

Reflections at the Silver Anniversary of the First Trans-Inclusive Gay Rights Statute: Ruminations on the Law and its History -- and Why Both Should be Defended in an Era of Anti-Trans 'Bathroom Bills'

Katrina C. Rose

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Reflections at the Silver Anniversary of the First Trans-Inclusive Gay Rights Statute: Ruminations on the Law and its History—and Why Both Should be Defended in an Era of Anti-Trans ‘Bathroom Bills’

Katrina C. Rose

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ABSTRACT

In 1993, Minnesota became the first state to enact a sexual orientation civil rights statute that also provides protections for transgender people. At the twenty-fifth anniversary of that achievement, the intricate history underlying the statute remains underappreciated. The pioneering status of the 1993 state statute, as well as that of the 1975 Minneapolis trans-inclusive ordinance upon which it was based, now typically are recognized. The degree to which radical agitation against politically moderate interests did not sabotage trans-exclusive gay rights but, instead, gave birth to trans-inclusive gay rights is still largely misunderstood. The degree to which that earliest trans rights ordinance almost disappeared in a comedy of errors and the degree to which it actually was disappeared by much scholarly writing is an overlooked historical issue. I argue that trans people in every jurisdiction in the United States and in every profession still suffer from the omissions of those who had platforms in decades past from which at least to acknowledge the existence of trans-inclusive civil rights but, at every opportunity, painted only images of trans-absence. I further argue that a renewed focus on appreciating the fragility both of trans civil rights protections and of their place in civil rights history is essential to understanding how and why trans rights have become diminished in some places and, in others, never appeared at all.

AUTHOR’S NOTE

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I. INTRODUCTION

*No customers, no sales
I've counted the change
Seven times by now.
And it comes out the same
O for the great
Amazon Awakening!
- "Ode to a Dull Day"¹*

This verse appeared in the staff log book of Minneapolis's lesbian feminist Amazon Bookstore.² The dull day in question was Thursday, May 8, 1975.³ After expressing excitement that a note from author Rita Mae Brown had arrived in the day's mail along with various mundane items, the ode's author questioned—presumably tongue-in-cheek—whether the absence of customers might have been the result of her having “terminal flatulence or something.”⁴

It is possible that at least some portion of Amazon's clientele was east of the Mississippi River that day. For there, at the state capitol in St. Paul, a gay rights bill that had already provoked what Senator Allan Spear characterized as “open warfare”⁵ within Minnesota's LGB(T) community reached the House floor for final consideration. One reason for that warfare was the absence from the bill of protections for people who would now fall under the umbrella of “transgender.”⁶

¹ Store Journal / Staff Log #3 (1975), Amazon Bookstore Cooperative Corporate Records, 1970-2012, Collection No. 15 (on file with the Jean-Nickolaus Tretter Collection in Gay, Lesbian, Bisexual and Transgender Studies at the Elmer L. Anderson Library, University of Minnesota [hereinafter Tretter Collection]).

² See generally Katharine Mieszkowski, *Battle of the Amazons*, SALON.COM (Oct. 28, 1999), http://www.salon.com/1999/10/28/amazon_3/ [https://perma.cc/NB79-HMGT] (not Amazon.com).

³ Store Journal/ Staff Log #3, *supra* note 1.

⁴ *Id.*; see also Tony Hendra, Sean Kelly & John Weidman, *Terminal Flatulence*, NAT'L LAMPOON, May 1975, at 47.

⁵ Letter from Allan H. Spear, State Sen., Minn. to Jack Baker (Mar. 21, 1977) (on file with the Minnesota Historical Society, St. Paul, Minnesota [hereinafter MHS], in Allan Spear Legislative Records 1972-2000 [hereinafter Spear Legislative Records], Box 9, Folder '77-SF 497: Gay Human Rights Bill—Letters).

⁶ The term “obvious gays” was as likely to be seen in relevant discourse of the day as were terms such as “transsexual” and “transvestite.” The term “transgender” was known at the time but had not yet ascended to its current

During the months leading up to the 1975 legislative session, the issue of trans inclusion ensured that Minnesota gay politics were discordant.⁷ Year-old ordinances in Minneapolis⁸ and St. Paul⁹ were going to serve as models for a state bill. Both ordinances were gay-only in scope—and trans people had no intention of being left out again.¹⁰ Spear, however, professed to “know for certain” that trans inclusion “would absolutely doom” a statewide bill in 1975.¹¹ He vowed not only to “actively oppose” inclusion efforts himself but to encourage other legislators to oppose them.¹²

On May 8, 1975, a legislator chose not to heed Spear’s revealed wisdom. He introduced an inclusion amendment. It failed. The gay-only bill as a whole did also.¹³ However, that was not the end of the story. It was just the beginning.

Eighteen years later, Spear wholly supported the bill¹⁴ that became the nation’s first trans-inclusive state gay rights statute.¹⁵ Two thousand eighteen marks the twenty-fifth anniversary of that moment of victory for the *entire* LGBT community—when state gay rights law ceased being a “heterosexuality, homosexuality and bisexuality”-only club. The story of what came before *and* after 1993 is one that many

status of an umbrella term encompassing all who vary in some way from rigid, binary, birth-designated sex status. *See generally* Cristan Williams, *Transgender*, in 1 TSQ 232, 232-34 (2014).

⁷ Meeting Minutes of the Board of Directors, Minn. Committee for Gay Rights (Sep. 15, 1974) (on file with the MHS, in Minnesota Committee for Gay and Lesbian Rights, Organizational Records 1974-1984 [hereinafter MCGLR Records], Acc. No. 15586, Box 1, Folder ‘1974 Board Meetings’).

⁸ Lars Bjornson, *Rights Bill Passed in Minneapolis*, ADVOCATE, Apr. 24, 1974, at 6.

⁹ Lars Bjornson, *Loud Opposition Fails to Defeat Rights Bill*, ADVOCATE, Aug. 28, 1974, at 8.

¹⁰ Prepared Statement of Tim Campbell, Coordinator, Gay Educational Consultants to the Minnesota House Judiciary Committee (Mar. 24, 1975) (on file with the MHS, in Spear Legislative Records, Box 9, Folder ‘75-SF 595: Gay Rights Bill (Coleman / Tomlinson bill)).

¹¹ Letter from Allan H. Spear, State Sen., Minn. to Tim Campbell (Jan. 29, 1975) (on file with the MHS, in Spear Legislative Records, SF 595 Folder).

¹² *Id.*

¹³ H.F. No. 536, § 29, 1975 Minn. H.J. 2460, 2460-63 (May 8, 1975).

¹⁴ H.F. 585, 78th Leg., Reg. Sess. (Minn. 1993). Spear authored the also-inclusive Senate companion bill. S.F. 444, 78th Leg., Reg. Sess. (Minn. 1993).

¹⁵ An Act Relating to Human Rights, 1993 Minn. Laws 121.

trans people know. But, it also is one that many cis LGBs do *not* know and one that some other cis LGBs try to rationalize away. In 1999, for example, then-Congressman Barney Frank deployed Minnesota's history as an excuse *not* to support adding trans protections to federal LGB rights proposals.¹⁶ He asserted a lack of awareness of Minnesota and 1993. Moreover, when told that stereotypes of gay men's sex lives rather than trans bathroom issues came close to derailing the trans-inclusive bill, Frank tersely countered:

*That's probably because the transgender community was not nearly as visible in 1993. The fact is, transgender issues would come up now. They were able to fly under the radar then. But, in the context we're now in, transgender issues have gotten a lot more publicity*¹⁷

His reasoning begs a question: If the trans community was so barely (or not at all) visible as to be able to “fly under the radar,” then why was not all (or most) gay rights legislation proposed prior to 1993 trans-inclusive?¹⁸

Most of the inclusion legislation was in Minnesota.¹⁹ In contrast, none of the bills Frank himself proposed as a Massachusetts state legislator were inclusive.²⁰ Frank remained an unrepentant adherent to the notion of ‘incremental progress,’ in which a jurisdiction enacts legislation covering only gays, lesbians and bisexuals and then, at some undefined point in an uncertain future, *might* go back and add

¹⁶ That year's ENDA bill—as all were until 2007—was gay-only. H.R. 2355, 106th Cong. (1999).

¹⁷ Gary Schiff, *Six Minutes with Barney Frank*, LAVENDER, Oct. 22, 1999, at 15-16 (emphasis added).

¹⁸ Far from *reductio ad absurdum*, this is merely a reflection of the degree to which trans-averse LGB politicians are unwilling either to build on trans legal accomplishments or even to acknowledge them.

¹⁹ Most, but not all. The exceptions were few and far between. See *infra* note 367 and Part V.B.3. One California proposal, wholly independent of sexual orientation bills, sought protections for “persons who are medically defined as transsexuals.” S. 814, 1983-1984 Leg., 1st Extraordinary Sess. (Cal. 1983). Derided as the “Tootsie” bill, it received little support. *'Tootsie' Bill Dies in Senate*, MOM...GUESS WHAT! NEWSPAPER, June 1983, at 2.

²⁰ See, e.g., H. 3882, 1980-1981 Sess., Reg. Sess. (Mass. 1980); H. 4020, 1980-1981 Sess., Reg. Sess. (Mass. 1980) (gay-only rights bills authored by then-Massachusetts State Rep. Barney Frank).

coverage to the law that textually benefits trans people. He frequently stated—with the same authority that he put behind his insistence on following an incremental strategy—that such gay-only anti-discrimination bills “will” pass during a particular legislative session.²¹ Massachusetts did not enact one until eight years after²² he entered Congress—which has never enacted one, gay-only or trans-inclusive.

The history of efforts by trans people to win civil rights protections demonstrates no benefit accruing to acceding to the limited goals inherent in incrementalism. Instead, trans people ultimately succeed by being vocal and, when necessary, by playing the role of thorns in the side of incrementalists. On occasion, this means being willing to have the thorn kill non-inclusive legislation. The story of birth and solidification of positive transgender law in Minnesota has far more than a coincidental connection to battles between trans activists and incrementalists decades later (and even well into the twenty-first century).²³ Some players of the 1970s went on to national roles.²⁴ And,

²¹ At least two such pronouncements were well off the mark. Frank said the chances of passage were “pretty good” in 1975. David Brill, *Anti-Discrimination May Pass This Time*, ADVOCATE, Mar. 12, 1975, at 5. Two years later, he stated, “The bills will pass in ‘77.” Sasha Gregory-Lewis, *Election Epilogue: How Did We Do?*, ADVOCATE, Dec. 15, 1976, at 7-8 (emphasis added); David Brill, *Mass. Bills Filed; Sodomy Repeal Approach Set*, GAY COMMUNITY NEWS, Dec. 18, 1976, at 1.

²² 1989 Mass. Acts 796.

²³ PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 20 (2000); Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE: SEXUALITY, PUB. POL’Y, AND C.R.* 451-68 (John D’Emilio, William B. Turner & Urvashi Vaid eds., 2000).

²⁴ Most prominently, Steve Endean went on to be the main participatory force in two national organizations, first the Gay Rights National Lobby (GRNL) and later the Human Rights Campaign Fund, now simply known as the Human Rights Campaign (HRC). See generally Lou Chibbaro Jr., *Endean to Give Up HRCF Post; Will Retain Two Others*, WASH. BLADE, Mar. 11, 1983, at 1, 9; David B. Goodstein, *Opening Space*, ADVOCATE, June 23, 1983, at 8-9; Steve Martz, *GRNL’s Endean Set to Resign*, WASH. BLADE, Oct. 14, 1983, at 1, 10; Dave Walter, *Endean Resignation Accepted; GRNL Faces Financial Woes, Possible Merger*, WASH. BLADE, Oct. 21, 1983, at 1, 18. Also of note, by the time the friction between moderates and radicals at the Minnesota capitol became fodder for an *Advocate* editorial, John Preston had become the magazine’s editor—under then-new owner David Goodstein—as it began to dwell more (though not exclusively) on style than activism. Preston’s gay rights background was in Minnesota but centered more on religion than politics.

sadly, trans restroom usage (and, by extension, trans existence) continues to be a rhetorical player in civil rights despite a complete absence of evidence of trans civil rights leading to any criminal activity. North Carolina's infamous H.B.2²⁵ is by far the most well-known attack against trans people, but it was not alone²⁶ and will not be the last.²⁷ This Article seeks to educate current practitioners, legislators, and jurists regarding how new transgender anti-discrimination law is *not*.

Part II examines a 1975 clash at the Minnesota Legislature. Overly-pragmatic, within-the-system LGB rights advocates had one vision of equality. More radical change-agents—including not only trans people but also non-trans people willing to stand with them—refused to accept that vision. The immediate result was a serious attempt to pass trans civil rights in the Midwest less than six years after the Stonewall Riots. The attempt failed, but in Part III the reader will find the positivity that emerged from the failure. By the end of 1975, trans civil rights *did* exist in Minnesota (at least in its largest city). One of the first gay-only rights ordinances became the first to be trans-inclusive. The addition of the language which had failed at the state legislature to the Minneapolis ordinance established a foothold for future trans-inclusion. For the most part, that put the battle over whether to include or not to include in the rearview mirror. Consequently, when the time finally came for the state's legislature to

DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 247-51 (1999); J.L. Preston, *Your Team*, ADVOCATE, Jan. 29, 1975, at 32.

²⁵ H.B. 2, Gen. Assemb., 2d Extra Sess. (N.C. 2016).

²⁶ *See generally* S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 3, 85th Leg. (Tex. 2017).

²⁷ *See generally* Brief of Alliance Defending Freedom as Amicus Curiae in Support of Respondents, *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185 (Mo. Ct. App. 2015) (No. SC96683) (attacking state-level trans protections derived from lived concepts of “sex”); Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights, U.S. Department of Education & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, U.S. Department of Justice, to Colleague (Feb. 22, 2017) (copy on file with author) (withdrawing pro-trans Title IX guidance from prior administration); *Stone v. Trump*, 280 F. Supp. 3d 747, 757, 772 (D. Md. 2017) (granting an injunction against President Trump's decree-via-tweet which attempted to end open transgender military service).

approve of LGB rights in 1993, it was not just LGB rights, it was LGBT rights.

Enacting the law proved to be the easy part, however. Many activists intone that a law is only as good as the willingness of the people to use it. A law is *also* only as good as the legal system's willingness to enforce it.²⁸ Trans people in Minnesota made use of the 1993 statute. Part IV examines the lengths to which the state's courts were, practically speaking, willing to pretend that 1993—and even 1975—never happened. Not surprisingly, most of the cases where this erasure occurred involved restroom access.

A trans-inclusive law also is almost only as good as the LGBT community's willingness to acknowledge its existence. Part V looks at the broader meaning of the trans-inclusive laws enacted in Minnesota—not just the 1993 state statute but the antecedent Minneapolis ordinance. A significant portion of this analysis is an examination of how academicians, legal professionals, and others with an interest in LGB(T) legislation have erased the 1975 trans-inclusive Minneapolis ordinance from relevant discourse to an even greater degree than Minnesota's courts erased the 1993 statute's effectiveness. This Article's Conclusion touches on a recent attempt to do away with the remaining effectiveness of the law as well as attempts in other states to replicate the anti-trans animus of North Carolina's H.B.2.

Outside of Minnesota, trans people have lost a number of wars to attain such intra-community equality—but trans people have won many as well. As the following chart illustrates²⁹, more recently, winning has been the norm. As of 2018, the only remaining gay-only rights statutes are those of Wisconsin—the first state gay rights law—and of New York.

²⁸ Lack of enforcement plagued many early gay rights ordinances. An Ann Arbor, Michigan city council, for example, became the target of protests when such ordinances went unenforced for almost two years. *Protest Closes Council*, GAY LIBERATOR, Apr. 1974, at 1; *City Charges Boss' Bias*, GAY LIBERATOR, May 1974, at 1.

²⁹ The UMass Law Review retains a folder of all of the sources listed on file.

	Sexual Orientation Law	Trans-Inclusion Law	Inclusion Terminology
D.C. ³⁰	24 D.C. Reg. 6038 (Dec. 13, 1977)	53 D.C. Reg. 14 (Dec. 22, 2005)	Gender Identity or Expression
WI	1982 Wis. Sess. Laws 901	NONE AS OF 2018	
MA	1989 Mass. Acts 796	2011 Mass. Acts 866 (housing and employment)	Gender Identity
		2016 Mass. Acts ch. 134	Gender Identity
CT	1991 Conn. Acts 118 (Reg. Sess.)	2011 Conn. Acts 859 (Reg. Sess.)	Gender Identity or Expression
HI	1991 Haw. Sess. Laws 3 (employment)	2011 Haw. Sess. Laws 51 (employment)	Gender Identity or Expression
	2005 Haw. Sess. Laws 688 (housing) (trans-inclusive)		Gender Identity or Expression
	2006 Haw. Sess. Laws 214 (public accommodations) (trans-inclusive)		Gender Identity or Expression
NJ	1991 N.J. Laws 2708	2006 N.J. Laws 938	Gender Identity or Expression
VT	1992 Vt. Acts & Resolves 26	2007 Vt. Acts & Resolves 201	Gender Identity
CA	1992 Cal. Stat. 4399 (codification of case law)	1992 LAW NOT TRANS-INCLUSIVE	
		1998 Cal. Stat. 6828 (hate crimes) ³¹	Gender (trans-inclusive)

³⁰ D.C. typically stands as a state-level entity apart from representation in Congress. *See generally* 18 U.S.C. § 31(9) (2018); 2 U.S.C. § 5540(5) (2018). While D.C. is listed as the first to enact a gay rights statute, Wisconsin's 1982 statute is viewed as the first state gay rights statute. D.C.'s did not add explicit trans protections until 2005, though the existing category of "personal appearance" was thought to provide some protections for trans people. *Underwood v. Archer Mgmt. Servs.*, 857 F. Supp. 96, 97-98 (D.D.C. 1994). Some sources regard D.C. as having enacted legislation in 1973. Patricia Kolar, *D.C. Gays Gain Legal Protection*, GAY BLADE, Dec. 1973, at 1. D.C.'s ability to legislate on its own behalf, however, leads others to point to the reenactment of the law as the proper date. *D.C. Rights Bill Faces Test*, BLADE, Sept. 1977, at 1.

	1999 Cal. Stat. 4228	1999 LAW NOT TRANS-INCLUSIVE	
		2000 Cal. Stat. 7696	Disability (federal de-linkage)
		2003 Cal. Stat. 1685	Gender (via 1998 Ch. 933)
MN	1993 Minn. Laws 121		Sexual Orientation
RI	1995 R.I. Pub. Laws 82	2001 R.I. Pub. Laws 1569	Gender Identity or Expression
NH	1997 N.H. Laws 88	2018 N.H. Laws ch. 176	Gender Identity
NV	1999 Nev. Stat. 1935 (employment)	2011 Nev. Stat. 493 (employment)	Gender Identity or Expression
	2005 Nev. Stat. 92 (public accommodations)	2011 Nev. Stat. 874 (public accommodations)	Gender Identity or Expression
	2011 Nev. Stat. 867 (housing) (trans-inclusive)		Gender Identity or Expression
MD	2001 Md. Laws 2112	2014 Md. Laws 2123	Gender Identity
NY	2002 N.Y. Laws 46	NONE AS OF 2018 ³²	
NM	2003 N.M. Laws 3525 (trans-inclusive)		Gender Identity
IL	2004 Ill. Laws 4837 (trans-inclusive)		Sexual

³¹ I include California's 1998 hate crime statute for reference; the 2003 anti-discrimination statute includes its trans-inclusive language.

³² Gov. Andrew Cuomo, *Don't Leave Behind Equality for Transgender Americans*, ADVOCATE (Jan. 12, 2016) <https://www.advocate.com/commentary/2016/1/12/dont-leave-behind-equality-transgender-americans/> [https://perma.cc/9FAX-AMQ5]; Paul Schindler, *Despite New State, City Regs, Transgender Leaders Go After ESPA*, GAY CITY NEWS, Jan. 2016, at 8. Contrary to the insistence of many of those who have been privileged with employment in the LGB() rights field, New York has not joined the ranks of states with trans-inclusive civil rights statutes. Instead, after winning marriage equality, the state's primary advocacy organization shut down. The official narrative holds that subsequently-promulgated non-statutory administrative regulations are the substantive and political equivalent of a statute.

		Orientation
ME	2005 Me. Laws 70 (trans-inclusive)	
		Sexual Orientation
WA	2006 Wash. Sess. Laws 12 (trans-inclusive)	
		Sexual Orientation
CO	2007 Colo. Sess. Laws 1254 (employment) (trans-inclusive)	
	2008 Colo. Sess. Laws 1593 (public accommodations and housing) (trans-inclusive)	
		Sexual Orientation
IA	2007 Iowa Acts 625 (trans-inclusive)	
		Gender Identity
OR	2007 Or. Laws Spec. Sess. 431 (trans-inclusive)	
		Sexual Orientation
DE	77 Del. Laws 264 (2009)	79 Del. Laws ch. 47 (2013)
		Gender Identity
PR*	2013 P.R. Laws 151 (trans-inclusive)	
		Gender Identity
UT	2015 Utah Laws 68 (trans-inclusive)	
		Gender Identity

Nineteen ninety-three would appear to be the breakthrough year—and an accurate 1993 version of this chart would have set Minnesota apart as the only one not like the others. Appreciation of Minnesota's place in such a chart requires an understanding of the 1975 Minneapolis ordinance that preceded it. An understanding of that ordinance requires an appreciation of the lack of willingness on the part of trans people and their true allies to accept the revealed (conventional) wisdom of LGB moderates.

At the twenty-fifth anniversary of the 1993 Minnesota state statute trans rights (both real and possible) in so many jurisdictions are under attack. It is my hope that this Article will aid activists and legal professionals in winning the inclusion wars (and the bathroom wars) of the future and ensuring that those victories mean something to the next generation—and the generations after that.

II. THE TOP OF THE (STRIP-MINED) MOUNTAIN

A. The State Political Roster

In 1975, Allan Spear was not alone in opposing any move toward trans inclusion. The Minnesota Committee for Gay Rights (MCGR),

the state's most politically-connected³³ gay rights group, opposed it, as did the legislature's overwhelming DFL³⁴ majority. But on Dull Day at Amazon, Republican Representative Arne Carlson formally introduced an amendment³⁵ to the bill to add gay rights to the Minnesota Human Rights Act (MHRA).³⁶ Its purpose was to supplement the proposed MCGR-sanctioned protected classification of "affectional or sexual preference" with the category of "transsexualism." The definition attached to Carlson's category was "having or projecting a self-image not associated with one's biological maleness or femaleness."³⁷ It was a variant of phraseology that Spear antagonist Tim Campbell had been prevented from suggesting to the House committee which had heard the bill.³⁸ With the formal amendment introduction³⁹ however, the

³³ Translated: politically moderate.

³⁴ In modern political parlance, "DFL" (Democratic-Farmer-Labor) is interchangeable with "Democratic" in Minnesota. However, within most Minnesota source material, the acronym "DFL" is used, reflecting the unique history of the state party as an entity which grew out of a 1944 merger between separate state Democratic and Farmer-Labor Parties. Future Vice-President Hubert Humphrey played a key role in the merger and is generally regarded as the founder of the DFL Party, Democratic-Farmer-Labor Party. *Our History*, MINN. DFL, <https://www.dfl.org/about/dfl-history/> [<https://perma.cc/V6TF-9UXM>] (last visited Feb. 21, 2018).

³⁵ H.F. No. 536, § 29, 1975 Minn. H.J. 2460, 2460-61 (May 8, 1975).

³⁶ H.F. 536, 69th Leg., Reg. Sess. (Minn. 1975). Other "M" states also use "MHRA" for their civil rights laws. The Maine MHRA is trans-inclusive and has seen more success in one key area than has Minnesota. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 601-02 (Me. 2014). An expansive interpretation of "sex" in Missouri's MHRA has been met with challenge. *See generally* R.M.A. v. Blue Springs R-IV Sch. Dist., 477 S.W.3d 185 (Mo. Ct. App. 2017).

³⁷ 1975 Minn. H.J. 2459-60.

³⁸ Thom Higgins, *Gay Activists Were Ejected From the Meeting*, MINN. DAILY, Apr. 29, 1975, at 7; Prepared Statement from Campbell to the Minnesota House Judiciary Committee, *supra* note 10.

