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REMARKS FROM EDITORS-IN-CHIEF

> *"All of the polls seem to indicate that if we live long enough—I won't, you will—attitudes [toward LGBT rights] will be very much more relaxed. But they will only stay that way if we continue to push in that direction. If we don't, things will move backward."*
>
> — Activist Frank Kameny in an interview in the October 2010 issue of the *Washingtonian*

As the steady march toward equality quickened its pace this past year, our staff of twelve passionate and committed students reflected on the purpose of an annual publication that aims to influence policy and policy makers. What can a printed, academic journal that cannot be continuously updated with breaking news or the latest legislative proposals or court cases contribute to the advancement of rights for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people? We proudly reviewed the year's major headlines chronicling our community's recent advances: achieving marriage equality in New York and Washington state, the end of "Don't Ask, Don't Tell," and the United Nations Human Rights Council declaration against discrimination. Yet during this review we noticed many important issues not being discussed, often because they are complex or affect only the most marginalized of our community.

The second edition of the *LGBTQ Policy Journal at the Harvard Kennedy School* aspires to share with its readers the in-depth research, commentaries, and stories often missed by the general public, the media, and, importantly, the legislators and government officials who—for better or worse—hold great influence over the progress of our equality. In these pages, you will read of the socioeconomic difficulties and discrimination faced by a superficially understood group of our community: those who identify outside of the restrictive gender binary society typically allows. You will hear from a transgender man who shares the trepidation and excitement of his personal transition process, the social complexities of which are often ignored. You will also learn of the struggles facing low-income members of our community. And you will live the traumatic but heroic tale of a gay Pakistani who risked everything to speak out, and as death threats accumulated, was forced to flee by night through his country's lawless tribal areas into the relative safe haven of Afghanistan.

We hope the research and commentary provided in these pages can assist policy makers and community members in understanding the issues that lag in our struggle and the potential approaches and tactics to comprehensively move equality forward. One of the American movement's founding fathers, Frank Kameny, who passed away in October 2011, spoke to the continued need to push forward to avoid moving backward. We ask policy makers holding this journal to consider their unique ability to assist in this push forward and to become an active participant in our movement for equality.

This second edition is dedicated to the life of Frank Kameny and to all those our community lost in 2011.

David Dodge and Elliot Imse
Editors-in-Chief
Cambridge, MA

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API Equality-LA salutes the LGBTQ Policy Journal at the Harvard Kennedy School

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Silent T:

Humanizing the Transgender Experience

by H. Tucker Rosebrock

On 5 August 2011, I began testosterone hormone therapy to commence my medical transition from female to male. This decision was precipitated by years of self-questioning, self-doubt, and self-discovery. I began learning about transgenderism as a name for what I was feeling in my first year at Wellesley College in 2006. Having completed six months of hormone therapy as of this writing in January 2012, I stand on the other side of the fence and feel ready to reflect on what has happened.

Once I realized starting testosterone (known in the female-to-male community as "T") was an option for me, I began to feel as one might before getting married. It was a joyous occasion, and I was happy. But there was a twinge of sadness at the life I would leave behind and some fear of the life-changing decision I was about to make. I came to the conclusion that the best way to ease into this transition was to document every day of it. Ten days before my first injection, I took a photo of myself. I continue to take a photo of myself daily, noting the date, time, and some information about what I did: what I had for lunch, what I'd read, what movies I watched (see photos 1 through 4). I find this journal to be helpful not only in documenting my personal process but also in showing others the day-to-day changes I face.

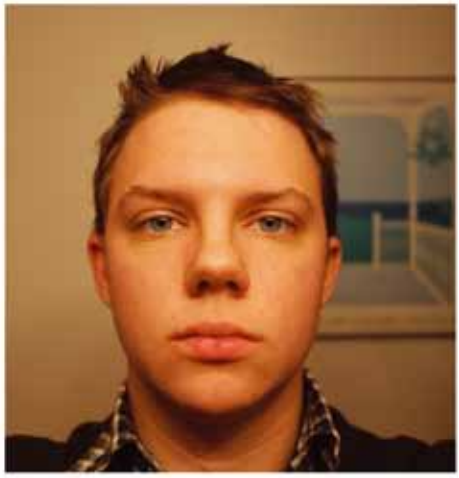
In much of the transgender community, the focus rests mainly on the "before" and the "after": the "pre-hormones, pre-op" to the "visible man or woman" one has become. While for many, keeping this transition process concealed is vital, I found the invisibility of the process of transitioning intriguing. How could one pinpoint a time and say, "This is when I became a 'visible' man?" Or, "This is when I felt comfortable in my own skin for the first time?" The important little victories like using the men's room and being called "sir" even after speaking were lost in this focus on the beginning and the end. Through my photos, I hope to tell the story of this journey.

I was eager to see the changes when I first started T. Every day I asked if my voice had changed; I inspected my face for new hair growth. Consciously, I knew this process would not occur quickly. It would take months, even years, before I would feel wholly satisfied with the changes. I didn't know what to expect in the interim. Perhaps more importantly, I didn't know how to explain to people the difference I felt between the

Wednesday August 3, 2011. 7:45pm
2 days til T. Taken in my bathroom in Allston. 40mg Prozac, .25mg Klonopin. Lunch // Chicken Salad Sandwich. Avoiding // Dinner. Listening to // Hanson. Watching // The Mentalist.

Monday September 5, 2011. 11:45pm
31 days on T. Taken in my bathroom in Southie. 40mg Prozac, .50mL Testosterone Cypionate Lunch // Burrito. New // Haircut. Done by // Me.

Tuesday October 18, 2011. 11:30pm
74 days on T. Taken in my bathroom in Southie. 40mg Prozac, .50mL Testosterone Cypionate Home // Sick. Self // Injected. Dinner // Steak.



Monday January 2, 2012. 8pm
150 days on T. 24 days til Top Surgery. 40mg Prozac, .50mL Testosterone Cypionate. Did // Laundry. Reading // 1984. Dinner // Sweet and sour chicken.

Photos 1-4: Photographs and captions from H. Tucker Rosebrock's journal documenting the changes after beginning testosterone hormone therapy in his transition from female to male. For more photos from Rosebrock's journal, visit the LGBTQ Policy Journal at the Harvard Kennedy School online.

day before I got my first shot and the day after. Articulating this deep, internal, and chemical change was something unexpected and challenging.

Before I began "passing"—being read as male in public—I was confronted with a host of issues that I had not yet anticipated. My voice had yet to change, my body shape was much the same, and my face lacked the square jaw that, I have learned, is all part of being read as male. For the first three months I was on T, I was reliving puberty again, with all of the awkwardness and insecurities. During this in-between time, bathrooms proved the biggest challenge. I had been using the female restroom at my office since my date of hire, but as I was feeling more male internally (if not externally), it felt less appropriate for me to be using this restroom. I feared coming out to my office as transgender, as changes were observable to no one but me. I found myself using the unisex restroom at Starbucks across the street and feeling uncomfortable when well-meaning friends would correct someone's pronoun usage.

I don't know the precise date I began passing, but I remember the first time I went out in public and felt confident that I would not be read as female. I went to get my haircut and the hairdresser accepted that I was male and assumed I would want a male haircut. I was elated and felt a sense of ease and relaxation in finally reaching this point, but growing up as female and shifting into a male place in society carries its own issues. Besides the fact that I attended an all-women's college—and therefore could not tell people my alma mater without outing myself—I found that my interactions with women needed to change entirely. When I went out to bars or rode public transportation home at night, I could no longer be friendly and congenial with women. I had to become aware of how my actions, as a man, would be seen by the women around me. A man smiling at a woman alone on the subway at night is very different than a woman smiling at another woman. It took, and continues to take, a constant sense of vigilance to remind myself of how others perceive me.

In addition to perceptions, practical concerns were a struggle as well. Few health insurances cover any kind of transgender treatment, and many still refer to it as "cosmetic" and therefore unnecessary and ineligible for coverage. For the average person seeking transgender treatment, navigating the world of health insurance is unnecessarily complicated. There are no clear and simple answers, no checklist or information packet.

As I did my research about hormone therapy and the upcoming bilateral mastectomy, or "top surgery," I found a wealth of information about everything from doctors to injection techniques. However, there were many conflicting accounts about whether health insurance would cover testosterone hormone therapy or any surgeries. There were arguments for having one's doctor not acknowledge that the hormones were for transgender treatment. These conflicting experiences made me wary of calling my health insurance and outright asking, lest I draw attention to myself. Navigating the health care system as a transgender individual involves a high level of discretion. When not covered by insurance, the cheapest injectable testosterone can cost approximately $100 to $200 a month. Gel testosterone can cost to $200 to $500. For many young people, this is prohibitively expensive. Many I know

Few health insurances cover any kind of transgender treatment, and many still refer to it as "cosmetic" and therefore unnecessary and ineligible for coverage.

have talked about working second jobs or having to stop hormone treatment because of the expense.

Insurance coverage for top surgery is no better. Several respected surgeons, my own included, refuse to take insurance up front; the amount of paperwork and legalese required is complicated. Instead, they require prepayment and suggest attempting retroactive coverage and reimbursement. Yet, coverage isn't guaranteed. The cost of my upcoming surgery is $5,900, not including pre-operation evaluations, blood work, or housing (it is an out-patient surgery, so I have to rent a hotel room in the area). Many transmen host fundraiser parties, start online accounts for donations, or even take out loans to pay for a surgery that many feel necessary and vital to their well-being.

Transitioning to a different gender is shrouded in mystery, and perhaps purposefully so. It is easy to show someone who you are now without the messy business of how you got there: the hammering and cobbling together, the ugly stages in between. It is easier to present a final draft than a rough one. But to ignore the steps along the way is to deny the importance of the journey and refuse others the knowledge you have gleaned. Transgenderism is easy to dehumanize. It is easy to fade into the woodwork as another cis male or cis female or to choose to live eternally in queer-exclusive social circles. No matter what path one chooses though, the policies need to be in place to support every step along the way.

Looking back at myself in that pre-T photo, I think about what has changed. Friends have told me I carry myself in a more masculine way, that I am more confident. I know I certainly feel more in command of my space, but I still worry about which bathroom to use (at work, I've started using the men's room, albeit on a different floor), about being outed inadvertently, about how to treat women, and about my health insurance coverage. I worry about my safety and acceptance. And I often wonder if these are just human worries, and that to humanize the transition process one needs to knit together connections and expose the raw human truth within all of us.

Public Speaking in Pakistan:

How an Interview Changed One Man's Life and Challenged His Country's Perceptions of Queerness

by Meghan Davidson Ladly

The first frame is a wide shot of a beach, the sun streaming down and reflecting off the sea. Far away figures are sticks of shadow, silhouetted against the glistening water as they walk along the sand and wade in the surf. Clifton Beach looks inviting; this is the Karachi waterfront at its best.

But close to this idyllic scene, a less pristine reality is being exposed. Inside a Chinese restaurant, five individuals sit together, captured on video. They are gathered around a table covered in red and white cloth, its surface scattered with the glass bottles of soft drinks, white ceramic teacups, and saucers. The group speaks to the camera in Urdu—occasionally punctuated with English—and upon closer examination one notices the image is subtly out of focus. Two transgender individuals and three gay men are risking much to speak about their lives; their faces are unclear to protect their identities. They introduce themselves—and their nation—to lesbian, gay, bisexual, and transgender (LGBT) Pakistanis (YouTube 2010).[1]

Tehseen sits at the table, one person in on the left. He is slim with dark, short hair and gestures with his hands as he speaks. He is a confident twenty-one-year-old, unaware his life is about to unravel and of the price he will pay for speaking up as an LGBT activist in a state increasingly dominated by Islamic fundamentalism (YouTube 2010; Sohail 2012).

"I've made my own peace," he said in an interview with the author, reflecting on the past from his new home of Canada (Tehseen 2011). But this self-peace has required letting go of friends, family, and a naive former self that openly challenged Pakistani law and conservative values. For a brief few months, Tehseen and his two friends—one of whom was his boyfriend at the time—became the face of LGBT activism in their country through the interview described above, which aired on television and was also posted on the Web. It would shape the domestic dialogue surrounding queer Pakistanis, and would cost them their identities, their comforts, and almost their lives.

It started in front of the Mr. Burger on Rashid Minhas Road, Gulshan-e-Iqbal, Karachi. Forty to forty-five men gathered on a day late in November 2009 and performed a simple, yet defiant, act. They held an hour-long march wearing rainbow-colored T-shirts with "Pakistan" written across them in black. The men walked beside the flow

"From nobility and engineering students we became beggars," said Tehseen, a gay man from Pakistan who was forced to flee the country after his sexuality was exposed.

of cars to the expo center on University Road, in what was likely Pakistan's first pride parade. The marchers did not disrupt traffic, nor did they hold any signs or banners. Although the rainbow is well-known as an LGBT symbol in the West, it is not widely understood as such in Pakistan, so the marchers did not encounter hostility. An organizer and participant, Tehseen was proud; the group was allowing the community to be visible to the world.

"It is very risky for anyone to be out in Pakistan, and to do any activism would be an even greater risk," Rob Hughes, a Canadian human rights lawyer, said in an interview with the author (Hughes 2011). Upper- and middle-class LGB individuals in the country tend to lead a quiet existence. They socialize, hook up, and date without even their families, let alone their wider social circles, knowing. This is no small feat given adult children frequently live with their parents and extended family (Khan 1997).

They have good reason to keep quiet about their sexuality. Pakistan has not had the high-profile trials that have occurred in neighboring states such as Iran and Egypt (Human Rights Watch 2001; Human Rights Watch 2010), but homosexual acts are illegal. Sodomy laws constructed by the British during colonization remain in place. Unnatural Offenses Article 377 criminalizes all "non-reproductive" sex and can result in lifetime imprisonment for any guilty party, yet the law is used almost exclusively to prosecute lesbians, gays, and bisexuals. Until 2006, convictions could result in a death sentence because it was an offense against Sharia law, but legal amendments have since placed this crime outside the jurisdiction of Sharia (Jilani 2011; Immigration and Refugee Board of Canada 2007). "Homosexuality is widely practiced, but legally it is not acceptable," said I.A. Rehman, director of the Human Rights Commission of Pakistan, in an interview with the author (Rehman 2011).

The legality of being LGBT is what the BBC interview was all about: defying the established laws and attaining visibility. Delhi's high court decriminalized homosexuality in July 2009, which piqued the marchers' attention (Timmons and Kumar 2009). While India housed a vibrant gay rights movement, the same was not the case for its western neighbor. BBC Urdu journalist Riaz Sohail heard about the Karachi pride parade through a friend and made contact with several organizers through Facebook to set up an interview. To Sohail, it was a unique story about a silent minority speaking out (Sohail 2012).

When BBC Urdu contacted the group responsible for the march, the individuals involved were pleased about the prospect of getting international media coverage, but there was concern about safety. The

organizers avoided exposure in the domestic media and turned away several press requests because they did not trust domestic outlets to safeguard their identities. But with the BBC they felt secure, and in the Chinese restaurant they worked out the details of what was and was not to be reported. Sohail says he agreed to fade their faces only. Yet Tehseen says he only agreed to speak because the BBC told him their faces and voices would be distorted to conceal their identities. "We wanted to show the world that Pakistan does not only have terrorists and Taliban and Al Qaeda," he said. "Pakistan has loving and caring people as well who are being ignored and discriminated against" (Tehseen 2011).

But their voices were not altered in the story and their faces, though unclear, were evidently distinguishable. They were recognized. Several weeks after the story aired on television in December 2009, Tehseen was told some of his university friends were plotting to lure him and the other two gay men appearing in the interview to a beach picnic with the intent of raping and murdering them (Tehseen 2011).

The young men's fears of prosecution or vigilante justice increased as news of the BBC Urdu story spread. Tehseen's father shunned him and threatened to turn him into the authorities should he return home. Tehseen stopped attending his university lectures as he was too terrified to risk venturing out where he might be recognized. He remembers reading page after page of online discussions on how best to make an example of the group for slandering the state. "If the extremists get you first they will not exercise the government laws," he said, "they will execute Sharia law."

After several weeks of hiding out in various parts of the country and exploring options, the three gay youths decided on a new strategy and took the BBC to court. Tehseen felt the media organization should have done more to protect them. Yet Sohail explains that the young men had contacted the news organization and requested the interview be taken down from the BBC Web site and that the BBC complied to avoid causing the interviewees any harm as a result of its reporting. But the lawsuit was launched long after the taping aired on television. "If they have any objections, why are they waiting four or five months?" Sohail said.

The case went to, and remains at, the High Court of Sindh. Tehseen and the others tried to get BBC Urdu to recant the story, claiming they had been paid money to say what they said during the interview. It was a desperate attempt to regain their heterosexual status and control of their lives, but other news media and the general public believed in the BBC's credibility.

The trial proceedings forced the three men back into hiding in Karachi, and they came under intense media scrutiny as a result of the press conferences relating to the case. They were now recognizable and confronting the real possibility of being kidnapped by extremists who demanded their lawyer hand over her clients. Tehseen and his now ex-boyfriend who also participated in the interview decided they had to leave (Tehseen 2011).

Tehseen and his then-boyfriend applied for visas at the embassy of the one country they knew would get them the necessary documents within twenty-four hours: Afghanistan. Forced to leave the third young man behind in the city because he was a minor, they took a train

to Peshawar and from there a cab northwest to the Afghan border. They fled across the border at night on foot, afraid they would be killed while navigating the lawless tribal area where one state blends into the next. Once in Kabul, they went to the Office of the United Nations High Commissioner for Refugees (UNHCR) in the city to seek help. They were forced initially, however, to survive through panhandling until they were able to register officially with the UNHCR, eventually securing UN assistance and having their case for refugee status expedited. "From nobility and engineering students we became beggars," said Tehseen.

Before leaving Pakistan, the men had been able to contact Hughes. The immigration lawyer has spent decades advocating for LGBT rights and has done extensive work with queer refugee claimants. He advised them on seeking refuge in his home country of Canada. After four months, they were allowed to leave for Canada. Yet Tehseen said during those months he "lost everything" (Tehseen 2011).

During our interview, Tehseen reiterated his support for queer Pakistanis living in a society that requires discretion around sexual intimacy of all kinds. Rehman asserts that all sexuality—and particularly that which falls outside the traditional confines of marriage—is taboo in Pakistan. Since 1990, the Human Rights Commission has received only two cases in which gay people complained of human rights violations, and those individuals eventually left the country. The state and its mechanisms are largely silent on the issue, with many individuals viewing homosexuality as a construct and vice of the West. "The idea is so alien to Pakistani society that they will not accept it," Rehman said (2011).

Tehseen may wish to focus on his new life in Canada, but his ordeal in Pakistan is hard to forget. While he regrets doing the BBC interview, he remains proud of his participation in the march. Despite the repercussions, he does not question his participation in overt activism.

As Hughes said, "Sometimes it is necessary to be in the closet and to quietly work for social change. And sometimes people have stood up and said 'I'm here, I'm queer' and been willing to suffer the consequences. It really is very individual" (Hughes 2011).

Tehseen says he will never return to Pakistan. It isn't safe now that he is a recognizable figure, and he continues to worry about Pakistani Inter-Services Intelligence (ISI) members discovering his whereabouts. The ISI is active in Pakistani society, and after running afoul of both his home country's law and religious extremists, he is cautious about who he speaks to about his ordeal (Tehseen 2011). As Tehseen found out too late, it is not a dialogue that state authorities and conservative voices wish to have.

But Sohail thinks it is a conversation his country should have. After his piece aired, he said other LGBT individuals volunteered to speak from elsewhere in the country; the exposure had encouraged others to act despite the high cost. Yet even though LGBT individuals may wish to speak out, the news media remains cautious.

Following the lawsuit, Sohail has avoided reporting on any similar subject matter. "It discourages me," he said about the court case. "I think I was the first journalist to report this, as usually Pakistani

media are not talking about these issues" (Sohail 2012).

In effect, Tehseen and the others opened up an interest in LGBT people with their interview but may have inadvertently cut off the dialogue as well. Though it is no longer of any benefit to Tehseen or his former boyfriend, the case is still pending in the high court. With two of the plaintiffs having left the country, it is uncertain how things will proceed.

In the last shot of the BBC piece, the five individuals file through the glass doors of the restaurant and out into the night. A few of them wave at the camera. "When we met them, we were inspired. They were very brave, taking their case to the world," Sohail said (2012).

REFERENCES

Hughes, Rob. 2011. Interview with author, December.

Human Rights Watch. 2001. Egypt: Gay men convicted in politically motivated trial. Human Rights Watch, 14 November.

———. 2010. Iran: Discrimination and violence against sexual minorities. Human Rights Watch, 15 December.

Immigration and Refugee Board of Canada. 2007. Pakistan: Situation of homosexuals, including the application of laws towards homosexuals, the number of prosecutions of homosexuals and their outcomes; whether any regions have an open and active gay community. Immigration and Refugee Board of Canada, 29 November.

Jilani, Hina. 2011. Interview with author, April.

Khan, Badruddin. 1997. Chapter 20: Not-so-gay life in Pakistan in the 1980s and 1990s. In *Islamic homosexualities: Culture, history, and literature*. Edited by Stephen Murray and Will Roscoe. New York: New York University Press.

Rehman, I.A. 2011. Interview with author, May.

Sohail, Riaz. 2012. Interview with author, January.

Tehseen. 2011. Interview with author, May.

Timmons, Heather, and Hari Kumar. 2009. Indian court overturns gay sex ban. *New York Times*, 2 July.

YouTube. 2010. Karachi gays and lesbian, BBC report. Uploaded by muhusama007 on 2 May.

ENDNOTES

[1] For the purposes of this article, I will be using gay, homosexual, queer, and LGB interchangeably. All are terms used by the people I interviewed. At times, a distinction will be made between LGB and LGBT because, within Pakistan, advocacy for the transgender hijra community is sometimes viewed as separate from LGB rights issues. The hijra in many ways have more visibility than LGB individuals, and the Supreme Court recently ruled that they should be recognized as a third gender.

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A Gender Not Listed Here:

Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey

by Jack Harrison, Jaime Grant, and Jody L. Herman

In the landmark 2008 National Transgender Discrimination Survey, respondents were given the latitude to write in their own gender if the predefined categories were not representative. This article reanalyzes the survey data to determine the experiences of those respondents who chose to write in their own gender. By examining several key domains of the study—education, health care, employment, and police harassment—it becomes evident that gender variant respondents are suffering significant impacts of anti-transgender bias and in some cases are at higher risk for discrimination and violence than their transgender counterparts in the study.

In 2008, the National Center for Transgender Equality (NCTE) and the National Gay and Lesbian Task Force (the Task Force) launched a nationwide study of anti-transgender discrimination in the United States. Over a six-month period, 6,450 transgender and gender nonconforming people answered a seventy-question survey, reporting on their experiences of discrimination and abuse at home, in school, in the public sphere, and in the workplace, as well as with landlords, doctors, and public officials, including judges and police (Grant et al. 2011).[1]

The results stunned even those working in the trenches with the most targeted and marginalized transgender people. Despite having attended college or gained a college degree or higher at 1.74 times the rate of the general population (47 percent versus 27 percent), respondents revealed brutal impacts of discrimination, experiencing unemployment at twice the rate and living in extreme poverty ($10,000 annually or less) at four times the rate of the general population. These and other experiences impacted study participants gravely, as 41 percent report having survived a suicide attempt.

For this landmark effort, NCTE and the Task Force attempted to collect the broadest possible swath of experiences of transgender and gender nonconforming people with the initial, qualifying question: "Do you identify as transgender or gender nonconforming in any way?" A series of identifiers followed, including Question 3 (Q3), which will form the basis of our exploration in this article.

Q3 asked, "What is your primary gender identity today?"

(A) Male/man

(B) Female/woman

(C) Part time as one gender, part time as another

(D) A gender not listed here, please specify _____

Response rates for the four options were: male/man, 26 percent; female/woman, 41 percent; part time as one gender, part time as another, 20 percent; and a gender not listed here (GNL), 13 percent.

Q3 garnered 860 written responses to GNL, many of them creative and unique, such as twidget, birl, OtherWise, and transgenderist. The majority of these respondents wrote in genderqueer, or some variation thereof, such as pangender, third gender, or hybrid. Still others chose terms that refer to third gender or genderqueers within specific cultural traditions, such as Two-Spirit (First-Nations), Mahuwahine (Hawaiian), and Aggressive (Black or African American).

Our purpose in examining the experiences of respondents who replied to Q3 as "a gender not listed here, please specify" is threefold. First, we would like to share the experience of creating a survey instrument that afforded respondents great latitude in articulating their gender identity in order to create a cache of data that speaks to the nuances of identity formation among transgender and gender nonconforming people at this moment in our communities' evolution. Language, age, culture, class, location, and community all shape identity among gender variant people and by asking several demographic questions alongside a broad series of identity signifiers, a data set has been created that begs to be asked complex questions.

Secondly, we wondered how Q3 gender not listed here (Q3GNL) respondents are constructing and describing their gender identities. Might there be some coherence among the Q3GNLs? What does the diversity of identities among Q3GNLs tell us about community, identity, and survival among gender variant people in the United States in this moment?

Finally, we wanted to look at the experiences of Q3GNLs in terms of the various domains the survey explores, such as education, health, and housing, as well as experiences with police, to see if Q3GNLs are faring better or worse than their transgender and gender nonconforming peers who did not write in their gender.

The findings we describe in what follows affirm the relevance of creating nuanced gender categories in collecting data on transgender and gender nonconforming people. By providing study participants multiple options for identifying and describing their gender identity, the resulting data shows that those who wrote in answers to Q3 have both unique demographic patterns as well as distinct experiences of discrimination. These important realities would have been rendered invisible by cruder or more simplistic instruments.

POSING THE T QUESTION

In late 2007, a group of advocates and researchers gathered in the conference room at the Task Force to construct an original survey instrument for a study coproduced with NCTE. This partnership was facilitated by the proximity of the offices of the two organizations (upstairs/downstairs) and by the strong networks of transgender advocates and researchers that both organizations brought to the table as staff, volunteers, interns, and (pro bono) consultants on the project. For a

little over a year, advocates and researchers with decades of experience in lesbian, gay, bisexual, and transgender (LGBT) movements at the grassroots and national levels wrestled over hundreds of potential questions and their formulation. This group included organizational leaders, legal advocates, experts in social science research and statistics, feminist and antiracism organizers, health and community-based researchers, therapists, interns of various backgrounds and training, and community organizers.[2] The combination of highly trained scholars and community-based end users of data was a particularly powerful mix that, in the end, attracted the largest group of participants in U.S. history to a project on transgender life and experiences of discrimination.

