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Mark(et)ing Nondiscrimination

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Mark(et)ing Nondiscrimination:

Privatizing ENDA with a Certification Mark

Ian Ayres* & Jennifer Gerarda Brown**

Abstract: A little-known piece of intellectual property, the certification mark, provides a viable mechanism for employers to commit to the exact substantive duties of the proposed "Employment Non-discrimination Act," which if passed would prohibit disparate treatment on the basis of sexual orientation. By signing the licensing agreement, an employer gains the right (but not the obligation) to use the mark and in return promises to abide by the word-for-word strictures of ENDA. Other certification marks (such as the Good Housekeeping Seal, the UL (Underwriters Laboratory), and the Orthodox Union (Kosher) marks) require the owner of the mark police licensees, but our proposed "Fair Employment" mark allows employees and applicants to enforce the ENDA duties directly as express third-party beneficiaries of the license. The "Fair Employment" mark thus replicates the core enforcement mechanism of ENDA by creating private causes of action in the same class of individuals.

The mark provides a mechanism for producing precedent about a statute *before* the statute is ever enacted. The cases enforcing the mark's requirements would provide legislators with information about how the statute might be interpreted, as well as a lower bound on the litigation rates it might engender. The mark represents a new form of federalism. Instead of jurisdictional federalism, the mark facilitates corporate federalism -- whereby individual corporations can experiment with taking on the duties of a proposed bill.

Employers might sign the license (and thereby take on the risk of discrimination liability) to: 1) induce more sales – including state and local EEO officers who are charged to contract only with non-discriminating employers; 2) recruit employees – including gay-friendly as well as gay applicants, and 3) appease input suppliers – including accreditation organizations and unions that already press for non-binding nondiscrimination provisions. Some employers might sign the license because their employees already have private rights of actions under state law or local ordinances. This article includes original empiricism suggesting that the litigation cost to employers in states that have prohibited sexual orientation discrimination has been quite modest. Still others may sign simply because it is the right thing to do. Many, many employers have already included sexual orientation in their non-binding nondiscrimination policies. For such employers, signing the license may mean only that the employer will never defend a claim by denying that it promised not to discriminate.

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Introduction

People in the United States strongly support the simple idea that employers should not discriminate against gays and lesbians. In a 2003 Gallup poll, a whopping 88 percent of respondents said that "homosexuals should . . . have equal rights in terms of job opportunities."[1] Even prominent conservatives -- such as George W. Bush -- at least give lip service to the idea that employment discrimination on the basis of sexual orientation is wrong.[2] Indeed, public support for non-discrimination in employment is much stronger than support for non-discrimination in marriage.[3] Especially in a climate where many states have or will soon constitutionally bar same-sex marriage, this seems an especially opportune time to pursue employment rights as a natural next step toward full equality for gay, lesbian, and bisexual Americans.

But gay rights advocates have made only modest progress on this issue. Fifteen "blue" states have prohibited employment discrimination against gays and lesbians. A seemingly modest bill, the "Employment Non-Discrimination Act" (ENDA), which only prohibits disparate treatment on the basis of sexual orientation, has been introduced several times in Congress, always without success.[4]

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[1] Gallup Poll, Question Id: USGALLUP .0331 Q19, see also 2004 L.A. Times Poll, Question Id: USLAT .041104 R52 (70 percent favor…laws to protect gays against job discrimination).

[2] When asked whether he thought that gays and lesbians should have the same rights as other Americans, Bush said, "Yes. I don't think they ought to have special rights, but I think they ought to have the same rights." He subsequently denied knowing "the particulars" of ENDA, and so avoided saying whether or not he would support it, but did claim to be "the kind of person -- I don't hire or fire somebody based upon their sexual orientation . . . I support equal rights but not special rights for people." When asked to define "special rights," Bush said, "Well, it'd be if they're given special protective status." Newshour with Jim Leher Transcript, 2nd Presidentail Debate, October 11, 2000, available at http://www.pbs.org/newshour/bb/election/2000debates/2ndebate3.html, last visited April 15, 2005.

[3] A national Harris poll conducted in April of 2004 found that only 27% of Americans thought that same-sex couples should be given the right to marry. *Strong Opposition to Same-Sex Marriage, But Those Who Approve Have Increased Substantially,* The Harris Poll #25, April 14, 2004, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=454, last visited April 15, 2005. A 2003 Gallup poll showed much higher levels of support employment nondiscrimination on the basis of sexual orientation. Eighty-eight percent of respondents said that "homosexuals should … have equal rights in terms of job opportunities." Gallup Poll, Question Id: USGALLUP .0331 Q19.

[4] The U.S. Equal Employment Opportunity Commission, Executive Order 13087, Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government, May 28, 1998, available at

ENDA has little chance of passing during the Bush administration unless mid-term elections in 2006 change the face of Congress radically. Civil rights advocates may even abandon ENDA and instead promote a broader, omnibus civil rights improvement act – in which employment rights for gays would presumably play a part.

This article attempts to extend ENDA rights to individual employees by another means. A little-known piece of intellectual property, the certification mark provides a viable mechanism for employers to commit to the exact substantive duties of ENDA. We have created a symbol we call the "Fair Employment" mark. It is an innocuous symbol, an "FE" inside a circle:

We have formally applied with the United States Patent and Trademark Office to register this symbol as a certification mark which we would own.[5]

The idea is simple, really. By signing the licensing agreement with us, an employer gains the right (but not the obligation) to use the mark and in return promises to abide by the word-for-word strictures of ENDA. Displaying the mark signals to knowing consumers and employees that the company manufacturing the product or providing the service has committed itself not to discriminate on the basis of sexual orientation.

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http://www.eeoc.gov/federal/eo11478/eo13087.html. The Executive Order prohibited discrimination on the basis of sexual orientation in employment within the Federal civilian workforce. George W. Bush left this executive order intact when he assumed office. Despite some uncertainty created by the Bush Administration Office of Special Counsel, the policy of nondiscrimination appears to remain in force. Civilrights.org, *Under Pressure, Bush Appointee Restores GLBT Anti-Discrimination Information,* April 23, 2004, available at http://www.civilrights.org/issues/glbt/details.cfm?id=22558, last visited April 15, 2005.

[5] Office of Patents & Trademarks, Certification Mark Application Receipt (Feb. 17, 2005) (copy on file with author).

Other certification marks (such as the Good Housekeeping Seal, the Underwriters Laboratory, and the Orthodox Union marks) require the mark holder to police the certification to insure compliance with the requirements of the licensing agreement. But the licensing agreement for the Fair Employment mark allows employees and applicants to enforce the ENDA duties directly as express third-party beneficiaries of the agreement.[6] The Fair Employment mark thus replicates the core enforcement mechanism of ENDA by creating private causes of action in the same class of individuals who would gain protection under the statute.

The mark represents an incremental strategy in the struggle for equality. Most importantly, the mark holds out the possibility of extending substantive ENDA rights – especially rights to sue for discrimination – to potentially hundreds of thousands of workers and applicants who are currently uncovered.

But the mark also provides a "demonstration" effect. It provides Congress with information that might quell concerns about whether they should support ENDA. The mark provides a mechanism for producing quasi-binding precedent about a statute before the statute is ever enacted. The mark thus provides legislators with information about the ways a statute might be interpreted by courts, as well as the rates of litigation the statute might engender.

Of course, these benefits of the mark will only accrue if employers actually sign the license agreement. Ay, there's the rub. "No employer in her right mind would volunteer to be a defendant in a law suit," our gentle readers might reasonably protest. We appreciate this concern, and ultimately devote a fair amount of space in this article to persuade our readers that employers could rationally volunteer for potential liability.

[6] A draft of the licensing agreement is attached as an appendix.

Of the reasons employers might make themselves vulnerable, the most important is that "practicing" the mark might induce more sales. The mark provides another way supporters of gay rights can vote with their wallets, rewarding progressive policies and institutions. Just as consumers can travel and spend tourism dollars to support progressive state and local governments, so, too, they can reward companies that treat gay employees fairly, by purchasing their products and services.

The mark might also help recruit employees and appease other input suppliers. Some employers might see little downside to signing the license agreement because their employees already have private rights of actions under state law or local ordinance. Still others may sign just because it is the right thing to do. Many, many employers have already included sexual orientation in nondiscrimination policies contained in employee handbooks. Some of these employers use their nondiscrimination policies to recruit employees and appease customers, but if sued they argue that an employee handbook does not constitute a *promise* not to discriminate. Signing the license means only that employers forego this possible defense.

The article is divided into four parts. Part I describes the law of certification marks and the potential benefits of the fair employment mark as a new type of federalism. Part II digs into the details of the licensing agreement and defends the drafting choices that we made in tailoring the duties of licensees. In part III, we identify employers who we predict would sign the mark – even in the face of potential boycotts and legal liability. Finally, Part IV takes on concerns about whether adoptions of the mark will actually further the larger goal of equality.

I. Marking Non-Discrimination

Certification marks are used to signal that a product or service bearing the mark has met a specific standard set forth by the mark's owner, the certifying entity. Groups or individuals can register certification marks with the federal government much as we do trademarks. But certification marks are a distinct type of intellectual property, because they are the only piece of IP that the owner cannot "practice" herself.[7]

If you own a trademark, you must be involved in producing the item or providing the service that bears the mark.[8] But a certification mark owner must remain independent and may not produce any of the goods or services to which the mark applies.[9] Owners of certification marks cannot use the mark on any product that they manufacture. Only licensees are allowed to use the mark. The owner's job is to certify that the licensees conform to requirements of the license so that the public can trust the quality of the product. The owner of the mark is prohibited by law from practicing her own mark, because self-certification is inherently self-interested.

Certification marks are not common. Owners of certification marks are held to high standards of conduct: decisions about whether or not to certify a product or service must be based exclusively upon the criteria the owner has set for the mark. In other words, certification cannot be based on a user's willingness to pay a fee to the owner of the mark (other than a minimal fee covering administrative costs). In effect, the certifying entity must operate as a non-profit. It takes a special sort of organization or individual to institute a certification mark -- one committed to the values reflected in the mark.

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[7] 15 USC § 1054

[8] 15 USC § 1064. Licensing a trademark while giving up control of the product would constitute abandonment of the mark under federal trademark law.

[9] See 15 USC §§1054, 1064.

Seen in this light, the Fair Employment mark is an idea that is both simple and traditional—but applied in a new context. Commerce in the U.S. has nurtured a venerable tradition of labeling products to improve work conditions for groups of oppressed people. Trade union labels first came into circulation as a way of promoting shorter work days. In 1869, the Carpenter's Eight-Hour League of San Francisco created a stamp that permitted lumber mills to signal that they ran on an eight-hour schedule rather than a ten-hour schedule.[10] This was typical of most union labels that followed, as they were generally used to promote better working standards and to guard against the use of tenement-house, sweatshop, and prison labor.[11] By the turn of the century, union labels were used by printers, bakers, wood workers, harness makers, iron molders, broom makers, coopers, photographers, shoemakers, custom tailors, mattress makers, blacksmiths, brewers, egg inspectors, barbers, and coal distributors.[12]

Although some early labeling schemes attempted to promote the quality or healthfulness of the product, the union label stood primarily for "better pay and improved work conditions."[13] For example, even before congress enacted legislation outlawing child labor, private organizations devised and administered labeling programs to promote products manufactured without the use of child labor.[14] Now U.S. consumers are faced with a growing number of products manufactured in countries where employment laws are lax or non-existent.[15] Some want to buy products that protect the environment or animal rights. Today, many products in the United States bear marks relating to

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[10] Ernest R. Spedden, Johns Hopkins University Studies in History and Political Science Series 28, no. 2, The Trade-Union Label, (John Hopkins Press 1910), microformed on Primary Source Media, 1998, Fiches 34,876-34,877.

[11] U.S. Dept. of Labor Bureau of Int'l Labor Affairs (ILAB), By the Sweat and Toil of Children, Vol. 4: Consumer Labels and Child Labor (1997), available at http://www.dol.gov/ILAB/media/reports/iclp/sweat4/toc.htm (visited April 15, 2005).

[12] Id.

[13] Id.

[14] Id.

issues of moral import to consumers: environmental impact, animal testing, fair trade, sweatshops, and child labor. The Fair Employment Mark would similarly permit consumers who care about gay rights to spend their money in ways more consistent with their values.

A. Minimalist Certification

Although certification marks enjoy a long tradition, two aspects of the Fair Employment mark are quite non-traditional. First, we have structured the licensing agreement to minimize what we as mark owners must certify. While traditional certification mark owners go out into the world and monitor licensees to make sure they are complying with the requirements of the mark, we have structured the license agreement so that we can certify without inspecting the licensee's employment practices. Indeed, under the licensing agreement, we certify almost nothing. We do not certify that the employer does not discriminate. Instead, we certify two crucial things:

1) the employer has *promised not to discriminate* in employment on the basis of sexual orientation; and
2) the employer has granted all of its employees and applicants *express third-party beneficiary status* to remedy any breaches of the non-discrimination promise.

Because the licensing agreement expressly includes both of these elements, we can truthfully certify these matters merely by certifying that the licensee has signed the license. The beauty of this structure is that any employer who gains a right to use the mark by signing the licensing agreement by the same act meets the minimum requisites for certification.

This minimalist certification structure has three advantages. First, it allows a mark owner to provide meaningful certification with virtually no expense. Even though we do not certify that the

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[15] Id.

employer does not discriminate, we are able to certify that the employer holds itself open to private suits for discrimination. To deny that this is meaningful would be to deny the value of private rights of action under Title VII and other civil rights laws. Second, this structure is transparent. It makes clear to employers that we as mark owners are not profiting from the mark. Because of this structure, employers can obtain a license to use mark without paying us a licensing fee. Third, this licensing structure allows us to emulate more closely the ENDA private cause of action. Employers need not worry that the mark owners will engage in vexatious litigation, because we do not have a right to sue for violations of the non-discrimination promise.

B. Third-Party Altruism

The second and related innovation in the structure of the licenses concerns the use of third-party beneficiary rights. In return for the right to use the mark, an employer expressly grants third-party beneficiary status to the same parties who could sue to enforce ENDA. Paragraph 5 of the License reads:

> **THIRD-PARTY BENEFICIARIES.** Licensee and Licensor agree to designate as express third-party beneficiaries of this agreement all persons and entities that would be entitled to sue if ENDA were in effect (including governmental civil rights enforcement agencies). In particular, Licensee and Licensor designate as express third-party beneficiaries all persons who are or have been employed by the Licensee or applied for employment with the Licensee during the term of the license. The Licensee and Licensor intend that these third-party beneficiaries will have the right to sue the Licensee for any breach of this agreement and have a legal right to the same remedies (including damages and injunctive relief) to which they would be entitled if ENDA were in effect.[16]

The license altruistically grants potential private rights of action to third parties. While contract promises (including intellectual property licensing agreements) traditionally require a return element of consideration in order to be enforceable, it is well settled that express third-party beneficiaries can

[16] See Appendix, Part A.

acquire enforceable contractual rights without providing consideration themselves.[17] So long as the consideration is provided by another party to the contract – in this case, by the mark owner in granting the licensee the right to use the mark – the beneficiaries' right to non-discrimination is enforceable.[18]

The licensing agreement thus represents an example of using third-party beneficiary status to link a private contract to a public or social good. While this strategy is rarely deployed, there is no legal impediment to using consumer contracts or other agreements to combine private and public goals. For example, newspaper sources in exchange for providing information could require that newspapers agree to compensate any person they injure through negligent misrepresentation.[19] Similarly, the Fair Employment licensing agreement grants the right to use the mark, but only if the licensee agrees to create rights of action in third parties: the licensee's applicants and employees.

