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NOTE

FINDING COMMON GROUND: HOW INCLUSIVE LANGUAGE CAN ACCOUNT FOR THE DIVERSITY OF SEXUAL MINORITY POPULATIONS IN THE EMPLOYMENT NON-DISCRIMINATION ACT

I. INTRODUCTION

The Employment Non-Discrimination Act ("ENDA") aims to protect all American employees who are or may be perceived as gay, lesbian, or bisexual by prohibiting discrimination in employment or employment opportunities, including, "firing, hiring, compensation, terms, conditions and privileges of employment ...."¹ Thus, ENDA creates a cause of action for any individual who is discriminated against because that individual is "perceived" as a homosexual, bisexual or heterosexual, whether or not they actually identify as such.² This Note explores possible language for ENDA, a measure that has been the primary legislative vehicle for extending federal protection from employment discrimination on the basis of an employee's actual or perceived sexual orientation.³

The effect of ENDA's language on the scope of protection for the lesbian, gay, bisexual, and transgender ("LGBT")⁴ community has

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². Id. at 2.
³. See id. at 2-10 (describing the legislative history and evolution of ENDA, beginning with the introduction of the first bill to address sexual-orientation discrimination in 1975).
⁴. A note on terminology: throughout this Note, I will utilize the acronym, "LGBT," which is an "[a]ronym for 'lesbian, gay, bisexual and transgender.'" THE NAT'L LESBIAN & GAY JOURNALISTS ASS'N, STYLEBOOK SUPPLEMENT ON LESBIAN, GAY, BISEXUAL & TRANSGENDER TERMINOLOGY 3 (2005), http://www.nlgja.org/resources/NLGJA_Stylebook.pdf [hereinafter NLGJA]; see also LISA MOTTET & JUSTIN TANIS, OPENING THE DOOR TO THE INCLUSION OF TRANSGENDER PEOPLE: THE NINE KEYS TO MAKING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ORGANIZATIONS FULLY TRANSGENDER-INCLUSIVE 1 (2008), available at http://www.thetaskforce.org/downloads/reports/reports/opening_the_door.pdf (providing definitions of lesbian, gay, bisexual, and transgender). The NLGJA Stylebook also provides definitions of what constitutes transgender, transsexual, gender identity, sexual orientation, gender non-conforming, queer, and genderqueer, which will demonstrate the fluidity of sexuality and identity within this
generated considerable debate. Specifically, how drafters define this community, and the sub-populations it makes up, determines the extent to which ENDA offers sexual minority employees protection from workplace discrimination. In its most recent form, ENDA defines sexual orientation to mean “homosexuality, heterosexuality, or bisexuality,” which only applies to those individuals perceived as lesbian, gay, and bisexual, but not transgender. Whether or not to include transgender individuals as a protected group in ENDA has been the central focus of this controversy.

As a means to garner support and sponsorship, drafters have periodically altered the language of ENDA, hoping that one form or the other will gain Congressional approval. In its earliest form, ENDA sought protection on the basis of sexual orientation, which specifically
applied to only gay, lesbian, and bisexual individuals.\textsuperscript{9} It was not until 2007 that House Bill 2015 finally included gender identity as a basis for discrimination, extending protection to transgender individuals.\textsuperscript{10} This Bill defined gender identity to mean “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.”\textsuperscript{11} However, for fear the House would not pass a trans-inclusive\textsuperscript{12} ENDA, sponsors reintroduced two separate bills, one extending protection on the basis of sexual orientation (House Bill 3685)\textsuperscript{13} and the other extending protection on the basis of gender identity (House Bill 3686).\textsuperscript{14} Subsequently, the House only approved House Bill 3685, leaving transgender individuals without recourse from discrimination.\textsuperscript{15}

This Note offers a pragmatic approach for drafting trans-inclusive language in ENDA. As opposed to focusing on the differences between sexual orientation and gender identity, this Note suggests focusing on the commonalities the LGBT community shares in terms of the discrimination they face based on “normal” sexual behaviors and gender non-conformities. To ignore the similarities will divide the community—a community that many advocates believe must remain a coalition in order to achieve full equality.\textsuperscript{16}

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\item[9.] See Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. § 18 (as introduced in Senate, June 23, 1994). This Bill represented the first version of ENDA, replacing the previous Civil Rights Amendments that attempted to amend the Civil Rights Act of 1964. See H.R. REP. NO. 110-406, pt. 1, at 2, 5.
\item[11.] \textit{Id.} § 3(a)(6).
\item[12.] “Trans-inclusive” is a term referring to the inclusion of transgender issues in the LGBT movement. See generally MOTTET & TANIS, supra note 4 (providing strategies for making LGBT advocacy organizations fully transgender-inclusive). In this Note, I use “trans-inclusive” to encompass protection for individuals regardless of whether they identify as transgender. I do this intentionally because not all individuals claim transgender as a basis for an identity, and not all transgender people define themselves similarly. Jenifer M. Ross-Amato, \textit{Transgender Employees & Restroom Designation—Goins v. West Group, Inc.}, 29 WM. MITCHELL L. REV. 569, 589-90 (2002). For instance, some transgender individuals seek to live as the sex for which they psychologically identify, simply as male or female. \textit{Id.} at 590. The transgender community also includes individuals who simply wear clothes associated with the other sex (for example, cross-dressers), yet still identify with their assigned sex. \textit{Id.} Moreover, transgender individuals also vary on their perceived or actual sexual orientation and may identify as heterosexual, bisexual, or homosexual. \textit{Id.}
\item[13.] Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (as placed on Senate calendar, Nov. 13, 2007).
\item[14.] H.R. 3686, 110th Cong. (as introduced in House, Sept. 27, 2007).
\item[15.] H.R. REP. NO. 110-406, pt. 1, at 9 (2007). House Bill 3686 subsequently died in Committee as the legislative session came to close.
\item[16.] See LAMBDA LEGAL, LAMBDA LEGAL’S ANALYSIS OF H.B. 3685: NARROW VERSION OF ENDA PROVIDES WEAKER PROTECTIONS FOR EVERYONE 1 (2007), \textit{available at}
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Part II will begin with an analysis of Title VII and its failure to extend protection to the LGBT community on the basis of "sex discrimination," including "sex stereotyping." Part III will discuss background information on ENDA, providing a historical account of its origin and the debate surrounding its controversy. Part IV will then discuss the importance of finding common ground within this diverse community as a means to ensure the passage of a trans-inclusive ENDA. This Part will also provide a discussion that explains why semantics do matter within the ENDA debate and how the public's perception of the LGBT community should shape legislative language.

Part V will conclude with offered legislative language that extends protection to the LGBT community. Specifically, this Note suggests drafting the definition of sexual orientation to include transgender individuals. While I recognize that the leading theorists of transgender law consider gender identity and expression as distinct from sexual orientation, I offer a pragmatic approach to ENDA. By incorporating the entire community within one definition, the focus is no longer on discrete categories of protection. Instead, the use of broad language within the definition of sexual orientation captures the connection between homophobia and transphobia. This approach is inclusive of all LGBT individuals, yet legislatures have less opportunity to compromise full equality by removing one segment of the community as a means to secure Congressional approval. This Note will conclude with an assessment of the pros and cons of this pragmatic approach, emphasizing the importance of a trans-inclusive ENDA in the fight for comprehensive federal reform.


17. See Jamison Green, Introduction to CURRAH & MINTER, supra note 6, at 7 (explaining that an individual’s transgender identity has no direct connection to their sexual orientation); Vade, supra note 16, at 270 (“Gender identity is who one is. Sexual orientation is to whom one is attracted.”).
18. See CURRAH & MINTER, supra note 6, at 41.
19. Id.
20. See LAMBDA LEGAL, supra note 16, at 3; see also Task Force Main Page, supra note 8 (describing the importance of a trans-inclusive ENDA as a means of achieving full equality).
II. THE CIVIL RIGHTS ACT OF 1964: TITLE VII’S FAILURE TO PROVIDE PROTECTION TO THE LGBT COMMUNITY AND WHY ENDA WILL ACCOUNT FOR TITLE VII’S SHORTFALLS

The text of Title VII of the Civil Rights Act of 1964 explicitly states that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin . . . ” 21

However, the statute gives absolutely no guidance to what “because of sex” means. 22 Congressional debates and the legislative history have not been helpful in interpreting the meaning of “sex,” nor have the courts been consistent as to what employment practices constitute sex discrimination. 24 It has been suggested that “the difficulty in separating sexual orientation discrimination from sexual stereotyping lies in the fact that definitions of sex and gender have continually evolved throughout the history of sexual discrimination jurisprudence.” 25 Courts have, however, consistently determined that sexual orientation does not constitute discrimination based on sex. 26 Thus, the LGBT community is left without recourse from acts of workplace discrimination.