No one in the room and no one providing feedback by phone or e-mail was completely satisfied with the final questionnaire. Everyone had to "give up" questions that were of vital importance from their particular vantage point in their movements and organizations. At times, the struggle to find appropriate language to facilitate participation and elicit nuances of experience frazzled nerves and tested relationships. After the survey was fielded, for example, there was a collective groaning regret that a question on religious affiliation fell off the table in the final draft. The study team struggled to create an instrument that was accessible, both in terms of literacy and length, to community members whose experiences are the most suppressed and marginalized, while at the same time capable of recording the breadth of anti-transgender targeting. The team's internal critique of the National Transgender Discrimination Survey (NTDS) questionnaire is detailed in Appendix B: The Survey Instrument—Issues and Analysis of the full report (Grant 2011).

No part required more strenuous negotiation than the initial four questions of the study, which included a qualifying question for participants and then sought to establish identity "containers" for respondents so that we might study the impacts of discrimination across a broad spectrum of gender identities. These questions were constructed so we might identify highest-risk identity categories and, with this data, uncover needed policy and legal changes.

The context in which the survey was created demanded attention on the matter of identity. The federal legislative battle of 2007 regarding the Employment Non-Discrimination Act (ENDA) exposed political fault lines within the community and also created a rallying cry for transgender advocates and their allies. Forces inside LGBT communities seeking a short-term, "historic" win in Congress led to transgender protections being dropped from ENDA, as some believed that it would not have enough votes to pass with the transgender inclusion. ENDA with the transgender protection dropped did pass the House but failed in the Senate.

Additionally, twenty years of pressure on both state and federal governments to collect data on LGBT people's experiences was gaining steam and critical mass, resulting in a smattering of youth, family, and health surveys on LGB experiences and only the merest experiments in posing the "T" question. In 2007, there was great internal debate in the community that reflected the dynamics of the ENDA battle, with many prominent lesbian and gay researchers arguing against pressing governments on

transgender questions, given that there was so little consensus about how to adequately pose them.

In this context, the group created a multilayered set of questions that may or may not be replicable in other settings. Advocates are constantly told by state and government actors that questions on LGBT experience are "sensitive" and dissonant for participants in mainstream population-based studies; in fact, they are considered so distressing that they risk ending participation in a study, whether on paper, by phone, or in person. However, several reviews of studies posing sexual orientation questions have debunked this myth (Williams Institute 2009). The next barrier governments often present is expense. Our relatively "small" LGBT community "can get" only one question in which to identify ourselves given the expense of adding us to large, population-based studies (i.e., the National Survey of Family Growth, the National Health Interview Survey, or the survey gold standard, the census). Because sexual orientation and gender identity are constructed as "distinct" identities by both our communities and society at large, logic follows that there must be at least two questions to locate LGBT participants in any study.

The group that formed the NTDS questionnaire endeavored to inform the current debates about posing the T question in both community-based studies and population-based work by crafting a community-based questionnaire that might attract participants through a layered set of identifiers that were likely recognizable to many gender variant people. While understanding that small, community-based questionnaires may be more nuanced instruments than larger, population-based surveys, we hoped the success of the survey would challenge local, state, and national researchers whose proposed set of survey options create only the narrowest avenue for members of our communities to engage and make visible our realities.

In the end, though many researchers viewed the questionnaire as prohibitively exhausting in terms of length (seventy questions total) and exclusionary in terms of its literacy level, the study attracted a record-breaking number of participants only a week after its fielding (3,500 participants at the one-week mark in November 2008). The final sample of 6,456 includes participation by people living on the streets and those with low levels of educational attainment and low incomes, perhaps demonstrating the energizing and attracting capacity of questions that incorporate gender variant people's language and processes of identity creation.

METHODOLOGY

Respondents for the survey were recruited in collaboration with 800 active, transgender-specific or transgender-related organizations nationwide that announced the survey to their membership. The survey link was also disseminated through 150 listservs that reach the transgender community in the United States. The survey was made available online and on paper. The final sample consists of 5,956 online responses and 500 paper responses.[3]

We posed the following four questions at the start of the survey:

Q1: "Transgender/gender nonconforming" describes people whose gender identity or expression is different, at least part of the time, from their sex assigned to them at birth. Do you consider yourself to be transgender/gender nonconforming in any way?

- ❑ Yes
- ❑ No. If no, do NOT continue.

Q2: What sex were you assigned at birth, on your original birth certificate?

- ❑ Male
- ❑ Female

Q3: What is your primary gender identity today?

- ❑ Male/man
- ❑ Female/woman
- ❑ Part time as one gender, part time as another
- ❑ A gender not listed here, please specify _____

Q4: For each term listed, please select to what degree it applies to you (not at all, somewhat, strongly).

- ❑ Transgender
- ❑ Transsexual
- ❑ FTM (female to male)
- ❑ MTF (male to female)
- ❑ Intersex
- ❑ Gender nonconforming or gender variant
- ❑ Genderqueer
- ❑ Androgynous
- ❑ Feminine male
- ❑ Masculine female or butch
- ❑ A.G. or Aggressive
- ❑ Third gender
- ❑ Cross-dresser
- ❑ Drag performer (King/Queen)
- ❑ Two-spirit
- ❑ Other, please specify _____

Q3GNLs have significantly higher educational attainment than their peers who did not write in their gender. . . Nonetheless, Q3GNLs are living in the lowest household income category at a much higher rate than those who did not write in their gender.

In *The Lives of Transgender People*, Genny Beemyn and Susan Rankin (2011) also examine respondents and interviewees whose identities challenge the constructed male-female gender binary. In referring to these respondents, they proposed the term female-to-different-gender and male-to-different-gender to complement the transgender-identified constructs of female-to-male and male-to-female (Beemyn and Rankin 2011). In this article, we explore the identities and impacts of discrimination on those who wrote in their own gender response for Q3. More research is needed to look closely at those who also selected and/or wrote in their own gender response on Q4, who at first glance appear to be quite different from Q3GNLs. Accordingly, there is a great deal more diversity of experiences around nonbinary gender identity and experiences of discrimination to be explored in this data set.

In this study, we employ Pearson's chi-square tests of independence to measure within-sample relationships between Q3GNLs and those who did not write in their gender for Q3. Pearson's chi-square tests are only generalizable when using random samples. The test's ability to find statistical significance may also be limited when utilized with a nonrandom sample. Yet, the test can be used to crudely measure a statistical relationship between two variables within this sample and provide hypotheses for future research (Lájer 2007).

I AM Q3GNL: THE COMPLEXITIES OF IDENTITY

In terms of gender spectrum, Q3GNLs identify more often on the transmasculine spectrum than overall participants in the study (see Table 1). In fact, participation is flipped in terms of the full sample, with 73 percent of Q3GNLs reporting assigned sex at birth as female and identifying on the transmasculine spectrum and 27 percent assigned male at birth and identifying as transfeminine. In the full sample, 60 percent of respondents were assigned male at birth and locate themselves on the transfeminine spectrum, while 40 percent were assigned female at birth and identify along the transmasculine spectrum.

In terms of age, Q3GNLs were younger than those who did not write in their gender. Fully 89 percent of Q3GNLs were under the age of forty-five, while 68 percent of those who said "man, woman, or part time" on Q3 were under the age of forty-five.

Q3GNLs were less likely to be White (70 percent) than those who did not write in their gender (77 percent) and more likely to be multiracial (18 percent compared to 11 percent). They were more often Black (5 percent) and Asian (3 percent) than those who did not write in their gender as

Table 1: ***Demographics of Q3GNLs, those who did not write in their gender in question 3, and the overall sample***

Demographic category		Q3GNLs	Those who didn't write in gender	Overall sample
Sex assigned at birth **	Female	73%	35%	40%
	Male	27%	65%	60%
Race **	American Indian or Alaskan Native only	1%	1%	1%
	Asian or Pacific Islander only	3%	2%	2%
	Black only	5%	4%	4%
	Latino/a only	4%	5%	5%
	Multiracial	18%	11%	11%
	White only	70%	77%	76%
Region **	New England	12%	8%	9%
	Mid-Atlantic	23%	21%	21%
	South	12%	19%	18%
	Mid-West	18%	21%	18%
	West, Alaska, and Hawai'i	18%	16%	17%
	California	16%	14%	17%
Annual household income **	$10,000 or less	21%	14%	15%
	$10,000 - under $20,000	16%	11%	12%
	$20,000 - under $50,000	33%	31%	32%
	$50,000 - under $100,000	21%	29%	28%
	$100,000 or more	10%	14%	14%
Educational attainment **	No high school diploma	4%	4%	4%
	High school diploma only	6%	9%	8%
	Some college	32%	42%	40%
	College degree only	35%	26%	27%
	Any graduate degree	23%	20%	20%
Age**	Ages 18-24	29%	17%	19%
	Ages 25-44	60%	51%	52%
	Ages 45-54	7%	18%	17%
	Ages 55-64	3%	12%	11%
	Ages 65 and older	0%	2%	2%

**Chi-square test of independence = $p<0.01$

well as the overall sample (4 percent and 2 percent, respectively), but less likely to identify as Latino/a (4 percent compared to 5 percent).[4]

Q3GNLs live in California and the Northeast, the Mid-Atlantic states, and the West (including Alaska and Hawaii) at higher rates. Q3GNLs live in the Midwest and the South at a lower percentage rate than do their counterparts who replied "man, woman, or part time" to Q3.

Q3GNLs have significantly higher educational attainment than their peers who did not write in their gender, and as

There appears to be no tension for many Q3GNLs between simultaneously identifying as fluidly gendered, multiply gendered, performing gender, or having no gender.

noted above, the full sample has a considerably higher level of educational attainment than the general population. Nonetheless, Q3GNLs are living in the lowest household income category (under $10,000 annually) at a much higher rate (21 percent) than those who did not write in their gender (14 percent), which may be partially attributable to the high percentage of young people among Q3GNLs in the study.

In terms of gender identity, 337 Q3GNLs (39 percent) identify wholly or in part as genderqueer.[5] An additional twenty-five respondents wrote in "queer" to Q3, which might be interpreted as "my current gender is queer," an equivalent of genderqueer. If we read this intent correctly, then an additional 2.9 percent of Q3GNL respondents identify specifically as genderqueer (42 percent of Q3GNLs, 6 percent of the sample).

Other written responses that conceptually align with genderqueer include: both/either/neither/in-between/non-binary (n=82), androgynous or blended (n=70), non-gendered, gender is a performance or gender does not exist (n=23), fluid (n=19), Two-Spirit (n=18), bi-gender, tri-gender or third gender (n=16), genderfuck, rebel, or radical (n=10). Many respondents combined one of these descriptors with queer or genderqueer in their responses, as a way to further describe their genderqueer identity.

Several Q3GNLs claim a genderqueer identity while expressing the belief that they possess no gender. There appears to be no tension for many Q3GNLs between simultaneously identifying as fluidly gendered, multiply gendered, performing gender, or having no gender. Accordingly, the study illuminates rich variation within genderqueer identity and raises questions about identity and impacts of discrimination. How do those whose identities present a more explicit confrontation or critique of current gender paradigms (i.e., genderfuckers or rebels) fare relative to their peers? How does nuance or multiplicity in gender identity and expression play out when interacting with gender policing structures and forces? These and many other questions await further study.

Among Q3GNLs, several respondents wrote in their own unique genders including: birl, Jest me, skaneelog, twidget, neutrois, OtherWise, gendertreyf, trannydyke genderqueer wombat fantastica, Best of Both, and gender blur. These identifiers speak to the creative project of gender identity creation. While much of the data in the study catalogs serious and widespread violations of human rights, this data testifies to resilience, humor, and a spirit of resistance to gender indoctrination and policing among respondents.

Table 2: ***Discrimination experiences for Q3GNLs, those who did not write in their gender in question 3, and the overall sample***

Experiences of Discrimination	Q3GNLs	Those who didn't write in gender	Overall sample
Harassment in K-12 schools due to bias**	83%	77%	78%
Sexual assault in K-12 schools due to bias**	16%	11%	12%
Lost job due to bias**	19%	27%	26%
Work in underground economy for income**	20%	15%	16%
Medical refusal due to bias**	14%	20%	19%
Postponed needed medical care for fear of bias**	36%	27%	28%
HIV positive**	2.9%	2.5%	2.6%
Unknown HIV status**	11%	9%	8%
Attempted suicide	43%	40%	41%
Harassment by police due to bias**	31%	21%	22%
Very uncomfortable seeking police assistance**	25%	19%	17%
Physically assaulted due to bias**	32%	25%	26%
Sexually assaulted due to bias**	15%	9%	10%

**Chi-square test of independence = $p<0.01$

Q3GNLS AND DISCRIMINATION

This final section offers a preliminary look at discrimination faced by study participants who chose a gender not listed in Q3. The analysis here merely scratches the surface of this extensive data set, but by looking at several arenas for experiences of discrimination, including education, employment, health care, police, and violence, we hope to create a foundation for our team and others to make deeper explorations (see Table 2).

Education

Although the NTDS was only open to respondents aged eighteen and older, we asked everyone to reflect on their experiences in K-12 schools. Q3GNLs who attended K-12 expressing a transgender identity or gender nonconformity reported higher rates of harassment and sexual assault than their counterparts in the study. Q3GNLs experienced harassment at a rate of 83 percent. This compares to 77 percent of those who did not write in their own gender. Sixteen percent of Q3GNLs reported surviving sexual assault at school, compared to 11 percent of those who did not write in their gender.

Because these experiences took place early in respondents' lives, perhaps often before they were fully expressing their gender identity, one might expect these rates to be consistent with the rates for those who identified as FTMs because of the high concentration of female-assigned-at-birth Q3GNLs. This is true for harassment, where the Q3GNL rate of 83 percent is very close to the FTM rate of 84 percent. Yet the reported rate of sexual assault for Q3GNLs was a full six percentage points higher than that of FTMs in the study, raising questions about specific sexual

assault risks for genderqueers assigned female at birth in K-12 settings.[6]

Employment

While we found virtually no difference between Q3GNLs and the full sample in terms of workforce participation, we did find that Q3GNLs "lost a job due to anti-transgender bias" at lower rates (19 percent) than other respondents in the study. They are, however, more likely to be "out at work" (76 percent) than their counterparts in the study (56 percent), while enduring the same level of harassment and abuse at work as the full sample: 90 percent report having experienced some form of anti-transgender bias on the job. Anti-transgender bias includes verbal harassment, denial of a promotion, physical and sexual violence, or having taken steps to avoid these outcomes by individuals delaying their transition or otherwise hiding who they are. This suggests that while Q3GNLs are less negatively affected by being "out at work" in terms of possible job loss, transgender-identified people as a whole in the study often have "lost a job due to bias," especially MTF transgender participants.

Q3GNLs are more likely to have participated in underground or informal economies for income. Twenty percent of Q3GNLs said they had been involved in drug sales, sex work, or other off-the-books work at some point in their lives. This compares to 15 percent of those who did not write in their gender and 16 percent of the overall NTDS sample. However, the rates of sex work for Q3GNLs and the full sample are the same. This counters mainstream discourse on the gender of sex workers in trans communities (widely viewed as MTF transgender) and the role of underground economies in sustaining people with genderqueer identity.

Health and Health Care

In the health section of the survey, respondents reported on direct forms of discrimination in medical care as well as health disparities, which may be interpreted as impacts of cumulative effects of discrimination.

Q3GNLs reported being refused medical care due to bias at a rate of 14 percent, a lower proportion than those who did not write in their own gender (20 percent). However, they are more likely to avoid care altogether when sick or injured because of the fear of discrimination (36 percent of Q3GNLs compared to 27 percent of those who did not write in their gender).

Q3GNLs are slightly more likely to be HIV positive (2.9 percent) than those who did not write in their gender (2.5 percent). Additionally, 11 percent of Q3GNLs did not know their status, compared to 9 percent of those who did not write in their gender.

Q3GNLs are slightly more likely to have attempted suicide at some point in their life (43 percent) than those who did not write in their gender (40 percent). Both of these figures strike a stark contrast against the 1.6 percent rate of suicide attempts over the lifespan for the general U.S. population (McIntosh 2004).

Police

Among respondents who had interacted with police, Q3GNLs are more likely to have experienced harassment (31 percent) than those who did not write in their gender (21 percent). Correspondingly, Q3GNLs are more likely to feel very uncomfortable going to the police for

assistance (25 percent) than those who did not write in their gender (19 percent). This data indicates that harassment and police abuse of genderqueers is a major problem that has not been fully examined relative to the better-documented problem of police harassment against transgender women.

Violence

One of the regrets we maintain about the survey instrument is that it did not pose a question about overall experiences of violence. Instead, we asked about physical and sexual assaults due to bias that occurred in several different contexts, including at school or in the workplace, as described above, as well as in various spaces of public accommodation and in the context of domestic violence. Looking across these contexts provides some sense of the overall rates of violence perpetrated against Q3GNLs.

Thirty-two percent of Q3GNLs report having been physically assaulted due to bias, compared to 25 percent of those who did not write in their gender. Fifteen percent of Q3GNLs report having been sexually assaulted due to bias, compared to 9 percent of those who did not write in their gender. Again, relative to their study peers, the higher rates of violence suggest the need for rigorous examination of violence against genderqueers.

CONCLUSIONS

In the earliest moments of crafting the National Transgender Discrimination Survey questionnaire, research team members wondered whether the NTDS should collect data on gender variant people who did not identify as transgender. Study team members theorized that transgender-identified people were likely to face more significant discrimination and abuse than gender nonconforming folks; our belief, based on anecdotal work in our communities, was that genderqueers generally were faring better than their transgender FTM and MTF peers. In the end, the team decided that it would be important to compare the experiences of genderqueer and transgender respondents and to examine how anti-transgender bias impacted people across a spectrum of gender identities.

This preliminary look at the experiences of Q3 write-ins affirms the importance of the study qualifier, "Do you identify as transgender or gender nonconforming in any way?" By examining just a few of the key domains of the study, such as education, health care, employment, and police, it seems clear that gender variant respondents, including those who see their gender as hybrid, fluid, and/or rejecting of the male-female binary, are suffering significant impacts of anti-transgender bias and in some cases are at higher risk for discrimination and violence than their transgender counterparts in the study.

We hope this article encourages other researchers to look closer at this data set for answers to the questions raised here about Q3GNLs in this study and to undertake new work to uncover and illuminate the lives, resiliencies, and vulnerabilities of genderqueers. A possible outcome of the work here, given that 6 percent of respondents overall identified specifically as genderqueer, might be that future survey instruments studying gender variant people include a specific checkoff for genderqueers. Other outcomes might include future studies of participants who wrote in for both Q3 and Q4, who certainly have much to tell us about the state of genderqueer and transgender life in the United States and

the specific resiliencies and challenges of genderqueers, gender rebels, and OtherWise.

REFERENCES

Beemyn, Genny, and Susan Rankin. 2011. The lives of transgender people. New York: Columbia University Press.

Grant, Jaime M. et al. 2011. Injustice at every turn: A report of the National Transgender Discrimination Survey. Washington, DC: National Gay and Lesbian Task Force and National Center for Transgender Equality.

Lájer, Konrad. 2007. Statistical tests as inappropriate tools for data analysis performed on non-random samples of plant communities. Folia Geobotanica 42(2): 115–122.

McIntosh, John L. 2004. Suicide data page: 2002. Prepared for the American Association of Suicidology. Compiled from Kochanek, K.D. et al. 2004. Deaths: Final data for 2002. *National Vital Statistics Reports* 53(5). Hyattsville, MD: National Center for Health Statistics.

Williams Institute. 2009. Best practices for asking questions about sexual orientation on surveys. Sexual Minority Assessment Research Team, Williams Institute.

ENDNOTES

[1] The information and figures in this article rely heavily on the data collected for and published in "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey." Where information is derived from other sources, those sources will be noted. Otherwise, assume the data stems from the aforementioned report.

[2] The group included Mara Keisling, Eli Vitulli, Nicholas Ray, M. Somjen Frazer, Jaime M. Grant, Lisa Mottet, Justin Tanis, and Steven K. Aurand. Susan Rankin, Hawk Stone, Scout, Shannon Minter, and Marsha Botzer also responded to drafts of questions by phone and e-mail consultation.

[3] Though the research team and staff members conducted widespread outreach efforts, including to rural areas, to recruit survey respondents from a variety of regions, literacy levels, and socioeconomic backgrounds, there are certainly segments of the transgender population that are not represented or are underrepresented in this survey. Therefore, while this is by far the largest sample of transgender experience collected to date, and its racial composition mirrors that of the general U.S. population, with respondents hailing from all fifty states and the District of Columbia, it is not appropriate to generalize the findings in this study to all transgender and gender nonconforming people because it is not a random sample.

[4] Respondents who checked a single-race option are described within a single race category, such as Black, Latino, or American Indian/Alaska Native. Respondents who checked more than one race option are described in the multiracial category of the study. Different researchers' analyses of the data report higher Black, Asian, and Latino participation by adding together Black-only, Latino-only, and Asian-only data with multiracial respondents who also claim these corresponding identities (i.e., Black-only plus Black-multiracial participants may be the focus of another researcher's analysis of the data to discuss Black trans experience). For the purposes of this article, NTDS researchers use single-race only option participants to describe Black, Asian, and Pacific Islander, Latina/o, and American Indian and Alaska Native respondent experiences. We use multiracial percentages to describe respondents who checked any of these categories along with an additional race category (including White).

[5] They wrote: genderqueer, Gender Queer, Genderqueer, and Gender-Queer, often following with additional descriptors such as genderqueer/genderfluid, genderqueer woman, genderqueer lesbian, genderqueer trannyfag, genderqueer/both/neither, etc.

[6] Female-assigned-at-birth Q3GNLs experienced harassment in K-12 schools at a rate of 85 percent and sexual assault at 13 percent.

"Bathroom Panic" and Antidiscrimination Laws:

The Role of Activists in Securing Gender Identity Protections in Gendered Public Spaces in Washington, DC

by Jody L. Herman

The designers of our built environment have created public facilities that are segregated by gender, such as public restrooms, prisons, and shelters. People who are transgender or gender nonconforming may face denial of access, harassment, and violence in these gendered spaces. Despite organized opposition, some U.S. jurisdictions have adopted laws that seek to address these problems. This first-of-its-kind case study of the policy process in Washington, DC, outlines the key activities and strategies employed by activists and advocates who worked to create and enact the strongest regulatory language on gendered spaces in the country. Findings of this case study inform hypotheses suggested for future research.

Gendered public facilities, such as restrooms and locker rooms, create one of the clearest structural lines between male and female—masculine and feminine—in the architecture of American society. In the moment that one must choose between two doors—one marked "men" and one marked "women"—the binary construction of gender is never more blatantly enforced. The expectation in our society that a person's gendered appearance and physical characteristics will be "aligned" in the most traditional sense for those entering these spaces is strong and nearly universal. Failure to conform to these expectations can result in violence, harassment, arrest, and public humiliation.

Restrooms are an integral and necessary part of our built environment. Yet, since gender is hyper-scrutinized in these spaces, these areas can create dangerous situations for transgender and gender nonconforming people.[1] A 2008 survey of transgender and gender nonconforming residents of Washington, DC, revealed that 68 percent of respondents had been denied access to, verbally harassed in, and/or physically assaulted in public restrooms (DC Trans Coalition 2009). These experiences took place in schools, places of employment, and places of public accommodation.

The limitations and inadequacies of our built environment are becoming apparent. How will our society respond as the assumption of a binary concept of two distinct and separable genders continues to erode, especially when that assumption is "built" into our environment? Our reliance on gender segregation in our public facilities does not provide for the safety and security of all people. Enacting laws that prohibit

discrimination against transgender and gender nonconforming people is one way to begin to address the problems created by gendered public facilities.

Antidiscrimination laws in Washington, DC, contain the strongest language in the country in regard to gendered public facilities. In this article, the District of Columbia's path toward strong and explicit protections is revealed in a case study based on participant observation, key informant interviews, and archival document review. Where these protections have been included in antidiscrimination laws in places like New York, Boston, and San Francisco, anecdotal evidence suggests that advocacy groups and activists played an important role in the policy process. Therefore, this study of Washington, DC, focuses on the activities of activists and advocacy groups as they worked toward the goal of securing strong protections for transgender and gender nonconforming people. This study provides an analysis of the key decisions and strategies that activists and advocates employed to achieve their goal and suggests hypotheses for future research on policy-making processes surrounding antidiscrimination protections in gendered public facilities.

CURRENT NATIONAL CONTEXT FOR ANTIDISCRIMINATION PROTECTIONS

Many cities, counties, and states have adopted protections for transgender and gender nonconforming people in employment, education, housing, and public accommodations. As of 20 January 2012, the National Gay and Lesbian Task Force (the Task Force) reported that sixteen states and the District of Columbia have explicit protections for people based on gender identity or expression or based on status as transgender (National Gay and Lesbian Task Force 2012). In addition, 143 cities, counties, and townships have added specific protections for transgender and gender nonconforming people, including Boston, Chicago, Los Angeles, New York, Philadelphia, and San Francisco. The creation of these specific protections is a recent and growing trend: 112 of the 143 jurisdictions (78 percent) that have adopted these protections have done so since the year 2000 (National Gay and Lesbian Task Force and Transgender Law & Policy Institute 2008; National Gay and Lesbian Task Force 2011).

Gendered public restrooms often serve as an ideological battleground in debates over enacting antidiscrimination laws at the local, state, and federal levels. Opponents of antidiscrimination protections for transgender and gender nonconforming people have argued that such laws would grant male sexual predators access to women's restrooms where they can assault women and children. This type of "bathroom panic" tactic was used most recently by the Massachusetts Family Institute in its campaign against the 2011 Transgender Equal Rights Bill in Massachusetts. Massachusetts legislators eventually removed gender identity antidiscrimination protections in places of public accommodation from the final bill, which was signed into law by Governor Deval Patrick in November 2011.