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[17] Williston on Contracts, *Beneficiary Not Required to Furnish Consideration,* §37:26 ("The rule regarding such situations has long been established: 'where one makes a promise to another for the benefit of a third person, such third person may avail himself of the promise and bring an action thereon, although the consideration does not move directly from him.')(citing Hale v. Ripp, 32 Neb. 259, 49 N.W. 218 (1891)." *See also* Franklin Fire Ins. Co. v. Howard, 230 Ala. 666, 667-68, 162 So. 683, 684 (1935) ("[I]f one person makes a promise for the benefit of a third party, such beneficiary may maintain an action thereon, though the consideration does not move from the latter.").

[18] Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 108 A.D.2d 3 (N.Y.App.Div. 1985) ("It is true that where performance is to be made directly to a third party, there is at least 'a presumption that the contract was for the benefit of the third party.' However, 'the intention of the promisee is of primary importance, since the promisee procured the promise by furnishing the consideration therefore.'").

[19] Ian Ayres has proposed and drafted such an agreement:

> In return for the participation of the source as an interviewee, the publication promises to compensate anyone who is damaged by a factual misrepresentation printed in an article that expressly quotes the source. Compensation for factual misrepresentations is to be measured by the dollar amount required to make the damaged person whole, but in no event shall be less than $100. Damages might be mitigated by timely retractions of the misrepresentation. Anyone explicitly named in the article is an express third party beneficiary of this contract and thereby has a right to directly sue the publication if it breaches its promise to compensate. The publication and the source intend for this to be a legally binding agreement. The reporter in agreeing to this contract on behalf of the publication represents that the reporter has actual and apparent authority to enter into this contract on behalf of the publication.

http://balkin.blogspot.com/2005/02/compensating-for-reckless-reporting.html. We suggest that the next time you're on the fence between saying yes or no to another institution's request for your help, paid or unpaid, you consider using the Fair Employment Mark as a tie breaker, conditioning references, lectures, or charitable gifts on the institution's willingness promise not to discriminate.

C. The Benefits of Privatizing ENDA

Together the license structure of minimal certification and third-party altruism allows for the privatization of ENDA. Instead of the mandatory non-discrimination duties of ENDA, the fair employment mark creates an opt-in mechanism for employers who want to contract affirmatively for ENDA duties. While Richard Epstein has railed against the mandatory nature of Title VII and other civil rights duties,[20] he along with all thorough-going libertarians ought to embrace the FE mark as expanding freedom of contract.

But the mark also represents a new form of federalism. We traditionally think of federalism as competition among jurisdictions, with individual states acting as the laboratories for legal experimentation. But the fair employment mark is an example of "corporate federalism" in which individual business organizations are allowed to experiment with different regulatory structures. Of course, any regime with freedom of contract allows corporate experimentation. But the fair employment market allows a type of structured experimentation. It is thus more akin to corporate statutes that give individual businesses discrete choices, e.g. opting into particular "control transaction" protections or opting out of discrete duties of care.[21]

i. Amelioration

If a substantial number of employers signed the license,[22] the mark would provide three different types of incremental benefits – amelioration, demonstration, and realignment.[23] First, the

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[20] Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992).

[21] See, e.g., Ga. Code Ann Sections 14-2-1110 -- 14-2-1113 & 14-2-1131 -- 14-2-1133 (opt-in (via bylaw amendment) Business Combination and Fair Price Laws); 8 Del. Code Ann. Sec. 203 (opt-out law). A complete list of anti-takeover law statutes (most opt-out, a few mandatory, and only Georgia with opt-in) can be found in the Investor Responsibility Research Center's "State Takeover Laws" serial publication. For director liability statutes, see 8 Del. Code Ann. Sec. 102(b)(7) (opt-in regime); Ohio Rev. Code Ann. 1701.59(D) (opt-out statute).

[22] Part III will predict which employers are most likely to sign the agreement.

mark would ameliorate the problem of orientation discrimination for covered workers. Outside of the 15 states that expressly provide private causes of action, employees often have no legal remedy for claims of discrimination. Even employers who include sexual orientation in their non-discrimination policy are sometime found not to have made a binding promise not to discriminate.[24] The extension of private causes of action to unprotected workers is not just a symbolic act. As in the early years of Title VII, there are many examples of blatant disparate treatment in conditions of employment. Even in businesses that voluntarily adopt the mark and that genuinely oppose discrimination, gay and lesbian workers may be subject to blatant disparate treatment from managers or co-workers.[25]

ii. Demonstration

Second, if the mark succeeds it will produce a demonstration effect that particularly may inform Congress and state legislators about the advisability of passing ENDA or state laws prohibiting discrimination. If 500,000 employees were covered by the mark, legislators would learn something over time about expected litigation rates and the size of liability. This litigation information would provide only a lower bound on potential claims, because employers who

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[23] We have argued that our "inclusive command" proposal represents another incremental strategy for providing these three types of benefits with regard to employment discrimination in the military. See Jennifer Gerarda Brown & Ian Ayres, The Inclusive Command: Voluntary Integration of Sexual Minorities into the U.S. Military, 103 Mich L. Rev. 150 (2004); Ian Ayres & Jennifer Gerarda Brown, Straightforward: How to Mobilize Heterosexual Support for Gay Rights 116 – 144 (2005).

[24] This enforceability of non-discrimination policies is discussed infra at ?.

[25] See, e.g., Empire State Pride Agenda, Anti-Gay/Lesbian Discrimination in New York State (2001), available at http://www.prideagenda.org/pride/survey.pdf, last visited April 18, 2005 ("In New York, anti-gay job discrimination in employment is pervasive, with more than one-third of the respondents (36%) experiencing some form of job-related discrimination within the last five years;" included 8% reporting that they were fired specifically because of their sexual orientation; 27% reporting verbal harassment in the workplace (e.g., being called names such as "faggot," "dyke," bulldagger," "sissy," "queer," or other anti-gay words); 7% reporting physical harassment in the workplace (e.g. being chased, followed, or threatened with physical violence); and 10% reporting a negative performance evaluation because of their sexual orientation). See also Dave Munday, Gay Workers Fear for Their Jobs; Nondiscrimination Policies Still Scarce, The Post & Courier, April 4, 2004.

volunteer for potential liability are less likely to have discriminatory practices than those who do not. But even this lower bound information is useful in demonstrating that ENDA would not open a floodgate of litigation. If in fact the litigation rates and awards are reasonably low under the mark,[26] it would demonstrate that the form of potential liability proposed under the statute could be managed – by employees and covered employers alike.

The inevitable litigation that would arise under the mark would also provide legislators with information about how ENDA would be interpreted by courts if it were enacted. The fair employment mark allows courts for the first time to create persuasive statutory precedent *before the statute is passed*. At first this seems impossible – statutes must be enacted before they are interpreted. And if it were possible, why would this be the first time it ever happened? The simple answer is that the licensing agreement is to our knowledge the first private contract that explicitly adopts the words of a proposed statute. As shown in the appendix, the licensing agreement expressly states its goal:

> WHEREAS Licensee desires to privately commit to non-discrimination as defined in the Employment Non-Discrimination Act (ENDA) as proposed in S. 1705, 108th Cong., 1st Sess. (2003).

This version of the ENDA bill is attached to the license; the substantive "Standards of Fair Employment" included in the license are taken word-for-word from the bill. Thus, when a court is asked to interpret the meaning of the words in the license it will be literally interpreting the same

[26] Evidence from the states that have already provided for private rights of action show that the rates of litigation are very low. Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions, (GAO/OGC-98-7R, Oct. 23,1997)(in states with statutes making it illegal to discriminate in employment on the basis of sexual orientation, relatively few formal complaints or lawsuits alleging such discrimination had been filed); Sexual-Orientation-Based Employment Discrimination: States' Experience
With Statutory Prohibitions Since 1997, GAO/OGC-00-27R, April 28, 2000) (both the number of complaints of sexual orientation discrimination in employment and the percentage of such complaints as a portion of overall complaints of

words that are included in the proposed bill. Even though the court will be interpreting a contractual promise, it will (because of the foregoing "whereas" clause) be asking whether the employer's conduct would have run afoul of ENDA had the bill been enacted.

Information about how courts will interpret ENDA can help quell legislative concerns about supporting the bill. Even though the next section will show that the bill is an incredibly narrow prohibition of disparate treatment alone, legislators may still worry that "activist judges" will extend the statute beyond its borders. Even though the statute does not reach discrimination on the basis of gender identity and expression, legislators may be concerned that ENDA will restrict employers' ability to regulate employee appearance and conduct. Resolving these possible ambiguities can ease the bill's passage – in part because the legislators can expressly approve or disapprove of this prior precedent. Just as Congress expressly disapproved of some Supreme Court precedent and expressly approved of other precedent when it passed the Civil Rights Act of 1991, so too Congress would have the option of explicitly embracing or rejecting particular court interpretations of the fair employment mark licensing agreement when considering whether to pass ENDA. The substantive language of the non-discrimination requirement in a future proposal of ENDA might even change in response to this prior precedent.

Of course, there are important differences between pre-passage license precedent and (the more traditional) post-passage ENDA precedent. As a formal matter, an interpretation of contractual language is not binding on a court when interpreting statutory language. This is particularly true when different courts are involved. With the exception of a few federal cases brought under diversity jurisdiction, the bulk of the license precedent will come from state courts. Post-passage

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employment discrimination filed "may still be characterized as relatively small;" the number of lawsuits pursuant to these state laws was even smaller). See also infra at ?.

ENDA interpretations will result from federal litigation. Federal courts might be reluctant to defer to state court interpretations of federal statutory language – especially when the federal statute has not yet been passed. Then again, affirmative references to these state court decisions in the Congressional record when the statute is subsequently enacted could radically raise the precedential value of the state court decisions.

Of course, the flip side is that Congressional action could also render this pre-passage license precedent irrelevant. The language of many bills is significantly amended before passage. The language of proposed legislation often changes from year to year as revised bills are introduced in successive legislative sessions. Our licensing agreement takes account of this possibility by allowing us to update the licensing language on an ongoing basis, keeping pace with the legislative state of play.[27]

iii. Realignment

Finally, the coverage of a substantial number of employees creates new legislative opportunities that might serve as a wedge issue to realign politicians who currently oppose ENDA. At first, it might seem that ENDA already represents an irreducible legislative minimum. It is carefully crafted solely to prohibit disparate treatment. It does not allow disparate impact claims or claims for health benefits by unmarried domestic partners. It expressly does not require affirmative action. It would seem that there is not much left on which gay rights proponents could compromise.[28]

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[27] Although we as owners of the mark may not unilaterally modify the license, we intend to propose modifications to conform the license to updated versions of the bill that are formally introduced into Congress. New licensees will opt into the latest version of the ENDA bill (or comparable legislation).

[28] In fact, ENDA could be pared back on a number of other grounds. For example, class actions could be prohibited or damages could be more severely capped.

The fair employment mark, however, illuminates an important limit on the freedom of private contract; this limitation on private action creates a new opportunity for public, legislative compromise. The most important respect in which the licensing agreement does not replicate ENDA is the enforcement regime. Under ENDA, the Justice Department and the EEOC (as well as individual employees and applicants) would be empowered to sue employers who discriminate. The licensing agreement goes as far as it can in naming as third party beneficiaries this same set of plaintiffs: to wit, "all persons and entities who would be entitled to sue if ENDA were in effect." This is an attempt to grant government actors enforcement power. Yet while this provision is sufficient consent upon the part of the corporate licensee for such enforcement, the government actors need a separate legislative authority to be able to bring an ENDA-like enforcement action. Put simply, private parties by themselves cannot give the Justice Department or the EEOC power to sue.

However, each licensing agreement could be seen as an invitation to Congressional action. If a million employees were covered by the license, gay rights advocates might lobby Congress to empower the civil rights agencies to enforce the non-discrimination policy against those corporations who had volunteered. Such an "opt-in" enforcement statute might garner the support of legislators who have been reluctant to impose ENDA's requirements on unwilling companies.

Indeed, it is a short step to see the license agreement not only as a vehicle for "opt in" enforcement, but also as a call for an "opt in" version of ENDA itself. Congress might easily displace the need for the mark's contractual commitment by passing a statute that made ENDA duties binding only on companies that affirmatively opted for the statute – possibly by formally

registering with the EEOC.[29] Free-market conservatives simply have no argument to resist such legislation. Richard Epstein, for example, railed against the mandatory nature of Title VII in his 1992 book, *Forbidden Grounds*.[30] For Epstein, the chief evil of Title VII is that it restricts freedom of contract. But Epstein should have no problem with a statute that permits firms to decide whether they want to be covered by civil rights laws.

Indeed, Epstein's criticism of the mandatory nature of Title VII only suggests that lawmakers should permit firms to contract around the default set of rights regarding employment discrimination. This kind of criticism tells us nothing about what the appropriate default rule should be.[31] Epstein's argument in *Forbidden Grounds* is a contractual nonsequitor. If Epstein believes that the mandatory nature of a civil rights law is unwarranted, he can certainly suggest that legislators make the statutory duty waivable. Epstein needs a separate kind of argument – which he never provides – to show that an opt-in statute is superior to an opt-out statute.[32] Epstein argues for the repeal of Title VII (implicitly turning it into an opt-in statute, creating no employment rights unless employers affirmatively contract for them), but he does not consider whether an opt-out default would be superior.

The same opt-in/opt-out debate lies at the end of this ENDA thought experiment. Once Congress begins to consider the opt-in version of ENDA described above, it is natural to ask whether an opt-out version of ENDA might be even better. Both are formally equivalent from a libertarian freedom-of-contract perspective, because both give employers the identical legal option to embrace

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[29] Such a statute would have to govern the conditions on which a firm might subsequently "opt out" of coverage. In the spirit of incrementalism, we believe that this should be allowed as long as there was sufficient public notice.

[30] Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992).

[31] See generally Ian Ayres & Robert Gertner, Majoritarian vs. Minoritarian Defaults, 51 Stan. L. Rev. 1591 (1999); Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87 (1989).

or avoid non-discrimination duties. But default choice matters. Default inertia is the iron law of contracting.[33] We would undoubtedly see more employees covered by non-discrimination promises in the shadow of an opt-out statute than an opt-in statute.[34] While the fair employment mark comes close to replicating the effects of an opt-in statute, only lawmakers can create an opt-out statute.

Stepping back, we can now see a variety of opportunities for incremental legislative progress. While the minimalistic ENDA duties initially did not appear amenable to statutory compromise, we have identified three incremental way-stations that become visible as a consequence of the fair employment mark. First, Congress might empower the federal civil rights agencies to enforce the mark's duties against voluntary licensees. Second, Congress might displace the mark by creating an opt-in ENDA statute. And most expansively, Congress might create an opt-out ENDA statute allowing employers to avoid potential liability by publicly disclaiming the statute's non-discrimination duties. While the fair employment mark goes a long way toward replicating the rights and responsibilities of the proposed statute, these final two default statutes would solve both the precedential and enforcement deficits of the mark. Precedents created under either an opt-in or opt-out statute would be solid federal precedent in the event of later mandatory passage of the statute. And these contractible statutes would create the public enforcement add-on that is currently missing from the licensing agreement.

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[32] Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, in LEGAL CANONS 47 (J.M. Balkin and S. Levinson, eds.) (2000).

[33] Put formally, in equilibrium when rule X is the default, one would expect to see a higher proportion of contractors covered by rule X than any other term. See Ayres & Gertner, Majoritarian vs. Minoritarian Defaults, 51 Stan. L. Rev. at 1598.

[34] Ian Ayres, Empire or Residue, supra note ?.

