientation and gender identity.<sup>152</sup> Nine additional states prohibit workplace discrimination on the basis of sexual orientation.<sup>153</sup> Yet even in states that have these laws, precise prohibitions are inconsistent, remedies may vary, cultural norms are difficult to change, and local enforcement of the laws may be lax.<sup>154</sup> Discrimination may be subtle and difficult to pinpoint, such as when people are passed over for promotion but are never told why. Also, persistent discriminatory attitudes and practices deter many individuals from coming out. This enables state and local government officials to continue the discrimination, because few may complain, due to their fear of the consequences of coming out.

*B. Prospective Benefits of ENDA for LGBT Educators and School Communities*

There are a number of key ways in which ENDA can transform the lives of gay and gender non-conforming educators, and, through these transformations, can benefit school communities nationwide. First, as the challenges described above dissipate, the health and well-being of these educators is likely to improve. It is a given in every walk of life that employees who are healthier physically and mentally feel more secure about their positions and maintain a positive outlook vis-à-vis their work, and will therefore be more effective in what they are doing from day to day. With less pressure to stay closeted and less overt and covert discrimination, faculty, staff, and school site administrators will be able to focus more of their energy on providing the best possible school climate and fostering the best possible educational environment.<sup>155</sup>

---

152. Legislation has been passed in jurisdictions that include California (1992, 2003), Colorado (2007), District of Columbia (1977, 2006), Illinois (2006), Iowa (2007), Maine (2005), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Oregon (2008), Rhode Island (1995, 2001), Vermont (1991, 2007), and Washington (2006). *Statewide Employment Laws and Policies*, *supra* note 49.

153. These states include Connecticut (1991), Delaware (2009), Hawaii (1991), Maryland (2001), Massachusetts (1989), Nevada (1999), New Hampshire (1998), New York (2003), and Wisconsin (1982). *Id.*

154. *See* Putignano, *supra* note 13.

155. Although research on LGBT educators is still scant, few will dispute the fact that employees who do not have to worry about discrimination—and are not distracted by issues such as whether and to what extent they have to pretend they are someone else—are likely to be able to focus more directly on doing their jobs.

The term “school climate” encompasses school culture, mood, the degree to which people get along, respect for differences, motivation, pride, and vision. *See School Culture and Climate*, ASS’N FOR SUPERVISION & CURRICULUM DEV., <http://www.ascd.org/research-a-topic/school-culture-and-climate-resources.aspx> (last visited Feb. 7,

In addition, if ENDA becomes the law of the land, it will pave the way for LGBT educators to play an additional, multi-faceted role—should they wish to do so—in helping to create public schools that are safe and welcoming for all students, including LGBT youth. Indeed, court records and research on LGBT youth in the K–12 schools reveal recurring examples of traumatic peer mistreatment,<sup>156</sup> which at a minimum has been found to jeopardize the academic achievement and aspirations of LGBT students, and in too many worst-case scenarios has resulted in serious injury or death.<sup>157</sup> Case decisions and settlement agreements have also revealed a troubling pattern of faculty, staff, and administrator complicity in peer mistreatment of LGBTs, which is not limited to looking the other way when mistreatment occurs,<sup>158</sup> but often includes admonishing the victims for being openly gay or “acting” gay and blaming them for bringing mistreatment on themselves.<sup>159</sup> In some cases, school officials have

---

2011). The linchpin of a positive school climate is collaborative and optimistic working relationships between all members of the school community. See MEGAN L. MARSHALL, CTR. FOR RESEARCH ON SCH. SAFETY, SCH. CLIMATE, & CLASSROOM MGMT., GA. STATE UNIV. EXAMINING SCHOOL CLIMATE: DEFINING FACTORS AND EDUCATIONAL INFLUENCES 1 (2004), [http://education.gsu.edu/schoolsafety/download%20files/whitepaper\\_marshall.pdf](http://education.gsu.edu/schoolsafety/download%20files/whitepaper_marshall.pdf) (identifying factors that influence a collaborative and optimistic school climate, such as positive interaction and feelings of safeness, trust, and respect).

156. See STUART BIEGEL & SHEILA JAMES KUEHL, NAT’L EDUC. POLICY CTR. & WILLIAMS INST., SAFE AT SCHOOL: ADDRESSING THE SCHOOL ENVIRONMENT AND LGBT SAFETY THROUGH POLICY AND LEGISLATION 3 (2010), <http://www.law.ucla.edu/williamsinstitute/pdf/LGBT-FINAL.pdf>.

157. See *infra* notes 173–181 and accompanying text. Many gays and lesbians remember that at some point in their childhoods they realized that they were different, and often found that both their achievements and their aspirations suffered as they struggled to come to grips with these differences. See, e.g., ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY AND LESBIAN EXPERIENCE (Russell Leong ed., 1995); DOES YOUR MAMA KNOW?: AN ANTHOLOGY OF BLACK LESBIAN COMING OUT STORIES (Lisa C. Moore ed., 1997); FARM BOYS: LIVES OF GAY MEN FROM THE RURAL MIDWEST (Will Fellows ed., 1996); TESTIMONIES: LESBIAN COMING-OUT STORIES (Sarah Holmes & Jennifer Trust eds., 2002). For works of fiction featuring perspectives on LGBT coming-of-age, see, for example, WILLIAM MAXWELL, THE FOLDED LEAF (1945); K.M. SOEHNLEIN, THE WORLD OF NORMAL BOYS (2001); EDMUND WHITE, A BOY’S OWN STORY (1982).

