

# A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity

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**Abstract** This article traces the history of the struggle for trans-inclusion in the federal Employment Non-Discrimination Act (ENDA), focusing in on the decision to take gender identity protections out of the 2007 ENDA. It situates this struggle in the larger histories of the national mainstream gay and lesbian movement and the emergence of visible trans activism in the 1990s. The author argues that the decision to take gender identity protections out of the 2007 ENDA should be understood as part of the wider record of compromises and alterations made to the bill, which must be contextualized alongside the move within the national mainstream gay and lesbian movement toward homonormative politics and strategies.

**Keywords** Transgender · Gay · Lesbian · LGBT · Congress · Gender identity · Activism

## Introduction

Congressional leaders' decision in 2007, supported by just a few gay and lesbian activists and organizations, to strip the Employment Non-Discrimination Act (ENDA) of its newly included gender identity protections sparked a loud, contentious, and very visible debate within the mainstream LG(BT) movement over the questions of trans-inclusion. This debate was by no means new to gay and lesbian political movements or communities. In fact, trans activists

and supporters had been attempting to make ENDA trans-inclusive for over a decade and a half.

Hegemonic constructions of trans and gender non-conforming and gay and lesbian identities have been intertwined throughout their histories. For example, early constructions of homosexuality were understood through gender nonconformity, called gender “inversion” at the time, in which a man who was attracted to men was thought to be acting like or have the brain of a woman, and a woman who was attracted to women was thought to be acting like or have the brain of a man (Stryker 2008a). While the theory of inversion has been discredited, most dominant stereotypes of gays and lesbians still are based on gender nonconformity.

The development of gay and lesbian politics and movements also have been intertwined with and run parallel to the development of trans<sup>1</sup> politics and movements. Trans communities and gay and lesbian communities share similar histories and struggles. Throughout their histories,

<sup>1</sup> We currently lack language to adequately describe and name complex gender and sexual performances and identities. For example, some communities who are understood as trans by service providers and others outside the community internally identify as gay or as something else entirely. The language of “transsexuality” and “transgender” has been mostly constructed in the privileged, mainly white spaces of the medical-psychological establishment, academia, and certain kinds of activism and can exclude or render invisible gendered communities of color and low-income gendered communities (Valentine 2007). I have chosen to use “trans” because it reflects the language used by mainstream LG(BT) organizations and because I believe it is the most inclusive language available at the moment. In this article, “trans” includes a wide range of gendered experiences, including everyone from transsexual people who have physically transitioned; to pre- or non-operative trans people; to genderqueer or other people who do not identify as one of the two socially recognized genders; to cross-dressers, drag kings, and drag queens; to masculine women and feminine men.

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trans, gay and lesbian, and queer people have formed communities together, organized and resisted together, and understood their identities through or against each other. Many scholars have pointed out that trans and gender nonconforming people have been integral in gay rights movements from the beginning (see, for example, Denny 2006; Minter 2006; Stryker 2008a, 2008b).

The mainstream gay movement that emerged in the 1950s, 1960s, and 1970s and consolidated into a professionalized, politically reformist and assimilationist, homonormative establishment in the 1990s has long sought to separate itself from trans populations—along with other gender and sexual non-normative, racialized, immigrant, and low-income populations. The question of whether trans people are a part of this community and movement—and therefore deserve not only inclusion but also significant resource allocation—remains a contentious and ongoing debate. In this article, I show that the exclusion of gender identity protections from the 2007 ENDA is just the most recent event in the long history of the trans-inclusion debate and that it is inextricably linked to other aspects of homonormative strategies that have been employed in attempts to pass the bill and more generally to normalize gay and lesbian community and rights.

In the first section of this article, I discuss the concept of homonormativity and how ENDA generally is governed by homonormative strategies and discourses. Next, I briefly sketch the history of the bill from its introduction in 1974 through the first vote on the bill in 1996. I then turn to a discussion of efforts by trans activists and their allies to make ENDA trans-inclusive. In the final section, I look at the events in 2007.

In this article, I focus on what I call the “mainstream LG(BT) movement”,<sup>2</sup> which refers to the gay and lesbian organizations and communities with the most political power and visibility in national politics and media. Organizations such as the Human Rights Campaign (HRC), the National Gay and Lesbian Task Force (the Task Force), and Parents, Family, and Friends of Lesbians and Gays (PFLAG) are central to this “community” and “movement”. Therefore, the following brief history is only one of many different histories of gay, lesbian, queer, trans, and other gender and sexual minorities. I use “histories”, instead of a singular “history”, in this introduction not to indicate two separate and separable “gay” and “trans”

histories but to point to the many different histories that these populations have. These histories are defined not only by gay and lesbian versus trans identities but by other gender, racial, class, national, and political identities. These histories are different but are also inextricably linked by dominant constructions of normative and deviant genders and sexualities, which are always contingent on race, class, citizenship status, ability, and other social categories. The movement and its history presented here should be understood as based in predominantly white, economically, and educationally privileged spaces. This whiteness and other privileges are an important part of the movement’s homonormativity, as will be discussed in the first section.

Since the 1970s, the passage of federal anti-discrimination legislation that covers sexual orientation—and eventually gender identity—has been at the top of the national LG(BT) agenda. On May 14, 1974, Representative Bella Abzug introduced the Equality Act into the House of Representatives. The introduction of this bill marked the first time that a “gay rights” bill had been introduced on the federal level in the US (“Federal Gay Rights”, 1974). Since then, some version of this bill has been introduced in every session but has only reached the floor of either house of Congress for a vote twice, in 1996 and 2007. This article focuses on the history of the work on and debate around trans-inclusion in this legislation through the development and recent institutionalization of homonormativity in the mainstream LG(BT) movement. I will attempt to contextualize the decision by Congressional leaders in 2007 to introduce an inclusive bill for the first time in its history and then, a few months later, split the bill and move forward only with sexual orientation protections.