II. Tailoring the Coverage of the Licensing Agreement

This section defends in more detail the proposed coverage of our licensing agreement – what is included as well as what is excluded from licensee duties. As for inclusion, we have simply tried to impose as nearly as possible the legal duties of ENDA, a bill that has been proposed repeatedly since 1993 but not yet enacted by Congress.[35] The central goal was to grant employees and applicants a private right of action if they are subject to disparate treatment because of their sexual orientation. In effect, ENDA would include sexual orientation in the group of characteristics that Title VII already makes off limits as the basis for the terms and conditions of employment.[36] Paragraph 4 of the licensing agreement sets out these substantive duties:

> **STANDARDS OF FAIR EMPLOYMENT.** Licensee promises not to engage in the following employment practices:
>
> (1) "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's sexual orientation; ENDA, S. 1705, §4 (a)(1) (attached hereto) or
>
> (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's sexual orientation;" ENDA, S. 1705, §4 (a)(2) (attached hereto)

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35. J. Banning Jasiunas, Note, Is ENDA the Answer? Can a "Separate But Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?, 61 Ohio St. L.J. 1529 (2000). In using the language of ENDA, we are placing the words of Chai Feldblum, one of its principal drafters, into our licensing agreement. See Chai Feldblum bio, Georgetown Law, http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=251, last visited April 20, 2005.

36. Representative Barney Frank, a supporter of ENDA, has stated that ENDA would result in legal protection "for gay and lesbian people" identical to the protections granted by Title VII. See Jasiunas, supra note ?, at 1545-46.

(3) to discriminate against any individual because of the sexual orientation of the individual "in admission to, or employment in, any program established to provide apprenticeship or other training;" ENDA, S. 1705, §4(d) (attached hereto)

(4) to discriminate against an individual because such individual opposed any of the employment practices described in subsections (1) through (3), "or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" concerned with this License. ENDA, S. 1705, §5 (attached hereto)

The employment practices described in any of subsections (1) through (3) "shall be considered to include an action described in that subsection, taken against an individual based on the sexual orientation of a person with whom the individual associates or has associated." ENDA, S. 1705, §4 (e) (attached hereto)

But unlike Title VII, our license follows ENDA in expressly limiting its coverage to claims of disparate treatment. Like ENDA, the licensing agreement expressly disclaims disparate impact and affirmative action duties and employers are not required to provide employee benefits to domestic partners.[37]

In tailoring the coverage of the license, we cleave to the ENDA duties for several reasons. First, they are clear and simple. The idea of having a legally enforceable private right of action to be free from disparate treatment in employment on the basis of an impermissible characteristic resonates with core conception of civil rights. This is why some consider the civil rights act of 1964 the most important piece of legislation since World War II. By excluding disparate impact coverage, the license avoids characterization as "a quota bill." By excluding any duty of affirmative action, it becomes harder to characterize the license as creating "special rights."

Moreover, the ENDA duties have become a focal point. The substantive language of our license has been repeatedly introduced into Congress. Hundreds of corporations have said that they

[37] See paras 6 and 7.

want the bill to be passed.[38] Potential licensees do not need to fly speck whether they agree with our particular drafting choices. Just as our disclaiming enforcement power assures potential licensees that we will not be vexatious litigators, so our disclaiming drafting power in choosing the contours of licensee duties can assure them that we have not slipped in an unduly burdensome or unreasonable requirement.[39]

In keeping with this principle, we have not attempted to re-engineer or improve upon the ENDA duties. Since ENDA would allow class actions, our license would allow class actions.[40] Since ENDA would allow suits for co-worker harassment, our license would allow suits for co-worker harassment.[41] But our license would also allow the same employer countermoves to limit potential liability. Since ENDA would allow arbitration agreements, our license would as well.[42]

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[38] See Corporations and Small Businesses Endorsing the Employment Nondiscrimination Act (ENDA), November 24, 2004, http://www.hrc.org/Template.cfm?Section=Endorsing_ENDA&CONTENTID=17977&TEMPLATE=/ContentManagement/ContentDisplay.cfm, last visited April 20, 2005.

[39] The license is thus an example of what IanAyres and Barry Nalebuff have called the KISS principal – "Keep It Similar, Stupid." The idea is that securing support for an innovation is often easier when the implementation will be similar to a familiar plan; in this way the potential adopter is not overwhelmed with change and can focus on the crucial innovative element.

[40] Section 12(b) of ENDA states that "the procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are the procedures and remedies applicable for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)." Courts have long held that class actions are available—and, indeed, often necessary—in Title VII cases. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) ("Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act . . . ."); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (court would construe Title VII to allow for class actions "to make sure that the Act works"); Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968) ("[I]f class-wide relief were not afforded . . . the result would be the incongruous one of the Court . . . itself being the instrument of racial discrimination . . . ."); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) ("Racial discrimination is by definition a class discrimination").

[41] An employer may be liable for coworker harassment under Title VII if the employer's negligence creates a "hostile work environment." Ocheltree v. Scollon Productions, Inc., 335 F.3d 325, 334 (4th Cir. 2003) ("An employer cannot avoid Title VII liability for coworker harassment by adopting a 'see no evil, hear no evil' strategy.").

[42.] Under ENDA (as with Title VII), discrimination disputes would be arbitrable so long as the arbitration agreement was conscionable. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (contract requiring arbitration of all employment disputes is enforceable), on remand 279 F.3d 889 (9th Cir. 2001) (ordinary principles of state contract law determine validity of agreement to arbitrate; because arbitration agreement was both procedurally and substantively unconscionable under California law, it was unenforceable), cert. denied 535 U.S. 1112, 122 S.Ct. 2329, 153 L.Ed.2d 160 (2002). We believe the same standards should generally apply to the licensing

Since ENDA would allow waiver of class action rights, so would our license.[43] And finally, since ENDA would require filing of claims within 180 days of the occurrence of a violation, so would our license.[44]

Our meta-goal is to come as close as possible to ENDA rights and responsibilities without ever going beyond them (that is, without ever imposing more duties on employers than would be imposed by the statute). We've already discussed a couple of dimensions in which our license falls short of ENDA: First it does not grant civil rights agencies an independent ability to enforce. Second, it cannot create federal court jurisdiction to hear claims arising under our license.[45] Our license may also fall short of ENDA with regard to certain remedies. Private parties may not

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agreement, ENDA, and Title VII. But since the licensing agreement does not include an arbitration clause, job applicants would be free to litigate claims arising from it. Even employees who signed employment contracts containing arbitration clauses might be able to litigate violations of the employment mark, qua third party beneficiaries of the licensing agreement.

[43] Many arbitration agreements do not provide for class actions. As long as the arbitration agreement is not found to be unconscionable, waivers of class action rights will be upheld. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (upholding waiver of class action rights in arbitration of claims arising under the Age Discrimination in Employment Act); Livingston v. Assocs. Fin., Inc., 339 F.3d 553 (7th Cir. 2003) (enforcing an arbitration agreement prohibiting class actions of claims arising under Truth in Lending Act); Randolph v. Green Tree Fin. Corp. - Ala., 244 F.3d 814, 817-18 (11th Cir. 2001) (same); Johnson v. W. Suburban Bank, 225 F.3d 366, 377 (3d Cir. 2000) (same), *cert denied*, 531 U.S. 1145 (2001) (same). *But see* Ingle v. Circuit City Stores, Inc. 328 F.3d 1165, 1172-73 (striking down arbitration agreement for unconscionability in part due to its prohibition of class actions).

[44] See Paragraph 14 of the Licensing Agreement ("Any lawsuit by a third-party beneficiary for violation of the Standards of Fair Employment shall be filed within one hundred and eighty days after the alleged violating employment practice occurred."). Section 12(b) of ENDA ordains that "the procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are. . .the procedures and remedies applicable for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) and 42 U.S.C. Section 2000e-5 ordains that charges of unlawful discrimination must be filed with the EEOC within 180 days of the occurrence. There is one dimension in which our license arguably goes beyond ENDA. ENDA would require private plaintiffs to file a charge with EEOC and obtain a "right to sue" letter before suing in federal court. (A similar duty to file with the state human rights commission is in place in California under its state non-discrimination statute). Plaintiffs under our license would not need to exhaust this administrative remedy before filing suit. While this might impose fewer procedural burdens on license-based plaintiffs, it is important to remember that exhaustion of administrative remedies does not substantively burden plaintiffs – because plaintiffs in any case retain a right to sue. Therefore the substantive effects of ENDA/Title VII and the license agreement should be the same.

[45] But as discussed supra at ?, Congress could empower these agencies to enforce the license against licensees and to allow enforcement by private or public plaintiffs in federal court.

contract for punitive damages.[46] Thus even if punitive damages would be available to plaintiffs under ENDA, courts may be unwilling to grant them to plaintiffs for breach of the licensing agreement. Similar logic may restrict courts' willingness to grant certain types of injunctive relief. Specific enforcement of promises is at times restricted by a variety of doctrines (such as the irreparable harm rule) which are not at play in remedying statutory civil rights claims.[47] These shortfalls from ENDA point out the limits of contracting. But at the end of the day, the license comes reasonably close to recreating the statutory duties – and the shortfalls (especially the restriction on punitive damages) should assuage employer fears about signing on to unlimited liability.

We have also intentionally granted licensees the power to change their minds. While the term of the license is 5 years (and by default automatically renews), we allow licensees to terminate the agreement at any time and for any reason. In contrast, we as licensors can terminate the agreement prior to the term of the agreement only for cause – that is, if the licensee violates the standard for fair employment. This asymmetry in termination rights is intended to assure licensees in yet another way that they have substantial control over their fate if their perceived liability or other risk exceeds their expectations.

While the minimalism and focal nature of our license duties have considerable appeal, some readers might protest that we have set the bar too low. Although ENDA clearly represents a major advance in employment protections for gay men and lesbians, the bill's proponents in Congress have had to limit its reach in order to make it more politically palatable. The statute has an

[46] Punitive damages can arise out of bad faith conduct or promissory fraud. See generally Ian Ayres & Gregory Klass, Insincere Promises: The Law of Misrepresented Intent (2005).

understandably modest goal. But as applied to the license, is this goal too modest? Considering that the license is a voluntary choice of employers (who in part are seeking a marketing advantage), shouldn't the license duties be expanded to secure more than a simple promise not to discriminate?

In the remainder of this Part, we explore five potential expansions in coverage. The first four concern substantive licensor duties related to gender identity and expression, health care coverage for employees' same-sex domestic partners, the Human Rights Campaign Corporate Equality Index, and affiliate corporations (concerning alternative enforcement options). In the end, we believe it is useful to retain a license that mirrors the language of ENDA as formally proposed in Congress. In this world of corporate voluntarism, we need not make either/or decisions. Corporations are contractually free to embrace both our ENDA-based fair employment mark as well as additional obligations to their employees.

A. Gender Identity and Expression

Probably the most troubling drafting choice we made concerns gender identity. By excluding gender identity and gender expression from protected status, our licensing agreement follows the contours of every version of ENDA that has been introduced in Congress to date. This means in part that transgender employees[48] would not be covered. In the view of ENDA's chief

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[47] See Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 687 (1990). But the trend seems to be toward enforcement of specific performance clauses. See Revised Uniform Commercial Code §2-716.

[48] "Transgender" is a broad term to cover a variety of gender identities; the term can refer to cross-dressers or pre and post-op transsexuals, intersexed people (born with ambiguous genitalia, or both male and female sex characteristics), and bigendered people (who feel comfortable in both male and female identities). When gender identity or expression is omitted from employment protection, employers can use behavior or characteristics that are gender nonconforming as the basis for disparate treatment.

congressional sponsors, including gender identity or expression in the bill would effectively make it impossible to enact.[49]

Gender identity illustrates well the difficult choices that an incremental approach requires. Is it ever appropriate to secure gains for only some? Is it moral to jettison the T in the LGBT community? Our license, like ENDA, sacrifices the interests of trangendered people – leaving them out of the calculus – in its attempt to secure a basic civil right for gay, lesbian, and bisexual employees. [50] The idea of incrementalism works on the assumption (or, at least, the hope) that fair treatment on the basis of sexual orientation is a step in the right direction, a step that brings us closer to fair treatment on the basis of gender identity at some point in the not-too-distant future. Such pragmatic choices, though difficult, are not unique to this issue. Civil rights advocates have constantly struggled with the question of when to push for "half a loaf."[51]

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[49] Adrian Brune**,** *HRC vows no ENDA if no trans protection: Dramatic policy shift follows protests, lobbying effort,* The Washington Blade**,** Friday, August 13, 2004, available at http://www.washingtonblade.com/2004/8-13/news/national/enda.cfm, last visited April 20, 2005 (in 2003, Winnie Stachelberg, Human Rights Campaign's political director, said "Now is not the time to add gender identity to ENDA. I listen to members of Congress and many of them — not all of them, but many — have said adding [transgender protections] will slow passage of this bill down.").

[50] We should note, however, that even putting aside the interests of transgender employees, some have argued that gay, lesbian, and bisexual employees need gender identity and expression in ENDA in order to gain full protection. To the extent that gay, lesbian, and bisexual employees exhibit characteristics or behavior that do not conform to gender stereotypes or expectations, employers would be able legally to subject them to disparate treatment on a basis separate from sexual orientation. Because sexual orientation and other aspects of gender can be difficult to disentangle, some argue, gender identity and expression protection is necessary in order to give gay, lesbian and bisexual employees full protection. *See* Cheryl Jacques, *Putting the 'T' into ENDA: HRC's Board has Decided Not to Support ENDA Without Transgender Protections. It's the Right and Pragmatic Thing to Do,* THE WASHINGTON BLADE, August 13, 2004, available at http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=22157&TEMPLATE=/ContentManagement/ContentDisplay.cfm , last visited April 20, 2005.

[51] In Connecticut in 2005, for example, marriage equality advocates had to make tough choices about whether to support a bill that granted civil union but not full marriage rights to same-sex couples. If, as German Prussian politician Otto Von Bismarck once remarked, "politics is the art of the possible," such compromises can be justified as ways of doing what is "possible" as soon as possible. Mark Pazniokas, Just One Hitch Before OK, House Adds `Marriage' Definition, New York Newsday, April 14, 2005, available at http://www.nynewsday.com/news/local/state/hc-civilunions0414.artapr14,0,3134495.story?coll=ny-statenews-headlines, last visited April 20, 2005.

In the past, HRC has been the primary gay rights lobbying group supporting ENDA as proposed, despite HRC's general position that gender identity also deserves protection. But recently there is movement toward inclusion. In the summer of 2004, HRC announced that it would not support any version of ENDA that excluded gender identity.[52]

While reasonable people of good faith can differ on this difficult issue, we cleave to the existing exclusion of ENDA solely for pragmatic reasons. Barney Frank says that he has always wanted transgender protection in ENDA; nonetheless, he says, "Civil rights bills have never passed as all or nothing . . . .You go in steps. The first civil rights bills didn't include voting or housing, but that didn't stop us from trying to get them passed. Every time you pass a partial civil-rights bill you reduce the fears you will run into for the next version."[53]

Gender identity has been excluded from every version of ENDA introduced in Congress because sponsors believe that including gender identity would doom such a bill to defeat. For many employers, inclusion of gender identity in the company's written nondiscrimination policy would been seen as too radical a move to be attempted, and they would opt out of using the mark despite their willingness to include sexual orientation in the policy. Just as the anxiety of the shower has driven military discrimination,[54] it is our sense that a certain anxiety of the restroom (as in, "which bathroom will he/she use?") has fueled the reaction to coverage of gender identity. Only 59 of the

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[52] *See* Adrian Brune**,** *HRC vows no ENDA if no trans protection, supra* note ?. Compare Statement by AFL-CIO President John Sweeney on the Employment Non-Discrimination Act (ENDA), June 24, 1999, available at http://www.prideatwork.org/pdffiles/ENDAFlr99b.PDF, last visited April 20, 2005 (the AFL-CIO, including its LGBT division, Pride at Work, "strongly urges Congress to pass" ENDA) with Jeremy Bishop, *An injury to one is an injury to all,* Pride at Work Action Alert, November 20, 2003, available at http://www.prideatwork.org/news.html (Bishop, Program Director for Pride at Work AFL-CIO, argues that the labor movement must require transgender protections in any employment discrimination legislation it supports).

[53] Stefen Styrsky, *Decision Day on Trans Rights: Human Rights Campaign board meets amidst growing demand for trans-inclusive legislation* GAY CITY NEWS, August 05 - 11, 2004, available at http://www.gaycitynews.com/gcn_332/decisiondayontrans.html (last visited April 25, 2005).