22. Tiffany L. King, Comment, Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation, 35 U.C. DAVIS L. REV. 1005, 1007-08 (2002). The inclusion of sex discrimination in Title VII was the result of a strategic backfire on the part of Conservatives opposing the Civil Rights Act. See id. at 1014. On the last day of the statute’s debate in 1964, Congressman Howard Smith, a principle opponent of the Civil Rights Act, “hoped that by adding employment rights for women, the entire bill would fail.” Id. Thus, sex was inadvertently added as a new category of protection. Id. However, the 88th Congress left little guidance to interpret the intended scope of sex discrimination in the workplace. Id. at 1019-20.
24. King, supra note 22, at 1007; see also Parrish, supra note 23, at 473 (describing Conservatives’ attempt to destroy the passage of the Civil Rights Act by adding “sex” and the subsequent ambiguity behind its meaning).
A. Discrete Categories: The Traditional Approach to the Protection of Marginalized Communities Under Title VII Employment Discrimination

Anti-discrimination laws have historically provided legal protection on the basis of distinct categories of people.\textsuperscript{27} In fact, "[c]ategorizations are inextricably woven into the framework of our society."\textsuperscript{28} One argument suggests that race, gender, and sex are artificial categorizations which have been reinforced by medicine, science, history, societal norms, and the legal system.\textsuperscript{29}

For instance, Title VII prohibits employment discrimination on the basis of race, color, religion, sex and national origin.\textsuperscript{30} Theoretically, Title VII was a simple mandate of equal treatment.\textsuperscript{31} The Supreme Court has made it clear that the objective of Title VII is "to achieve equality of employment opportunities" and remove barriers that have disadvantaged identifiable groups (for example, African Americans and women) in favor of other identifiable groups (for example, Caucasians and men).\textsuperscript{32} Simply stated, the Act aimed to level the playing field for protected groups, "ensur[ing] that merit, not impermissible factors would govern employment decisions."\textsuperscript{33} Thus, identifying a protected class of people is essential for an employee to successfully bring a Title VII claim of discrimination.\textsuperscript{34} At this point of discrimination jurisprudence, the categorical approach is the primary means of protection for marginalized communities.\textsuperscript{35}

\textsuperscript{27} See Paul Steven Miller, Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age, 1 U. PA. J. LAB. \\& EMP. L. 511, 515 (1998).
\textsuperscript{28} Emily Q. Shults, Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender, 12 CARDOZO J.L. \\& GENDER 337, 337 (2005).
\textsuperscript{29} Id.
\textsuperscript{31} Miller, supra note 27, at 512, 515.
\textsuperscript{32} Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (stating that "Congress enacted Title VII ... to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin").
\textsuperscript{33} Miller, supra note 27, at 513.
\textsuperscript{34} 42 U.S.C. § 2000e-2(a); see also King, supra note 22, at 1016 (noting a plaintiff must show that the employer's intentional discrimination was based on the employee's protected status).
\textsuperscript{35} See Miller, supra note 27, at 515, 520; see also E. Christi Cunningham, The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases, 30 CONN. L. REV. 441, 446 (1998) (suggesting that Title VII was intended to remedy inequities experienced by historically disadvantaged groups).
B. Discrimination "Because of Sex": The Limitation of Title VII’s Categorical Approach on the LGBT Community

In order to establish a prima facie case of sex discrimination under Title VII, a plaintiff must show that: (1) he is a member of a protected class; (2) he was subject to an adverse employment decision; (3) he was qualified for the position; and (4) he was treated differently than a similarly situated individual outside of the protected class.\(^{36}\) Implicit in requiring a plaintiff to belong to a particular class of people is the limit of Title VII’s protections according to identity.\(^{37}\) In fact, some argue that this requirement unnecessarily defines plaintiffs as specially protected members of a defined group of discrimination, rather than as individuals who are unfairly disadvantaged in the workplace.\(^{38}\)

Whereas protected classes of people based on race, national origin, and religion are relatively easy to define and interpret by the courts, discrimination "because of sex" generates considerable ambiguity in defining the parameters of sex discrimination.\(^{39}\) Although LGBT advocates have argued that "courts should recognize that like race, there are many 'shades' in the gender spectrum, ... courts seem reluctant to veer from the traditional understandings of 'sex.'"\(^{40}\) "Absent any legislative guidance, most federal courts have narrowly construed the meaning of 'sex' under Title VII, restricting it to the plain meaning of the word."\(^{41}\) Thus, the traditional theory surrounding "because of sex" interprets this basis to mean because of "biological or anatomical sex."\(^{42}\) This approach fails to take one's sexual identity into account.\(^{43}\) Therefore, Title VII protects gay men and lesbians from discrimination based on their biological sex and not on their homosexual or bisexual status.\(^{44}\) Most jurisdictions interpret Title VII to offer protection only to men-born-as-men and women-born-as-women.\(^{45}\) Therefore, transgender

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38. Id. at 449.
40. Parrish, supra note 23, at 480.
41. King, supra note 22, at 1020; see also supra note 22.
42. Parrish, supra note 23, at 479-80.
43. King, supra note 22, at 1020.
44. See id. "Therefore, Title VII prohibits discrimination against a female employee because she is a woman, but not because she is a lesbian. Likewise, a male employee is protected from discrimination because his is a man, but not because he is gay." Id.
individuals, in addition to gay, lesbian, and bisexual plaintiffs, are unprotected from workplace discrimination based on sexual orientation.\textsuperscript{46}

Because of the narrow interpretation of the word "sex," LGBT individuals are left with little chance of success in bringing a Title VII claim.\textsuperscript{47} However, in the landmark case, \textit{Price Waterhouse v. Hopkins},\textsuperscript{48} LGBT advocates saw a window of opportunity to expand Title VII's protection to this community.\textsuperscript{49} For the first time, the Court considered "gender" in its Title VII analysis, "expand[ing] the parameters of sex discrimination beyond its traditional scope."\textsuperscript{50} Even though this case involved a heterosexual plaintiff, the LGBT community perceived its holding as victorious because the Court finally recognized that gender is relevant and not limited to the biological and anatomical views of sex.\textsuperscript{51} In this case, an employer failed to recommend the plaintiff, a heterosexually woman, for partnership because some partners thought that she acted too masculine.\textsuperscript{52} One partner even advised her to appear more feminine by styling her hair and wearing makeup and jewelry.\textsuperscript{53} The Supreme Court held that the prohibition of discrimination "because of sex" means that gender must be irrelevant to employment decisions.\textsuperscript{54} Thus, Title VII protects against discrimination on the basis of "sex-stereotyping."\textsuperscript{55} Specifically, sex stereotyping occurs when an employer discriminates against an individual for failing to exhibit the characteristics expected of their sex.\textsuperscript{56} Thus, in \textit{Price Waterhouse}, the Supreme Court expanded the parameters of sex discrimination beyond its traditional scope.\textsuperscript{57}

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\item \textsuperscript{46} See \textit{id.} at 306-07; King, \textit{supra} note 22, at 1020.
\item \textsuperscript{47} See King, \textit{supra} note 22, at 1020; Hatami & Zwerin, \textit{supra} note 39, at 332-37.
\item \textsuperscript{48} 490 U.S. 228 (1989).
\item \textsuperscript{49} See King, \textit{supra} note 22, at 1021.
\item \textsuperscript{50} Id. at 1022; see also \textit{Price Waterhouse}, 490 U.S. at 242 (stating that a person's gender may not be considered in employment decisions).
\item \textsuperscript{51} See Parrish, \textit{supra} note 23, at 475-76; Sunish Gulati, Note, \textit{The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence}, \textit{78 N.Y.U. L. REV.} 2177, 2185 (2003).
\item \textsuperscript{52} \textit{Price Waterhouse}, 490 U.S. at 234-35.
\item \textsuperscript{53} Id. at 235.
\item \textsuperscript{54} Id. at 242.
\item \textsuperscript{55} Id. at 251.
\item \textsuperscript{56} Id. at 250-51.
\item \textsuperscript{57} See Ilona M. Turner, Comment, \textit{Sex Stereotyping Per Se: Transgender Employees and Title VII}, \textit{95 CAL. L. REV.} 561, 575-76 (2007); see also King, \textit{supra} note 22, at 1040-41 (arguing that a broad interpretation of the word "sex" within the meaning of Title VII is consonant with Congressional intent and public policy).
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Since *Price Waterhouse*, there has been considerable effort by LGBT advocates who argue that discriminating based on sexual orientation or gender identity should be considered "sex stereotyping" and therefore a viable Title VII claim. Their argument suggests that discriminating on the basis of sexual orientation is in effect discriminating on the basis of one's non-gender conforming behavior regarding sexual preferences. Therefore, an employer who discriminates based on one's sexual preference is discriminating "because of sex.".

Conversely, most federal courts have held that discrimination on the basis of sexual orientation is not discrimination on the basis of sex stereotyping. This theory has been seriously challenged when courts began facing claims of sex discrimination by transgender individuals. In light of these holdings, it has been suggested that gay plaintiffs who bring claims under Title VII should emphasize gender stereotyping and de-emphasize any connection the discrimination has to homosexuality. In doing so, the courts can rely on the *Price Waterhouse* standard of sex stereotyping, leaving out one's sexual preference as a relevant factor. Unfortunately, courts still remain confused on where to draw the line, often mistaking sex stereotyping for discrimination based on sexual orientation.