### The LG(BT) Movement and Homonormativity

Within the last decade a small segment of the gay and lesbian population—predominantly white, middle-class and wealthy, and gender-normative—has gained increased visibility, acceptance, and political legitimacy in dominant US society. Increased visibility in entertainment and the media, the decriminalization of sodomy with the 2003 *Lawrence v. Texas* decision, and the growing acceptance and legalization of “gay marriage” have both contributed to and are a reflection of shifting boundaries of normative sexuality and familial structures. Scholars have described this as the emergence of homonormativity or the extension of heteronormative privilege to certain normative gays and lesbians (see, for example, Duggan 2003; Ferguson 2005; Puar 2007; Agathangelou, et al. 2008; Stryker 2008b). However, while homonormativity has facilitated (slightly) larger boundaries of what constitutes normative sexuality in the US, it ultimately re-entrenches interlocking systems of normative sexuality and gender and white supremacy.

<sup>2</sup> The parentheses signify the ongoing question of who actually is included in these different formulations of gay, lesbian, bisexual, transgender, and queer movements and communities. There are multiple conceptions of LGBT movements in the US, many of which are not always inclusive of the different kinds of LGBT identities. I have chosen to use “LG(BT)” in this essay both to reflect the most widely used label “LGBT” and to mark this movement’s historical and ongoing exclusions of trans and bisexual people as well as its frequent privileging of (white) gay male interests.

Homonormativity, like heteronormativity, is defined in terms of whiteness, traditional and essentialized gender roles, property and wealth, monogamy and the nuclear family structure, able-bodiedness, and US citizenship. Both heteronormativity and homonormativity are interlocked with white supremacy and rely on constructions of normative whiteness. Their whiteness is seen in their normalization and naturalization of constructions of normative gender, sexuality, and family structures that are defined through whiteness, while racial difference operates as a sign of non-normativity and exclusion (Ferguson 2005). In other words, heteronormativity and homonormativity are defined in opposition to the sexuality of people of color. Homonormativity constructs gay identity as white and aligns gay politics with dominant constructions of knowledge and power that disqualify other (racialized and non-hetero/homonormative) modes of knowing that threaten dominant, normative space and authority (Stryker 2008b).

In the US, normative systems of gender and sexuality rely on constructions of normative bodies and stable, essentialized binary gender and sex, where “men” (who always have penises) are the opposite of “women” (who always have breasts and vaginas), which trans people challenge and threaten. Homonormativity similarly relies on and attempts to naturalize these normative constructions. Homonormative gay and lesbian identity assumes a stable, essentialized sexual object choice that is attached to normative “male” and “female” genitals corresponding to specific normative gender expressions. Queer or unstable sexual object choice and trans, gender non-conforming, and surgically altered bodies denaturalize and expose the performativity of these normative constructions of gender and sexuality and therefore remain outside homonormativity.

While heteronormativity is one of the most important, basic structures of the U.S. state and dominant society, the emergence of homonormativity signals the reentrance of white, gender-normative gays and lesbians into the rights and privileges of US citizenship, allowing them to access racial and class privileges by conforming to gender and sexual norms. Homonormative gays and lesbians mimic (white) heteronormative gender, sexual, and family structures, strengthening both heteronormativity and white supremacy (Puar 2007).

The (white) mainstream LG(BT) movement relies on and has helped to construct and consolidate homonormativity. This movement has developed in the last decade or so into an institutionalized, professional nonprofit model that utilizes assimilationist, homonormative strategies. The model of “equality” that it espouses is one based on narrow, formal access to a few conservative institutions and hinges on a (homo)normative, domesticated, depoliticized right to

privacy (Duggan 2003). This work has increasingly marginalized people of color, low-income people, and trans people as homonormative organizations work to integrate the most privileged sections of gay and lesbian populations into the US state.

This movement constructs issues mainly relevant to white, wealthy, and middle-class gender-normative gay men as generalized “gay issues”, legitimizing this, in part, by framing itself as single issue and therefore universal to the “gay experience” while constructing issues that affect LGBT people of color, low-income people, trans people, and other queer people as special issues and thus outside the scope of sexuality. In other words, the homonormative subject’s ability to (re)gain access to the state, citizenship, and white privilege is based on the reestablishment of racialized, sexualized, and gendered boundaries between “us” and “them” and the policing and reiterative performance of these boundaries. These strategies render power and identity differentials invisible within “the LGBT movement”, thereby misrepresenting and naturalizing the unequal distribution of power within it (Cohen 1997).

In a recent article, Susan Stryker (2008b) identifies two different origins and usages of homonormativity. The more common usage, generally attributed to Lisa Duggan in *Twilight of Equality*, focuses on homonormativity as a product of neoliberal politics. Queer of color critique scholars have recently engaged with this usage to describe how normative, dominant homosexuality and gay politics are based on normative whiteness and white supremacy (see, for example, Ferguson 2005; Puar 2007; Agathangelou, et al. 2008). Stryker also identifies a different, earlier version of homonormativity that emerged out of trans communities and activism and was articulated by Judith Halberstam in *Female Masculinity* that describes trans and gender non-conforming people’s “double sense of marginalization and displacement” (p. 145) that arises out of their conflicts with gender-normative, assimilationist homosexuality, and gay politics. It is also a way to link the disparagement of gender non-normativity in gender-normative gay and lesbian contexts with similar disparagement in heteronormative ones.

I do not think that these two “versions” of homonormativity are in opposition or even in tension—nor do I think Stryker would say that they are—but that they focus on different aspects of homonormativity. Homonormativity, like heteronormativity, is based on interlocking systems of gender normativity, white supremacy, and neoliberalism—along with other systems of oppression like ableism and US xenophobia and nationalism. While some scholars have chosen to focus on particular aspects of homonormativity, all are vital parts of homonormative discourses and strategies. In this article, I hope to demonstrate how these different aspects work together to govern strategies around and work on ENDA.

While most people outside gay, lesbian, trans, and other queer communities generally do not think of a difference between gays and lesbians and trans people, LG(BT) activists and organizations have worked to invent a distinction between trans people and gays and lesbians in their efforts to look more normative and to gain political legitimacy in a state in which heteronormativity is a central structuring principle. These activists and organizations assert that trans people are outsiders that have no intrinsic connection or claim to gay rights. They do not consider trans people to be part of the gay and lesbian community. The exclusion of trans and gender nonconforming people from the mainstream gay movement is rooted in a homonormative reformation of gay identity as explicitly non-gender transgressive.