379 companies rated in HRC's Corporate Equality Index survey "include gender identity, characteristics or expression in their non-discrimination policy."[55] However, things may continue to change and change quickly. Our intention is to conform the license to the potentially evolving language of ENDA as reflected in legislation embraced by major Congressional cosponsors. As long as Barney Frank favors its exclusion, we are likely to as well – but not without regret.

B. Health Care Coverage

Another dimension where the license could be more ambitious and go beyond ENDA concerns health care coverage. The license might have also mandated the provision of health care and other benefits for employees' same-sex domestic partners.[56] The mark might require this as a way of responding to the state's own discrimination in denying marriage to same-sex couples. In jurisdictions where same-sex couples cannot signal their commitment through civil marriage, they are unfairly harmed by employment policies that condition certain benefits upon civil marriage.

Employers who refuse to extend health benefits in this way could argue that they are treating all employees equally: gay or straight, employees receive family health benefits, but only if they are married. But such a response misses the point. This is not a case in which the harm arises from treating similarly-situated people differently. Instead, the harm results from treating differently-

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[54] See Kendall Thomas, Shower/Closet, 22 Assemblage 80 (1994).

[55] *See* Human Rights Campaign Foundation, Corporate Equality Index 9 (2004), *available at* http://www.hrc.org/Template.cfm?Section=Search_the_Database&CONTENTID=23003&TEMPLATE=/ContentManagement/ContentDisplay.cfm, last visited April 20, 2005.

[56] Some employers might also want to make these benefits available to employees' different-sex domestic partners, but in our view, an employer's decision not to cover different-sex domestic partners should not preclude use of the Fair Employment Mark. Because different-sex couples have the option of marrying and thereby gaining employment benefits, while same-sex couples cannot (except in Massachusetts), it seems fair to include unmarried same-sex couples, but not unmarried different-sex couples in the benefits package. If the employer operates in a state that extends equal marriage rights to same-sex couples, the need for domestic partner benefits might similarly dissipate; discriminating on the basis of marital status need not have a disparate impact on gay people.

situated people the same, without regard for the background conditions of inequality that cause this treatment to affect them in different ways.

The trouble is that an employment policy extending health benefits to same-sex but not different-sex domestic partners could be seen as discriminating against heterosexuals, thus violating the nondiscrimination policy that forbids discrimination on the basis of sexual orientation. To mandate health benefits only for employees' same-sex domestic partners could be seen as a form of affirmative action – which would be inconsistent with ENDA and could allow critics to attack the license as granting gay and lesbian workers "special rights."

To avoid this reverse disparate treatment, the Fair Employment mark could require licensees to offer health benefits to employees' domestic partners, regardless of gender. Many companies have voluntarily achieved this standard already. Whether out of a corporate ethic of fairness to all employees or out of a recognition that gay men and lesbians can be valuable employees worth recruiting, more and more companies are including domestic partners in employee benefits packages. In fact, recent studies show that more than 4000 U.S. companies offer their employees Domestic Partner Health Benefits. Nearly half of the Fortune 500 companies do so.[57] Thus, nothing in the license would prohibit an employer from doing what thousands of companies are already doing -- granting all employees domestic partner benefits. But to keep the mark's message focused on the most undisputable measure of equality, we have structured the license to retain ENDA's clarity. Paragraph 7 of the license expressly provides that the agreement "shall not be construed to

[57] Daryl Herrschaft & Kim I. Mills, Human Rights Campaign, The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2003 (2004) available at http://www.hrc.org/Template.cfm?Section=20042&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18678 (last visited May 21, 2004).

require the provision of employee benefits to an individual for the benefit of the domestic partner of such individual."

C. More Expansive Measures of Gay Friendliness

A very different kind of certification model has already been created by the Human Rights Campaign (HRC) based on its Corporate Equality Index, a 100-point system that rates corporate policies and actions toward the lesbian, gay, bisexual and transgender community.[58] The HRC Corporate Equality Index rates several hundred of the country's largest corporations based upon the extent to which they:

- Include the words "sexual orientation" in their primary written non-discrimination policy.
- Include the words "gender identity" or "gender identity and/or expression" in their primary written non-discrimination policy.
- Offer health insurance coverage to employees' same-sex domestic partners firm-wide; or provide cash compensation to employees to purchase health insurance for a domestic partner on their own.
- Officially recognize and support a gay, lesbian, bisexual and transgender employee resource group; or would support employees' forming a GLBT employee resource group if some expressed interest by providing space and other resources; or have a firm-wide diversity council or working group whose mission specifically includes GLBT diversity.
- Offer diversity training that includes sexual orientation and/or gender identity and expression in the workplace.
- Engage in respectful and appropriate marketing to the gay, lesbian, bisexual and transgender community and/or provide support through their corporate foundation or otherwise to GLBT health, educational, political or community organizations or events.
- Engage in corporate action that would undermine the goal of equal rights for gay, lesbian, bisexual and transgender people.[59]

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[58] The Human Rights Campaign is a gay rights advocacy organization based in Washington D.C. which administers the index.

[59] HRC acquired 'glvindex' in 2001 and subsequently renamed it the HRC Corporate Equality Index survey. See http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/Corporate_Equality_Index/Non_Responders/CEI_Non-Responders.htm.

HRC uses its criteria to rate the companies on a 100-point scale, so that a company can achieve a relatively high score even if it cannot certify that it complies with all of the six standards. Companies that achieve a 100% score can use a "Corporate Equality Index 100 Percent" service mark on their products. Several companies including American Airlines, Ford Motors and PepsiCo are HRC mark licensees.

The HRC 100% mark is both more and less ambitious than our fair employment mark. It is less ambitious because it does not legally prohibit discrimination on the basis of sexual orientation. The HRC mark requires the employer to include sexual orientation in its non-discrimination policy, but in many jurisdictions these policies do not constitute legally binding promises – especially with regard to applicants who are never hired (and therefore not in privity with the employer).[60] In these jurisdictions, a non-discrimination policy is a form a "cheap talk" because employees and third-parties gain no means to enforce violations of the policy. By transforming such policies into promises, the Fair Employment Mark has enforcement "teeth" that the HRC 100% may lack.

But on other dimensions the 100% mark is more demanding than the Fair Employment Mark. HRC's measure includes both gender identity (albeit without requiring it to be a binding policy) and domestic partnership health benefits, as well as a variety of activities to support LGBT workers.

So which mark is better? We reject the idea that this must be an either/or choice. It might be appropriate to have more than one mark to allow employers to signal different qualities. But in a commercial environment where consumers and potential employees must sift through complex and sometimes conflicting information about companies and products, we do think there is some virtue

in the Fair Employment Mark's simplicity.[61] Our concerns with the HRC mark are two-fold: 1) we worry that some of the attributes are difficult to certify in a meaningful way; and 2) we worry that some of the mark attributes may be perceived to confer "special rights" that undercut some of the power of the rating system. In contrast, the Fair Employment Mark is intentionally structured so that the public need not trust our bona fides or vigor in auditing compliance. The mark empowers employees and applicants to vindicate a clear wrong – discrimination on the basis of sexual orientation.

A specific criterion on the HRC scale that might be difficult for HRC to certify neutrally is the one requiring that the company support an LGBT employee group. The HRC criteria do not explain how an employer would "support" an LGBT employee group. Is it enough if the company can certify that such a group exists, and can provide one contact person involved in the group? Some employers may be too small to support such a group, lacking a critical mass of openly LGBT employees. The HRC standards recognize this fact when they provide, as an alternative to support for an LGBT employee group, that a company could establish a senior level diversity council. Even the smallest company could fulfill this requirement.

Note, however, that the requirement of an LGBT employee group goes beyond the command of equality. It does more than bring sexual orientation on par with race and gender in employment protections. LGBT employee groups and diversity councils are forms of affirmative action, as they

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[60] See supra note ? It still might be plausible to argue that an applicant entered into a pre-employment contract – in exchange for the applicant's applying, the employer implicitly or explicitly promised not to discriminate.

[61] Our conclusion is tempered by our presumption of qualified deference to HRC, a highly credible and effective gay rights advocacy organization. In Straightforward, we suggest that individual supporters of gay rights – especially heterosexuals – should give qualified deference to gay rights organizations. See Ian Ayres & Jennifer Gerarda Brown, Straightforward: How to Mobilize Heterosexual Support for Gay Rights 189-92 (2005). The Human Rights Campaign has done and continues to do heroic work in the struggle for equal employment rights. Our first inclination is to defer to their views on these matters.

represent affirmative steps to recruit and retain LGBT employees and make the workplace more comfortable for them. From one perspective they represent a form of disparate treatment because there would not be similar support for groups for heterosexual workers. Our point is not to accept the equation of affirmative action with other forms of discrimination, but only to suggest that any requirement vulnerable to the "special rights" canard may weaken the mark's signal, at least for some consumers. A non-discrimination requirement should never be removed, but remedial affirmative action and other forms of outreach might appropriately be subject to an ultimate sunset.[62]

The HRC requirement of charitable contributions to LGBT organizations, sponsorship of LGBT events or advertisements in LGBT publications might also draw the "special rights" criticism. Moreover, it may strain the public's trust of HRC – because if contributions to HRC itself can satisfy this requirement, then HRC as an organization becomes self-interested in the transaction. This aspect of certification might take on the character of a "shakedown" that demands concessions in exchange for a certification of fairness. The Rev. Jesse Jackson and his civil rights organization, PUSH, have been subject to this sort of critique. Some observers have accused them of giving companies charged with racial discrimination a sort of absolution in exchange for large donations to PUSH.[63]

The Fair Employment mark, in contrast, avoids these criticisms. Companies using the fair employment mark need not pay us or anyone else a licensing fee. Licensees and the public need not worry about whether we will be opportunistic with regard to certification or litigation. We certify only that a licensee has signed the license and then we retire from the scene. There is no hint or

[62] A government employer could constitutionally adopt the fair employment mark, but the HRC mark "special rights" might require some degree of additional justification.

possibility of personal profit and thus our mark avoids the appearance of self-dealing that has at times brought PUSH under fire.

Indeed, any aspect of certification that is subject to interpretation requires a level of trust on the part of both the public and potential licensees. Some of the factors in the HRC index are especially problematic on this score. Consider how subjective and difficult to police the following criteria could be:

- The company "engage[s] in respectful and appropriate marketing to the gay, lesbian, bisexual and transgender community and/or provide support through their corporate foundation or otherwise to GLBT health, educational, political or community organizations or events."
- The company "engage[s] in corporate action that would undermine the goal of equal rights for gay, lesbian, bisexual and transgender people.

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Actions that undermine the dignity and worth of LGBT employees could be difficult to define and observe. Companies might wonder if this standard exceeds the requirements ENDA would impose. Similarly, it might be difficult to assess the importance of a company's sponsorship of LGBT activities and events. A company that directs significant resources to an event and becomes closely identified with it should get more credit than one that merely takes out a small ad in a print program. Such distinctions may be difficult and time-consuming to detect, however, and even more difficult to convey under the rubric of the Fair Employment Mark. This is not to say that charitable giving and support for LGBT events are unimportant, but only that the Fair Employment Mark might not be the best vehicle for promoting these activities.

One response to these difficulties would be to permit the mark itself to signal varying levels of company compliance. The mark might include a numeral signaling the company's rating on an

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[63] See generally, Kenneth Timmerman, Shakedown: Exposing the Real Jesse Jackson (2002); Marc Morano, PUSH Comes to Shove: Jesse Jackson's Empire Crumbles, CNSNews.com, Jan. 15, 2002, at

index similar to that used by the HRC. Thus, for example, cereals made by General Mills might bear a label reading "FE=9", while cereals made by Kellogg would rate only "FE=7". General Mills could boast its higher Fair Employment rating because it has included sexual orientation in its nondiscrimination policy, offers domestic partner health insurance benefits, and has an LGBT Employee Group.[64] These three factors – a nondiscrimination policy that covers sexual orientation, health benefits for domestic partners, and an LGBT employee group – are the easiest, most objective criteria to monitor, and General Mills has fulfilled all of them. Kellogg does offers only spotty domestic partner health benefits, which suppresses its score. This difference might provide some consumers a reason to buy Cherios rather than Rice Krispies. But the example of General Mills and Kellogg suggests a reason *not* to combine the mark with a numerical rating. The difference between offering or withholding health benefits for domestic partners is significant, but the difference between a "9" and a "7" may be insufficiently transparent to convey this difference to consumers.

For pragmatic reasons, we reject these subjective and varying signals. Companies might worry that it would be difficult to refute a negative assessment with regard to subjective criteria. And consumers will not only have difficulty understanding a ratings system, they may not equally endorse the varied commands of the HRC program. Instead, we have chosen – at least initially – to have a much simpler and limited coverage that is targeted at eradicating the core wrong – intentional disparate treatment on the basis of sexual orientation. To this end, we propose that the mark should be licensed only to companies that privately promise not to violate the ENDA commands of

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http://www.newsmax.com/archives/articles/2002/1/14/170935.shtml, last visited April 20, 2005).

[64] See Human Rights Campaign, HRC WorkNet Employer Database, http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch_dtl.cfm&srchtype=QS&searchid=1&orgid=1244 (last visited April 20, 2005).

nondiscrimination. The license agreement expressly states that its goal is "to privately commit [the Licensee] to non-discrimination as defined in the Employment Non-Discrimination Act."

One way to resolve the differences between the HRC approach and ours is through a kind of harmonization. HRC has already announced plans to update its index criteria in 2006. It will give increased weight to equal benefits, workplace policies for transgender employees and diversity training. But the simplest ways to build bridge between the two approaches would be for HRC to make its criteria legally binding.[65] By changing a just two words, HRC might accomplish the major goal of the fair employment mark – granting employees private causes of action. All it would need to do is measure the extent to which the companies:

- Include the words "sexual orientation" in their ~~primary written~~ legally binding non-discrimination policy.

This change would substantially undercut the need for a separate fair employment mark.[66]

But harmonization is a two way street. It would also be possible for the fair employment mark to evolve to more closely follow the contours of the HRC mark. While our initial license only commits companies to the non-discrimination mandates of ENDA, subsequent editions of the mark might encompass more far-reaching goals. For example, once ENDA is enacted, the license would

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[65] The same point could be made about another recent HRC innovation: The Congressional Non-Discrimination Pledge. HRC, along with the Gender Public Advocacy Coalition and other allied organizations, has secured "*commitments* from members of Congress not to discriminate based on sexual orientation and gender identity and expression in their personal offices." *See* Members of 108th Congress With Sexual Orientation and Gender Identity and Expression Inclusive Non-Discrimination Pledges, http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Workplace_Discrimination/Background_Information4/Pledge_Project.htm, last visited April 22, 2005 (emphasis added). To make the pledge, members of Congress must sign the following statement: "The sexual orientation and gender identity or expression of an individual is not a consideration in the hiring, promoting or terminating of an employee in my office." We are thrilled to see that 21 Senators and 124 Representatives (15 Republicans, 128 Democrats) have signed the pledge. Again, however, we worry that "statements" and "commitments" fall short of enforceable promises. The symbolic value is great, but for an LGBT employee who actually suffers discrimination, the pledge may prove toothless.

[66] The only question would be whether the additional "special rights" features chilled acceptance to the point where it might be worthwhile to have a separate mark which solely prohibited discrimination.

be wholly redundant with the mandated federal right. At that point in time, it might be appropriate to require that licensees provide domestic partnership benefits (at least to same-sex partners, who are denied the option to marry civilly). Alternatively, it might be appropriate to add gender identity and expression to the covered protections. In the spirit of incrementalism that informs much of our thinking,[67] we endorse the possibility of evolving rights. But we should be careful not to impose an ever escalating set of duties on employers. Corporations will be chary of the mark if they can predict that it will become increasingly burdensome (because there will be costs in adverse publicity if in the future they choose to discontinue the mark's use).