The large majority of jurisdictions have held that discriminating because one is a transsexual or homosexual is not enough to bring a sex

58. 490 U.S. 228 (1989).
59. Hatami & Zwerin, supra note 39, at 325.
60. Id. at 324-25.
61. See id. However, in terms of winning law suits, lawyers advise gay and lesbian plaintiffs to frame sex discrimination arguments as gender stereotype claims, not on the basis of sexual orientation. Keith J. Hilzendeger, *Walking Title VII's Tightrope: Advice for Gay and Lesbian Title VII Plaintiffs*, 13 LAW & SEXUALITY 705, 708 (2004). In doing so, courts can focus on the discriminatory acts of the employer, and not the sexual orientation of the employee. Id.; see also Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1119-20 (2003) (advising effeminate male plaintiffs to present evidence that an employer discriminated because of perceived gender norms, and not perceived sexual preference).
63. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 35 (1995); see also Gulati, supra note 51, at 2189-96 (describing the recent trend in the past decade of transgender plaintiffs bringing claims of sex-stereotyping under Title VII).
64. Bovalino, supra note 61, at 1134.
66. Bovalino, supra note 61, at 1134.
discrimination claim under Title VII. For instance, in Howell v. North Central College, the District Court cautions that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”

Likewise, in Dawson v. Bumble & Bumble, the Second Circuit held that a gender stereotyping claim should not be used to “‘bootstrap protection for sexual orientation into Title VII.’” In this case, the plaintiff alleged that the employer constantly harassed her because she did not conform to the image of women, suggesting that she should act more like a woman than a man. The court relied on the Price Waterhouse holding, distinguishing Dawson on the grounds that the plaintiff had not produced substantial evidence from which the court could infer that her alleged failure to conform to feminine stereotypes resulted in any adverse employment action. In other words, the courts in both Howell and Dawson relied on gender as a relevant factor, yet were hesitant to automatically consider discrimination based on sexual orientation or gender identity as an automatic sex stereotyping claim under Title VII.

This apprehension appeared again in the 2006 decision of Vickers v. Fairfield Medical Center, concluding that the “recognition of Vickers’ [same-sex harassment] claim would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination.” The court reasoned that “any discrimination based on sexual orientation would be actionable under a sex stereotyping theory...as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.” I challenge this proposition in that the discrimination against homosexuals, bisexuals, and transsexuals is often grounded in perceived notions of sexual divergence from the social norm. However, the Sixth Circuit refused to

70. Dawson, 398 F.3d at 218 (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)).
71. Id. at 215.
73. Dawson, 398 F.3d at 222-23.
75. Id.
76. Carolyn E. Coffey, Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures, 7 N.Y. City L. Rev. 161, 166 (2004); Green, supra note 17, at 8.
admit that homosexuals sometimes fail to conform to gender stereotypes, merely to avoid protecting these individuals.

In light of these preceding holdings, there have been several decisions that have given LGBT advocates hope that eventually the courts will extend protection to this community under Title VII. See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998); Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.C. Cir. 2008); Smith v. Salem, 378 F.3d 566, 575 (6th Cir. 2004).

For instance, in Oncale v. Sundowner Offshore Services, Inc., the Court held that sexual discrimination consisting of same-sex harassment is actionable under Title VII. In this case, a male employee alleged sexual harassment by male co-workers. While the trial court held that the plaintiff had no cause of action against male co-workers, the Supreme Court found nothing in the statutory language suggesting same-sex harassment claims were excluded from the scope of Title VII.

After determining that same-sex harassment claims are actionable, the Sixth Circuit reached another small milestone in Smith v. Salem. The court explicitly stated that "a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." The court pointed out that some courts have superimposed the classification of "transsexual" on plaintiffs, attempting to formalize gender non-conformity into an unprotected classification. While merely claiming one is a transsexual is not enough to substantiate a Title VII claim, being a transsexual does not preclude its success.

Very recently, the District of Columbia held that discriminating against a transgender employee because he or she reveals that they plan to undergo a sex change is literally discrimination "because of sex." The court focused on the plain language of Title VII and used the analogy of an employee converting from Christianity to Judaism. If an employer were to discriminate because an employee reveals they plan to become Jewish, this would clearly be discrimination "because of sex."

78. Oncale, 523 U.S. at 82. Several coworkers forcibly subjected the plaintiff to sex-related actions, physically assaulted him in a sexual manner, and called him derogatory names suggesting his homosexuality. Id. at 77.
79. Id. at 77.
80. Id. at 79.
81. 378 F.3d 566 (6th Cir. 2004).
82. Id. at 575.
83. Id. at 574.
85. Id. at 306.
religion. It follows that if an employee reveals they are transitioning from male to female, discriminating on these grounds would clearly be "because of sex." In fact, the court states that "[f]or Diane Schroer to prevail on the facts of her case, however, it is not necessary to draw sweeping conclusions about the reach of Title VII." Moreover,

[e]ven if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach "has been eviscerated by Price Waterhouse," (citation omitted)—the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination "because of... sex."

While this is a huge step toward transgender equality, past rulings of other jurisdictions suggest this will be an uphill battle for more secure protection.

In sum, homosexuality or transgender status is not protected under Title VII. Moreover, discriminating on these grounds does not constitute sex discrimination for purposes of Title VII. It follows that not only has the categorical approach failed the LGBT community, but there is strong evidence that leaving it up to the courts to interpret what falls under these categories has failed as well. It has even been suggested that while it may seem that being a "lesbian" and "woman" should warrant double protection, this binary categorization in fact decreases the protection provided. Thus, with the exception of the Schroer decision, Title VII has left LGBT people without recourse from employment discrimination based on sexual orientation. Because the categorical approach has failed the LGBT community in the Title VII context, advocates should try to avoid ambiguous language that fails

86. Id.
87. Id.
88. Id. at 307-08.
89. Id. at 308.
90. See supra notes 62-76 and accompanying text.
91. See supra notes 62-76 and accompanying text.
95. See supra notes 58-76 and accompanying text (describing the courts' resistance of adding sexual orientation as a protected class under Title VII).
to account for the entire LGBT community.\textsuperscript{96} For the purposes of ENDA, advocates should avoid this categorical approach to create clearly defined language that is fully inclusive of the LGBT community.

III. THE EMPLOYMENT NON-DISCRIMINATION ACT: AN ATTEMPT TO ACCOUNT FOR THE SHORTFALLS OF TITLE VII JURISPRUDENCE FOR THE LGBT COMMUNITY

To address the failed efforts of Title VII protection for sexual minority individuals, ENDA provides an alternative approach to combat the national problem of sexual orientation discrimination in America’s workforce.\textsuperscript{97} ENDA attempts to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation,\textsuperscript{98} and in a more recent version, on the basis of sexual orientation and gender identity.\textsuperscript{99} Without protection at the federal level, millions of LGBT Americans can be fired from their jobs, refused work, paid less, and ultimately left subjected to employment discrimination merely because their actual or perceived sexual orientation or gender identity does not conform to social norms.\textsuperscript{100}

Currently, only nineteen states and the District of Columbia prohibit workplace discrimination on the basis of sexual orientation.\textsuperscript{101} Even fewer of these states provide protection on the basis of gender identity.\textsuperscript{102} These statistics are not surprising since a majority of

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\item \textsuperscript{96} CURRAH & MINTER, supra note 6, at 36.
\item \textsuperscript{98} Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (as placed on Senate calendar, Nov. 13, 2007).
\item \textsuperscript{100} H.R. REP. NO. 110-406, pt. 1, at 1 (2007). In addition, ENDA applies to Congress, the federal government, and employees of state and local governments. Id. at 2. According to the Task Force, “gender identity” means “[a]n individual's internal sense of being male, female, or something else.” MOTTET & TANIS, supra note 4, at 6.
\item \textsuperscript{102} TASK FORCE STATE LAWS, supra note 101. The thirteen states that provide protection on the basis of gender identity, in addition to sexual orientation, include the following: California, Colorado, District of Columbia, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Id.
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Americans still think that homosexuality is immoral.\textsuperscript{103} Moral discomfort for LGBT individuals explains the impervious hatred driving the countless instances of ostracism, harassment, and the arbitrary firing of these individuals, simply because they do not fit the majority's cultural notions of what is normal.\textsuperscript{104} In fact, studies have shown that up to forty-four percent of LGBT employees have reported being subjected to some form of employment discrimination in their lifetimes.\textsuperscript{105} Similarly, a study conducted by Out and Equal Workplace Advocates in San Francisco showed that two in five gay employees reported being subjected to harassment at work.\textsuperscript{106} Thus, the need for protection on the federal level is clear.

While instances of workplace discrimination may reflect the nation's hostility towards the LGBT community, there does seem to be a greater acceptance of homosexuality today than there was during ENDA's first proposal.\textsuperscript{107} Surveys show that a majority of Americans think gays should be allowed to enjoy certain basic civil liberties,\textsuperscript{108} "such as the right to vote, work, and have private consensual sex."\textsuperscript{109} One study indicates that up to "eighty-three percent of Americans believe that homosexuals and bisexuals should be protected from discrimination in employment."\textsuperscript{110} These attitudes are also reflected on the state level: nine states and the District of Columbia enacted laws prohibiting discrimination on the basis of sexual orientation and gender identity since 2005.\textsuperscript{111}

The passage of state laws to protect LGBT individuals are a significant development for future federal laws banning employment
Specifically, compared to local ordinances, state laws “provide . . . secure private employment protection” and have a much broader effect than those at the local level. And by garnering support at state level, Congressional Representatives have more local support to vote in favor of a federal bill that reflects the desires of their constituent base. Furthermore, state statutes provide a well established body of precedent that federal courts could use if Congress were to pass a similar statute.

However, state and local laws are also vulnerable to political pressures and are more easily repealed than federal laws, leading to divisive political conflicts. The fact that a large majority of states have not afforded protection to LGBT individuals suggests that it will take many years before any meaningful consensus among the states will occur in regards to this issue. Also, local commissions, unlike the Equal Employment Opportunity Commission (“EEOC”), have limited powers and available remedies for victims of employment discrimination. Federal legislation, on the other hand, can regulate acts of discrimination in a more appropriate and efficient manner. Moreover, “[f]ederal legislation would not be vulnerable to political referenda or preemption and would ensure uniformity on the national level.” Thus, the need for a federal workplace discrimination ban is critical to ensure uniform, comprehensive protection for LGBT employees. Unfortunately, ENDA has yet to gain full Congressional approval.