Currently, only around 5 percent of jurisdictions with antidiscrimination protections explicitly protect a person's right to use the gendered public restroom consistent with that person's gender identity or expression (Mottet 2012). Restroom protections are explicitly included in the antidiscrimination statutes or ordinances passed by New Jersey, the cities of Oakland, Boston,

Denver, and Boulder, and several jurisdictions within the state of Oregon. Enforcement regulations, which are drafted and implemented by government agencies, provide restroom protections in the cities of San Francisco and New York, the state of Colorado, and Washington, DC. The offices of human rights or civil rights divisions in the states of Iowa, Colorado, Nevada, and Washington have created compliance brochures and/or checklists to aid implementation of their gender identity antidiscrimination laws that cover restroom access. It remains unclear whether restroom protections are included in statutes, ordinances, and regulations where they are not explicitly mentioned.[2]

Regulations in Washington, DC, protect a person's right to use the restroom consistent with that person's gender identity or expression and require businesses that have single-occupancy gendered restrooms to make those restrooms gender-neutral (Office of the Secretary of the District of Columbia n.d.). The provision to create gender-neutral restrooms is unique to the DC regulations and serves to provide safer restroom options for transgender and gender nonconforming people. Since restrooms have served as an ideological battleground in debates over antidiscrimination policies in places as progressive as Massachusetts, how is it that Washington, DC, and other jurisdictions have been able to explicitly include these protections in their statues and regulations? Findings from the following case study of the policy-making process in Washington, DC, begin to answer this question.

PROTECTIONS IN GENDERED PUBLIC SPACES: THE CASE OF WASHINGTON, DC

Local History and Organizing in the Transgender Community

On 7 August 1995, Tyra Hunter was critically injured in a car accident in southeast DC. What happened in the minutes between Tyra Hunter's car accident and death would spark a movement that continues to this day. DC Fire Department (DCFD) first responders arrived on the scene of the car accident and began treating the victims. The DCFD worker who attended to Tyra Hunter cut away her pants and discovered that she had male genitalia. Upon this discovery, the DCFD worker stopped treating her and, together with the other DCFD staff at the scene, spent several minutes making jokes and ridiculing her. After Hunter was finally transferred to DC General Hospital for treatment, the public hospital's emergency room staff refused to treat her. Two hours after her accident, Tyra Hunter died from survivable injuries.[3]

The transgender community was horrified by the mistreatment and death of Tyra Hunter and channeled the collective energy generated by her death to organize to improve the lives of transgender people in DC. Community members availed themselves of opportunities to educate DC government officials and to express the frustration created by the many hardships transgender people face. In December 2008, a DC agency official who elected to remain anonymous described his perspective on transgender community participation in public hearings: "It was a learning experience for me to learn about the hardships that these individuals would go through. Disowned, come out and kicked out of the home, lack of

education. There was a lot of pent-up frustration over things that had happened in the city, like the Tyra Hunter incident. We would hear that."

Transgender community leaders organized town hall meetings following both the death of Tyra Hunter and a wave of murders of several transgender women in 2002 and 2003. The meetings were convened to discuss the violence and salient issues affecting the local transgender community. The community agreed on a variety of priorities to focus on to improve safety and quality of life. There was also increasing recognition of the need for explicit legal protections for transgender people in DC.

Organizing the Campaign to Amend the DC Human Rights Act in 2005

After the series of community meetings in response to the 2002 and 2003 murders had ended, attorneys Lisa Mottet and Jeffrey Light, along with local activist Sadie Crabtree, organized a community meeting with the explicit purpose of launching a campaign to pursue antidiscrimination protections for transgender people in DC.[4] The DC Human Rights Act (DC HRA) outlines the prohibited forms of discrimination in Washington, DC, and at that time did not include any explicit protections for transgender and gender nonconforming people.[5] Light, a former staff member for DC Council Member Jim Graham, had already been in communication with Graham about the possibility of legislation to amend the DC HRA to include "gender identity or expression." Graham was amenable to introducing legislation, but he wanted community support before moving forward. The community meeting was therefore designed to organize a community-based advocacy group that would provide the political communications, legal and technical expertise, and community-organizing abilities to launch a campaign to amend the DC HRA and advocate for strong enforcement regulations.

An announcement for the first meeting to organize the campaign went out through e-mail messages to individuals and DC transgender community listservs and was addressed to "Trans People and Allies in Washington, DC." The announcement explained that the purpose of the January 2005 meeting was to discuss antidiscrimination legislation and the kinds of provisions desired by the community, such as whether to pursue potentially controversial provisions like public restroom protections. Light observed:

> Meetings had happened before, usually after there was a tragic event, like a murder. There would be community meetings that were reactionary in nature, then interest in legislation would fade as people's everyday lives resumed. This effort was successful in achieving legislative victory because it wasn't reactionary. We [were] going to be more goal-oriented. Instead of a reaction, it was a concrete plan for change. (Light 2008)

The initial meeting was considered a success, with attendance of thirty to fifty racially diverse DC transgender community members and allies. The group continued to meet biweekly to discuss the various issues it wanted the new DC HRA amendment to address. The group agreed to advocate for legal access to gender-segregated public facilities. The group members created a name for their organization that centralized its structure and purpose but did not indicate a basis in any particular identity: the Coalition to Clarify the DC Human Rights Act. The coalition agreed on the primary goal of persuading the DC Council to amend the

DC HRA with the subsequent goals of passing strong regulations through the DC Commission on Human Rights (CHR) and serving as a community-based advocacy group to work toward full implementation of the law and regulations.

Key Decisions and Strategies in the Campaign

Provisions and Text of Proposed Legislation and Regulations

To reach its goals, the coalition made strategic decisions regarding the legislative language it proposed for the DC HRA amendment bill and the provisions it reserved for the enforcement regulations. The coalition drew on the experience, connections, and strengths of its membership and networks (attorneys, political insiders, community organizers, and long-time local activists). Having worked on transgender rights for the Task Force since 2001, Mottet was very knowledgeable about the most recent developments in antidiscrimination legislative language, and with assistance from Light, she wrote the proposed language for the bill.

The coalition made the strategic decision not to pursue some desired protections, such as legal access to public restrooms, in the actual text of the legislation. Though having statutory language is a stronger protection than enforcement regulations promulgated by an agency, coalition members were concerned about interference from Congress. Congress has oversight of all DC legislation and can disapprove legislation or block appropriations to implement it. There is no formal Congressional review of enforcement regulations, so the provisions the coalition wanted would not fall under federal scrutiny if addressed in the regulations written to enforce the new DC HRA amendment.

The coalition wanted the regulatory language to address discrimination in areas of employment, education, public accommodations, housing, identity documents, harassment, and access to restrooms, showers, and locker rooms. The coalition knew that restroom protections had been adopted in regulations in other jurisdictions, but those provisions stopped short of mandating the creation of gender-neutral restrooms. The coalition was able to utilize the best provisions from other cities to propose DC regulations that were even stronger. The DC regulations, therefore, not only cover the right of a person to use the gendered public facility that accords with that person's gender identity, but also mandate that current single-occupancy gendered restrooms must be made gender-neutral.[6]

The coalition did decide, though, not to advocate for some provisions that may have been too controversial and might have delayed or derailed the process. For instance, the coalition desired a provision that employer-based health insurance plans must cover transition-related health care needs. However, the coalition decided that this change likely would provoke strong opposition from the business community and therefore was not feasible.

Community Outreach and Minimization of Opposition

The coalition needed to provide a show of support from the community for the amendment to the DC HRA but decided neither to utilize mainstream media for outreach nor to engage in a public education campaign outside the lesbian, gay, bisexual, transgender (LGBT) community. The coalition wanted to avoid provoking opposition from Congress or local conservative groups

The coalition did decide, though, not to advocate for some provisions that may have been too controversial and might have delayed or derailed the process.

during outreach efforts. As Everett Maroon, a coalition member, explained, "There was no public discussion about this. It wasn't in the [*Washington*] *Post*. It was in the [*Washington*] *Blade* a little. We basically kept it out because we didn't want to have a fight. We didn't want to have a public discussion on the validity of trans people. We just wanted the changes to go through and then move on from there" (Maroon 2008).

The coalition conducted its main outreach effort to the public at the 2005 Capital Pride events in June. The coalition decided that conducting outreach at Capital Pride would provide the best opportunity to garner support for the legislation from a friendly community. The coalition produced postcards that declared support for amending the DC Human Rights Act and asked individuals to sign them. By the time the amendment was introduced on 6 July 2005, the coalition had collected nearly 1,200 postcards and had hand delivered them to the DC Council.

The coalition also conducted community outreach by tapping into networks of friendly organizations and conducting education and outreach in the larger LGBT community. Coalition members attended meetings and contacted leaders of local organizations, such as the Gay and Lesbian Activist Alliance (GLAA), ACLU of the National Capitol Area (ACLU-NCA), and the Gertrude Stein Democratic Club, with the goal of gaining those organizations' support of the legislation. Organizations were asked to write formal comments during public comment periods and, if possible, testify at public hearings. When public hearings were eventually held, several organizations, including GLAA and the Task Force, testified in support of the amendment. Organizations also wrote in support during the public comment period on the regulatory language, including Metro DC PFLAG (Parents, Families, and Friends of Lesbians and Gays) and Us Helping Us.

Though the coalition reached out to friendly organizations early in the campaign, relations between the coalition, the ACLU-NCA, and GLAA became strained after the amendment had passed. The latter two organizations raised objections to the regulatory language late in the process of drafting the regulations.[7] The coalition was blindsided and frustrated by these objections but had to act quickly to reestablish united community support. The coalition met several times with the ACLU-NCA to work out concerns with the regulations. It was able to finalize new, and arguably stronger, language that all three organizations could support.

Strategic Political Communications

The coalition engaged in political communications with the government actors who would be involved in the 2005 amendment and subsequent regulations. The coalition knew that although the DC Council seemed generally supportive of antidiscrimination protections for transgender people, legislation had to be

introduced to the council, placed on the relevant legislative committee's agenda, and then submitted favorably from the committee back to the full council for a vote. The coalition understood that while Jim Graham would introduce the antidiscrimination bill, the "gatekeeper" would be Vincent Orange, the chair of the Committee on Government Operations, where the bill would be referred.

The coalition set up meetings with Orange's staff to discuss the legislation well before it was introduced. Coalition members knew that Orange was going to run for mayor in 2006, but he did not have a positive relationship with DC's LGBT community. Therefore, coalition members were strategic in their communications with Orange. Light explained:

> I am pretty sure that Orange didn't think that this bill was his top priority. If he wasn't running for mayor, I think this would have sat for a long time in his committee. He basically had nothing to offer the GLBT community to vote for him. We gave him this bill so he was able to put on all his commercials that he supported civil rights by introducing the gender identity expression amendment. He definitely used that when he went to GLBT conferences as a talking point. (Light 2008)

Orange decided to co-introduce the bill with Graham on 6 July 2005. It was named the Human Rights Clarification Amendment Act of 2005. The remaining eleven DC Council members signed on to cosponsor the legislation.

The act was then referred to Orange's committee. The committee submitted its favorable report to the council, which unanimously passed the Human Rights Clarification Amendment Act of 2005. Mayor Anthony Williams signed the act on 22 December 2005. The act was then transmitted for review by Congress. Congress took no action on the act, which then became law in DC on 8 March 2006.

Coalition members attended the CHR meeting in May 2005, more than seven months before the DC HRA amendment was passed. The CHR would be responsible for promulgating enforcement regulations for the new amendment, so the coalition approached the commissioners early in the campaign to begin advocating for the provisions they desired, such as protections in gendered public facilities. Coalition members also offered assistance with writing the regulations. In November 2008, one commissioner who chose to remain anonymous noted, "They discussed with us why they felt the legislation was needed and made a presentation to bring our attention to this issue so we were not caught unaware when the council passed the law. We knew what was coming, and that's the kind of advocacy we needed." When the law was passed, the CHR had already begun work on the regulations.

At the CHR meeting on 12 January 2006, the commission discussed the rule-making process for the enforcement regulations and created a committee to draft the regulations and to submit them to the full commission for review. Coalition members attended this meeting with the purpose of proposing the provisions the coalition wanted. The CHR invited Mottet of the Task Force, Craig Howell of GLAA, and Sadie Crabtree of the coalition to participate on the drafting committee. The drafting committee held meetings to craft the proposed regulatory language, with substantial work completed outside of regular commission meetings by the commission's Chief Hearing Examiner Neil Alexander, Mottet, and Crabtree. GLAA had sent in

recommendations to the chair of the commission via e-mail and did not participate otherwise in the drafting sessions.

Through the drafting committee, coalition members were able to be very ambitious in advocating for their desired provisions, including protections in public restrooms and other gendered public facilities. In December 2008, one commissioner who elected to remain anonymous noted of the decision to invite the coalition to participate:

> We knew very little about what all the issues were that transgender people face in the day to day, so it would have been very difficult, or stupid, to try to pursue the regulations without doing what we did. When doing the original regulations, it wouldn't have made any sense to just publish something and wait for comments because we didn't even know where to start.

In April 2006, the drafting committee presented a set of proposed regulations to the full commission. The next CHR meeting would be held on 11 May 2006, with time allocated for testimony on the proposed regulations from coalition members and the general public, followed by a vote on the final draft. Though the coalition knew the CHR was likely to pass the regulations, coalition members attended the meeting in order to demonstrate the transgender community's support and to counter any challenge to the regulations. Many coalition members testified about the harassment, discrimination, and other problems they had experienced because of their gender identity, including being harassed in public restrooms and having health problems caused by avoiding public restrooms altogether. No members of the general public attended the meeting.

In keeping with the strategy to not provoke opposition, the coalition and the commission agreed not to name or provide instructions for specific DC government agencies in the regulations, such as the Department of Corrections. The regulations were designed to provide blanket coverage of all DC agencies, which would all be subject to the regulations. The coalition and the CHR did not want to invite a fight from any DC agency by specifically naming agencies. Subsequently, no DC agency opposed the regulations until after they went into effect. The final rules were published on 27 October 2006, officially becoming part of the DC Municipal Regulations.

CONCLUSION

The antidiscrimination enforcement regulations in Washington, DC, are the first to address the discrimination and harm suffered by transgender and gender nonconforming people in public restrooms not only by protecting a person's right to use the restroom that accords with one's gender identity but also by creating more gender-neutral restrooms. These protections are especially notable given that "bathroom panic" campaigns have been used by opponents in a variety of jurisdictions to argue against antidiscrimination laws. Because DC's regulations are the strongest in the country, the key decisions and strategies employed by the activists and advocates involved in this particular policy success represent an example of an advocacy campaign that achieved a unique and notable success in the United States. Therefore, researchers studying the policy-making process around antidiscrimination protections in other jurisdictions, particularly in the area of gendered public facilities, may want to consider testing hypotheses based on the findings of this case study.

First, advocates created the Coalition to Clarify the DC Human Rights Act to provide the community-based organization necessary to launch a successful campaign for these protections in Washington, DC. It is possible that in any jurisdiction the work of activists and advocacy organizations is essential in securing legal protections in gendered public facilities for transgender and gender nonconforming people.

Second, in order to prevent mobilization of the opposition and bathroom panic campaigns, the coalition strategically selected which provisions to advocate for in legislation and which provisions to pursue in regulatory language. Advocates also purposefully kept their work out of the mainstream media and did not engage in general public education activities during their campaign. Securing legal protections in gendered public facilities in other jurisdictions may be related to the ability of proponents to minimize opposition mobilization and bathroom panic campaigns.

Third, the coalition harnessed the political climate and upcoming mayoral campaign of a key DC Council member to ensure that the proposed legislation was quickly considered and approved by the appropriate legislative committee. Gaining legal protections in gendered public facilities in other jurisdictions may rely on to the ability of proponents to take advantage of political opportunities and engage in persuasive communications with the government officials involved in the policy process.

Finally, the coalition established a collaborative relationship with the DC Commission on Human Rights and acted as a resource for the commission, providing needed expertise on the regulatory language. Success in securing protections in gendered public facilities may be related to the extent to which advocates and government can work collaboratively so that advocates can provide the technical expertise necessary to craft strong statutory or regulatory language.

Furthermore, future research should study the process of implementing antidiscrimination protections and assess the impact they have in people's lives. The strategies employed by the coalition may have been the right ones to achieve victory in the short term, yet some decisions would have negative implications during implementation of the regulations. Therefore, understanding the future impacts of strategic campaign decisions may help to refine the work of other similar campaigns in the future. For instance, the strategy not to engage in public education, which included businesses and business organizations, during the drafting of the regulations may have contributed to an attempt by the DC Chamber of Commerce in July 2008, in collaboration with the new director of the

In order to prevent mobilization of the opposition and "bathroom panic" campaigns, the coalition strategically selected which provisions to advocate for in legislation and which provisions to pursue in regulatory language.

DC Office of Human Rights, to remove the gender-neutral restroom provision of the regulations. This led to a long and hard-fought campaign to preserve the original text of the regulations and implement the gender-neutral restroom regulations with area businesses. Such lessons from the implementation of the regulations in Washington, DC, may therefore be instructive to the implementation of similar measures elsewhere.

REFERENCES

DC Trans Coalition. 2009. Our survey results. DC Trans Coalition blog, 8 November.

Light, Jeffery. 2008. Interview with author, Washington, DC, 17 November.

Maroon, Everett. 2008. Telephone interview with author, 10 November 2008.

Mottet, Lisa. 2012. E-mail communication with author, 3 February.

National Gay and Lesbian Task Force. 2011. Jurisdictions with explicitly transgender-inclusive nondiscrimination laws. Fact sheet, October.

———. 2012. State nondiscrimination laws in the U.S. Fact sheet, 20 January.

———, and Transgender Law & Policy Institute. 2008. Scope of explicitly transgender-inclusive anti-discrimination laws. Fact sheet, July.

Office of the Secretary of the District of Columbia. n.d. District of Columbia Municipal Regulations, Title 4, Chapter 8.

ENDNOTES

[1] For the purposes of this article, "transgender" and "gender nonconforming" describe people whose current gender identity or expression is different from those traditionally associated with their assigned sex at birth.

[2] For instance, see Goins v. West Group and Cruzan v. Special School District #1. Both cases originated in the state of Minnesota and leave unclear what protections, if any, transgender people have in gendered restrooms.

[3] Hunter's mother, Margie Hunter, filed a civil lawsuit against the District of Columbia in February 1996. In this case, Margie Hunter v. District of Columbia, et al., Civil Action No. 96-1338, DC Superior Court, the jury found that medical negligence likely caused Tyra Hunter's death and awarded Margie Hunter nearly $3 million in damages. The transgender community in DC was angered that the city appealed the ruling then settled for $1.75 million.

[4] Lisa Mottet, director of the Transgender Civil Rights Project of the National Gay and Lesbian Task Force, wrote a memo on 25 August 2004 entitled "Clarifying the District of Columbia Human Rights Act" that reviewed the status of current protections and provided detailed arguments for the adoption of explicit language to cover transgender people in the DC Human Rights Act.

[5] The U.S. District Court for the District of Columbia had found in Underwood v. Archer Management Services that a transsexual woman was protected against employment termination under the "personal appearance" provision of the DC Human Rights Act.

[6] These regulations do not change current law in the District of Columbia that allows establishments to segregate certain facilities by gender. The DC Municipal Regulations Rule 4-506.7 states: "Locker rooms, restrooms, and shower rooms may be lawfully segregated based on sex." In Hockaday v. United States, 359 A.2d 146, 151 n.10 (D.C. 1976), the court found that property owners have a right to segregate restrooms by gender.

[7] They argued that there may be potential First Amendment challenges based on provisions on harassment and hostile environment and that there may not be adequate protection of safety and privacy for non-transgender individuals in gender-segregated facilities.

A New Approach to Health Care Equality for Transgender People:

California's Insurance Gender Non-Discrimination Act

by Kellan Baker, Shannon Price Minter, Kristina Wertz, and Matthew Wood

This article outlines a new approach to protecting transgender people from insurance discrimination. Specifically, we describe the equality framework behind California's Insurance Gender Non-Discrimination Act, the first statewide law in the United States prohibiting gender identity discrimination in insurance. To improve compliance with the law, in early 2012 the California Department of Insurance issued regulations that provide guidance to insurance carriers about practices that constitute impermissible discrimination. We explore the role these regulations will play in improving access to insurance coverage for transgender Californians and also discuss the law's potential nationwide implications in the context of federal health care reform.

OVERVIEW OF THE PROBLEM: PERVASIVE DISCRIMINATION AGAINST TRANSGENDER PEOPLE IN ACCESS TO HEALTH CARE AND HEALTH INSURANCE

Transgender people in the United States face serious and often life-threatening discrimination in access to health care. Nationally, one in five transgender people report being refused medical care because of their gender identity or expression (Grant et al. 2011). In California, transgender people report high rates of discrimination in accessing a wide range of health care services. For example, 27 percent have been refused hormone therapy, 15 percent have been refused gender-specific care (such as pap smears for transgender men and prostate exams for transgender women), and 10 percent have been refused primary health care (Hartzell et al. 2009).

A major contributor to these alarming rates of discrimination against transgender people in health care is the fact that many health insurance plans, including Medicare, most state Medicaid programs, and many private insurance policies such as those offered through the Federal Employees Health Benefits Program, exclude coverage for treatments relating to gender transition. In some instances, these exclusions apply only to surgical treatments while permitting coverage of counseling and hormone therapy. In others, the exclusions are sweeping, excluding, for example, the coverage of any "services, drugs, or supplies related to sex transformations" (Government Employees Health Association 2012). Such exclusions are frequently expanded in practice to deny

transgender people coverage for basic health care services that are routinely covered for non-transgender people (Hong 2002).

Insurers often seek to justify these exclusions with the claim that treatments for gender transition are "experimental." While this may have been true in the past, today there is a wealth of data and clinical experience demonstrating the safety and efficacy of these treatments. As such, there is a strong and growing consensus among leading medical experts that treatments related to gender transition—including hormone therapy and gender confirmation surgeries—are medically necessary for transgender people. Major U.S. medical associations recognize that optimal health for transgender people requires access to the same health care services and benefits as non-transgender people and that discrimination on the basis of transgender status is unethical; some of these organizations include: the American Medical Association (American Medical Association House of Delegates n.d.); the American Psychological Association (American Psychological Association Council of Representatives 2008); the Endocrine Society (Hembree et al. 2009); the American College of Obstetricians and Gynecologists (American College of Obstetricians and Gynecologists 2011); and the World Professional Association for Transgender Health (WPATH 2008).

Moreover, in response to the growing understanding that exclusions targeting care for transgender people are based on prejudice rather than any sound medical foundation, an increasing number of companies are requiring insurers to remove these exclusions from the policies they offer to their employees (Human Rights Campaign 2010; Human Rights Campaign 2011).

CALIFORNIA'S INSURANCE GENDER NON-DISCRIMINATION ACT

In 2005, attorneys from the Transgender Law Center, Equality California, and the National Center for Lesbian Rights sought to address the pervasive discrimination against transgender people in California by drafting the Insurance Gender Non-Discrimination Act (IGNA). California law already prohibited discrimination by insurance companies and health care service plans on the bases of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age. IGNA amended the statute to explicitly protect transgender people by clarifying that the term "sex" includes gender identity. Then Governor Arnold Schwarzenegger signed the legislation in September 2005, and it took effect on 1 January 2006, making

There is a strong and growing consensus among leading medical experts that treatments related to gender transition—including hormone therapy and gender confirmation surgeries—are medically necessary for transgender people.

California the first, and thus far only, state in the country to prohibit insurance companies and health service plans from discriminating against transgender people.

The protections established by IGNA apply to all private health insurance policies and plans in California. The law adds a prohibition against gender identity discrimination to two different sections of the California Code: (1) the Knox-Keene Act, which applies to health care service plans and is enforced by the California Department of Managed Health Care (DMHC); and (2) the Insurance Code, which applies to life, disability, and health insurance and is enforced by the California Department of Insurance (CDI). The plans regulated by the DMHC are health maintenance organizations (HMOs), and those regulated by the CDI are preferred provider organizations (PPOs). Together, the plans affected by IGNA cover 30.8 million Californians (U.S. Census Bureau n.d.; Fronstin 2011). IGNA does not affect Medicare, which is governed by federal law. It also does not affect the benefits provided to California Medicaid recipients, who were already eligible to receive coverage for medically necessary treatments related to gender transition.

By prohibiting gender identity discrimination in insurance, IGNA sought to eliminate the full range of discriminatory practices used against transgender consumers by private insurance companies and health care service plans including but not limited to refusal to issue a policy to a transgender person; charging higher premiums without sound actuarial justification; refusal to cover medically necessary treatments, including gender-specific treatments such as pap smears or prostate examinations that would be covered for other people; and refusal to cover treatments related to gender transition when the same treatments are covered for other conditions. The State Senate report on the bill particularly highlighted the problems of health plans and insurers declining to enroll transgender applicants solely because of their transgender status and of transgender patients being denied sex-specific procedures such as pap smears or prostate exams. With regard to the latter, the report explained:

> [T]his problem occurs because while transgender enrollees may identify themselves as a certain sex, they may still need medical services typically given to members of the opposite sex only. For example, a transgender individual identifying himself as a man may still need gynecological services. A health plan that automatically denies coverage of gynecological services for men as inappropriate could then deny appropriate and medically necessary services for transgender enrollees. (Senate Committee on Banking, Finance, and Insurance 2005)

The law sought to address these problems not by mandating coverage of specific treatments or procedures but by adopting an equality framework. The equality framework regards coverage determinations based solely upon gender identity or a person's transgender status as unfairly discriminatory. This approach rejects the marginalization of transgender people and emphasizes that the health needs of this population are not qualitatively different from those of other people. For example, individuals may require hormone therapy for a variety of reasons, including an intersex condition or low production of testosterone or estrogen.

The premise of IGNA is that if a health plan covers hormone therapy for other persons and conditions, it cannot deny hormone therapy to a transgender person who needs it for purposes of gender transition. A similar analysis applies to reconstructive surgeries. If a health plan covers reconstructive surgeries for persons who require them due to illness or injury, it cannot deny reconstructive surgeries for transgender persons.

In principle, the equality framework has the virtues of being simple, clear, and direct. In practice, however, this approach poses a particular challenge: insurers and consumers must understand and apply its broad principles in a variety of contexts, including enrollment in plans and coverage of various treatments and procedures, without guidance from a list of mandated services and treatments. Moreover, the difficulty of changing entrenched bias against this population that persists in the insurance industry and society as a whole has made enforcement of IGNA challenging.