This point of view was asserted during the 2007 ENDA debates and could be seen throughout the blogosphere. For example, Andrew Sullivan (2007), in a blog post about ENDA, favorably quoted another blogger's take on the trans-inclusion question:

I've been sitting here sort of picking my own brain and asking myself if gay and trans people do in fact have some crucial thing in common. I've read tons of opinion pieces and blog posts on the ENDA war in recent weeks, but none of them really opened my eyes. What do I have in common with a guy who wants to remove his willy, grow breasts, become a woman and get married to a man? From where did this relatively new concept of "the LGBT community" come?

Sullivan uses a number of stereotypes of trans people—that a trans person is their birth assigned sex until bottom surgery is performed and that they are always straight; constructs trans people as freaks in opposition to the normativity of gay people; and plays into the sexist masculine anxiety over castration in an attempt to create a distinct, "natural" separation between trans and gay people.

The exclusion of trans people frequently is justified through their construction as freaks and deviant and homonormative people's desire to separate themselves from this in order to construct themselves as normative. One important example of this is the discussion over "the shower issue", or the repeatedly expressed "concern" about pre- or non-operative transfeminine people showering in women's locker rooms with non-trans women. In fact, Rep. Barney Frank has repeatedly cited this as one of his greatest problems with gender identity protections.<sup>3</sup> This "concern"

<sup>3</sup> I have found numerous accounts of Frank's transphobia around "the shower issue". For example, in a 1999 *Advocate* article, he claimed, "Transgendered people want a law that mandates a person with a penis be allowed to shower with women. They can't get that in ENDA" (quoted in Currah 2008b, p. 333). See also Miranda Stevens-Miller's (n.d.) description of an encounter she had with Frank.

relies on understandings of transfeminine people as always inherently "men" and as freaks, sexual deviants, and sexual threats. As Frank cites this "concern", he draws a distinct line between the freakish, threatening trans women who seek to invade "real women's" space and normative (white) gay men like himself.

ENDA is an example of homonormative legislation in terms of both usages of homonormativity that Stryker identifies. The exclusion of gender identity from the bill is homonormative in the sense that gender non-normative people are excluded in favor of a vision of a completely gender-normative gay and lesbian "community". The bill in general is homonormative because it represents an attempt to assimilate gay and lesbian people into the "American dream" and the (white-washed, class-unconscious) normative discourse of individualism, hard work, and personal responsibility.

In addition, there have been important critiques of anti-discrimination laws that point out, for example, that they have been ineffective in eradicating discrimination, that most people do not have access to the legal resources to enforce these laws, and that they represent an investment in formal equality which ignores the situation of those who are most marginalized (Mananzala and Spade 2008). Matt Richardson (in Currah 2008a) points out that equal protection laws do not produce the same benefits for everyone because many people "are not recognized by the state as full citizens no matter what [their] passports say and whether or not [they] were born in the United States" (p. 100).

Anti-discrimination laws promote formal equality but do not address structural or systemic inequalities and have no redistributive power. This is in part because they are largely unenforced but more importantly because they focus on individual acts of discrimination and not larger institutional discrimination. Critical Race Theory scholars have critiqued civil rights laws and discourse and other anti-discrimination laws that largely focus on individual discrimination and do nothing to address institutional or systemic racism. By viewing racism and discrimination as aberrant, isolated acts by individuals, anti-discrimination and civil rights laws create structures of formal equality while simultaneously hiding and reinforcing the status quo of institutional racism (see for example, Crenshaw 1995; Freeman 1995; Gotanda 1995). By similarly refusing to address institutional power hierarchies and systems of oppression, such as heteronormativity, ENDA fails to address and cannot remedy structural heteronormativity. The understanding of inequality and oppression that anti-discrimination laws generally espouse is in line with homonormativity because they are ultimately depoliticized—they assume that discrimination is aberrant, individual acts and not normative in U.S. society and state—and are about inclusion in the U.S. state in a way that reinforces and legitimizes current structural inequalities.

Throughout the history of ENDA, numerous concessions and compromises have created a bill that privileges some sexual practices and identities while stigmatizing others. The legislation privileges monogamously coupled, procreative, unpromiscuous, noncommercial, non-kinky normative sexuality. Patrick McCreery (1999) argues that ENDA presumes the existence of normative sexual practices in which gays and lesbians engage and that “any presumption of ‘normative sexuality’ is a corollary of heteronormative culture” (p. 41). Homonormative discourses reinforce this by unlinking gay identity from sexuality, allowing ENDA to protect gay identity without actually protecting any expression of gay sexuality. Furthermore, by relying on the historically contingent categories heterosexual, homosexual, and bisexual, ENDA reinscribes heteronormative culture because these categories presume the existence of immutable binary gender and render any fluidity in sexuality unimaginable. It is also through these stagnant categories that heterosexuality is constantly reinscribed as always normative. By relying on these categories, the legislation renders queer identity and trans and gender non-normative identities and relationships invisible and thus unprotectable. This invisibility and exclusion is necessary to sustain the homonormativity of the bill.

The history of the bill, in some ways, parallels the history of the mainstream LG(BT) movement. The bill was introduced in 1974 during the beginning of an assimilationist, reformist gay rights movement that was emerging out of the Gay Liberation Movement. It was a first effort at incorporation into the U.S. state and national politics. Throughout the 1970s, 1980s, and into the 1990s, the bill “refined” as a national gay and lesbian lobbying establishment emerged and consolidated. It was also an important vehicle and object for these developing lobbying efforts. The first two decades of the bill were mainly characterized by intensive, individual lobbying of Congress people to become supporters and cosponsors of the bill, which resulted in the slow but steady increase in cosponsors (Feldblum 2000b).<sup>4</sup> Over the next few decades, as this gay and lesbian political establishment developed, became more conservative and institutionalized, and as the new homonormativity developed, the bill reflected these changes, becoming less inclusive, less expansive, and continued to accommodate more and more exclusions and compromises. It is within this context of compromise that the decision to cut gender identity protections for the 2007 ENDA must be understood.

<sup>4</sup> Feldblum (2000b) explains that this work on the bill was backseated in 1983 because of AIDS and that serious efforts did not begin again until 1991. Throughout these 8 years, the national mainstream gay and lesbian political establishment matured a great deal and was integrated into the mainstream civil rights community.

This strategy of compromise is inextricably intertwined with the view of trans people’s place in the movement advocated by proponents of the split bills because it shows that they view trans and gender nonconforming people as expendable to the larger goals of the movement. Furthermore, the expendability of trans people is related to the expendability of other LGBTQ people, namely people of color, low-income people, immigrants, disabled people, and others. This expendability of the most marginalized queer people is an important element in the national mainstream LG(BT) movement’s homonormative political strategy.