³⁹ I intermittently refer to it as Campbell's language but also use the term "Carlson Amendment," in no small part because I have done so elsewhere. Campbell and trans advocates helped develop the actual wording, but it did not actually enter Minnesota's formal legal lexicon until Carlson introduced it as the proposed amendment. Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397, 420-22 (2009).

supporters of inclusion had reached, in Campbell's words, the "top of the mountain."⁴⁰

Campbell was a radical, with no use for moderates within the LGBT community⁴¹ (or those outside of the community who he felt were only pretending to support it).⁴² Against critics, who he decried for focusing on moments when "I lose my cool," he defended his record. "I work at this job, you know, 24 hours a day for peanuts. I struggle to pay the bills, I struggle to get to as many activists' activities as I can, no matter how tired I am. And there's a lot of stress in all of that. I can't be as cool as somebody who does unstressful stuff and just leaves the status quo."⁴³ Spear, somewhat grudgingly, agreed with Campbell's assessment of what he put into the movement—particularly the *GLC Voice* newspaper—versus what he got out of it.⁴⁴

Campbell, who was not trans, instead identified with a "category of gender identity variation" whose members "see and feel, and saw and felt as children, very little relevance in the mind constructs 'male' and 'female.'"⁴⁵ Stated somewhat differently, he viewed himself as falling into a category he deemed "obvious gays," not trans *per se* yet identifiable, even if largely by stereotype, as falling outside of

⁴⁰ Tim Campbell, *Equal Rights for Transexuals, Transvestites*, MINN. DAILY, Feb. 5, 1976, at 7 (single "s" variant of "transsexual" in original).

⁴¹ Robert W. Peterson, *A Bruising Over Cruising in Minneapolis*, ADVOCATE, Dec. 5, 1989, at 9, 11 (Campbell: they want "to render gay men eunuchs and asexual beings"). MCGR (by then MCGLR) banned Campbell from its meetings over the leaking of information. Letter from Len M. House to the Board of Directors of the Minnesota Commission for Gay-Lesbian Rights (Jan. 15, 1980) (copy on file with the MHS, in Minutes, Jan. 8, 1980, Board Minutes 1980, MCGLR Records); Larry Kivens, *Campbell Barred from Board Meetings*, MCGLR LESBIAN/GAY NEWSBRIEFS, Feb. 8, 1980, at 6; see also Tim Campbell, Guest Editorial, *Something Rotten on Capitol Hill*, WIS. LIGHT, Sept. 19-Oct. 2, 1991, at 4 (criticizing the opposition by NGLTF and the then-HRCF to outing closeted politicians).

⁴² Tim Campbell, Viewpoint Letter, *Marriage Authorizes Sex*, FOCUS POINT, June 12-18, 1996, at 4 (targeting Sen. Paul Wellstone's opposition to same-sex marriage).

⁴³ Cynthia Scott, *Tim Campbell on Tim Campbell, Recovery, Feminism, Gay Marriage, AIDS, Activism*, EQUAL TIME, Nov. 22, 1989, at 8.

⁴⁴ Interview by Scott Paulsen, University of Minn., with Allan Spear, State Sen., Minn., in Minneapolis, Minn. (Oct. 27, 1993) (on file with the MHS) ("I don't think Tim ever made a cent out of that newspaper but, he kept it going.").

⁴⁵ Tim Campbell, *Gender Identity and Transsexualism*, MINN. DAILY, Feb. 7, 1975, at 7.

societally-demanded heteronormativity.⁴⁶ His opposition to policies excluding LGBs from open military service sought to re-focus the debate, away from “those who got into the military by not checking the [homosexual tendencies] box” and instead thinking about “those who did.”⁴⁷ He saw the link between gay and trans, but he was careful to limit his historical connection to the trans battles as one of a supporter of those transsexuals who were actually directly involved. “The issue was theirs,” he said in 2013.⁴⁸

Having been left out in Minneapolis in 1974, they were conscious of occupying a legal position even more precarious than their cis LGB colleagues (and opponents). It was not an effort joined by all trans people in Minnesota any more than the 1970s pushes for gay-only rights received support from all Minnesota LGBs. But many trans people did not sit on the sidelines when it counted. “Except for Verna Jones,” Campbell recalled, “there wasn’t an ounce of closetedness among them.”⁴⁹

The most prominent of the trans activists of the time was Diana Slyter.⁵⁰ Describing herself as having come out as transsexual in 1972, she nevertheless said she was not “boisterously out” during the 1970s while a student and worker at Metropolitan State University in

⁴⁶ In 1989 Campbell stated, “I’ve never had a clear identity as a female which would lead me to be a fulltime transvestite or anything like that, but I’ve always questioned whether I belong in the locker room with the jocks.” Scott, *supra* note 43, at 9. He was known to appear at gay pride events as “Miss Liberty.” *Gay Pride*, MINN. DAILY, June 28, 1976, at 3. And one of his many activism-related arrests yielded a police report describing him as a “gay/transvestite.” MINNEAPOLIS POLICE DEP’T, ARREST REP., (Aug. 7, 1990) (on file with the MHS, in Leo Treadway Papers, Box 5, Folder—Governor’s Task Force on Lesbian and Gay Minnesotans: Minneapolis—Written Testimonies).

⁴⁷ Tim Campbell, *Gays Arguing Military Issue Poorly*, GAYLY OKLAHOMAN, Apr. 15, 1993, at 4.

⁴⁸ Telephone Interview with Tim Campbell, Publisher, GLC Voice (Dec. 7, 2013).

⁴⁹ *Id.* As president of Twin Cities Transsexuals, she was visibly involved with the radical Coalition of Concerned Gays. *Wrongs Rights*, Coalition of Concerned Gays pamphlet (on file with the Tretter Collection, in Tretter Information Files, Box 17, Thom Higgins Folder 4).

⁵⁰ One can encounter two different spellings each of her first (Diana or Dyna) and last (Slyter or Sluyter) names. When quoting and citing authorship of sources, I utilize the spelling therein; otherwise, I utilize Diana Slyter as she utilizes that in relevant archived correspondence.

Minneapolis.⁵¹ In the 1970s, though, she was the director of the Minnesota Gender Identity Association.⁵² “In 1975 I was outed by several local TV stations while lobbying for trans inclusive GLBT human rights legislation at the Capital.” With not even the city ordinance being inclusive at the time, this could have been extremely problematic. It proved not to be: “When I returned to my part time job at Metro State the next work day I received warm support from all.”⁵³

Trans medicolegal issues had been visible in Minnesota for some time,⁵⁴ in no small part due to the University of Minnesota’s gender program.⁵⁵ Favorable mainstream media coverage of transition was not unusual.⁵⁶ The first major push for LGB and/or T rights in the state even had a tangential trans connection but, again, involved a radical who was not himself trans. The push was in court via Jack Baker and

⁵¹ Letter from Diana Slyter to Lavender Bridge (Oct. 10, 1998) (on file with the Tretter Collection, in Trans Issues Box, Mark Kasel Reporter’s File Folder).

⁵² *Wrongs Rights*, *supra* note 49.

⁵³ Letter from Diana Slyter to Lavender Bridge, *supra* note 51. Slyter was out in some contexts but viewed herself as not being out in others. Robert Halfhill, *Transsexual Wins Insurance Settlement*, GAILY PLANET, Dec. 3, 1980, at 1 (expressing that she did not think that her employer knew of her transsexuality). She was involved with the gay rights movement in Minnesota from its earliest days, with the radical Fight Repression of Erotic Expression (FREE). *Id.* at 6. The more conservative MCGR approvingly noted her presence at the 1974 Minneapolis Pride celebration. cyd james-irish & David Differding, *Gay Pride Week ‘74*, TOGETHER, Aug. 1974, at 1. However, one activist blamed her by name for the result of the 1975 legislative session. Robert Halfhill, Letter to the Editor, *Defeat in MN*, ADVOCATE, July 2, 1975, at 38.

⁵⁴ Including an early gender-change case. *See generally* in re Valdesuso, No. 653427 (Minn. Dist. Ct. Hennepin Co. Sept. 25, 1968). There was even an early trans employment discrimination claim, apparently brought by a woman identified only as “Emily” against the Twin Cities Milk Producer’s Association. *Sex Change Suit Charges Discrimination*, GAY, Feb. 2, 1970, at 10. *Valdesuso* receives mention in a contemporary law journal article. R. Joel Tierney & Timothy M. O’Brien, *You’re A Good Man Charlotte Brown Or What Now My Love?*, 37 HENNEPIN LAW. 4, 5 (1968). However, I have located no other reference to the 1970 discrimination claim. The *Gay* article does not clearly indicate the theory under which the woman brought her claim.

⁵⁵ Tierney & O’Brien, *supra* note 54, at 7.

⁵⁶ *See generally* Don Spavin, *Brothers Become Sisters: Transsexual Operations End ‘Years of Torment’*, ST. PAUL SUNDAY PIONEER PRESS, July 26, 1970, at 1 [hereinafter Spavin, *Brothers Become Sisters*]; *see also* Don Spavin, *‘We Are Free, Happy and Female’*, ST. PAUL SUNDAY PIONEER PRESS, Aug. 16, 1970, at 10.

Mike McConnell's quest for marriage equality.⁵⁷ While still in law school, Baker was elected president of the University of Minnesota's Student Association; in one of his ads he wore a pair of women's pumps. "Put yourself in Jack Baker's shoes," the ad implored.⁵⁸

Steve Endean attended college but never graduated. However, he did begin to immerse himself in politics, eventually working on the successful 1970 gubernatorial campaign of DFL candidate Wendell Anderson, a former Olympic hockey hero.⁵⁹ Endean soon decided to try to "stop being gay" in order to possibly have a political career himself. He gave up on both in favor of a career of influencing public policy outside of holding office.⁶⁰ He transformed his position as the coat check at Minneapolis's Sutton Place bar into politicking perch, eventually becoming the prime force behind the 1974 establishment of MCGR.⁶¹ Among his painful experiences in activism, Endean rated the failure of 1975 as being second only to *Advocate* publisher David Goodstein's attacks on him in the early 1980s.⁶²

The political outcome in St. Paul in 1975 also was painful for Allan Spear, but he was in a much different position. By then he had already been a history professor at the University of Minnesota for a decade. During that time he had become active in DFL party politics, running for office unsuccessfully in 1968 but subsequently winning a state Senate seat in 1972 while running on the radical "Rochester Platform" which supported marijuana legalization, draft amnesty and gay rights—including gay marriage.⁶³ Though Spear embraced⁶⁴ and

⁵⁷ Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

⁵⁸ DICK HEWETSON, HISTORY OF THE GAY MOVEMENT IN MINNESOTA AND THE ROLE OF THE MINNESOTA CIVIL LIBERTIES UNION 19 (2013).

⁵⁹ Lars Bjornson, *Republicans Back Minnesota Law Reform*, ADVOCATE, Apr. 11, 1973, at 22.

⁶⁰ STEVE ENDEAN, BRINGING LESBIAN AND GAY RIGHTS INTO THE MAINSTREAM 311 (Vicki L. Eaklor ed. 2006).

⁶¹ Derisively referring to this part of Endean's career, Campbell called him the "hat check girl." In Campbell's view, Endean's time at Sutton Place *should* have introduced him to enough of the trans community for Endean to have been a bit more willing to consider inclusion politically. Interview with Tim Campbell, *supra* note 48.

⁶² ENDEAN, *supra* note 60, at 120-21.

⁶³ Jack Baker played a key role in the DFL state convention that year, held in Rochester, that produced the platform. Scott Paulsen interview with Allan Spear, *supra* note 44. The 1972 Republican Convention, in contrast, refused even to

ran on the platform (unlike many 1972 DFL candidates), he was not yet out as a gay man.⁶⁵ Not until after his first legislative session as a senator did he come out.⁶⁶ It was Endean who “encouraged me to greater gay activism, and told me to go about it at my own pace, which was the method I followed.”⁶⁷

B. A Trio of Preludes

The first formal effort to enact gay rights at the Minnesota Legislature occurred in 1973 with Spear still closeted when the Senate Judiciary Committee added “homosexual orientation”⁶⁸ to an MHRA modification bill the House had already passed.⁶⁹ Jack Baker equated the key term to “cocksucker.”⁷⁰ Contrarily, Steve Endean favored it, reasoning “there’s no question what we’re talking about,”⁷¹ which meant that trans people were not what was being talked about. That became moot, at least for 1973, when the full Senate removed the amendment.⁷²

include a platform plank favoring decriminalization of private, adult consensual sexual conduct. *The State Conventions*, FREE VOICE, Oct. 1972, at 13.

⁶⁴ To “prove how radical” he was. Howard Erickson, *Inspired by Elaine Noble – Legislator Comes Out*, ADVOCATE, Jan. 1, 1975, at 1.

⁶⁵ CLENDINEN & NAGOURNEY, *supra* note 24, at 230. Still, there were rumors that he was gay. A perception of him being “unelectable” when he sought his DFL senatorial nomination in 1972 led to him being challenged by Fran Naftalin, wife of a former Minneapolis mayor. However, the district convention endorsed him on the first ballot. *Candidate*, FREE VOICE, Oct. 1972, at 12-13.

⁶⁶ Carl Griffin, Jr., *Allan Spear—One Year Out and Going Strong*, ADVOCATE, Dec. 17, 1975, at 14.

⁶⁷ Mark Kasel, *Allan Spear: 20 Years Gay and Still Going Strong*, GAZE MAGAZINE, Oct. 16, 1992, at 27.

⁶⁸ H.F. No. 377, 1973 Minn. S.J. 2553, 2553 (May 10, 1973).

⁶⁹ H.F. 377, 68th Leg., Reg. Sess. (Minn. 1973). Not yet out, Spear did not carry this bill. Griffin, *supra* note 66, at 14.

⁷⁰ Additionally, Baker feared an administratively-supplied definition could defeat the intent of the law. Lars Bjornson, *Baker Rejects ‘Homosexual’ in Gay Rights Amendment*, ADVOCATE, May 25, 1973, at 6. He also opposed “sexual orientation.” He saw “affectional preference” as implicating observable lawful activity whereas “sexual orientation” only addressed private behavior. Tim Campbell, *400 Church School Kids Flood Committee to Oppose Gay Rights Bill; Few Supporters on Hand*, GLC VOICE, Apr. 18, 1983, at 1.

⁷¹ Bjornson, *supra* note 70, at 6.

⁷² H.F. No. 377, 1973 Minn. S.J. 3148, 3148-50 (May 17, 1973).

The following year trans-exclusion morphed from mere proposal into substantive law in the state's two largest cities. Minneapolis became the tenth U.S. city to enact a gay rights ordinance.⁷³ It contained language which did not cover trans people.⁷⁴ Edean received credit for being the driving force behind getting the ordinance enacted.⁷⁵ Four months later,⁷⁶ St. Paul enacted an ordinance—also gay-only.⁷⁷ It was a year remembered nationally for Watergate, but for the LGBs of Minnesota's two largest cities it was the year of securing anti-discrimination protections. The Twin Cities' most prominent television station, CBS affiliate WCCO, ran PSAs reminding the citizenry of the degree to which the law protected LGBs.⁷⁸

C. Springtime in St. Paul: The First Trans-Political Bathroom War

1. Realization of Exclusion

Immediately after the legislative failure of 1973, Allan Spear telegraphed the future statewide plan: “[I]n 1975, that should be just about right for another push.”⁷⁹ MCGR indeed sought to build on the success of the 1974 Twin Cities ordinances via an effort to put similar

⁷³ *Gay Rights Gains*, GAY LIBERATOR, May 1974, at 2.

⁷⁴ Bjornson, *supra* note 8, at 6; *Gay Rights Gains*, *supra* note 73, at 2. The ordinance defined “affectional or sexual preference” as “having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment.” MINNEAPOLIS, MINN., CODE ORDINANCE § 945.020(s) (1974).

⁷⁵ Letter from Allan Spear, State Sen., Minn. to Albert J. Hofstede, Mayor, Minneapolis, Minn. (June 28, 1974) (on file with the Tretter Collection, in Allan Spear Papers, Box 1, Gay Correspondence Folder 1). The ordinance “got so little news coverage that it was a kind of victory without a battle.” HEWETSON, *supra* note 54, at 76 (quoting Campbell from a 2012 interview). However, a local conservative's berating of Jack Baker with anti-gay epithets on a public affairs program led one Council fence-sitter to vote yes. Bjornson, *supra* note 8, at 24.

⁷⁶ Bjornson, *supra* note 9, at 8.

⁷⁷ “Affectional or sexual preference” under the St. Paul ordinance was “having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment.” ST. PAUL LEG. CODE § 74.02(j) (repealed 1978).

⁷⁸ *Here & There*, GPU NEWS (Milwaukee), Jan. 1975, at 30.

⁷⁹ Lars Bjornson, *Minnesota Senate Gives, House Takes Away*, ADVOCATE, July 18, 1973, at 12.

language into the MHRA. Those who were not covered in Minneapolis and St. Paul—and would not thereafter be covered statewide—had no interest in seeing lightning strike a *third* time. “Nowhere in the bill are we mentioned,” Verna Jones told the St. Paul *Pioneer Press* on April 24th. “We want recognition so we can apply for jobs in our present forms without fear of discrimination.”⁸⁰ Bill sponsor Rep. John Tomlinson, countered by noting that a House subcommittee had rejected inclusivity as being “inappropriate.”⁸¹ Tomlinson’s summary, however, was a vast over-simplification.

As introduced, the bill defined “affectional or sexual preference” as “having or manifesting an emotional or physical attachment to another person or persons, or having or manifesting a preference for that attachment.”⁸² Problematically, Tomlinson felt such wording covered non-workplace crossdressing. “Obvious gays,” would be protected, “provided they meet dress codes, do not bother co-workers, and do good work. I think Campbell is wrong.”⁸³ In fairness to Tomlinson, he was writing upon a blank slate of theory; a quarter-century would pass before a federal court explicitly rejected it.⁸⁴ But even less anachronistically, he still was wrong; his interpretation contradicted the stated intent of the sponsors of the Minneapolis ordinance, who had been quite clear that transvestites were *not* included in its scope.⁸⁵

2. Shrinkage and Shenanigans

However much it may seem in retrospect to have been *the* flashpoint,⁸⁶ trans inclusion was not the only issue the Minnesota moderates feared in 1975. Thom Higgins (one of the pot-stirrers Allan

⁸⁰ *Gay-Rights Bill Irks Transsexual*, ST. PAUL PIONEER PRESS, Apr. 24, 1975, at C22.

⁸¹ *Id.*

⁸² H.F. No. 536, § 1, 69th Leg., Reg. Sess. (Minn. 1975).

⁸³ Memo from John Tomlinson to Steve Endean & Allan Spear (prepared in advance of Mar. 24, 1975 hearing) (on file with the MHS, in Spear Legislative Records, SF 595 Folder, p.1).

⁸⁴ *See Oiler v. Winn-Dixie*, No. Civ. A. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002) (non-workplace crossdressing *not* covered under Title VII sex discrimination law, which some federal courts had begun to interpret favorably for trans litigants).

⁸⁵ Bjornson, *supra* note 8, at 6.

⁸⁶ CLENDINEN & NAGOURNEY, *supra* note 24, at 235-38.

Spear had no respect for⁸⁷) promoted “compulsory gay sex education.”⁸⁸ Jack Baker and the marriage advocates promoted their issue but did so by asserting “public accommodations” and “public services” equality would open the door to marriage and adoption equality. And the prospect of gay teachers “monopolized” much of the legislative debate.⁸⁹ Not until after the session did MCGR acknowledge that the teacher issue frightened legislators more than trans rights did.⁹⁰

During the session, MCGR decided both categories the marriage advocates were counting on were expendable. Moves toward that constriction (Higgins called it “castration”) began while the bill was in subcommittee—and hearings were contentious. A promise of a further opportunity to testify led opponents of MCGR to agree to a limit on testimony on March 24th. But it proved to be a bait-and-switch.⁹¹ Campbell was cut off after only a small portion of a prepared speech;⁹² only afterward was he able to urge the committee to add his trans-covering “obvious gays” language, but to no avail. “Endean and the subcommittee members seemed pleased as punch,” Higgins observed. “The heavily gay audience was stunned.”⁹³

The moderates’ impact on the bill led to radical protests against the DFL legislative leadership. Campbell held an impromptu press conference in a capitol restroom.⁹⁴ The St. Paul *Pioneer Press* featured a photo of him addressing reporters in front of stalls adorned with

⁸⁷ Spear saw Higgins as “more interested in simply stirring things up than in long-range consequences.” ALLAN H. SPEAR, *CROSSING THE BARRIERS: THE AUTOBIOGRAPHY OF ALLAN H. SPEAR* 313 (2010).

⁸⁸ Carl Griffin, Jr., ‘No Compromise’ Gay Coalition May Sink Rights Bill, *ADVOCATE*, May 7, 1975, at 4.

⁸⁹ *Gay-Rights Bill Rejected*, *MINNEAPOLIS TRIB.*, May 9, 1975; Campbell, *supra* note 40, at 7.

⁹⁰ *MCGR in ‘76*, *MINN. COMMITTEE FOR GAY RGTS. NEWSL.*, Jan. 1976, at 1; *see also* Carl Griffin, *Lake State Hopes Evaporate*, *ADVOCATE*, June 4, 1975, at 5.

⁹¹ Thom Higgins, *Legislature Neglects Gay Rights*, *MINN. DAILY*, Apr. 23, 1975, at 7.

⁹² Prepared Statement of Campbell to the Minnesota House Judiciary Committee, *supra* note 10, at 1.

⁹³ Thom Higgins, *Gay Activists Were Ejected From the Meeting*, *MINN. DAILY*, Apr. 29, 1975, at 7.

⁹⁴ Bruce R. Nelson, *Gays Drop Lid on Banned-in-Can Bill*, *ST. PAUL PIONEER PRESS*, Apr. 4, 1975; Kay Miller, *Gays Fight First for Acceptance, Then for Life*, *STAR TRIB. (Minneapolis)*, July 22, 1987.

“HETEROS ONLY” signs.⁹⁵ He later asserted that his intended location was the capitol’s grand staircase, which happened to be near a restroom. When the press wanted photographs, he suggested the restroom as a locale with “less traffic.”⁹⁶

Whether planned or happenstance, such events generated the sort of negative mainstream attention that Spear hated and feared. And yet the radicals did win some positive attention, notably a mainstream news editorial in favor of trans inclusion. “As peace shouldn’t be divided, neither should tolerance. If we accept one, we should accept them all.”⁹⁷ Lee Brewster’s *Drag* magazine reprinted the editorial in full, adding a comment: “We suggest that the Gay Libbers be so Liberal!”⁹⁸

They were not.

Neither was the DFL leadership—doubly so for Steve Endean. In his memoir he repeatedly derided Campbell and the proponents of inclusive legislation as having “never even worked for the lesbian and gay rights bill.” Of course, that dismisses any possibility that it took the reality of what MCGR’s more conservative agenda would do to the “obvious gays” to spur “Tim and his cohorts” to become as vocal as they became that spring.⁹⁹

Whether called ‘transsexual’ or ‘obvious gay,’ Endean had no use for them. Seemingly, it was a particularly Midwest incarnation of the transsexual “double bind.”¹⁰⁰ In Endean’s view, neither being silent nor being vocal could ever pave a way to acceptability.

⁹⁵ Nelson, *supra* note 94.

⁹⁶ Interview with Tim Campbell, *supra* note 48. However, “less” traffic did not mean “none.” Freshman Republican Rep. Ken Zubay of Rochester happened to be using the facility (for non-press purposes) when Campbell and the media entered. “I was minding my own business,” he told the *Pioneer Press*, “when all of a sudden the room is filled with television cameras and reporters.” Nelson, *supra* note 94.

⁹⁷ *Tolerance Test*, DULUTH NEWS-TRIB., Apr. 25, 1975, at 28.

⁹⁸ Caption added to *Tolerance Test*, as reprinted in, DRAG, Vol. 5, No. 19, at 9 (1975).

⁹⁹ ENDEAN, *supra* note 60, at 120-21.

