

FOREWORD: UNFINISHED BUSINESS

America's long civil rights odyssey proves that the moral arc of the universe bends toward justice. From segregated schools to anti-miscegenation laws, from the criminalization of same-sex relationships to the Defense of Marriage Act (DOMA), justice always triumphs in the end. But even though the arc ultimately bends in the right direction, it does not do so without help. As President Barack Obama observed in August 2013, on the 50th anniversary of the historic 1963 March on Washington, there still “remains our great unfinished business” of providing justice and economic equality for all.¹

This unfinished business requires more than simply holding the beachhead and sustaining the gains of the righteous who went before us. It requires us to continue seeking higher ground—to conquer the next civil rights frontier. At the forefront of that struggle is the movement for transgender equality, the most recent addition to America's collective quest for justice. Vice President Joseph Biden has called the fight for transgender rights the “civil rights issue of our time.”² The time and tide for this book are auspicious as issues that affect the lesbian, gay, bisexual, and transgender (LGBT) community are garnering greater traction with policy makers and amassing an impressive series of legal victories, including *United States v. Windsor*.³ That momentum has resulted in stunningly swift changes in the law on various fronts, which seem to announce a sea change in society that has not yet ended.

Indeed, the arc is beginning to bend toward equality for transgender people. Over the past few years, issues that affect the transgender community have received increasing attention from courts, political figures, and the media. In the area of employment rights, the U.S. Equal Employment Opportunity Commission (EEOC) released its groundbreaking opinion in

¹Office of the Press Secretary, The White House, Remarks by the President at the “Let Freedom Ring” Ceremony Commemorating the 50th Anniversary of the March on Washington (Aug. 23, 2013), available at www.whitehouse.gov/the-press-office/2013/08/28/remarks-president-let-freedom-ring-ceremony-commemorating-50th-anniversa.

²Donovan Slack, *Biden Says Transgender Discrimination “Civil Rights Issue of Our Time,”* POLITICO (Oct. 30, 2012), available at www.politico.com/politico44/2012/10/biden-says-transgender-discrimination-civil-rights-147761.html. See also Editorial Board, *The Next Civil Rights Frontier*, N.Y. TIMES (July 31, 2013) (calling the efforts to provide equality to transgender students “the next civil rights frontier”), available at www.nytimes.com/2013/08/01/opinion/the-next-civil-rights-frontier.html; Katy Steinmetz, *The Transgender Tipping Point: America's Next Civil Rights Frontier*, TIME, June 9, 2014, available at <http://time.com/135480/transgender-tipping-point>.

³570 U.S. ___, 133 S. Ct. 2675, 118 FEP 1417 (2013) (holding that §3 of DOMA, which denied equality of federal benefits to married same-sex couples, is unconstitutional).

Macy v. Holder,⁴ which defined discrimination on the basis of gender identity as a form of sex discrimination actionable under Title VII of the Civil Rights Act of 1964 (Title VII). That decision was consistent with the position of many major companies, some of which developed nondiscrimination policies for transgender employees years ago; other businesses, large and small, have since implemented similar policies.

In December 2012, the Board of Trustees of the American Psychiatric Association approved the removal of the term “Gender Identity Disorder” from the 2013 edition of its *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, shifting the profession’s perspective by de-pathologizing expressions of gender variance. Several state legislatures have recognized that these expressions are normal, healthy variations in humankind and have outlawed conversion therapy intended to “straighten” LGBT people.⁵

In June 2013 and January 2014, respectively, the Colorado Civil Rights Division and the Maine Supreme Judicial Court determined that local school districts discriminated against transgender grammar school girls when they refused to let the girls use the girl’s restroom.⁶ In 2013, the Social Security Administration amended its requirements for changing the gender marker on a person’s Social Security records, continuing a national trend of making it easier for transgender people to obtain identity documents that reflect reality.⁷ States that prohibit discrimination on the basis of gender identity, such as California and Oregon, are beginning to require that insurance companies cover transition-related care that was previously the subject of industrywide policy exclusions.⁸ In 2014, the federal Office of Personnel Management and the U.S. Department of Health and Human Services Departmental Appeals Board implemented long overdue changes that will

⁴2012 WL 1435995 (EEOC Apr. 20, 2012).

⁵CAL. BUS. & PROF. CODE §865 *et seq.*; N.J. STAT. ANN. §§45:1-54, 1-55. Both the Ninth Circuit Court of Appeals and the U.S. District Court for the District of New Jersey have resoundingly rejected constitutional challenges to those statutes. *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014), *cert. denied*, ___ U.S. ___, 2014 WL 514711 and 1669209 (June 30, 2014); *King v. Christie*, 981 F. Supp. 2d 296, 303 (D.N.J. 2013). Confident that those statutes comply with constitutional limits, several other state legislatures are contemplating similar legislation.