158. See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1138 (9th Cir. 2003) (applying the Equal Protection Clause of the Fourteenth Amendment to rule in favor of the LGBT student plaintiffs after finding that school site administrators repeatedly looked the other way when peer harassment and mistreatment was reported).

159. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 456, 458, 460 (7th Cir. 1996) (determining that a reasonable factfinder could find that school district officials’ discrimination violated plaintiff’s constitutionally protected rights and holding that reasonable school district officials would have known that their conduct was unconstitutional); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1076, 1077 (D. Nev.

joined in the harassment and mistreatment by mocking, demeaning, or punishing the victimized students for what has occurred.<sup>160</sup>

Research has shown that LGBT educators can make a dramatic and highly beneficial difference in addressing these realities, both day to day in the schools and in professional-development settings. Instead of taking advantage of the fact that openly LGBT teachers, coaches, and school-site administrators can play a central and highly positive role, many districts continue to put explicit or implicit pressure on these educators to keep their identities closeted.<sup>161</sup> Reinforcing this practice, major political leaders have opposed even the thought that openly LGBT educators might be “allowed” to work with young people in schools.<sup>162</sup>

---

2001) (finding credence in the plaintiff’s arguments regarding retaliation for the exercise of constitutionally protected rights and ruling that the school district was not entitled to qualified immunity). In *Nabozny*, administrators blamed a student for the mistreatment he had suffered and said that it would not have happened if he were not openly gay. In *Henkle*, administrators tried to stop a student from being openly gay and allegedly retaliated when the student continued to exercise his right to free speech.

160. See Complaint for Injunctive and Declaratory Relief and Damages, *Ramirez v. L.A. Unified Sch. Dist.*, No. 04-8923 17 (C.D. Cal. Oct. 28, 2004). The school district settled the case in 2005, after plaintiff LGBT students reported a level of faculty and staff complicity at their high school that went significantly beyond refusing to intervene or blaming the victim, to the point where much of the harassment actually came from the adults at the school. The June 28, 2005 settlement included repeated mandatory trainings over a three-year period for staff and students both at the high school itself and at the middle schools that feed into it. See ACLU FOUND. OF S. CAL., DOCKET SUMMARY 19 (2006), [http://www.aclu-sc.org/attach/d/docket\\_20061101.pdf](http://www.aclu-sc.org/attach/d/docket_20061101.pdf).

161. Telephone interview with Paul Sathrum, Senior Policy Analyst, Nat’l Educ. Ass’n (NEA) (May 24, 2010); Interviews and focused discussions with NEA “GLBT Cadre Members,” thirty-three K–12 educators from schools across the country, in Nashville, Tenn. (July 21, 2010). I also base these conclusions on my own experience in the education community as a K–12 classroom teacher, a supervisor of student teachers in the field, a trainer of future principals, the federal court’s on-site Consent Decree Monitor for the San Francisco public schools, and someone who has worked closely with education professionals generally in a supervisory and advisory capacity for over twenty-five years. Recent poll data and national survey results indicate that Americans’ attitudes towards LGBT educators have become more positive during this era. In the twenty years that Pew tracked this issue, for example, the percentages of people who would endorse the firing of gay and lesbian teachers for no reason other than their sexual orientation dropped from 51% in 1987 to under 30% in 2007. Yet it is clear from these data that a substantial percentage of people continue to oppose the presence of LGBT teachers in the K–12 schools. See Shawn Neidorf & Rich Morin, *supra* note 26; see also JANNA M. JACKSON, UNMASKING IDENTITIES: AN EXPLORATION OF THE LIVES OF GAY AND LESBIAN TEACHERS (2007) (a collection of personal stories further documenting these same realities).

162. See, e.g., Lynne P. Shackelford, *DeMint Addresses Conservative Issues at Spartanburg Church Rally*, SPARTANBURG HERALD-J., Oct. 2, 2010 (“[South Carolina Senator Jim] DeMint said if someone is openly homosexual, they [sic] shouldn’t be teaching in the classroom . . . .”); see also Elizabeth A. Harris, *Paladino Laces Speech*

Programs and initiatives to improve school climate and provide an equal level of support for all students can benefit greatly from the participation of LGBT adults. The value of having people on campus who understand LGBT-related issues because they have lived them, have the standing within the community to step forward, and can collaborate on a range of initiatives within and outside of the classroom cannot be underestimated. Should they wish to do so and should they be allowed to do so without fear of discrimination and negative consequences, LGBT administrators, faculty, and staff can contribute invaluable information to school-wide and district-wide professional development, develop resources that can be used to help improve school culture, and help address the needs of gay and gender non-conforming youth in an advisory capacity. Indeed, the law today increasingly recognizes that LGBTs do have the same right as their colleagues to play supportive roles as advisers for students with similar interests and identities. Just as an openly Christian teacher can serve as a faculty advisor for an after-school student Bible club,<sup>163</sup> so too can an openly gay or transgender teacher serve as a faculty advisor for a gay-straight alliance.<sup>164</sup> Just as a teacher with a strong ethnic identity

---

*with Anti-Gay Remarks*, N.Y. TIMES, Oct. 11, 2010, at A17 (Carl P. Paladino, Republican candidate for Governor of New York, warned against the “brainwashing” of public school children by gays: “I just think my children and your children would be much better off and much more successful getting married and raising a family, and I don’t want them brainwashed into thinking that homosexuality is an equally valid and successful option—it isn’t.” Mr. Paladino’s prepared text also included the following sentence: “There is nothing to be proud of in being a dysfunctional homosexual.” Paladino omitted that statement when he gave the speech.).

163. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 231 (1990). The Supreme Court agreed with the plaintiff that the Equal Access Act, 20 U.S.C. §§ 4071–4074 (2000), prohibits a high school “from denying a student religious group permission to meet on school premises during noninstructional time,” and that the act, so construed, does not violate the Establishment Clause of the First Amendment. In so doing, the Court set forth guidelines for schools to follow pursuant to the act and explicitly provided a legal basis for faculty advisors. *See id.*

164. *See id.* at 253 (“[Assigning] a teacher, administrator, or other school employee to a meeting for custodial . . . oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities.”) (internal quotations omitted). Thus, as long as the faculty advisor meets the requirements of the Equal Access Act as construed in *Mergens*, there is arguably no express or implied restriction on whether the students do or do not know fundamental aspects of the faculty advisor’s identity or personhood.

In the litigation successfully challenging school district efforts to keep gay-straight alliances off school campuses, the gay students and their straight allies built on the legal efforts of these religious organizations to secure the right of religious students to have their own clubs, prayer groups, and Bible study groups on K–12 campuses. Much of the early litigation focused on Utah, with subsequent noteworthy cases filed in Boyd County, Kentucky and Orange County, California. The courts

can serve as an advisor for students who seek a safe place to discuss their own identity-related issues, so too can an openly LGBT educator choose to serve as an advisor for LGBT students pursuant to district-approved “safe zone” programs and wellness centers.<sup>165</sup> ENDA can help to bring about such a reality, moving the nation toward a culture in which LGBT educators can serve school communities in positive and welcoming environments.<sup>166</sup>

---

typically based their decisions on the provisions of the Equal Access Act. *See* Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 680 (E.D. Ky. 2003); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1150 (C.D. Cal. 2000). In contrast, this pattern worked in the opposite direction at the higher education level, with religious student groups building on the victories of LGBT student groups to win victories against universities engaging in viewpoint discrimination. *See* *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 819–21 (1995); *see also* Alice Riener, *Pride and Prejudice: The First Amendment, the Equal Access Act, and the Legal Fight for Gay Student Groups in High Schools*, 14 AM. U. J. GENDER SOC. POL’Y & L. 613, 623 (2006) (comparing the gay-straight alliance cases with the religious student group cases).

165. For an overview of safe-zones, wellness centers, and other LGBT-specific programs, *see infra* notes 189–193 and accompanying text. The empirical data fly in the face of the Supreme Court’s rejection of the role model justification in an employment context. *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). While public school districts are generally prohibited from making employment decisions on the basis of whether a particular educator can serve as a role model, the overwhelming evidence in the educational policy literature is that educators do serve as role models and invariably can make a big difference in students’ lives as a result. And it must be emphasized that the direct advisory role played by educators with regard to student groups that are formed pursuant to common interests and identities—ranging from religious organizations to ethnicity-based organizations to LGBT-related organizations—is a commonly accepted reality in school districts across the country today, and is completely legal under the law. *Wygant* is inapposite here, because the role of existing employees who serve school communities in this way has long been recognized under the dictates of the federal Equal Access Act of 1984, individual state laws, and local district policies.

166. In too many places today, programs and activities that provide direct support for LGBT youth, children of LGBT parents, and their family and friends in school communities are still contested, with some individuals continuing to seek to abolish the programs. In such adversarial settings, it is often difficult to maintain these programs, because of the pall that is cast by what might be very vocal and highly publicized opposition to them. An example of this opposition is the divisive “Day of Truth,” an annual event begun on public school campuses in 2005 under the auspices of the anti-gay Alliance Defense Fund, which sought to establish a high-profile opposition to gay-straight alliances and to events designed to call attention to unresolved issues of school safety negatively impacting LGBT youth. *See* Josh Kimball, *Ex-Gay Christian Ministry Pulls Support for Annual “Day of Truth,”* CHRISTIAN POST (Oct. 6, 2010, 11:54 PM), <http://www.christianpost.com/news/ex-gay-christian-ministry-pulls-support-for-annual-day-of-truth-47096/>:

After four years of supporting the “Day of Truth” initiative and one year spearheading the effort, Exodus International announced Wednesday that it was “returning the event” to the group that launched it—the Ariz.-based Alliance Defense Fund.

### 1. *Reconceptualizing the Role of LGBT Educators in Professional Development*

Professional development for both teachers and school site administrators is one of the most important steps a school district can take to combat peer harassment and discriminatory discipline practices, because it contemplates a process whereby educators can explore problems that may have arisen and develop prospective strategies for addressing them.<sup>167</sup> Indeed, professional development has been an essential remedy in settings where troubling developments have been prevalent. Many court orders, consent decrees, and settlements addressing best practices have relied to a great extent on professional development.<sup>168</sup>

---

“Even though we have reached a fair number of students, we believe that due to the timing of the event, Day of Truth was always perceived in an adversarial manner, and became more about policy than people,” reported Exodus International President Alan Chambers.