¹⁰⁰ Katrina C. Rose, *Has the Future Already Been Forgotten? A Post-2007 Transgender Legal History Told Through the Eyes of the Late, (Rarely) Great Employment Non-Discrimination Act*, 23 WM. & MARY J. WOMEN & L. 527, 538 (2017).

3. The Context of the Carlson Amendment

Being vocal and being unwilling to accept Endean's revealed wisdom eventually led to finding legislative support in the form of Republican Representative Arne Carlson. He not only listened to the transsexuals but also researched the issue on his own.¹⁰¹ The result was a proposed amendment to Tomlinson's bill which would have added an additional category of coverage to the MHRA: "transsexualism." The contours of that proposed category would be "having or projecting a self-image not associated with one's biological maleness or femaleness."¹⁰² While the Amazon employee was bored and fretting in Minneapolis over terminal flatulence and a lack of clientele, Carlson "argued eloquently" in St. Paul.

To no (immediate) avail.

The Carlson Amendment did fail,¹⁰³ but the episode demonstrated the futility of trying to divert potentially-spookable legislators' attention from trans issues by leaving trans people unprotected.¹⁰⁴ Tomlinson was the only House member to speak against Carlson. He "trembled visibly," professing to have sympathy for transsexuals but opposing Carlson's amendment because it "would apply to transvestites."¹⁰⁵ Yet, even afterward, a rural representative expressed that he felt the non-inclusive bill would force his wife to share restrooms with "men dressed up like women."¹⁰⁶ Tomlinson's earlier parsing of how (little) the MCGR-approved version of the bill would apply to transvestites was lost on him.

It also was lost on St. Paul *Pioneer Press* editor William G. Sumner. For his paper's Sunday readership in the immediate aftermath of House floor showdown, he focused on the scenario of "a queen in drag . . . skip[ing] along with little children on a field trip," conflating gay and trans—and erasing stealth-desiring transsexuals.¹⁰⁷ Tomlinson

¹⁰¹ CURRAH & MINTER, *supra* note 23, at 20.

¹⁰² H.F. No. 536, § 29, 1975 Minn. H.J. 2460 (May 8, 1975).

¹⁰³ The defeat came without a roll-call vote, though Tim Campbell estimated that the tally was 40 in favor and 70 against. Campbell, *supra* note 40, at 7.

¹⁰⁴ A lesson not learned in San Francisco. See Tom Benet, *Gay Rights Law OK'd by Supervisors*, S.F. CHRON., Mar. 21, 1978, at 1.

¹⁰⁵ Campbell, *supra* note 40, at 7.

¹⁰⁶ *Id.*

¹⁰⁷ William G. Sumner, *The 'Gays' Fashion Their Own Chains*, ST. PAUL SUNDAY PIONEER PRESS, May 11, 1975.

offered a rejoinder, but only to distance the bill from drag queens and to emphasize the tame blending-in of gays to hetero-primacy society. Being “fired from your job because it is discovered that you are gay,” he implored, should be worthy of legal redress.¹⁰⁸ The tame blending-in of the post-transition transsexuals—which had been going on in the Twin Cities for a decade¹⁰⁹—ultimately was lost in the fray.¹¹⁰

It would not be the last time that those who claimed to embrace a moderate view of the politically possible refused to similarly embrace even that portion of the trans community so often vilified for alleged moderate—even conservative—views on visual heteronormativity. That lack of an embrace exposed a degree of hypocrisy that, in differing forms, persists decades later.

D. Pushback Against Positive Possibility

Nineteen seventy-five was the first calendar year of David Goodstein’s ownership of *The Advocate*.¹¹¹ Autocratic and conservative in vision for what was an acceptable face for the gay community¹¹² and gay media, during his ownership the magazine nevertheless sported a hardcore sex advertising supplement (“Trader Dick”) that could have been no less frightening to straight America than any aspect of gender transition ever was or ever could be.¹¹³

¹⁰⁸ Letter from John Tomlinson, State Rep., Minn. to The Editor, St. Paul Dispatch, May 12, 1975 (on file with the MHS, in Spear Legislative Records, SF 595 folder).

¹⁰⁹ In support of his inclusion motion, Carlson reminded his colleagues not only of transsexuals’ right to petition the government for redress of grievances but also of the legislature’s appropriation of funding for the University of Minnesota’s gender program. Campbell, *supra* note 40, at 7; CURRAH & MINTER, *supra* note 23, at 20.

¹¹⁰ Five years earlier, Sumner’s paper ran the friendly, front-page features on transitioning siblings. Spavin, *Brothers Become Sisters* *supra* note 56, at 1.

¹¹¹ *The Advocate Is Sold*, *ADVOCATE*, Dec. 4, 1974, at 1.

¹¹² Mere days before the showdown at the Minnesota capitol Goodstein bragged about “gay leaders” having “given up the rhetoric and tactics of the 60’s for more effective if less flamboyant methods.” Letter from David B. Goodstein, Publisher, *The Advocate* to Bob Ross, Editor-in-Chief, Bay Area Reporter (Apr. 28, 1975) (on file with the Division of Rare and Manuscript Collections, Cornell University Library [hereinafter Cornell Collection], in Box 2, Folder 11, Correspondence Feb. 20-Apr. 30, 1975, Goodstein Papers).

¹¹³ Letter from David B. Goodstein, Publisher, *The Advocate* to Richard T. Stark (Apr. 1, 1975) (on file with the Cornell Collection, in Box 2, Folder 11, Correspondence Feb. 20-Apr. 30, 1975, Goodstein Papers).

Presaging the longstanding effort to turn the negative gaze of society away from perceptions of what some gay men do in public men's toilets¹¹⁴ and toward an imagined trans woman bathroom predator,¹¹⁵ Goodstein wrote in April 1975, “[W]e do not believe it is news when police arrest gay men in public bathrooms.”¹¹⁶

Public sex, however, was not the only point on which Goodstein's political morality was quite malleable. Prior to his purchase of the *Advocate*, the magazine ran (in what possibly was the issue that was current when the Minneapolis City Council approved Steve Endean's gay-only ordinance) an opinion piece in which Goodstein championed lowering the age of consent to twelve. In it he also suggested that the only conceivable objection to public sex would be if “public orgies or even copulating couples, under certain circumstances, might become traffic hazards.”¹¹⁷

A few months later, in his first formal editorial as publisher, Goodstein seemed to display an attitude of tolerance for trans people and rights. He listed “transvestism” and “transsexualism” among those things he professed it was “truly . . . all right to be.”¹¹⁸ Not as “all right,” however, would be the people encompassed by those two words when they demanded to be regarded as the equals of LGBs, not merely pathetic political stepchildren that one rich, conservative gay man might pat himself on the back for grudgingly tolerating.

The issue of the *Advocate* that likely was current on the day Arne Carlson introduced the trans-inclusion language to the full Minnesota House featured a childish vicious jab at those who maintained politically “flamboyant methods.” An editorial took the form of a

¹¹⁴ See *Shaw v. Minnesota Bd. of Teaching*, No. C0-00-2173, 2001 WL 605096 (Minn. Ct. App. June 5, 2001); see also *infra* note 226 and accompanying text.

¹¹⁵ An unsigned 1977 editorial lumped transsexualism together with “sado-masochism, rape, child molestation” and “fetishes of all varieties” as “sins” that heterosexuals engage in. *Heterosexuality in the Shadows*, *ADVOCATE*, Dec. 14, 1977, at 18.

¹¹⁶ Letter from David B. Goodstein, Publisher, *The Advocate* to Ned Tuck (Apr. 11, 1975) (on file with the Cornell Collection, in Box 2, Folder 11, Correspondence Feb. 20-Apr. 30, 1975, Goodstein Papers).

¹¹⁷ David B. Goodstein, *Private Sex the First Step Only—Porn, Pederasty, OK, But What About Public Sex?* *ADVOCATE*, Apr. 10, 1974, at 43. As late as 1983, the magazine allowed defenses of NAMBLA that compared its gay detractors to self-hating Jews. Arnie Kantrowitz, *Till Death Do Us Part: Reflections on Community*, *ADVOCATE*, Mar. 17, 1983, at 27, 31.

¹¹⁸ David B. Goodstein, *Our Challenge*, *ADVOCATE*, Jan. 29, 1975, at 3.

“fairy tale” about “the state with 10,000 lakes (which really had 15,291).” According to Sasha Gregory-Lewis, the credited author, a “group of dyke and fairy persons went to their law-givers seeking equality with non-dyke and non-fairy persons in their state.” The heroes of the tale were “Neadne” and the law-giver “Nalla Screaps.” Among the “fairy crazies,” only “Sniggih” received a cute fairy-tale name; Campbell, Baker, Slyter and the others were relegated into a collective group “friends” of “Sniggih.” And though the conflict at the legislature did involve “dyke and fairy person sex classes,” the “fairy tale” either ignored the transsexuals or reflected a belief by Gregory-Lewis that transsexual women are just men who “dress like ladies.”¹¹⁹

Despite having in 1974 publicly expressed support for legalized sex between adults and children as young as twelve, it seemed “clear” to Goodstein in 1975, several weeks after the key events of St. Paul concluded, “that the perception of gay people held by many Americans is false. That perception can only be changed by education and example. Laws can only be changed by political effort.”¹²⁰ Nineteen seventy-five proved the truth of that last sentence.

But not via the chaotic quixotic failure of May.

III. SUCCESS AFTER DEFEAT

A. *Big Brothers, Lame Ducks, and the 1975 Minneapolis Ordinance*

Several months after the more famous 1977 repeal of the Miami ordinance,¹²¹ St. Paul’s non-inclusive ordinance also fell via referendum.¹²² A moderate-radical strategic rift was blamed, though the matter of trans-inclusion was not involved. One strategy involved letting the endorsements of prominent political, religious and labor leaders convince voters of the value of the ordinance. The other strategy involved confrontational education on gay issues—with the help of a veteran of the Miami battle. Each side accused the other of

¹¹⁹ Sasha Gregory-Lewis, *Editorial*, *ADVOCATE*, May 7, 1975, at 30.

¹²⁰ Letter from David B. Goodstein, Publisher, *The Advocate* to Joseph Pfeffer, Saddle & Bridle (May 28, 1975) (on file with the Cornell Collection, in Box 2, Folder 11, Correspondence May 1-July 31, 1975, Goodstein Papers).

¹²¹ Joe Baker, *Miami*, *ADVOCATE*, July 13, 1977, at 6-7.

¹²² Elenore G. Pred, *Rights Lost in St. Paul*, *ADVOCATE*, May 31, 1978, at 9.

“selling out” the entirety of the community.¹²³ “‘St. Paul just wasn’t ready to accept public affection by people of the same sex,’ one moderate gay leader said. ‘We knew it. The others didn’t. And we lost.’”¹²⁴

The Minneapolis ordinance survived, but not without a moment of peril. The city’s first election following the passage of the ordinance was in November 1975. Charles Stenvig, a conservative¹²⁵ former mayor swept back into office, defeating ordinance-supporter Albert Hofstede. More conservatives also won council seats,¹²⁶ but not enough to create a majority that would be able to repeal the ordinance.¹²⁷ Hofstede then retook the mayoralty two years later.¹²⁸

¹²³ Jeffrey C. Kummer, *How the Gays Lost the Battle in St. Paul*, S.F. SUNDAY EXAM’R & CHRON., Apr. 30, 1978.

¹²⁴ *Id.*

¹²⁵ *Stenvig Calls for Repeal of Gay Rights Ordinance—MCGR Responds by Lobbying the City Council*, TOGETHER, Oct.-Nov. 1976 [hereinafter *Stenvig Calls for Repeal*]. Stenvig’s first choice to head the Civil Rights Department, African-American Richard Parker, could not secure confirmation. He left many with the impression that he did not believe in equal rights for women or gays. Plus, he was caught lying about whether he himself had ever been the subject of a formal discrimination complaint. He had been. *Ramirez for Civil-Rights Director*, MINNEAPOLIS TRIB., Feb. 10, 1976; *The Right Decision on Richard Parker*, MINNEAPOLIS TRIB., Jan. 31, 1976, at 4A; M. Howard Gelfand, *Parker Rejected as Rights Aide*, MINNEAPOLIS TRIB., Jan. 31, 1976; M. Howard Gelfand, *Opponents Accuse Parker of Lying at Hearing*, MINNEAPOLIS TRIB., Jan. 27, 1976, at 1A. Parker claimed to know injustice “because as a black man—I’ve faced it,” but Mary Bremer of the DFL Feminist Caucus viewed him as “abysmally ignorant” on women’s issues. George White, *Parker Confronts Feminists; 6th Alderman Opposes His Bid*, MINNEAPOLIS TRIB., Jan. 29, 1976.

¹²⁶ *Polarization at the Polls*, ADVOCATE, Dec. 3, 1975, at 8-9.

¹²⁷ The biggest problem facing the ordinance during this period was a sexual orientation rights case against Big Brothers. Howard Erickson, *Big Brothers Charged*, ADVOCATE, Feb. 1975, at 25. Stenvig saw it as a specific reason for repeal. Spear called the case “highly dubious” and MCGR, while grudgingly acknowledging that the strict wording of the law supported the plaintiffs, saw the case as a “political disaster,” conjuring up images of molestation and conversion. The 1977 Miami repeal campaign used the existence of the litigation as one of its rhetorical weapons. *Battle Rages on Gay Law*, VOICE (Archdiocese of Miami), June 3, 1977, at 1-2; Letter from Ellen Crimmins, Executive Board, Dade County Coalition for the Humanistic Rights of Gays to Allan Spear, State Sen., Minn. (Apr. 5, 1977) (on file with the Tretter Collection, in Spear Papers, Box 1, Gay Correspondence Folder 1, 1972-1995); *Stenvig Calls for Repeal*, *supra* note 125, at 1. The Minnesota Supreme Court let the ordinance stand. However, it ruled against the plaintiffs’ desire to prevent the organization from

The Minneapolis ordinance did change significantly after Stenvig's victory—not under his leadership however, but during a lame duck council session before he took office. On December 30, 1975, the outgoing council reworded the ordinance's key definition by adding Tim Campbell's trans-inclusion language. Notably, it was not as Arne Carlson's stand-alone "transsexualism" category. Instead, Endean's exclusionary definition transitioned into an inclusive one.

*"Affectional preference" means having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment, or having or projecting a self-image not associated with one's biological maleness or one's biological femaleness.*¹²⁹

Six-and-a-half years after Stonewall, the T was legally equal to the LGB.

At least in Minneapolis.

Despite the significance of such an accomplishment (particularly when compared to the uproar over the radicals' goals at the capitol in May) it appears to have gone without mention in mainstream print media coverage.¹³⁰ The *Minneapolis Tribune* and *Star* heavily editorialized against the radicals in the spring for opposing the trans-excising compromise.¹³¹ Yet in their pages there was no mention of the late-year inclusion until a letter to the editor so prompted. This would be the first of many instances of mainstream and gay discussion omitting the post-Dull Day at Amazon inclusivity of Minneapolis's

informing mothers of potential little brothers about plaintiffs' "affectional preference." The court saw that claim not as equal rights but a desire for special rights. *Big Bros., Inc. v. Minneapolis Comm'n on Civil Rights*, 284 N.W.2d 823, 826, 828-29 (Minn. 1979).

¹²⁸ *Mayoral Races in 6 Major Cities*, N.Y. TIMES, Nov. 9, 1977, at 18.

¹²⁹ Minneapolis, Minn., Ordinance (Dec. 30, 1975), *codified at* MINNEAPOLIS CODE ORDINANCE § 139.20 (2018). The term "affectional preference" eventually did give way to "sexual orientation." Additionally, the trans language has become its own separate line item, though as the conceptually broader "gender identity" rather than the "transsexualism" of May 1975. MINNEAPOLIS CODE ORDINANCE § 139.20 (2018).

¹³⁰ See Rose, *supra* note 100, at 628 n.601 and accompanying text.

¹³¹ See generally *A Moderate Gay Rights Bill*, MINNEAPOLIS TRIB., Apr. 21, 1975 at 4A; see also *Protesters Jeopardize Rights Bill*, MINNEAPOLIS TRIB., Apr. 21, 1975.

ordinance.¹³² In February, Tim Campbell trumpeted the revision of the ordinance (and the radical spring antecedent) in the *Minnesota Daily*;¹³³ the trans-specific *Drag* subsequently re-ran Campbell's piece (though curiously, without a byline).¹³⁴

But David Goodstein's *Advocate*?

As the spring 1975 showdown was occurring, *Advocate* readers were regaled with Sasha Gregory-Lewis's pro-incrementalism fairy tale.¹³⁵ Later, a report on the smoldering ashes of that year's legislative session afforded only Steve Endean the opportunity to engage in positional spin. He continued expressing his anger at the pro-trans forces for refusing to compromise, and yet conceded that other factors—including timing and legislators lying to MCGR about supporting the bill—played major roles in the defeat.¹³⁶ Perhaps most interestingly, he revealed that even his faction had a no-compromise position—something missing from historical analysis of 1975. Endean's Rubicon was not an inherent class of people but an occupation: teachers. When a provision exempting schools from the gay-only rights language was adopted, he considered the bill dead. "We felt that was going beyond the point of being reasonable."¹³⁷

A letter from Robert Halfhill followed, blaming "the small group led by Jack Baker, Tim Campbell, Thom Higgins and Diana Slyter who issued inflammatory statements demanding everything yesterday" for the failure of the MHRA bill.¹³⁸ Those same readers did learn of

¹³² Tom Erickson, Letter to the Editor, *Transsexuals Included*, MINNEAPOLIS TRIB., Jan. 14, 1976, at 8A.

¹³³ Campbell, *supra* note 40.

¹³⁴ *Midwest TS's and TV's Fight for Civil Rights*, DRAG, Vol. 6, No. 23, at 25-26 (1976). The lack of attribution might seem rather insignificant, but it was *this* version that first informed me of the events of 1975. The absence of a byline in Lee Brewster's national trans publication led me to conclude that it had been written by Brewster, Bebe Scarpie or someone else connected with *Drag*, further leading me to characterize it—in print and in trans history classes I have taught—as "trans-authored." Rose, *supra* note 39, at 420 n.125. Granted, Campbell's descriptions of himself could support an argument that my characterization was accurate. However, for accuracy's sake (1) he avoided applying any 'T' term to himself and (2) even if he had, I did *not* have him in mind when I so characterized.

¹³⁵ Gregory-Lewis, *supra* note 119, at 30.

¹³⁶ Griffin, *supra* note 90, at 5.

¹³⁷ *Id.*

¹³⁸ Halfhill, *Defeat in MN*, *supra* note 53, at 38.

the trans-inclusive language fairly quickly, but also via a letter to the editor. In that case, Steve Carter shared the news.¹³⁹ A Republican, he challenged Allan Spear for his Senate seat later in 1976—unsuccessfully.¹⁴⁰

A subsequent *Advocate* feature on Twin Cities culture also mentioned the ordinance.¹⁴¹ However, the anemic media reaction to a victory that the political insiders had seen as impossible was a harbinger of things to come.

Not just in analysis, but also in politics.

B. The 1980 Minneapolis Ordinance (That Fortunately Never Happened)¹⁴²

December 30, 1975 was the apex of LGBT rights in Minnesota in the 1970s. Nineteen seventy-seven's MHRA bill saw no trans-inclusion language, but the events of 1975 did not spur anti-trans language. Paranoia about gay teachers, however, did trigger specific negative language.¹⁴³ Still, the 1977 bill went nowhere. A 1980 non-inclusive bill also went nowhere but even the 1977 teacher clause was gone.¹⁴⁴

The same year, Minneapolis's trans-inclusion almost disappeared—not as the result of a right-wing attack, but apparently via carelessness, although *whose* carelessness is still somewhat of a mystery. An ordinance-revision project yielded a draft that lacked any

¹³⁹ Stephen W. Carter, *Spearing Spear*, *ADVOCATE*, Feb. 11, 1976, at 18.

¹⁴⁰ He even received the support of Jack Baker “because of Allan’s shameful refusal to support full equality regardless of affectional preference.” Letter from Jack Baker to Rick Scott, DFL State Chair (Nov. 12, 1977) (on file with the Tretter Collection, in Spear Papers, Box 1, Gay Correspondence Folder 2, 1972-1995); Gregory-Lewis, *supra* note 21, at 7-8.

¹⁴¹ Carl Griffin, *Minneapolis/St. Paul: Bible Belt Twins ‘Trying Hard to be Liberal,’* *ADVOCATE*, May 19, 1976, at 15.

¹⁴² This subsection elaborates on information I included in a footnote in a 2009 article. Rose, *supra* note 39, at 422-23 n.139. The subsection, however, is augmented by research that went into my dissertation.

¹⁴³ The language differed from the 1975 floor amendment, which wholly removed schools from the ambit of the proposed gay-only rights language. H.F. No. 536, § 29, 1975 Minn. H.J. 2460 (May 8, 1975). The new language would have added pro-gay advocacy as a specific ground for termination, somewhat of a precursor to California’s 1978 Briggs Initiative. H.F. 1176, 70th Leg., Reg. Sess. (Minn. 1977).

¹⁴⁴ H.F. 2299, 71st Leg., Reg. Sess. (Minn. 1980).

language that would cover trans people.¹⁴⁵ Queries as to who might have been to blame yielded curious, and not entirely compatible, responses. Not a single person that the *Gaily Planet*¹⁴⁶ contacted could explain proposing any change to the 1975 class definition beyond assertions it was “verbose.”¹⁴⁷ Sheldon Mains, the “most involved” with the rewrite said the intent was to simplify, not exclude. Dan Hanson, a member of MCGLR’s Legal Task Force blamed the City Attorney for providing faulty language. “Had we known that Transgender or Transsexual individuals were part of the revision of the ordinance, we definitely would have included them.”¹⁴⁸ Sue Short, another member of that Task Force, claimed the copy of the ordinance from which she was working pre-dated December 1975.¹⁴⁹ Mains eventually tried to lay the blame on the head of the Civil Rights Department, who in turn pointed to former Alderman Louis DeMars.¹⁵⁰

The answers taken together facially suggest a comedy of errors, but one should not overlook the possibility of lingering animosity toward Tim Campbell as having played some role. On the day preceding the formal introduction of the Carlson Amendment language into Minnesota’s legal lexicon in 1975, the *Minnesota Daily* ran an op-ed by Davis and Short, decrying Campbell and the pro-inclusion forces as having “done their best to convert gay rights from a serious political issue to a statewide joke.”¹⁵¹ It is not unthinkable that they might have relished the opportunity to take one last shot at Campbell—at the expense of trans rights that had become real since May 8, 1975.¹⁵²

¹⁴⁵ Robert Halfhill, *Changes in Mpls. Gay Rights Law Proposed*, GAILY PLANET, Aug. 20, 1980, at 1.

¹⁴⁶ Seemingly the only Twin Cities LGB(T) publication to cover the matter.

¹⁴⁷ Halfhill, *supra* note 145, at 6; *see also Action Delayed on Rights Law Changes*, GAILY PLANET, Aug. 27, 1980.

¹⁴⁸ Halfhill, *supra* note 145, at 6.

¹⁴⁹ *Id.*

¹⁵⁰ *Action Delayed on Rights Law Changes*, *supra* note 147, at 5. DeMars was an early gay rights supporter. Steve Endean, *Politics Make Strange Bedfellows*, GAY-VIEW, Feb. 1972, at 18.

¹⁵¹ Rick Davis & Susan A. Short, *Extremists Distorted the Gay Issues*, MINN. DAILY, May 7, 1975.

¹⁵² Also worth noting is that those *Gaily Planet* items covering the attempted revision that feature a byline are attributable to Robert Halfhill, who, in 1975,

Ultimately, though, evidence as to any intent by anyone is at best inconclusive.

Evidence is much clearer as to the general attitude toward the revision project. Opposition intensified and it grew beyond the trans issue.¹⁵³ Diana Slyter did testify about the extent to which the removal of the 1975 language would affect trans people¹⁵⁴ and the Target City Coalition endorsed any effort that would strengthen the ordinance *without* altering the trans-inclusive scope.¹⁵⁵ However, fears grew that the religious right could get involved and trigger a less-friendly legislative revision or possibly a total repeal. Even Allan Spear came to oppose any revision attempt, noting the opposition of other Minneapolis gay groups.¹⁵⁶ Short reported the Task Force had drafted a “more acceptable” definition of “affectional preference.” However, on Spear’s motion, the Board without objection passed a resolution opposing any change.¹⁵⁷ From there, the Carlson Amendment did more than merely survive as part of the Minneapolis ordinance.