⁶*Mathis v. Fountain-Fort Carson Sch. Dist.*, 8, No. P20130034X (Colo. Div. Civ. Rts. June 17, 2013), available at www.transgenderlegal.org/media/uploads/doc_529.pdf; *Doe v. Regional Sch. Unit 26*, 86 A.3d 600 (Me. 2014), *rev’g sub nom. Doe v. Clenchy*, No. CV-09-201 (Me. Super. Ct. Nov. 20, 2012). Similarly, in July 2013, the U.S. Department of Education and U.S. Department of Justice entered into a groundbreaking resolution agreement with the Arcadia Unified School District in response to a complaint filed on behalf of a transgender student who was denied access to sex-separated programs, activities, and facilities based on gender identity. See Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, OCR Case No. 09-12-1020 and DOJ Case No. 169-12C-70 (July 24, 2013), available at www.nclrights.org/cases-and-policy/cases-and-advocacy/student-v-arcadia-unified-school-district. The *Mathis*, *Doe*, and *Arcadia* cases are discussed elsewhere in this treatise, including in Chapters 36 (Gender-Segregated Facilities) and 43 (Portraits of Gender in Today’s Workplace).

⁷See Chapter 18 (Immigration and LGBT Employees), Section III., and Chapter 31 (Names, Gender Markers, Pronouns, and Telephone Etiquette), Section III.A.

⁸See Chapter 37 (Employee Benefit Issues), Section III.G.

permit federal employees and Medicare recipients, respectively, to receive medically necessary gender-affirming medical care.⁹ Perhaps more important, transgender persons are now a significantly more visible and valued constituency in the LGBT community after years of living in the shadows.

Despite these leaps forward, the transgender movement has seen its share of setbacks. For example, the political gridlock in Washington, D.C., continues to stall the Employment Non-Discrimination Act (ENDA), which would prohibit discrimination in employment based on gender identity or sexual orientation. Opponents continue to frighten the public with unfounded assertions that ENDA would “increase frivolous litigation and cost American jobs, especially small business jobs.”¹⁰ In addition, some proponents of ENDA still worry that protections for transgender individuals will be scrapped from the ENDA bill in order to win passage in the House of Representatives, a gambit that was used successfully in 2007 when the House passed a version of ENDA that did not include gender identity.¹¹

In some federal courts of appeal, the scope of protection afforded transgender employees under Title VII remains an open question, as EEOC rulings are not binding on the courts.¹² State legislatures continue to consider bills with the sole purpose of demeaning and vilifying transgender people. For example, in 2013, legislation was proposed in Arizona that would have imposed criminal sanctions on transgender people who used restrooms, and other gender-segregated facilities, that correspond to their gender identity.¹³ Many transgender people live in states where they have no explicit legal

⁹*Id.*

¹⁰Robert Farley, *Spinning ENDA*, FACTCHECK.ORG (Annenberg Public Policy Center Nov. 6, 2013), available at www.factcheck.org/2013/11/spinning-enda (quoting official statement from House Speaker John Boehner’s office after the Senate voted to move forward with a debate on ENDA); Laura E. Durso and Winnie Stachelberg, *Business Support for the Employment Non-Discrimination Act—Fact Not Fiction*, Center for American Progress (Nov. 5, 2013), available at www.americanprogress.org/issues/lgbt/news/2013/11/05/78894/business-support-for-the-employment-non-discrimination-act-fact-not-fiction (same).

¹¹See Sunnivie Brydum, *Will Trans Folk Become an ENDA Bargaining Chip?*, ADVOCATE (Nov. 8, 2013), available at www.advocate.com/politics/transgender/2013/11/08/will-trans-folk-become-enda-bargaining-chip.

¹²*Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642–43 n.11, 100 FEP 1025 (2007) (in a Title VII case, the Court declined to accord “deference to the [EEOC’s] Compliance Manual . . . and the EEOC’s adjudicatory positions”).