And that, he said, “is in conflict with the mission we have chosen to embrace as an organization.”

167. *Professional development* has been defined as “activities to enhance professional career growth.” Such activities may include individual development, continuing education, and in-service education, as well as curriculum writing, peer collaboration, study groups, and peer coaching or mentoring. See *Professional Development for Teachers*, N. CENT. REG’L EDUC. LAB., <http://www.ncrel.org/sdrs/areas/issues/educatrs/profdevl/pd2prof.htm> (last visited Jan. 29, 2011). The definition has been expanded in a variety of contexts. Some see it as including “the sum total of formal and informal learning experiences throughout one’s career.” Others suggest an even broader definition that includes formal and informal means of helping educators “not only learn new skills but also develop new insights into pedagogy and their own practice, and explore new or advanced understandings of content and resources.” See *id.*

The term “professional development” has gradually taken the place of the more traditional term “staff development,” reflecting ongoing efforts on many fronts to enhance the stature and indeed the self-image of K–12 classroom teachers. The terms are generally viewed as synonymous, and are often used interchangeably. See *NSDC’s Standards for Staff Development*, LEANING FORWARD, <http://www.nsd.org/standards/> (last visited Nov. 19, 2010) (website of the National Staff Development Council, an organization devoted to the synthesis and dissemination of best practices in this area).

168. The landmark settlement in *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003), included mandatory professional development on LGBT issues for district educators. See Stacy Finz, *Settlement in Gay Suit*, S.F. CHRON., Jan. 7, 2004, at A15. The settlement in *Ramirez v. L.A. Unified Sch. Dist.* included mandatory faculty training on diversity, discrimination, and harassment and focused primarily on issues pertaining to actual or perceived sexual orientation and gender identity. See Press Release, ACLU of Southern California, ACLU of Southern California Stands Up for Gay and Lesbian High School Students Harassed by School Officials on Basis of Sexual Orientation (Oct. 29, 2004), <http://www.aclu-sc.org/releases/view/100779>; see also *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 51–60 (N.D. Cal. 1983) (setting forth a decree focusing on both school desegregation and academic achievement, mandating ongoing professional development in this con-

Research has shown that professional development is most effective when it takes the form of a collaborative dialogue among educators, as well as a vehicle for keeping abreast of new developments in their respective fields.<sup>169</sup> Openly LGBT faculty, staff, and school site administrators have served as valuable resources in these settings because they understand from personal experience what it is like to be targets of homophobic and transphobic mistreatment.<sup>170</sup> They have also been effective in developing strategies to counter this mistreatment.<sup>171</sup>

*a. Disseminating Information about the Challenges Faced by LGBT Youth*

A first step in maximizing the role of LGBT educators in professional development would be to enlist their assistance in disseminating additional information regarding the challenges faced by LGBT youth.<sup>172</sup> Such challenges are reflected in highly troubling data regarding peer harassment and mistreatment in the K–12 schools. An extensive national study released in late 2008 by the Gay, Lesbian and

---

text, and requiring independent monitoring of the professional development throughout the life of the decree).

169. See Willis Hawley & Linda Valli, *The Essentials of Effective Professional Development*, in *TEACHING AS THE LEARNING PROFESSION: HANDBOOK OF POLICY AND PRACTICE* 151–80 (Linda Darling-Hammond & Gary Sykes eds., 1999); LUZ MALDONADO, COLL. ENTRANCE EXAMINATION BD., *EFFECTIVE PROFESSIONAL DEVELOPMENT: FINDINGS FROM RESEARCH 2–10* (JoEllen Victoreen ed., 2002), [http://apcentral.collegeboard.com/apc/public/repository/ap05\\_profdev\\_effectiv\\_41935.pdf](http://apcentral.collegeboard.com/apc/public/repository/ap05_profdev_effectiv_41935.pdf).

170. Of course, the same can be said of anyone who has been mistreated by his or her peers in school. However, what makes the personal experiences of LGBT educators particularly valuable is that these experiences shed light on an area that so many are not familiar with. This is the case not only because of the discomfort many people still feel when even the topic of LGBTs is brought up in the conversation but because of the ongoing pressure in education settings to refrain from any and all discussion of these issues and how they might be addressed. See *supra* notes 18–27 and accompanying text.

171. See, e.g., ERIC ROFES, *A RADICAL RETHINKING OF SEXUALITY AND SCHOOLING: STATUS QUO OR STATUS QUEER* 21–52 (2005) (reflecting on experiences as an openly gay K–12 educator); see also *Classroom Resources for Teachers and Curriculum Specialists*, WASHINGTON SAFE SCHOOLS COAL., <http://www.safeschoolscoalition.org/blackboard-teachers.html> (last visited May 17, 2009) (a representative collection of LGBT-related curricular resources).

172. While it might be argued that this material can simply be forwarded to faculty and staff via email or in hard copy, it is an unquestioned principle in education contexts that such an approach may result in many educators not even reading the material, or just glancing at it at some remote point in time. See, e.g., Biegel, *supra* note 167. Discussing the material together, however, perhaps pursuant to a PowerPoint presentation, can have a completely different impact, especially if the presentation is by an openly LGBT colleague, who can also speak to his or her own experiences in this regard.