C. The First Trans-Inclusive State Gay Rights Statute

1. Setting the Stage

a. *The 1980s and the Increment of Proposal*

In 1981 Spear was joined in the Legislature by lesbian Karen Clark, who had won a House seat representing an inner-city Minneapolis district.¹⁵⁸ Describing her as “not yet fully conversant” with critical civil rights and criminal statutes Campbell nevertheless praised her connection with activists as being much “tighter” than Spear’s.¹⁵⁹ That might have been an underestimation. When the

lambasted the pro-inclusionists in the aftermath of the failure at the legislature. Halfhill, *Defeat in MN*, *supra* note 53, at 38.

¹⁵³ *Rights Law Changes Sent Back to Committee*, GAILY PLANET, Sept. 24, 1980.

¹⁵⁴ *Action Delayed on Rights Law Changes*, *supra* note 147, at 1.

¹⁵⁵ *Rights Law Changes Sent Back to Committee*, *supra* note 153.

¹⁵⁶ Meeting Minutes of the Board of Directors, Minn. Committee for Gay Rights (Aug. 23, 1980) (on file with the MHS, in MCGLR Organizational Records 1974-1984, Box 1, 1980 Board Minutes Folder, at 1).

¹⁵⁷ *Id.*

¹⁵⁸ Tom Davies, *Karen Clark Wins, and Here’s How*, MINNEAPOLIS TRIB., Nov. 5, 1980.

¹⁵⁹ Tim Campbell, *New Organization Being Formed to Lobby*, GLC VOICE, Jan. 1981, at 6; *see also* Dave Wood & Ray Olson, *A Busy Weekend in Minneapolis*,

MHRA bills were introduced—by Spear in the Senate but now also by Clark in the House—both utilized the Carlson Amendment-infused Minneapolis wording to define “affectional or sexual orientation.”¹⁶⁰ Less than six years had passed since Spear’s vow to oppose the non-incremental use of such language. Now, it had his blessing as the default non-incremental legislative norm.

This did not attract much attention in gay media, possibly because the major concern of 1981 was whether the bills would receive any legislative attention at all. Along with a sodomy repeal bill, the House MHRA bill was quickly tabled following a hearing. Clark said even getting that hearing was “a major victory.”¹⁶¹ Ever impatient, Campbell did not agree. Legislators were able to kill the bill without having to go on the record even though opponents “presented a very bad case,” he remarked.¹⁶²

By 1983, AIDS began to tinge the sentiments of the opposition to the MHRA bills. But the trans language also began to attract some attention.¹⁶³ At a hearing, attorney Tom Strand suggested Clark’s H.F. 109 would give Sister Boom Boom of the Sisters of Perpetual Indulgence¹⁶⁴ free rein to apply for employment *in character*.¹⁶⁵ The *Advocate* touted Spear’s S.F. 83 making it out of committee. However, in noting that both it and Clark’s would add the phrase “sexual or

GAY COMMUNITY NEWS, Oct. 28, 1978, at 13 (Clark showing an understanding of classism).

¹⁶⁰ S.F. 852, § 2, 72nd Leg., Reg. Sess. (Minn. 1981); H.F. 832, § 2, 72nd Leg., Reg. Sess. (Minn. 1981).

¹⁶¹ Christine Guilfooy, *Minnesota Gay Bill Tabled*, GAY COMMUNITY NEWS, May 16, 1981, at 3.

¹⁶² *Id.*

¹⁶³ Letter from Terry Todd, Minnesota Eagle Forum to Legislator (May 16, 1983) (on file with the MHS, in Spear Legislative Records, Box 9, ‘83-SF 83 Folder: GLBT Human Rights); “[M]en can dress like women and visa [sic] versa and not be subject to different treatment!” *Homosexual Privileges Bill*, Berean League flyer (1983) (summarizing and advising on H.F. 109 and S.F. 83) (on file with the MHS, in Spear Legislative Records, Box 9, ‘83-SF 83 Folder: GLBT Human Rights).

¹⁶⁴ See generally Herb Michelson, *Sister Boom Boom and Moral Majority and Everything In Between*, SACRAMENTO BEE, July 14, 1984, at A12.

¹⁶⁵ *Hearing on H.F. 109 Before the H. Judiciary Comm.*, 73rd Leg., Reg. Sess. (Minn. 1983) (audio recording on file with author).

affectional orientation” to the MHRA, the trans-inclusive definition eluded mention.¹⁶⁶

Frustration persisted throughout the decade over what seemed to be token introduction of bills leading to little or no effort to move them forward.¹⁶⁷ Renewing his criticism in 1985, Campbell branded Spear as having “always been stone deaf to the gay-identified community, the activist community.”¹⁶⁸ Harsh to be sure, but at this point even some of Spear’s defenders conceded some criticism might be valid. Gay Minneapolis Councilmember Brian Coyle, for example, acknowledged that Spear was “not quite as close to the street, to the younger gay person that goes to the beaches, [or] frequents the bars”¹⁶⁹ Spear’s own view of his place in 1980s Minnesota activism was that his activities were “pretty constant” with his major goals being passage of a statewide civil rights law and repeal of the sodomy law. “Of course when AIDS came along, then the agenda began to shift.”¹⁷⁰

The MHRA bills for the remainder of the decade were trans-inclusive.¹⁷¹ A hate crime bill did pass in 1989, but it contained no definition for “sexual orientation.”¹⁷² As the decade drew to a close, assault in Minnesota was no more illegal than it was when the decade began—but if the assault was motivated by the victim’s sexual

¹⁶⁶ Stephen Kulieke, Pat Califia & Mark Potter, *Gay Rights Bills Advance in Calif., Minn. Legislatures*, ADVOCATE, May 12, 1983, at 10 (note that the bills use the language “affectional or sexual orientation” but the change makes no substantive difference); S.F. 83, § 2, 73rd Leg., Reg. Sess. (Minn. 1983); H.F. 109, § 2, 73rd Leg., Reg. Sess. (Minn. 1983); *see also* Mark Potter et. al., *Gay Bills Falter in Me., Minn. and Ill.*, ADVOCATE, July 7, 1983, at 11 (referring to the bills as “comprehensive” without indicating if this meant trans-inclusive or that they covered more than employment discrimination).

¹⁶⁷ Letter from Jeffrey L. Strand, Secretary, Gay Rights Alliance of Minn. & Robert Halfhill, Treasurer, Gay Rights Alliance of Minn. to Allan Spear, State Sen., Minn. (Feb. 16, 1985) (on file with the MHS, in Spear Legislative Records, Box 9, 1985-SF 736 Folder: Gay Human Rights).

¹⁶⁸ Shoshana Hoose, *Opposites Reflect: State Legislators Allen Quist and Allan Spear*, MINN. MONTHLY, May 1985, at 29.

¹⁶⁹ *Id.*

¹⁷⁰ Scott Paulsen interview with Allan Spear, *supra* note 44.

¹⁷¹ S.F. 736, 74th Leg., Reg. Sess. (Minn. 1985); H.F. 1446, 74th Leg., Reg. Sess. (Minn. 1985); S.F. 352, 75th Leg., Reg. Sess. (Minn. 1987); H.F. 1675, 75th Leg., Reg. Sess. (Minn. 1987).

¹⁷² 1989 Minn. Laws 892.

orientation,¹⁷³ then the punishment would be enhanced. If, however, as a result of reporting the assault, a non-Minneapolis LGBT victim was outed and, in turn, lost a job or housing, then the person committing the assault would win—even from behind bars.

b. Tidying Up Loose Ends for the 1990s

DFL majorities used not one but *two* preliminary victories to aid in the ultimate enactment of a statewide trans-inclusive gay rights law. One was the elimination of what Spear saw as the lingering albatross of the St. Paul repeal. “If it can’t pass in St. Paul,” he had reasoned, “what interest does a rural legislator have in it?”¹⁷⁴ But then St. Paul enacted a new ordinance. Like the original one, it was also challenged at the ballot box. Unlike the original one, it was trans-inclusive. Also unlike the original one, the new ordinance survived.¹⁷⁵

The second preliminary victory was the 1990 gubernatorial election. Incumbent DFL Governor Rudy Perpich ran for a third full term. Ultra conservative Republican nominee Jon Grunseth was forced to withdraw in the wake of a sex scandal only nine days before the November general election.¹⁷⁶ However, the scandal also took down Perpich, who was widely perceived as having played an unseemly role in disseminating the negative Grunseth information.¹⁷⁷ This, plus unease with what even many Democrats had come to view as an “imperial governorship,” led the electorate instead to embrace the Republicans’ last-minute replacement candidate, who Grunseth had defeated in the primary: Arne Carlson.¹⁷⁸

¹⁷³ Undefined at the state level. It is unclear if the Minneapolis definition was imputed in any prosecution where its breadth would have made a difference.

¹⁷⁴ *Remembering Minnesota’s GLBT Human Rights Act Amendment 15 Years Later*, LAVENDER, June 5, 2008, <https://tinyurl.com/yaw8oogl> [<https://perma.cc/9FVC-AXEE>].

¹⁷⁵ Anthony Lonetree, *Controversial Gay-Rights Proposal May be Introduced to City Council*, STAR TRIB. (Minneapolis), Mar. 10, 1990, at 1A; Jim Ragsdale, *Gay Rights Ordinance Survives Repeal Vote*, ST. PAUL PIONEER PRESS, Nov. 6, 1991, at 1A.

¹⁷⁶ *Republican Quits Governor’s Race in Minnesota*, N.Y. TIMES, Oct. 29, 1990, at A12.

¹⁷⁷ Bill Salisbury, *Time for Change, Grunseth Mess Had Big Role in Perpich’s Defeat*, ST. PAUL PIONEER PRESS, Nov. 8, 1990, at 1A.

¹⁷⁸ *New Nominee in Minnesota*, N.Y. TIMES, Oct. 31, 1990, at D25; *Midwest—Michigan’s Governor Barely Loses; The 1990 Elections*, N.Y. TIMES, Nov. 8, 1990, at B9.

And yet, for the first time in over a decade, trans-inclusion was missing from the MHRA bills when the legislature first convened during the Carlson Administration.¹⁷⁹ This confused supporters as much as it angered them.¹⁸⁰ Leo Treadway wrote to Allan Spear, “[T]he decision to push the bill this year appears to have hit most of the community leadership and organizations like a bolt from the blue.”¹⁸¹ Many had presumed 1991 would see no serious effort to pass any bill, allowing the Governor’s Task Force¹⁸² to gather evidence to make passage more likely in 1993. The actual reasoning for the move in 1991 is unclear,¹⁸³ but as a strategy it failed, ending with a negative 13-11 House Judiciary Committee vote.¹⁸⁴ The honor of becoming the third state with a gay rights statute instead fell to Hawaii.¹⁸⁵

2. 1993 and Steve Endean’s Ironic Victory Lap

As the 1993 legislative session began, Allan Spear was elected by his colleagues to be President of the Senate.¹⁸⁶ Trans-inclusion returned, and 1993 proved finally to be the year for LGBT rights for the entire state of Minnesota.¹⁸⁷ In hearings throughout the state, the

¹⁷⁹ S.F. 1000, 77th Leg., Reg. Sess. (Minn. 1991).

¹⁸⁰ Susan Kimberly, *Together – Transgender*, TWIN CITIES PRIDE GUIDE (1991), at 25 (noting the 1991 bills were “modeled after the Wisconsin Act” and, therefore, “contrary to trends otherwise evident in our communities”).

¹⁸¹ Letter from Leo Treadway, Ministry Associate, The Wingspan Ministry of St. Paul-Reformation Lutheran Church to Allan Spear, State Sen., Minn. (May 5, 1991) (on file with the MHS, in Spear Legislative Records, Box 9, Folder 1991-92-SF 1000: Gay Rights Bill).

¹⁸² Which Perpich had set in motion in April 1990. REPORT OF THE GOVERNOR’S TASK FORCE ON GAY AND LESBIAN MINNESOTANS 1 (1991).

¹⁸³ See *Remembering Minnesota’s GLBT Human Rights Act Amendment 15 Years Later*, *supra* note 174.

¹⁸⁴ There were some indications of misplaced reliance on the new governor’s supportive history being able to coax Republican support. Additionally, the lack of trans-inclusion did not stop radical right opposition, which instead demonized the bill by equating homosexuality with pedophilia and AIDS. Eric Stults, *Rights Bill Defeated in Committee*, EQUAL TIME, Apr. 26, 1991.

¹⁸⁵ *Gay Rights Bill is Law in Hawaii—Governor Signs Bill First Day He Received It*, GAY COMMUNITY NEWS (Hawaii), May 1991, at 1. It too lacked trans protections—despite Hawaii state law having, even then, recognized transition for almost two decades. 1973 Haw. Sess. Laws 50.

¹⁸⁶ *Minnesota Senate President is Gay*, WIS. LIGHT, Jan. 21-Feb. 3, 1993, at 2.

¹⁸⁷ *Civil Rights Take Center Stage*, EQUAL TIME, Jan. 1-Jan. 15, 1993, at 1.

gubernatorial Task Force¹⁸⁸ had gathered evidence of systemic discrimination not only against gays, lesbians, and bisexuals; but also against transgender people in the state.¹⁸⁹ Task Force member Father Ed Flahavan, explained to the House Judiciary Committee the difficulty in putting together an accurate picture of discrimination in Minnesota outside of the Twin Cities. Three separate and distinct meetings would take place in each of the various communities where the Task Force took testimony.¹⁹⁰ The first would be a meeting with business leaders, civic leaders and elected officials. Typically, this group would say that “there is no such problem in this community” because all non-heterosexuals gravitate to the Twin Cities because of the protections already in place there.¹⁹¹ The second meeting would follow shortly thereafter. It would be an open public forum, sharply divided between those supporters relaying tales of discrimination and opponents “including angry clergy who would tell us that we were all going to hell.”¹⁹² The third meeting would be the next day—in a location publicized only within the local LGBT community. “There,” Flahavan said, “we would hear the truth” about discrimination in those communities. “You would hardly believe you were in the same town.”¹⁹³

At the committee hearings at the state capitol during the early months of 1993, Task Force members were well-prepared and ably

¹⁸⁸ REPORT OF THE GOVERNOR’S TASK FORCE ON GAY AND LESBIAN MINNESOTANS, *supra* note 182; *see also* REPORT OF THE GOVERNOR’S TASK FORCE ON GAY AND LESBIAN MINNESOTANS 1 (1995).

¹⁸⁹ Austin conservative Rep. Leo Reding surprised Karen Clark with a willingness to co-sponsor the 1993 bill. He specifically pointed out to the Task Force the need to address transsexual issues. Card of Meeting with Leo Reding and Civic Leaders (Sept. 8, 1990) (on file with the MHS, in Leo Treadway Papers, Box 5, Folder—Hearings, Albert Lea, Sept. 8, 1990); *Remembering Minnesota’s GLBT Human Rights Act Amendment 15 Years Later*, *supra* note 174.

¹⁹⁰ *Hearing on H.F. 585 Before the Minn. H. Judiciary Comm.*, 78th Leg., Reg. Sess. (Minn. Mar. 1993) (audiotape on file with author) (testimony of Fr. Ed Flahavan). The cities were: Rochester, Albert Lea, Duluth, Grand Rapids, St. Cloud, Moorhead, Bemidji, St. Paul and Minneapolis—with additional meetings in Brainerd and Marshall. REPORT OF THE GOVERNOR’S TASK FORCE ON GAY AND LESBIAN MINNESOTANS, *supra* note 182, at 1.

¹⁹¹ *Hearing on H.F. 585 Before the Minn. H. Judiciary Comm.*, *supra* note 190.

¹⁹² *Id.*

¹⁹³ *Id.*

presented the evidence to legislators.¹⁹⁴ Trans people did not testify at any of those hearings. However, many did actively lobby. “You had to stand in line for a legislator, then, there were so many people lobbying,” Diana Slyter recalled.¹⁹⁵

Going into the 1993 session, one of the biggest concerns¹⁹⁶ was counteracting what had come to be a winning strategy (notably in Colorado,¹⁹⁷ less so in Oregon¹⁹⁸) for right wing opponents of equality: painting gay rights as special rights.¹⁹⁹ Mary Doty, a moderate Republican equality supporter, felt that the strategy might work in Minnesota by tapping into the “libertarian feeling” in the state.²⁰⁰ Spear had a related fear: Fundamentalists tend to have an effect far out of proportion to their numbers. “[T]hey’re highly motivated.”²⁰¹ In the end, however, Spear conceded that the pro-equality forces had done the better job on that front, viewing them as having been “better organized.”²⁰² Karen Clark saw evolution as being critical. “There’s a whole grass roots effort that’s been put together and I think people have evolved. People have been able to sort out fact from fiction.”²⁰³

The floor votes in both the House and Senate took place on March 18, 1993. It was the first time any MHRA bill had reached a chamber floor since the Senate considered the 1977 bill. And in the House? Not

¹⁹⁴ Including trans-specific examples. Katrina C. Rose, *Three Names in Ohio: In re Bicknell, In re Maloney and Hope for Recognition That the Gay-Transgender Twain Has Met*, 25 T. JEFFERSON L. REV. 89, 89-90 n.4 (2002) (quoting *Hearing on H.F. 585 Before the Minn. H. Judiciary Comm.*, Mar. 5, 1993 (testimony of Nancy Biele)).

¹⁹⁵ CURRAH & MINTER, *supra* note 23, at 22.

¹⁹⁶ Overall; not just as related to trans issues.

¹⁹⁷ *Romer v. Evans*, 517 U.S. 620, 626 (1996) (rejecting the argument that Colorado’s Amendment 2 only prohibited “special rights”).

¹⁹⁸ Dallas Chase, *OCA: The Extremist Movement Exposed*, DIVERSITY (Boise), Dec. 1992-Jan. 1993, at 8.

¹⁹⁹ Mark Kasel, *The Clock is Running for It’s Time Minnesota’s Mary Newstrom*, GAZE, Dec. 25, 1992, at 26-27.

²⁰⁰ Kelly Gaines, *Fundamentalist Forces Set Vocal Anti-Gay Agenda*, EQUAL TIME, Jan. 1-Jan. 15, 1993, at 1, 18.

²⁰¹ *Id.* at 18.

²⁰² David Southgate, *Governor Expected to Sign Legislation Within Two Weeks*, EQUAL TIME, Mar. 26-Apr. 9, 1993, at 2.

²⁰³ *Id.*

since Dull Day at Amazon in 1975.²⁰⁴ Passage came via comfortable bipartisan margins, though some of the Republican support was unanticipated. Going into the session, actual legislative support for the bill from outside the Twin Cities was largely “unknown and untested.”²⁰⁵ Republican Senator Dean Johnson of Willmar gave an impassioned speech in favor of the bill,²⁰⁶ which came as a surprise to many—including Spear.²⁰⁷ Johnson was the Minority Leader at the time—a position he eventually was driven away from because of his support for LGBT equality.²⁰⁸ But he saw his vote as the “right thing to do” so that “a group of productive citizens don’t have to live in fear.”²⁰⁹

²⁰⁴ Donna Halvorsen, *Legislature Votes for Gay-Rights Bill - Margin of Approval Wider than Expected with Help of Some Unanticipated IR Votes*, STAR TRIBUNE (Minneapolis), Mar. 19, 1993, at 1A.

²⁰⁵ Kasel, *supra* note 199, at 26. This is in contrast to 1991, when some appeared to presume much support from ‘Greater Minnesota.’ Mark Kasel, *The Green Light is Go for Making History*, TWIN CITIES GAZE, Apr. 4, 1991, at 8.

²⁰⁶ Almost immediately, New York’s Empire State Pride Agenda (ESPA) began to use Johnson’s speech as a tool to persuade Republicans in the state Senate to approve the first gay rights bill in that state ever to pass in the Assembly and to make it to the upper chamber. A.B. 1336, 1993-1994 Gen. Assemb., Reg. Sess. (N.Y. 1993); Kevin Sack, *Bill is Passed by Assembly on Gay Rights: Albany Measure Faces Tough Fight in Senate*, N.Y. TIMES, Feb. 2, 1993, at B1. Johnson himself did not mention trans people specifically in his speech. The Minnesota bill, of course, was inclusive, but this fact was absent from an ESPA ad which reproduced Johnson’s speech in full. Advertisement, *Attention Senators*, LEGIS. GAZETTE, June 7, 1993, at 10-11. The response of New York Senate Republicans was to not allow a vote or even a debate on the bill. David Bauder, *Gays and Lesbians Angered Over Killing of New York Civil Rights Bill*, NEW VOICE (Houston), July 9-July 15, 1993, at 6. Of a closed-door caucus meeting, one report indicated “a majority of Republican senators made homophobic statements about gay men and lesbians.” Susan Jordan, *GOP Caucus Refuses to Let Rights Bill Come to Senate Floor for Vote; Senators Express Hatred*, EMPTY CLOSET (Rochester), Aug. 1993, at 1.

²⁰⁷ Doug Grow, *A ‘Quiet Dissident’ Among IR Senators is Quiet No More*, STAR TRIB. (Minneapolis), Mar. 19, 1993, at 3B.

²⁰⁸ Joshua Preston, *Senator Allan Spear and the Minnesota Human Rights Act*, MINN. HIST., Fall 2016, at 83-84. The same was true for his party affiliation. He eventually switched to the DFL party but did re-ascend to leadership, becoming the only person ever to lead both major parties in the chamber. *Id.* at 83 n.24.

²⁰⁹ Jack B. Coffman, *Gay Rights Bills Zip Through State House, Senate*, ST. PAUL PIONEER PRESS, Mar. 19, 1993, at 1A.

Steve Endean, severely weakened by AIDS and who would be dead before the end of the year, came back to Minnesota from D.C. to see the 1993 bill pass.²¹⁰ Because the bill moved quicker than many had anticipated, he only made it back by scrounging frequent-flyer miles from a friend at the last minute.²¹¹ Gary Peterson, the author of an *Equal Time* feature on Endean's return, acknowledged a personal connection to his subject: In 1977, a whisper to the effect that Endean thought he had a cute butt got to him; this spurred his coming-out process. Perhaps it was a favor in return for that flirtatious remark, or perhaps it was just a lack of willingness to force a dying man to confront a political ghost that caused Peterson to shy away from addressing the critical difference between the bills Endean had pushed in the 1970s and the one that he would see pass in 1993.²¹² The ghost, however, was no ghost at all. Instead, it was a political victory for Tim Campbell, Jack Baker, Twin Cities Transsexuals (as well as its 1990s counterpart, the City of Lakes Crossgender Community (CLCC)) and "such creatures as sat in the gallery"²¹³ of the House on May 8, 1975, a victory that outlived Endean and his assimilationist political expertise.²¹⁴

This leaves something of a hole in the historical record. Endean himself said nothing about the reality of 1993's inclusivity in the memoir he completed shortly before he died. In his last months, he had positive words for the lobbying group, It's Time Minnesota, which pushed the trans-inclusive bill. Unlike some groups that "disparage old-timers such as myself as a way of building themselves up,"²¹⁵ the

²¹⁰ Gary Peterson, *Steve Endean's Passionate Activism Comes Full Circle*, EQUAL TIME, Apr. 9-Apr. 23, 1993, at 1.

²¹¹ ENDEAN, *supra* note 60, at 293.

²¹² Peterson, *supra* note 210. Other reflections mentioning Endean's early activism in Minnesota in conjunction with the passage of the 1993 bill also omitted the critical difference between 1975 and 1993. Doug Grow, *Death Be Not Proud, For a Legacy and a Spirit Can Live On*, STAR TRIB. (Minneapolis), Aug. 6, 1993, at 3B; Karen Schneider, *10 Years, AIDS Have Changed the Climate for Gay Rights Laws*, ST. PAUL PIONEER PRESS, Apr. 22, 1993, at 4A; Kristina Campbell, *Minnesotans Celebrate as Governor Signs Bill*, WASH. BLADE, Apr. 9, 1993, at 1; *see also* Halvorsen, *supra* note 204.

²¹³ CLENDINEN & NAGOURNEY, *supra* note 24, at 237.