113. Id. at 188; see also Jasiunas, supra note 97, at 1534-35 (indicating that state statutes are more reliable than local ordinances because they are more politically secure, do not run a great risk of preemption, and have a broader reach with a more uniform application).

114. Putignano, supra note 112, at 188.

115. Jasiunas, supra note 97, at 1535.

116. Id.


118. Id.

119. Jasiunas, supra note 97, at 1535.

A. The Life of ENDA: A Historical Account Leading Up to the ENDA Controversy

Since the mid-1970s, advocates have introduced countless bills in both the House of Representatives and the Senate that have addressed discrimination based on sexual orientation.\(^{121}\) Beginning in 1974, the focus for achieving protection for the LGBT community surrounded amending the Civil Rights Act of 1964 ("Civil Rights Act").\(^{122}\) In 1975, Congresswoman Bella Abzug (D-NY) introduced the first bill (House Bill 166) that addressed sexual orientation discrimination by "amend[ing] the Civil Rights Act of 1964 to prohibit discrimination on the basis of affectional or sexual orientation, sex, or marital status in public accommodations, public education, equal employment opportunities, ... housing, and education programs which receive Federal financial assistance."\(^{123}\) The Bill only garnered four co-sponsors and although it reached the Judiciary Committee, the Committee never considered the Bill.\(^{124}\) However, by March 1975, Representative Abzug reintroduced the Civil Rights Amendment as House Bill 5452, gaining twenty-three cosponsors.\(^{125}\) Although this Bill was not considered by the Judiciary Committee,\(^{126}\) the increased support in just over a year is indicative of the upward battle LGBT advocates have faced since this fight began.

For two decades, amending the Civil Rights Act remained the focus of achieving protection for the LGBT community.\(^{127}\) It was not until 1994 that ENDA became a separate measure designed to address the need for employment discrimination protection outside the realm of the Civil Rights Act.\(^{128}\) Senator Edward Kennedy (D-MA) introduced the first version of ENDA (Senate Bill 2238) to the Senate in June 1994.\(^{129}\) The matter was "referred to the Senate Labor and Human Resources Committee, which held the first hearing on the issue ... "\(^{130}\) For the

\(^{121}\) See generally, H.R. REP. NO. 110-406, pt. 1, at 2-10, for a detailed account of ENDA's committee action including legislative history and votes.

\(^{122}\) H.R. REP. NO. 110-406, pt. 1, at 2. See infra notes 157-94 and accompanying text, for a more detailed analysis of ENDA's similarities to Title VII regarding the categorical approach of protection.


\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) Id.

\(^{127}\) See id. at 2-5.

\(^{128}\) Id. at 5.

\(^{129}\) Id.

\(^{130}\) Id.
first time, numerous witnesses testified to the importance of ENDA, including senators, LGBT employees, business leaders, civil rights advocates, and law professors. Numerously supporters of the Bill submitted written testimony as well. While no further action was taken on Senate Bill 2238, Representative Gerry Studds (D-MA) introduced House Bill 1430 in the same year; after referral to several House committees, no further action was taken. However, “on September 5, 1995, Senator Edward Kennedy (D-MA) introduced the Employment Non-Discrimination Act of 1995” (Senate Bill 2056) “which was brought before the Senate by unanimous consent.” A year later, Senate Bill 932 was introduced, mirroring Senate Bill 2056. “The Senate narrowly rejected [Senate Bill] 932 by a 50-49 vote.” While the Bill failed by one vote, “[i]t marked the first time that the idea of a Federal non-discrimination clause protecting gays and lesbians in employment was voted on in the Congress.”

In March 2007, Representative Barney Frank (D-MA) introduced House Bill 2015, the first version of ENDA that prohibits employment discrimination on the basis of gender identity. The Bill defined “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.” By incorporating gender identity as a basis of protection, ENDA would be fully trans-inclusive. Specifically, “the proposed bill required employers to provide adequate shower or dressing facilities to employees who were transitioning,” but it “did not prohibit employers from imposing reasonable dress or grooming standards . . . .” The Bill also provided that “employers allowed transitioning employees to adhere

131. Id.
132. Id.
133. Id. at 5-6.
134. Id. at 6.
135. Id.
136. Id.
137. Id.
138. Id. at 9.
140. Id. at 5.
142. Id.
to their new gender’s dress or grooming standards." However, with the addition of gender identity and the accompanying controversial provisions, a survey of House members “revealed that the bill would fail to garner enough support.” A bill protecting discrimination solely on sexual orientation would likely pass.

In the face of vehement opposition by civil rights organizations, Representative Frank introduced two separate bills to the House to replace House Bill 2015. Specifically, House Bill 3685 provided protection only on the basis of sexual orientation, and House Bill 3686 provided protection only on the basis of gender identity. While House Bill 3686 died in Committee, the House of Representatives finally passed the first version of ENDA that has ever reached the House floor. By a 235-184 vote, the House referred House Bill 3685 to the Senate which, if passed and signed by former President George W. Bush, would have extended workplace discrimination protection on the basis of perceived or actual sexual orientation, but not gender identity. Similar to Title VII claims, the legislation would not create “special rights,” but would guarantee “equal rights,” prohibiting intentional discrimination on the basis of sexual orientation. The bill defines “sexual orientation” as “homosexuality, heterosexuality, or bisexuality.” Therefore, only lesbian, gay, and bisexual individuals will be protected (or those individuals perceived as such), leaving transgender individuals without protection from employment discrimination. While seen as a historical milestone in the eyes of many,

143. Id. at 605-06.
144. Id. at 606.
145. Id.
146. Id.
148. H.R. 3685.
149. H.R. 3686.
152. H.R. 3685. In addition to creating a cause of action for a homosexual who is actually homosexual, ENDA creates a cause of action for an individual who is actually heterosexual, but is discriminated against because that individual is perceived as homosexual. H.R. REP. NO. 110-406, pt. 1, at 2.
the passage of this bill without extending protection on the basis of gender to transgender individuals represented a failure for others.155

B. A Community Divided: The Strategic Differences and Theoretical Underpinnings of the ENDA Controversy

As previously discussed, ENDA provides workplace discrimination protection similar to that of Title VII.156 Similar to the civil rights rationale, proponents argue that there is a lack of evidence that "sexual orientation relates to job performance" and that "success at work should be directly related to one's ability to do the job."157 Thus, sexual orientation should be prohibited as a form of job discrimination in the same way Title VII prohibits discrimination on the basis of race, gender, religion, national origin, age, and disability.158 The focus of ENDA has been to provide protection based on discrete categories of protection, namely on the basis of sexual orientation or sexual orientation and gender identity.160 This approach utilizes the historical tendency of anti-discrimination law to use categories to define protected classes of people.161 However, for the LGBT community, the categorical approach has failed in terms of Title VII.162 Courts consistently determine that sex discrimination does not apply to discrimination based on sexual orientation.163

155. Herszenhorn, supra note 8. Matt Forman, the executive director of the Task Force, gave the following statement expressing his disappointment in the exclusion of gender identity from the bill: "What should have been one of the most triumphant days in our movement's history is not... It's one of very mixed reactions." Id. However, Joe Solmonese, the executive director of the Human Rights Campaign praised the passage of the bill, stating "Today's vote in the House sends a powerful message about equality to the country, and it's a significant step forward for our community." Id.


158. Id.


161. See supra notes 27-35 and accompanying text.

162. See supra notes 62-73 and accompanying text (reviewing case law that consistently holds that discrimination on the basis of sexual orientation or gender identity is not discrimination "based on sex").

163. Jasiunas, supra note 97, at 1557. See supra notes 62-73 and accompanying text.
With the shortfalls of Title VII in mind, it has been proposed that "[i]f the intent of Congress is to protect sexual orientation like Title VII protects race, color, sex, religion, and national origin, ENDA is not the solution." This argument is based on the theory that addressing sexual orientation in ENDA, but not in Title VII, will emphasize the differences between sexual orientation and other forms of discrimination in Title VII. Because the federal courts have demonstrated a continued reluctance to afford protection to LGBT individuals, they will be less likely to read a free-standing piece of legislation as expansively as Title VII, thus limiting the protection afforded to this community.

Based on the federal courts' hostility towards Title VII claims, this may be a plausible assumption. However, this Note contends that a well defined ENDA can provide adequate protection for the LGBT workforce, accounting for the shortfalls of Title VII jurisprudence. Proper language clearly defining the scope of ENDA is key. Leaving it up to the courts to interpret what constitutes "sexual orientation" or "gender identity" may lead to the same battle that Title VII claims "because of sex" have demonstrated. While a statute that discretely segregates the community sounds ideal in terms of easy interpretation, drafters must explore ways to account for the diversity and fluidity of this community. In doing so, ENDA can adequately define the prohibited forms of discrimination, laying the foundation for unambiguous interpretation for employers, legislators, and the courts.