D. Covering Affiliate Corporations

Finally, it might be appropriate to require users of the mark to certify that affiliated corporations – particularly major suppliers – have also agreed to be bound by the non-discrimination mandate of the mark. Other labeling schemes have dealt more rigorously with the problem of suppliers. For example, the "leaping bunny" mark of the Coalition for Consumer Information on Cosmetics ("CCIC") certifies that both the manufacturer *and the ingredient suppliers* for marked cosmetics and household products do not perform tests on animals.[68]

In order to insure a critical level of participation, we have crafted the Fair Employment license only to apply to the licensor's own employment practices. Again, this mimics the coverage of ENDA itself – as corporations are not responsible for discriminatory practices of their suppliers. Of course, one danger of this is that an essentially empty "gay friendly" shell could be devised to bear the label, while the entire manufacturing process is conducted by companies that discriminate

[67] See Ayres & Brown, Straightforward, supra note ? at 84.

against gay, lesbian and bisexual employees. But we find it unlikely that corporate forms will be manipulated because of the possibility of disparate treatment liability, and we are reluctant to require an adopting company to enforce non-discrimination up the supply chain (at least in the first iteration of the mark).

E. Group Enforcement

The potential victims of discrimination are the most obvious group of enforcers. The certification license expressly empowers this group by naming the corporation's employees and applicants as third party beneficiaries and clothing them with the same kind of private action rights they would have under ENDA:

> The Licensee and Licensor intend that these third-party beneficiaries will have the right to sue the Licensee for any breach of this agreement and have a legal right to the same remedies (including damages and injunctive relief) to which they would be entitled if ENDA were in effect.

Gay and lesbian employees will have the strongest incentives to police the licensee's conduct, and the cheapest access to information regarding violations. Therefore, using the licensing agreement to create rights of action in the employees – who are, after all, the intended beneficiaries of the whole arrangement – is eminently sensible.

For current or potential employees to assist in enforcement efforts, they must know about the mark and the rights it guarantees. Some licensees might use the mark to promote it products sales with consumers but without alerting employees about its meaning. But we doubt that this is a serious concern. As argued below, many employers will use the mark as a tool to recruit potential

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[68] FAQ, Web site for The Coalition for Consumer Information on Cosmetics, *at* http://www.leapingbunny.org/faq.htm (last visited May 21, 2004).

employees who are gay, lesbian, or bisexual. Moreover, gay and lesbian employees have good incentives to learn about the non-discrimination policies of their actual or potential employers. The names of all licensees will be publicly available on the Internet. Gay rights advocacy groups such as HRC are likely to continue to provide information about the policies of individual employers. Some employers may not be motivated to distribute this information to employees on their own. But gay workers are likely to learn very quickly when their employer has chosen to start marking its product.

Certification marks usually involve the licensor as an active monitor in certifying the compliance of the mark user. The mark users pay license fees to the licensor to cover these monitoring expenses. But we have opted for a much more decentralized structure that obviates the need for licensor monitoring and the payment of licensing fees. The licensor merely certifies that the licensee has promised not to discriminate. This certification does not require licensor effort because the very act of validly using the mark constitutes the promise of non-discrimination itself. The employees of the licensee then are then left (just as under ENDA) to do the substantive work of enforcing the underlying promise.

Far more complex enforcement schemes than the Fair Employment mark have succeeded with regard to other certification marks. For example, consider the "Orthodox Union" emblem (a letter "U" inside a larger circle or letter "O") certifying that a product is kosher.[69] The Orthodox Union certification service employs a staff of "over 1,000 rabbinic coordinators, kashruth supervisors, food chemists and support personnel." It certifies "250,000 brand names, hotels, restaurants, services and 2,505 companies in 54 countries around the globe."[70] Substantial

[69] U.S. Patent Office #636,593 and #1,087891 at http://www.ou.org/kosher/policy.htm (last visited May 21, 2004).
[70] http://www.ou.org/about/ou.htm (last visited May 21, 2004).

paperwork and close attention to detail are required of companies using the OU emblem.[71] In contrast, the Fair Employment mark is a model of procedural licensing simplicity.

An alternative way of supplementing private employee enforcement would be to specify that particular gay rights advocacy organizations would have standing as third-party beneficiaries to enforce the agreement. Such organizations have standing to enforce other civil rights laws.[72] And extending such enforcement powers might be particularly appropriate in a world where government enforcement was not forthcoming. Indeed, if an organization such as Human Rights Campaign and/or its division Worknet would act as the licensor itself, it would have direct standing as a certifier to ensure that its licensees were complying with the promises of the license. Even if HRC did not act as licensor, it might be listed as a third party beneficiary of the agreement, again creating the right to enforce the standards of fairness in employment contained in the agreement.

The power of advocacy groups is also related to the question of auditing. To facilitate enforcement by agencies and organizations, the licensing agreement could require the licensee company to permit "testing" – what some might call "deceptive audits" – by which people who do not really intend to take jobs or remain in jobs pose as applicants or employees to test the company's compliance with the licensing agreement. Testing is used regularly in making sure that minorities aren't discriminated against in federal housing programs. States also use testing to judge stores' compliance with laws against the purchase of alcohol or cigarettes by minors. Similarly here, testers

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[71] The website of the Orthodox Union carries a short article that illustrates the complexity of compliance. See Is Your Kosher Program Running Smoothly?, at http://www.ou.org/kosher/behindsymbol/kosherprog.htm (last visited May 21, 2004).

[72] Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (giving standing to civil rights organization to sue as fair housing plaintiff).

could apply for a posted job opening and present themselves as openly bisexual, gay or lesbian. They could ask about discrimination policies, domestic partner benefits, or LGBT employee groups. They might even take the jobs temporarily, without a bona fide intention of working for the company, just to see whether the policies are actually followed once employees enter the company.

Corporate consent to potential auditing is important because it can reduce the risk that the auditor will be sued by the corporation. In one case, a company subject to similar testing sued and obtained a large jury verdict against the testing entity. In *Food Lion v. ABC,* Food Lion brought a tort action when ABC broadcast videotape of unwholesome food handling practices. The videotape had been obtained by ABC reporters who gained employment in Food Lion supermarkets by misrepresentation. The plaintiff alleged fraud, employee disloyalty, and unfair trade practices. The jury returned a verdict for the plaintiff, awarding $1,402 in compensatory damages and over $5 million in punitive damages, which the trial judge reduced to $315,000 through remittitur. On appeal, the court rejected Food Lion's fraud claim, because the reporters were at-will employees for an indefinite period, and Food Lion could show no reliance on their misrepresentations in training them and paying their wages. With respect to the claims of employee disloyalty, however, the court held that the reporters intended to act against the interests of the plaintiff and were liable in tort. The reporters' disloyalty also caused the reporters to exceed the consent Food Lion granted them to enter plaintiff's premises; the reporters therefore committed trespass. The court rejected Food Lion's claim that misrepresentations on the job applications alone could vitiate Food Lion's consent.

To avoid anything resembling the Food Lion case, the entity licensing the Fair Employment mark might include in the licensing agreement a clause making clear that use of the mark is conditioned upon consent to random testing. This could create incentives for licensees to comply

with the mark's requirements, and in the event testing did occur, preempt any claims of fraud or trespass they might bring arising from the testing.

While there are strong arguments for empowering advocacy groups like HRC to both audit and bring suit against licensees, we have chosen, in the spirit of incrementalism, to maintain a narrow set of potential plaintiffs and enforcement tools for the initial version of the license. Real progress can be made just by endowing the direct victims of discrimination with a power to sue. And to our minds, the costs of scaring away potential licensees could outweigh these concrete benefits if the licensing scheme becomes too ambitious or complex. By expressly waiving any right to sue for violations of the non-discrimination promise, our license agreement makes clear that our attitudes toward enforcement are inconsequential. Our transparent passivity is one less thing for employers to worry about when deciding whether to commit to the licensee.

A more modest alternative would be to use a group enforcement system as a substitute for individual enforcement. Instead of our proposed system of private causes of action with damages and no auditing, one could instead have a system of vigorous auditing and no damages. Under this alternative, loss of the mark would be the only consequence of discriminating. Potential licensors would not have to worry about potential dollar damages for violating the non-discrimination promise because the only consequence of such a finding would be loss of the mark. As a remedial matter, this alternative is close to the structure of the HRC 100% mark. The HRC takes responsibility for enforcing compliance and the consequences of negative assessments are purely informational – loss of the mark and negative publicity. While this represents a plausible incremental alternative, we prefer replicating ENDA rights with legally binding causes of action – at least to the extent that we

can induce a substantial number of employers to sign. The next section will argue that it is plausible to expect that a substantial number of employers may be willing to sign.

III. Marketing Non-Discrimination

This section takes on the hard question of why a company might be willing to sign up for potential legal liability. One response to the mark is that it's a non-starter because no general counsel worth her salt would ever allow a company to volunteer for liability. But this surely can't be right as a matter of a priori theory. Every contract – every promise, every warranty, every representation of fact – is a volunteering for potential legal liability. Business is the art of calculated volunteering and risk-taking. The crucial empirical question is whether the benefits of licensing the mark will ever outweigh the costs.

This section explores the potential benefits of licensing. In large part these will be the marketing benefits of being seen as a non-discriminator. But the section is also about marketing in a second sense. We are also interested in identifying the set of employers to whom we might be able to market the licensing agreement. This is not just a theoretical exercise. The publication of this article kicks off our campaign to cover 100,000 employees in the next year. This section attempts to develop a positive theory of identifying the conditions under which an employer's benefits are likely to outweigh its costs of adoption. We will ultimately identify a number of factors, but among the most likely signatories are employers:

- that are located in 15 states with statutes that already grant private rights of action for sexual orientation discrimination;
- that have independently included sexual orientation in their non-discrimination policy or have publicly announced support for ENDA;

- that sell to government entities requiring contractors not to discriminate on the basis of sexual orientation; or
- that have smaller market shares.

The first two characteristics describe employers that face smaller additional costs of signing, while the last (smaller market share) describes an employer for which we predict the net gains in demand will be particularly high.

A. The Incremental Costs

As an initial matter, it is important to get a handle on the magnitude of the potential litigation risk for companies that become licensees. Earlier we emphasized that the experience of licensees themselves would provide valuable information on the likely litigation rates that one might see under ENDA. But it turns out that the United States General Accounting Office has already compiled valuable information on the number of complaints filed under state statutes that prohibit employment discrimination on the basis of sexual orientation.[73] In 2000, the GAO analyzed the claim rates in 11 states with statutory prohibitions.[74] The study reported the number of claims of sexual orientation discrimination made in each state in each year. But the study failed to analyze the rate of claiming relative to the number employees in each state.[75] When we combine the GAO claim data together with information from the Bureau of Labor Statistics on yearly levels of state employment, we can

[73] GAO letter, Sexual Orientation Based Employment Discrimination: States' Experience with Statutory Prohibitions Since 1997 to the Honorable James M. Jeffords, Chairman, Committee on Health, Education, Labor and Pensions (April 28, 2000).
[74] Id. at 7 (these were that states that had claim data available).
[75] It instead calculated the proportion of state discrimination complaints that were based on claims of sexual orientation. Under this analysis, one finds that Vermont experienced a higher proportion of sexual orientation complaints than other states. But this might be an artifact of Vermont having fewer racial and ethnic minority workers than other states. It does not tell us about the expected additional risk that employers face in Vermont because the employment protections for gay workers.

more directly assess the incremental litigation risk created by prohibitions on sexual orientation discrimination.[76]

Table 1: Analysis of Litigation Rates and Expected Costs of State Prohibitions

	Employees Per Complaint	Gay Employees Per Complaint	% of Gay Employees Filing Complaints	Cost Per Employee	Cost Per Gay Employee
Average	59,739	1792	0.06%	$ 1.67	$ 55.80
Maximium	294,550	8,837	0.18%	$ 5.32	$ 177.22
Minimum	18,809	564	0.01%	$ 0.34	$ 11.32
Standard Deviation	55,309	1,659	0.04%	$ 1.23	$ 41.09

Notes: Complaint Data taken from GAO Report, supra note xxx; Employment Data taken from Bureau of Labor Statistic Report, surpra note xxx. In the end there were 67 state-year observations. "Gay Employee" calculations assume 3% of employees are gay or lesbian. "Cost" calculations assume that employer expects average complaint to cost $100,000.

Table 1 shows the results of the analysis. We find that overall the rate of complaining is relatively low. Averaging over the 67 state-year observations in the data, we find almost 60,000 workers for every sexual orientation complaint filed. The lowest claiming rate was New Hampshire in 1998 where there was only 1 complaint for every 294,550 employees (the highest claiming rate was found in Massachusetts in 1999 where there were still over 18,000 employees for every complaint). The second column recalculates the complaint rate in terms of gay employees – arbitrarily assuming that 3% of all employees are gay or lesbian.[77] The analysis suggests that in an average year only 1 out of every 1792 gay employees filed a complaint. In other words, the probability that a gay employee will file a sexual orientation charge in any year is six-tenths of one

[76] The number of employees comes from the U.S. Department of Labor, Bureau of Labor Statistics and can be accessed at http://data.bls.gov/PDQ/outside.jsp?survey=sm. The employment number used is the total number of non-agricultural employees for a given state in a given year. Employment numbers are given on a monthly basis, so we used the average monthly employment for our annual data.

[77] *See* Jennifer Gerarda Brown, Competitive *Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 SO CAL L REV 745, 776-779 (1995) (conservatively adopting 3%, based upon surveys and other social scientific research). The point of this exercise is to give a ball park estimate for the magnitude of the rate. Since the second

percent. Again the lowest rates of claiming were found respectively in New Hampshire in 1998 (where 1 in 8837 gay employees filed complaints) and the highest in Massachusetts in 1999 (where 1 in 564 gay employees filed complaints).

To get a handle of the economic costs to employers of such complaints, Table 1 also reports the average costs per employee assuming that the expected average costs for an employer of responding to a complaint (including costs of diverted attention, attorney fees, legal damages, etc.) is $100,000. This is a ball-park estimate (possibly generous) which is only an attempt to measure the probable magnitude of the costs of this new type of liability. Table 1 suggests that the overall costs to date have been low. The average cost of these laws per employee is less than $2 per year ($1.67).

The final column of Table 1 calculates the expected annual costs per gay employee. Here we see a more substantial average cost: about $56 per year. Again Massachusetts (in 1999) and New Hampshire (in 1998) were the outliers. On net, for each additional year a statute has been in effect, the expected annual cost per employee rises by 9.7 cents. [78]

This analysis suggests that the state statutes have not substantially increased the overall wage bill. Measured on a per-employee or a per-gay employee basis, it is hard to think that the costs of responding to litigation complaints is driving employer resistance to making binding non-discrimination promises.[79]

Concerns about added litigation expense provide an even weaker excuse for employers in places that prohibit sexual orientation discrimination in employment by state statute. There are

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column is merely the first column multiplied by the proportion of workers who are gay, readers can easily calculate claims rates based on alternative assumptions.

[78] An OLS regression of the annual costs per employee on a variety of factors suggests that the general cost is decreasing over time, but for each state, costs increase the longer the law is in effect. The regression controlled for "year of the observation," "years law has been in effect in this state" and 10 state dummies. The background data and analysis is publicly downloadable at www.law.yale.edu/ayres/

currently 17 states (including the District of Columbia) that legislatively prohibited such discrimination.[80] Adopting the mark exposes employers in these states to no additional liability because they are independently amenable to suit under the state analog to the license. Indeed, the laws in many of these states are more expansive then the Fair Employment mark duties, because they include the possibility of punitive damages, open employers to the potential for disparate impact claims, or have been interpreted to cover gender identity and expression.[81] The benefits of protecting workers in these states with the Fair Employment Mark are greatly reduced, but so too are the marginal costs of providing this contractual coverage.