²¹⁴ *Proposed State Civil Rights Bill for Transgendered Persons*, CLCC NEWS, July 1992, at 1, 3; *Help!*, CLCC NEWS, Mar. 1993, at 2; *Minnesota Civil Rights Bill Adopted*, CLCC NEWS, June 1993, at 1.

²¹⁵ ENDEAN, *supra* note 60, at 293.

new organization welcomed his presence in 1993. Legendary Houston activist Ray Hill recalls that shortly before he died, Endean spoke with him “and apologized for the top heavy bureaucracy HRC had become and he felt it had lost the focus he had intended at the start.”²¹⁶ While that does indicate that Endean came to have somewhat of the same general view of HRC that many trans people have, it does not actually show how he felt about trans people—either as part of the movement or even simply as people. Consequently, despite trans-inclusion eventually succeeding at the state level in Minnesota without the incremental step of a gay-only MHRA, there is no indication that Endean ever had a change of heart on trans-inclusion.²¹⁷

Allan Spear’s legacy, on the other hand, is that of a pragmatist who could be taken at his word. Nineteen ninety-one showed some willingness to return to a gay-only model, but from 1981 onward he generally stuck with trans-inclusive language—up to and including 1993. That positioning shows his 1970s opposition to inclusion to have been something other than evidence of an underlying fear of transgender identity. And even after 1993, Spear worked on behalf of trans people on trans-specific issues, notably fighting conservative efforts to defund Medicaid-based transition-related healthcare.²¹⁸ During the 1995 legislative session, Diana Green of the Transsexual Task Force wrote to Spear thanking him. “[It] proves we really are all in this together.”²¹⁹

As the MHRA stood in 1993, everyone *was* in it together. The language of the Carlson Amendment was in force throughout the state. Minnesota stood alone among the states with gay rights statutes, something not spelled out in several reports on the victory in local LGB(T) media across the nation.²²⁰ Still, Minnesota had become a

²¹⁶ E-mail from Ray Hill to author (Apr. 9, 2002, 08:51 CST) (copy on file with author).

²¹⁷ I also am not able to comfortably state with certainty whether Endean could be classified as a true transphobe or whether the quasi-conservative political arrogance that Campbell and other radicals so detested merely happened to operate to the disadvantage of trans people.

²¹⁸ Compare 1995 Minn. Laws 1033, with S.F. 1110, 79th Leg., Reg. Sess. (Minn. 1995) (amendment SCS1110A54 failed on voice vote in Finance Committee).

²¹⁹ Letter from Diana Green, Transsexual Task Force, GLCAC to Allan Spear, State Sen., Minn. (n.d., but during the 1995 legislative session) (on file with the MHS, in Spear Legislative Records, Box 9, GLBT Misc. Issues Folder).

²²⁰ As a small sampling, compare *Minnesota Governor Expected to Sign Gay Rights Bill*, WIS. LIGHT, Apr. 1-Apr. 14, 1993, at 3, *Gay Rights in Minnesota*,

beacon for trans people in states that either had chosen to make trans people third class citizens or had chosen to leave LGBs and Ts equal as between one another, but all nevertheless outsiders to equality. With the dawning of the new millennium, other states began to join Minnesota in trans-inclusion.²²¹ At the same time, however, the Minnesota Supreme Court pretended that the two decades of political pain and emotional turmoil preceding 1993 never happened.

IV. THE TOILET APOCALYPSE

A. Victim Inversion

Minneapolis Southwest High School administrators fully recognized teacher Debra Davis's transition from male to female. Another teacher, Carla Cruzan, claimed the school was committing sex discrimination against *her* merely by allowing Davis to be there.²²² "Having this employee in the restroom has created a hostile environment for me based on my sex," she asserted in a filing with the Minnesota Department of Human Rights (DHR).²²³ However, the agency found no evidence indicating Davis had engaged in "conduct or communication of a sexual nature."²²⁴

DALL. VOICE, Apr. 2, 1993, at 5, Robin Kane, *Status of U.S. Gay Rights Bills*, OUT! MAG. (N.M.), May 1993, at 23, Jim Thomas, *Minnesota Rights Law Makes Eight*, LESBIAN & GAY NEWS-TELEGRAPH (Mo.), May 1993, at 1, *Gay Rights Bill Poised for Passage in Minnesota*, OUTLINES (Chi.), Apr. 1993, at 12, and *Minn. Gets Gay Rights*, OUTLINES (Chi.), May 1993, at 10 (lacking mention of trans-inclusion), with *Minnesota Now the 7th [sic] State with Gay Rights Protections*, DIVERSITY (Idaho), Apr. 1993, at 8 (does mention it).

²²¹ See Katrina C. Rose, *And Then There Were Two*, TEX. TRIANGLE, July 27, 2001.

²²² Minnesota's anti-equality forces noticed. *Transgender Teacher 'Comes Out' in Blaine—Your School Could be Next*, PRO-FAMILY NEWS, Dec. 1998. See also Rachel Gold, *Alyssa Williams Criticizes "Vocal Parents and Clergy"*, FOCUS POINT, Mar. 3-Mar. 9, 1999, at 1, 3; *The Loss of Something Special*, FOCUS POINT, Mar. 10-Mar. 16, 1999, at 4; Laura Billings, *Alyssa Williams Left to Fend for Herself*, ST. PAUL PIONEER PRESS, Mar. 4, 1999.

²²³ Charge of Discrimination, *Cruzan v. Special Sch. Dist. No. 1* (No. 31706) (Minn. Dep't Hum. Rts. Nov. 30, 1998). Presaging the more recent usage of 'religious liberty' claims as a weapon against equality, Cruzan also claimed that the situation constituted religious discrimination against her. *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 966 (D. Minn. 2001), *aff'd sub nom.*, *Cruzan v. Special Sch. Dist.*, No. 1, 294 F.3d 981, 984 (8th Cir. 2002).

²²⁴ Charge of Discrimination, *supra* note 223.

As a *de facto* defendant in Cruzan's case, Davis won. She (and the district) also prevailed in Cruzan's journey through the federal court system.²²⁵ But was it a victory for all trans people? One prong of DHR's position was that the school district "allows the other employee to use the designated 'women's restroom' as an accommodation" and that allowing this did not violate Cruzan's rights. The *other* prong was that the MHRA "does not require" such accommodation.²²⁶

During the run-up to the litigation, Commissioner Dolores H. Fridge felt Davis had come away from a three-hour meeting having "misunderstood much" of what had been said regarding the DHR's position on trans people's rights under the MHRA. "This," Fridge claimed, "is disappointing, but not surprising."²²⁷ Yet this is what that understanding was:

1. The rights of transgendered persons stop at the bathroom door;
2. Under "the law" a person is to use the bathroom that "matches" their body parts;
3. Limiting transgendered persons access to facilities in a workplace is a fair "balance of the rights of transgendered persons and the rights of others";
4. Transgendered persons may be considered to be disabled and therefore employers may need to accommodate them with regard to workplace facilities;
5. In order for the law to apply to transgendered persons in the workplace, they must provide the employer with written documentation of their gender status from a therapist.²²⁸

"Contrary to Ms. Davis' understanding, the Human Rights Act does not require people to use the bathroom that matches their body parts," Fridge wrote to attorney Joni Thome. "Rather, it does not

²²⁵ Cruzan v. Minneapolis Pub. Sch. Sys., 165 F. Supp. at 967-969.

²²⁶ Charge of Discrimination, *supra* note 223.

²²⁷ Letter from Dolores H. Fridge, Commissioner, Minn. Dep't of Human Rights to Joni M. Thome, Legal Program Coordinator, Outfront Minn. (Sept. 29, 1998) (on file with the Tretter Collection, in Trans Issues Box, Kasel File).

²²⁸ Letter from Joni M. Thome, Legal Program Coordinator, OutFront Minn. & Debra Davis, Executive Director, Gender Education Center to Delores Fridge, Commissioner et. al., Minn. Dep't of Human Rights (Sept. 18, 1998) (on file with the Tretter Collection, in Trans Issues Box, Kasel File).

prohibit employers from using anatomy as the determinant of bathroom.²²⁹

That, of course, left a loophole—one that, contrary to Fridge’s condescending assessment, was not only real but was also glaringly obvious to Davis: Even if the MHRA might not require a genital-bathroom gender-match, each and every employer in Minnesota was free to establish such a requirement. What trans person—what *person*—does not ever have to make use of restroom facilities? The DHR’s interpretation left no practical difference between the restroom aspect of MHRA’s trans employment protections as they stood at the end of the 1993 legislative session and as the law existed prior to 1993.

And then along came a plaintiff.

In May 1997, Juli Goins, a transsexual woman, began working full-time at legal publisher West Group in its Rochester, New York, office. She transferred to West’s Minnesota facility in Eagan in October of the same year. By January 1998, she had left West because of a dispute over which restroom she could use—a dispute that did not arise until she began work in Minnesota.²³⁰ As Davis’s employer could have *allowed* a trans woman to transition on the job and use appropriate post-transition restroom facilities prior to 1993, West in New York apparently *allowed* the already-transitioned Juli Goins to do so in 1997.²³¹ West *could have allowed* the same in Minnesota with or without the 1993 additions to the MHRA.

But West did not.

B. Because West Did Not Have To

Goins sued West in Hennepin County District Court, where Judge Thomas Wexler expressed doubts about the MHRA being trans-inclusive to any degree whatsoever.²³² He called attention to the absence of trans issues in a contemporary law journal article about the 1993 statute. There, 1993 was proclaimed to have been the result of years of lobbying and testimony about “the abuse and discrimination

²²⁹ Letter from Dolores H. Fridge to Joni M. Thome, *supra* note 227.

²³⁰ *Goins v. W. Grp.*, 619 N.W.2d 424, 426-27 (Minn. Ct. App. 2000), *rev’d*, 635 N.W.2d 717 (Minn. 2001).

²³¹ New York at the time had no state LGBT rights statute. It enacted a gay-only statute in 2002. 2002 N.Y. Sess. Laws 46. It has never been statutorily amended to include trans people. Schindler, *supra* note 32, at 8.

²³² Order Granting Summary Judgment, *Goins v. W. Grp.*, No. 98-18222 (Minn. Dist. Ct. Hennepin Co. Jan. 14, 2000) at 5-6.

that gays, lesbians and bisexuals in Minnesota continually encounter.”²³³ It is true that trans people did not testify in 1993—but they were part of the process and the history.²³⁴

It would not be the last time that the *Goins* litigation bypassed history.

Indeed, it was not the only problematic aspect of the article.²³⁵ A footnote reference to *Ulane v. Eastern Airlines*²³⁶ is the only overt mention of anything trans.²³⁷ However, a reader can also find key category definitions from all of the then-existing state gay rights statutes. Minnesota’s clearly stands out as the only one with language resembling the Carlson Amendment.²³⁸

Wexler eventually was able to acknowledge that gender identity was part of Minnesota’s definition of sexual orientation, yet he adopted the DHR’s view that it was irrelevant for purposes of restroom access. His analysis led him to refer to several trans marriage cases—including the then-recent *Littleton v. Prange*²³⁹ decision from Texas. (He saw it as doubly relevant in light of *Goins* having been born in Texas, her having secured a gender-change order there and the anti-marriage provision²⁴⁰ in the 1993 statute.²⁴¹) Wexler declared that the “bottom line issue” was whether a “pre-op male-to-female transsexual person is legally entitled to be treated as a female for the purpose of bathroom use,” which was enough for him to rule in favor of West.

²³³ Charles M. Goldstein & Lori V. Berke, *The New Human Rights Protection Based on Sexual Orientation: A Promising Beginning*, 62 HENNEPIN LAW. 26, 29 (May-June 1993).

²³⁴ See generally *id.*. Even omitting 1975 and the eighteen years of activism that followed, consider the testimony that referred to trans issues. See Rose, *supra* note 194, at 89 n.4.

²³⁵ It is worth noting that the Goldstein-Berke article appears only two pages before an article authored by Wexler himself, albeit not about the MHRA. Thomas W. Wexler, *Why Couldn't We Have Reached This Result Before?*, 62 HENNEPIN LAW. 31, 31 (May-June 1993).

²³⁶ *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984).

²³⁷ Goldstein & Berke, *supra* note 233, at 26 n.2.

²³⁸ *Id.* at 26.

²³⁹ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999).

²⁴⁰ 1993 Minn. Laws 126.

²⁴¹ Order Granting Summary Judgment, *Goins v. W. Grp.*, No. 98-18222 (Minn. Dist. Ct. Hennepin Co. Jan. 14, 2000) at 5-8 (quoting the provision then at MINN. STAT. § 363.021, subd. 4).

Yet, to read his opinion one might think that Juli Goins was seeking to enter the women's restroom at West to celebrate (perhaps consummate?) a marriage, one that some jurisdictions then might have viewed as being same-sex.²⁴²

Goins appealed, finding a friendlier statutory interpretation at the Minnesota Court of Appeals. Judge Terri Stoneburner rejected any relevance of marriage cases²⁴³ and bluntly concluded that the MHRA “does not require an employee to eliminate an inconsistency between self-image and anatomy.” Rather, that is precisely what the law “protects the employee from discrimination based on.”²⁴⁴

West continued to insist that the issue was not “sexual orientation” but “sex,” whose MHRA provisions do specifically carve out an allowance for restroom segregation.²⁴⁵ Stoneburner, however, rejected its relevance. “Even if the exception for sex discrimination regarding restroom use applies to restrooms in the workplace, the exception is for sex discrimination, not for sexual orientation discrimination.”²⁴⁶

This was a victory for Juli Goins. However, it was a victory that did not include judicial exposition on the history of how Minnesota came to have a trans-inclusive definition of sexual orientation. It also was a victory that was short-lived.

A unanimous Minnesota Supreme Court also was unwilling to look at the history of the wording at the core of the dispute. “To conclude that the MHRA contemplates restrictions on an employer’s ability to designate restroom facilities based on biological gender,” Justice Russell Anderson wrote, “would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature.”²⁴⁷ Anderson yearned for “more express guidance from the legislature,” professing the belief that “the obligation of the judiciary in construing legislation is to give

²⁴² Consequently, under Minnesota’s marriage equality regime, a legally married female couple could enter a women’s restroom at West and not be challenged, irrespective of their intent upon entering said restroom, unless one of the women was known (or suspected) to be a trans woman.

²⁴³ *Goins v. W. Grp.*, 619 N.W.2d 424, 428 n.2 (Minn. Ct. App. 2000), *rev’d*, 635 N.W.2d 717 (Minn. 2001).

²⁴⁴ *Id.* at 429.

²⁴⁵ *Id.* (citing the provision then at MINN. STAT. § 363.02, subd. 4).

²⁴⁶ *Id.*

²⁴⁷ *Goins v. W. Grp.*, 635 N.W.2d 717, 723 (Minn. 2001).

meaning to words accorded by common experience and understanding.”²⁴⁸

Anderson’s words begged several questions. What was the relevant common experience? The relevant common understanding? The relevant original understanding? Are they embodied by the DHR’s internal ruminations of 1998? Or are they to be found in the turmoil of 1975 in which Tim Campbell crafted the language that became the Carlson Amendment, language that went on to become part of the Minneapolis Civil Rights Ordinance and, eventually, part of the MHRA that the Supreme Court interpreted?

Despite Campbell’s concern for “obvious gays,” the Carlson Amendment entered Minnesota politics as the definition of “transsexualism.”²⁴⁹ Few, if any, contemporary understandings of transsexualism did *not* include a pre-surgery real-life test in which the transsexual person lives and presents publicly—and uses toilets—as the post-transition gender.²⁵⁰ Recognizing Juli Goins’s equal restroom access would not have been judicial legislation. Rather, it is the only historically reasonable interpretation of the language presented on the floor of the Minnesota House on May 8, 1975. Yet, a Minnesota Supreme Court—with six of its seven justices having been appointed by *Governor Carlson*²⁵¹ not only disregarded legislative history,²⁵² but went further by ensuring that anyone whose knowledge of MHRA trans-inclusion might emanate solely from the *Goins v. West Group* case would not possess the deep history of the state’s broad concept of sexual orientation. As Neil Dishman observed, given that he “cited no authority for its speculative assertion that the legislature did not intend to disturb ‘the traditional and accepted practice’ of designated

²⁴⁸ *Id.*

²⁴⁹ H.F. No. 536, § 29, 1975 Minn. H.J. 2460 (May 8, 1975).

²⁵⁰ See generally *Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978) (existence of state transsexual birth certificate relied upon to invalidate application of anti-crossdressing ordinance to transsexuals).

²⁵¹ *Biographies of Minnesota Court of Appeals Judges*, <https://mn.gov/law-library-stat/judges.html> [<https://perma.cc/9RWH-MNAK>] (last visited Feb. 10, 2018). In 2001, only Associate Justice Alan Page was not a Carlson appointee. See *Page v. Carlson*, 488 N.W.2d 274 (Minn. 1992).

²⁵² An amicus brief called the court’s attention to this history. Brief for OutFront Minnesota and Minnesota Lavender Bar Association as Amici Curiae Supporting Respondents, *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001) (CX-00-706) at 2-8.

restrooms, showers, and locker rooms by biological gender,” Anderson’s *Goins* opinion “is hard *not* to criticize.”²⁵³

C. An Adjoining Rhetorical Bathroom

Another Minnesota bathroom-centric case played out concurrently with *Goins* and *Cruzan*.²⁵⁴ However, it was not a trans MHRA action involving mere access and proper usage. Instead, it involved an out gay man—and as the Minnesota Court of Appeals explained, it involved something that was *not* “a function one normally witnesses in a public restroom.” Described more explicitly, David Shaw “exposed his erect penis to try to meet another man.”²⁵⁵

Shaw was a teacher. The incident did not happen at school, but it did involve his profession. On November 24, 1998, he had attended an education conference at a hotel. His employer, the Bloomington School District, had officially excused him from work to attend.²⁵⁶

The Minnesota Board of Teaching suspended his license for two years for “immoral conduct.” In siding with the Board, the Court of Appeals glazed over one of Shaw’s substantive arguments as to why his actions should *not* have been viewed as “immoral conduct.” As the court phrased it, “Shaw argues that his actions are a *common* occurrence in the gay community and are therefore not immoral.”²⁵⁷ More pointedly, Shaw argued it was “a *recognized* method of meeting people in the gay society.”²⁵⁸

The *Shaw* decision came a few months before 9/11.

The *Goins* Supreme Court decision came a few months after those attacks.

²⁵³ Neil Dishman, *The Expanding Rights of Transsexuals in the Workplace*, 21 LAB. LAW. 121, 125 n.24 (2005) (emphasis added).

²⁵⁴ *Shaw v. Minn. Bd. of Teaching*, No. C0-00-2173, 2001 WL 605096 (Minn. Ct. App. June 5, 2001). As of July 30, 2017, no appellate court opinion cites *Shaw* and only one law review article does. Eva DuBuisson, *Teaching from the Closet: Freedom of Expression and Outspeech by Public School Teachers*, 85 N.C. L. REV. 301, 330 n.180 (2006).

²⁵⁵ *Shaw*, 2001 WL 605096, at *4.

²⁵⁶ *Id.* at *1. He had taught in Bloomington for over a decade, and in Iowa for several years before that. Relator’s Brief, *Shaw v. Minn. Bd. of Teaching*, No. C0-00-2173, 2001 WL 605096 (Minn. Ct. App. June 5, 2001), at 5-6.

²⁵⁷ *Shaw*, 2001 WL 605096, at *4, 8.

²⁵⁸ Relator’s Brief, *supra* note 256, at 17-18.

As 2002 dawned, and American politics devolved into a reactionary fervor, trans people were still strangers to federal gay rights bills—proposals that had no chance of becoming law—due largely on political mantra: Trans people are just *too much*. And yet, as 2002 dawned, nothing stood in the way of David Shaw entering any public restroom in Minnesota that matched the gender marker on his driver’s license. But had the Employment Non-Discrimination Act, as it stood in 2002,²⁵⁹ become law, David Shaw would have enjoyed federal anti-discrimination protections. No trans person—even those never accused of improper restroom conduct—would have enjoyed similar federal protections. With the legal edict of the MHRA judicially whittled²⁶⁰ down to accommodation by whim, was the landscape in Minnesota—where the battle was thought to have long been won—any better?

An answer to that question came by the end of the year.

D. The Continuing Damage

Minneapolis may have been the first jurisdiction to enact trans-inclusion language into law, but soon after *Goins*, the City hid behind Russell Anderson’s whittling to defend itself against a discrimination claim by a trans man. The defense was successful.²⁶¹ Subsequently, at both the city and the state levels, the *wording* of the Carlson Amendment survived not only frequent Republican legislative animosity²⁶² but also eight years of a post-Carlson Republican

²⁵⁹ Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong. § 3 (2002); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. § 3 (2001).

²⁶⁰ Or “pinched,” as Dishman characterized Anderson’s reading of the MHRA. Dishman, *supra* note 253, at 125 n.24.

²⁶¹ See generally *Doe v. Minneapolis*, No. C2-02-817, 2002 WL 31819236 (Minn. Ct. App. Dec. 17, 2002), *appeal denied*, 2003 Minn. LEXIS 139 (Minn. Mar. 18, 2003).

²⁶² See generally *Party Control of the Minnesota House of Representatives, 1951-Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/lrl/histleg/caucus.aspx?body=h> [<https://perma.cc/WD5G-CP37>]; *Party Control of the Minnesota Senate, 1951-Present*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/lrl/histleg/caucus.aspx?body=s> [<https://perma.cc/8LLU-VZ36>].

governor who was eyeing the White House.²⁶³ Predictably, Tim Pawlenty went to great lengths to distinguish himself from Dean Johnson, professing profuse regret²⁶⁴ over having been one of the Republican legislators to vote favorably in 1993.²⁶⁵

As an employer, the City of Minneapolis continued to be freely magnanimous in its future treatment of its trans employees as it wanted to be. However, the combination of *Cruzan*, *Goins* and *Doe v. City of Minneapolis* came to stand for the proposition that if it did not want to be, it did not have to be. And likewise, that same combination came to stand for the proposition that no employer in Minnesota had to be. This is not to say that the state instantaneously became less trans-friendly overall. Rather, it stands as one of so many examples disproving Dan Savage's overly-commercialized adage.

Sometimes, things *don't* get better. Minneapolis City Council soon thereafter passed an ordinance clarifying that restroom use by trans people was not a *criminal* offense.²⁶⁶ However, that did not overturn *Goins* or *Doe*.

But other times, things actually *do* get better.

In 2017, on the same day Danica Roem was elected to the Virginia House of Delegates,²⁶⁷ Minneapolis voters elected not one, but two trans councilmembers.²⁶⁸ Minneapolis's trans future, therefore, would

²⁶³ Brian Bakst, *Ex-Minn. Gov. Tim Pawlenty Ends White House Bid*, HUFFINGTON POST (Aug. 14, 2011), [<https://web.archive.org/web/20160611203913/http://www.huffingtonpost.com/huff-wires/20110814/us-pawlenty-2012/>].

²⁶⁴ Referring to the trans-inclusion language, Tim Pawlenty branded the 1993 statute as "overbaked." Howard Fineman, *Tim Pawlenty—He Doesn't Have Sarah Palin's Pizzazz or Mitt Romney's Money. But the Governor of Minnesota May be a Shrewd Republican Bet in 2012*, NEWSWEEK, Jan. 4, 2010, at 64.

²⁶⁵ H.F. No. 585, 1993 Minn. H.J. 818, 818-19 (Mar. 31, 1993).

²⁶⁶ David Hawley, *City Alters Ordinance on Restroom Issue*, ST. PAUL PIONEER PRESS, Sept. 27, 2003, at B6. Anti-trans forces had called for prosecution of Debra Davis. Letter from Tom Prichard, Pres., Minn. Fam. Council, to Robert K. Olson, Chief of Police, Minneapolis Police Dep't (Sept. 13, 1999) (on file with the Tretter Collection, in Various 1990s E-mails Folder).

²⁶⁷ Michael K. Lavers, 'A New Chapter Has Begun,' WASH. BLADE, Nov. 10, 2017, at 1.