Exactly how to define the individuals intended to be protected under the federal legislation drives the ENDA debate. The primary controversy surrounds whether or not to prohibit discrimination in the workplace on the basis of "sexual orientation and gender identity" or as only "sexual orientation." In 1999, leading LGBT rights organizations stopped supporting ENDA on the grounds that it failed to include transgender individuals. For the next decade, these organizations

164. Jasiunas, supra note 97, at 1557.
165. Id. at 1556.
166. Id. 
167. See supra Part II.B (reviewing the evolution of what constitutes discrimination "because of sex").
168. See CURRAH & MINTER, supra note 6, at 36-43 (providing strategies for drafting clear and effective statutory language that is inclusive of the transgender community).
169. See supra notes 138-55 and accompanying text.
ardently fought for a trans-inclusive ENDA. While the introduction of House Bill 2015 provided for this protection, the passage of House Bill 3685 over the trans-inclusive bill represented a huge setback for the transgender community.

The exclusion of the transgender community from House Bill 3685 represents a strategic measure in the eyes of many LGBT advocates. In fact, the thrust of the ENDA debate questions whether or not the bill should provide protection to the entire LGBT community all at once, or if the bill should provide protection to subsets of the population in a piecemeal or incrementalist approach.

On the one hand, advocates argue that leaving out gender identity will ensure the short term goal of securing protection on the basis of sexual orientation. Viewed as a necessary form of political compromise, this strategy is based around the belief that equality cannot be fully achieved “in one fell swoop.” Instead, the most efficient way to achieve full equality is through “incrementalism,” defined as “the process by which social, political, or legal change is achieved one step at a time.”

171. Tan, supra note 141, at 605. In 2004, Matt Foreman, the Task Force Executive Director, made the following statement: “ENDA isn’t poised to be passed and be signed into law anytime soon.... Now is the time to make it trans-inclusive, so that when all the conditions come together and make ENDA ready to move at last, it will be the law we can all embrace.” Task Force Timeline, supra note 170.


174. See Tan, supra note 141, at 606; see also supra notes 138-55 and accompanying text (explaining the controversy surrounding a trans-inclusive ENDA).

175. H.R. 3685.

176. See LAMBDA LEGAL, supra note 16, at 3, 11. Following the passage of House Bill 3685, the President of the Human Rights Campaign, Joe Solmonese, stated: “Today’s vote in the House sends a powerful message about equality to the country, and it’s a significant step forward for our community.” Herszenhorn, supra note 8.


178. See id. at 36-37.

179. Id. at 19; see also Joshua Colangelo-Bryan, Comment, Discrimination Down Under: Lessons from the Australian Experience in Prohibiting Employment Discrimination on the Basis of Sexual Orientation, 7 PAC. RIM L. & POL’y J. 377, 379, 404 (1998) (indicating that a strategy of compromise can be successful in establishing protection against discriminatory employment practices among LGBT people); Marc R. Poirier, Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?, 59 RUTGERS L. REV. 291, 344 (2007) (arguing that the piecemeal approach is a successful strategy for changing social norms).
a time.” As an alternative to seeking sweeping judicial or legislative reform, “the objective is to accumulate a series of small victories” that ultimately amount to comprehensive reform. Thus, legislation limiting protection to only lesbian, gays, and bisexuals “should be seen as the beginning of an incremental process to win comprehensive employment rights for all sexual minority individuals.” Rather than seeing this short term limitation as an ends unto itself, subsequent steps in this process will provide complete protection.

The fight for gay marriage is one example of this piecemeal or incrementalist approach. By arguing successfully in various contexts that visible same-sex couples and parents can function as the equivalent of idealized opposite sex couples and parents, advocates are slowly shifting cultural and legal norms. Without directly advocating for the legal status of marriage, various piecemeal victories eventually acquire the functional equivalence of the benefits and responsibilities of marriage. For example, achieving domestic partnership benefits and same-sex parental rights are example of these small victories. Thus, by requiring formal equality in the access to the institution of marriage, these piecemeal successes point towards the legal rights and obligations. This strategy highlights the underlying belief that while political compromise is far from ideal, it is preferable to a complete absence of legislation protecting the LGBT community.

On the other hand, proponents of a trans-inclusive ENDA prefer including gender identity and sexual orientation in one bill, arguing that leaving one segment of the population behind will have detrimental

181. Id. An example of incrementalism includes the environmentalist movement, for it has employed gradual remedies to achieve goals rather than a direct attack strategy. Id. In contrast, the civil rights movement employed a direct strategy attack, focusing on the “separate but equal doctrine” directly, resulting in the ground breaking Brown v. Board of Education decision. Id. at 1160-61.
182. Colangelo-Bryan, supra note 179, at 403.
183. Id.
184. See Poirier, supra note 179, at 293-94.
185. Id.
186. Id. at 294-95.
187. Id. at 317-19, 321-22.
188. Id. at 295. Hillary Clinton’s stance on gay marriage exemplifies the increment approach: “[I]f the real goal cannot be achieved, some kind of intermediary step will be taken, such as domestic partnerships.” Donovan, supra note 177, at 5-6.
189. Colangelo-Bryan, supra note 179, at 379.
effects in the overall fight for equality.\textsuperscript{190} Moreover, proponents argue that "[a]dvancing or preferring the civil rights of one group while marginalizing or ignoring the rights of other subordinated groups reinforces systems of oppression."\textsuperscript{191} Because transgender and sexual orientation groups have faced similar oppression in the past and share the joint goal of eradicating discrimination, the entire sexual minority community should remain a cohesive unit in achieving comprehensive reform.\textsuperscript{192} Therefore, political compromise that negatively affects a subset of the community is ineffective in reaching common goals.\textsuperscript{193} In joining this view, I argue that the exclusion of gender identity from a future version of ENDA will pose a harmful threat to the LGBT civil rights movement.

IV. LGB v. T: Why Proper Language Can Provide Federally Supported Employment Discrimination Protection for Both Sides of the "V"

Advocacy groups and Congressional representatives have debated whether or not the next version of ENDA should exclude protection to the transgender community (the "T" in "LGBT") and instead provide protection to only gay, lesbian, and bisexual individuals.\textsuperscript{194} While LGBT individuals share the commonality of being perceived as sexually divergent,\textsuperscript{195} the differences among the community have caused discrepancy in the appropriate ways to provide protection.\textsuperscript{196}

\begin{thebibliography}{9}
  \bibitem{190} LAMBDA LEGAL, supra note 16, at 11; Task Force Main Page, supra note 8. Lambda Legal expressed their concern of excluding transgender individuals in ENDA:
  \begin{quote}
  But, just as Congressman Frank has talked about his concerns over needing momentum to pass ENDA in some later Congress, we are worried about getting stuck. We are worried that, if we give in to diminished expectations, all that we will be able to pass under a friendlier administration will be a law that excludes transgender people from protection and that inadequately provides protection to lesbians, gay men and bisexuals. We all need to work together to ensure that that is not what happens, and that we instead obtain the strongest law that we possibly can.
  \end{quote}
  LAMBDA LEGAL, supra note 16, at 11.
  \bibitem{192} Coffey, supra note 76, at 169.
  \bibitem{193} Greenberg, supra note 191, at 106-07.
  \bibitem{194} See LAMBDA LEGAL, supra note 16, at 11; Task Force Main Page, supra note 8; see supra notes 169-93 and accompanying text.
  \bibitem{195} See Green, supra note 17, at 8.
  \bibitem{196} See supra notes 169-93 and accompanying text; see also Andrew Gilden, \textit{Toward a More Transformative Approach: The Limits of Transgender Formal Equality}, 23 BERKELEY J. GENDER L. & JUST. 83, 84 (2008) (suggesting that the ENDA controversy has become the LGBT communities' most prominent national debate); Knauer, supra note 16, at 4-5 (purporting that the commonalities
\end{thebibliography}
In fact, it was not until the late 1990s that lesbian and gay advocates officially began incorporating transgender issues into gay politics.\textsuperscript{197} Unfortunately, the resulting alliance has not been embraced by the entire community, resulting in only partial incorporation.\textsuperscript{198} The Human Rights Campaign ("HRC"), one of the major gay rights organizations, did not add transgender people to its mission statement until 2001.\textsuperscript{199} As previously mentioned, HRC supported the removal of gender identity from ENDA in November 2007.\textsuperscript{200} On the other hand, the Task Force continues to fight for a trans-inclusive ENDA, maintaining that excluding gender identity will negatively impact all sexual minority individuals.\textsuperscript{201} In terms of applicability of the law in the courtroom and