CONTINUING PROBLEMS OF DISCRIMINATION DESPITE IGNA'S ENACTMENT

In the seven years since IGNA was passed, both the strengths and the weaknesses of the equality framework have become apparent. On the one hand, the law has been a valuable tool for attorneys and transgender community members, and its application has resulted in the successful resolution of many individual claims of discrimination. On the other hand, many consumers are not aware of the law's protections, and many insurance companies do not fully understand their obligations under IGNA and have continued to engage in discriminatory practices.

There is no data on how effective the law has been, but anecdotal experience of community advocates and attorneys strongly suggests that unlawful insurance discrimination against transgender consumers in California is still widespread. This is likely due to a combination of factors: lack of knowledge among consumers and insurers that the law prohibits gender identity discrimination; uncertainty or misinformation among consumers and insurers about what IGNA requires; failure by insurers to recognize that certain practices, such as denying gynecological care to a transgender man or providing coverage for a hysterectomy for cancer but not for gender transition, are discriminatory; resistance among insurers to comply with the new law based on lingering bias against transgender people; and failure by the administrative agencies responsible for implementing the law to vigorously and consistently enforce its protections.

Consider the cases of three transgender people who have contacted the Transgender Law Center to address discrimination perpetrated by health care service plans since IGNA was enacted. Although all of these individuals were insured by health service plans (HMOs) administered by the DMHC rather than the CDI, the types of discrimination they faced are not unique to managed care providers, and these cases demonstrate the need both for IGNA and for regulations to clarify its protections.

"J" is a fifty-year-old transgender man whose health plan refused to provide coverage for a bone density scan. J has a family history of osteoporosis and vitamin D deficiency, and his physician requested the procedure. Despite this, the plan upheld the denial, finding that J did not meet its policy's criteria for a bone

density test on the basis of age or medical history (from a letter from the insurer to "J," 2010, on file with the Transgender Law Center).

In fact, J did meet the plan's age and medical history criteria, but he did not meet the plan's criterion related to sex, which provides coverage for this test for any female fifty years or older with a family history of osteoporosis and a vitamin D deficiency. J's request was denied solely because he had transitioned from female to male. The DMHC reversed the plan's decision on appeal. It recognized that the decision was based on bias relating to J's transition, finding, "the medical group incorrectly viewed your transitioning male status as a medical basis for its denial" (from a letter from the insurer to "J," 2011, on file with the Transgender Law Center).

In another case from April 2009, "K," a transgender man, was denied an insurance policy by another health care service plan. K was twenty-five-years-old and for the past thirteen years had been covered by his parents' policy, which had covered the prescription and administration of testosterone therapy. When K "aged out" of his parents' policy, he applied for an individual policy and was surprised to find that his transition had rendered him uninsurable. The denial letter stated as reasons that he (1) was "in the process of gender reassignment" and (2) had listed testosterone as a prescription medication (from a letter from the insurer to "K," 2009, on file with the Transgender Law Center).

As a healthy young man with no other risk factors, K is precisely the type of person insurers like to cover because he offsets older, less-healthy people in the risk pool. After K appealed the decision, the plan reconsidered and offered him a policy but one with no prescription drug coverage. Unfortunately, despite IGNA, the DMHC upheld the HMO's decision on appeal without further comment. In this case, the plan's refusal to offer K a policy with prescription drug coverage as a result of his testosterone usage was merely a proxy for his transgender status. Thus, the DMHC's approval of that refusal was based not only on misconceptions about the process of gender transition (many transgender people, like many non-transgender people, utilize hormone replacement therapy on an ongoing basis, but this does not mean they are always "in the process of gender reassignment") but also on overt discrimination against K as a transgender person. Medical misconceptions aside, the denial of coverage in this case was fundamentally based on K's male gender identity and his concomitant need for a testosterone prescription.

In the last case, "F," a fifty-five-year-old transgender woman, was denied coverage for genital sex reassignment surgery in December 2008. F's health insurance policy specifically excluded "transgender surgery," although it included coverage for her hormone replacement therapy. Because F needed a high dosage of estrogen to offset her body's unusually high natural production of testosterone, this increased her risk of stroke and other complications. Her doctor determined that this was not a safe or sustainable situation and recommended that she undergo an orchiectomy (removal of testicles). The exclusion in F's insurance policy unlawfully prohibited her from obtaining coverage for this procedure even though it would have been covered for other medically necessary reasons such as testicular cancer. The DMHC

upheld the denial without explanation, requiring F to pay out of pocket for care that would otherwise have been covered. Although the DMHC's decision directly contradicts IGNA's mandate of equal treatment, the agency appeared hesitant to enforce the law to override an express exclusion. This again reflects the need for more detailed regulations and vigilance on the part of advocates to ensure that the administrative agencies responsible for enforcing IGNA understand the law and fulfill its purpose.

NEW REGULATIONS ISSUED BY THE CALIFORNIA DEPARTMENT OF INSURANCE

In response to these recurring problems of discrimination and uneven enforcement of IGNA, advocates from the organizations that drafted the law urged both the DMHC and the CDI to adopt regulations providing specific guidance about what IGNA requires. In response, in January 2012, the CDI adopted regulations that spell out the requirements of the law in considerable detail. The DMHC is now considering similar regulations. It is not necessary for the DMHC to issue its own regulations to implement IGNA, but issuance of regulations by the DMHC would provide important additional guidance to all insurers regarding compliance with IGNA's requirements.

The new regulations issued by the CDI bring clarity, consistency, and fairness to the application of IGNA to PPOs and the other private plans governed by the CDI, and they set an important precedent for health care service plans governed by the DMHC. The regulations specify acts that constitute impermissible gender identity discrimination under the law. The regulations first define key terms, including actual and perceived gender identity, transgender person, and gender transition. The regulations then identify four types of prohibited discriminatory practices, including the following:

1. Denying, canceling, limiting, or refusing to issue or renew an insurance policy on the basis of an insured's or prospective insured's actual or perceived gender identity, or for the reason that the insured or prospective insured is a transgender person

2. Demanding or requiring a payment or premium that is based in whole or in part on an insured's or prospective insured's actual or perceived gender identity, or for the reason that the insured or prospective insured is a transgender person

3. Designating an insured's or prospective insured's actual or perceived gender identity, or the fact that an insured or prospective insured is a transgender person, as a preexisting condition for which coverage will be denied or limited

4. Denying or limiting coverage, or denying a claim, for services including but not limited to the following, due to an insured's actual or perceived gender identity or for the reason that the insured is a transgender person:

- ***a.*** Health care services related to gender transition if coverage is available for those services under the policy when the services are not related to gender transition, including but not limited to hormone therapy, hysterectomy, mastectomy, and vocal training
- ***b.*** Any health care services that are ordinarily or exclusively available to individuals of one sex when the denial or limitation is due only to the fact that the insured is enrolled as belonging to the other sex or has

A substantial number of transgender people stand to gain coverage under the ACA, many for the first time.

undergone, or is in the process of undergoing, gender transition

These regulations mark an important new milestone in the quest to normalize and integrate health care for transgender people into a framework that emphasizes equality and fairness in health insurance coverage. Consistent with IGNA's mandate, they identify the most common types of discriminatory practices directed at transgender people and provide clear guidance to insurance companies about how to avoid them.

POTENTIAL NATIONWIDE IMPLICATIONS OF CALIFORNIA APPROACH IN THE CONTEXT OF NATIONAL HEALTH CARE REFORM

California's enactment of IGNA, including the new regulations issued by the CDI, has taken on increased national significance in light of the Patient Protection and Affordable Care Act (ACA). A significant focus of the ACA, which was signed into law by President Barack Obama in March 2010, is reform of the private insurance market and the expansion of health insurance coverage to those who are uninsured.

Because of the high degree of discrimination and poverty experienced by transgender people, they are more likely than the general population to be uninsured (Grant et al. 2011). Thus, a substantial number of transgender people stand to gain coverage under the ACA, many for the first time. In order for the transgender population to maximally benefit from the ACA, however, the regulations developed to implement the law's insurance reforms must effectively address the range of deeply entrenched insurance industry practices described earlier that are commonly used across the country to deny coverage to transgender people. In this effort, California's new regulations for the Insurance Gender Non-Discrimination Act provide an excellent road map for other states and for the federal government in implementing the ACA.

One of the primary vehicles for insurance coverage expansion under the ACA is the network of state-based health insurance exchanges that will become operational in 2014. According to the ACA, the exchanges may only sell plans that are certified as qualified health plans (QHPs). Importantly, the primary component of QHP certification is that all QHPs must cover the categories of minimum essential benefits outlined in the law. Plans sold outside the exchanges may also seek certification as QHPs, but certification is not mandatory.

In December 2011, the U.S. Department of Health & Human Services (HHS) released draft guidance proposing to give each state the flexibility to choose one of four options as its benchmark for defining the minimum essential benefits. These options are as follows: (1) one of the three largest small group plans in the state by enrollment; (2) one of the three largest state employee health plans by enrollment; (3) one of the three largest federal employee health plan options by enrollment; or (4) the largest HMO plan offered in the state's commercial market by enrollment (Center for Consumer

Information and Insurance Oversight 2011).

This news is mixed for transgender advocates. On the one hand, many have pushed HHS to set a nationwide minimum standard for the essential benefits that includes nondiscrimination mandates and coverage for transgender people regardless of where they live. The four-option plan increases the likelihood that benefits will vary significantly from state to state, potentially widening already substantial disparities between benefits and protections for transgender people in different states.

On the other hand, the HHS guidance recognizes that many proposed benchmark plans do not currently cover all of the benefit categories required by the ACA. Many states will thus need to require their chosen benchmark plan to update its benefits design and conditions of coverage before it can serve as a minimum standard for the essential benefits. During the process of updating a proposed benchmark plan to bring it into conformity with the ACA, these states may be able to additionally incorporate nondiscrimination protections in essential benefits coverage, including protections on the basis of gender identity, and to expressly prohibit exclusions that would prevent transgender people from accessing any essential benefit. In the case of California, explicitly incorporating the fundamental premise of the Insurance Gender Non-Discrimination Act into the state's essential benefit benchmark would simply require plans offering the essential benefits to cover all essential services for transgender people that they cover for non-transgender people. Such a step would substantially advance IGNA's ongoing progress toward eliminating unfair discrimination against transgender Californians in the state's insurance market.

It would also anticipate a major advance in nondiscrimination protections for transgender people that may occur under the ACA. Specifically, ACA Section 1557 applies existing U.S. civil rights statutes, such as the Civil Rights Act, the Americans with Disabilities Act, and the Rehabilitation Act, to all federally funded or supported health programs or activities, including the exchanges and the essential benefits. As of January 2012, HHS has not yet issued regulations clarifying its understanding of the full scope of the protections offered by Section 1557. However, judicial precedent and a recent trend in Equal Employment Opportunity policies across a number of federal agencies, including HHS, indicate that HHS may interpret the protections against discrimination on the basis of sex offered by Title IX of the Civil Rights Act to include gender identity. This would effectively prohibit the exchanges in every state from establishing an essential benefits standard that invokes gender identity as a pretext to deny any essential benefit or service to a transgender person.

Thus, all states may soon be grappling with the transgender equality framework captured in IGNA. With California leading the way, the implementation of ACA Section 1557 and the essential benefits have the potential to build a powerful wave of momentum across the country to eradicate transgender exclusions from private and public insurance programs. The road is long and much remains uncertain, but landmarks such as California's Insurance Gender Non-Discrimination Act are pointing in the right direction.

REFERENCES

American College of Obstetricians and Gynecologists. 2011. Health care for transgender individuals. Committee Opinion, Number 512: Committee on Health Care for Underserved Women, the American Congress of Obstetricians and Gynecologists.

American Medical Association House of Delegates. n.d. Resolution 122 (A-08): Removing financial barriers to care for transgender patients.

American Psychological Association Council of Representatives. 2008. APA policy statement: Transgender, gender identity, & gender expression non-discrimination, August.

Center for Consumer Information and Insurance Oversight. 2011. Essential health benefits bulletin, 16 December.

Fronstin, Paul. 2011. California's uninsured. California Healthcare Foundation.

Government Employees Health Association. 2012. A fee-for-service (high and standard option) health plan with a preferred provider organization. Government Employees Health Association, Inc. Benefit Plan.

Grant, Jaime M., Lisa A. Mottet, and Justin Tanis. 2011. Injustice at every turn: A report of the National Transgender Discrimination Survey. National Center for Transgender Equality and National Gay and Lesbian Task Force.

Hartzell, E. et al. 2009. The state of transgender California: Results from the 2008 California Transgender Economic Health Survey. San Francisco: Transgender Law Center.

Hembree, Wylie C. et al. 2009. Endocrine treatment of transsexual persons: An endocrine society clinical practice guideline. Journal of Clinical Endocrinology & Metabolism 94(9): 3132-3154.

Hong, Kari E. 2002. Categorical exclusions: Exploring legal responses to health care discrimination against transsexuals. Columbia Journal of Gender & Law 11: 88-126.

Human Rights Campaign. 2010. Corporate equality index 2011: Rating American workplaces on lesbian, gay, bisexual and transgender equality. Washington, DC: Human Rights Campaign.

———. 2011. Corporate equality index 2012: Rating American workplaces on lesbian, gay, bisexual and transgender equality. Washington, DC: Human Rights Campaign.

Senate Committee on Banking, Finance, and Insurance. 2005. AB 1586, Bill analysis. Hearing date, 29 June.

U.S. Census Bureau. n.d. California QuickFacts. State and County QuickFacts.

WPATH. 2008. WPATH clarification on medical necessity of treatment, sex reassignment, and insurance coverage in the U.S.A. World Professional Association for Transgender Health (WPATH).

Addressing LGBT Poverty Through Regulatory Change in the Obama Administration

by Christian Pangilinan

Comparatively little attention has been given to an important development that has taken place during the Obama administration: new regulations by federal agencies that prohibit discrimination in the provision of services to lesbian, gay, bisexual, and transgender (LGBT) people. This article examines the possible impact that these administrative changes may have on an issue of increasing importance to the LGBT community: LGBT poverty. While the new regulations are positive developments, they will have only a limited impact on ameliorating LGBT poverty. Lawyering for social change through the administrative process is constrained by the need to accommodate the federal legislative limitations, including the still operative Defense of Marriage Act.

The first two years of the Obama administration saw widely publicized shifts in judicial and legislative attitudes toward lesbian, gay, bisexual, and transgender (LGBT) people.

In July 2010, two opinions from a Massachusetts federal court held the Defense of Marriage Act (DOMA), which defines marriage to be between a man and a woman for federal purposes, unconstitutional. The two cases were *Massachusetts v. U.S. Dep't of Health & Human Servs.* (2010), where it was held that DOMA violated the Tenth Amendment and exceeded Congress's power under the Spending Clause, and *Gill v. Office of Personnel Management* (2010), in which it was held that DOMA violated the Equal Protection Clause. In August 2010, *Perry v. Schwarzenegger* (2010) invalidated a California state ban on same-sex marriage. In September 2010, *Log Cabin Republicans v. United States* (2010) declared invalid the infamous "Don't Ask, Don't Tell" (DADT) law, which allowed the military to discharge members of the armed services on the basis of their sexual orientation. In December 2010, the U.S. Senate followed the House in voting to repeal the DADT statute, and it was signed into law that same month by President Barack Obama. These events received extensive media scrutiny.

Beyond the actions of Congress and the courts, the executive branch has also engaged in pro-LGBT activism, notably the administration's decision not to defend DOMA in court. Further, LGBT advocacy groups have not restricted the forums of their advocacy to the courts and to Congress. Indeed, the National Gay and Lesbian Task Force launched an initiative before the 2008 election "to push for concrete federal administration policy and regulatory changes directly benefiting the lives of lesbian,

gay, bisexual and transgender people" (National Gay and Lesbian Task Force 2011). In addition to trying to influence legislation, win rights in court, and invalidate existing laws, advocates also seek changes that benefit LGBT people in the way that government administers laws.

The use of law to change relationships of power or to change social attitudes (Minow 1996, 289) is more often associated with judicial decisions like *Lawrence v. Texas*, invalidating a state prohibition on sodomy, or with civil rights legislation than with the issuance of regulations or guidance documents that implement or interpret the law. Litigation and legislative action have overshadowed efforts to produce change through "administrative lawyering," a term that refers here to activity affecting the administration of government or the way the government interprets and applies law. Legislation usually requires and empowers the executive branch to create rules and regulations in order for the laws to be administered. Hence, the rule-making process, which requires agencies to interpret the laws, is an arena for promoting the administration of the law in a way that benefits LGBT people. As this article illustrates, advocates and agencies are working together to advance the welfare and equality of LGBT people through administrative and regulatory action.

This article represents a first effort to examine regulatory change during the Obama administration in relation to a pressing issue within the LGBT community: poverty. An increasing volume of research suggests that poverty is a major problem for LGBT people. Examining regulatory change with regard to how it might or might not impact poverty may identify where regulatory change can provide concrete benefits and where it cannot. Looking at administrative lawyering through the lens of LGBT poverty may then identify the potential and the limits of lawyering for social change through the administrative process.

This article begins by summarizing recent studies of LGBT poverty. It then explains why administrative law might not have been seen as an avenue for social change in the past but also describes how advocacy groups have started to use executive agencies as a means of pursuing change. The article next provides an overview of administrative change during the Obama administration with a focus on two instances of informal rule making that extended nondiscrimination rules to LGBT people. Finally, the article discusses the legal and practical limitations that apply to pursing positive developments in administrative law for LGBT persons. While the new rules are likely to survive legal challenge, they are also limited measures that only provide protections against discrimination. A focus on nondiscrimination alone does not sufficiently address the needs of the LGBT poor. Nonetheless, the article also provides guidance on pursuing administrative change to benefit the LGBT community.

LGBT POVERTY

A frequent stereotype applied to the LGBT community is that it is affluent and not subject to the poverty or political powerlessness of other minority groups (Albelda et al. 2009, iii; MAP and SAGE 2010a, i-ii). Indeed, in *Romer v. Evans* (1996), Justice Antonin Scalia explicitly referred to LGBT people as politically powerful with "high disposable income." Recent research on poverty shows that

this stereotype is not true. In 2009, the Williams Institute at the University of California, Los Angeles, released the first detailed report on gay, lesbian, and bisexual poverty in America. The report revealed that perceptions of comparative LGB affluence are incorrect; LGB couples or individuals are just as or more likely to experience poverty (Albelda et al. 2009, 1). Among other findings, the report indicated that child poverty rates for children with LGB parents are twice as high as those for heterosexual married couples (Albelda et al. 2009, 2, 6) and that LGB individuals are more likely to be poor than heterosexuals (Albelda et al. 2009, 6). Indeed, while 9.3 percent of heterosexual women are poor, 24.1 percent of LGB women are poor (Albelda et al. 2009, 6).

A report by the Movement Advancement Project (MAP) and Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders (SAGE) indicates that LGBT elders are also less well-off financially (2010a). Specifically, the report says that LGBT elders are more likely to live in poverty than other elders (MAP and SAGE 2010a, ii). The report states that elder gay couples have a poverty rate of 4.9 percent and elder lesbian couples have a poverty rate of 9.1 percent while elder different-sex couples have a lower poverty rate of 4.6 percent (MAP and SAGE 2010a, 11). The report also found that many LGBT elders identify financial problems as a major concern (MAP and SAGE 2010a, 12). Aside from government policies that have a negative impact on LGBT elder couples, LGBT elders continue to live with the implications of long-term social disapproval. As the MAP/SAGE report discusses, LGBT elders have lived through times when being LGBT was considered a psychiatric disorder, a criminal activity, and immoral (2010a, 4). The lives of LGBT elders have therefore been disrupted by widespread social prejudice, negatively impacting their ability to earn and to build the social networks others may rely upon for support in their later years (MAP and SAGE 2010a, 4-5). A resulting distrust in public institutions also means that older LGBT persons are less likely to access public services like housing assistance and food stamps (MAP and SAGE 2010a, 5).

LGBT youth also face a higher risk of poverty and homelessness. Although estimates vary widely, most research indicates that LGBT youth constitute a disproportionately large percentage of homeless youth (Ray 2006, 13-14). And for LGBT youth, sexual orientation or gender identity is both a contributing factor to homelessness and a potential source of abuse and discrimination. Many young people leave or are forced out of their homes after coming out (Ray 2006, 16-17). Some suffer assault after their parents learn of their sexual orientation or gender identity (Ray 2006, 18). And, upon leaving home, LGBT youth become vulnerable to suffering from depression and loneliness, alcohol and drug abuse, criminal victimization, and discriminatory treatment from shelter and care providers (Ray 2006, 1-6).

Finally, transgender individuals face a higher risk of poverty than the general population. This year, the National Center for Transgender Equality and the National Gay and Lesbian Task Force released a report on discrimination against transgender persons (Grant et al. 2011). The publication reported on the findings of the 7,500-respondent National Transgender Discrimination Survey, which indicated that transgender people are almost four times more likely than the

general population to have a household income of less than $10,000 a year (Grant et al. 2011, 2). Respondents reported experiencing unemployment at twice the rate of the general population, with those who were also members of racial minorities experiencing unemployment at four times the national rate (Grant et al. 2011, 3). Respondents also reported a high rate of unequal treatment or harassment by government officials (Grant et al. 2011, 5). Moreover, transgender persons had lower incomes than the general population regardless of their level of educational attainment (Grant et al. 2011, 33).

Of course, contributory factors to LGBT poverty also include official public discrimination. Inequalities are mandated, for instance, in the DOMA's restriction of the definition of marriage in federal law and the exclusion of sexual orientation as a prohibited cause for employment discrimination in federal law. For LGBT couples, the restriction of the definition of marriage has tangible negative economic effects. In *Gill v. Office of Personnel Management*, the plaintiffs complained that they had been denied a host of federal benefits that would be available to persons presently in or who had been in different-sex marriages. These benefits include the ability to obtain federal health coverage under the Federal Employees Health Benefits Act for a same-sex spouse, the ability to obtain dental and vision insurance coverage, access to retirement benefits and Social Security survivor benefits, and the ability to file a joint tax return. Particularly relevant to LGBT elders, the Medicaid exemption that allows a healthy partner in a marriage to be able to retain significant assets while the other qualifies for long-term care does not apply, meaning that both partners must impoverish themselves so that one may qualify for expensive long-term care (MAP and SAGE 2010b). Throughout their lives, LGBT people face official discrimination that also contributes to economic hardship.

LGBT WELFARE AND THE ADMINISTRATIVE STATE

Social Change and the Administrative State

The rise of the administrative state is most associated with the regulation of economic life (Novak 2010). New Deal agencies such as the National Labor Relations Board and the Securities and Exchange Commission reflected a "faith in the ability of experts to develop effective solutions to the economic disruptions created by the market system" (Rabin 1986, 1266-1267), as well as efforts to produce social change in addition to economic regulation of industry. President Franklin Roosevelt's Executive Order No. 8802 (1941), for instance, prohibited discrimination in employment in defense industries or in government on the grounds of "race, creed, color, or national origin." Civil rights legislation from the Great Society and afterward follows a similar pattern of allocating to various federal agencies the mandate and authority to change the structure of American society.

Discussions of administrative law and social change are limited even though scholarship on the judiciary and social change or of "judicial activism" is substantial (Chayes 1976; Horowitz 1977; Fiss 1979; Sandler and Schoenbrod 2003). Administrative law has not been studied as a medium for advancing social ends because of at least two factors. First, the increasing prominence of the regulatory

LGBT advocates have made administrative and executive action a forum for pursuing change.

state notwithstanding, scholarly attention was largely diverted from whether there was a need for a regulatory state toward what Judge Richard Posner refers to as the stuff of the "domestication" of administrative law, matters like the scope of statutory agency discretion and how well an agency had to explain its decisions (Posner 1997, 954; Rabin 1986, 1262-1265). Second, administrative actors were seen primarily as neutral actors in social debates until the 1960s—implementers of legislation rather than primary actors in social reform themselves (Shapiro 1983, 1495-1500; Strauss 1996, 755-756). This view has shifted toward one of agencies as political agents subject to interest group influence (Strauss 1996, 755-756), but much of the scholarship is focused on influence by industry (Seidenfeld 1992, 1565-1570).

Nevertheless, LGBT advocates have made administrative and executive action a forum for pursuing change. As mentioned earlier, the National Gay and Lesbian Task Force's New Beginning Initiative has the express mission of pursuing "concrete federal administration policy and regulatory changes directly benefiting the lives of lesbian, gay, bisexual and transgender people" (2011). The initiative and its partner organizations developed a list of policy priorities that they shared with the incoming administration's transition team. The list of state accomplishments indicates that LGBT groups have not been reluctant to seek to advance their causes administratively.

Several reasons explain the decision to extend advocacy efforts to the administrative setting in addition to legislative and judicial ones. The most obvious is the openness of the Obama administration, which has encouraged LGBT advocates to reach out to the executive branch. Another is the recognition, most notably by Elena Kagan, that presidents can use agencies to effectuate regulatory policy without that necessarily meaning deregulation alone (Kagan 2001, 2248-2249). The Clinton administration, Kagan argued, made the agencies "more and more an extension of the president's own policy and domestic agenda" (Kagan 2001, 2248-2249). In line with that view, the Obama administration appeared ready to assert similar authority over agencies (Kerwin and Furlong 2010, 20-21). Finally, the Supreme Court's administrative law jurisprudence has increasingly given courts less leeway to overturn agencies' interpretations of the laws that they administer, giving agencies more power to interpret them progressively (Eskridge et al. 2000, 322-320). In particular, the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council* (1984) required courts to refrain from invalidating regulations when the underlying legislation was "silent or ambiguous" and the agency's interpretation of it was reasonable. The Chevron-deference standard left statutes open to interpretations that accommodate LGBT interests so long as the statutes were silent as to their application to LGBT people.

Administrative Change in the Obama Administration

Since taking office, the Obama administration's most prominent actions with respect to the welfare of LGBT people have supported basic rights against discrimination and against violence. In October 2009, Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expanded the coverage of federal hate crimes law to include crimes motivated by sexual orientation and gender identity, and the Ryan White HIV/AIDS Treatment Extension Act of 2009, which repealed a ban on travel into the United States by noncitizens with HIV and extended federal funding for HIV treatment. In December 2010, the administration and its congressional allies successfully repealed the "Don't Ask, Don't Tell" law, which had permitted the dishonorable discharge of service members who were gay or lesbian.