²⁶⁸ Kyle Potter, *Minneapolis Elects 2 Black Transgender City Council Members*, ASSOCIATED PRESS (Nov. 8, 2017), [<https://apnews.com/df8796545b544817bdcc77c6e23ef4b4>] [<https://perma.cc/CE43-STJD>].

seem to be positive. However, it was malfeasance regarding the past that erected a reality in which the city was able to avoid obeying its own anti-discrimination law, begging perhaps the most cynical question of all: What good is a civil rights ordinance if the city that enacts it aggressively defends itself from having to obey it? A portion of the answer to that question is that it can never be any better than the willingness of society to remember that the ordinance exists *and* how it came to be.

V. DEATH, LIFE AND AFTERMATHS

A. Participants—Political and Factual

1. The Texas Connections

Tim Campbell lived to see the fortieth anniversary of both the Capitol protests and Carlson's introduction of the trans-inclusion amendment. By a few days however, he did not live to see the fortieth anniversary of the addition of that language to Steve Endean's Minneapolis ordinance.²⁶⁹ After moving back to Texas he still engaged in activism—some pro-gay²⁷⁰ and some anti-gun—well into his seventies.²⁷¹ With his intermittent blogging, he championed the memory of the Baker-McConnell marriage.²⁷² He also contrasted the impact of marriage with that of the anti-discrimination laws he himself had fought for.

And he came down on the side of marriage.

²⁶⁹ He died on December 26, 2015, having written his preferred obituary. Tim Campbell, *Tim Campbell (1939- 2015)*, LAVENDER (George Holdgrafer ed., Jan. 21, 2016), <http://www.lavendermagazine.com/my-lavender/tim-campbell-1939-2015/> [<https://perma.cc/PTF6-W9MC>].

²⁷⁰ Kristine Galvan, *No Thank You*, MY FOX (Houston) (July 12, 2013), <http://www.myfoxboston.com/story/22830669/2013/07/12/no-thank-you> [<https://perma.cc/TZ4V-XQF7>]; Megan Smith, *Gay Blood Drive Brings Attention to FDA Ban*, OUTSMART (July 15, 2013), <http://www.outsmartmagazine.com/2013/07/gay-blood-drive-brings-attention-to-fda-ban/> [<https://perma.cc/4ZZF-NTTW>].

²⁷¹ Tim Campbell, *Tim Campbell Dogs the NRA Convention in Houston*, TIM CAMPBELL SPEAKS OUT (May 16, 2013, 10:00 AM), <http://timcampbellxyx.blogspot.com/2013/05/tim-campbell-dogs-nra-convention-in.html> [<https://perma.cc/NC48-WNP3>].

²⁷² Tim Campbell, *News Release that Brought Gay Marriage to the Modern World*, TIM CAMPBELL SPEAKS OUT (June 3, 2013, 3:14 PM), <https://tinyurl.com/ydecq4bn> [<https://perma.cc/EXE7-PSL6>].

“More gays and lesbians have applied for marriage licenses this year in San Francisco in one week than have filed discrimination complaints throughout the country since 1975,” he wrote in 2004, perhaps overselling his point.²⁷³ “That suggests lots of gays think the right to marry is a very important right.”²⁷⁴ Most significantly for him, it was a reminder for the world of how radical the Baker-McConnell marriage was—and how radical Minnesota’s ‘respectable’ gay leaders of the time were *not*. And his combined view of Endean and Spear never changed, except to grow sufficiently sour to not even give Spear credit that he ultimately earned on the trans issue. “Both,” Campbell said in 2013, “were limited enough in their vision of real life that it didn’t cross their minds that trans people were included in gay rights.”²⁷⁵

Juli Goins also eventually left Minnesota. Having embarked on her journey to the state filled with visions of the eccentricities which saturate the movie *Fargo*²⁷⁶, she left embittered. The Supreme Court decision was not the exclusive reason.²⁷⁷

A few days after the ruling, an LGBT community action ‘town hall’ meeting took place in Minneapolis to discuss the ruling, its ramifications and how to move forward. She was on the panel of participants. The apparent lack of community interest in the event added insult to her injury. The handful of attendees heard her surmise that the evening’s new episode of *The West Wing* must have been of

²⁷³ Of course, it should be noted that by the spring of 1975 only seven cases had been filed under the Minneapolis ordinance and only one under St. Paul’s. Memo from John Tomlinson to Steve Endean & Allan Spear, *supra* note 83. Moreover, he engaged in some extremely radical behavior when he felt the city of Minneapolis was not sufficiently active in its ordinance enforcement. *Campbell Pleads Guilty; Verdict in Mace Arrests*, ADVOCATE, Nov. 16, 1977, at 18.

²⁷⁴ Tim Campbell, *Gay Marriage - The Early Years*, PULSE OF THE TWIN CITIES (Apr. 8, 2004), <http://www.pulsetc.com/articled9e4.html> [<http://perma.cc/C6RK-AFT4>].

²⁷⁵ Telephone Interview with Tim Campbell, *supra* note 48.

²⁷⁶ Gill Creel, *Transgender Discrimination Gets Its Day in Court*, LAVENDER, Jan. 12-25, 2001, at 13.

²⁷⁷ Juli H. Goins, Response to *The Phantom Penance*, ENDABLOG (Sept. 28, 2011, 8:06 AM), <http://endablog.wordpress.com/2011/08/28/the-phantom-penance/> [<https://perma.cc/8Q48-Y39B>].

far greater importance to the area's LGBs.²⁷⁸ "It was a case with [a] negative outcome for them, too, but because a trans person was implicated, perhaps they felt otherwise and stay[ed] home instead of rallying to show their presence."²⁷⁹ And then it got worse.

I naïvely believed I would be seeing a lot of empathetic faces that night. It was almost three months after the "war on terror" was announced, and between that, the dot-bomb recession, and my name being firebranded in the Twin Cities courtesy of the court opinion, my temp employment on which I'd relied for four years had dried up instantly. I was utterly broke, on the verge of eviction, had no food at home, and had just lost my phone service (with it, the internet, too).

So when I was asked to be on the "after-party" panel to discuss the case with my name on it, I thought it would give me the chance to speak, to directly engage with the attendees from the panel stage, to share with them what I was experiencing being in the middle of a firing zone and what I might do next. That wasn't what happened.²⁸⁰

Her counsel and representatives of OutFront Minnesota spoke. What followed were not expressions of sympathy (or empathy²⁸¹) but rather, as Goins described it, "people's own monologues about their life

²⁷⁸ Juli Goins, Town Hall Discussion in Minneapolis, Minn. (Dec. 12, 2001) (I retain no written material or notices pertaining to the meeting. However, my recollection is that it occurred approximately two weeks after the Supreme Court's November 29, 2001 opinion. Only one new episode of *The West Wing* aired during December. This would situate the meeting on Wednesday, December 12th.).

²⁷⁹ Goins, *supra* note 277.

²⁸⁰ *Id.*

²⁸¹ As noted earlier, I attended the 2001 town hall meeting in question. My own recollection is that there were two very long monologues, one each from two members of the audience. One was from a trans woman regarding her personal experiences, but the other was from a gay man who engaged in a rambling conspiratorial diatribe about issues far afield from trans coverage under the MHRA. He was cut off after announcing, after already having spoken at great length, that he was only getting started with his rant.

stories and workplaces (many who spoke were gainfully employed and had transitioned on the job, something I never did).”²⁸²

2. The Pioneer

One of the trans radicals of 1975 also has expressed anger—dating to the time period of the *Goins* litigation yet not connected to it. The National Gay-Lesbian Task Force (NGLTF)²⁸³ published an activism handbook in 2000, *Transgender Equality*.²⁸⁴ It is one of the few pre-*Goins* analyses of Minnesota LGBT history to acknowledge not only 1993 but also 1975 as antecedent. Its authors, Shannon Minter and Paisley Currah, sought out Slyter for her perspective on Minnesota.²⁸⁵

Having been assured that the pamphlet was for activists and not the general public, I gave them some history of our lobbying strategy. The pamphlet was printed with no repercussions. Then, NGLTF posted the pamphlet on the internet without asking my permission. Instantly, a web search on my name outed me thanks to NGLTF.

....

Thanks to NGLTF and their “everyone should be out” mentality that is typical of the TG “movement”, I have lost my career and hundreds of thousands of dollars in retirement benefits.

The first and foremost right of GLBTI people is the right to privacy. Until NGLTF and TG groups can

²⁸² Goins, *supra* note 277. Her e-mail to me was not in response to any request for recollections, though it did occur after she had seen me make reference to the 2001 town hall meeting in a blog post. See Katrina C. Rose, *The Phantom Penance*, ENDABLOG (Aug. 28, 2011, 7:08 PM), <http://endablog.wordpress.com/2011/08/28/the-phantom-penance/> [<https://perma.cc/8Q48-Y39B>].

²⁸³ NGLTF eventually became the “National LGBTQ Task Force.” Rea Carey, *Why This Major Organization Is Changing Its Name*, ADVOCATE (Oct. 8, 2014), <https://www.advocate.com/commentary/2014/10/08/op-ed-why-major-organization-changing-its-name> [<https://perma.cc/J8CD-VVZJ>].

²⁸⁴ CURRAH & MINTER, *supra* note 23.

²⁸⁵ *Id.* at 19 n.20.

*respect community members privacy, their advocacy for any rights is hypocrisy.*²⁸⁶

Her ultimate expectation of web anonymity might not have been entirely reasonable. By 2000, trans historians, including myself²⁸⁷ were digging into Minnesota’s history, where Slyter’s name appears frequently in community publications²⁸⁸ as well as archival materials—and at least one mainstream news item related to the 1975 legislative battle.²⁸⁹

B. Historical Treatment of the 1975 Minneapolis Ordinance

1. Competing Millennial Views

The anger *Transgender Equality* triggered in Slyter clearly was visceral and personal. It is more than a little ironic then, that a quarter-century after the fact, that activism guide appears to have been the *only* relevant historical account of 1975 that did not erase the positive results of what she, Verna Jones, Tim Campbell and the other radicals had set in motion. Currah and Minter took great issue with the anti-trans slant of Clendinen and Nagourney’s narrative casting Allan Spear’s serious, dignified, button-down protégé, Steve Endean, as an innocent victim of wild-eyed, ignorant bullies.²⁹⁰ In *Out for Good*, Endean was the tragic hero, the good gay in the white hat who was driven to thoughts of suicide when the 1975 bill failed; in the end settling instead for compulsive, anonymous sex.²⁹¹ The dogma of the impossibility of trans-inclusion went unchallenged. The actions of the final 1975 session of the Minneapolis City Council went unmentioned.

Little had changed since Lawrence Knopp’s scholarly analysis of Minneapolis activism as it stood in the mid-1980s. He presented a

²⁸⁶ Dyna Sluyter, Posting to TGV_Advocacy@yahoo.com (May 4, 2008) (copy on file with author).

²⁸⁷ Spurred in significant part by hearing of Juli Goins’ case.

²⁸⁸ See Halfhill, *Transsexual Wins Insurance Settlement*, *supra* note 53, at 1; James-Irish and Differding, *supra* note 53, at 1.

²⁸⁹ Campbell, *supra* note 40. That is in addition to still being active in “transsexual and intersexual activism” in the 1990s via publishing a short newsletter which intoned readers to copy and distribute it. TRANSACTION, Jan. 1999.

²⁹⁰ See CURRAH & MINTER, *supra* note 23, at 19 n.20.

²⁹¹ CLENDINEN & NAGOURNEY, *supra* note 24, at 238 (Endean “drowned his sorrow in strange bodies”); Jim Chalgren, *Steve Endean: No Stranger to the System*, ADVOCATE, Sept. 8, 1976, at 13.

rather elaborate timeline of the “political development of Minneapolis’s gay and lesbian communities,” while saying nothing about how trans issues played out in 1975, either at the state capitol in May or in Minneapolis in December. The article’s main text does touch on the state efforts, but only to the extent of casually lumping “transvestism” together with “intergenerational sex” as issues that were too radical for the pragmatists to address.²⁹² For those who might have relied on Knopp as source material, anything trans-positive and trans-possible would remain unknowable.

And Knopp had, in no way, disturbed the status quo of Randy Shilts’ arrogant *Advocate* political gloss on the Twin Cities in the late-1970s. He reduced 1975 to an assertion that “Jack Baker didn’t like the way things were going.”²⁹³ To Shilts, that led directly to the men’s room press conference, and “obliterated any chances of gay rights passage in that session.”²⁹⁴ Even Endean had, by that point, felt compelled to offer a more honest assessment of that year’s legislative failures—in the *Advocate* no less.²⁹⁵

All paled in comparison to *Out for Good*.

Of May 8, 1975, Clendinen and Nagourney wrote of how Arne Carlson, Republican champion of the trans people, “delivered a heartfelt and dignified speech urging his colleagues to support the rights of such creatures as sat in the gallery.”²⁹⁶ Absent, however, from the thick tome (commercially billed for the ages as “the definitive” account of the first two decades following Stonewall)²⁹⁷ was any mention of those “creatures” succeeding seven months later in having their desired language added to Endean’s 1974 Minneapolis ordinance.²⁹⁸ Making them even more historically problematic than

²⁹² Lawrence Knopp, *Social Theory, Social Movements and Public Policy: Recent Accomplishments of the Gay and Lesbian Movements in Minneapolis, Minnesota*, 11 INT’L J. OF URB. & REGIONAL RES. 243, 248, 256 (1987).

²⁹³ Randy M. Shilts, *The Polyester Plot: A Conspiracy of Belief*, *ADVOCATE*, Mar. 8, 1978, at 7-8.

²⁹⁴ *Id.* at 8; see also Randy Shilts, *Twin Cities: Bars, Breeders and the Politics of Civility*, *ADVOCATE*, Apr. 5, 1978, at 15 (touting the strength of the ordinances without noting the Minneapolis difference).

²⁹⁵ Griffin, *supra* note 90, at 5. And that is in addition to Tim Campbell’s own explanation of the bathroom press conference. See *supra* Part II.C.2.

²⁹⁶ CLENDINEN & NAGOURNEY, *supra* note 24, at 237.

²⁹⁷ *Id.* (dustjacket).

²⁹⁸ *Id.* at 237-38.

Knopp or Shilts, Clendinen and Nagourney actually *do* mention successful Minnesota trans-inclusion. However, that mention can only be found by a reader endeavoring to search far beyond the main text; and only if happening upon an aside, buried in a biographical description of transsexual former St. Paul City Council member Susan Kimberly—an aside which *only* mentions the 1993 MHRA statute.²⁹⁹ Such a reader would still be largely at the mercy of primary sources to find any evidence of the December victory that came from the May turmoil.

Readers of this Article, who might feel that in focusing on one particular absence I am being hyper-critical of *Out for Good*, should refer back to the review of the book which appeared in the *New York Times*—the newspaper that long employed both Clendinen and Nagourney as writers. Stephen O. Murray did not mention trans concerns specifically (while characterizing *Out for Good*'s attention to Minnesota as being “richly detailed”), though he criticized the book’s authors for having “largely ignore[d] the many disparate groups of gay and lesbian advocates seeking broad social or political changes to dote on those seeking to be part of one political party.”³⁰⁰ Murray did point to some specific omissions and diminutions.

After detailed accounts of the 1977 repeals of gay rights ordinances in Miami and St. Paul, the authors mention but do not tell the story of the first success in combating such a campaign (in Seattle in 1978).³⁰¹

What Clendinen and Nagourney did regarding the Minneapolis story is even worse. They told only the part of the story that painted Steve Endean as a paragon of reasonableness; omitted the part that did not fit their narrative; and thereafter buried the even-less-convenient epilogue

²⁹⁹ *Id.* at 583.

³⁰⁰ Stephen O. Murray, *Tracing the Rise of the Gay Rights Movement*, N.Y. TIMES, July 5, 1999, at E13.

³⁰¹ *Id.* For an even more pointedly negative assessment of the book, see Michelangelo Signorile, *Whitewashing the Gray Lady: Old Bias Back in the Closet*, N.Y. OBSERVER, June 7, 1999, at 33 (calling it “neither balanced nor objective” and noting its gratuitous use of demeaning physical descriptions of multiple activists as well as its complete omission of “of any reference to the historic animosity between gay activists and the authors’ employer, *The New York Times*, even as the authors document homophobia at other news organizations, from *The Miami Herald* to *The New Orleans Times-Picayune*”).

in their book's appendices.³⁰² "This book is written for mainstream America," Clendinen asserted contemporaneously with *Out for Good*'s release.³⁰³ "It lets people understand what a familiar and very American experience this particular struggle for civil rights is."³⁰⁴ But anyone whose knowledge of LGB(T) law and politics was solely informed by reading *Out for Good* would likely have interpreted the LGB vs. T battles as being totally devoid of any meaningful accomplishments by trans people and their supporters. Despite the reality that this debate represented the new rising political sun of the fast-approaching twenty-first century, readers were more likely led to the perception that trans people and their supporters had accomplished little more than a press conference in a bathroom at the Minnesota state capitol in 1975, much less securing substantive civil rights—incrementally or otherwise, in Minnesota or elsewhere.

2. Knowledge (Non-)Dissemination³⁰⁵

*Reading this book is a terribly discouraging experience. It seeks to provide "a comprehensive guide to the rights of gay people under the Constitution, the various state laws, and recent court decisions." The book is depressing because its achievement of that objective establishes once again that gay people have secured for themselves very few rights indeed. The book is short for precisely the same reason.*³⁰⁶

Neither the *Advocate*, nor an academic article, nor even a skewed, lengthy mass-market tome proved to be the worst thing to happen to the 1975 Minneapolis ordinance. In 1975, the American Civil Liberties

³⁰² CLENDINEN & NAGOURNEY, *supra* note 24, at 237-38, 583.

³⁰³ Larry Dougherty, *Before Pride Came the Fight for Rights*, TAMPA BAY TIMES, July 3, 1999, at 1B.

³⁰⁴ *Id.*

³⁰⁵ I dealt with this topic in a footnote I included in a previous article. Rose, *supra* note 39, at 422 n.139. The expanded treatment I include in this subsection reflects further research I conducted while writing my dissertation.

³⁰⁶ Don Knutson, Review, *E. Carrington Boggan, Marilyn Haft, Charles Lister and John Rupp, The Rights of Gay People: An American Civil Liberties Handbook*, ADVOCATE, Oct. 8, 1975, at 23.

Union published a mass-market handbook on gay rights.³⁰⁷ A relatively inexpensive paperback that was available at mainstream outlets, *The Rights of Gay People: The Basic ACLU Guide to a Gay Person's Rights*, was the subject of the *Advocate* review by attorney and professor Don Knutson excerpted above.³⁰⁸ He pointed out that, while the picture the guide presented was discouraging, it was also useful.³⁰⁹ The guide was eagerly received—Pittsburgh's *Gay News* even devoted a special issue to its release.³¹⁰

What Knutson did not delve into was that, even as to what the book presented, it was not perfect. Some of the included contact information already was out of date by the time the book was available to the public. For example, the phone number listed as belonging to the Atlanta Lesbian Feminist Alliance had moved on to a woman who had “no connection with or interest in that organization.”³¹¹

That was not the only item to have become quickly outdated.³¹² In his review, Knutson favorably references the then-existing gay rights

³⁰⁷ E. CARRINGTON BOGGAN, MARILYN G. HAFT, CHARLES LISTER AND JOHN P. RUPP, *THE RIGHTS OF GAY PEOPLE: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* (1975).

³⁰⁸ Knutson, *supra* note 306, at 23.

³⁰⁹ *Id.*

³¹⁰ Clifford Romwell, *The Rights of Gay People*, PITTSBURGH GAY NEWS, Sept. 6, 1975, at B5-B9. This included excerpts from the guide's coverage of trans issues. *Id.* at B9. However, an accompanying list, compiled by the paper, of gay ‘victories’ was devoid of trans victories—which, at that time, would have been primarily the enactment of the early birth certificate statutes. *A Chronology—Our Rights: Gay Victories Over the Years*, PITTSBURGH GAY NEWS, Sept. 6, 1975, at B5, B7-B8.

³¹¹ Letter from Alan Reitman, Associate Director, Am. Civil Liberties Union to Southern Bell Telephone Company (Mar. 9, 1976) (on file with the American Civil Liberties Union Records [hereinafter ACLU Records], Mudd Manuscript Library, Princeton University, in ACLU Records, Box 235, Folder 7). The woman was incensed at receiving phone calls from “queers,” even more so at notes slipped under her door asking her to meet up at gay bars. Letter from Alan Reitman, Associate Director, Am. Civil Liberties Union to Aryeh Neier, Executive Director, Am. Civil Liberties Union (Feb. 11, 1976) (on file with the ACLU Records, Mudd Manuscript Library, Princeton University, in ACLU Records, Box 235, Folder 7).

³¹² Letter from E. Carrington Boggan, Author, *The Rights of Gay People* to Gene Kaiser, Avon Books (Nov. 11, 1976) (on file with the ACLU Records, Mudd Manuscript Library, Princeton University, in ACLU Records, Box 235, Folder 7).

ordinances.³¹³ Provided as models for activists to use in securing civil rights protections elsewhere, one of the book's appendices contained the entirety of the ordinances from East Lansing, Michigan and Minneapolis.³¹⁴ Steve Endean's 1974 version of the latter was current law as of July 1975.³¹⁵ Through no fault of the authors, within six months, that portion of that appendix was out-of-date.³¹⁶

Notably, the authors had included trans issues within the scope of *the rights of gay people*.³¹⁷ A fourteen-page chapter focused on "The Rights of Transvestites and Transsexuals."³¹⁸ The authors even began with a blunt defense of that inclusion, noting trans issues were appropriate for the book because "the legal and factual issues are closely related."³¹⁹ With that positioning, it seems reasonable to assume that the ordinance-language appendix would have included the text of the nation's first trans-inclusive ordinance—if the authors could have. But, as noted, they could not because, as of the book's publication, the text did not yet exist (at least as enacted law).

I have not been able to ascertain when, or even if, the December trans-inclusion ordinance came to the attention of any of the 1975 handbook's authors, but in September 1976, co-author E. Carrington Boggan felt that there had been "enough significant developments" generally to warrant a revised edition.³²⁰ Knutson's October 1975 review explicitly expressed hope for frequent revisions,³²¹ but a second

³¹³ Knutson, *supra* note 306, at 23.

³¹⁴ BOGGAN ET AL., *supra* note 307, at 251-56. Boston's *Gay Community News* saw this as worthy enough to mention specifically. David Brill, *The ACLU Reads Us Our Rights*, GAY COMMUNITY NEWS, Oct. 25, 1975, at 11.

³¹⁵ MINNEAPOLIS, MINN., CIV. RTS. ORDINANCE § 945.020(s) (1974).

³¹⁶ MINNEAPOLIS CODE ORDINANCE § 139.20 (1975).

³¹⁷ BOGGAN ET AL., *supra* note 307, at 147.

³¹⁸ *Id.* at 147-160.

³¹⁹ BOGGAN ET AL., *supra* note 307, at 147. Brill seemed to minimize it by characterizing it as "definitely a new area." Brill, *supra* note 314, at 11.

³²⁰ Letter from E. Carrington Boggan, Author, The Rights of Gay People to Aryeh Neier, Executive Director, Am. Civil Liberties Director (Sept. 23, 1976) (on file with the ACLU Records, Mudd Manuscript Library, Princeton University, in ACLU Records, Box 235, Folder 7). In the same letter Boggan made a pitch to have the same authors do that revision.

³²¹ Knutson, *supra* note 306, at 23.

edition did not appear until 1983,³²² in which the 1975 authors returned, joined by Tom Stoddard.³²³ Even though trans people's place within the gay rights movement deteriorated throughout the late 1970s and on into the 1980s, one can see no significant overall decrease in the presence of trans issues in the 1983 revised version.³²⁴ By the time of the 1992 edition, however, trans issues were absent.³²⁵

The most troubling absence on trans matters, however, occurred in the seemingly-inclusive 1983 edition: The appendices *still* included the text of the 1974 version of the Minneapolis ordinance, not the trans-inclusive 1975 version.³²⁶ This absence all but ensured anyone referencing the 1983 edition for model language for future laws would not see—and, in turn, would be unlikely to suggest—the trans-inclusive 1975 language.³²⁷ Yes, it certainly would be unreasonable to assume that *all* post-1983 ordinances can be linked back to this particular trans-absence. But it is equally unreasonable to dismiss the possibility that at least *some* of the non-inclusivity in ordinances enacted between 1983 and 1992 (and afterward) had some connection to the absence.³²⁸

³²² E. CARRINGTON BOGGAN, MARILYN G. HAFT, CHARLES LISTER, JOHN P. RUPP & THOMAS B. STODDARD, *THE RIGHTS OF GAY PEOPLE: COMPLETELY REVISED AND UP-TO-DATE* (1983).