\begin{itemize}
  \item shared between the LGBT community, not the differences, should drive the inclusion of transgender issues).
  \item \textsuperscript{197} Knauer, supra note 16, at 1; see also John M. Ohle, \textit{Constructing the Trannie: Transgender People and the Law}, 8 J. GENDER RACE & JUST. 237, 240-43 (2004) (describing the evolution of the LGBT movement). In 1969, the Stonewall riots marked the beginning of the modern gay rights movement. \textit{Id.} at 240-41. "Drag queens, fags, trannies, and dykes all fought back when the police came to raid the Stonewall Inn." \textit{Id.} at 241. "In response to Stonewall, the Gay Liberation Movement arose," but the movement was centered around and mostly led by gay men. \textit{Id.} Because gay men often saw lesbians running their own battles in the feminist movement, the two communities remained separate in their respective fights for acceptance by the hetero-normative society. \textit{Id.} Finally, gay men and lesbians realized "that working together would be more effective than the separatist and failed identity-based movements of the past." \textit{Id.} The bisexual community eventually joined the movement, creating the GLB affiliation. \textit{Id.} However, the lesbian community became upset about the order of the letters in the acronym, GLB, arguing that placing the "G" ahead of the "L" further symbolized the oppression women in a male dominated society. \textit{Id.} Thus, the affiliation rearranged the letters to create LGB. \textit{Id.} It was not until much later that the "T," representing the transgender community, finally made its way into the LGBT movement. \textit{Id.}
  \item \textsuperscript{198} Knauer, supra note 16, at 1. In fact, the feminist reception to transgender issues has been particularly unsuccessful. \textit{Id.} at 1-2. One advocate "attribute[s] much of the progressive resistance to the transgender narrative to a particular form of post-feministagnosticism regarding gender that served as a central tenet of identity formation for many of us who were born in the 1960s and 1970s." \textit{Id.} at 3; see also Elvia R. Arriola, \textit{Queering the Painted Ladies: Gender, Race, Class, and Sexual Identity at the Mexican Border in the Case of Two Paulas}, 71 SEATTLE J. FOR SOC. JUST. 679, 683-84 (2002) (describing one advocates personal journey towards accepting the transgender community within the feminist movement's view of gender and sexual identity).
  \item \textsuperscript{199} Ohle, supra note 197, at 241. The current HRC mission now reads: "HRC envisions an America where lesbian, gay, bisexual and transgender people are ensured equality and embraced as full members of the American family at home, at work and in every community." Human Rights Campaign, Mission Statement, http://www.hrc.org/aboutus/what_we_do.asp (last visited July 26, 2009).
  \item \textsuperscript{200} Ohle, supra note 197, at 241-42.
  \item \textsuperscript{201} See Task Force Main Page, supra note 8 (advocating for a trans-inclusive ENDA). The Task Force's mission statement states: "The mission of the National Gay and Lesbian Task Force is to build the grassroots power of the lesbian, gay, bisexual and transgender (LGBT) community. We do this by training activists, equipping state and local organizations with the skills needed to organize broad-based campaigns to defeat anti-LGBT referenda and advance pro-LGBT legislation, and building the organizational capacity of our movement." Nat'l Gay and Lesbian Task Force,
employment practice, language plays a critical role. \(^{202}\) The difficulty of this task lies within the complex nature of accounting for the diversity of the sexual minority community in a clear and efficient way. \(^{203}\) Thus, drafting language that is inclusive of the entire sexual minority population will be instrumental in ensuring comprehensive employment discrimination protection for this community.

\[A. \text{The Diversity of the LGBT Community—Why Semantics Do Matter in the Realm of LGBT Protection and Identity Politics}\]

LGBT people represent a diverse subset of the population. Beyond their shared experiences of discrimination, this community shares little in common. Before discussing the differences between the subgroups, it is important to understand the varying definitions used to describe this community.

The term “sexual orientation” refers to a person’s “innate sexual attraction.” \(^{204}\) More specifically, sexual orientation is “[a] term describing a person’s attraction to members of the same sex or different sex.” \(^{205}\) Most often, sexual orientation is defined as lesbian, gay, bisexual, or heterosexual. \(^{206}\) One’s “sexuality” is “a way of expressing and/or enacting relationships of intimacy . . . .” \(^{207}\) While there is no universal definition of “sex” and “gender,” “sex” is often referred to as the biological determination of one’s sex, as determined by X and Y chromosomes. \(^{208}\) “An XX pair is deemed female and an XY pair is deemed male. All other combinations are ‘abnormal.’” \(^{209}\)

“Gender,” on the other hand, “implicates how society constructs the roles to be played by the different anatomical sexes . . . .” \(^{210}\) While sex is not changeable over time, society’s concept of gender can change


\(^{202}\) CURRAH & MINTER, supra note 6, at 36.

\(^{203}\) See id. at 36-43 (providing strategies for drafting clear and effective statutory language, inclusive of transgender individuals).

\(^{204}\) NLGJA, supra note 4, at 5.

\(^{205}\) MOTTET & TANIS, supra note 4, at 7.

\(^{206}\) Id.

\(^{207}\) Ohle, supra note 197, at 245.

\(^{208}\) Id.

\(^{209}\) Id.

\(^{210}\) Leonard, supra note 5, at 153; see also Ohle, supra note 197, at 245 (defining “gender” as “a complex system of labeling and performing” driven by societal norms); Tan, supra note 141, at 582-83 (“While ‘sex’ is generally understood to mean whether a person is anatomically male or female at birth, ‘gender’ is whether a person possesses qualities that society considers masculine or feminine.”).
throughout the generations. A great example of the variation in socially constructed gender roles are the "long, powdered wigs worn by traditional English barristers and judges." Viewed today as feminine, these wigs during that time were socially construed as masculine.

The term "gender identity" refers to "[a]n individual's emotional and psychological sense of being male or female." However, this is not necessarily the same as an individual’s biological identity.

"Transgender" is a term that describes "a range of 'gender' identities, including cross-dressers, those who do not conform to societal stereotypes of what it means to be 'male' or 'female,' and transsexuals." Specifically, "transgender" is "[a]n umbrella term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth, including but not limited to transsexuals, cross-dressers, androgynous people, genderqueers, and gender non-conforming people."

"FTM" refers to "a person who transitions from 'female-to-male'" and is known as a "transgender man."

"MTF" refers to "a person who transitions from 'male-to-female'", and is known as a "transgender woman."

"Transsexual," "transvestite," and "cross-dresser" are terms often used interchangeably with "transgender." A "transsexual" is a medical term for people whose gender identity is different from their assigned sex at birth and often "alter or wish to alter their bodies through hormones or surgery . . . ." Conversely, a cross-dresser is a person "who dress[es] in clothing traditionally or stereotypically worn by the other sex, but who generally ha[s] no intent to live full-time as the other gender."

"Transvestite" is a derogatory term for a cross-dresser.

"Gender expression" is "[h]ow a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics." Gender expression, like the social concept of gender, can change throughout one’s lifespan as well.
The period during which a person begins to live as their new gender is called “transitioning” and “may include changing one’s name, taking hormones, having surgery, or changing legal documents . . . to reflect their new gender.”\(^{224}\) Along these same lines, “gender non-conforming” is “[a] term for individuals whose gender expression is different from societal expectations related to gender.”\(^{225}\) Thus, being transgender is considered a “gender identity” and not a “sexual orientation.”\(^{226}\) Because sexual orientation pertains to one’s attraction to another person, the sexual orientation of transgender people can vary.\(^{227}\) For example, a transgender person can be heterosexual, bisexual, or homosexual.\(^{228}\)

As previously discussed, sex is generally understood as one’s anatomical sex, and gender is whether a person possesses qualities that society considers masculine or feminine.\(^{229}\) Whether a person is homosexual or not, “men with feminine characteristics are often assumed to be gay, and women with masculine characteristics are often assumed to be lesbian.”\(^{230}\) This is based on the assumption that lesbian, gay, and bisexual individuals do not conform to the stereotypical norms of what men and women should look like.\(^{231}\) However, apart from their obvious attraction to the same sex, many gay and lesbian people do not view themselves differently from mainstream America.\(^{232}\) While some lesbians may be mistaken as male (the typical “butch” stereotype), “femme” lesbians, also known as “lipstick” lesbians, are very gender conforming.\(^{233}\) Moreover, many lesbians and gay men look androgynous, neither embracing nor opposing gender stereotypes.\(^{234}\) A transgender individual, on the other hand, clearly does not conform to their given gender at birth.\(^{235}\) Transgender means, “[l]iterally, one who transcends gender norms.”\(^{236}\)

Despite many attempts to classify this community into clearly labeled categories, there is no universal way to describe this community.
This is best indicated by society’s and the courts’ tendency to continually interchange the definitions of “sex” and “gender.” At first glance, this interchange seems harmless. If someone were to ask a seemingly male co-worker what their sex is, their response would most likely be the same if that person were to ask them what their gender is. However, in terms of constructing a sound theoretical framework, the tendency to interchange these terms is problematic. This is particularly apparent through the courts’ inconsistent interpretations of “because of sex” in the context of sex stereotyping claims. For example, the use of gender-loaded identities (lesbians, gay men, and transgender individuals) has obscured most courts’ analysis of sex-stereotyping claims. On the one hand, the law is clear that discrimination based on one’s failure to conform to stereotypes about gender-appropriate clothing violates Title VII. However, when a victim is classified as a cross-dresser, most courts have found such discrimination permissible, reasoning that discriminating on one’s identity as a cross-dresser is not discrimination based on sex. Thus, the court’s ambiguity between sex and gender has important implications in terms of judiciary interpretation.

For instance, it was not until the Price Waterhouse decision that the Court for the first time referred to gender, not just sex, in terms of Title VII. The Sixth Circuit decision of Smith v. City of Salem applied the Price Waterhouse theory, “ruling, for the first time by any federal circuit, that gender identity discrimination, as such, violates Title VII, and that transsexuals, who by definition are persons whose gender identity is discordant from their biological sex, can assert sex discrimination.”

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237. Id. at 243.
238. Id. at 243-44.
239. See supra notes 48-70 and accompanying text; see also Leonard, supra note 5, at 150-58 (describing federal courts’ reluctance to interpret sex based discrimination as prohibiting discrimination on the basis of sexual orientation). In fact, Judge Posner of the Seventh Circuit has argued that including sexual orientation as a basis for sex-based determination is “a way to bootstrap sexual orientation discrimination into Title VII.” Id. at 154.
240. Gulati, supra note 51, at 2182-84, 2202-03.
241. Id. at 2177-78 (citing Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)); see also supra notes 47-57 and accompanying text (discussing the origin of the sex stereotyping claim in Price Waterhouse).
243. Leonard, supra note 5, at 153-54. The Court held, “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
244. See Price Waterhouse, 490 U.S. at 228.
discrimination claims under Title VII. However, other circuits have not been as accepting of this theory. This has important implications, for if sex cannot change over time, but gender can, the argument to prohibit discrimination based on gender identity becomes extremely critical for transgender protection. In other words, if courts interpret "sex discrimination" to include gender discrimination, then one's change in gender is more likely to be protected, just as one's change in religion is protected.