In addition to these legislative efforts, the Obama administration has initiated or completed a number of agency and executive actions concerning LGBT welfare that have already eclipsed those of the two full terms of the preceding Bush administration.[1] The most prominent include the administration's decision not to defend the Defense of Marriage Act in court and the nominations of openly LGBT individuals to judicial and other posts. Yet preceding these actions, clear indications existed that the administration intended to pursue a variety of avenues to advance LGBT welfare. In one proclamation, President Obama made no distinction between legislative and administrative action, placing equal benefits for LGBT federal employees within the same category of actions as the repeal of DOMA and the passage of a nondiscrimination act (Presidential Documents 2010a).

According to President Obama, congressional efforts like the repeal of "Don't Ask, Don't Tell" needed to be combined with administrative actions in order to "renew our commitment to the struggle for equal rights for LGBT Americans and to ending prejudice and injustice wherever it exists" (Presidential Documents 2010b). In several areas, the administration has either initiated rule making that interprets statutes in a way that protects LGBT people, or, where rule making was unnecessary, issued new or clarified existing guidelines to better include LGBT persons in regulations prohibiting discrimination. As mentioned above, this includes when the president issued a memorandum to the heads of executive agencies in June 2010 ordering the extension of benefits to the same-sex partners of federal employees (Presidential Documents 2010a). While the memorandum acknowledged that legislative action would be necessary to "provide full equality to LGBT Federal employees," it also stated that agencies had identified "a number of benefits that can be extended under existing law." Since then, rule making to implement the president's order has begun. The next section examines two instances of rule making to gauge the success of these efforts.

CASE STUDIES OF RESPONSES TO REGULATORY CHANGE: HHS AND HUD

HHS: Visitation Rights and Advance Directives

In April 2010, the president directed the secretary of the Department of Health & Human Services (HHS) to initiate rule making to ensure visitation rights for

LGBT people in hospitals that participate in Medicare or Medicaid and to ensure respect for LGBT people's advance directives (Presidential Documents 2010c). A lack of visitation rights for same-sex partners or a failure to recognize same-sex partners as patients' representatives have led to the exclusion of same-sex partners from their partners' bedsides or hospitals, overlooking patient wishes (MAP and SAGE 2010a, 40). Following the president's directive, HHS initiated informal rule making to ensure patients' visitation rights (Presidential Documents 2010d). Informal rule making, also known as "notice and comment" rule making, requires an agency, at a minimum, to provide notice of a proposed rule in the *Federal Register*, the opportunity for interested persons to participate in the rule-making process through written submissions, and the publication of the final rule not less than thirty days before its effective date.[2] In its notice, HHS proposed changes to existing conditions of participation for hospitals that participate in Medicare or Medicaid: hospitals would be required to have written policies and procedures regarding patient visitation rights and would have to inform patients or their representatives of their right to visitation with a requirement that hospitals expressly inform patients of their right to receive visitors, including same-sex domestic partners (Presidential Documents 2010d).

Of the seven-thousand comments received by HHS on the proposed rule, only a few comments were negative. Apparently no commenters disagreed that HHS either lacked the authority to propose or adopt a rule that forbade discrimination on the basis of sexual orientation or gender identity in this context or that it would otherwise be wrong for HHS to forbid such discrimination. According to HHS, the negative comments only expressed the views that there was no need for the proposed rule or that requiring further disclosures of patients' rights would increase costs and administrative burdens. Moreover, many commenters expressed support for HHS at having adapted to changed social circumstances. The final rule came into effect on 18 January 2011.

Minimal opposition to HHS's rule making shows that administrative efforts may be a successful means to directly advance LGBT welfare. Yet the success in this instance could be attributable to anti-LGBT groups' lack of awareness of the regulatory proposal and a resulting failure to organize against it, or perhaps to the fact that the rule focused specifically on hospital visitation, an area in which LGBT couples may enjoy relatively more public support than on other policy questions. The success may also be attributable to the wide scope of the regulatory proposal, which went beyond extending nondiscrimination rules to LGBT people. Although the proposed rule contained particular protections for LGBT people, it was also directed toward people with disabilities and to all patients' friends or unmarried partners. Prior to the new rule, no HHS regulation expressly protected the right of patients to visitation (Presidential Documents 2010d). By embedding protections for LGBT people within a general rule that provided greater protection for all persons, HHS may have avoided a negative response to its rule making. Hence, the success of the HHS rule does not indicate that rule making with positive implications for LGBT people will go unopposed if it is solely aimed at LGBT people.

If embedding nondiscrimination provisions in rules that affect all persons deflects opposition to these provisions covering LGBT persons, then rule making with a sole focus on extending protections for LGBT people might encounter greater resistance.

HUD: Nondiscrimination in HUD Programs

If embedding nondiscrimination provisions in rules that affect all persons deflects opposition to these provisions covering LGBT persons, then rule making with a sole focus on extending protections for LGBT people might encounter greater resistance. Rule making by the Department of Housing and Urban Development (HUD) with a sole focus on extending antidiscrimination rules to LGBT people has not, however, encountered much opposition or publicity, and the announcement that HUD was engaging in the rule making elicited only minor opposition.[3]

HUD formally provided notice of the proposed rule in January 2011 (Presidential Documents 2011). Providing a more detailed factual basis for the rule making than HHS provided in its notice, HUD argued that increasing evidence, namely reports from the Michigan Fair Housing Center and the National Center for Transgender Equality, had shown that "LGBT individuals and families do not have equal access to housing" (Presidential Documents 2011). In addition, HUD noted that more localities had moved to prohibit discrimination on the basis of sexual orientation or gender identity and that Congress had passed the Matthew Shepard Act. The proposed rule prohibits "owners and operators of HUD-assisted housing or housing whose financing is insured by HUD" from asking about the sexual orientation or gender identity of housing applicants. The rule also specifies that eligible families may participate in HUD programs regardless of sexual orientation or gender identity. HUD argued that it could create a nondiscrimination provision because it was not required to employ a restrictive statutory definition of "family." The 1937 statute on which the agency had previously based its definition of "family" did not limit the term to heterosexual couples or individuals (42 U.S.C. 1437a §3(b)(3)(B)). In practice, HUD noted, it had already allowed two persons living together to be considered a family regardless of sexual orientation.

CHALLENGES AND STRATEGIES AHEAD FOR ADMINISTRATIVE EFFORTS

The Limits of Administrative Lawyering for Social Change

Legal Limitations

The enforcement of the new rules discussed above merits additional scrutiny. Attempts at enforcement risk legal challenges. For instance, although the majority of comments to HUD's proposed rule were positive, it did prompt one comment that suggests future challenges to pro-LGBT administrative efforts. The United States Conference of

Catholic Bishops (USCCB) opposed HUD on the grounds that the agency had no statutory basis to create a nondiscrimination rule that included sexual orientation or gender identity (United States Conference of Catholic Bishops 2011, 1).[4] USCCB noted that no statute establishes a "general policy of forbidding discrimination based on 'sexual orientation,' including any such policy in federal housing programs." Rather, it argued, DOMA provided the applicable congressional mandate and the proposed rule undermined its requirement that "the federal government treat only different sex unions as 'marriage.'" The comment indicates that an avenue of attack upon administrative efforts will be that they exceed an agency's statutory authority. Specifically, challenges may argue that an agency has acted outside the bounds of its authorizing statute or acted in contravention of the express congressional mandate against recognizing same-sex marriage in DOMA.

Such challenges would have some legal foundation. The Supreme Court has made clear that the delegation of discretion to agencies "is not a roving license to ignore the statutory text . . . but a direction to exercise discretion within defined statutory limits" (Massachusetts v. EPA 2007). The Court has also made clear that, in interpreting the scope of an agency's discretion, it is important to consider how the "meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand" (FDA v. Brown & Williamson Tobacco 2000). Given that the Republican-controlled House of Representatives has retained counsel to defend DOMA, it is unlikely to repeal the law anytime soon. DOMA sets a requirement that agencies constrain their interpretation of the word "marriage" to legal unions between two people of different sex. Rules that provide equal benefits to families or to couples of the same sex may arguably run counter to congressional will.

Counterarguments exist, for example, that agencies making rules protecting LGBT people is not itself cause for a legal challenge to the agencies' actions, provided the agency can offer a reasoned explanation for its action including a factual and legal basis (FCC v. Fox Television 2009). The new research on LGBT poverty or LGBT discrimination may provide that factual basis, and HUD has already incorporated that research into proposed rule making as a basis for its proposed rule (Presidential Documents 2011). Congress has also acted since the beginning of the Obama administration to repeal "Don't Ask, Don't Tell" and to incorporate sexual orientation and gender identity into the list of protected characteristics under federal hate crimes law. This recognizes that LGBT people deserve legal protection.

Another argument is that, while DOMA provides a limitation on what kind of marriages the federal government can recognize, proposed rules such as that of HUD do not per se redefine marriage but, at most, redefine family. And in that case, HUD's proposed rule making contains a strong argument that the agency has been empowered by the breadth of the statutory text with respect to "family" to allow the word to include same-sex relationships. Under the Chevron-deference standard, the HUD rule stands little chance of judicial invalidation especially since HUD can argue that

same-sex partners can constitute families without being recognized as spouses.

Nonetheless, until DOMA is repealed or definitively deemed unconstitutional, administrative rule making will likely be unable to expressly act whenever an enabling statute relies on the word "marriage" or "spouse." This also speaks to a significant legal limitation to the use of administrative means to pursue change to benefit LGBT people. Administrative agencies cannot rewrite their statutory mandates. They can create rules that address LGBT poverty only when their enabling statutes permit them. Worse, should a future Republican Congress and president amend existing law or write new laws that expressly do not apply to LGBT individuals or families, the agencies would have little power to interpret the statutes otherwise.

Practical Limitations

From the perspective of LGBT advocates, the rule making by HUD and HHS represents a positive development. HHS rules about visitation require hospitals to announce to every patient that visitation cannot be restricted on the basis of sexual orientation and gender identity, which may dissuade LGBT people from generally fearing discrimination in the provision of services. As previously noted, LGBT elders, for instance, rely less on services like food stamps and housing assistance out of distrust (MAP and SAGE 2010a, 5). HUD antidiscrimination rules may help to address housing discrimination against LGBT people. A report from California has documented that one in five respondents to a survey on gender identity discrimination has been denied housing because of gender identity (Davis and Wertz 2010, 477-478).

Yet, the new regulations are also limited measures that cannot fully address LGBT poverty. The HUD and HHS rules focus on nondiscrimination: LGBT persons or couples or families are not to be excluded on the basis of sexual orientation or gender identity. But as one comment to the HUD rules emphasizes, more would need to be done to benefit LGBT people than just enacting nondiscrimination rules. The National Fair Housing Alliance's comment points out that the existence of nondiscrimination rules is only the beginning of efforts to ensure access to housing; for example, the Fair Housing Act already forbids racial and other kinds of discrimination but it did not end discrimination on those grounds (National Fair Housing Alliance 2011). Rather, enforcement and "education and outreach" to "make people aware of discrimination and to prevent discrimination" was also necessary. HUD has to do more than just proscribe discrimination; the agency also has to engage in affirmative efforts to ensure that LGBT persons have housing.

As sensible as the National Fair Housing Alliance's comment is, there is a pragmatic barrier to carrying out affirmative efforts to alleviate LGBT poverty. The publication of efforts to advance LGBT welfare runs the risk of political backlash from conservative groups or from Congress that would threaten to derail new rule making. This was the case with the military's policy of discrimination against gays and lesbians during the Clinton administration. Before "Don't Ask, Don't Tell," the policy of excluding gays and lesbians from the military was not statutory and could have been revoked by executive action (Gardina 2009, 241). But when President Clinton told his secretary of defense to prepare an

Until DOMA is repealed or definitively deemed unconstitutional, administrative rule making will likely be unable to expressly act whenever an enabling statute relies on the word "marriage" or "spouse."

order to end the policy, Congress vehemently opposed the move, eventually leading to "Don't Ask, Don't Tell," which would take years to repeal (Gardina 2009, 241-242; Halley 1999, 19-23). Publicizing administrative efforts to create affirmative obligations ensuring access to LGBT persons and improving LGBT welfare could similarly lead to adverse congressional attention (Feldblum 2002, 166-167).

In addition, nondiscrimination provisions alone are unlikely to end LGBT poverty. Certainly, nondiscrimination provisions that incorporate race have not ended poverty for people of color (Zietlow 2008, 354). And in California, despite the passage of gender identity nondiscrimination laws, poverty and homelessness continue to affect transgender people at an alarming rate, leading to calls for more "education, health, and job training and placement programs" (Davis and Wertz 2010, 472-473).

Moreover, as Alan Freeman identified, American antidiscrimination law has evolved toward the assumption of a "perpetrator perspective" in which discrimination is perceived only when it is "active" or intentional rather than when it is structural (Freeman 1978, 1052-1057). Many of the most significant difficulties facing LGBT persons may be structural as well as intentional. Exclusion of LGBT people from social institutions and fear of government may play as important a role in keeping LGBT people away from social services or private supportive networks as intentional discrimination. Thus, even granting the right to same-sex marriage on its own may not affect economic disparities between same-sex male couples and same-sex female couples or between White same-sex couples and same-sex couples of color. New administrative nondiscrimination provisions are, at best, only components of what has to be a larger effort to address poverty.

Strategies for Social Change

Notwithstanding the potential limitations on administrative lawyering for LGBT welfare, such lawyering may still provide important benefits to LGBT people as a component of a wider program to address poverty. To that end, this section lays out a potential strategy for further administrative change taking into consideration the legal and pragmatic limitations discussed earlier.

There is a dearth of scholarship on the subject of effective administrative advocacy during the rule-making process, though more scholarship on legislative advocacy exists. For instance, Georgetown Law Professor Chai Feldblum calls her guidance on legislative advocacy the "Six Circles Theory of Effective Advocacy" (Feldblum 2003, 786). Feldblum suggests that effective advocacy requires "six circles"—a team whose members embody six different skills sets: a strategist, lobbyist, legislative lawyer, policy

researcher, outreach strategist, and communications director (Feldblum 2003, 793-794). In much of its substance, the theory is applicable to rule making as well as legislative contexts: an advocacy strategy for rule making will also require legislative lawyers, policy researchers, and the like.

But rule making does call for different considerations than legislation (Mashaw 2002; Rubin 2002), as demonstrated by the New Beginning Initiative's refusal to employ a public campaign involving grassroots organizers or an effort to mobilize public support using the media. In the administrative context, this might be a sound strategy. Given an administration already receptive to proposals from LGBT advocates, the publication of efforts to pursue regulatory change might attract hostile congressional attention, as with Clinton's regulatory proposal to end discrimination on the basis of sexual orientation in the military. In addition, as agencies are subject to congressional oversight, advocates and agencies must be wary of provoking hostile attention from Congress, which can "require agency officials to testify, demand an explanation [for the agency's] actions, and harangue [the agency] for [its] actual or purported errors" (Rubin 2002, 6).

The New Beginning Initiative's coordination of efforts to produce regulatory change has several benefits. Coordination allows the shared utilization by advocacy organizations of each other's contacts within the various agencies, thereby creating avenues to introduce proposals for regulatory change. Coordination also allows for a division of major responsibilities for the regulatory effort. Some organizations will have particular strengths as legislative lawyers, others as drafters of best policies. In the poverty context, it will be particularly important to supplement advocacy efforts with empirical data on LGBT poverty. The availability of poverty data and reports would provide a foundation for identifying where advocacy should be directed. This also informs legislative lawyers, skilled at researching and interpreting statutory text, where their efforts should be focused.

In addition, advocacy organizations, through their own comments or through the mobilization of public comments, play an important role in agency thinking. The public comment requirement for rule making allows the provision of factual and legal support to agencies seeking to implement regulatory change and the mobilization of comments from members of the public to signify popular support (Mashaw 2002, 14). HUD and HHS have cited the overwhelmingly positive public comments as support for their rule making. Some organizations have also used the public comment procedure as a means to buttress the legality of proposed rule making. Indeed, agencies may not have the ability to do all the necessary research to support their rule making (Kerwin and Furlong 2010, 169). A prime example of this kind of lawyering is the National Center for Lesbian Rights' comment to the proposed HUD rule, which provides a detailed defense of HUD's authority to extend its nondiscrimination regulations to include sexual orientation and gender identity (National Center for Lesbian Rights 2011).

Finally, in light of pragmatic limitations to efforts to advance LGBT welfare through regulatory change, advocates should tie regulatory change to ameliorating basic human welfare through changes that improve access to health, education,

employment, and social services. Both the HHS and HUD rule making concerned basic needs. Seeking to address such needs rather than abstract equality may be more legally defensible in relation to agencies' authorizing statutes. Moreover, addressing basic needs may better address the basic problems that underlie LGBT poverty (Minow 1996, 293-294). The incorporation of gender identity into HUD regulations provides a protection for transgender individuals who face a much higher incidence of housing discrimination than others. Mandating that the wishes of patients about who can make their health care decisions should be followed regardless of the nature of their relationship to their proxy ensures that LGBT patients' life wishes are honored. Although it is too soon to assess the outcome of these regulatory changes, what we do know suggests that administrative lawyering may lead to positive, if not necessarily comprehensive, outcomes for LGBT people.

CONCLUSION

LGBT poverty is a real issue, and to address it, advocates should consider paths other than the courts or Congress. But administrative efforts during the Obama administration, while certainly positive developments, are limited both legally and practically. Whether agencies can produce social change that makes for real and concrete improvements to the lives of LGBT persons and their families remains to be seen. It will likely depend on how agencies and advocacy organizations navigate and overcome limitations so that rule making can be supplemented by enforcement and other positive action. It is clear that effective administrative lawyering has the potential to improve LGBT welfare.

REFERENCES

Albelda, Randy et al. 2009. Poverty in the lesbian, gay, and bisexual community. Los Angeles: Williams Institute.

Chayes, Abram. 1976. The role of the judge in public law litigation. *Harvard Law Review* 89(7): 1281-1316.

Chevron U.S.A. v. Natural Resources Defense Council 467 U.S. 837 (1984).

Davis, Masen, and Kristina Wertz. 2010. When laws are not enough: A study of the economic health of transgender people and the need for a multidisciplinary approach to economic justice. *Seattle Journal for Social Justice* 8(2): 467-495.

Eskridge, William N., Philip P. Frickey, and Elizabeth Garrett. 2000. *Legislation and statutory interpretation*. New York: Foundation Press.

Executive Order 8802. 6 Fed. Reg 3109 (1941).

FCC v. Fox Television 129 S.Ct. 1800, 1800-12 (2009).

FDA v. Brown & Williamson Tobacco 529 U.S. 120, 133 (2000).

Feldblum, Chai R. 2002. Rectifying the tilt: Equality lessons from religion, disability, sexual orientation, and transgender. *Maine Law Review* 54(2): 159-194.

———. 2003. The art of legislative lawyering and the six circles theory of advocacy. *McGeorge Law Review* 34(4): 785-850.

Fiss, Owen M. 1979. The forms of justice. *Harvard Law Review* 93(1): 1-58.

Freeman, Alan David. 1978. Legitimizing racial discrimination through antidiscrimination law: A critical review of Supreme Court doctrine. *Minnesota Law Review* 62(6): 1049-1120.

Gardina, Jackie. 2009. Let the small changes begin: President Obama, executive power, and "Don't Ask Don't Tell." Boston University *Public Interest Law Journal* 18(2): 237-268.

Gill v. Office of Personnel Management 699 F. Supp. 2d 374, 387 (D. Mass. 2010).

Grant, Jaime M. et al. 2011. Injustice at every turn: A report of the National Transgender

Discrimination Survey. Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force.

Halley, Janet E. 1999. *Don't: A reader's guide to the military's anti-gay policy*. Durham: Duke University Press.

Horowitz, Donald L. 1977. *The courts and social policy*. Washington, DC: Brookings Institution.

Kagan, Elena. 2001. Presidential administration. *Harvard Law Review* 114(8): 2245-2385.

Kerwin, Cornelius M., and Scott R. Furlong. 2010. *Rulemaking: How government agencies write law and make policy*. 4th ed. Washington, DC: CQ Press.

Log Cabin Republicans v. United States 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010).

MAP (Movement Advancement Project) and SAGE (Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders). 2010a. Improving the lives of LGBT older adults, March.

———. 2010b. Issue brief: LGBT older adults and long-term care under Medicaid.

Mashaw, Jerry L. 2002. Agency statutory interpretation. *Issues in Legal Scholarship* 2002: Article 9.

Massachusetts v. EPA 549 U.S. 497, 532-33 (2007).

Massachusetts v. U.S. Dep't of Health & Human Servs. 699 F. Supp. 2d 234, 235-36 (D. Mass. 2010).

Minow, Martha. 1996. Political lawyering: An introduction. *Harvard Civil Rights-Civil Liberties Law Review* 31(2): 287-310.

National Center for Lesbian Rights. 2011. Comment on Proposed Rule FR 5359-P-01, Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity.

National Fair Housing Alliance. 2011. Comment on Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity. Letter, 25 March.

National Gay and Lesbian Task Force. 2011. New Beginning Initiative. Washington, DC: National Gay and Lesbian Task Force Foundation.

Novak, William J. 2010. Law and the social control of American capitalism. *Emory Law Journal* 60(2): 377-406.

Perry v. Schwarzenegger 704 F. Supp. 2d 921 (N.D. Cal. 2010).

Posner, Richard A. 1997. The rise and fall of administrative law. *Chicago-Kent Law Review* 72(4): 953-964.

Presidential Documents. 2010a. Extension of benefits to same-sex domestic partners of federal employees. *Federal Register* 75(109), 32247, 8 June.

———. 2010b. Proclamation 8529 of May 28, 2010: Lesbian, Gay, Bisexual, and Transgender Pride Month, 2010. *Federal Register* 75(108), 32079, 7 June.

———. 2010c. Respecting the rights of hospital patients to receive visitors and to designate surrogate decision makers for medical emergencies. *Federal Register* 75(75), 20511, 20 April.

———. 2010d. Medicare and Medicaid programs: Changes to the hospital and critical access hospital conditions of participation to ensure visitation rights for all patients. *Federal Register* 75(123), 36610, 28 June.

———. 2011. Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity. *Federal Register* 76(15), 4194, 24 January.

Rabin, Robert L. 1986. Federal regulation in historical perspective. *Stanford Law Review* 38(5): 1189-1326.

Ray, Nicholas. 2006. Lesbian, gay, bisexual and transgender youth: An epidemic of homelessness. National Gay and Lesbian Task Force Policy Institute and National Coalition for the Homeless.

Romer v. Evans 517 U.S. 620 (Scalia, J., dissenting) (1996).

Rubin, Edward. 2002. Dynamic statutory interpretation in the administrative state. *Issues in Legal Scholarship* 2002: Article 2.

Sandler, Ross, and David Schoenbrod. 2003. *Democracy by decree: What happens when courts run government*. New Haven: Yale University Press.

Seidenfeld, Mark. 1992. A civic republican justification for the bureaucratic state. *Harvard Law Review* 105(7): 1511-1576.

Shapiro, Martin. 1983. Administrative discretion: The next stage. *Yale Law Journal* 92(8): 1487-1522.

Strauss, Peter L. 1996. From expertise to politics: The transformation of American rulemaking. *Wake Forest Law Review* 31(3): 745-778.

Tedeschi, Bob. 2009. HUD combats discrimination. *New York Times*, 8 November.

United States Conference of Catholic Bishops. 2011. Comment on Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity. Letter, 25 March.

Zietlow, Rebecca E. 2008. Belonging and empowerment: A new "civil rights" paradigm based on lessons of the past. *Constitutional Commentary* 25(2): 353-375.

ENDNOTES

[1] Agency actions during the administration of George W. Bush that could be defined as pro-LGBT consisted only of funding measures within the first two years of that administration from the Department of Health & Human Services that identified LGBT persons as an underserved community in the provision of domestic violence prevention services. Notices: Fiscal Year 2002 Family Violence Prevention and Services Discretionary Funds Program, 66 Fed. Reg. 64437-01 (13 December 2001); Violence-Related Injury Prevention Research; Notice of Availability of Funds, 67 Fed. Reg. 9292-01 (28 February 2002); Cooperative Agreement for Violence Against Women Planning and Implementation, 67 Fed. Reg. 38123-01 (31 May 2002).

[2] "Formal" rule making, as opposed to informal rule making, requires rules to be made on the record after a hearing (5 U.S.C.A. § 553(c)).

[3] Mortgage lenders, for one, complained that the rule making implied that they discriminated against LGBT people (Tedeschi 2009).

[4] The bishops also objected to the proposed rule on the grounds that it would "force" faith-based organizations participating in HUD programs to contravene their religious beliefs.

Where Do We Go from Here? Incorporating LGBT-Inclusive Health Policies in Affordable Care Act Implementation

by Kellan Baker

The Patient Protection and Affordable Care Act (ACA) of 2010 offers many opportunities to advance health equity for marginalized populations, including the lesbian, gay, bisexual, and transgender (LGBT) population. These opportunities include collecting more and higher-quality sexual orientation and gender identity data, establishing LGBT-inclusive nondiscrimination protections in the state-based health insurance exchanges, ensuring the essential health benefits are available to everyone who needs them, and supporting LGBT-inclusive community-based public health interventions. This article explores recent advances in each of these areas and formulates recommendations for maximizing the ACA's potential to enhance the health and well-being of the LGBT population.

INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) of 2010 is the most significant reform of the American health care system since the creation of Medicare and Medicaid in the 1960s. One of the ACA's many potential benefits is the opportunity it creates to advance health equity for marginalized populations, including the lesbian, gay, bisexual, and transgender (LGBT) population.[1] The implementation of the ACA provides LGBT advocates with numerous opportunities at the federal, state, and local levels to address health disparities and to ensure that the law helps our health care system better serve everyone in America, including gay and transgender people and their families.

This article builds on "Changing the Game: What Health Care Reform Means for Gay, Lesbian, Bisexual, and Transgender Americans," a report released by the Center for American Progress and the National Coalition for LGBT Health in March 2011 (Baker and Krehely 2011). The report identifies several aspects of the ACA that have particular potential to help close LGBT health disparities: instituting LGBT-inclusive nondiscrimination protections in the health insurance exchanges; counting LGBT Americans under the law's disparity data collection requirements; recognizing and including LGBT families in new programs and activities created by the law; and supporting community-

based public health initiatives that include specific outreach to LGBT communities (Baker and Krehely 2011).