A similar argument applies to employers who have independently included sexual orientation within their non-discrimination policy. Employers who have already committed themselves not to discriminate on the basis sexual orientation have little to lose in the way of legal liability by signing the FEM license. But the issue is complicated by the uncertain legal effect of non-discrimination policies. It might come as a surprise to some readers, but in some jurisdictions the majestic language

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[79] Infra at ? we will consider whether the threat of consumer boycotts provides an alternative cost basis.

[80] According to the National Gay and Lesbian Task Force, 47% of the U.S. population lives in jurisdictions that have adopted nondiscrimination laws. This includes 38% who live in states with such laws; another 9% are covered by city or county law. *See* Sean Cahill, *The Glass Nearly Half Full: 47% of U.S. Population Lives in Jurisdiction with Sexual Orientation Nondiscrimination Law,* available at http://www.thetaskforce.org/downloads/GlassHalfFull.pdf, last visited April 25, 2005. The states are California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, and Wisconsin. See *Laws/Legal Resources Affecting GLBT People in the Workplace,* http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/Laws_Legal_Resources2/Workplace_Laws_Legal_Resources.htm, last visited April 25, 2005.

[81] See, e.g., N.J.S.A.10:5-1 et seq.; Office of the Attorney General Division on Civil Rights, web site devoted to information regarding the statute, http://www.state.nj.us/lps/dcr/employ.html, last visited April 25, 2005 (statute includes disparate impact claims); N.Y. Exec. L. Art. 15 §§ 290-300; California AB 196 (amending Fair Employment and Housing law to include gender identity and gender status); California Omnibus Labor and Employment Non-Discrimination Act, AB 2900 (amending existing labor and employment non-discrimination provisions in California law to be consistent with the non-discrimination provisions of the Fair Employment and Housing Act (FEHA) – including prohibitions on discrimination on the basis of gender identity); see Equality California AB 2900 fact sheet, http://www.eqca.org/atf/cf/{687DF34F-6480-4BCD-9C2B-1F33FD8E1294}/AB_2900_factsheet.pdf, last visited April 25, 2005. *See generally* Transgender Law & Policy Institute and National Gay & Lesbian Task Force, *Scope of*

of the "policies" does not constitute a legally binding "promise." Employers who include sexual orientation in their non-discrimination policies have been known to turn around and claim that they have no legal duty not to discriminate – and they sometimes win.

Cases considering the contractual enforceability of nondiscrimination provisions in employee handbooks and company policies follow a somewhat similar structure. They start with the at-will presumption, namely that an employment relationship is presumed to be terminable at will on both sides. Sometimes, courts go on to rule that handbooks or policies *can* create enforceable obligations (typically by establishing specific procedures or criteria for termination). In a smaller number of cases, the courts consider whether the specific nondiscrimination provision at issue is enforceable.

Some courts have held that even very clear language in an employee handbook (e.g., "No employee shall be dismissed without just cause") was unenforceable under contract because it did not meet the traditional requirements of contract formation.[82] For example, in Joachim v. AT&T Information Systems, the Fifth Circuit affirmed summary judgment against a plaintiff who invoked

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Explicitly Transgender-Inclusive Anti-Discrimination Laws, http://www.transgenderlaw.org/ndlaws/ngltftlpichart.pdf, last visited April 25, 2005 (listing states and towns with employment protections for transgendered people).

[82]Joachim v. AT & T Information Systems, 793 F.2d 113 (5th Cir. 1986) (per curiam) (A T & T's personnel handbook said that sexual orientation would not be used as a basis for job discrimination or termination; plaintiff alleged that he was terminated because he was gay, but court held that "[E]mployee handbooks 'constituted no more than general guidelines,' and did not create a contractual right in the employees.") (quoting Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex.App. 1982); Poree v. Lakewind East Apartments, 1994 WL 705428 at *2 (E.D. La. 1994) (although employee handbook described a company a policy of nondiscrimination and plaintiff alleged racial discrimination in violation of that policy, complaint dismissed because "under Louisiana law, employee handbooks and personnel policy manuals do not in themselves create contractual rights between the employer and employee."); Hillie v. Mutual of Omaha Ins. Co., 245 Neb. 219, 224 (1994) (suggesting that any language in a handbook that reserves discretion in the employer to (a) follow handbook procedures, or (b) fire the employee at will has effect of negating the existence of a contractual promise not to discriminate); Johnson v. National Beef Packing Co., 220 Kan. 52, 55 (1976) (although company policy manual said, "No employee shall be dismissed without just cause," court held this "was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy."); Morosetti v. La. Land and Exploration Co., 522 Pa. 492, 495-96 (1989) (when company circulated a severance pay policy, but later denied severance pay to several employees, court held no contract. "A company may indeed have a policy upon which they intend to act, given certain circumstances or events, but unless they communicate that policy as part of a definite offer of employment they are free to change as events may require.").

the employer's handbook when complaining of sexual orientation discrimination, because the court concluded that the handbook did not form a contract. [83]

The issue is complicated because the legal enforceability of non-discrimination policies (and employee handbooks more generally) is in flux. Some courts have held that nondiscrimination provisions *can* give rise to enforceable obligations.[84] For example, Albertus Magnus College (a school physically located between our home institutions of Yale and Quinnipiac) was unable to persuade a federal district court in 2000 that its non-discrimination policy was not an enforceable contract under state law.[85]

Arizona has an open-ended test that relies heavily on particular facts to determine whether handbook language is enforceable. This test is motivated by the policy that "if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory."[86] California also

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[83] Joachim v. AT&T Info. Sys., 793 F.2d 113, 114 (5th Cir. 1986).

[84] *See, e.g.*, Adleta v. General Elec., 1996 WL 365783 at *4 -*5 (S.D. Ohio 1996) ("Ohio appears to recognize a cause of action based upon a company's employment policies and procedures. . . . [i]n order to create a binding obligation, these representations must satisfy the traditional elements of contract law—namely, offer, acceptance and consideration."); Black v. Baker Oil Tools, Inc., 107 F.3d 1457, 1462 (10th Cir. 1997) (court held that "the promise that '[a]ll relations and decisions pertaining to employment ... [and] terminations ... will be executed without regard to ... physical ... handicap ....' is more than a mere 'vague assurance' or 'puffery,' but rather is a 'substantive restriction' on Baker Oil's ability to terminate its employees;" still, plaintiff must give consideration for this obligation); Johnson v. Celsius Energy Co., 1989 WL 260154, at *4 (D.Wyo. 1989) (when defendant's employee handbook "*prohibits* unlawful discrimination in all aspects and conditions of employment, including hiring, training, advancement, compensation, transfers, benefits, and terminations," court held that such language negates employment at-will, because it "creates an expectation on the part of an employee that [the provision] will be followed, inducing an employee to continue his employment. A handbook provision such as this negates employment at-will.") (citations and internal quotation marks omitted; emphasis added).

[85] Hartwig v. Albertus Magnus Coll., 93 F. Supp. 2d 200 (D. Conn. 2000); see also Durham Life Ins. v. Evans, No. CIV.A.94-0801, 1994 WL 447406, at *2–3 (E.D. Pa. Aug. 19, 1994) (allowing employee's claim for breach of contract in sexual harassment suit to proceed), aff'd, 39 F.3d 1169 (3d Cir. 1994).

[86] Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 548 (1984). It should be noted that the employee's reliance is not necessary: it is "only one of several factors that are relevant in determining whether a particular policy was intended by the parties to modify an at-will agreement." Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 383 (1985).

has an open-ended, multi-factor test examining "the totality of the circumstances…. Every case thus turns on its own facts."[87] Massachusetts recently liberalized its test for determining whether company policies can give rise to contractual obligations, finding contractual language in a personnel manual because it "g[a]ve each employee the right to expect that she will be treated fairly" even though there was no express language guaranteeing discharge only for cause.[88]

Like the court in Arizona, the Massachusetts Supreme Court was driven by a desire for fundamental fairness:

> Management distributes personnel manuals because it is thought to be in its best interests to do so. Such a practice encourages employee security, satisfaction, and loyalty and a sense that every employee will be treated fairly and equally. Management expects that employees will adhere to the obligations that the manual sets forth. Courts recently have been reluctant to permit management to reap the benefits of a personnel manual and at the same time avoid promises freely made in the manual that employees reasonably believed were part of their arrangement with the employer. Management voluntarily offers, and defines the terms of, any benefit set forth in its unbargained for personnel manual. The employees may have a reasonable expectancy that management will adhere to a manual's provisions.[89]

Although one (federal) court recently applied New Jersey law to rule nondiscrimination provisions unenforceable, the New Jersey Supreme Court has found handbook language enforceable when it used definite, promissory language such as "efforts *will be made* to take one or more of the following measures."[90] This language even overrode an express disclaimer found elsewhere in the handbook.[91]

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[87] Guz v. Bechtel Nat. Inc., 24 Cal.4th 317, 337 (2000).
[88] O'Brien v. New England Tel. & Tel. Co., 422 Mass. 686, 695 (1996).
[89] *Id.* at 694.
[90] Geldreich v. American Cyanide Co., 691 A.2d 423, 427 (N.J. 1997).
[91] Id.

The trend is away from requiring that the employee knew or relied on the policy.[92] But courts still at times refuse to enforce non-discrimination policies – finding that the policies were too vague or were not intended to be legally enforceable.[93]

Non-discrimination policies may also fail to cover discrimination against rejected applicants. Since the rejected applicant is not hired, courts find no enforceable promise between the applicant and the employer. Applicants may argue that even if there is not an employment contract, there was an independent application contract whereby the applicant agreed to apply in return for the employer's promise to consider the application on a non-discriminatory basis. But courts might resurrect the requirement that the applicant knew and actually relied on the employer policy. In contrast, the Fair Employment Mark license expressly grants rejected applicants rights to sue for discrimination. Rejected applicants thus represent another divergence in potential legal risk even for employers who have included sexual orientation in their non-discrimination policy.

At the moment, the most that one can say is that employer nondiscrimination policies are only probabilistically enforceable. The magnitude of the probability depends upon the jurisdiction, whether the plaintiff is an applicant or an employee, and details of how the policy was promulgated and presented. The Fair Employment Mark represents a real gain for civil rights because it grants employees certain, as opposed to uncertain, rights to sue. The flip side of that coin, however, is that adopting the mark exposes some employers to higher potential liability. But since any employer who has voluntarily included sexual orientation in its non-discrimination clause already faces some

[92] See, e.g., Marfia v T.C. Ziraat Bankasi 903 F. Supp. 463 (SD NY 1995) (Employer Bank's "Non-Discrimination Policy" set forth in employee manual "surely can be read as a contractual limitation on the Bank's ability to discharge employees for discriminatory reasons"). But see Gruver v. Ezon Prods., Inc., 763 F. Supp. 772 (M.D. Pa. 1991) (to establish contractual violation, employee must establish that harassment policy in personnel manual induced her employment).

prospect of litigation, employers with inclusive non-discrimination policies have relatively less to fear in terms of litigation from signing the license.

Employer willingness to sign will of course turn on the benefits as well as these costs of signing. An analysis of litigation experience under state non-discrimination statutes suggests that the litigation risk of signing is in fact rather low. Moreover, employers who are bound by these state statutes or by their own voluntary policies of non-discrimination have even less reason to resist committing to non-discrimination. Employers may worry instead that adopting the mark will expose them to consumer boycotts that will reduce the demand for their products. We'll expressly address this concern below. But the idea of added litigation risk is not a conversation stopper – if employers are willing to rationally assess its true magnitude.

B. Satisfying Input Demand

The next section will assess the impact of the mark on consumer demand. But before doing that, it is useful to assess the impact of the license on the flow of various inputs to a firm. Most basically, adopting the Fair Employment mark may be an attractive mechanism for recruiting gay and lesbian employees. Members of the gay community have strong incentives to learn about the non-discrimination policies of perspective employers and, other things being equal, are likely to prefer employers that promise not to discriminate. Some employers may even prefer the mark to the passage of ENDA because it gives them a means of meaningfully distinguishing themselves from other employers.

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[93] E.g., Blaise-Williams v. Sumitomo Bank, 592 N.Y.S.2d 41, 42 (N.Y. App. Div. 1993) (ruling that general antidiscrimination statement in handbook too vague to be enforceable).

The Fair Employment Mark is particularly helpful here because it is something that the employer commits to before it negotiates contracts with individual employees. Employees who value non-discrimination may be reluctant to propose such a term because it might also signal to the employer that the potential employees are litigious.[94] But by adopting the mark, the employer can satisfy employee demand (at low cost) without requiring this kind of signaling.

Of course, one needs to consider whether adopting the mark would make other employees less likely to work for the employer. At least as a theoretical matter, adoption could induce employee boycotts. While worthy of consideration, we doubt that this is a serious concern. At least with regard to employers who have voluntarily included sexual orientation in their non-discrimination policies, it is unlikely that there would be any additional adverse impact of adopting a formal commitment not to discriminate. And more generally, the public opinion is strongly in favor of equal employment opportunity. It is hard to imagine many applicants saying, "I *refuse* to work for Company X because it promises not to discriminate."

An employer's adoption of the mark might also be driven by employee preferences in another way. Unions might collectively bargain for adoption of the mark. Pride at Work, the AFL-CIO affiliate group that promotes LGBT employment equality, has already been successful in having formal non-discrimination promises included in union contracts.[95] But unions usually bargain for enforcement procedures that utilize union grievance procedures – and unions may be reluctant to

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[94] It is a well known result of contracting theory that defaults will become sticky when suggestions to alter the contract reflect badly on the proposer. Jason Scott Johnston, Strategic Bargaining and the Economic Theory of Contract Default Rules, 100 Yale L.J. 615 (1990); Ian Ayres & Robert Gertner, Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules, 101 Yale L.J. 729 (1992); Omri Ben Shahar, Sticky Defaults, -- FSU Law Rev -- (forthcoming 2005).

[95] For a guide to negotiating such contracts, see *Seven Easy Steps For Adding Domestic Partner Benefits To Your Union Contract*, Pride At Work, AFL-CIO Publication, April 2005, available at http://www.prideatwork.org/newscurtop.html, last visited April 20, 2005.

bargain for adoption of the mark because it allows individual union members independent private rights of action.[96]

Adopting the mark might also facilitate the flow of other inputs – including the certification of oversight organizations. Certifying organizations may urge or require adoption of a binding commitment not to discriminate. The Association of American Law Schools (AALS), for example, not only requires member schools to include sexual orientation in their own non-discrimination policies, but also to stop discrimination by employers utilizing the schools' career placement facilities.[97] But neither of these provisions requires a legally binding promise not to discriminate. For example, AALS Regulation 6.19 provides:

> A member school shall inform employers of its obligation under Bylaw 6-4(b) [the AALS's non-discrimination policy], and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b).[98]

"Providing an assurance" of a "willingness to observe the principles of equal opportunity" may well fall short of a promise not to discriminate. Indeed, many law schools fail to require a clear promise. For example, for years Yale Law School has merely required employers participating in the school's interview programs to sign the following "Non-Discrimination Statement":

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[96] Indeed, it is arguable that an employer's signing of the licensing agreement in any unionized setting might constitute a violation of its collective bargain duty. But no union to our knowledge has ever complained about inclusion of sexual orientation in non-discrimination policies which at least probabilistically also create independent rights of action.

[97] AALS By-Law 6-4

[98] AALS Regulation 6.19. AALS Bylaw 6-4(b) provides: "A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity."

> I, [Name of Representative] an authorized representative of [Name of Employer] affirm that said employer is aware of and complies with Yale Law School's nondiscrimination policy, as stated below:
>
> *Yale Law School reaffirms its policy against discriminatory employment practices. The law school does not countenance any form of discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients.*[99]

The legal effect of this document is not free from doubt. The representative is signing a "statement," not a "contract." She is "affirming," not "promising." The key question is whether "affirming that said employer . . . complies with" the law school policy of "not countenanc[ing] any form of discrimination based upon . . . sexual orientation" is a legally binding contractual commitment. And if it is, it is uncertain whether students have third-party beneficiary status to enforce violations of the promise.