As courts begin to recognize the intricacies of gender, many advocates continually urge that the sexual minority community should find common ground without invalidating their differences. It has been suggested that "[f]rom a position of commonality within our difference, it is then possible to consider how transgender identities and embodiments challenge and enhance our understanding of existing identity formations." Instead of taking the stance that gender is not real and therefore cannot literally redefine a person, advocates must recognize that gender does matter. This of course challenges pre-existing feminist notions that gender is merely a social construct. Once advocates accept this view, transgender claims regarding the importance of gender allows for the opportunity to embrace commonalities.

Other groups have abandoned "identity-based politics," claiming that the real problem lies with gender. Coined the "non-identity based argument," this view contends that "when there are essentialist boundaries enforced by the subjects of the movement, the movement will fail because of in-fighting, [and a] lack or loss of constituencies." The disenfranchisement within the movement itself leads to a loss of

245. Leonard, supra note 5, at 154 (citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)).
246. See supra notes 58-76 and accompanying text.
247. See Scheor v. Billington, 577 F. Supp. 2d 293, 306 (D.C. Cir. 2008); see also supra notes 84-89 and accompanying text (detailing the facts, holding, and implications of this decision).
250. Id. at 3.
251. Id.
252. Id.
253. See Ohle, supra note 197, at 243.
254. Id. at 247.
political power. Thus, it is essential to organize around gender and not the meaningless labels that ultimately divide the community.

Advocates of the "coalitional theory" share a similar view:

[T]he progressive and critical theory movements have come up with many ways of describing the complex nature of discrimination for individuals who are 'multi-identified' but few ways of addressing the perceived inter-group conflicts in identity politics. By exploring new terms and concepts that could be used to theorize more about the interconnection or reinforcing aspects of oppression, progressive theorists and activists are encouraged to find more bases for common empowerment and for solidarity rather than conflict in relationships.

In ensuring a trans-inclusive ENDA, I share the view that we must explore the commonalities of gender without invalidating its differences. For purposes of legislative interpretation, defining the scope of protection in a clear and efficient manner should be a common goal that the entire sexual minority community should embrace.

B. Society's Perception of the LGBT Community: Do Employers, Legislatures, and the General Public See a Difference Between the L, G, B, and T?

The principle that the LGBT community is diverse does not bring anything new to the ENDA debate. Unfortunately, in the context of ENDA, the differences rather than the commonalities of the community are the driving force of this controversy. But do employers, legislatures, and the general public really see the differences between LGBT people? Perhaps the constant focus on these differences originates from within the community, creating internal conflict in the face of outside opposition. This insight has important implications, for the way differences are perceived (or not perceived) can provide a

255. Id.
256. Id. at 243.
257. Arriola, supra note 248, at 447.
258. Id. at 453; see also Greenberg, supra note 191, at 107 (forming alliances around nonconformity is critical to effectively challenge sex and gender discrimination systems that harm sexual minorities).
259. See supra note 17 and accompanying text.
260. See Ohle, supra 197, at 247. Stemming from the right of self-determination, the central right at stake triggering internal conflicts within identity-based movements is the right of the individual to determine his/her identity. Id.; see also Arriola, supra note 248, at 450-51 (utilizing a coalition-based theory to create intersectionality as a tool to identify the multiple forces that impact persons of marginalized and oppressed groups).
Inclusive Language for Sexual Minority Populations

To understand the importance of building alliances within the LGBT community, it is important to recognize the driving force behind gender-based discrimination. “Advocates argue that the transgender and sexual orientation groups have faced similar opposition” by society’s normative ideal of gender roles and therefore “share the goal of eradicating sexism and gender stereotyping.” Thus, the motivating force behind the discrimination is not their sexual orientation, but because they fail to conform to gender norms.

“Gender expression is inherently political,” driven by society’s perception of gender. Hate crimes, or “anti-gay” crimes, are indicative of how the public focuses on the similarities among the LGBT community and not the self-identification of an individual. In fact, “it is often difficult to establish whether the perpetrators of a particular hate crime targeted their victim because of the person’s gender or sexual orientation, or because they perceived the victim to be gender variant.” Moreover, “‘faggot’ is the most common epithet used when transgendered people are victims of hate crimes.” This suggests the public fails to recognize the differences within this community, perceiving the entire community as one immoral population.

“Transpeople are targeted because of the perception that[they] are gay. And gays are often picked out because they are ‘visibly queer,’ that is, because they are gender-different. But the fine-line distinctions we draw to populate and protect the divisions among us—between orientation and gender or between gay and queer or between you and me—are lost upon those who stalk and prey upon us.”

The explicit goals of ENDA cannot be fully achieved without addressing gender issues in conjunction with sexual orientation issues.

261. Coffey, supra note 76, at 169.
262. Id.
263. Ohle, supra 197, at 247. The author further argues that identity should be determined by the individual, not assigned or determined by society. Id.
264. See CURRAH & MINTER, supra note 6, at 66.
265. Id. at 66-67.
266. Id. at 67.
267. Id. (quoting Riki Wilchens, executive director of GenderPAC).
268. See Donovan, supra note 177, at 34. Transgender individuals “may be at the extreme end of the gender role transgressors, but their issue is also a gay issue.” Id.; see also, Gilden, supra note
By protecting only on the basis of sexual orientation and not gender identity, ENDA will not protect against discrimination motivated by gender role infractions. Instead, "‘[p]assive’ homosexuals and effeminate men of any orientation, homo or hetero, transgress the stereotypical gender boundaries demanded of ‘real’ men, and could be discriminated against on that basis without violating ENDA." For example, if an employer discriminates against a gay male because he wears feminine clothes and not because he is gay, then the employer does not violate ENDA. Thus, "prohibiting discrimination based on gender affects gays, lesbians, and those heterosexuals who are perceived as not being ‘masculine’ or ‘feminine’ enough." This understanding challenges the argument that ENDA does not need to be trans-inclusive because the transgender community has garnered adequate protection under Title VII jurisprudence. In this respect, ENDA needs the transgender community.

Based on society's perception of what is normal, people are killed, attacked, and stigmatized if their gender expression strays from gender norms. However, there are many "shades" in the gender spectrum, and discrimination is often motivated by the intolerance of an individual who falls somewhere between the feminist or masculine extremes. Despite these "shades" of variance, society generally views the LGBT community as a single non-conformity community, and not as discrete sub-populations. Thus, in terms of federal comprehensive reform, "there are inarguable common issues, such as gender non-conformity which may be pursued in the legislatures." To provide adequate protection, legislation must address the root of the underlying forces that marginalize the entire community. Most importantly, the emphasis should be on the common motivating force, not the intricate differences between sub-populations.

196, at 84 (leaving out gender identity from ENDA fails to "confront gender-phobia that stigmatizes gay, lesbian, and bisexual identities").

269. Donovan, supra note 177, at 34.
270. Id.
271. Coffey, supra note 76, at 169.
272. Gilden, supra note 196, at 84.
274. Parrish, supra note 23, at 480. This view challenges the courts' current reluctance to stray from the traditional binary understanding of what constitutes "sex." See id.
275. Coffey, supra note 76, at 169.
V. PROPOSED LANGUAGE: "TRANSGENDER" AS DEFINED WITHIN "SEXUAL ORIENTATION"

Proposed language for ENDA should be inclusive of the differences that this unique community represents. Clear language that simultaneously accounts for the diversity within marginalized groups will provide courts with a firm understanding of what constitutes discrimination. After all, the goal of ENDA is to curtail discrimination from the outside world, not generate dissent within the community itself. As we have learned from Title VII, ambiguous language can lead to inconsistent interpretations, potentially creating unintended exclusions.276 To leave it up to the courts to determine whether the idea of "gender identity" is discrete from "sexual orientation" will likely generate similar issues.

Even though there is not a necessary connection between one’s gender identity, gender expression, or sexual orientation, American society routinely fails to see the distinction.277 In fact, men and women who deviate from gender norms are often mistaken to be lesbians or gay men, regardless of their actual sexual orientation.278

That sexual orientation is interwoven with gender identity and expression is manifested quite clearly in common instances of anti-gay discrimination and harassment. Many gay boys, long before engaging in same-sex sexual activity, share the experience of being taunted and teased for "acting queer" or "looking like a faggot" simply because they are not as aggressive or masculine-appearing as other boys. These boys are not harassed because of the sex of their intimate partner, of course, but because of how they express their gender. More specifically, they are harassed and bullied because of their failure to conform to the gender norms assigned to their sex (i.e., their degree of masculinity if they are male or femininity if they are female).279

Regardless of a LGBT individual’s personal perception of these differences, the fact remains that transgender people face discrimination

276. CURRAH & MINTER, supra note 6, at 36; see also supra Part II.A (discussing the courts’ varying interpretations of “because of sex”).
277. See supra Part IV.B.
278. Green, supra note 17, at 8.
in the workplace for many of the same reasons gay, lesbian, or bisexual people do—because they are perceived as gender non-conforming.\textsuperscript{280} Discrimination against transgender individuals is similar to that of lesbian, gay, and bisexual individuals, specifically the “desire to maintain traditional concepts about appropriate gender roles.”\textsuperscript{281} Thus, the similarities underlying the cause of discrimination—fear of the sexually divergent—should be the focus.