Since the report's completion, recent developments in ACA implementation have opened new windows for advocacy and change in these areas. To continue to create a road map for the ongoing incorporation of LGBT-inclusive policies in key aspects of ACA implementation, this article reviews the potential impact of these developments on gay and transgender people and their families as well as the advocacy opportunities the developments create. The four developments discussed here include:

1. The creation of an LGBT data progression plan by the U.S. Department of Health & Human Services (HHS) in June 2011

2. The proposal of LGBT-inclusive federal guidance mandating nondiscrimination on the basis of sexual orientation and gender identity in the state health insurance exchanges in July 2011

3. The issuing of guidance on the essential health benefits by HHS in December 2011

4. The release of the first round of funding under the Community Transformation Grant (CTG) program in October 2011

This review informs the following recommendations in each of those four development areas for those working to maximize the ACA's potential to enhance the health and well-being of the gay and transgender population:

Data Collection

- Encourage HHS to continue making progress in developing and testing survey questions for both gender identity/transgender status and sexual orientation, with the goal of adding these questions to federal health surveys in 2013
- Advocate with state and local jurisdictions to add questions about sexual orientation and gender identity/transgender status to state and local health, employment, and other surveys

State Health Insurance Exchanges

- Engage with the exchange planning process in individual states to push for the meaningful and nondiscriminatory inclusion of gay and transgender people, their families, and other health insurance consumers throughout exchange planning, establishment, and operation activities

Essential Health Benefits

- Encourage HHS to adopt LGBT-inclusive nondiscrimination rules that protect access to the essential benefits for gay and transgender people and their families, regardless of where they live
- Encourage state governments to choose essential benefits benchmark plans that do not exclude coverage for care related to gender transition and that provide each consumer with comprehensive coverage for any essential benefit that a provider has determined to be medically necessary for the individual's well-being

Community Transformation Grant Program

- Partner with local Community Transformation Grant program grantees to ensure that inclusion of gay and transgender communities is intentional, culturally competent, and effective in reducing LGBT disparities

WHY WE NEED THE AFFORDABLE CARE ACT

Few would deny that the U.S. health care system has long been in trouble. In 2009, the United States spent 17.4 percent of the entire output of its economy on health care (Organisation for Economic Co-operation and Development 2011). Yet our health care system ranks well below that of other developed nations on efficiency, equity, and effectiveness. The World Health Organization awarded the United States thirty-seventh place for overall performance in its landmark study of the health care systems in 191 countries, putting the country just ahead of Slovenia and Cuba, and fifty-fourth place for fairness (World Health Organization 2000). We spend 50 percent of our health care resources on services for just five percent of the population (Kaiser Family Foundation 2009), prioritize expensive medical technologies for a lucky few rather than primary care for everyone (Davis et al. 2007), and, according to the secretary of HHS, consistently fail to make the investments in prevention and wellness necessary to transform the American "sick care" system into a true health system (Sebelius 2010).

Worse, these systemic weaknesses are not evenly distributed. An African American baby is twice as likely as a White baby to die before his or her first birthday (MacDorman and Mathews 2011). One person in the United States dies every 12 minutes from a lack of health insurance (Wilper et al. 2009). And despite advances in HIV prevention and treatment, gay and bisexual men and transgender women, particularly African Americans and Latinos, are still disproportionately likely to become infected with HIV and to die from AIDS (Centers for Disease Control and Prevention 2011b; Centers for Disease Control and Prevention 2011c).

These health disparities reflect more than just inequities in health status. They arise from poverty, unfair allocation of resources, and discrimination in critical determinants of health such as access to insurance coverage and health care, employment, education, and housing (Braveman et al. 2011). This discrimination particularly affects people who are already marginalized on the basis of sexual orientation, gender identity, race, ethnicity, disability status, or other factors.

WHAT ADVANCES IN ACA IMPLEMENTATION MEAN FOR GAY AND TRANSGENDER PEOPLE

In an ambitious attempt to reform the deeply flawed U.S. health care system, President Barack Obama signed the Patient Protection and Affordable Care Act into law on 23 March 2010. Crucially, the ACA expands access to public or private health insurance coverage for an estimated 32 million currently uninsured people.[2] It also codifies the application of federal civil rights protections to health care programs and activities, dedicates $11.5 billion to support community health centers, and invests $15 billion in prevention and wellness, among other key provisions. Some ACA provisions will not take effect until 2014, but implementation of many parts of the law is already underway at both the state and federal levels. As described earlier, this article assesses four recent developments in ACA implementation that are likely to have substantial positive impact on gay and transgender people and their families.

Improving LGBT Data Collection

Comprehensive data collection through government health surveys and programs

is a vital component of identifying, understanding, and addressing the disparities that negatively impact the health and well-being of marginalized populations. Unfortunately, the lack of standardized tools for collecting sexual orientation and gender identity data means that researchers, policy makers, and providers across the country have trouble identifying, tracking, and addressing health disparities that affect the LGBT population (U.S. Department of Health & Human Services n.d.a). In March 2011, the Institute of Medicine issued a landmark report on LGBT health that strongly recommended the routine collection of demographic and health data on LGBT people and specific subpopulations, including LGBT people of color (Institute of Medicine 2011b).

The ACA directs the secretary of HHS to collect a range of data on the health disparities associated with race, ethnicity, sex, disability status, and primary language, as well as other factors that the secretary deems relevant (see Patient Protection and Affordable Care Act §4302). In June 2011, HHS Secretary Kathleen Sebelius released the HHS LGBT data progression plan, which indicated her intent to draw on the authority granted under the ACA to direct federal health surveys to collect more and higher-quality demographic data on sexual orientation and to begin collecting demographic data on gender identity (U.S. Department of Health & Human Services 2011b).[3] The first survey targeted for this effort is the National Health Interview Survey (NHIS), which is the federal government's flagship instrument for assessing general population health in the United States.

This plan is broken down into stages, the first of which begin in 2011:

- **June-December 2011: Test sexual orientation data collection measures for federal health surveys.** The National Center for Health Statistics at the Centers for Disease Control and Prevention (CDC) is testing measures for collecting data that will allow researchers to identify and assess disparities associated with sexual orientation, including those related to health status and access to insurance and care (Miller and Ryan 2011).
- **Fall 2011: Hold first roundtable on gender identity data collection.** Because no national health survey collects demographic data on gender identity/transgender status, HHS does not have significant experience in collecting this information. In fall 2011, HHS convened a roundtable that brought HHS officials together with external researchers who work on collecting demographic data on the transgender population that can help identify and assess disparities in health status and in access to insurance and care that affect these individuals. Among these researchers were several whose state-administered Behavioral Risk Factor Surveillance System includes a question on transgender status, though this data has yet to be reported (Massachusetts Department of Public Health 2009).
- **Winter 2011-2012: Hold follow-up roundtable on gender identity data collection.** As of this writing in January 2012, this second roundtable has not been held.
- **Spring 2012: Create a strategy to include gender identity measures on HHS surveys.** The HHS Data Council will incorporate the input gathered through the two roundtables to create a plan for integrating appropriate measures into federal health surveys. As

of January 2012, the timeline for developing and adding gender identity measures to federal surveys remained unclear. Continued advocacy with HHS will be necessary to ensure that this process parallels the development and addition of sexual orientation questions to federal surveys as closely as possible.

- **Spring 2012: Complete initial field test of sexual orientation questionnaire.**
- **End of 2012: Complete large-scale field test of sexual orientation questionnaire.** If the measures developed to collect demographic data on sexual orientation perform well in the field tests (i.e., if they successfully identify gay, lesbian, and bisexual people; do not erroneously identify heterosexual people as gay, lesbian, or bisexual; and provide statistically meaningful estimates of the number of gay, lesbian, and bisexual Americans), these measures will be integrated into the NHIS and eventually into the full scope of HHS data collection efforts.
- **2013: Begin collecting sexual orientation data through the NHIS.** The current phase of data collection under the ACA, including sexual orientation, gender identity, and the five statutory categories of race, ethnicity, sex, disability status, and primary language, is focused on national surveys. However, the law ultimately requires the expansion of these data collection efforts to all HHS programs. Fully implementing this provision with respect to sexual orientation and gender identity data will thus require HHS to eventually develop comprehensive standards for LGBT data collection similar to those developed in 2011 for the five statutory categories (U.S. Department of Health & Human Services 2011a). These standards will be integrated not only into HHS health survey instruments such as the NHIS but also into administrative data collection efforts through HHS programs. The states and other federal agencies can then use these standards as guides for advancing their own LGBT-inclusive data collection initiatives.

Instituting LGBT-Inclusive Nondiscrimination Protections in the Health Insurance Exchanges

One of the ACA's central goals is expanding access to insurance coverage, with a standard set of comprehensive essential health benefits, for the 50 million Americans who are currently uninsured. This population includes many gay and transgender people and their families; as a result of widespread discrimination in employment, relationship recognition, and insurance industry practices, gay and lesbian Americans are twice as likely as the general population to be uninsured, and the disparity is even larger for bisexual and transgender people (Lambda Legal 2010). The main vehicle for the expansion of insurance coverage under the ACA is the network of state-based health insurance exchanges, which will provide access to private coverage for an estimated 16 million people starting in 2014.

Under the ACA, the exchanges in each state will serve as marketplaces where individuals with incomes between 138 percent and 400 percent of the federal poverty level (about $14,000 to $42,000 annually for a single person) and small businesses can purchase health insurance for themselves or their employees. The exchanges will be largely federally funded but administered by the states, unless a state chooses not to operate its own exchanges. In that case, HHS will administer the state's exchanges. States must

demonstrate readiness to operate their exchanges by January 2013, and the exchanges will become operational in January 2014.[4]

Eligible individuals and families will receive tax credits to defray premium costs in the exchanges. Same-sex couples will not be eligible for family subsidies because of the Defense of Marriage Act (DOMA), which prohibits the federal government from recognizing same-sex couples as spouses.[5] However, in summer 2011, HHS issued proposed exchange regulations that direct states to not discriminate on the basis of sexual orientation or gender identity in marketing, outreach, and enrollment, among other unspecified areas (Presidential Documents 2011). As such, exchange-related advertising, information hotlines, and public outreach programs in every state must be accessible to and inclusive of gay and transgender people and their families. One of the most important outreach mechanisms that these regulations will affect is the Navigator program, which each state must establish to help connect eligible individuals to coverage through exchanges (Community Catalyst 2011). Ensuring that Navigator programs are actively engaged in helping gay and transgender people and their families understand coverage options through the exchanges and choose appropriate plans is a key component of maximizing the benefits of the exchanges for the LGBT population.

Another important aspect of nondiscrimination in the exchanges is the implementation of ACA Section 1557, which applies existing federal civil rights protections to any health program or activity established under ACA Title I (including the exchanges) or receiving federal funds. Title IX of the Education Amendments of 1972 includes protections from discrimination on the basis of sex, which recent court decisions and a trend in federal agency equal employment opportunity policies define to include gender identity and sex stereotyping (U.S. Department of Health & Human Services n.d.b; Glenn v. Brumby 2011). The HHS Office for Civil Rights, which is already enforcing Section 1557, may thus respond affirmatively to complaints of discrimination brought by transgender individuals who are denied coverage for medically necessary services by plans in the exchanges. The relationship between nondiscrimination protections in the exchanges and coverage for transgender people is discussed in more detail in the following section.

Defining the Essential Health Benefits

The ACA requires every health plan sold through the exchanges to be certified as a qualified health plan (QHP).[6] All QHPs must offer a minimum set of essential health benefits in ten broad categories (Patient Protection and Affordable Care Act §1302(b)(1)):

1. Ambulatory patient services
2. Emergency services
3. Hospitalization
4. Maternity and newborn care
5. Mental health and substance use disorder services, including behavioral health treatment
6. Prescription drugs
7. Rehabilitative and habilitative services and devices
8. Laboratory services
9. Preventive and wellness services and chronic disease management
10. Pediatric services, including oral and vision care

When the ACA was first passed, many advocates viewed the essential benefits as a historic opportunity to transcend the current patchwork of state insurance mandates by establishing a firm national floor that would require QHP issuers in every state to offer adequate minimum benefits. Unfortunately from this perspective, the Obama administration has consistently sought to build support for the ACA among state governments by demonstrating interest in supporting individual state efforts at reform rather than invoking the full scope of federal regulatory powers available under the ACA. Thus, in December 2011, HHS released preliminary guidance that proposes to give each state substantial discretion to define its own essential benefits standards within the basic parameters established by the law (Center for Consumer Information and Insurance Oversight 2011).

This guidance gives states the flexibility to choose one of four options to serve as its essential benefits benchmark plan as follows:

1. The largest plan by enrollment in any of the three largest small group insurance products in the state's small group market

2. Any of the largest three state employee health benefit plans by enrollment

3. Any of the largest three national Federal Employee Health Benefit Program (FEHBP) plan options by enrollment

4. The largest insured commercial non-Medicaid health maintenance organization (HMO) operating in the state

If a state does not choose a benchmark plan, HHS intends to propose that the default benchmark plan in that state will be the largest plan by enrollment in the largest product in the state's small group market (Center for Consumer Information and Insurance Oversight 2011).

All of these options have serious shortcomings from the perspective of gay and transgender people and their families. FEHBP plans carry a DOMA-imposed ban on coverage for same-sex spouses or partners and their dependents, and the other benchmark options in most states likely have no existing precedent for offering coverage to same-sex domestic partners or spouses. The situation is even more concerning for transgender people. Despite statements testifying to the medical necessity of transition-related care from professional associations such as the American Medical Association (American Medical Association House of Delegates 2008), almost all FEHBP plans, as well as Medicare, most state Medicaid programs, and the majority of private insurance plans, explicitly exclude coverage for services related to gender transition. These exclusions are frequently interpreted to deny services to transgender people that are routinely covered for non-transgender people (Hong 2002). Such services include those that may be related to gender transition but that are also frequently needed by non-transgender people, such as a hysterectomy or hormone replacement therapy, and those that are unrelated to transition, such as routine preventive screenings for prostate, cervical, and other cancers.

Many services that are medically necessary for transgender people fall under essential benefits categories such as prescription drugs, preventive services, and mental health services. It is imperative that HHS and the state governments act to ensure the full spectrum of essential benefits is available to everyone who needs them, including transgender

people. For state governments, this primarily involves selecting a benchmark plan that does not have exclusions for care related to gender transition. If such an option is not available, it may be possible for states to follow an example like that of California, whose Insurance Gender Nondiscrimination Act (IGNA) of 2005 prohibits insurers from discriminating on the basis of gender identity in benefits design or coverage determinations. Under IGNA, any service that an insurer covers for a non-transgender person must be covered for a transgender person for whom the service is medically necessary.

From the perspective of the federal government's role in regulating the exchanges, two aspects of the ACA's essential benefits provision are particularly relevant. First, the secretary of HHS may not design the essential benefits in any way that discriminates against individuals because of factors such as a disability (see Patient Protection and Affordable Care Act §1302(b)(4)). Second, in designing the essential benefits, the secretary must take into account the health needs of diverse segments of the population. On the basis of these provisions, the secretary has the authority to promulgate two rules that would provide a strong foundation for efforts to ensure that no population is unfairly targeted for discrimination in the essential benefits.

The first rule, a simple nondiscrimination mandate, would prohibit discrimination in access to the essential benefits on the basis of gender identity and sexual orientation, as well as other factors such as race, sex, disability, or primary language. Such a rule would mirror the nondiscrimination provision already included in the proposed regulations governing the general operation of the exchanges, as well as the protections on the basis of gender identity and sex stereotyping that many believe are implied by the sex nondiscrimination provision of ACA Section 1557.

The second rule would forbid insurers from using arbitrary, condition-based exclusions to unfairly restrict access to the essential benefits. The Medicaid statute already contains such a rule (42 C.F.R. §440.230(c)), and the Institute of Medicine's 2011 report on the essential benefits concludes that, in drafting the essential benefits provision of the ACA, Congress intended "to ensure that insurers do not make arbitrary and discriminatory decisions based on certain characteristics of people rather than assessing the individuality of each case when making medical necessity decisions and applying clinical policies" (Institute of Medicine 2011a). A rule banning the application of arbitrary, condition-based exclusions to the essential benefits would not only protect transgender people but would also provide important protections for others whose access to essential coverage for medically necessary treatments related to conditions such as cancer, autism, or HIV is routinely restricted by insurance carriers eager to curtail claims costs.

Supporting LGBT-Inclusive Public Health Interventions

A central part of the effort to transform our "sick care" system into a true health care system is the ACA's $15-billion Prevention and Public Health Fund, which is dedicated to supporting innovative prevention and public health initiatives (see Patient Protection and Affordable Care Act §4201). One of the major initiatives supported by this fund is

the new Community Transformation Grants (CTG) program, which the ACA established under the oversight of the CDC. Grants from the CTG program support community-level efforts to reduce chronic diseases such as heart disease, cancer, stroke, and diabetes; promote healthy lifestyles; and close health disparities.

Studies show that gay and transgender people experience significant disparities in many of the priority areas for CTG program intervention, including tobacco-free living; active living and healthy eating; and prevention and control of high blood pressure and high cholesterol. For example, Healthy People 2020 and the Institute of Medicine report that LGBT people smoke at rates up to twice the national average and that lesbians and bisexual women, particularly Black and Latina women, are less likely than other women to have access to preventive services and more likely to be overweight or obese (U.S. Department of Health & Human Services n.d.a; Institute of Medicine 2011b).

In fall 2011, the CDC awarded the first round of CTG funding, comprising $103 million, to sixty-one state and local government agencies, tribes and territories, and state and local nonprofit organizations in thirty-six states (Centers for Disease Control and Prevention 2011a). The CDC also funded a CTG National Dissemination and Support Initiative at $4.2 million in fall 2011 (Centers for Disease Control and Prevention 2012). These grants went to seven national networks of community-based organizations, including the American Public Health Association, the YMCA, and the American Lung Association. Together, organizations and programs funded by the CTGs in 2011 serve at least 120 million Americans in communities across the country.

The CTG program requires grantees to describe in their implementation plans how they will actively engage with population subgroups experiencing health disparities and to identify appropriate strategies for ensuring effective and equitable CTG implementation. CTG guidance indicates that grantees may choose to include gay and transgender populations in their proposals, and several grantees specifically cited their intent to work with these populations (Bauer 2011). As of January 2012, CTG grantees were negotiating their implementation plans with the CDC, and a key role for LGBT health advocates across the country throughout 2012 will be to partner with CTG grantees whenever possible to help ensure that the inclusion of gay and transgender populations in CTG initiatives is intentional, culturally competent, and effective in reducing the burden of preventable health disparities affecting LGBT communities.

CONCLUSION

The years 2012 and 2013 present several pivotal opportunities to ensure that the ACA's most vital and groundbreaking reforms respond to the needs of gay and transgender people and their families. The Department of Health & Human Services, state governments, and LGBT and allied health advocates each have key roles to play in collecting more data on LGBT health disparities, establishing comprehensive protections from discrimination in the exchanges and the essential benefits, and addressing LGBT health disparities from the neighborhood to the national level. As Secretary Sebelius emphasized in her remarks at the October 2011 meeting of the National Coalition

As Secretary Sebelius emphasized in her remarks at the October 2011 meeting of the National Coalition for LGBT Health, the Affordable Care Act may be the best opportunity we have ever had to begin closing LGBT health disparities.

for LGBT Health, the Affordable Care Act may be the best opportunity we have ever had to begin closing LGBT health disparities (Sebelius 2011). It is an opportunity our community cannot afford to miss.

REFERENCES

American Medical Association House of Delegates. 2008. Resolution 122: Removing financial barriers to care for transgender patients.

Baker, Kellan, and Jeff Krehely. 2011. Changing the game: What health care reform means for gay, lesbian, bisexual, and transgender Americans. Center for American Progress and National Coalition for LGBT Health.

Bauer, U. 2011. Personal communication with author.

Braveman, P.A. et al. 2011. Health disparities and health equity: The issue is justice. *American Journal of Public Health* 101(S1): S149-155.

Center for Consumer Information and Insurance Oversight. 2011. Essential health benefits bulletin, 16 December.

Centers for Disease Control and Prevention. 2011a. Community Transformation Grants (CTG) states and communities, 27 September.

———. 2011b. HIV and AIDS among gay and bisexual men. Fact sheet, September.

———. 2011c. HIV infection among transgender people, August.

———. 2012. Funded national networks, 19 January.

Community Catalyst. 2011. Navigators: Guiding people through the exchange, June.

Davis, Karen et al. 2007. Slowing the growth of U.S. health care expenditures: What are the options? The Commonwealth Fund, January.

Glenn v. Brumby 663 F.3d 1312 (11th Cir. 2011).

Hong, Kari E. 2002. Categorical exclusions: Exploring legal responses to health care discrimination against transsexuals. *Columbia Journal of Gender & Law* 11: 88-126.

Institute of Medicine. 2011a. Essential health benefits: Balancing coverage and cost. Washington, DC: National Academies Press.

———. 2011b. The health of lesbian, gay, bisexual, and transgender people: Building a foundation for better understanding. Washington, DC: National Academies Press.

Kaiser Family Foundation. 2009. Health care costs: A primer, March.

Lambda Legal. 2010. When health care isn't caring: Lambda Legal's survey on discrimination against LGBT people and people living with HIV.

MacDorman, Marian F., and T.J. Mathews. 2011. Understanding racial and ethnic disparities in U.S. infant mortality rates. National Center for Health Statistics Data Brief 74.

Massachusetts Department of Public Health. 2009. The health of lesbian, gay, bisexual, and transgender (LGBT) persons in Massachusetts, July.

Miller, Kristen, and J. Michael Ryan. 2011. Design, development and testing of the NHIS sexual identity question. National Center for Health Statistics, Questionnaire Design

Research Laboratory, Office of Research and Methodology.

Organisation for Economic Co-operation and Development. 2011. Health at a glance 2011: OECD indicators.

Presidential Documents. 2011. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans. Federal Register 76(136), 41866, 15 July.

Sebelius, Kathleen. 2010. From sick care to health care. *Charleston Gazette*, 27 July.

———. 2011. Remarks at the annual meeting of the National Coalition for LGBT Health, 17 October.

U.S. Department of Health & Human Services. n.d.a. 2020 Topics & objectives: Lesbian, gay, bisexual, and transgender health. Healthy People 2020.

———. n.d.b. EEO policy statement. EEO Compliance & Operations.

———. 2011a. Implementation guidance on data collection standards for race, ethnicity, sex, primary language, and disability status, October.

———. 2011b. Improving data collection for the LGBT community. Office of Minority Health.

Wilper, Andrew P. et al. 2009. Health insurance and mortality in US adults. *American Journal of Public Health* 99(12): 2289-2295.

World Health Organization. 2000. The world health report 2000: Health systems: improving performance.

ENDNOTES

[1] This article uses "LGBT" and "gay and transgender" interchangeably to refer to the full range of people who identify as gay, lesbian, bisexual, and/or transgender.

[2] In addition to the approximately 16 million uninsured people who will be able to purchase private coverage through the exchanges, another 16 million will become eligible for Medicaid in 2014 under the new national standard raising the eligibility ceiling for all state Medicaid programs to 133 percent of the federal poverty level.

[3] According to the Web site GayData.org (www.gaydata.org), the National Health and Nutrition Examination Survey and the National Survey of Family Growth have collected some data about sexual orientation and/or same-sex sexual behavior since 1988 and 2002, respectively.

[4] Thus far, forty-eight states (excluding only Alaska and Florida) and the District of Columbia have received a total of $423.3 million in several rounds of federal grants to plan and, in some cases, to begin to establish exchanges. As of December 2011, fifteen states have passed legislation setting up exchanges or announcing intent to set up exchanges. The governance structures of the state exchanges can vary within certain parameters. These include whether the exchange is a clearing-house that accepts all plans, as in Utah, or an active purchaser that contracts with specific insurers and sometimes negotiates premiums and other conditions of coverage, as in Massachusetts; whether it is a nonprofit, a government agency, or a quasi-governmental body; and the proportions in which its governing board includes stakeholders such as insurance industry representatives, consumer advocates, state health officials, or service providers.

[5] ACA §1401(d) states, "The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year." Section 151 of the Internal Revenue Code allows deductions only for spouses (as defined under DOMA) and eligible dependents.

[6] Plans sold outside the exchanges may also seek certification as qualified health plans, though certification is not mandatory.

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Discrimination and Dollars:

Why a Pro-Business Framing Is Key to the Passage of the Employment Non-Discrimination Act

by Crosby Burns

Workplace discrimination introduces significant costs and inefficiencies that result in a less qualified and less productive workforce. The proposed Employment Non-Discrimination Act (ENDA) will help reduce the existing high rates of discrimination facing the lesbian, gay, bisexual, transgender, and queer population. ENDA's passage will ultimately benefit firms by enforcing efficient hiring and firing practices, breeding a qualified and productive workforce, and providing employers with legal clarity, uniformity, and predictability. To secure political support for ENDA, advocates of workplace fairness must deliver a compelling narrative that frames ENDA as a policy that will not only help victims of workplace discrimination but also benefit businesses' economic performance.

While many other demographic groups also experience high rates of employment discrimination, lesbian, gay, bisexual, transgender, and queer (LGBTQ) people are perhaps the largest recognized demographic group to lack comprehensive employment protections under federal law. Some states have passed laws prohibiting employment discrimination based on sexual orientation and gender identity. Still, it remains perfectly legal in a majority of states to fire someone simply for identifying as LGBTQ. As a result, far too many workers are forced out of a job or denied employment based on their sexual orientation or gender identity, characteristics completely irrelevant to job performance.

The proposed Employment Non-Discrimination Act (ENDA) will help reduce the existing high rates of discrimination facing the LGBTQ population. While members of Congress have introduced ENDA in every session except one since 1996 (the sole exception being the 109th Congress), ENDA has failed to garner enough political support to be enacted into federal law. In fact, ENDA has only twice come up for a floor vote in Congress, first in 1996 before the Senate, and again in 2007 before both chambers of Congress. Both versions of the bill included only sexual orientation, not gender identity, as a protected category (Hunt 2011). It is unlikely that ENDA will have an opportunity for passage until 2013 at the earliest given conservative opposition in the 112th House of Representatives.