³²³ In addition to later heading Lambda Legal, he is widely credited as being the author of New York City's 1986 gay-only rights law. David W. Dunlap, *Thomas Stoddard, 48, Dies; An Advocate of Gay Rights*, N.Y. TIMES, Feb. 14, 1997.

³²⁴ Thirteen pages in the 1983 edition as opposed to fifteen in the 1975 edition. BOGGAN ET AL., *supra* note 307, at 118-30.

³²⁵ NAN D. HUNTER, SHERRYL E. MICHAELSON & THOMAS B. STODDARD, *THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* (1992).

³²⁶ BOGGAN ET AL., *supra* note 322, at 171-75.

³²⁷ *Id.*

³²⁸ It is worth noting that this is not the extent of the informational gap in trans law in both editions. Neither was up to date on the number of states with statutory recognition of change of sex. Both listed Illinois and Louisiana, two of the three earliest such laws, but the 1983 edition only added Arizona's statute, which was enacted a year before Louisiana's. 1955 Ill. Laws 1026; 1968 La. Acts 1397; 1967 Ariz. Sess. Laws 459. Neither makes mention of Hawaii. 1973 Haw. Sess. Laws 50. It is possible that the North Carolina and Utah laws occurred too late to make it into the 1975 edition, but both were in effect by July. 1975 N.C. Sess. Laws 602 (in effect June 11th); 1975 Utah Laws 221 (in effect May 13th). There seems to be no excuse for them—as well as nine others—not to have been included in the 1983 edition. 1976 Iowa Acts 238; 1977 Cal. Stat. 4907; 1978

The 1983 edition seems to imply that some jurisdictions then provided some trans-based anti-discrimination protections.³²⁹ A corresponding footnote lists only citations for the even-by-then familiar string of rulings holding *against* coverage under federal law.³³⁰ This leaves one to wonder *which* jurisdictions were the trans-inclusive ones to which the authors could have been referring, for there is no reference to Minneapolis *or* to the other trans-inclusive ordinance enacted between 1975 and 1983.

And, yes, there was (at least) one.

3. The First Inclusion Without Incrementalism

Los Angeles enacted a trans-inclusive ordinance *non-incrementally* in 1979.³³¹ It passed with little fanfare or public involvement and Mayor Tom Bradley quickly signed it.³³² Councilmember and ordinance author Joel Wachs touted it as “the most comprehensive in the United States. It’s more than just Berkeley’s and San Francisco’s.”³³³ He said he “took every ordinance that existed and took a little from [each]. . . . I think it’s going to make it a little easier for a lot of other cities that might have been reluctant, to go forward now.”³³⁴ The key component he appropriated was the 1975 Minneapolis class definition:

As used in this ordinance, the term “sexual orientation” shall mean an individual having or manifesting an emotional or physical attachment to

Mich. Pub. Acts 865; Guam Pub. L. 15-90 (1980); 1981 Ark. Acts 250; 1981 D.C. Law 4-34; 1981 N.M. Laws 1521; 1981 Or. Laws 236; 1982 Ga. Laws 723.

³²⁹ BOGGAN ET AL., *supra* note 322, at 126.

³³⁰ *Id.* at 126 n.50 (citing *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975), *aff’d*, 570 F.2d 354 (9th Cir. 1978); *Powell v. Read’s Inc.*, 436 F. Supp. 369 (D. Md. 1977); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Kirkpatrick v. Seligman & Latz, Inc.*, 475 F. Supp. 145 (M.D. Fla. 1979), *aff’d*, 636 F.2d 1047 (5th Cir. 1981); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982)).

³³¹ L.A., CAL., ORDINANCE NO. 152 § 458 (in effect July 8, 1979).

³³² *Bradley Signs Gay Rights Law Without Fanfare*, L.A. TIMES, June 2, 1979, at SD_A14.

³³³ *Mayor Presents Ordinance at GRC Dinner*, GAY RTS. GUARDIAN, July 1979, at 1.

³³⁴ *Notable and Quotable*, GAY RTS. GUARDIAN, July 1979, at 2.

*another consenting adult person or persons, or having or manifesting a preference for such attachment, or having or projecting a self-image not associated with one's biological maleness or one's biological femaleness.*³³⁵

Activist Morris Kight worried that the lack of publicity would result in “many of the city’s estimated half million gays” not knowing they had employment and housing protections.³³⁶ He was also bothered by the ordinance being created largely behind the scenes and by its broad definition of “sexual orientation.”³³⁷ Lesbian activist Jeanne Cordova echoed his sentiment: “I don’t recognize my self-image in that definition.”³³⁸

Wachs defended both the ordinance and its underlying strategy, stating, “the opposition was hastily organized and caught off-guard. It was always my intent to have this legislation introduced and passed without the usual public screaming and yelling, and endless debate in the chamber.”³³⁹ From Wachs’s perspective, the operative definition also had to be as broad and as inclusive as possible, with no “outs.”³⁴⁰ He thought that the “sexual orientation” definition³⁴¹ “would seem to cover just about everybody in the city except farmyard animals.”³⁴²

That remark may have been genuinely triumphant or possibly even sarcastic. The context is not clear; there was no elaboration about “everybody.” Consequently, there was no specific mention of the class of people whose members had helped to push that language into the Minneapolis ordinance.³⁴³ Wachs did express the belief that the “greatest benefit” of the ordinance would be as a “deterrent.”³⁴⁴ Those who might be inclined to discriminate, he reasoned, “might think twice

³³⁵ The language is still extant. L.A., CAL., CODE § 49.71(4) (2018).

³³⁶ *L.A. Passes Gay Bill*, LESBIAN TIDE, July-Aug. 1979, at 23.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Harry Baldwin, *Councilman Discusses Ordinance Strategy*, GAY RTS. GUARDIAN, Oct. 1979, at 9.

³⁴⁰ *Id.*

³⁴¹ *Id.* The *Gay Rights Guardian* incorrectly referred to it as coming from the repealed St. Paul ordinance.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 14.

about breaking the law and incurring a fine” if they are aware that discrimination is against the law.³⁴⁵ Knowledge, however, is a sword that can cut both ways. “[T]he ordinance can only be effective if those for whom it was designed to protect are ready and willing to make use of it.”³⁴⁶

Kight feared the ordinance would be doomed to being culturally hidden, yet it was touted in the *Los Angeles Times*.³⁴⁷ And people did utilize the ordinance.³⁴⁸ However, where Kight seems to have been most accurate was in relation to the aspect of the ordinance he disliked: the definition of “sexual orientation.” When the *Times* covered the passage of the ordinance, it did provide readers with the wording Wachs imported from Minneapolis.³⁴⁹ In subsequent years however, activists and scholars have been less generous with disseminating it.

A 1982 *Advocate* feature on gay L.A. minimized the significance of the Los Angeles ordinance by pointing out that it was not passed until two years after San Francisco’s.³⁵⁰ Whether this attitude had anything to do with the ordinance’s trans-inclusivity cannot be ascertained from that item.³⁵¹ But back in 1979, all the *Advocate* could say about the Los Angeles ordinance was that it was strong and “modeled on laws in San Francisco and Berkeley.”³⁵²

Minneapolis was already forgotten.

Robert Self’s study of “The Politics of Sexual Liberalism in Los Angeles” from 1963 to 1979 barely mentions Wachs’s anti-discrimination ordinance.³⁵³ Cast simply as part of a gay shift from

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Sid Bernstein, *City Gay Rights Measure Wins Tentative Approval*, L.A. TIMES, May 24, 1979, at B3; Erwin Baker, *Council OKs Gay Rights Measure*, L.A. TIMES, May 31, 1979, at 1; *Bradley Signs Gay Rights Law Without Fanfare*, *supra* note 332, at SD_A14.

³⁴⁸ *See generally* Rolon v. Kulwitzky, 200 Cal. Rptr. 217 (Cal. Ct. App. 1984).

³⁴⁹ Baldwin, *supra* note 339, at 9; *see also* sources cited *supra* note 347.

³⁵⁰ Scott P. Anderson, *Gay Politics in Los Angeles: Coming of Age*, ADVOCATE, Aug. 19, 1982, at 24, 25; *see also Los Angeles Passes Strong Gay Ordinance*, ADVOCATE, July 12, 1979, at 8.

³⁵¹ Anderson, *supra* note 350, at 24, 25.

³⁵² *Los Angeles Passes Strong Gay Ordinance*, *supra* note 350, at 8.

³⁵³ Robert O. Self, *Sex in the City: The Politics of Sexual Liberalism in Los Angeles, 1963–79*, 20 GENDER & HIST. 288, 306 (2008).

sexual freedom to political power, it merely “occurred in the long shadow of Harvey Milk’s assassination in San Francisco the previous year.”³⁵⁴ In Lilian Faderman and Stuart Timmons’s *Gay L.A.*, the ordinance languishes in footnote text within four pages of the subtitled epilogue “The Twenty First Century,” devoted to a decades-long swath of “Trans Los Angeles” history.³⁵⁵

Minneapolis remained forgotten.

4. The Power of Absence

Should such scholarly omissions and political absenting be of concern even to historians, much less legal practitioners? My position is that they should be. Even some trans-inclusive ordinances of more recent vintage find themselves administered by bureaucrats who have no idea that the ordinances in question actually are trans-inclusive.³⁵⁶ “This is clearly problematic,” Mitchell Dylan Sellers notes, “for any worker attempting to utilize the policies.”³⁵⁷ And recall that, very likely, a lack of awareness on someone’s part that the Minneapolis ordinance had become inclusive in 1975 almost resulted in the erasure of that inclusivity during the 1980 revision fiasco.³⁵⁸

Does the evidence conclusively prove erasive *mens rea* either in the 1980 Minneapolis revision effort or with the various ACLU handbook editions? No. The reason that the 1974 version of the ordinance remained in the 1983 ACLU handbook *may* have been the same as one of the proffered explanations for the 1980 Minneapolis

³⁵⁴ *Id.*

³⁵⁵ LILLIAN FADERMAN & STUART TIMMONS, *GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS* 352-55 n.22 (2006).

³⁵⁶ The initial defense reaction in the *Goins v. West Group* litigation was disbelief that the MHRA was trans-inclusive. Deposition of Lewis Freeman, at 21-22, in Appellant’s Appendix, *Goins v. W. Grp.*, No. CX-00-706 (Minn. Ct. App.).

³⁵⁷ Mitchell Dylan Sellers, *Discrimination and the Transgender Population: Analysis of the Functionality of Local Government Policies That Protect Gender Identity*, 46 ADMIN. & SOC’Y 70, 81 (2012); see also Jenny M. Betz, *Fighting for Gender Identity and Expression: Legislation and Activism in the Boston Transgender Community* (Dec. 18, 2003) (unpublished M.A. thesis, Simmons College).

³⁵⁸ Halfhill, *supra* note 145.

ordinance snafu: The city might have provided outdated information.³⁵⁹ If so, it may have been innocent—or not.

Additionally, it would be wrong to wholly dismiss the possibility that the feelings of at least some who did not feel that trans people *actually* are part of the gay rights movement outweighed the feelings of others connected with the projects who did.³⁶⁰ And both projects involved relatively small numbers of people. The ordinance revisers were unlikely to attract significant attention even within the gay community.³⁶¹ The ACLU handbooks were the internal product of a non-governmental (albeit public advocacy-oriented) entity. The end product in any such undertaking will certainly reflect the priorities *and prejudices*³⁶² of those involved. And while some goals may have enjoyed unanimous support among the decision-makers within the project, others may not have. After all, it seems unlikely that anyone involved with either the ordinance revision or the ACLU handbook authorship would have been against decriminalization of gay sex. Yet, there easily could have been strong disagreement among those involved over pornography, an issue that divided Minneapolis's

³⁵⁹ Of course, the woefully inaccurate passage on transsexual birth certificate statutes in the 1983 edition would seem to weigh against that assumption. Still, it is a possibility.

³⁶⁰ Stoddard claimed that his goal in working for gay rights was to champion diversity instead of conformity. "Non-conforming gay people have a stake in that world as well. I don't want anyone to be left out." David Anger, *Legal Briefing With Lambda's Tom Stoddard*, EQUAL TIME, Nov. 22, 1989, at 5. However, he did ensure that trans people—ultra non-conformists such as Sylvia Rivera as well as the most conformist of stealth transsexuals—were left out of the 1986 New York City ordinance. Boggan was the law partner of William Thom, who had dismissed the *Mayes v. Texas* case and the matter of cross-dressing criminalization as "not a gay issue." *Supreme Court Upholds Drag Ban*, ADVOCATE, Apr. 24, 1974, at 10. He was also affiliated with the GAA, which was an early opponent of trans-inclusion in the city gay rights proposals. Don Collins, *ABA Ducks Gay Rights Issue. . . For Now*, ADVOCATE, Sept. 13, 1972. *See also*, *Thom Seeks Judgeship*, ADVOCATE, Sept. 18, 1984, at 15.

³⁶¹ Multiple groups were aware and expressed opposition to the revision effort. But, interestingly, Tim Campbell's *GLC Voice* does not appear to have covered the controversy. My only awareness of it has come from the short-lived *Gaily Planet*. Don Schnelle, *Planet Still in Limbo*, POMEGRANATE, May 1, 1981, at 1. A lesbian-specific paper did focus on trans issues, but only to support and expound upon Janice Raymond's irrational hatred of trans women. Keziah and Thrace, *Political Aspects of Transsexualism for the Lesbian Community*, LESBIAN INSIDER/INSIGHTER/INCITER, Aug. 1980, at 1, 6.

³⁶² *See, e.g.*, Davis & Short, *supra* note 151.

LGB(T) community in the early 1980s as much or more than the trans-inclusion issue ever did.³⁶³

Reflection upon even a portion of transgender legal history requires reflection upon absence. Such reflection requires honest inquiry into what such absence has wrought, politically if not legally. For while the 1980 Minneapolis revision did *not* ultimately happen, the ACLU handbooks did. A wide range of contemporary legal scholarship³⁶⁴ and other works³⁶⁵ reference one or more of the first two editions. But that is not the extent of the handbooks' influence.³⁶⁶ They provided education on LGB(T) issues when many law schools did not. One gay law professor recalled the status quo at Harvard's law library while he was a student: "The absence of legal materials about my life was deafening." However, one of the few sounds to pierce that silence was "a dog-eared and defaced" copy of the 1975 ACLU handbook.³⁶⁷ In those "proto-computerized days,"³⁶⁸ the Carlson Amendment language would not have been available to those whose access to the text of enacted gay rights ordinances went no further than (or was limited to) the 1983 handbook.³⁶⁹

³⁶³ See generally Tim Campbell, *Anti-Porn Maneuver Turns into Fiasco of the Year*, GLC VOICE, Dec. 19, 1983, at 1; see also *Tragedy Occurs in Pornography Debate*, EQUAL TIME, July 25, 1984, at 7.

³⁶⁴ Rose, *supra* note 100, at 611-12 n.515 (citing a long list of law journal articles from the 1970s and 1980s).

³⁶⁵ See, e.g., *Lesbianism and National Security: A Personal Encounter*, OFF OUR BACKS, July 1981, at 16; *Civil Liberties: Gay Rights*, N. IOWAN, Apr. 11, 1978, at 2.

³⁶⁶ Robert G. Bagnall, Patrick C. Gallagher & Joni L. Goldstein, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 527 n.118 (1984); *Leading Cases*, 100 HARV. L. REV. 100, 220 n.60 (1986); *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1537 n.128 (1989).

³⁶⁷ William B. Rubenstein, *My Harvard Law School*, 39 HARV. C.R.-C.L. L. REV. 317, 318-19 (2004).

³⁶⁸ *Id.* at 318.

³⁶⁹ That same year the ADVOCATE told its readers that Harrisburg, Pennsylvania's enactment of an anti-discrimination ordinance in March of that year resulted in it being "believed" to be "the first jurisdiction in the country" to protect "transvestites and transsexuals." J. DeMarco, *Harrisburg, Pa., Mayor Signs into Law Gay Rights Bill*, ADVOCATE, Apr. 26, 1983, at 8, 9 (title ellipsis omitted). A year earlier, a feature item on the Twin Cities mentioned only St. Paul's repealed ordinance. The in-force, trans-inclusive Minneapolis ordinance was

Of course, even where inclusive language is known, it can lose out to disparagement. Testimony in favor of a gay rights proposal in Alexandria, Virginia in 1984 included advocacy *for* a “short, precise and clear” definition for “sexual orientation,” one that only encompassed heterosexuality, homosexuality and bisexuality.³⁷⁰ That positive advocacy walked arm-in-arm with advocacy *against* one particular “quite ornate” definition of the term—the one which came to Los Angeles from Minneapolis.³⁷¹

Alexandria did enact an ordinance, but not until 1988.³⁷² It eschewed “ornate” inclusivity. Trans people remain strangers to its protections.³⁷³

The Alexandria ordinance came into being while the 1983 ACLU handbook was current—with its major glaring omission and multiple minor errors. And then the 1992 edition, also co-authored by Tom Stoddard, provided its own “deafening” absence, a trans-specific one. It was the edition of currency throughout the decade in which trans people began vocally demanding re-inclusion into their own movement and into laws that those who had grown to control that movement championed but which excluded them—all while continually battling the ‘this is too new of an issue to add to the gay rights agenda’ canard. A 1992 appendix listing all gay rights

absented. Mark Potter, *Gay Entrepreneurs Break the Ice in the Twin Cities*, ADVOCATE, Apr. 1, 1982, at 26.

³⁷⁰ Testimony of Daniel R. Sivil to the City of Alexandria, Va., Human Rights Commission, Public Hearing (Dec. 13, 1984) (on file with the Bentley Historical Library, University of Michigan, in Box 1, Folder 1, Daniel R. Sivil Papers).

³⁷¹ He did not mention Minneapolis, but did cite and quote in full the Minneapolis-derived Los Angeles definition. *Id.*

³⁷² Cornelius F. Foote, Jr., *Alexandria Bars Housing, Job Bias Against Gays*, WASH. POST, Oct. 17, 1988, at A17.

³⁷³ ALEXANDRIA, VA., CODE § 12-4-3(cc) (2018) (“Having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.”). In 1986, the city’s own Human Rights Administrator was fired over multiple acts of sexual harassment including coercing a transsexual woman to perform oral sex on him. John F. Harris, *Alexandria Council Votes to Pay For Employee’s [sic] Defense in Lawsuit; Woman Sued by Fired Official She Accused of Sexual Harassment*, WASH. POST, May 18, 1986, at C2; Mary Jordan, *Sex Harassment Charge Brought by Transsexual; Two Other Women Also Accuse Va. Official*, WASH. POST, Apr. 12, 1986, at B3. The act in question occurred in the administrator’s office. No restrooms were involved.

ordinances and statutes includes Minneapolis and Los Angeles but offers no indication that they are trans-inclusive.³⁷⁴ The appendix containing actual excerpts from ordinances and statutes leaves out Minneapolis entirely. Included, however, are the Wisconsin and Massachusetts state statutes as well as Stoddard's New York City ordinance and the San Diego ordinance—all replete with gay-only definitions of “sexual orientation.”³⁷⁵

Would inclusion of a fully accurate accounting of trans law in the first three editions of the ACLU handbook *by itself* have made Barney Frank or the Human Rights Campaign amenable to a trans-inclusive ENDA before 2007? Unlikely. Would it have changed the outcome of that year's ENDA Crisis?³⁷⁶ Also unlikely.

But an informational gulf rigged the game.

The introduction to the 1992 handbook intoned, “How society will treat lesbians and gay men is a critical social barometer for all those who dissent from social conventions and stereotypes associated with sex and gender.”³⁷⁷ As devoid of any mention of trans people and issues as the professionalized LGB() rights movement was of trans employees and positive trans agenda priorities when I graduated in 1998, that 1992 edition was what I would have found to be current while I was in law school. In retrospect, the 1975, 1983 and 1992 editions acted as a collective barometer—for where trans people stood in a movement in which they had long since earned a place, a place that had never been secure but which by the 1990s had long since been stolen from them. A year after the 1992 edition, Minnesota broke the state-statute gridlock by enacting trans-inclusive anti-discrimination legislation, legislation whose silver anniversary this Article celebrates.³⁷⁸ It is proper, if perhaps futile, to wonder whether the timeline would have been different—and better for trans people—had the fonts of information available to activists, policymakers and the LGB(T) community at large been even slightly more accurate than they were.

³⁷⁴ HUNTER ET AL., *supra* note 325, at 204-06.

³⁷⁵ *Id.* at 176-200.

³⁷⁶ Rose, *supra* note 100, at 541 n.88 (citing Gunner Scott, Boston Area Transgender Community Leaders and the “ENDA Crisis:” An Oral History Project 5 (Aug. 2009) (unpublished B.A. thesis, Goddard College)) (copy on file with author).

³⁷⁷ HUNTER ET AL., *supra* note 325, at xiv.

³⁷⁸ 1993 Minn. Laws 126.

VI. CONCLUSION

A. The Present and Ongoing

Minnesota State Representative Glenn Gruenhagen, a Republican from Glencoe, has a rather low opinion of homosexuality. To him, it is “an unhealthy, sexual addiction” curable by “conversion therapy.”³⁷⁹ His view of trans people is similarly stunted. Gruenhagen telegraphed plans for an anti-trans bill in the fall of 2015 in an e-mail to his colleagues.³⁸⁰

*Instances have come up in Minnesota where individuals have attempted to use bathroom facilities in workplaces that aren't their biological sex, making some employees uncomfortable. I've spoken with female employees who are too afraid to speak out and wonder about their rights in the workplace if they do not want men using women's bathrooms. This has happened to a constituent of mine who works in the metro area. A man in her department has declared himself to be a women [sic] and wants to use the women's bathroom.*³⁸¹

He then lamented that an employee “can ask an employer” to act as West did against Juli Goins, but “likely can't legally force a complete separation based simply on biological sex.” In short, *Goins v. West Group* is not anti-transgender *enough* for his liking; no employer, in his view, should even be allowed to be as trans friendly as Debra Davis's was.³⁸²

³⁷⁹ Susan Du, *Minnesota Anti-Trans Bullies Offer New Bill to Legislate Bathrooms*, CITY PAGES (Mar. 24, 2016), <http://www.citypages.com/news/minnesota-anti-trans-bullies-offer-new-bill-to-legislate-bathrooms-8147020> [<https://perma.cc/5HNN-BKTH>].

³⁸⁰ Naturally, the e-mail did not remain within the confines of the state capitol. Andy Birkey, *Rep. Gruenhagen Promises Anti-Transgender Legislation in 2016*, COLUMN (Oct. 19, 2015), <http://thecolu.mn/21361/rep-gruenhagen-promises-anti-transgender-legislation-in-2016> [<https://perma.cc/EMV4-AJP3>].

³⁸¹ E-mail from Rep. Glenn Gruenhagen, Minn. House of Representatives (Oct. 15, 2015, 10:25 AM), <http://thecolu.mn/wp-content/uploads/2015/10/Gmail-News-from-Representative-Gruenhagen-10-15-2015.pdf> [<https://perma.cc/V4X5-L7AD>].

³⁸² *Id.* (citing *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001)).

Gruenhagen’s H.F. 3396 would have had Minnesota law proclaim, “A person’s sex is either male or female as biologically defined.” But it did not stop there.

No claim of nontraditional identity or “sexual orientation” may override another person’s right of privacy based on biological sex in such facilities as restrooms, locker rooms, dressing rooms, and other similar places, which shall remain reserved for males or females as they are biologically defined.

. . . .

*Other than single-occupancy facilities, no employer shall permit access to restrooms, locker rooms, dressing rooms, and other similar places on any basis other than biological sex.*³⁸³

It is extremely difficult to distinguish H.F. 3396’s right-wing political essentialism from the pseudo-feminist brand of transphobia.³⁸⁴

*[T]he proliferation of legislation designed to protect “gender identity” and “gender expression” undermines legal protections for females vis-à-vis sex segregated spaces, such as female-only clubs, public restrooms, public showers, and other spaces designated as “female only.”*³⁸⁵

³⁸³ H.F. 3396, 89th Leg., Reg. Sess. (Minn. 2016) (emphasis added); see also S.F. 3002, 89th Leg., Reg. Sess. (Minn. 2016).