Straight Education Network (GLSEN) found that 86.2% of LGBT public school students reported being verbally harassed because of their sexual orientation, 44.1% were physically harassed, and 22.1% were physically assaulted.<sup>173</sup> The majority of these students did not report the incidents to school officials, believing that little or no action would be taken or that the situation might even be exacerbated if reported.<sup>174</sup> Nearly one-third of those who did report the mistreatment said that school officials did nothing in response.<sup>175</sup>

Such a dynamic inevitably affects both achievement and aspirations. Of the LGBT students surveyed, 32.7% missed a day of school because of feeling unsafe, compared to only 4.5% of a national sample of secondary school students.<sup>176</sup> Research shows that not only do LGBT students' grades suffer as a result of their K–12 education experience, but the percentage of LGBTs who do not plan to pursue a post-secondary education is almost twice that of a national sample of students generally.<sup>177</sup>

Scholarship focusing on gay and gender-non-conforming youth consistently finds that a significant percentage of LGBT students in K–12 public schools experience a negative self-image, stunted emotional growth, and ongoing challenges above and beyond those of the typical adolescent. These challenges occur at every level of social interaction.<sup>178</sup> The research also reveals lives lost, both directly through assaults and indirectly through suicide.<sup>179</sup> LGBT runaway and teen homelessness rates remain disproportionately high.<sup>180</sup> At the same

---

173. 2007 *National School Climate Survey: Nearly 9 out of 10 LGBT Students Harassed*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK (Oct. 8, 2008), <http://www.glsen.org/cgi-bin/iowa/all/news/record/2340.html>.

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.*

178. *See* LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH: PSYCHOLOGICAL PERSPECTIVES (Anthony R. D'Augelli & Charlotte J. Patterson eds., 2001) (exploring the psychological dimensions of lesbian, gay, and bisexual identities from puberty to adulthood); CAITLIN C. RYAN & DONNA FUTTERMAN, *LESBIAN AND GAY YOUTH: CARE AND COUNSELING* (1998) (a landmark examination of the physical and emotional health issues faced by many LGBT youth, and what might be done to address them).

179. *See* MASS. DEP'T OF EDUC., 2005 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY 47–51 (2007); Stephen Russell, *Sexual Minority Youth and Suicide Risk*, 46 *AM. BEHAV. SCIENTIST* 1241–57 (2003).

180. *See* NICHOLAS RAY, *NAT'L GAY & LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS* (2006), at 2, <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>; David Wagner, *Nowhere to Go: Issue Brief on Gay and Transgender Youth Homelessness*, *CTR. FOR AM. PROGRESS* (Aug. 10, 2010), <http://www.americanprogress.org/issues/2010/08/>

time, instead of stepping in to help, teachers are hesitant to “take sides” in disputes that implicate LGBT issues, are afraid to step in to stop peer mistreatment, and often think twice before even mentioning the word “gay” in classroom settings.<sup>181</sup>

As clear as it is that faculty and staff must understand the particular needs and issues relevant to LGBT youth, it is also important that faculty and staff are aware that LGBT students of color face particular challenges.<sup>182</sup> For instance, a 2009 NEA Report found that LGBT students “from poor and rural communities [generally] are acutely disadvantaged in obtaining resources, finding allies, and integrating into school culture,” and it also documented the fact that gay and gender non-conforming youth of color “are at elevated risk of harassment and social, familial, or community estrangement.”<sup>183</sup> Moreover, a National Gay & Lesbian Task Force study found that LGBT youth of color may confront a “tricultural” experience: they can face homophobia from their respective racial or ethnic group, racism from LGBTs of other racial/ethnic communities, and a combination of the two from society at large.<sup>184</sup>

---

homelessness\_brief.html; see also Alexandra Zavis, *Gay and Homeless: In Plain Sight, A Largely Hidden Population*, L.A. TIMES, Dec. 12, 2010, at A1 (providing a detailed overview of the challenges faced by homeless gay youth in Los Angeles).

181. In addition to confirming these prevalent patterns of behavior on the part of K–12 classroom teachers, current and former teachers and teacher education professionals at the University of California, Los Angeles have indicated to me that many teachers fear that if they “get involved” in any way with LGBT-related issues, they may be accused of “taking sides” in what they perceive to be a community controversy that they should “stay out of.” Interview with Rigoberto Marquez, Ph.D. Student, UCLA Graduate Sch. of Educ. & Info. Stud.: Div. of Urban Schooling, and Former Teacher, L.A. Unified Sch. Dist., in L.A., Cal. (Sept. 27, 2010); Interview with Dr. Jeff Share, Faculty Advisor, UCLA Teacher Educ. Program, in L.A., Cal. (Mar. 19, 2010); Interview with Van To, Teacher, L.A. Unified Sch. Dist., in L.A., Cal. (July 8, 2009).

182. See, e.g., RESTORED SELVES: AUTOBIOGRAPHIES OF QUEER ASIAN/PACIFIC AMERICAN ACTIVISTS (Kevin K. Kumashiro ed., 2003).

183. See ROBERT KIM ET AL., NAT’L EDUC. ASS’N, A REPORT ON THE STATUS OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER PEOPLE IN EDUCATION: STEPPING OUT OF THE CLOSET, INTO THE LIGHT vii (2009), <http://www.nea.org/assets/docs/glbttstatus09.pdf>; see also Caitlyn Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Adults*, 123 PEDIATRICS 346 (2009) (examining the parameters of the negative impact of familial estrangement in this context).