### Legislative History

In 1974, Rep. Bella Abzug introduced the first federal “gay rights bill”, the Equality Act, into the House of Representatives (H.R. 14752). The Act proposed to add the categories of sex, sexual orientation, and marital status to the Civil Rights Act of 1964. This anti-discrimination coverage would have included employment, housing, public accommodations, education, and federal programs (“Federal Gay Rights”, 1974; H.R. 14752). In 1975, Abzug separated sexual orientation from sex and marital status, introducing the “Civil Rights Amendments of 1975”, which proposed protections for “affectional or sexual preference” (H.R. 166; H.R. 5452). The Civil Rights Amendments were introduced with little change for the following eight Congressional sessions by Reps. Edward Koch and then Ted Weiss, attracting an increasing number of cosponsors, from none on the original bill in 1974 to 110 in 1991.

The analogous Senate bill had a slightly different history. In 1979, 5 years after Abzug introduced the Equality Act in the House, Senator Paul Tsongas introduced “A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation” (S. 2081). Tsongas introduced a similar bill focusing on employment discrimination in the next two sessions of Congress (S. 1708 in 1981; S. 430 in 1983). The Senate bill did not extend beyond employment discrimination until Senator John Kerry introduced the Civil Rights Amendments Act of 1985 in the 99th session of the Senate (S. 1432), which was identical to the bill introduced in the House that year. Following 1985, the bills introduced in the Senate and the House were identical. Cosponsorship in the Senate rose steadily and slowly from three in 1979 to sixteen in 1991.<sup>5</sup>

In 1994, gay and lesbian activists and Congressional leaders chose to shift their strategy by whittling down the anti-discrimination bill to cover only employment discrimination. That year they introduced the Employment

<sup>5</sup> See Feldblum (2000b) for an excellent, detailed history of the gay rights bill from 1974 to 1999.

Non-Discrimination Act into both houses of Congress (H.R. 4636; S. 2238). The previous year's loss in the fight against the U.S. military's ban on gay service people had seriously weakened the perceived political power of gay and lesbian organizations. Chai Feldblum<sup>6</sup> (2000b) explains that because of this loss of political power, they chose to cut down the bill to the issue they believed had the most political and popular support: employment non-discrimination. Indeed, polls since the mid-1970s had indicated a majority of people in the US supported employment protections for gays and lesbians, even as they believed that sodomy should be criminalized. Lisa Mottet (personal communication, April 23, 2008), the Director of the Transgender Civil Rights Project at The Task Force, explains that job protections were seen as "more American". This strategy did expand support for the bill, attracting by 1995 the co-sponsorship of one out every four members of Congress, including twelve Republicans, as well as the endorsement of President Clinton (Howlett 1995; Devroy 1995).<sup>7</sup> However, when Republicans gained control of Congress in the 1994 elections, passage efforts were postponed (Wendland 2007).

This constriction of the gay rights bill was an important part in the effort to assimilate normative gays and lesbians into full US citizenship. The focus on equality in employment relies on white, heteronormative, middle-class, neoliberal constructions of "American values" of individualism, hard work, and personal responsibility that anybody who works hard can achieve the "American dream" of wealth, success, and full citizenship. This is reflected in Mottet's description of employment non-discrimination protections as "more American". This homonormative strategy, while pulling certain gays and lesbians into normative citizenship, reinforces existing power structures and discourses that criminalize and exclude people of color, low-income people, and other queer people from normative citizenship by strengthening the link between full citizenship and "legitimate" employment.

The creation of ENDA, with the removal of other non-employment-related protections, was not the first and certainly would not be the last time that the bill was watered down and compromised to make it more "acceptable" and less threatening to its opponents. This willingness to repeatedly compromise often to the

detriment of the purposes of the legislation is symptomatic of homonormative strategies. For example, prior to the creation of ENDA, the Civil Rights Amendments bill was rewritten not to amend the Civil Rights Act of 1964, thereby unlinking it from previous civil rights legislation and effectively ranking homophobia as something less than and separate from racism, sexism, and other covered oppressions (McCreery 1999).<sup>8</sup> This separation conforms to the homonormative, single-issue logic that separates "gay and lesbian issues" from "racial issues", "class issues", and others. It also assimilates itself to a legal system that cannot understand intersectionality and weakens the bill to help maintain the status quo.

Since the enormous compromise that created ENDA, the bill has been further rewritten almost every time it has been reintroduced to make it less "threatening" and consequentially weaker. Over the past decade and a half, numerous clauses have been written into the bill, including: broad exemptions for the military and religious organizations (exemptions that seem to get broader with each rewriting), a clause that explicitly forbids affirmative action aimed at gays and lesbians, and a clause that embeds into the bill Defense of Marriage Act's (DOMA) definition of marriage as between one man and one woman. Even the bill's definition of "sexual orientation" has been narrowed since 1994. While the original bill gave the broadest definition of sexual orientation, defining it as "lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations", the following versions defined sexual orientation as "homosexuality, bisexuality, or heterosexuality, whether such orientation is real or perceived." Feldblum has explained that the "as manifested" language was removed in order to deny ENDA's critics a "hook" to begin talking about specific sexual practices that they could claim the bill endorsed (in McCreery 1999, p. 46). This ultimately separates these "identities" from actual sexual practices in order to reinforce the "normativity" of the gays and lesbians it is designed to protect.

Prior to 2007, ENDA came close to passage only once, in 1996. That year, an effort was made to attach ENDA as an amendment to DOMA in the Senate by Senators Edward Kennedy and James Jeffords. Feldblum (2000b) explains that gay activists and pro-gay Congressional leaders were planning to add a range of unrelated amendments, such as

<sup>6</sup> Feldblum has been integrally involved with ENDA since before its introduction in 1994. She served as the lead lawyer, as a consultant for HRC, for the drafting and negotiation of ENDA of 1994 and 1995 and has been involved with its subsequent redrafting and political advocacy in various ways up to the present.

<sup>7</sup> This marked the first endorsement by a sitting president involving a major piece of gay rights legislation (Holmes 1995).