Overall, there are three main strategies that can be used to secure legislative protection for transgender people.\textsuperscript{282} A first strategy involves “creating an inclusive statutory definition of gender or sex,” so gender has the same meaning as sex in the context of anti-discrimination legislation.\textsuperscript{283} This idea draws on the principle that existing sex discrimination laws should be interpreted to include transgender people.\textsuperscript{284} Title VII sex stereotyping claims involving transgender plaintiffs exemplify this principle.\textsuperscript{285} Because the discrimination is based on the failure to conform to gender norms, plaintiffs argue that discriminating against an employee because they are transgender is discrimination “because of sex.”\textsuperscript{286} In making this argument, “gender” is equated with “sex.” Even though \textit{Price Waterhouse} used the word gender to interpret Title VII,\textsuperscript{287} the majority of courts deny recourse to transgender plaintiffs on this basis.\textsuperscript{288} In presenting new legislation, ENDA should account for these shortfalls, not base its language on the same ambiguities that have predominately failed the LGBT community in the past.\textsuperscript{289} 

\textsuperscript{280} Green, supra note 17, at 8; see also Coffey, supra note 76, at 165 (describing examples of workplace discrimination against transgender employees such as offensive or intimidating behavior and being fired from their jobs).

\textsuperscript{281} Green, supra note 17, at 8; see also Coffey, supra note 76, at 166 (explaining that many gay, lesbian, and bisexual people are not discriminated against because of their sexual orientation, but because they appear gender variant).


\textsuperscript{283} \textit{Id.}

\textsuperscript{284} CURRAH & MINTER, supra note 6, at 42.


\textsuperscript{286} See supra notes 77-89 and accompanying text (discussing successful sex stereotyping claims brought by transgender plaintiffs).

\textsuperscript{287} See generally Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

\textsuperscript{288} See supra notes 68-76 and accompanying text.

\textsuperscript{289} In recent sex discrimination cases, some courts find that transsexuals are protected by statutory language forbidding “gender discrimination,” but not language forbidding “sex discrimination.” Gulati, supra note 51, at 2194. However, this conflicts with the \textit{Price Waterhouse} protection of gender non-conformity within Title VII’s “because of sex” language. \textit{Id.}
A second strategy proposes that gender identity and expression could be added as a new protected category in addition to that of sexual orientation. From an education standpoint, legislation should differentiate between sexual orientation and gender identity to clearly communicate the unique attributes of the transgender community. While designating gender identity as a free standing classification “sends a powerful message that transgender people are entitled to full equality and legitimacy,” this approach failed as House Bill 3685 removed gender identity from its scope of protection. Moreover, creating a separate category runs the risk of producing a narrowly defined category that is difficult for employers and courts to interpret. In the meantime, many transgender employees are left without recourse from workplace discrimination. In fact, recent surveys have found anywhere from fifteen to fifty-seven percent of transgender people report experiencing employment discrimination. These numbers are essentially equivalent to the fifteen to forty-three percent of lesbian, gay, and bisexual people reporting workplace discrimination. Clearly, transgender employees need ENDA’s protection just as much as LGB employees. Taking gender identity out of ENDA was an unwarranted compromise benefiting one segment of the community at expense of the other. The question remains, what strategy will ensure immediate yet comprehensive protection for the entire LGBT community?

The third strategy suggests creating an inclusive statutory definition in which transgender individuals are defined within the meaning of sexual orientation. It has been argued that by adopting this strategy, transgender individuals are not accurately represented because gender identity is not sexual orientation. Transgender individuals are not given the recognition and legitimacy they deserve as a respected class of people. However, a broad, inclusive definition of sexual orientation

290. Currah & Minter, supra note 282, at 50.
291. CURRAH & MINTER, supra note 6, at 41.
292. Currah & Minter, supra note 282, at 50.
294. CURRAH & MINTER, supra note 6, at 41.
296. Id. at 3.
297. See LAMBDA LEGAL, supra note 5, at 11; Task Force Main Page, supra note 8.
298. Currah & Minter, supra note 282, at 50.
299. See Vade, supra note 16, at 270.
300. Currah & Minter, supra note 282, at 50.
can provide recourse to discrimination that best captures the community without relying on discrete categories of protection.\textsuperscript{301}

Minnesota successfully applied this approach in its state-wide antidiscrimination law passed in 1993.\textsuperscript{302} Minnesota opted to define sexual orientation broadly, leaving out categorical terms such as homosexuality, heterosexuality, and bisexuality.\textsuperscript{303} Specifically, Minnesota defines "sexual orientation" as:

\begin{quote}
[H]aving or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. "Sexual orientation" does not include a physical or sexual attachment to children by an adult.\textsuperscript{304}
\end{quote}

The language prohibits discrimination on the basis of one's affection, choice of partner, and self expression, which not only includes transgender individuals, but other gender variant people who may or may not identify as transgender.\textsuperscript{305} The Minnesota statute provides a pragmatic strategy to ensure comprehensive coverage, yet avoids potentially rigid and narrowly defined categories of protection.

In determining which strategy ENDA should adopt, leading trans-inclusive activists, Paisley Currah and Shannon Minter, advise that "the 'best' strategy is the one that has the most chance of success in a given city or state."\textsuperscript{306} Jurisdictions that do not have current laws that include sexual orientation are split on whether to include transgender individuals as a new category or include them within the same definition.\textsuperscript{307} From a pragmatic standpoint, "it may be easier to persuade legislators to amend the definition of an existing protection than to add a new category of protected persons to the law, which is likely to be seen as a more radical step."\textsuperscript{308}

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\textsuperscript{301} Currah & Minter, supra note 6, at 41; see also Vade, supra note 16, at 311 (explaining that because transgender people do not have a sex-gender congruency, creating a distinction between sex and gender disempowers transgender people).

\textsuperscript{302} Minn. Stat. Ann. §§ 363A.01-.05 (West 2004 & Supp. 2009); Currah & Minter, supra note 6, at 42.

\textsuperscript{303} Minn. Stat. Ann. § 363A.03; Currah & Minter, supra note 6, at 42.

\textsuperscript{304} Minn. Stat. Ann. § 363A.03.

\textsuperscript{305} Id.

\textsuperscript{306} Currah & Minter, supra note 6, at 43.

\textsuperscript{307} Id.

\textsuperscript{308} Currah & Minter, supra note 282, at 50.
With the recent exclusion of gender identity as a separate category of ENDA, this Note proposes adopting the third strategy—defining sexual orientation to include transgender individuals. Specifically, ENDA should model the broad, Minnesota-type definition of sexual orientation, which avoids categorical language such as gender identity. Given that prohibiting discrimination based on sexual orientation did pass the House (House Bill 3686)\textsuperscript{309} it seems that an amendment to this definition is more promising than introducing a separate bill based on gender identity. Moreover, the broad, inclusive definition of sexual orientation moves away from the categorical approach that has failed the LGBT community in terms of Title VII.\textsuperscript{310} By using language that accounts for the entire community, the focus is on the root of the discrimination—gender non-conformity and fear of the sexually divergent—and not the differences that the community sees within itself. Therefore, including transgender individuals within the definition of sexual orientation is a pragmatic and realistic response to the current ENDA debate.

VI. CONCLUSION: A TRANS-INCLUSIVE ENDA IS CRITICAL IN THE FIGHT FOR COMPREHENSIVE FEDERAL REFORM

In terms of prohibiting employment discrimination, Title VII has failed to provide adequate protection for the LGBT community. With a few exceptions, the Price Waterhouse decision is a far cry from securing a cause of action against an employer for discriminating on the basis of sexual orientation or gender identity.\textsuperscript{311} As ENDA attempts to account for Title VII's shortfalls, controversy remains for exactly how to account for the diversity of the LGBT community. While some believe the elimination of gender identity from the most recently passed form of ENDA was a necessary step towards comprehensive reform, proponents of a trans-inclusive bill view its removal as a setback for the entire movement.

As opposed to focusing on the community's own perceived differences between the L, G, B, and T, this Note focuses on the commonalities this community shares in terms of the discrimination they face by the outside world. Because society generally views the entire LGBT community as a single non-conforming population, legislation

\textsuperscript{309} Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (as placed on Senate calendar, Nov. 13, 2007).
\textsuperscript{310} See supra notes 92-98 and accompanying text.
should address the root of the underlying motivation to discriminate. From a pragmatic standpoint, this Note proposes language that moves away from categorical approach of anti-discrimination law, yet provides language that accounts for the diversity of this community without overshadowing the similarities shared. A trans-inclusive ENDA that incorporates transgender individuals into the definition of sexual orientation is an appropriate response to the current ENDA debate. Building on ENDA’s current success and learning from its failures can shape language that is inclusive of all LGBT people, yet improve its Congressional support and viability. After all, “what both gay and transgender people aspire to is neither ‘gay rights’ nor ‘transgender rights,’ but simply human rights.”

Meredith R. Palmer*


* I would like to extend my sincere gratitude to Lisa Mottet of the National Gay and Lesbian Task Force for her inspiring work and dedication to the LGBT movement. I would also like to thank Professor Holning Lau for his thoughtful input and instruction throughout my law school career. Finally, I would like to dedicate this Note to my grandfather, who taught me the importance of “Neatness, Accuracy, and Concentration.”