No federal law outlaws employment discrimination based on sexual orientation or gender identity. It is perfectly legal in most states to fire someone because they are LGBTQ.

Forty-two percent of gay[1] people have experienced some form of employment discrimination because of their sexual orientation (Sears and Mallory 2011, 4). Transgender workers face even higher rates of workplace discrimination and harassment. An astonishing 90 percent of transgender individuals report experiencing some form of harassment, mistreatment, or discrimination on the job or taking actions like hiding who they are to avoid such issues. This includes 47 percent who say they have experienced an adverse job outcome such as being fired, being denied employment, or not receiving a deserved promotion because of their gender identity (Sears and Mallory 2011, 2).

Employment discrimination doesn't only harms its victims. It also has a harmful economic impact on businesses that tolerate or encourage discrimination against their workers. Conservative estimates of the aggregate costs of discrimination indicate that businesses lose at least $64 billion annually due to unfairness in the workplace (Corporate Leavers Survey 2007, 2). Those costs result in large part from inefficient hiring and firing practices that yield a substandard workforce. Such costs are also largely due to depressed job productivity and performance since employment discrimination and workplace hostility prevent employees from optimally performing their core responsibilities on the job.

Congress should pass the Employment Non-Discrimination Act (ENDA) to protect workers' rights and bolster firms' economic performance. ENDA will prohibit most U.S. businesses from discriminating on the basis of sexual orientation and gender identity. With ENDA's passage, businesses will consequently realize significant financial gains from a more qualified workforce and a more productive workforce, two of the key ingredients of firm profitability. Businesses will also realize cost savings by avoiding employee turnover that would otherwise occur when LGBTQ individuals are needlessly forced out of their jobs. ENDA will provide clearer and more uniform standards for nondiscrimination compliance, enhancing legal predictability and helping firms avoid potentially costly litigation. Using these facts and figures, advocates of workplace fairness should deploy a business framing in order to build sufficient political support to secure ENDA's passage.

IMPLEMENTATION OF ENDA WILL ENHANCE FIRMS' ECONOMIC PERFORMANCE

Currently, twenty-one states and the District of Columbia have enacted statutes that prohibit private and public employment discrimination on the basis of sexual orientation. Sixteen states and the District of Columbia have also implemented employee protections on the basis of gender identity (Human Rights Campaign 2012). In addition to

these state laws, more than 240 municipalities have enacted local ordinances prohibiting employment discrimination on the basis of sexual orientation, with at least sixty of these municipalities including gender identity as a protected class (Burns and Ross 2011, 10). Laws prohibiting employment discrimination on the basis of sexual orientation and gender identity are currently nonexistent in twenty-nine states and thirty-four states, respectively. No federal law outlaws employment discrimination based on sexual orientation or gender identity. It is perfectly legal in most states to fire someone because they are LGBTQ. Moreover, some of the states that do ban LGBTQ discrimination apply different legal standards in employee lawsuits (Hunt 2012).

Given the existing gaps in LGBTQ nondiscrimination coverage, ENDA is needed to provide employers with uniform and comprehensive guidelines concerning LGBTQ workplace protections under federal law. When it is passed, ENDA will boost firms' economic performance by removing inefficiencies from the market and by providing employers with clearer, more uniform, and more predictable legal standards for LGBTQ nondiscrimination compliance.

ENDA Will Help Remove Market Inefficiencies

Given the negative impact of discrimination on firms' financial performance, employers should independently implement a host of company policies to combat workplace discrimination against LGBT employees. Many employers have declined to do so because they wrongly believe those policies introduce more costs than they eliminate. In reality, a 2011 survey of small businesses—arguably the businesses that would be most impacted by ENDA's passage—showed that a majority have already prohibited discrimination against LGBTQ workers, and that there were few costs associated with implementing and maintaining LGBTQ-inclusive nondiscrimination provisions (Burns and Krehely 2011). It is therefore likely that, when Congress passes ENDA, businesses fearful of compliance costs will realize that ENDA's significant economic benefits outweigh whatever costs may be associated with introducing nondiscrimination policies.

RECRUITMENT

ENDA will require efficiency in hiring practices to ensure employers across the nation are hiring individuals based on their qualifications and capacity to contribute and not on their sexual orientation or gender identity. Recruiting skilled and qualified employees has become increasingly necessary to remain competitive in today's global economy. Discrimination, however, creates unnecessary barriers that could implicitly or explicitly push away qualified LGBTQ candidates for employment. As a result, businesses that discriminate forego the economic benefits of an optimal workforce. These benefits can be substantial: anecdotal evidence suggests that hiring one high-performing worker has the equivalent worth of hiring three mediocre workers, each paid the same salary (Bryant 2010). By outlawing discrimination based on sexual orientation and gender identity, ENDA will ensure employers are pooling from the largest possible market of qualified labor in their industry.

RETENTION

Relatedly, firms will realize significant cost savings from ENDA's passage due to decreased rates of employee turnover when LGBTQ workers leave or are forced out of employment due to workplace discrimination. For LGBTQ employees, workplace discrimination based on sexual orientation results in turnover rates nearly double those of Caucasian heterosexual men (Corporate Leavers Survey 2007, 4).

The turnover costs resulting from employment discrimination are significant. According to one study, the recruiting and staffing costs of replacing a departing employee range from $5,000 to $10,000 for an hourly worker and from $75,000 to $211,000 for an executive with a $100,000 salary (Robinson and Dechant 1997, 23). A more recent study found that these costs have increased over the last decade with the economy shifting toward industries that require more highly skilled workers. According to that study, replacing a low-skilled hourly worker costs approximately half that worker's annual wages plus benefits, and replacing someone in upper management can cost employers three to five times that individual's annual salary and benefits (The Rainmaker Group n.d.).

Firms will benefit from ENDA's ultimate passage by ensuring employees are not unnecessarily forced out of a job because they are LGBTQ. Instead, ENDA will facilitate more efficient human resources management by compelling employers to evaluate employees on their qualifications and contributions on the job rather than on their sexual orientation and gender identity. Firms will subsequently realize significant cost savings by eliminating turnover-related expenses that arise when discrimination goes unchecked.

PRODUCTIVITY AND JOB PERFORMANCE

Businesses will also capitalize on a more productive and higher-performing workforce once Congress passes ENDA. Numerous measures of job productivity show that employees who do not feel valued on the job—as is the case for LGBTQ employees working in hostile and discriminatory environments—have substantially diminished levels of productivity compared to those who report working in inclusive and nondiscriminatory environments. Employees who report fearing discrimination exhibit higher rates of absenteeism, are less committed to their employer, receive fewer promotions, and report more physical and mental health problems than those who do not report fearing discrimination or hostility on the job (Burns 2012). Each of these negative outcomes racks up substantial costs for businesses that allow discrimination to go unchecked.

The relationship between discrimination and poorer job performance certainly holds for LGBTQ workers. According to the Center for Work-Life Policy, "those hiding their sexual orientation . . . are more likely to feel that they are stalled [and] more likely to distrust the organization. And they are more likely to feel isolated" (Ludden 2011). Rather than focus on their core responsibilities on the job, many LGBTQ workers are distracted by hostile and discriminatory work environments. One conservative estimate is that a company with 1,000 employees loses at least $200,000 annually from diminished productivity among its LGBTQ workers (Hewlett and Sumberg 2011, 7).

By outlawing LGBTQ discrimination, ENDA will help foster LGBTQ-friendly

Compared to their closeted counterparts, out LGBTQ employees report higher levels of trust, entrepreneurialism, loyalty to their employer, job satisfaction, and happiness with their careers.

workplaces that encourage LGBTQ employees to "come out" on the job, allowing them to focus on completing their core workplace responsibilities rather than censoring themselves out of fear of unfairness and discrimination. Compared to their closeted counterparts, out LGBTQ employees report higher levels of trust, entrepreneurialism, loyalty to their employer, job satisfaction, and happiness with their careers (Hewlett and Sumberg 2011; Sears and Mallory 2011). Controlled experiments even suggest that laws like ENDA will help increase the productivity of the non-LGBTQ workforce, since non-LGBTQ individuals perform significantly better when they are aware of their colleague's sexual orientation (Everly et al. 2012).

ENDA Will Provide Employers with Clearer and More Uniform Legal Standards with Respect to LGBTQ Nondiscrimination Compliance

Employment discrimination exposes firms to potentially costly litigation, which often results in high attorney and court fees, time spent away from the business, and unwanted media attention. These costs are often significant regardless of the case's outcome. ENDA will inject both clarity and uniformity into the legal system and ultimately help firms avoid costly discrimination-related lawsuits.

First, ENDA will help employers by clarifying what constitutes discrimination against a transgender employee. Some transgender victims of discrimination have successfully sued their employer in federal court on the basis of sex discrimination. These claims have proven increasingly successful over the past decade. In *Price Waterhouse v. Hopkins*, for example, the Supreme Court held that existing federal laws prohibiting sex discrimination apply to harassment directed at an employee because that employee fails to conform to gender stereotypes (Maza and Krehely 2010). Similarly, the Eleventh Circuit ruled that firing an individual based on his or her gender identity violated the Equal Protection Clause's prohibition of sex-based discrimination (Glenn v. Brumby 2011). This trend in the case law has resulted in significant legal uncertainty for employers who are unsure how to avoid discrimination lawsuits from transgender or gender nonconforming workers.

Clarity in the form of a national standard prohibiting discrimination against transgender people is necessary to help businesses avoid these often financially painful (and otherwise avoidable) lawsuits. ENDA will make absolutely clear that hiring and firing decisions based on someone's gender identity is against the law. In this way, ENDA will help employers better navigate the litigation minefield and avoid unnecessary litigation that could result in millions of dollars of damages.

Second, ENDA will benefit businesses by harmonizing nondiscrimination compliance standards across the country, thereby lowering the cost of compliance. Right now, companies must comply with gay and transgender nondiscrimination laws on a state-by-state basis. A company with offices in Iowa and Florida, for example, must comply with different nondiscrimination requirements in the two states, since Iowa has both sexual orientation and gender identity nondiscrimination laws whereas Florida has neither. When passed, ENDA will create a more uniform set of rules that will largely eliminate the inefficient state-by-state approach of nondiscrimination compliance, reducing overhead costs and boosting overall profits.

LGBTQ ADVOCATES MUST UTILIZE A BUSINESS FRAMING TO GARNER SUFFICIENT POLITICAL SUPPORT TO SECURE ENDA'S PASSAGE

As advocates of workplace fairness prepare for the next legislative opportunity to secure ENDA's passage, which as noted at the start of this article may not be until 2013 at the earliest, they must deploy an effective communications, messaging, and framing strategy that broadly appeals to the public and to policy makers. Part of this strategy should certainly focus on fairness as well as the human impact of workplace discrimination. Firing or refusing to hire someone simply for identifying as LGBTQ is an affront to human dignity and should be portrayed as such. From a strategic messaging perspective, however, the "fairness framing" is only part of the story.

Equally essential is framing ENDA as a law that ultimately yields the numerous aforementioned benefits to the business community. Advocates of workplace fairness attempted to highlight ENDA's economic benefits during the last political debate over the policy in 2007. However, these advocates lacked the data points needed to garner sufficient political support for ENDA's passage. For example, executives from some of America's largest businesses testified before Congress that nondiscrimination policies and laws made for good business policy and good public policy. Evidence to substantiate those claims, however, was mainly limited to anecdotal and correlative facts and figures. In the future, ENDA advocates must deliver a more robust, research-driven narrative and disciplined messaging strategy to effectively augment public and political support for comprehensive workplace protections for the LGBTQ population.

Framing ENDA as an Economic Policy that Benefits Business Will Undercut Opponents' Central Argument Against Workplace Protection Laws

In prior legislative debates, conservative opponents of LGBTQ workplace protections often emphasized alleged business opposition to ENDA. For example, Senate Minority Leader Mitch McConnell (R-KY) argued that ENDA "would impose significant regulatory burdens and costs on small businesses." Similarly, Focus on the Family sent a letter to members of the House of Representatives in September 2009 claiming that "ENDA will . . . increase compliance costs for businesses—costs that small business can ill-afford, particularly during this economic down turn" (Burns and Krehely 2011). This framing was also evident in Congressional testimony from small business owners and others that cast ENDA as an antibusiness piece of legislation.

ENDA advocates should counter these claims with the substantial body of evidence that suggests ENDA will actually lower costs and reduce operational inefficiencies resulting from a suboptimal workforce. A pro-business messaging strategy will strengthen ENDA's prospects for passage by significantly weakening one of the core arguments conservatives have put forth in opposition to ENDA. This framing will not only neutralize opponents' attacks on ENDA but also put opponents on the defensive, requiring them to spend time and resources in order to defend their claims.

A Business Argument for Workplace Protections Will Capitalize on Significant and Increasing Support from the Business Community Itself

Advocates should not only aggressively communicate the evidence that discrimination is wasteful and that ENDA is economically sound but also capitalize on the business community's significant and increasing support for comprehensive LGBTQ workplace protections.

Eighty-five percent of *Fortune* 500 companies have enacted nondiscrimination policies that cover sexual orientation, and 49 percent have done so regarding gender identity. Looking at the very top of the *Fortune* ladder, the proportion of companies offering employment protections in the *Fortune* 100 skyrockets to 93 percent for sexual orientation and 74 percent for gender identity. Further, many of America's largest and most successful businesses have endorsed ENDA itself, including more than 148 companies that have signed on as part of the Human Rights Campaign's Business Coalition for Workplace Fairness (2011). Even a majority of small businesses (63 percent) support ENDA, despite conservative claims to the contrary (Burns and Krehely 2011).

LGBTQ and like-minded advocates should lobby businesses to actively voice their support for ENDA to the public and directly to policy makers. Having businesses themselves frame ENDA as an economic policy that benefits the business community is key to securing ENDA's passage, especially given the size and reach of this powerful constituency. ENDA advocates should also highlight recognizable brands and companies that have voluntarily implemented workplace protections. This strategy has already begun augmenting support for the legislation. Future advocates should continue to build upon this success.

Framing ENDA as an Economic Issue Is Necessary Given the Ongoing Emphasis on Jobs and the Economy in the Current Political Discourse

ENDA must be framed as part of a broader jobs and economic agenda in order for it to become law. Given the tepid economic recovery following the Great Recession, particularly in the labor market, legislators are constantly emphasizing the economic and employment benefits of proposed pieces of legislation in order to garner political support for their passage. This is true both for bills directly related to economic issues, like tax and budget policies, and for those not directly related. For example, following the 2010 midterm elections conservative state legislators framed recently passed anti-immigration bills as legislation that would reduce state and local unemployment rates. While ENDA will likely not resurface in Congress until 2013 at the earliest, advocates should frame it as a jobs bill and as a growth bill, one that removes inefficiencies from the labor

market. Such a framing will likely broaden ENDA's political appeal to some policy makers who are less than LGBTQ-friendly.

Establishing the Economic Case for Nondiscrimination Laws Extends the Argument for ENDA Beyond the Civil Rights and Equality Framework

While support for LGBTQ individuals and issues has grown over the past decade, the argument that laws such as ENDA grant "special rights" to LGBTQ people still resonates with a large proportion of the American public. As a result, advocates of workplace fairness cannot rely solely on a "fairness framing" when lobbying for ENDA's passage. A civil rights messaging strategy may in fact prove detrimental to ENDA's passage. Unemployment is projected to remain relatively high over the next decade, and arguing that LGBTQ people need an employment rights bill may dissuade the public and policy makers from supporting ENDA at a time when people from all demographics are struggling to find or maintain employment. Instead, a messaging strategy that casts workplace protections as promoting efficient labor markets and profitable businesses could create a larger coalition for passing ENDA, a coalition that goes beyond the LGBTQ community and like-minded advocates.

LESSONS FROM DADT REPEAL

The business case for enacting ENDA mirrors a framing and messaging strategy successfully used to achieve the December 2010 repeal of "Don't Ask, Don't Tell" (DADT), the military's ban on openly gay service members. At first, in the early 1990s, advocates of repealing the ban on open service framed the issue largely as one of "the right to serve." Former President Bill Clinton, who as a candidate had promised to lift the ban on gays in the military, also relied on this framing, arguing that everybody who was willing to fight for their country deserved an equal opportunity to serve (Frank 2009, 18). Opponents, however, successfully argued that the inclusion of openly gay service members would compromise military readiness and combat effectiveness by weakening unit cohesion and troop morale. Their success ultimately maintained the gay ban in the form of the DADT "compromise" policy.

In the late 2000s, advocates of open service turned their opponents' arguments against them by arguing that the DADT policy itself compromised military readiness and combat effectiveness. These advocates successfully highlighted the fact that the ban on open service drove thousands of otherwise capable men and women out of the military, thus depriving the armed forces of valuable service from these individuals while the country was engaged in two wars halfway across the globe. Open service advocates also neutralized their opponents' unit-cohesion arguments by showing that the vast majority of service members were comfortable serving alongside openly gay soldiers. Advocates' success in reframing the issue in this way significantly contributed to Congress ultimately repealing DADT in 2010.

There are strong parallels between the combat-effectiveness framing that helped end DADT and the pro-business framing that could help enact ENDA. By co-opting the combat-effectiveness argument promulgated by DADT proponents, advocates lobbying for DADT repeal undercut the main rationale against open service, effectively putting DADT proponents on the defensive. Should advocates of workplace fairness effectively

frame ENDA as an economic and pro-business issue, they could similarly succeed in co-opting conservative arguments against ENDA, thereby minimizing political opposition to the bill.

DADT repeal advocates further capitalized on newfound support for repeal from senior military officials. While many in the military continued to oppose repeal in the late 2000s, advocates successfully highlighted military leaders' support for repeal, especially emphasizing the support from leaders with historically conservative leanings like former Secretary of State Colin Powell and then Secretary of Defense Robert Gates. ENDA advocates would do well to promote and publicize support among business leaders—also traditionally a politically conservative constituency—in order to neutralize erroneous claims that ENDA will impose costs on companies and hamper their performance.

DADT repeal advocates learned an important lesson from the early 1990s: a civil rights framing on its own can do more harm than good. This is why advocates rarely emphasized LGBTQ rights and equality when working toward repeal in the late 2000s. Instead they focused on the more pragmatic frame of combat effectiveness and how open service would strengthen the armed forces. ENDA advocates should adopt an analogous approach. Rather than emphasize ENDA's civil rights implications, they should frame ENDA as an economic policy that will benefit the business community.

CONCLUSION

The high rate of LGBTQ workplace discrimination in the United States harms not only LGBTQ employees but also the businesses that employ them. Discrimination introduces significant inefficiencies into human resources management, thereby imposing unnecessary costs on businesses. In order to eliminate these costs, employers should independently institute low-cost and commonsense workplace policies that prohibit discrimination based on sexual orientation and gender identity in their organizations. Employers could achieve even deeper cost savings, however, through the enactment of federal legislation, such as ENDA, that would ban LGBTQ workplace discrimination. ENDA would clarify and harmonize the legal standards surrounding workplace protections, thereby reducing the costs of compliance and the risk of expensive litigation. There is now a wealth of evidence regarding the economic benefits of workplace fairness. ENDA proponents should make this evidence the cornerstone of their advocacy efforts. With support from a broad coalition including fairness advocates, the business community, and others, ENDA may finally become the law of the land.

REFERENCES

Bryant, Adam. 2010. Three good hires? He'll pay more for one who's great. *New York Times*, 13 March.

Burns, Crosby. 2012. The costly business of discrimination. Washington, DC: The Center for American Progress.

———, and Jeff Krehely. 2011. Ensuring workplace fairness is not expensive. Washington, DC: The Center for American Progress.

———, and Philip Ross. 2011. Gay and transgender discrimination outside the

workplace. Washington, DC: The Center for American Progress.

Corporate Leavers Survey. 2007. The cost of employee turnover due solely to unfairness in the workplace. San Francisco, CA: Level Playing Field Institute.

Everly, Benjamin A., Margaret J. Shih, and Geoffrey C. Ho. 2012. Don't ask, don't tell? Does disclosure of gay identity affect partner performance? *Journal of Experimental Social Psychology* 48(1): 407-410.

Frank, Nathaniel. 2009. *Unfriendly fire. How the gay ban undermines the military and weakens America.* New York: Thomas Dunne Books.

Glenn v. Brumby 663 F.3d 1312 (11th Cir. 2011).

Hewlett, Sylvia Ann, and Karen Sumberg. 2011. The power of "out." New York: Center for Work-Life Policy.

Human Rights Campaign. 2011. Business coalition for workplace fairness. Washington, DC: Human Rights Campaign.

———. 2012. Statewide employment laws & policies. Washington, DC: Human Rights Campaign.

Hunt, Jerome. 2011. A history of the Employment Non-Discrimination Act. Washington, DC: The Center for American Progress.

Ludden, Jennifer. 2011. Workplace atmosphere keeps many in the closet. National Public Radio, 3 July.

Maza, Carlos, and Jeff Krehely. 2010. Establishing fairness and legal predictability. Washington, DC: The Center for American Progress, 10 November.

The Rainmaker Group. n.d. The real costs of employee turnover.

Robinson, Gail, and Kathleen Dechant. 1997. Building a business case for diversity. *Academy of Management Executive* 11(3): 21-31.

Sears, Brad, and Christy Mallory. 2011. Documented evidence of employment discrimination & its effects on LGBT people. Los Angeles: Williams Institute, July.

ENDNOTES

[1] For variety and simplicity, the word "gay" is sometimes used as an umbrella term for gay, lesbian, and bisexual.

Absence and Uncertainty:

LGBT Families in Federally Funded Healthy Relationship Programs

by Patrick Hart

Federal resources for programs supporting marriage have coincided with an increase in the number of lesbian, gay, bisexual, and transgender (LGBT) families. This article examines how federal healthy marriage/relationship programs treat LGBT families through a discussion of previous research, personal interviews, and an examination of the program grantees. While more extensive research is needed, these findings indicate a range of attitudes within these programs toward LGBT families. Since there is a great deal of discretion for grantees, this range of attitudes indicates that LGBT families may have varied experiences within the program. Recommendations for future research and policy changes are offered to facilitate equal inclusion of LGBT families in federally funded healthy relationship programs.

Over the last fifteen years, policy makers in the United States have increasingly allocated resources toward the creation and promotion of "healthy marriage" programs. These programs provide financial support to help low-income parents remain in healthy and stable relationships, particularly marriages. This recent trend is in part due to a growing body of research suggesting that low-income children have more favorable life outcomes when raised by two married parents, though there is still substantial dispute about the validity and meaning of this research (Nock 2005; Cowan and Cowan 2009). While much uncertainty exists regarding the government's healthy marriage support strategy on both ethical and efficiency grounds, it has been embraced by major members of both parties. The administrations of Presidents George W. Bush and Barack Obama have both supported federally funded programs to encourage and nurture healthy relationships and marriages.

While this shift in family policy has been occurring, another equally significant societal change has been taking place: the growing visibility and social acceptance of lesbian, gay, bisexual, and transgender (LGBT) individuals and couples as parents.1 Many older LGBT people who already had children have come out as cultural homophobia has decreased. In addition, as more LGBT people feel confident about coming out at a young age, more LGBT couples are having children of their own through adoption, donor insemination, or surrogacy (Movement Advancement Project et al. 2011). Legally, an increasing number of states explicitly allow adoption by same-sex couples or ban discrimination against them in the adoption process. Seventeen states and the

District of Columbia now fall into this category, while only five states explicitly ban joint adoption by same-sex couples (Movement Advancement Project et al. 2011, 26-27). At the same time, more states are legally recognizing same-sex marriage, and there is a growing push to make equal marriage rights the law nationwide. In the United States today, LGBT parents are becoming more of a norm.

METHODOLOGY AND LIMITATIONS

For this article, I wanted to determine what happens when these two developments—the growing healthy marriage/relationship movement and the growing presence of LGBT parents—intersect. Specifically, I set out to answer the question of how LGBT families are treated and viewed in federally funded healthy marriage/relationship programs. I examined the Web sites of the most recent federal healthy relationship grantees and conducted an e-mail survey of those grantees to see what programs, if any, they offered to LGBT families and what their attitudes toward those families were.

There were fifty-nine grantees, of which fifty-five had Web sites describing their programs. While only eighteen actually described their recent grant award, the other thirty-seven did describe the organization's marriage/relationship program in some level of detail. I searched the Web sites for descriptions of their programs and their target populations, as well as any language specifically indicating whether LGBT families were welcome in those programs. In addition, I examined the language and imagery on all the Web sites to see whether they prominently contained anything specifically inclusive of LGBT families or specifically anti-LGBT. As a follow-up to my Web site observations, I e-mailed all the organizations to ask about their programs. Fifty-six had e-mail addresses, either through a specific person's e-mail address or through a form on their Web site. The response rate was quite low, but I did receive substantive replies from nine grantees, in addition to six responses promising more information that was never delivered.

These findings are limited and point to the need for comprehensive quantitative and qualitative research on this question. This was a limited examination of a preselected set of grantees with several biases in both the researcher and the respondents; it was not a rigorous scientific survey of these grantees and their practices. It is also important to note that since new grant activities started in January 2012, descriptions on the organizations' Web sites do not necessarily correspond with what the grants are used for. Indeed, at least one e-mail respondent indicated that her organization would be serving a broader range of families than its Web site indicated. Yet given the Web site is the primary public face of an organization, its description of clients remains relevant and will determine which families seek out the program. As the program evolves, it is possible that Web sites and descriptions will change.

I chose to examine the fifty-nine just-announced grantees and not those that had received the older Bush administration grants. While the previous grantees may have had more experience and perhaps records of couples served, I determined it most beneficial and feasible to evaluate new grantees for several reasons. First, new grantees would be performing these services for the next few years and therefore would be most relevant to any policy discussion. Second,

the current grant application's inclusion of proposals for "allowable activities" gives new grantees a clear idea of which services they will perform and which populations they will serve. Finally, many new grantees also received the previous grant or have otherwise previously conducted marriage and relationship work, and therefore many already have programs in place.

Before discussing results, it is important to understand the types of grantees. Many different entities were eligible to apply for the grant, and those that received it were a mix of public, private, and nonprofit organizations. In many cases, the applicant was merely one of a larger coalition that might include many different types of agencies. As mentioned above, most grant recipients have some experience with relationship or marriage counseling for adults or teenagers, but the depth and breadth of this experience varies widely. The request for proposals (RFPs) indicated that the government reviewers would look favorably on applicants with a specific focus on low-income or other at-risk populations, so many recipients had these focuses. As we will see later when I discuss the findings, the grantees also have different target populations for their services.