<sup>8</sup> It should be noted that Feldblum (personal communication, June 15, 2009) explains that this was done because any legislation that seeks to revise and expand existing civil rights laws also opens them up to revisions designed to repeal or weaken them. Therefore, the mainstream civil rights community will not support this type of legislation, which is one reason that the ADA is a free-standing bill. However, this points to the continued tenuous position of civil rights legislation, even though it has been law for over 40 years.

on gun control, to the Senate bill that could force Republicans into an embarrassing vote. They then decided to attach ENDA as an amendment to DOMA. Before the Senate vote, Republicans offered Kennedy a deal to avoid any embarrassing votes: an up-or-down vote on DOMA with no amendments in return for an up-or-down vote on ENDA, also with no amendments. Kennedy took the deal with the agreement of gay and other civil rights organizations.

On September 10, 1996, the Senate voted on the two bills. DOMA passed with a 85–14 vote, but ENDA came one vote shy of passage with a final vote of 50–49 against it (S. 2056). Senator David Pryor, who had promised to vote for the bill, was called away at the last minute because of a family medical emergency and therefore missed the vote. If Pryor had voted, the outcome would have been a tie of 50–50, and Vice President Al Gore would have cast the tie breaker in favor of passage (Wetzstein 1996). The ability for ENDA to come so close to passage was due largely to DOMA. The strategic decision was made to juxtapose ENDA with gay marriage so that “the more benign bill might seem less threatening” (Bull 1997, ¶ 7). Frank explained: “DOMA served as a stop-loss order for members of the Senate. In the past they always feared that if they voted for gay rights they would be accused of supporting a much broader gay agenda. When they voted for DOMA and ENDA, they could go home and say, ‘Don’t tell me I voted for the gay rights agenda. I voted to ban gay marriage’” (Bull 1997, paragraph 9). While this strategy may have been politically expedient, gay and lesbian activists and their advocates, ended up supporting homophobia and heteronormativity in an effort to carve out a small space in which homonormative gays and lesbians could gain access to the full privileges of citizenship.

### Making ENDA Trans-Inclusive

The early 1990s saw a “tremendous burst of new transgender activism” (Stryker 2008a, p. 121). The emergence of this new trans activism is related to the formation of coherent trans identities and communities, the increased visibility of trans people in the media and entertainment industry, the emergence of trans studies in academia, and the loosening of the medical establishment’s strict control over discourses on transsexuality and trans identity—mainly because of the ongoing activism of trans people over the previous four decades. A much more cohesive national trans movement and increased trans visibility and voice within established gay and lesbian organizations came out of this burst of activism. By the late 1990s and early 2000s, gay and lesbian organizations began to include trans people explicitly in their mission statements and their

work and accepting trans people as integral parts of the gay and lesbian—reconceptualized as the LGBT—movement (Denny 2006). For example, the Task Force changed its mission statement in 1997 (NGLTF 2008), PFLAG in 1998 (PFLAG 2008), and HRC in 2001 (NTAC 2004). Despite this nominal progress, there has never been consensus among LGB people, or even trans people, that trans people belong in the gay and lesbian community. Furthermore, while nearly all organizations have made these semantic changes to their names and mission statements, few resources have been allocated to “trans issues” and trans people remain extremely underrepresented in their staffs (Mananzala and Spade 2008).

Since the first drafting of ENDA, trans activists have fought to have gender identity protections included in the bill, with Congressional leaders and leading gay activists and organizations actively opposing this inclusion. Inclusion of gender identity threatens the homonormative construction of gays and lesbians by linking them with gender non-normativity. Gay and lesbian activists frequently fought—and still fight—against this linkage in order to be able to be incorporated into the normative state. As homonormative gays and lesbians constructed themselves as not threatening to the heteronormative state, they were able to gather more votes for ENDA. As Frank explained in 1993, the inclusion of gender identity protections would have caused “a very significant fall-off, especially among Republicans” (Brune 2004, paragraph 14), which he cited as the reason for their exclusion. While drafters of the 1994 bill very briefly considered including trans status, Feldblum (2000a) explains that this inclusion was decided against because it was believed that it would come at “significant political cost” (p. 627) and that this type of discrimination was covered under existing sex discrimination laws. More importantly, she explains that they “believed that discrimination based on transgender status was conceptually different from discrimination based on sexual orientation” (pp. 627–8) and that trans people were not integral parts of the community they serve. While a number of trans activists advocated for inclusion, they were “dismissed out of hand” (Keisling, personal communication, May 1, 2008).

The first public effort by trans activists to get gender identity included in ENDA was the attempt by Phyllis Frye and Karen Kerin to speak at the July 1994 Senate Hearings on ENDA (Keisling, personal communication, May 1, 2008). While they were not allowed to speak, they were able to talk to a number of members of Congress (Frye, personal communication, April 13, 2008). In March 1995, six trans activists, including Frye, Kerin, and Riki Ann Wilchins, lobbied Congress for an inclusive ENDA. Frye (2000) describes this event as the “first organized transgender lobbying event in our nation’s capital” (p. 463). Frye and other activists also drafted an inclusive bill, which

Jeffords had said he would introduce. Despite these efforts, on June 15, 1995, a non-inclusive ENDA was introduced in the Senate, angering trans activists who felt betrayed.

HRC, which helped push through the non-inclusive bill, was at the center of this “betrayal”.<sup>9</sup> By September 1995, HRC agreed to meet with a number of trans activists, including Frye and Kerin. Following the meeting, HRC arranged to allow two trans activists to work with Feldman, the main author of the bill, on an amendment that would add gender identity protections. HRC agreed not to oppose this amendment if it were to be offered but did not agree to work for, support, or even recommend the introduction of such an amendment. This position was reaffirmed in a follow-up meeting between HRC and trans activists in 1996. Ultimately, this effort went nowhere (Frye, personal communication, April 13, 2008; Feldblum 2000a).

The reintroduction of a non-inclusive bill and the failed negotiations with HRC caused trans activists to change their strategy from focusing on Congressional leaders to focusing on HRC and other national organizations. Mottet (personal communication, April 23, 2008) explains that activists worked to get all the major gay and lesbian organizations to change their position on ENDA to supporting only an inclusive bill. While HRC continued its policy of non-inclusion, activists worked to isolate HRC and make them the “lone holdout”.