184. See JASON CIANCOTTO & SEAN CAHILL, NAT’L GAY & LESBIAN TASK FORCE POL’Y INST., EDUCATION POLICY: ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH 17 (2003); see also Nova Gutierrez, *Resisting Fragmentation, Living Whole: Four Female Transgender Students of Color Speak about School*, 16 J. GAY & LESBIAN SOC. SERVS. 69 (2004) (groundbreaking interviews focusing on compelling realities that have gained far too little attention). For additional perspectives on this area, see, for example, BLACK LIKE US: A CENTURY OF LESBIAN, GAY, AND BI-

b. *Disseminating Information about Structural and Institutional Failures within School Communities*

School-site personnel can also benefit greatly from the perspectives of openly LGBT administrators, faculty, and staff regarding what has transpired in recent LGBT-related litigation, and especially regarding the fact that the courts are increasingly intolerant of action or inaction by school officials that contributes to the mistreatment of LGBT youth.<sup>185</sup> Particularly important in this context is the opportunity to confront structural and institutional failures in school communities, including faculty complicity in peer harassment and mistreatment, discriminatory discipline practices of school-site administrators, and the misuse of the special education system generally.<sup>186</sup>

Discrimination is not only evident in court cases addressing decisions by school-site administrators to ignore the complaints of LGBTs while acting on the complaints of others regarding peer harassment, but also in a recent study that reports that LGBT youth are disciplined at a higher frequency than their straight counterparts.<sup>187</sup>

---

SEXUAL AFRICAN AMERICAN FICTION (Devon W. Carbado ed., 2002); THE VERY INSIDE: AN ANTHOLOGY OF WRITINGS BY ASIAN & PACIFIC ISLANDER LESBIANS (Sharon Lim-Hing ed., 1994); ELIZABETH M. DIAZ & JOSEPH G. KOSCIW, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, SHARED DIFFERENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION'S SCHOOLS,

[http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1332-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1332-1.pdf). See also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149 (1989) (“Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another.”); RUSSELL K. ROBINSON, *Racing the Closet*, 61 STAN. L. REV. 1463, 1464–65 (2009) (critiquing “down low (DL) discourse”—reflected in media pieces regarding “black men who are said to live on the ‘down low’ in that they have primary romantic relationships with women while engaging in secret sex with men”—and through this critique “reveal[ing] important lessons about media framing, gender schemas, and victimization, and the relationship of all three to law.”); Jonathan Grady & Rigoberto Marquez, *Rethinking Revolutionary Critical Pedagogy: Queer Youth of Color Creating Dialogues of Resistance*, Paper presented at the Annual Meeting of the American Educational Research Association at 8-17 (May 1, 2010) (conceptualizing prospective paths for queer youth of color to address and overcome the challenges they face).

185. See BIEGEL & KUEHL, *supra* note 156, at 1–9 (setting forth the nature and extent of the problems to be addressed).

186. See *id.*

187. See Elizabeth Lopatto, *Gay, Lesbian, Bisexual Students More Likely to Be Punished*, BLOOMBERG BUSINESSWEEK (Dec. 6, 2010, 12:21 AM), <http://www.businessweek.com/news/2010-12-06/gay-bisexual-lesbian-adolescents-more-likely-to-be-punished.html> (“Teenagers attracted to people of the same sex were 41 percent more likely to be expelled from school, and 42 percent more likely to be convicted of a crime as an adult.” The study highlights the extent of bias and intimidation experienced by non-heterosexual teens.); see also Kathryn E. Himmelstein & Hannah

Here too, having openly LGBT colleagues in the room during discussions about these matters and possible brainstorming sessions regarding changes that might be implemented at local school sites in response to these unsettling findings is an opportunity that can add an entirely new dimension to the inquiry. Indeed, an additional benefit of openly LGBT colleagues' presenting their perspectives at these professional development sessions is that discussions about LGBT-related matters likely play out in a more sensitive and empathetic direction. The potential for more productive sessions is often evident in analogous situations, such as when colleagues who are people of color present their perspectives during discussions regarding racial matters or when colleagues who are people with disabilities present their perspectives on disability rights issues.<sup>188</sup>

## 2. *The Prospective Role of LGBT Educators in Directly Addressing the Needs of Gay and Gender Non-Conforming Youth*

In addition to their active participation in professional development, openly LGBT administrators, faculty, and staff can play a central role in addressing the needs of gay and gender non-conforming students on a day-to-day level. For instance, studies show that when LGBT educators take on advisory roles in research-based programs, extracurricular associations, and organized sports, students become more accepting and programs become more inclusive.

Research-based programs and activities with proven track records, which rely on scholarship documenting the need for certain strategies and the value of particular approaches, have been developed to provide support for LGBT youth. Most programs contemplate the active involvement of faculty liaisons. In general, these initiatives fo-

---

Brückner, *Criminal-Justice and School Sanctions against Nonheterosexual Youth: A National Longitudinal Study*, 127 *PEDIATRICS* 49, 49 (2010) (reporting results indicating that “[n]onheterosexuality consistently predicted a higher risk for sanctions”).