But just as the HRC index could be easily changed to require binding legal commitments, the AALS provisions and the law school Non-Discrimination "Statements" could be easily changed to require promises. AALS Bylaw 6.4(b) could be amended to read:

> A member school shall ~~communicate to~~ require each employer to whom it furnishes assistance and facilities for interviewing and other placement functions ~~the school's firm expectation that the employer will~~ to promise to observe the principle of equal opportunity.

Or alternatively, the AALS might simply require that member schools (1) sign the Fair Employment license, and (2) require employers receiving placement assistance to sign the license.[100] Such a requirement – by a powerful input supplier – would in one fell swoop provide clear and enforceable private causes of action to the direct victims of employment discrimination.

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[99] http://www.law.yale.edu/outside/pdf/Career_Development/cdo-empreg05.pdf.

[100] A third and analogous regulation would be a requirement that member schools promise not to discriminate on the basis of sexual orientation in their own admissions. AALS Bylaw 6-4(a) currently requires that member schools "shall

The restrictions on employer recruiting are animated by law schools' desire not to have their facilities used in the service of discrimination. A similar motivation might apply to faculty recommendations. Many faculty would not want to participate in the evaluation process for an employer who retains the legal right to discriminate on the basis of sexual orientation. The Fair Employment mark gives faculty a means to make sure they steer clear for such employers. In the not-too-distant future, one could imagine that faculty might refuse to write recommendations to employers who refused to sign the license.

Beyond these requirements, input suppliers can powerfully impact the contracting equilibrium just by the way they frame questions. Consider for example NALP, the National Association for Law Placement. Its law firm questionnaire currently makes the open ended request: "State your organization's non-discrimination policy."[101] But imagine what would happen if instead it asked, "Has your organization promised not to discriminate on the basis of sexual orientation?" We predict that the vast majority of firms would check "Yes" and in so doing would probably give applicants an enforceable legal right to sue for violations of the promise.[102] Or alternatively, NALP could more directly exploit the subject of this article by asking: "Has your organization licensed the Fair Employment Mark?"

At the end of the day, adoption of the license is not just a recruitment tool, but for many employers it might be a way of staying in good graces with a variety of input suppliers – including certifying and membership organizations and outside evaluators. Both the push of institutional

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provide equality of opportunity . . . without discrimination . . . on the ground of . . . sexual orientation." But member schools need to provide applicants with a viable private cause of action – and few schools clearly do.

[101] http://www.nalp.org/forms/firmdir.pdf.

[102] An applicant who had been discriminated against could not only argue that it was an intended third-party beneficiary of the promise, she could argue that by checking the box on the NALP recruitment form the organization was offering not to discriminate in return for the applicant's application.

pressure (as already seen in the case of union and AALS requirements) and the pull of recruiting advantages (as seen in NALP disclosures of non-discrimination policies) may tip employers toward adoption.

C. Additional Consumer Demand

While upstream input suppliers may motivate some employers, the prospect of additional downstream demand as a motive for adoption is more directly tied to the idea of a certification mark. While the Fair Employment Mark certifies non-discrimination to potential employees, certification marks traditionally have been used as market tools to certify product quality to potential purchasers. In this section, we will explore the plausible impact of the mark on consumer demand -- first, in a world of "acoustic separation" (where sellers are able to convey a targeted message to gay rights supporters without signaling opponents) and subsequently in a world of full information where the prospect of consumer boycotts must be weighed against the benefits of consumer "buycotts."

1. Government Contractor Ordinances

But before delving into these questions of impact on generalized consumer demand, it is important appreciate the possible impact of what we might call "regulated demand." Just as the last section illustrated the potential impact of input pressure that has been brought to bear by particular unions and certifying organizations, a demand side pressure can be brought to bear by particularly powerful individual purchasers – namely the government.

Dozens of cities and counties prohibit public contractors from discriminating on the basis of sexual orientation.[103] Since San Francisco enacted its Equal Benefits Ordinance in 1997, similar laws have been enacted in Berkeley, Los Angeles, Oakland, San Mateo, Seattle, Minneapolis, Broward County, Florida, and Portland, Maine.[104]

These government entities in effect will only purchase goods and services from suppliers who promise not to discriminate. These contractor ordinances are at times redundant with state statutory prohibitions on employment discrimination. Thus, for example, San Jose's ordinance prohibiting discrimination by city contractors does not substantively affect any California supplier, who are independently prohibited from sexual orientation discrimination by state statute. But these contractor laws have potential bite in two different circumstances. First, they have sometimes been adopted by cities and counties located in jurisdictions that have not prohibited private employment discrimination on the basis of sexual orientation. For example, Phoenix and Cleveland require non-discrimination by city contractors but neither they nor the state prohibit discrimination by employers generally.[105] Second, even in places (such as San Jose) were employment discrimination by private employers is generally prohibited, the local ordinances can still have an impact – simply because local governments sometimes contract with out-of-state suppliers who would otherwise be allowed to discriminate.

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[103] *See generally* Wayne van der Meide, Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States The Policy Institute of the National Gay and Lesbian Task Force, January, 2000, available at http://www.thetaskforce.org/downloads/legeq99.pdf, last visited April 21, 2005.

[104] Cynthia G. Goldsmith, San Francisco Human Rights Commission, Five Year Report on the San Francisco Equal Benefits Oridinance, November 14, 2002, available at http://www.sfgov.org/site/sfhumanrights_page.asp?id=6295, last visited April 21, 2005

[105] Charter and Code of Phoenix. See generally, Ch. 18-4 ("Human Relations"); Cleveland City Code. (Amd. Ord. No. 77-94, 1/10/94) & (Amd. Ord. No. 272-96, 2/12/96.) Sec. 667.05; Private Employment: In regard only to private employers who have contracts with the City: Sec. 187.04 See also Town of Lake Park Code. See generally, Ch. 2, Art. V, Div 2, Sec. 2-110; Cleveland Heights City Code. See generally, Ch. 749 ("Housing Delivery System"). Also see, Ch.

But to date, local compliance officers have lacked an effective mechanism for assuring compliance. Much like the AALS and its members schools, the compliance officers have been satisfied with contractor assurances that they do not discriminate or the contractor's inclusion of sexual orientation in its non-discrimination policy. But as explained above, these non-discrimination policies are at times non-binding commitments, often failing to equip the victims of discrimination with effective enforcement mechanisms. The advent of the Fair Employment mark changes all this. Compliance officers can simply ask whether a contractor has signed the license. As we move forward to roll out the mark, we plan to urge local contractor compliance officers to consider promoting and/or requiring the use of the mark as a means of fulfilling the cities' requirements. At the very least, the mark should provide a credible commitment device for contractors who are trying to demonstrate their compliance with a city's non-discrimination mandate.

2. The Impact on Demand in a World of "Acoustic Separation"

An employer may worry that adopting the mark will promote a backlash of reduced demand. The very hostility toward gay, lesbian, and bisexual people that makes the protections of the mark valuable could also work against the mark. Opponents of gay rights can read product labels as well as allies, and some companies may refuse to use the mark out of fear of boycotts. But before considering the impact of boycotts, we first explore how the mark might work in a world with a kind of "acoustic separation" – that is, a world in which the proponents of gay rights learn of a firm's adoption, but the opponents of equality do not.[106]

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171 ("Administrative Code"). (Amd. Ord. No. 154- 1994 (AS), 1/3/95.) Private Employment: In regard only to private employers who have contracts with the City: Ch. 171.

[106] Meir Dan-Cohen, Decision Rules and Conduct Rules: On Accoustic Separation in Criminal Law, 97 HARV. L. REV. 625 (1984).

The benchmark of "acoustic separation" is not as outlandish as it might first appear. The kosher symbol provides one possible illustration. The "U" encircled by an "O" is so innocuous that many anti-Semites miss the signal, even though they might wish to punish companies that affirmatively market products to Jewish consumers. The Fair Employment mark proposed here would be similarly opaque. For consumers "in the know," the mark could create incentives to buy particular products. But there is nothing about the appearance of the mark as proposed to tie it to gay rights or gay people generally. Other, more explicitly "gay" symbols – a pink triangle, a rainbow flag, or the Greek letter lambda – would certainly be more transparent. Even consumers who'd never heard of the mark would know that the company using the symbol is positioning itself in sympathy with the gay community. But this more explicit positioning would also run the risk of alienating consumers who are hostile to gay rights (who will react to an explicitly "gay" symbol but not to a neutral one).

Moreover, an employer's adoption of the license gives the employer the option but not the duty to display the mark. The mark need not be displayed on every product or indeed on any product. Licensees may choose to display the mark selectively, in contexts where it is more likely that allies will see the mark. They might decide to display the mark only in certain advertisements or in certain states.

By reaching out to ally consumers, the Fair Employment Mark promotes a kind of "buycott." It allows equal rights proponents to "vote with the wallets." The time may be particularly ripe to troll for pent up equality demand. Progressives who are trapped in red states don't have a governmental outlet for their political perspective to be heard. Patronizing firms that have privately

adopted ENDA – have promised not to discriminate – is a pragmatic way of making progress on employment equality, particularly when local and federal legislatures are not ready to act.

Even opponents of marriage for same-sex couples could be counted as potential consumers of products bearing the mark. A frequent claim of marriage opponents is that they believe in treating gay people fairly, but they just think that marriage by definition is between a man and a woman. By embracing the Fair Employment mark either as licensees or consumers, marriage opponents can prove their bona fides as believers in employment equality.

In recent years, gay rights advocates have sometimes flexed the community's economic muscles. The "gay dollar" is now a recognized – if controversial -- phenomenon. By stamping or writing the words "gay dollar" on ordinary dollar bills, the gay community can tangibly signal the number of dollars that literally pass through gay hands. These marked dollars are meant to demonstrate the spending power of the gay community. The gay community and its supporters have sought to exercise that spending power positively. For example, when voters in Tampa, Florida, enacted an anti-gay rights ordinance, the Human Rights Task Force of Florida responded by instituting a buycott rather than a boycott. The group published a directory of businesses that have "'policies in support of gays and lesbians.'"[107] In the first five months of the directory's publication, the list grew from 105 to 430 entries.[108] Todd Simmons, spokesperson for the Human Rights Task Force of Florida, explained, "We decided on an approach that would empower us economically and politically. The buycott has improved our standing in the community. Businesses and other institutions have changed their policies to get in our book."[109]

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[107].Michael Wright, *Avoidance Tactics*, ATLANTIC , Oct. 1993, at 44, 48.
[108].Id.
[109] Id.

Large companies have launched advertising campaigns targeted to gay consumers, including AT&T, Anheuser-Busch, Apple Computer, Benetton, Philip Morris, Seagram, Sony, and Absolut.[110] The story of Absolut vodka illustrates the way gay and lesbian consumers demonstrate loyalty to supportive manufacturers and other businesses. Absolut, it seems, was one of the first major labels to advertise in gay publications. According to Rick Dean, Vice President of Overlooked Opinions, "The gay community tied it back -- Absolut was there on the back cover of gay publications before the others, and Absolut vodka is poured at gay bars."[111] George Slowik, publisher of *Out* magazine, notes that gay men and lesbians are "'an audience not accustomed to being courted, so they're more apt to notice who's supportive and who's not, particularly at this point. The first ones in will reap extra benefits in each category.'"[112] The same sort of loyalty that allows Absolut to "reap extra benefits" as the "first one in" could allow the first firms that adopt the mark to reap extra revenue from consumers wishing to show their support for nondiscrimination.[113]

M. V. Lee Badgett has examined the three distinct roles that gay, lesbian and bisexual people can play in an economic system: "consumers," "investors," and "producers."[114] Many companies have recognized the LGBT community as an important group of consumers, and have developed advertising to target this market. The concerns of gay people and their allies as investors are

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[110].Stuart Elliott, *A Sharper View of Gay Consumers*, N.Y. TIMES , June 9, 1994, at D1.

[111] Mary Gottschalk, Gay Cachet: Advertisers Get Wise to the Fact that the Gay and Lesbian Community is a $500 Billion a Year Gold Mine, SAN JOSE MERCURY NEWS, Sept. 19, 1993, at 1H, 7H..

[112] Id.

[113]This brand loyalty is also evident in the travel industry. According to one marketing executive, "All a mainstream company has to do is show up at a gay travel expo and because of brand loyalty, gay and gay-friendly travelers will use them and their business will increase." Stu Glauberman, *Gay Tourism: Island Companies Tap a Growing Market*, HONOLULU ADVERTISER , Feb. 14, 1994, at C1.

[114] M.V. Lee Badgett, Thinking Homo/Economically, in Overcoming Heterosexism and Homphobia: Strategies that Work 380 (James T. Sears & Walter L. Williams, eds. 1997).

reflected in rating systems that grade companies for their gay friendliness.[115] As producers, LGBT people get some recognition in nondiscrimination policies, statutes, and local ordinances; employee benefit programs; and other incentives offered by companies that wish to recruit talented people, regardless of sexual orientation. Tools like the HRC Equality Index can help potential employees to identify the companies that respect LGBT people as producers. The Fair Employment Mark complements these existing strategies as it conveys information about companies' employment practices to wider audience in a decentralized way. In a sense, the Mark completes the circle by allowing gay and non-gay consumers to tie their purchasing decisions to the fair treatment of LGBT employees.

A key characteristic of the Mark is that it could facilitate heterosexual support for gay rights in ways that need not be public. This could create opportunities to work for gay rights for a new group of "stealth" supporters – people who, for any number of reasons, and not able or willing to act publicly but who wish at the very least to spend their money responsibly. As heterosexual consumers begin to feel aligned with the cause through their purchasing decisions, other, more public forms of support might start to feel comfortable as well. Perhaps most importantly, from simple, every day consumer choices, an internal sense of connection to and identification with LGBT people could grow. Remaining open to these internal changes could be a key component of gay rights advocacy for many heterosexual supporters.

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[115] The Equality Project, for example, is "an investor coalition dedicated to supporting and espousing full adoption of the Equality Principles on Sexual Orientation and Gender Expression in the workplace through shareholder activism, education and community outreach." http://www.equalityproject.org/index.htm (last visited July 1, 2004). The HRC Equality Index also helps investors avoid discriminatory companies and direct their money to companies that treat LGBT employees fairly.

3. The Impact on Demand in a World with Boycotts

But notwithstanding the innocuous nature of the mark itself and notwithstanding the selective and targeted disclosure of the mark by licensees, it is still possible that adopting the mark will cause a licensee to lose some potential consumers of its goods or services. Adopting the mark may cause a conservative group to call for boycotts of the gay-friendly company. Even more troublesome, licensees must consider whether adoption will cause individual consumers to independently shift their consumption to other suppliers. Consumers may be turned off by the politicization of the product. The privacy of the grocery aisle, which liberates allies to purchase the product without being challenged, also may liberate opponents to buy a close substitute without being challenged. Indeed, the decision to switch might not even be based on conscious disapproval of the firm's adoption of the mark; it might be an unconscious or implicit attitude.[116] While boycotts are seldom effective,[117] the fear of individual, unconscious turn-offs should not be ignored by any profit maximizing producer.

The concern that the mark may disaffect some consumers may be particularly important for firms with large market shares. In concentrated industries, where a few companies have captured the market, each company has a lot to lose if it alienates a significant portion of the market. In such markets, a boycott could cause real economic loss if anti-gay consumers far outnumber pro-gay consumers. In such circumstances, it will always be in at least one company's self-interest to reject the mark – being known as the one company that is not "gay friendly" could help that company

[116] See generally A.G. Greenwald & Marjan Banaji, Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes 102 PSYCH. REV. 4 (1995).

[117] Brown, Competitive Federalism, supra note ?, at 812.

capture the anti-gay consumers' business (just as the Fair Employment mark would help companies capture the business of pro-gay consumers).