Over the following years, most national gay rights organizations changed their positions on ENDA to actively supporting an inclusive bill. In January 1995, the National Lesbian and Gay Law Association became the first national gay and lesbian organization to pass a board resolution calling for trans-inclusion in ENDA. In 1998, PFLAG began advocating for an inclusive ENDA (Frye 2000). In 1999, The Task Force changed its position to supporting only an inclusive ENDA and became the first national gay and lesbian organization to stop their work on the bill because of its lack of trans-inclusion (NGLTF 2008). Nearly every other major gay and lesbian organization quickly followed suit, except HRC (Mottet, personal communication, April 23, 2008).

In 1999, the Task Force officially requested to the staffs of Senators Jeffords and Kennedy that ENDA include gender identity protections. Both Senators rejected this request. However, Feldblum (2000b), who was involved with these requests, explains that they were able to have

serious discussions with their staffs about inclusion and that both staffs believed that if there was a shift in the views of the “American public” on trans people, Congress would shift as well. As far as I know, this was the first official request by a mainstream LG(BT) organization to Congressional leaders that they make ENDA trans-inclusive.

During this time, trans activists continued to lobby Congress in order to increase their visibility. In October 1995, activists held another lobby day. Frye (2000) claims that in just 2 days, over 100 trans activists and supporters from 35 states lobbied 95% of Congress. Trans activists and supporters held lobby days in most of the ensuing years. Frye (personal communication, April 13, 2008) describes the responses of the members of Congress as mostly “very cordial” and that they would follow the lead of Kennedy and Frank.

By the early 2000s, trans activists had successfully positioned HRC as the lone holdout standing in the way of an inclusive bill. Organizations—including the Task Force, Pride At Work of the AFL-CIO, PFLAG, National Organization of Women, National Center for Transgender Equality (NCTE), and Gender Public Advocacy Coalition—together began to put pressure on HRC to change its position (see Ames et al. 2002). In August of 2004, a group of trans activists, including Keisling, Mottet, Minter, Jamison Green, Donna Rose, and others gave a presentation on trans-inclusion in ENDA to HRC’s Board of Directors (Keisling, personal communication, May 1, 2008).<sup>10</sup> Keisling explains that they were probably allowed to give this presentation because the Board was “already almost there” in changing their official policy on trans-inclusion in ENDA and that the staff at the time was very supportive of an inclusive bill. Later that month, after nearly a decade of struggle, the Board of Directors voted not to support the proposed bill the following year unless it included gender identity protections, thereby officially changing the organization’s policy and coming into line with the rest of the LG(BT) movement.

Following the victory with HRC and now possessing a united front, activists turned their full attention to convincing Frank, now the main Congressional leader on ENDA, to introduce a gender identity inclusive bill. It took nearly 2 years before Frank agreed to this change. While his decision to change was in part because activists could show him that they had more votes for an inclusive bill than ever

<sup>9</sup> As the largest and most well resourced national LG(BT) organization and most influential on Capitol Hill, many politicians see them as the representative of all LGBTQ people. Until recently, they were the only LGBT organization with professional federal lobbyists and still employ the most. They are the only LGBT organization with a Congressional scorecard on LGBT issues and the only one with a political action committee, which allows them to give money to politicians.

<sup>10</sup> In her discussion of this presentation, Keisling (personal communication, May 1, 2008) emphasized that HRC made it clear that they were only talking about federal anti-discrimination legislation. Following this presentation and their change in policy on trans-inclusion in ENDA they continued to “weasel for years” about trans-inclusion in the federal hate crimes legislation they were trying to pass. She explained that a main reason for the differing policies on these legislations was that they believed that they had a chance of passing the hate crimes bill but not ENDA.

before, it was due mainly to pressure from the LG(BT) movement. By 2006, it was very clear that the movement was unified behind an inclusive bill. Keisling (personal communication, May 1, 2008) explains that Frank agreed to introduce, but not necessarily to pass, an inclusive bill. He was willing to try to pass the inclusive bill but only with the understanding that if he needed to split the bill later, he would. By then, it was the end of the session of Congress, and Frank decided to wait for the next session to introduce the new bill.

### The Employment Non-Discrimination Act of 2007

On April 24, 2007, Frank introduced a new version of ENDA into the House (H.R. 2015). This bill marked the first time gender identity protections had been added to the sexual orientation protections. Activists with Lambda Legal, NCTE, the Task Force, the National Center for Lesbian Rights (NCLR), the American Civil Liberties Union, HRC, and Gay and Lesbian Advocates and Defenders (GLAD) had begun drafting the new bill in 2004 (Mottet, personal communication, April 23, 2008). The bill enjoyed wide support in 2007, attracting 174 co-sponsors (Chibbaro 2007a; Wendland 2007). It also had mainstream labor and corporate sponsorship, which further grounded the bill within the neoliberal economic and normative U.S. state. At the time of its introduction, Frank and other House leaders were confident that the bill would pass the House.

On September 5, 2007, hearings were held on the inclusive bill. At this point, trans activists had no indication that there were significant problems with it. However, the mark-up meeting that was supposed to follow these hearings was postponed a number of times and activists began to hear rumors about trepidation over the bill's gender identity protections (Mottet, personal communication, April 23, 2008). Concerns among Democratic leadership started to arise over whether they had enough votes for an inclusive bill. Keisling (personal communication, May 1, 2008) contends that there was no real indication that they did not have the votes, that members of the House were just being "skittish", but pressure began to build on Democratic leadership.

As soon as they heard about a meeting between Reps. Frank, Tammy Baldwin and Speaker Nancy Pelosi to discuss stripping the bill of its gender identity protections, activists put together a statement reiterating their support for only a trans-inclusive ENDA. On September 27, nine national LGBT organizations—PFLAG, The Task Force, NCTE, NCLR, the National Stonewall Democrats, the National Coalition for LGBT Health, Pride At Work, the National Coalition of Anti-Violence Projects, and the Mautner Project of the National Lesbian Health Organization—issued a statement denouncing

the stripping of gender identity protections from ENDA. It read, in part:

Our organizations oppose the removal of protections for transgender people from ENDA. We would also oppose any employment nondiscrimination bill that did not protect transgender people. We are shocked and upset that...influential members of the House of Representatives have apparently made a decision to remove protections for transgender people from the bill. If true, this decision was made without consultation with leaders of the lesbian, gay, bisexual and transgender community (as quoted in Foreman 2007, ¶ 7).