¹³Ariz. S.B. 1432, 51st Legis., 1st Reg. Sess. (prop. amend. by Rep. John Kavanagh Mar. 18, 2013), available at www.azleg.gov/legtext/51leg/1r/proposed/h.1432-se-kavanagh.pdf. The sponsor of that legislation, Representative John Kavanagh, withdrew that proposal and instead offered an amendment to S.B. 1045 to include a provision that would strip local governments of the authority to ensure that transgender people are provided access to restrooms and other facilities based on gender identity. That amendment was approved by the House Committee on Appropriations, a committee that Rep. Kavanagh chairs. See Ariz. S.B. 1045, 51st Legis., 1st Reg. Sess. (as amended by H. Comm. on Appropriations Mar. 27, 2013), available at www.azleg.gov/legtext/51leg/1r/adopted/h.1045-se-approp.pdf; Minutes of H. Comm. on Appropriations (Mar. 27, 2013), available at www.azleg.gov/legtext/51leg/1r/comm_min/house/032713%20approp.doc.htm. See also Hearing on S.B. 1045 Before the H. Comm. on Appropriations, 51st Legis., 1st Reg. Sess. (Mar. 27, 2013) (video recording of statement of Rep. Kavanagh, Chairman, H. Comm. on Appropriations, and other speakers), available at http://azleg.granicus.com/MediaPlayer.php?view_id=21&clip_id=12339.

protections and a hostile legal system chills the exercise of the few rights accorded them.

Those setbacks are part of a broader social context in which transgender people experience inordinately high levels of violence, discrimination, and harassment. In 2012, 54 percent of all LGBT murder victims were transgender women, up from 40 percent the year before.¹⁴ According to the National Transgender Discrimination Survey¹⁵ carried out by the National Gay and Lesbian Task Force and the National Center for Transgender Equality, transgender people experience unemployment at double the rate of the population at large.¹⁶ Transgender parents suffering through negative custody and visitation decisions are the rule, not the exception. The stress of this pervasive societal discrimination has contributed to a staggering statistic: 41 percent of transgender people have attempted suicide, 25 times the national average.¹⁷

In light of the arsenal of legal tools at lawyers' disposal, our role in addressing these issues cannot be underestimated. But, in order for those tools to be effective, lawyers must know and use them. Every arrow in the legal quiver supporting transgender equality should hit its mark. That includes litigation, concomitant education of judges and juries, and advising our corporate, government, and private clients to adopt transgender-inclusive antidiscrimination policies.

However, in the end we know that legal maneuvering can only take any justice movement so far. The proof of the pudding is in changing societal attitudes. With the passage of time, we have learned that discrimination against women, people of color, and lesbian, gay, and bisexual individuals hurts everyone—and expressions of prejudice have become increasingly unacceptable even in private conversations. That same attitudinal lesson needs reinforcement in connection with transgender people, who have been universally stigmatized and marginalized, even by other seekers of justice. This work is particularly important given the so-called “ick factor” that many people continue to associate with transgender issues and that has been shamelessly exploited to deny transgender people their basic humanity and dignity.¹⁸

¹⁴Press Release, National Coalition of Anti-Violence Programs, National Report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities Released Today (June 4, 2013), available at http://avp.org/storage/documents/2012_mr_ncavp_hvreport.pdf. See also NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, 2012 REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE (2013), available at http://avp.org/storage/documents/ncavp_2012_hvreport_final.pdf.

¹⁵JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, National Gay and Lesbian Task Force and National Center for Transgender Equality (Feb. 2011), available at www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

¹⁶*Id.* at 3, 51, 55, 68.

¹⁷*Id.* at 2, 65, 72, 82.

¹⁸The “ick factor” is discussed in Vandy Beth Glenn’s essay in Chapter 6 (*Glenn v. Brumby: Forty Years After Grossman*).

This treatise, a labor of love for editor-in-chief Christine Michelle Duffy and the other project participants, will advance every one of these outlined approaches. In chronicling all aspects of the transgender journey, the treatise is a “reader” that addresses the entire gamut of relevant issues, from the deeply personal struggle of transgender people for self-acceptance to the transformative power of words—an effort to address not just legal but societal issues. That is not to suggest that the treatise is only philosophical. To the contrary, it is a pragmatic guide that covers subjects as germane as federal and state antidiscrimination laws and as practical as the process of coming out in the workplace. Even the oft-ignored relationship of the LGBT community to organized religion and culture is probed. No important subject has been overlooked with respect to the spectrum of employment discrimination faced by LGBT individuals.

Because of the unfinished nature of the business, this treatise is at once groundbreaking and a work in progress. We owe Christine a real debt of gratitude for her labors. Not only has she enlisted an extraordinary cadre of more than 125 experts in every aspect of LGBT life, but she has produced her own original work: In her commentary and in the structure she has created for the various expert presentations, she has provided us not only with vital information and insights, but also with context so that we can see the issues as a whole. Lawyers, social workers, scholars, and ordinary citizens alike will return to this volume again and again not only for knowledge but for inspiration, and perhaps even to inform the next battle for civil rights, whatever that may be. We are proud to be part of this volume and of “the long grey line” that has fought in every battle along the way, and that in the end will prove triumphant.

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