188. A narrow majority of the Supreme Court rejected the idea that there is value in diverse perspectives in the workplace. *See, e.g.*, *Adarand Constructors v. Peña*, 515 U.S. 2000 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). However, the prospective educative role described on these pages, according to which existing employees in K-12 professional development settings take the lead in helping to create a positive and welcoming school climate, is not about compelling state interests in an affirmative action context. Instead, it is provided in this section as support for a key public policy argument on behalf of ENDA: the argument is that LGBTs who are already employed as teachers and administrators can do so much more to help all students and set the tone for our entire society if they have the statutory protection that comes with this federal law. Thus, the Supreme Court's conclusions in fractured cases, such as *Croson* and *Adarand*, are inapposite.

cus on immediate issues of health and safety for gay and gender non-conforming students, as well as effecting longer-term changes in both school culture and societal norms. They include safe zones,<sup>189</sup> wellness centers,<sup>190</sup> suicide prevention programs,<sup>191</sup> and gay-straight alliances. For example, a 2009 study explores the empowerment that youth experience when they participate in such organizations.<sup>192</sup> Scholars have identified the importance of teacher mentoring in the lives of LGBT youth, focusing in particular on “how significant teacher-mentors are to the educational resilience of sexual minority women of color.”<sup>193</sup> Scholarly literature has also documented the benefits of such programs for all students. Indeed, ENDA embodies a special promise in this regard, since LGBT educators, freed from concerns about discriminatory consequences, can play a transformative role in setting the tone for our entire society by enabling all members of school communities to be accepting of differences in our pluralistic society.

---

189. Safe zones and safe spaces programs involve the identification of spaces on campus—typically a classroom at the K–12 level and an educator’s office at the higher education level—where LGBT students can feel safe to be themselves and feel comfortable enough to talk about issues relating to their sexual and/or gender identities. See *Safe Zone Programs*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, (Jan. 23, 2003), [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/245-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/245-1.pdf).

190. Wellness programs designed to assist LGBT people of color by addressing the unique combination of needs and challenges that many face include *Imagenes Positivas*, a Spanish-language version of the L.A. Gay and Lesbian Center’s Positive Images program, and the Asian and Pacific Islander Wellness Center in San Francisco. While not school-based per se, the program coordinators work hand-in-hand with local educational institutions, providing valuable materials as well as on-site presentations. See, e.g., ASIAN & PACIFIC ISLANDER WELLNESS CTR., <http://www.apiwellness.org/home.html> (last visited Feb. 13, 2011).

191. Suicide prevention programs are not generally school-based, but they often contemplate express or implied partnerships with school officials, particularly those in the mental health field. In addition to the general suicide prevention programs designed for everyone, there are two noteworthy examples of programs in this area that directly focus on LGBTs and their unique needs. The Trevor Project, which grew out of the success of the Academy Award-winning HBO film *Trevor*, is designed specifically to address suicide prevention among LGBT teenagers. It includes both a helpline and a Facebook page, enabling those who might be contemplating suicide, or their friends and families, to contact the organizations and seek concrete advice. See THE TREVOR PROJECT, <http://www.thetrevorproject.org/about-trevor/organization> (follow “About Trevor”) (last visited Feb. 24, 2011). The GLBT National Help Center includes both a national hotline and a national youth talkline. See *Contact Us*, GLBT NAT’L HELP CTR., <http://www.glnh.org/contact/index.html> (last visited Feb. 24, 2011).

192. See Stephen T. Russell et al., *Youth Empowerment and High School Gay-Straight Alliances*, 38 J. YOUTH & ADOLESCENCE 891 (2009).

193. See Billie Gastic & Dominique Johnson, *Teacher-Mentors and the Educational Resilience of Sexual Minority Youth*, 21 J. GAY & LESBIAN SOC. SERVS. 219, 220–21 (2009).

Gay and gender non-conforming educators can also help provide perspective on how LGBT issues arise in the context of school athletic programs. Interscholastic athletics often casts a giant shadow on the day-to-day interactions and mindsets of people in educational settings. In many places, it is the single most important factor in the school's climate. Indeed, some schools are known as "sports schools," proud of their successful, high-profile sports programs and united by an overriding interest in the outcomes of the sports events. Athletes, coaches, cheerleaders, and others involved in the success of the programs are among the most-admired persons on campus. The sports culture becomes one and the same with campus culture.<sup>194</sup>

Thus, in such K–12 settings, if school officials desire to change the campus culture, they must address the sports culture. School sports programs have tremendously positive value for participants—ranging from the fine-tuning of physical and mental skills to the building of character. But the sports culture often presents a difficult set of circumstances for LGBTs because the aforementioned defamatory myths and negative mindsets remain particularly prevalent in sports settings.<sup>195</sup> The culture of sports thus frequently perpetuates homophobia and transphobia, thereby marginalizing gay and gender non-conforming youth.<sup>196</sup>

---

194. See BIEGEL & KUEHL, *supra* note 157 at 13.

195. Further complicating matters is that the culture of organized sports is only partially under the control of school districts. Young people may be exposed to pervasively homophobic comments and behaviors when they participate in sports programs outside of school. The culture persists after high school, and it is typically at its worst in men's team sports. See ESERA TUAOLO, *ALONE IN THE TRENCHES: MY LIFE AS A GAY MAN IN THE NFL* (2006); JOHN AMAECHI, *THE MAN IN THE MIDDLE* (2007). See also BILLY BEAN, *GOING THE OTHER WAY: LESSONS FROM A LIFE IN AND OUT OF MAJOR LEAGUE BASEBALL* (2003), written by the former major league baseball player who, along with former NFL player Esera Tuaolo and former NBA player John Amaechi, was one of only a handful of participants in major men's professional sports who came out after retiring. Bean describes a homophobic and heterosexist culture, which was already fostered in organized competition at the fourth-grade level. Bean tells how he will never forget the first time he heard the word faggot on an athletic field. "Don't run like a faggot, boy," he remembers the coach of his Junior All-American Pop Warner football team shouting, after another fourth grader had missed a tackle:

Every kid on the field that day got the message, despite what I suspect was our collective ignorance. What, exactly, was a faggot? How did faggots run? Clearly, it wasn't a good thing. It was probably the worst thing imaginable. It equaled weakness and timidity, everything a budding, insecure jock wanted to avoid.

*Id.* at 107.

196. See generally *Sports Project History*, NAT'L CTR. FOR LESBIAN RTS., [http://www.nclrights.org/site/PageServer?pagename=issue\\_sports\\_overview](http://www.nclrights.org/site/PageServer?pagename=issue_sports_overview) (last visited Feb. 17, 2011) (explaining that the National Center for Lesbian Rights Sports Project

Improving school climate, with support for LGBT students through targeted initiatives, will undoubtedly have an impact on sports programs and those who participate in them. Yet without the active involvement of persons from within the sports community, changes in the sports culture may be slow. If some members of the sports community are openly LGBT, however, the prospects for positive change are greatly increased. The positive impact of an openly gay coach, an out athlete, or an out administrator/former athlete as a role model in this area cannot be overstated. In a best case scenario, openly LGBT persons from within the campus sports community, working together with other committed faculty and staff, could exemplify the ideal of a positive and welcoming and collaborative school climate.<sup>197</sup>

#### CONCLUSION: THE PROMISE OF ENDA

LGBT persons have a difficult history in America's public schools. A discriminatory school culture has persisted in the aftermath of the blatant mistreatment that took place in the mid-twentieth century. Inadequate employment discrimination laws and institutional pressure to remain closeted send a message that mistreatment and isolation of openly LGBT educators and students is still acceptable.

The passage of ENDA will be a statement that this country has reached a major, concrete, and unassailable turning point. There is already evidence of significant progress at this point in time, including the key fact that more people than ever before are willing to discuss LGBT issues openly. Thus, for example, tragic suicides linked to peer mistreatment are no longer grieved in the shadows, and collective outrage by community leaders often follows incidents of gay bashing.

For the education community, ENDA has a special promise. By ending the discrimination against LGBT educators and seeing them as valuable resources in combating the mistreatment of LGBT youth,

---

was "the first project of its kind to prioritize, through litigation and policy work, rampant anti-LGBT discrimination and forced invisibility of LGBT athletes, coaches, and sports professionals.").

197. For example, LGBT persons might also form or encourage athletes to participate in gay-straight alliances for athletes. They could take the lead in changing curriculum and pedagogy, which might entail a discussion of openly gay sports figures during lessons on sports history or sports-related current events. Finally, with regard to pedagogy, coaches and physical education instructors who understand their obligation to respect the right to be out, and who commit to treating all students with equal dignity, can have a substantial impact by making it clear that gay bashing is unacceptable on the field, in the gym, in the locker room, and in any other athletic settings under their supervision. See BIEGEL & KUEHL, *supra* note 156, at 14–16 (setting forth research-based policy recommendations to address the mistreatment of LGBT youth in the U.S. public schools).

schools can set the tone for our entire society, potentially playing a big part in eradicating tolerance of homophobia and transphobia in every walk of life.

ENDA remains unfinished business until it is passed and signed into law. But even after it is passed, another level of unfinished business will inevitably remain: the unfinished business of implementing the statutory scheme, particularly in K–12 education environments. Implementing ENDA in public schools may prove exceedingly difficult for the numerous reasons discussed above. But for the same reasons, ENDA's enforcement is critical in schools, in order to create a welcoming and supportive environment for all students.

Given how far we have come in this area in the last ten years alone, there is great reason for optimism. At the state level, the growing recognition of same-sex relationships and the increasing willingness of state legislators to pass anti-discrimination laws that include protection for LGBTs together constitute the equivalent of a turning of the tide. At the federal level, the passage of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009<sup>198</sup> (which broadened the definition of federal hate crimes to include those based on actual or perceived sexual orientation and gender identity) and the repeal of Don't Ask, Don't Tell in 2010,<sup>199</sup> are being seen as major breakthroughs. Taken together, these acts of Congress impact the whole country and send a message that a tipping point may have been reached on the LGBT front.

This special issue on the life and work of Senator Edward M. Kennedy affords us the opportunity to reflect on his legacy and follow through on his dreams of high quality public education, equal access and equal opportunity for all, and civil rights for all citizens in a pluralistic society—across all racial, ethnic, religious, and socioeconomic groups—within every institution and at every level. *Tolerance* of differences was not enough for Kennedy. *Equal treatment* was the byword, and it was evident in his unwavering support for ENDA. We honor the memory of Senator Kennedy and all those who have combated the mistreatment of LGBT people in America's public schools by working to make the passage of ENDA a reality.

---

198. See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190, 2835–2844 (2009).

199. See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515–3517 (2010).