This statement represented the inception of an unprecedented coalition of national and local LGBT organizations uniting to advocate for trans rights and trans-inclusion in the LG(BT) movement. HRC, however, did not sign the statement. The organization said it would not "assent" to stripping the bill of gender identity protections but did not indicate at this point how it would proceed (Eleveld 2007). This position not to outright oppose a non-inclusive bill angered many in the LG(BT) movement. It also represented a very quick reversal of HRC's stated policy regarding trans-inclusion. Less than a month earlier, Joe Solmonese, HRC's Executive Director, addressed the Southern Comfort conference, the largest trans conference in the country, stating: "We try to walk a thin line in terms of keeping everything in play and making sure that we move forward but always being clear that we *absolutely do not support and in fact oppose* any legislation that is not absolutely inclusive" ("Does HRC Support Transgender People?" 2008).

The 2007 ENDA controversy split the LG(BT) movement and brought the long standing disagreement over trans-inclusion to the forefront. As discussed in the introduction, over the past decade formal trans-inclusion has gained increasing acceptance within LG(BT) organizations and the movement as a whole. The formation of United ENDA and the overwhelming groundswell of support for inclusion of trans people in ENDA marked the first time that a large majority of LG(BT) organizations and their constituents came out to advocate for trans-inclusion and argue that trans people are integral parts of their communities. It also represented a deeper understanding of the connection between homosexuality, queer sexuality, trans-ness, and gender nonconformity. For example, some advocates argue that taking out gender identity stripped ENDA of any teeth it had. Lambda Legal (2007) called the bill "riddled with loopholes" because gays and lesbians are often discriminated against because of gender nonconformity and employers could claim that their conduct was based on gender expression not sexual orientation. This

means that ENDA would protect soundly only white, middle-class, gender-normative gays and lesbians who need protection the least and allow discrimination against the most vulnerable LGBTQ people—trans and gender non-conforming people, people of color, and low-income people.

The splitting of the movement around ENDA in the fall of 2007 was as much about strategy as it was about trans people's place in the LG(BT) movement. For those who came down on the side of a non-inclusive bill, namely Frank and HRC, expediency and the passage of any bill were most important. This stance is based in a homonormative strategy and history of not seeing the connection between gender transgression and sexual orientation. As an organization, HRC epitomizes the homonormative strategy (see Agathangelou et al. 2008). For example, HRC has acted to keep gender identity out of some gay rights legislation, most prominently ENDA and federal hate crimes legislation. Monica Roberts (2007), a trans activist and former Lobby Chair for the National Transgender Advocacy Coalition, claims that HRC has a history of “refusing to deal with trans people as equals not only in terms of civil rights legislation but even in hiring talented transgender people for their organization” (paragraph 39). In fact, HRC has been the subject of numerous protests by LGBTQ activists over the years. For example, in 2000, NTAC launched a campaign, called “Embarrass HRC”, that encouraged activists across the country to protest HRC dinners and other events to call the organization out on its resistance to including trans people in ENDA (Roberts 2007). Given this history, it is not surprising that HRC was the lead organization supporting and possibly even advocating stripping the gender identity protections from ENDA.

On September 27, the day after nearly all the major national LG(BT) organizations issued the statement opposing taking gender identity protections out of the bill, Frank announced his plan to split ENDA into two bills (H.R. 3685 with sexual orientation; H.R. 3686 with gender identity). He planned to introduce two versions of ENDA in the House Education and Labor Committee, extending protections based on sexual orientation and the other based on gender identity (“A Civil Rights Law” 2007). The sexual orientation bill would immediately go to committee for mark-up and then proceed to the House floor for a vote. The gender identity bill would be put on a separate, slower track that would allow supportive legislators to hold hearings and better educate other legislators on employment discrimination based on gender identity (Eleveld 2007).

House Democratic leaders said they decided to drop gender identity from the bill following an internal Democratic head count that found that the bill would likely be defeated if it included gender identity (Chibbaro 2007a).

Frank and other House leaders indicated that they were concerned that Republicans would introduce a motion to recommit, specifically to recommit promptly with instructions, which would force the bill back into committee where it would die. They believed that opponents would focus specifically on an aspect of trans-inclusion, such as trans daycare workers or teachers, that would make it very difficult for supportive Democrats to vote against the motion because of the fear of angering their constituents. Nearly everyone agreed that the original bill could pass; the concern was whether it could survive a motion to recommit. The controversy and decision to split the bill was never about overall passage (Mottet, personal communication, April 23, 2008).

Baldwin described the response from LGBT activists to the splitting of the bill as a “deluge of phone calls and email messages” sent to House members demanding that Democrats support a fully inclusive bill or no bill at all (Chibbaro 2008). Within 48 hours of the Congressional move to strip gender identity from ENDA, more than one hundred LGBT organizations from across the country mobilized to form the coalition United ENDA, whose purpose is to use grassroots mobilization to pass only the original, inclusive bill (Minter 2007). The United ENDA coalition quickly expanded to more than 200 organizations by early November (Chibbaro 2008).

HRC did not join United ENDA. On October 2, HRC's Board of Directors voted to “reaffirm [their] 2004 policy supporting a fully inclusive version” of ENDA, yet they took the position that they would not oppose the non-inclusive bill. They issued a statement that said, in part: “Since 2004, HRC has had in place a policy that supports only a fully inclusive version of ENDA and the Board of Directors voted to reaffirm that position...Therefore, we are not able to support, *nor will we encourage Members of Congress to vote against*, the newly introduced sexual orientation only bill” (HRC 2007, paragraph 3, emphasis added). This position represented a break with its earlier stated support for only an inclusive bill, as well as with nearly every other major national and local LG(BT) organization across the country, thereby positioning HRC in opposition to most of the LG(BT) movement. In the days and weeks before Frank announced the splitting of the bill, a time in which HRC was in close communication with Frank, HRC's position went from opposing a non-inclusive bill to being neutral to openly pushing the non-inclusive bill. In fact, they were quietly pushing for the non-inclusive bill before publicly taking that position (Mottet, personal communication, April 23, 2008).