³⁸⁴ As distinguished from elements of feminism which were trans-inclusive. Cristan Williams, *Radical Inclusion: Recounting the Trans Inclusive History of Radical Feminism*, in 3 TSQ 254, 254-55 (2016).

³⁸⁵ Cathy Brennan and Elizabeth Hungerford, *2011 Letter to the UN on “Gender Identity” Legislation*, SEX MATTERS (Aug. 1, 2011), <https://sexnotgender.com/gender-identity-legislation-and-the-erosion-of-sex-based-legal-protections-for-females/> [<https://perma.cc/MAL3-CG28>]; see also Autumn Sandeen, *Doxxed by Cathy Brennan?*, LGBT WEEKLY (Sept. 3, 2015), https://groups.google.com/forum/#!topic/transgender-news/_c6NvdIcEis [<https://perma.cc/8LSN-LP7V>]; Brennan v. Stevenson, Civ. No. JKB-15-2931, 2015 WL 7454109 (D. Md. Nov. 24, 2015); Elizabeth Hungerford, *An Open Letter to Smith College About Transwomen*, ELIZABETH HUNGERFORD (Dec. 15, 2001), <http://ehungerford.com/?p=65> [<https://perma.cc/4ENM-4GLN>].

In each, a deceptive tautology masks praxis: the erasure of trans people, most pointedly the erasure of trans women. In some instances, the similarity between far-right and (allegedly) far-left is more than coincidental.³⁸⁶

Gruenhagen reiterated his generation's version of anti-trans histrionics when he presented H.F. 3396 to the Civil Law and Data Practices Committee.³⁸⁷ The witnesses in favor ranged from those claiming not to be transphobic—and claiming to understand that the feared acts, even if they occurred, would not be perpetrated by trans women³⁸⁸—to those taking up where Carla Cruzan left off a generation

³⁸⁶ Cristan Williams, *Fake "Radical Feminist" Group Actually Paid Political Front for Anti-LGBT James Dobson Organization*, TRANSADVOCATE (Apr. 10, 2017), https://www.transadvocate.com/fake-radical-feminist-group-actually-paid-political-front-for-anti-lgbt-james-dobson-organization_n_20207.htm [<https://perma.cc/TE4K-WKH8>]; see also Brief of Women's Liberation Front as Amicus Curiae Supporting Petitioner, Gloucester Cty. Sch. Bd. v. G.G., 822 F.2d 709 (4th Cir. 2016) (No. 16-273), 2016 WL 5673283; Brief of Women's Liberation Front and Family Policy Alliance as Amici Curiae Supporting Petitioner, Gloucester Cty. Sch. Bd. v. G.G., 822 F.2d 709 (4th Cir. 2016) (No. 16-273), 2016 WL 192762.

³⁸⁷ MNHouseInfo, *Hearing on H.F. 3396: Minnesota Legislature, House Civil Law and Data Practices Committee*, YOUTUBE (Apr. 12, 2016), <https://www.youtube.com/watch?v=SHTh3H3YkwA> (last visited Dec. 18, 2016) (statement of Rep. Glenn Gruenhagen at 8:07) [hereinafter *Hearing on H.F. 3396*]. Notably, Gruenhagen began his October 15th e-mail with favorable references to the discredited former chief of psychiatry at John Hopkins, Paul McHugh, who has become conservatives' favorite trans-negative source for what can, to the nonobservant eye, appear to be science. See O'Donnabhain v. Comm'r, 134 T.C. 34, 67 n.47 (2010) (the court chastising an attempt to pass off McHugh's work as science). Shortly before the H.F. 3396 hearing, Gruenhagen sent another blanket e-mail to his colleagues in which he bolsters his position with the apparent authoritativeness of an organization called the American College of Pediatricians (ACPeds) and its negative stance on trans rights. E-mail from Rep. Glenn Gruenhagen, Minn. House of Representatives (Feb. 29, 2016, 9:28 PM), http://thecolu.mn/wp-content/uploads/2016/02/Gmail-Fwd_-News-from-Rep.pdf [<https://perma.cc/2QLZ-B7J6>]. What he failed to point out is that it is a far-right fringe group, on par with the National Association for Research and Therapy of Homosexuality (NARTH). Ryan Lenz, *American College of Pediatricians Defames Gays and Lesbians in the Name of Protecting Children*, SPLC INTELLIGENCE REPORT (Mar. 1, 2012), <https://www.splcenter.org/fighting-hate/intelligence-report/2012/american-college-pediatricians-defames-gays-and-lesbians-name-protecting-children> [<https://perma.cc/HL2U-PPDE>].

³⁸⁸ *Hearing on H.F. 3396*, *supra* note 387 (statement of Kate Ives at 15:15).

ago by essentially equating the presence in a restroom or changing facility of someone with a situationally-disfavored genital configuration to sexual assault.³⁸⁹ Ann Taylor, identified as a parent, demanded that swimming facilities not be allowed to have unisex changing rooms even if management makes a business decision in favor of them.³⁹⁰

Not surprisingly, trans people and their supporters were not pleased with the slanted socio-legal image H.F. 3396's proponents painted. Catherine Crow passionately reminded the Committee of the reality of the bill and the hysteria behind it. "This guy wants to call me a rapist so that he can win some seats at the state and national level—and that is not okay."³⁹¹ The Chair, Republican Peggy Scott, chastised those who displayed anger toward Gruenhagen, intoning against "personal attacks."³⁹²

At least against those who themselves attacked trans existence.

Scott showed no inclination to stop Melissa Coleman either from characterizing trans people in general as "gender confused" or from reaching back into history to refer to Juli Goins via male pronouns.³⁹³ Coleman was not the only attorney to speak in favor of the anti-trans proposal, but she seemed to serve as H.F. 3396's chief legitimizer. Her farrago of cherry-picked law and pseudo-history surely left some with the false impression nothing has changed in Title VII jurisprudence since the wrongly-decided transsexual cases of the 1970s and 1980s.³⁹⁴ And her assessment of federal legislative history could have been lifted from all of those pre-*Price Waterhouse v. Hopkins*³⁹⁵ trans decisions. "Congress has declined numerous requests to add gender identity as a protected class," she told the Committee.³⁹⁶ Those pronouncements rested on presumptions and implications that had any

³⁸⁹ *Id.* ("The presence of a member of the opposite sex in a restroom or locker room immediately violates the bodily privacy rights of every other person in that facility.") (statement of James Ballentine at 22:00).

³⁹⁰ *Id.* (statement of Ann Taylor at 36:06).

³⁹¹ *Id.* (statement of Catherine Crow at 56:38).

³⁹² *Id.* (remark of Rep. Peggy Scott at 58:05).

³⁹³ *Id.* (statement of Melissa Coleman at 28:25 and 30:20).

³⁹⁴ *See generally* *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

³⁹⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

³⁹⁶ *Hearing on H.F. 3396, supra* note 387 (statement of Melissa Coleman at 28:25).

of the early federal gay(-only) rights bills become law, the early transsexual Title VII plaintiffs would have prevailed.

None would have.³⁹⁷

The story of trans law is not just of battles to enact prospective positive law. It is—and in reality always has been—also an ongoing battle to protect trans history.³⁹⁸ Sadly, I have been able in this Article to present numerous instances of Minnesota’s trans legal history falling through multiple cracks.

There are still battles to enact positive law; forty years of failure at the federal level is a national disgrace—as are the two remaining gay-only state laws. Wisconsin’s is particularly insulting. Enacted during my final semester of *high school*,³⁹⁹ I am still a stranger to its protections.⁴⁰⁰ When my wife and I enter the state—either from Illinois (where we live), from Iowa (where we attended school, she for her B.A and I for my M.A. and Ph.D.) or from Minnesota (where I lived and worked prior to attending grad school in Iowa)—I become legally unequal to her and every other cis person in the state, a problem that will in no way be rectified even if the Supreme Court firmly and unanimously holds that federal sex discrimination law does cover trans people. For Wisconsin state employment law governs employers of even one employee⁴⁰¹—fourteen less than federal law.⁴⁰² In Illinois, Iowa and Minnesota, I am (*Goins* notwithstanding) legally equal to the tenured cis lesbian, gay and bisexual faculty members who might be called upon to evaluate whether my credentials render me worthy of joining their ranks.

In Wisconsin (and New York) I am not.

Now, there are the battles to prevent enactment of explicitly trans-negative law. Minnesota survived Gruenhagen’s 2016 attempt; a similar bill went nowhere in 2017.⁴⁰³ Consequently, in 2018 Minnesota—along with trans people everywhere—will mark the

³⁹⁷ Rose, *supra* note 100, at 530-33.

³⁹⁸ *Id.* at 619-21 (noting a curious instance in which MSNBC’s Rachel Maddow omitted the trans-inclusivity of the 1993 MHRA law in a feature on Allan Spear).

³⁹⁹ 1981 Wis. Sess. Laws 901.

⁴⁰⁰ WIS. STAT. § 111.32(13m) (2018).

⁴⁰¹ WIS. STAT. § 111.32(6)(a) (2018).

⁴⁰² 42 U.S.C. § 2000e(b) (2012).

⁴⁰³ H.F. 2553, 90th Leg., Reg. Sess. (Minn. 2017).

passage of twenty five years since the enactment of the first statewide gay rights law that actually is an LGBT rights law *with that law unscathed*.⁴⁰⁴ Most of the other states with trans-inclusive civil rights laws also *appear* to be safe from H.B.2-esque hysteria.⁴⁰⁵ However, deceptively entitled ‘economic uniformity’ proposals stand ready to wipe out local trans (and LGB) protections.⁴⁰⁶

B. A History Worthy of Defense

In 2007, the United ENDA coalition of hundreds of pro-inclusion organizations was branded a failure for not being able to stop the D.C. incrementalists of that time from torching a trans-inclusive federal gay rights bill and replacing it with one that could have been authored by Steve Endean himself. Yet, as Isaac West points out, United ENDA moved the needle toward inclusion.⁴⁰⁷ Exactly what the pushback against the highest-profile anti-trans bills has moved the trans community *toward* is not yet clear. North Carolinians did take down the Republican governor who pushed H.B.2, but eventually the true yield was a bait-and-switch betrayal by his Democratic successor which left the Charlotte civil rights ordinance as dead as it was under the H.B.2 regime.⁴⁰⁸ Texas seems years away from legitimate

⁴⁰⁴ Or at least no more so than it was by the *Goins* decision.

⁴⁰⁵ The 2016 Massachusetts law adding trans public accommodations protections (completing the work begun in 2011 with employment and housing) had to face a referendum in 2018. 2016 Mass. Acts ch. 134. However, the repeal effort failed. This drove some opponents of trans rights to such despondence that they publicly admitted having “concocted the ‘bathroom safety’ male predator argument.” *Massachusetts Voters Overwhelmingly Say “Yes” to Transgender “Bathroom” Law. What Happened?*, MASSRESISTANCE (Nov. 9, 2018), <https://www.massresistance.org/docs/gen3/18d/NoTo3/election-analysis.html> [<http://perma.cc/8SGB-49TV>].

⁴⁰⁶ “The legislature finds that the provision of employment discrimination regulations that are uniform throughout the state is a matter of statewide concern....” A.B. 748 § 9, 2017-2018 Sess., Reg. Sess. (Wis. 2017); *see also* John M. A. DiPippa, *Bias in Disguise: The Constitutional Problems of Arkansas’s Intrastate Commerce Improvement Act*, 37 U. ARK. LITTLE ROCK L. REV. 469 (2015); 2015 Ark. Acts 570 (state preemption of local civil rights ordinances); H. 600, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (state preemption plus birth certificate “sex” linkage).

⁴⁰⁷ Isaac West, *TRANSFORMING CITIZENSHIPS: TRANSGENDER ARTICULATIONS OF THE LAW* 157-58 (2014).

⁴⁰⁸ H.B. 142, 2017 Sess., Reg. Sess. (N.C. 2017); Jim Morrill & Deon Roberts, *Gay Rights Group Turns Down Bank of America’s Money Over HB2 Compromise*,

statewide positive protections,⁴⁰⁹ but the lack of an H.B.2 to overcome—when enactment of one seemed like it would be a done deal—may be a victory that one day pays great dividends.

And Minnesota?

Minnesota’s two-decade-long road to the enactment of the nation’s first trans-inclusive state gay rights statute is a historical microcosm of the good and the bad, and at times even the ugly. It demonstrates how trans people must demand inclusion in order to have any hope of ever achieving it, even if making such demands also ruffles feathers (or worse). And, placed in the context of all that has transpired since, it strongly suggests that taking no for an answer and instead accepting the front end of promised incrementalism has not been a viable strategy—and never will be.

It is, of course, ironic that the reality of 1974-75 *can* allow a proponent of so-called ‘incremental progress’ to assert that the strategy actually does work. And Allan Spear did precisely that in early 1976, reiterating his belief that in 1975 “a gay rights bill which specifically included transsexuals and transvestites had absolutely no chance to pass” in the Minnesota Legislature.⁴¹⁰ But, writing to David Madson of Minneapolis, he championed the “Minneapolis experience.” That, Spear insisted, illustrated the “basic soundness” of his position. “Minneapolis passed a basic gay rights ordinance in 1974 and a year and a half later extended protection to transsexuals and transvestites with relatively little controversy.”⁴¹¹ For him, that amounted to Q.E.D. “[I]n this very controversial area change can best be achieved one step at a time. It is unfortunate, I think, that a few people have insisted on taking an all or nothing approach that has seriously damaged the entire cause.”⁴¹²

CHARLOTTE OBSERVER (May 5, 2017), <https://www.charlotteobserver.com/news/politics-government/article148901179.html> [<https://perma.cc/26SW-5EUA>]; Chris Johnson, *NCAA Caves, Returns Games to N.C.*, WASH. BLADE, Apr. 7, 2017, at 1.

⁴⁰⁹ The Rick Perry-signed hate crime statute is still gay-only. TEX. CRIM. PROC. CODE ANN. § 42.014(c) (West 2017).

⁴¹⁰ Letter from Allan Spear, State Senator, Minn. to David Madson (Feb. 26, 1976) (on file with the MHS, in Spear Legislative Records, SF 595 folder).

⁴¹¹ *Id.*

⁴¹² *Id.*

History does show that Spear eventually came through for trans people, but it also allows opponents of incrementalism to make the better case. And yet it is unfortunate that so many chroniclers, scribes and advocates have, over the four decades after December 30, 1975, seemingly gone out of their way to ensure that proponents of trans-inclusion (particularly those who have advocated the non-incremental approach) have so little of an accessible, accurate historical record with which to counter the louder, often-more-well-funded claims that inclusion—and certainly non-incremental inclusion—is, somehow, always too new and too much. At a time when trans people were all but totally excluded from gainful employment opportunities within LGB(T) advocacy, the authors of *Out for Good* were paid for their efforts;⁴¹³ and their finished product received glowing reviews in mainstream (and LGB(T)) media across the nation.⁴¹⁴

⁴¹³ While complaining of the financial hardships that working under the contract ultimately entailed, Clendinen nevertheless noted that “Everybody wanted the book, seven houses bid on it.” Bob Roehr, *A Few Words with Dudley Clendinen*, *Co-author of Out for Good*, LAMBDA BOOK REP., July-Aug. 1999, at 30.

⁴¹⁴ Dan Blue, *Big Bang Theory: A History of the Gay Rights Movement*, BAY AREA REP., June 10, 1999, at 47 (praising the authors’ inclusivity of cis women, accepting the “definitive history of the movement” self-gloss as being accurate “[b]y most journalistic standards,” and fully ignoring trans people/issues); Shane Harrison, ‘Out for Good’ *Aibly Traces Gay Rights Drive*, ATLANTA J.-CONST., June 13, 1999, at 13L (while saying nothing about trans people/issues, proclaiming, “What Clendinen and Nagourney have created is an invaluable document, impressively researched, remarkably well-written and groundbreaking in its scope,” and accepting the authors’ claim of comprehensiveness as “a valid boast”); Greg Morago, *Stonewall: A Defining Moment for Gay Rights*, HARTFORD COURANT, June 27, 1999, at A1 (not a book review, but uncritically accepting the recently-published book as “an account of the . . . gay rights movement in America”); Tom Uskali, *A Rainbow of Activism*, PRESS-REG. (Mobile, Ala.), Aug. 15, 1999, at 5 (omitting mention of trans people/issues, while seeing the book’s “limited chronology” as “frustrating, but a minor fault in an otherwise illuminating work”); Jim Marks, *The Road From Stonewall*, WASH. POST, June 13, 1999, at M5 (criticizing the book’s overall structure—though not specifically saying anything about its treatment of trans concerns—while praising the placement of Steve Endean as a central character in the narrative); Jody A. Benjamin, *Stonewall’s Legacy—Out for Good is Rich with Historical Perspective but Misses the Deep Cultural Changes Brought by the Lesbian and Gay Rights Movement*, SUN-SENTINEL (Fort Lauderdale, Fla.), June 20, 1999, at 8D (offering criticism suggested by the review’s title, but nothing trans-targeted); Martin Duberman, *Uncloseted History*, NATION, June 14, 1999, at 51, 52 (sharply criticizing many of the book’s omissions but coming

Not only is the success of Minneapolis's twenty-month incrementalism of 1974-75 the exception rather than the rule, but it also only came to fruition precisely because of the refusal to accept the transmission of city-level incrementalism to the state capitol as the only legitimate strategy. Without the radicals of the spring, there would have been no legislative dots to connect to the Minneapolis Civil Rights Ordinance in December.⁴¹⁵

The years that followed the back end of incrementalism in Minneapolis illustrate how fragile trans civil rights are, the history of their existence even more so.⁴¹⁶ If carelessness was the culprit in the near-disappearance of the law itself, then it was a lack of awareness—by some person or entity—of Minneapolis's trans-inclusive language that may have played a role. A lack of awareness also may have played a role in the near total lack of replication of the law.

And it all seems to have happened in a civil rights Twilight Zone.

During the quarter-century after the Carlson Amendment language became the law of Minneapolis, a plethora of legal and historical sources focusing on LGB(T) rights and Minnesota presented practitioners in multiple disciplines with an image devoid of any reference to positive, trans-inclusive civil rights law existing *anywhere* prior to 1993. Yes, the actual reasons for this absence can only be speculated upon. But I assert that the extent of the absence is in its own way as substantive as the lack of trans protections was (and is) in so many of the jurisdictions that enacted gay(-only) rights laws after 1975. Likewise, it is as substantive as the intellectual addiction to the concept of incrementalism that did calcify within gay politico-legal

no closer to trans issues than noting the minimal attention paid to “the fierce disagreement among lesbians in the seventies over whether butch/femme roles were an unfortunate imitation of heterosexual role-playing or a brave affront to gender stereotyping”); Bob Summer, *Just the Facts*, LAMBDA BOOK REP., July-Aug. 1999, at 29, 30 (critical of the book's attempted scope but, as for Steve Endean, only offering praise).

⁴¹⁵ And there would have been no “ornate” language available for Los Angeles to utilize in 1979.

⁴¹⁶ Similar to the local publications that omitted the unique trans-inclusive nature of the 1993 law, the *ADVOCATE* seemed uneager to inform its national readership that trans-inclusion at the state level had become a viable option. *See Midwest News in Brief*, *ADVOCATE*, Apr. 6, 1993, at 25; *Midwest News in Brief*, *ADVOCATE*, Apr. 20, 1993, at 25; Chris Bull, *Out of the Cold: Minnesota's New Gay Rights Law May Ease Battles Elsewhere*, *ADVOCATE*, May 4, 1993, at 29 (none noting 1993's inclusivity); *see also* Rose, *supra* note 100, at 619-21.

culture after 1975 but which may only have done so because essential texts did not offer up real, existing trans inclusion as any sort of possibility for serious consideration. It also is reasonable to assert that the absencing and denigrating have also played a role in the degree to which trans rights are susceptible to H.B.2 style legislation and to which trans people (particularly trans women) are targeted by deceptive ‘privacy’ arguments put forth concurrently by women claiming to be radical feminists and by right-wing conservative men (and, sadly, women) who oppose women’s equality on all other fronts.

At the same time, it makes the triumphs over such laws and proposals all the more amazing.

During the 2007 ENDA Crisis, leading trans historian Susan Stryker forcefully advocated for the use of the reality of history as a weapon—defensive and offensive—against the ‘trans people only showed up five minutes ago’ canard.⁴¹⁷ Predictably, the battle against H.B.2 brought out new gay voices claiming to be supportive of trans people in theory while opposing inclusion in practice—and twisting history in knots while doing so.⁴¹⁸ In the year of the silver anniversary of Minnesota’s pioneering 1993 trans-inclusive statute—during a time not merely of ongoing bathroom wars but of the federal government doing the bidding of religionist conservatives in a multi-tentacled effort to eviscerate LGBT civil rights law⁴¹⁹ (thus far only with partial

⁴¹⁷ Susan Stryker, *It’s Your History—Use It! Talking Points for Tran-Inclusive ENDA Activists*, LEFT IN SF BLOG (Oct. 2, 2007, 11:33 AM), <https://web.archive.org/web/20071003050056/http://leftinsf.com/blog/index.php/archives/2236> [<http://perma.cc/9F8V-95PA>].

⁴¹⁸ See Shannon Gilreath, *The Politics of the Single-Minded: Lessons from North Carolina’s ‘Bathroom Bill,’* HUFFINGTON POST (Mar. 28, 2016), http://www.huffingtonpost.com/shannon-gilreath/the-politics-of-the-singl_b_9558682.html [<https://perma.cc/7D4Q-5CLR>]. I feel obligated to note that a commenter to a notorious anti-trans blog utilized “FTM” and female pronouns to refer to Gilreath after quoting from that *Huffington Post* item. Comment by keshher to GallusMag, *North Carolina Pushes Back Against Transgender Mandate to Eliminate Sex-Based Protections for Women and Girls*, GENDERTRENDER (Mar. 29, 2016, 10:46 PM) (copy on file with author).

⁴¹⁹ See generally Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4004530; Ariana Eunjung Cha & Juliet Eilperin, *New HHS Civil Rights Division Charged with Protecting Health-Care Workers with Moral Objections*, WASH. POST (Jan. 18, 2018), (<https://www.washingtonpost.com/news/to-your-health/wp/2018/01/18/new-hhs-civil-rights-division-charged-with-protecting-health-workers-with-moral->

success,⁴²⁰ though the retirement of Justice Anthony Kennedy and his having been replaced by Brett Kavanaugh—whose less-than-truthful statements about the legality of his teenage drinking and the degree to which he had elite, familial connections to Yale render his assertions that as Justice Kavanaugh he will evaluate cases with an open mind to be not credible⁴²¹—make for an ominous immediate future⁴²²)—its history deserves to be remembered and remembered accurately.⁴²³

objections/?utm_term=.ef26f91c2622) [<https://perma.cc/HX39-NCXL>]; Chris Johnson, *Supreme Court Won't Hear Challenge to Mississippi Anti-LGBT Law*, WASH. BLADE (Jan. 8, 2018), <https://www.washingtonblade.com/2018/01/08/supreme-court-wont-hear-challenge-mississippi-anti-lgbt-law/> [<https://perma.cc/N584-M6MQ>].

⁴²⁰ *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

⁴²¹ Jason Lemon, *Kavanaugh Said He Had 'No Connections' to Yale. He Was, in Fact, a Legacy Student*, NEWSWEEK (Sept. 30, 2018), <https://www.newsweek.com/kavanaugh-said-he-had-no-connections-yale-he-was-legacy-student-1145286> [<http://perma.cc/QC6F-LTMP>].

⁴²² See generally Chris Johnson, *Marriage Rights in Jeopardy?*, WASH. BLADE, July 6, 2018, at 1.

⁴²³ As a closing note, though, I do wish to acknowledge that this is not the most complete history of the statute imaginable. The gubernatorial task force records and the audio recordings of the relevant 1993 legislative proceedings would be, in and of themselves, worthy of an article the length of this one.