The final important limitation is that I did not do a comparable examination for the strong fatherhood grants, which were announced by the U.S. Department of Health & Human Services (HHS) at the same time as the healthy relationship grants. This would be an intriguing avenue for further research. Because the fatherhood awards are focused on parenting, not on couples, the sexual orientation of the father should not matter. Yet the rhetoric about the importance of the father used by many national fatherhood organizations and government agencies can sometimes veer into the heterocentric rhetoric used by equal marriage opponents.2 At any rate, the fatherhood programs represent a promising future avenue for research.

HEALTHY MARRIAGE AND RELATIONSHIP PROGRAMS THROUGH THE YEARS

The Personal Responsibility and Work Opportunity Act of 1996, or the welfare reform law, signed by former President Bill Clinton, was an early indication that the federal government intended to promote marriage as a policy for fighting poverty (104th Congress 1996). The bill included language discouraging out-of-wedlock births and encouraging marriage in the Temporary Assistance to Needy Families (TANF) program, and several states began using TANF funding for healthy marriage programs (National Healthy Marriage Resource Center 2009, 3). During the early 2000s, President George W. Bush launched an official national push toward supporting marriage as a policy goal, and HHS began using various discretionary funds within TANF to support healthy marriage programs (National Healthy Marriage Resource Center 2009, 5-8). In particular, Bush and several scholars argued that marriage was important in low-income communities and that one reason for worse outcomes for low-income children was the breakdown of the two-parent family in those communities (Rector and Pardue 2004). Several of Bush's allies in the conservative intellectual community spoke out in support of the president's so-called healthy marriage proposal (Rector and Pardue 2004). In many ways, these arguments were the culmination of a long tradition of conservative criticism of the family structure in low-income,

and particularly African American, communities as a contributor to high rates of poverty in those communities.

In recent decades, several more liberal scholars focused on low-income children, such as Sara McLanahan (1999), also began arguing that family structure did matter for children's outcomes. These scholars argued that, all things being equal, being raised by two married biological parents was better than being raised by cohabiting parents or a single parent (McLanahan 1999). Today, McLanahan is the lead researcher on the Fragile Families study, which examines outcomes over a period of many years for children born to unmarried parents. The results from this study continue to show that, particularly for low-income youth, growing up without two married parents is a detriment to positive life outcomes, though there is a high level of uncertainty about how family status interacts with other factors (Waldfogel et al. 2010). Because of the many variables involved, this conclusion is not unanimously shared, and there are serious critiques of the concept that marital status is a driving force for children's outcomes (Coontz and Folbre 2002; Cowan and Cowan 2009). Nevertheless, by the time President Bush and Congress reauthorized TANF in 2005 to include a specific carve-out for healthy marriage and relationship funding (National Healthy Marriage Resource Center 2009, 3), the idea of supporting marriage, though not necessarily all the components of Bush's initiative, had support from both liberal and conservative camps.

The portion of TANF funding allocated in the budget for healthy marriage activities was awarded in 2006 and included several planks focused on teaching marriage and relationship skills to married and unmarried couples, single parents, and teens (National Healthy Marriage Resource Center 2009, 8-10). The initial grant ran until 2011. Along with $100 million annually for healthy marriage programs, the grant included $50 million for "responsible fatherhood" programs aimed at helping low-income single fathers (National Healthy Marriage Resource Center 2009, 9).

When President Obama took office, there was substantial discussion within and outside his administration about what grants should look like when renewed, particularly with reauthorization of TANF looming. The administration initially proposed a Fatherhood, Marriage, and Family Innovation Fund that would focus more broadly on parenting, relationships, and a broad range of outcomes for children and less specifically on marriage (Boggess 2010). This proposal met with opposition from those in the healthy marriage community who were concerned that it would deemphasize marriage too much (Bradley and Rector 2010; Wetzstein 2010).

For the time being, the compromised result is that the Obama administration announced that the new round of $150 million in grants would be divided in half: $75 million would be for healthy marriage and relationship programs, and the other $75 million would go to responsible fatherhood programs aimed at supporting low-income fathers—single or not—and helping them build ties to their partners and children, though the grant application did specify that these services must be made available to mothers on an equal basis (U.S. Department of Health & Human Services 2011b). HHS put out an RFP in June 2011, and the grant awards were announced in October 2011. These grants

were selected through a competitive process conducted by the department's Administration for Children & Families (ACF). ACF staff evaluated proposals based on several factors such as capacity and budget, but the most important factor was how well the proposal advanced healthy marriage and relationship goals and served clients through various allowable activities such as public advertising campaigns, direct work with couples and single people, and youth outreach (U.S. Department of Health & Human Services 2011a). Initial awards are for one year, but HHS left open the option of continuing the awards in future years subject to funding availability and grantee performance (U.S. Department of Health & Human Services 2011a).

LGBT FAMILIES IN THE UNITED STATES

In relative historical terms, the speed at which the dialogue around LGBT people as parents has changed is remarkable. While there have been movements for LGBT rights throughout much of the twentieth century, it has been only in the last thirty years or so that historical prejudices against LGBT people and couples as parents have begun to dissipate. In the United States today, the best recent estimate indicates that there are approximately 2.3 million children living with openly LGBT parents (Movement Advancement Project et al. 2011, 118-119). While these parents are both single and coupled, the best recent estimates indicate that more than 100,000 same-sex couples are raising children (Williams Institute 2011).

When discussing LGBT parents, two challenging stereotypes often arise. The first, still common in much of the country, is that a same-sex couple by its very nature cannot provide the same level of parenting that a heterosexual couple can. While this image persists, it has been uniformly rejected by mainstream medical and mental health associations, which note a voluminous body of studies and evidence confirming that all other things being equal, children of LGBT parents do just as well as children of heterosexual parents. Because of the difficulty in obtaining comparable sample sizes for different types of parents and the difficulty of disentangling the effects of parents' sexual orientation from the effects of social stigma and other variables, there are still research questions that need to be answered in this area (Biblarz and Stacey 2010). However, the general consensus of the field is that LGBT parents can raise children just as well as straight parents can.

The second stereotype presents a different challenge. Anecdotally, in conversations about this article, many people expressed surprise that LGBT parents would even need any type of federal services, given the popular image of LGBT people as affluent and the prominent portrayal of lesbian and gay parents as well-off White suburbanites (for example, in TV shows and movies such as Modern Family and The Kids Are All Right). However, recent research provides a more accurate portrayal of LGBT families in the United States. Families with same-sex couple parents are more than twice as likely to be living in poverty as families with married straight parents, while same-sex couple parents and their children are more likely to be people of color than straight parents and their children, and same-sex couple parents of color have higher poverty rates than same-sex White parents (Movement Advancement Project et al. 2011).

Government policies themselves exacerbate the problem: many federal programs

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and tax breaks are only available to married heterosexual families, and LGBT families are thus forced to pay more than they would if they were straight (Movement Advancement Project et al. 2011).3 TANF, the parent program for the healthy marriage grants, uses "a narrow definition of family" and can exclude families with same-sex parents (Movement Advancement Project et al. 2011, 57-58).

In addition, while many straight parents take their ties to their children for granted, many LGBT parents go through procedures such as adoption, surrogacy, and securing legal contracts to ensure their parentage, all of which can cost thousands of dollars (Movement Advancement Project et al. 2011). Persistent homophobia and social stigma can make families feel unwelcome in day care programs and at other social service providers, and this can have a mental, emotional, and financial drain. Even where no legal barrier exists, providers of adoption, health care, and other social services on the ground often act in homophobic ways (Movement Advancement Project et al. 2011). LGBT families of color bear the double burden of facing homophobia and persistent racial/ethnic discrimination and inequality. Understanding the truth about poverty rates among LGBT families is particularly important when we examine programs such as healthy marriage, which have a stated goal of focusing on low-income families. Since LGBT families are more likely to be poor, it is all the more unjustifiable if they are being ignored by this antipoverty program.

WHEN LGBT FAMILIES AND HEALTHY MARRIAGE PROGRAMS MEET

Given the added barriers that LGBT families face, it would seem important that they are able to access federal programs aimed at helping families in difficult relationship situations. To be sure, there are both progressive and conservative critiques of the idea that government should be providing these services at all (Polikoff 2008; Coburn 2011, 182-183). There is also debate about whether these programs actually achieve their goals. A large-scale evaluation of the program sites that were part of the Building Strong Families federally funded healthy relationship project in the last decade found that most of the program sites evaluated did not have a significant effect on relationship outcomes, though there were significant effects observed at the Oklahoma site (Wood et al. 2010). While this debate and evaluation is ongoing, as long as the federal government is providing services, it seems important that it provides those services to all who might benefit.

The first anecdotal reports I saw indicated that many federally funded healthy relationship/marriage grantees cited the

Defense of Marriage Act (DOMA) as a bar to LGBT families participating in their programs (Petrelis 2011; McGonnigal 2010). DOMA is a 1996 federal law enacted in response to the early movement toward same-sex marriage. It mandates that in any federal law or regulation, the words "marriage" and "spouse" only refer to heterosexual marriage. While President Obama is opposed to DOMA and his Justice Department has declined to defend it in court, the law remains on the books.

The existence of DOMA, however, does not alone account for the difficulties facing LGBT families in accessing support through healthy marriage programs. While the program is a "marriage" focused program, there are many allowable activities within the program that are not limited to married couples. The Obama administration's recent version of the healthy marriage RFP clearly includes many services about "relationship" rather than "marriage" help. There are eight eligible activities in this RFP, and only two of these are reserved for married couples, while three others include "relationship skills" or are specifically open to unmarried couples. The other three involve general advertising or policy change and not direct work with couples. In addition, low-income families, whether they receive TANF or not, are a specific population of interest for the grant, and we have already observed that LGBT families are disproportionately low-income (U.S. Department of Health & Human Services 2011a). While DOMA clearly represents a major barrier to LGBT couples in many respects, it is not true that it systematically bars federal grantees from using healthy relationship resources to help LGBT couples.

At the same time, while the language of the RFP certainly leaves room for service providers to serve LGBT couples and individuals, the federal government has not publicly made clear that this is the case or encouraged grantees to do so. During the Bush administration, HHS explicitly announced, citing DOMA, that healthy marriage grant funds could only be used for straight married couples (U.S. Department of Health & Human Services 2004). My early attempts to gain information about the Obama administration's HHS position met with limited success. HHS either did not answer or did not provide relevant information in response to several e-mails.

In a later conversation, Naomi Goldberg of Movement Advancement Project suggested that this might be deliberate, as HHS probably wanted to avoid taking an affirmative position about what DOMA said one way or the other given that it is still the law but is officially opposed by the administration (Goldberg 2011). Scott Stanley, who was involved in the development and evaluation of one of these program models as an academic, has heard anecdotally (though there has been no official announcement) that HHS might be telling grantees that if they are in a state where same-sex marriage is legal, they can serve same-sex couples. At the same time, he noted that even dating back to the first Bush Healthy Marriage Initiative, many grantees opened their relationship support services to all couples, including LGBT ones, though there is no clear data on LGBT couples or individuals served (Stanley 2011). Theodora Ooms, another family policy scholar involved in the development of marriage and relationship programs, also reported that officials in the Bush administration HHS informally acknowl-

edged that some programs would serve LGBT people in practice and that in her experience even programs designed for married couples "never asked for proof of marriage at the door" (Ooms 2011).

In a similar vein, the Alternatives to Marriage Project submitted Senate testimony in 2010 that noted that, anecdotally, many healthy marriage–funded relationship service providers expressed openness to serving same-sex couples, though the project expressed skepticism that all the openness was genuine (Alternatives to Marriage Project 2010). Therefore, while there is still some uncertainty as to the precise federal position, grantees appear to have discretion under the current legal and regulatory language to serve LGBT families if they choose to do so. Ultimately, though, the best way to determine the attitudes of grantees is to examine the grantees themselves. Using the methodology described at the beginning of this article, I examined the Web sites of the grantees announced in October 2011 for the recent healthy marriage/relationship grants. I followed that up, when possible, with e-mail messages to those grantees to ask if their programs worked with LGBT couples, and if so, how many couples had been assisted.

THE FINDINGS

Finding 1: Most Programs Do Not Explicitly Exclude LGBT Families, But Few Make Any Public Indication that LGBT Families Are Welcome

Only two Web sites explicitly welcomed LGBT families to their programs. On the other hand, four Web sites had language that was specifically anti-LGBT, such as statements that marriage is "between one man and one woman," rules that only heterosexual couples could meet despite a program being located in a state with marriage equality, and links to anti-equal marriage testimony from noted anti-LGBT activist Maggie Gallagher. Most of the Web sites did not include specifically anti-LGBT language but had overtly heterocentric language and prominently displayed happy images of straight couples on their Web sites. I could find no Web site in the group that included any images of same-sex couple parents. The two Web sites with pro-LGBT language were both for organizations based in high equality states.4 Of the four organizations with anti-LGBT language on their Web sites, two were based in low equality states, one in a medium equality state, and one in a high equality state.

Only two Web sites explicitly welcomed LGBT families to their programs . . . four Web sites had language that was specifically anti-LGBT, such as statements that marriage is "between one man and one woman."

Finding 2: Most of the Program Descriptions on the Web Sites Do Not Necessarily Exclude LGBT Families

Forty-two Web sites provided enough detail about who could be served through their programs for me to draw some distinctions. Four only welcomed married couples to their programs, and given the constraints of DOMA, that means their healthy relationship programs are reserved for straight couples. Thirteen welcomed all couples, while six were specifically programs for unmarried couples; either of these sets could, theoretically, under the program language, include same-sex couples. In addition, five programs specifically focused on relationship education for teens. Some programs were reserved only for parents. Of these, three were reserved for either married parents or parents who had biological children together, in both cases excluding LGBT couple parents, even when one parent may be the biological parent and the other parent may be a legally adoptive parent and no other legally recognized biological parent exists. A large number of Web sites were unclear or undetermined as to what types of families they served.

Finding 3: The Organizational Affiliations of Some Grantees Imply Additional Reason for Concern

It should also be noted that besides the four grantees with explicitly anti-LGBT language on their Web sites, seven additional grantees had strong links either to abstinence-only programs or to religious groups that have a history of hostility toward LGBT people. While this does not necessarily mean LGBT people will be mistreated or turned away in these settings, it is cause for concern. None of these grantees were from a state with full marriage equality, though there is a substantial range of LGBT rights laws within the seven states (four are low equality states, one is a medium equality state, and two are high equality states).

Finding 4: Some Organizations May Be More Welcoming to LGBT Families than Their Web Sites Suggest

As a follow-up to my Web site survey, all the organizations were sent e-mail requests for information. Of the grantees who responded, two (one in a high equality state and one in a low equality state) explicitly said their programs welcomed LGBT couples, while five (one in a high equality state and the rest in low equality states) made statements that effectively said all comers would be welcome but did not explicitly embrace serving LGBT families. One asked "what does LGBT stand for?" while another cited DOMA as a bar to explicitly serving same-sex couples but said that many of its Web materials might well be applicable to same-sex relationships (both of these grantees were in low equality states). Multiple grantees reported that there was a donor meeting for grant recipients in Washington, DC, recently, and one grantee reported that this issue had been addressed in the meeting. The impression this grantee received from the meeting is that if grantees chose objectives in their grant application that specifically focused on "marriage," DOMA was still an obstacle. Several grantees were apparently trying to serve all same-sex couples, whatever their legal status, as unmarried couples, so as not to run afoul of DOMA. In the above results, however, there may be a selection bias since grantees with a more pro-LGBT outlook may be more likely to respond to an author writing an article that is sympathetic to LGBT rights.

DISCUSSION OF FINDINGS

While we need to be cautious about drawing any broad conclusions from this limited data, some trends do become clear. While few organizations explicitly use anti-LGBT language, the overwhelming majority use heterocentric imagery and language on their Web sites. In addition, many programs implicitly bar LGBT families because they are limited to married couples and/or couples with biological children.

There are some programs that welcome LGBT families. The results of my e-mail survey indicate that at least some percentage of the grantees are open to serving LGBT families within the constraints of federal law. This is consistent with conversations I had for this project and with written Senate testimony by the Alternatives to Marriage Project mentioned earlier. Still, an LGBT parent or couple looking at the Web sites of most of the grantees, which is how many people seek out services, would find very little to indicate that the programs are LGBT-friendly and in a significant number of cases would find language or organizational affiliations that would probably discourage them from attending the program.

The survey results suggest that the inclusivity of a program may have more to do with the attitudes of the grantee itself toward LGBT families than with federal or state policy. As mentioned earlier, there seems to be room within the legal constraints of DOMA for a grantee to offer services to LGBT families. Even so, there is no mandate for grantees to offer such services, and it would certainly be possible for grantees to avoid serving LGBT families. The grantees with specifically anti-LGBT language, strong links to anti-LGBT organizations or abstinence programs, or e-mail responses that were not necessarily inclusive were spread among states of many different types, though they were more likely to be in low equality states. At the same time, I found examples of grantees in high equality states that included LGBT-hostile language and grantees in low equality states that reported that they welcomed LGBT families.

The importance of organizational values is reiterated because all organizations that had LGBT-positive language on their Web sites or specifically reported openness to serving LGBT families were public organizations or secular nonprofits. Many of the organizations with anti-LGBT language were organizations of the same type, but it is notable that none of the religious organizations that received funds had LGBT-positive language on their Web sites or substantively replied to the survey. This does not mean that no religious organizations will provide

An LGBT parent or couple looking at the Web sites of most of the grantees . . . would find very little to indicate that the programs are LGBT-friendly and in a significant number of cases would find language or organizational affiliations that would probably discourage them from attending the program.

services to LGBT families, but given current high-profile examples of organizations using "religious liberty" claims in an attempt to avoid providing publicly funded social services to LGBT people (Goodstein 2011), it is worth noting the concern.

So potential trends indicate, if they hold for all fifty-nine grantees, that secular organizations in high equality states, all else being equal, are more likely to offer LGBT-inclusive services. At the same time, given that the federal rules are the same for all grantees, it seems likely that it is the grantees' own attitudes and values that primarily influence their actions toward LGBT families.

NEXT STEPS

Multiple people interviewed for this project felt that to truly determine how these programs treat LGBT families, a large nationwide survey of federal grantees, including qualitative and quantitative data, is needed (Goldberg 2011; Stanley 2011). The evaluation of the Building Strong Families program and other healthy marriage initiatives has taken years, but a similar evaluation of these programs' attitudes toward LGBT families would be welcome. It would need to involve phone interviews and in-person visits to programs, as well as potentially testing to see how program staffers treat LGBT families. This type of evaluation would be a valuable project for LGBT rights organizations, social policy research centers, government agencies, or some combination of these.

At the same time, there are things that can be done now. The federal government can make clear that except for services that specifically relate to "marriage" or "married couples," all relationship support services in the marriage and fatherhood grants should be available to all families. Indeed, there is precedent for this type of regulation within the Obama administration's HHS, as detailed elsewhere in this volume of the LGBTQ Policy Journal (Pangilinan 2012).

Insofar as this is possible within federal law, future RFPs should include specific requirements or credits for working with LGBT families, as the most recent RFP did for several populations likely to be disadvantaged. Since organizations' own attitudes appear to matter a great deal for their LGBT-inclusiveness, federal grant makers should consider these attitudes when making funding decisions. Naomi Goldberg noted that it would be fascinating to see what happened if an LGBT community organization or counseling service was a partner on a future healthy relationship grant application (Goldberg 2011). There are LGBT healthy relationship–focused groups, such as the Gay Couples Institute, as well as a well-established network of LGBT community centers and advocates across the country. Theodora Ooms (2011) noted that it remains unclear whether LGBT families would be best served by relationship education classes with straight families or specifically LGBT-tailored ones, therefore an LGBT-focused grantee might offer additional opportunities to develop and test the best methods of relationship education for LGBT families. A recent pilot study suggested that relationship programs designed specifically for same-sex couples, free of heterosexist imagery, could have strong benefits for those couples (Whitton and Buzzella 2011). As long as the federal government continues to support healthy relationship–type activities, submitting LGBT family-focused applications is an idea worth considering; at the very least, it

would be provocative and challenge many of the assumptions within the broader healthy marriage movement.

In the long term, repeal of DOMA and other discriminatory laws is essential in order for the LGBT community to have equal rights and opportunities. Since LGBT families are a growing part of U.S. families, future versions of TANF and other family-oriented federal programs should recognize that LGBT families are a part of society. The Obama administration's initial proposal to create a broader healthy relationship/parenting support fund less specifically linked to "healthy marriage" is an idea worth reconsidering. Because of institutional and social discrimination, LGBT parents and their children are more likely to be economically disadvantaged than Americans at large. Federal programs should be supporting these families and not actively embracing policies that will make them even more fragile.

REFERENCES

104th Congress. 1996. Public Law 104-193. Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Alternatives to Marriage Project. 2010. Written statement in response to the hearing titled Welfare Reform: A New Conversation on Women and Poverty, September 21, 2010, submitted to the Senate Committee on Finance. Alternatives to Marriage Project, 29 September.

Biblarz, Timothy J., and Judith Stacey. 2010. How does the gender of parents matter? *Journal of Marriage and Family* 72(1): 3-22.

Boggess, Jacquelyn. 2010. The president's Fatherhood, Marriage, and Family Innovation Fund. Madison, WI: Center for Family Policy and Practice, 7 June.

Bradley, Katherine, and Robert Rector. 2010. How President Obama's budget will demolish welfare reform. Heritage Foundation, 25 February.

Coburn, Tom. 2011. Back in black: A deficit reduction plan. Plan from Tom Coburn, U.S. Senator from Oklahoma.

Coontz, Stephanie, and Nancy Folbre. 2002. Marriage, poverty, and public policy. Discussion paper from the Council on Contemporary Families. Prepared for the Fifth Annual CCF Conference, 26-28 April.

Cowan, Philip, and Carolyn Cowan. 2009. When is the relationship between facts a causal one? Council on Contemporary Families, August.

Goldberg, Naomi. 2011. Telephone communication with author.

Goodstein, Laurie. 2011. Bishops say rules on gay parents limit freedom of religion. New York Times, 28 December.

McGonnigal, Jamie. 2010. Federally-funded website provides help for (straight) couples. Talk About Equality blog, 27 December.

McLanahan, Sara. 1999. Father absence and the welfare of children. Working paper. Network on the Family and the Economy.

Movement Advancement Project, Family Equality Council, and Center for American Progress. 2011. All children matter: How legal and social inequalities hurt LGBT families. Report, October.

National Healthy Marriage Resource Center. 2009. Administration for Children and Families Healthy Marriage Initiative, 2002-2009: An introductory guide. U.S. Department of Health & Human Services.

Nock, Steven L. 2005. Marriage as a public issue. Marriage and Child Wellbeing 15(2): 13-32.

Ooms, Theodora. 2011. E-mail communication with author.

Pangilinan, Christian. 2012. Addressing LGBT poverty through regulatory change in the Obama administration. LGBTQ Policy Journal at the Harvard Kennedy School of Government 2.

Petrelis, Michael. 2011. Can gays attend $12M fed-funded CA marriage classes? Petrelis Files blog, 15 May.

Polikoff, Nancy D. 2008. Beyond (straight and gay) marriage. Boston: Beacon Press.

Rector, Robert, and Melissa Pardue. 2004. Understanding the president's healthy marriage initiative. Heritage Foundation, 26 March.

Stanley, Scott. 2011. E-mail communication with author.

U.S. Department of Health & Human Services. 2004. Will same-sex couples be eligible for healthy marriage initiative services? U.S. Department of Health & Human Services, Administration for Children & Families. ACF Questions and Answers Support, 18 March.

———. 2011a. Community-centered healthy marriage and relationship grants funding opportunity announcement. U.S. Department of Health & Human Services, Administration for Children & Families.

———. 2011b. Pathways to responsible fatherhood grants funding opportunity announcement. U.S. Department of Health & Human Services, Administration for Children & Families.

Waldfogel, Jane, Terry-Ann Craigie, and Jeanne Brooks-Gunn. 2010. Fragile families and child wellbeing. *Fragile Families* 20(2): 87-112.

Wetzstein, Cheryl. 2010. The family funds breakup. Washington Times, 12 March.

Whitton, Sarah, and Brian Buzzella. 2011. Relationship education with same-sex couples. National Council on Family Relations Report 56.4, Winter.

Williams Institute. 2011. United States Census snapshot 2010. Williams Institute, September.

Wood, Robert G. et al. 2010. Strengthening unmarried parents' relationships: The early impacts of Building Strong Families. Princeton, NJ: Mathematica Policy Research.

ENDNOTES

[1] Throughout this article, I refer to "LGBT families" or "LGBT parents." Because of the limited research that is available on this topic, and because the healthy marriage programs have a heavy emphasis on couples, most of my focus will be on same-sex couples raising children. There is, however, a wide need for research on transgender parents, and given the high level of transphobia in our society, this is a pressing area for future work to address. While my focus is more on same-sex couples, the issues of inclusion and acceptance in federally funded social service programs are applicable to all LGBT people.

[2] For example, the National Fatherhood Initiative notes on its Web site that "Fathers make unique and irreplaceable contributions to the lives of children." One wonders about the initiative's views of children being raised by, for instance, a lesbian couple.

[3] See Movement Advancement Project et al. 2011 for more detail. This point is complicated because for certain federal tax breaks and antipoverty programs, it may actually be advantageous for a couple not to claim married status since they may be eligible as individuals but their combined income may be too high for the program. In addition, for straight married couples, filing together can sometimes present economic disadvantages, while in other cases, the reverse is true; straight married couples, however, have a choice about whether to file federal taxes jointly, while same-sex couples, even if legally married in their home state, do not. This is a complex point well-explained by the Movement Advancement Project et al. (2011) report, but the end result is that families with same-sex couple parents are generally faced with a substantial financial disadvantage when compared with similar families with heterosexual couple parents.

[4] Throughout this section, I use the Movement Advancement Project's designation of states as high, medium, or low equality. These designations represent a summary of the state of LGBT legal equality in each state's laws, though the Movement Advancement Project notes that these designations do not take into account how well such laws are enforced or implemented. See the organization's Web site for a complete map of the states by equality designation and description of methodology (www.
lgbtmap.
org/equality-maps/legal_equality_by_state).

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