Feldman (personal communication, June 15, 2009) explains that a very small group—consisting of Frank and other House leadership, HRC, and LCCR—made the decision that they did not have enough votes for the

inclusive bill and to split them. No other groups were brought in. While the decision itself was not an unusual political decision, the decision not to consult the broader LG(BT) movement was extraordinary. It was especially strange that he did not consult with the Task Force or the ACLU, who are the other relevant organizations with lobbyists in DC. She explains that ultimately what caused the ensuing “train wreck” were the decision-makers’ lack of community accountability and the leadership’s “close-minded arrogance”.

Despite little to no support from the LG(BT) movement, on October 18, 2007, the non-inclusive ENDA was voted out of committee by a vote of 27–21, with four Democrats voting against it because of its exclusion of gender identity,<sup>11</sup> and sent to the full House floor. Republicans proposed a number of amendments in committee that many claimed were aimed at gutting the bill. The Democratic-controlled committee voted down all these amendments; however, the House Rules Committee allowed three amendments to be considered, including one introduced by Rep. Mark Souder, who was actively trying to kill the bill (Chibbaro 2007b).

Souder’s amendment struck a section of ENDA that prohibited employers from conditioning employment on a person being married or being eligible to be married (H. AMDT. 883). The second amendment, offered by Rep. George Miller, broadened and clarified the religious exemption to make it the same as Title VII’s religious exemptions, stated that ENDA did not alter DOMA in any way and inserted language defining “married” in accordance with DOMA, and removed language referencing “a same-sex couple who are not married” in the Employee Benefits section (H.AMDT. 882).

The final amendment was offered by Baldwin and would reinsert the stripped gender identity protections (H.AMDT. 884). This amendment was Baldwin’s last ditch effort to keep the bill inclusive; however, almost no one thought they had the votes to pass it. For a time, activists thought that if the vote was close, it could indicate that Pelosi and Frank had made a mistake in stripping the bill of its gender identity protections. However, as time went on, it became clear that the vote would not be close. Even supportive members were indicating that they would not vote for it because they feared it would kill the overall bill (Keisling, personal communication, May 1, 2008).

On November 7, 2007, ENDA was introduced on the House floor for a vote. After a few hours of debate, the House passed ENDA with a vote of 235 to 184. Seven Democrats voted against the bill because of its exclusion of

gender identity.<sup>12</sup> The House also approved Souder and Miller’s amendments by votes of 325 to 101 and 402 to 25, respectively. Baldwin introduced her amendment but then withdrew it immediately without seeking a vote. It was reported that Baldwin agreed to this after first-term House Democrats appealed to Pelosi not to have a separate vote on the trans-inclusion issue because it would hurt their reelection chances (Chibbaro 2007b). Ultimately, Baldwin introduced the amendment in order to be able to speak on the issue of gender identity, which without its introduction she could not have done (Keisling, personal communication, May 1, 2008). Reps. Souder and Buck McKeon attempted to use a parliamentary maneuver to prevent Baldwin from withdrawing her amendment in an attempt to kill the bill before the vote, but they were ruled out of order. A motion to recommit with instructions, which called for adding language that would prevent courts from using ENDA to change the legal definition of marriage as being between one man and one woman, was also introduced by Rep. Randy Forbes. After a short debate, Forbes’ motion to recommit was defeated 222 to 198 (“Employment Non-Discrimination Act of 2007”, 2007).

## Conclusion

While the inclusion debate continues, the political struggles around ENDA in 2007 seem to have consolidated for many the idea that trans people are an important part of the gay and lesbian movement. It is significant that nearly every national and many local LG(BT) organizations came out actively and vocally in support of only an inclusive ENDA and viewed trans people as indispensable members of their community and that they did political work to support this contention.

On June 24, 2009, Frank reintroduced an inclusive ENDA into the House of Representatives (H.R. 3017). At the time of this writing, activists and Congressional leaders are planning a hearing in the House Committee on Education and Labor in September followed by a vote in the full House. Keisling (personal communication, July 30, 2009) explains that they are “extremely optimistic” that the bill will pass the House and believe that there is a “very good chance” that it will become law by the end of this Congressional session. This optimism is due in large part to the political and educational work on trans issues that happened in Congress in response to the events of 2007.

While the controversy and political mobilization around the 2007 ENDA has led to increased knowledge of trans

<sup>11</sup> Reps. Dennis Kucinich from Ohio, Rush Holt from New Jersey, Linda Sanchez from California, and Yvette Clarke from New York (“Bill to Protect GLB Workers Advances Without the T”, 2007).

<sup>12</sup> Reps. Clarke, Jerrold Nadler, Edolphus Towns, Nydia Velasquez, and Anthony Weiner, all from New York City; Holt from New Jersey; and Michael Michaud from Maine.

people among members of Congress, there is more work to do. I hope that these events and current work on the new inclusive bill will lead to increased and ongoing discussions of trans and gender nonconforming people and their issues within and outside the mainstream LG(BT) movement and will stimulate discussion over the homonormative strategies of the movement. Trans-inclusion in ENDA challenges the gender normativity of the LG(BT) movement, which excludes trans and gender nonconforming people and silences their voices. Unfortunately, discussion over how trans-exclusion and homonormative strategies also silence the voices and ignore the needs of other marginalized queer people, particularly LGBTQ people of color and low-income LGBTQ people, has not been a significant part of the ENDA controversy (see Cohen 1997; Valentine 2007; Agathangelou et al. 2008; Currah 2008a; Mananzala and Spade 2008). There also has not been discussion about which trans people will remain excluded from the benefits of a trans-inclusive bill and from a more trans-inclusive LG (BT) movement, such as trans and gender nonconforming people of color and low-income people, because of their lack of racial and economic privileges. Instead of the current strategy of centering the most privileged LGBT people, I hope to see the creation of a movement that centers the most marginalized and oppressed, addressing the interplay of multiple oppressions and the lived realities of those who experience them.

As trans people become a more accepted and normative part of the mainstream LG(BT) movement, it is important for us to question whether we want to be assimilated into a homonormative movement. Do we want to participate in a movement that ultimately supports status quo systems of oppression and inequality, even as it works to shift them slightly? Or should we align ourselves with other gender and sexual non-normative people, people of color, and low-income people? Is ENDA really the vehicle that will end the economic marginalization, poverty, homelessness, and discrimination experienced by large numbers of trans people? Or is the better option a different strategy that focuses on broader issues of employment, underemployment, poverty, and other issues that bases itself in an intersectional framework and centers instead of excludes the voices and work of those most affected and marginalized?

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