But in markets with many firms, the story is very different. Even in a world where opponents of employment equality substantially outnumber equality advocates, there will be robust incentives for a few of the firms to adopt the mark. To see how this works, let's imagine a stylized market consisting of 10 hammer makers. Suppose that hammers are so uniform that consumers are completely indifferent about the source of hammers they buy; consumers purchase randomly, so each manufacturer gets 10% of the market. Suppose further that 5% of customers support equal employment rights for gay men and lesbians so strongly that they will go out of their way to buy hammers from the company that treats gay employees fairly.[118] We are not assuming that 5% would cut off their arm to further gay rights, but other things being equal (such as price) they would strongly prefer sellers who promised not to discriminate. But imagine that four times as many consumers – 20% – actively dislike or disapprove of gays (enough that they'll avoid purchasing from companies that treat gay employees fairly). The remaining seventy five per cent of the consumers don't care one way or the other.

Now consider what happens to the first company adopting the Fair Employment mark. Even if that company loses all of its business from the anti-gay consumers, that difference is more than made up by the pro-gay consumers who are induced to buy products bearing the mark. The first mover increases from a market share of 10% (before using the mark) to a 12.5% market share after adopting the Fair Employment mark. This increase in demand results despite the fact that the

[118]. On the one hand, this seems to be an extremely conservative assumption, since 88% of Americans oppose employment discrimination on the basis of sexual orientation, according to a 2003 Gallup Poll. Question Id: USGALLUP .01M010 R30. See also L.A. Times Poll, supra note 21. On the other hand, this group of Americans might not feel so strongly about the issue that they would make purchasing decisions based upon it.

company loses its share of the anti-gay customers' business. The company is still getting its random tenth of the consumers who don't care (one-tenth of 75% = 7.5%), plus *all* of the consumers who support gay rights (5%).

How can this be -- that a firm has an incentive to adopt the mark when consumers who dislike the mark outnumber those who like it four to one? The answer is that most of the opponents weren't going to buy from the first-adopter firm anyway. Because there were 10 identical firms in the market, the first adopter only had a 10% chance of getting *any* consumer to buy. From the first-adopter's perspectives, the anti-gay consumers fall from a 10% chance to a 0% chance of buying. But the pro-gay consumers rise from a 10% chance to a 100% chance of buying. Because of this disproportionate change in shifting probabilities, the buycott effect is likely to be much stronger than the boycott effect for first-adopters in markets with many firms. Of course, in the real world the pro-gay consumers will not go all the way to 100% probability of buying – but the underlying idea that first-adopters will not be deterred, even in the face of considerable anti-gay consumer sentiment, still holds true.

Indeed, in our stylized example, a second firm will have an incentive to use the mark as well. The two "marked" firms will now split the pro-gay consumers, so each gets 10% of the market (7.5% (1/10th of consumers who don't care) plus 2.5% (half the pro-gay consumers)).[119] In equilibrium, all the firms will have the same 10% market shares that they began with. An economist at Columbia piped up at a presentation of this paper and was heard to say, "So the mark didn't make any difference." How wrong he was! Even though market shares settle back to their pre-mark

[119] Some of the remaining eight firms may affirmatively signal their antipathy for gays to gain some of the anti-gay consumers.

status, employment protections for 20% of gay and lesbian employees in the industry have improved.

This example suggests that the Fair Employment mark could create some very strong "first mover" advantages -- if only to capture the gay-supportive consumers who remain brand loyal even after other brands adopt the mark.[120] In a generalized version of this example, we would expect at least one adopter as long as there are at least 5 firms.[121] But there is also a very strong incentive for another company to become the "second mover."

If we more realistically assume that distribution of pre-mark market share is not random, we still see that producers with small market shares will have incentives to adopt the mark. Assume a 10-company industry in which 5 companies have 15% market shares and 5 companies have 5% market shares. If one of the smaller-share companies were to adopt the mark, it would stand to move from a 5% share to a 7.75% share (all of the pro gay consumers (5%) plus one-twentieth of the neutral consumers (3.75%) minus one-twentieth of the anti-gay consumers (1%)). This is a sizable jump, one that would raise the company's sales by more than 50%. As long as one firm in the industry has less than a 20% market share, there will be at least one firm with an economic incentive to adopt the license. Additional firms will adopt as long as the market share of the adopters is less than 25%.[122] In this asymmetric market share example, in equilibrium, all four firms that start with 5% market shares will have incentives to adopt the mark.

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[120] The first mover also has a better chance of selling the product to anti-gay consumers before they catch on to the meaning of the mark, but we hesitate to give much weight to this sneaky motivation.

[121] If P = proportion of pro-gay consumers and A = proportion of anti-gay consumers and N = number of firms, then it can be shown that at least one firm will adopt the license so long as: $(N-1)P > A$. The largest integer smaller than $N*P/A$ defines the number of firms that will adopt.

[122] More generally (using the notation of the previous note) firms will continue to adopt as long as the total market share of adopting firms is below $P/(P+A)$.

This example shows that the potential benefits of using the Fair Employment Mark could outweigh the potential costs, at least for a few companies. But we should emphasize that the assumed 4 to 1 ratio of anti-gay to pro-gay consumers is wildly at odds with the public attitude toward equal employment rights. In a world where 88% of Gallop respondents say it is wrong to discriminate in employment on the basis of sexual orientation, it is inconceivable that 20% of consumers would actively shun a product that promised not to discriminate. Instead the point of the exercise is to emphasize that the threat of demand reduction does not pose an impediment to adoption of the mark by part of an industry. Just as smallness is a spur to Delaware's innovation in corporate federalism,[123] theory suggests that fringe firms with smaller market shares should be lead the way with the Fair Employment Mark.

D. Corporate Morality

Firms that have already publicly embraced non-discrimination on the basis of sexual orientation are likely adopters of the Fair Employment license. Organizations that identify with a commitment to the cause of equality may adopt the mark not because of the foregoing recruiting or marketing benefits, but merely because licensing is consistent with organization's self-conception.

While it is natural to think of employers as corporations with a single-minded profit motive, there are many non-profit employers who by definition pursue other goals. For example, universities are non-profits that employ substantial numbers of people. It should be no surprise from an organizational identity perspective that these academic non-profits have taken a lead in including sexual orientation in their non-discrimination policies. Employers that have included sexual

[123] Brown, Competitive Federalism, supra note ? at 819; Roberta Romano, Law as Product: Some Pieces of the Incorporation Puzzle , 1 J L Econ & Org 225 (1985).

orientation in their non-discrimination policies are therefore natural targets for adoption of the Fair Employment Mark.

A subset of these employers who have already adopted non-discrimination policies are especially likely to adopt. The Human Rights Campaign has been successful in convincing over a hundred corporations to endorse the passage of ENDA.[124] These corporations that have said they want to be bound by the substantive duties of ENDA would be hard pressed not to adopt a license imposing these same duties.

Of course, a corporation might argue that it would only be willing to take on these duties if its competitors had to as well. After all, it is not unreasonable to support a 50-cent gasoline tax if borne by all, but protest if asked to pay it individually. Given our earlier empiricism on claiming rates under state nondiscrimination statutes, however, it is unlikely that fear of competitive cost disadvantage would chill an endorser's willingness to adopt the license.

At the end of the day, we believe there are strong reasons to believe that a predictable subset of employers will sign the licensing agreement. The identifiable employers would be those who (1) have relatively small market shares; (2) have already included sexual orientation in their non-discrimination policies or publicly endorsed ENDA; (3) supply cities that require public contractors not to discriminate; (4) are members of certifying organization that prohibit discrimination; or (5) are located in jurisdictions that independently prohibit sexual orientation discrimination.

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[124] The list includes a variety of blue chip stocks and household names: Agilent Technologies Inc., Apple Computer, Inc., AT&T, Bausch & Lomb, Ben & Jerry's Homemade Ice Cream, Borland International, BP, Capital One Financial Corp., Charles Schwab & Co. Inc., Chubb Corp., Cisco Systems, Coors Brewing Co., Corning Inc., Digi-Net Syndication, Eastman Kodak, Electronic Arts, FleetBoston Financial Corp., Trillium Asset Management, General Mills, Hewlett-Packard Co., Hill and Knowlton, Honeywell, IBM, Imation, Intel Corp., JP Morgan Chase & Co., John Hancock Financial Services Inc., Kaiser Permanente, Levi Strauss & Co., Louis Dreyfus Corp., MFS Investment Management, Microsoft, Millipore Corp., Nationwide, Nike Inc., Oracle Corp., Prudential Insurance Co., Quark, SGI, Shell Oil Co.,

Of course, some employers might believe that the benefits of signing outweigh their costs, but still resist because they fear "slippery slopes." If they make this promise, they might worry, a never-ending parade of other certification promises will follow, with pressure applied to sign each one. This argument, like others, will have different salience for different employers. The same slippery slope argument could be used to resist including additional categories in a firm's non-discrimination policy: if an employer includes sexual orientation, it will then be pressured to include gender identity (or attractiveness, or weight). But employers who have been willing to take on this slippery slope risk in including sexual orientation in their non-discrimination policies are more likely to be willing to take on some additional slippery slope risk with regard to legal commitments not to discriminate.

IV Responding to Criticisms

The last section was concerned with whether too few employers would sign the licensing agreement. Here we ask the converse question: will too many employers sign? Specifically, this section takes on four different criticisms concerning privatization of civil right duties. Could it be that giving employers a convenient mechanism to promise not to discriminate somehow hurts the cause of employment equality?

A. Reducing Demand for a Statutory Prohibition

As an initial matter, we should consider whether the Fair Employment Mark might take the wind out of the sails of the push for passage of ENDA itself. We have argued for the mark as an incremental strategy that could be used as a step in the process of compelling all employers not to

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Software Spectrum Inc., State Street Corp., The Quaker Oats Company, Triarc Beverage Group, Verizon

discriminate on the basis of sexual orientation. But a pervasive concern with incrementalism is the possibility that it will cause a movement to stall out short of its ultimate goal. The privatization of ENDA duties might work as a substitute, rather than a complement, to national passage of legislation protecting lesbian and gay people in employment.

This concern recently drove the leading marriage equality group in Connecticut, Loves Makes a Family, to oppose a civil union bill for same-sex couples. Although the civil union bill would immediately grant same-sex couples all of the legal rights of marriage (and represent the first time that a state legislature free from court order had conferred full benefits),[125] the group worried that legalizing civil union would take the "wind out of the sails" of the equal marriage rights movement. The group's executive director, Anne Stanback, testified to a joint judiciary committee of the general assembly that a civil union bill would not be a stepping stone to marriage but a stopping point.[126] She initially testified that if a civil union bill was brought up for a vote that Love Makes a Family would lobby for its defeat.[127]

As a theoretical matter, we might be agnostic about whether voluntary adoption by a portion of employers would produce either increase or decrease demand for a mandatory ENDA-like statute. We might expect a snowball effect as momentum grows behind employment protections for gay and lesbian people. But from a public choice perspective, if adoption of the mark satisfied the demands of the most ardent proponents of non-discrimination, the Fair Employment mark could reduce the

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Communications, Wainwright Bank, Worldspan L.P., Xerox, Yahoo Inc.

[125] California has come close with domestic partnership, however.

[126] Daniela Altimari**,** *Lawmakers Favor Civil Unions, Despite Objections***,** The Hartford Courant, Feb. 8, 2005 ("Stanback said that she would rather the legislature do nothing than approve civil unions, which she said aren't a 'stepping stone' on the road to gay marriage but a stopping point in the debate. Since Vermont enacted civil unions, its legislature now has no interest in revisiting gay marriage, she said.")

pressure for a federal statute. City and state laws prohibiting discrimination could have a similar impact. Charles Shipan and Craig Volden have empirically measured these competing snowball vs. pressure valve effects with regard to the diffusion of city anti-smoking laws.[128] In this context, they concluded that the "snowball effect" dominated – states were more likely to pass anti-smoking legislation if cities had already enacted similar legislation.

We think a snowball effect is likely to dominate here as well. The thirst of proponents of gay rights will not be quenched by partial, voluntary adoption. We imagine that employers will adopt the mark as a beacon to others. Ultimately, the covered entities will want their competitors to be covered as well. This is especially true once there is sufficient entry into the market to dilute away the initial advantage of first-mover licensees.

In our stylized market of 10 hammer manufacturers, the first adopter increased its market share. This sole adopter would not benefit from the passage of ENDA. But in that example, the adoption of the mark by a second firm absorbed the economic advantage and returned all 10 firms to their ex ante market shares. It is at this point that we imagine the adopters as well as non-adopters would welcome the legislation that "forces" them to do what they would want to do anyway – hire the most qualified individual. Moreover, the demonstration benefits of the mark that we described above are benefits that lower the cost of enacting. Public support for the law, low litigation rates, and some record of how courts interpret the statutory language are elements that could enhance the "snowball" impact of the law.

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[127] LMF subsequently withdrew this threat, when members decided that defeat of the civil union bill would do more harm than good, and Anne Stanback declared it a "great day" when Connecticut Governor Jodi Rell signed the civil union bill into law. *Governor Signs Civil Unions into Law,* New Haven Register, April 21, 2005 A1.

[128] Charles R. Shipan & Craig Volden, Policy Diffusion from Cities to States: Antismoking laws in the U.S. (working paper 2005).

When push comes to shove it's difficult to turn down the immediate "bird in the hand" benefits of incremental progress. Indeed, returning the Connecticut civil union debate, it should not surprise us that "Love Makes a Family" ultimately changed its position. While it initially said it would oppose the civil union bill, when a civil union bill was in fact voted out of committee, they chose not to oppose it. It is similarly difficult to oppose an effort to give gay and lesbian employees an enforceable non-discrimination promise.

B. Contingent Demand for a Statutory Prohibition

A related concern is that the mark might promote a kind of *conditional* demand for statutory prohibitions. Think of this as the dark side of the demonstration benefit. The experience of the licensees provides legislatures with valuable information. But what happens if this information is bad news? What happens if we find that:

> few employers adopt the mark, or
>
> there is an unexpectedly large amount of litigation (leading chastened employers to terminate their licenses), or
>
> "activist" judges and juries[129] radically expand the contours of liability (also leading chastened employers to terminate their licenses)?

The demonstration effects of the mark could make legislators' support for civil-rights empirically contingent. The norm of non-discrimination becomes a hostage to fortune. Some might argue that it is wrong to hitch our wagon to such an uncertain star.

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[129] In 1991, Congress amended Title VII to create the right to trial by jury and to entitle plaintiffs to recover compensatory and punitive damages, within certain caps based on the size of the employer. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a(c)(1). Just as Title VII cases can be tried to a jury, so too ENDA claims seeking compensatory or punitive damages would almost surely be subject to jury trial. Section 12(b) of ENDA makes "the procedures and remedies applicable to a claim alleged by an individual for a violation of this Act" the same as "the procedures and remedies applicable for a violation of title VII of the Civil Rights Act of 1964." (42 U.S.C. 2000e et seq.) As is true in

We disagree. This is a situation where more information is a good thing.[130] Let's consider the list in reverse order. If judges are misconstruing the intended duties of ENDA, it is appropriate for legislators to take these precedents into account in redrafting the statute. If the mark leads to unexpectedly high litigation rates, congress (and society) might learn that there is more disparate treatment on the basis of sexual orientation that we had earlier perceived. However, if the litigation spike is caused by frivolous or unsubstantiated claims (reflected in high rates of summary judgment or dismissal for failure to state a claim), we think it is again appropriate for legislators to consider these effects in deciding whether to redraft the statute. Finally, we believe that even if firms fail to adopt the mark, this does not necessarily send a dire negative signal. The mark is a sufficiently novel idea that lack of adoption can be explained away by a number of neutral reasons, including (misguided) narrow self-interest.

And if history is any indication, the news about the mark will not be bad. One of the most startling things about some gay rights victories is how *little* they change the world. Marriage was extended to same-sex couples in Massachusetts (as well as some Western European countries) and the sky didn't fall. Openly gay and lesbian service members were welcomed to into the armed forces of the European Union we see business as usual (even when those forces cooperate with their more "sheltered" American colleagues). The experience of the 16 jurisdictions that already prohibit private employment discrimination shows us that adoption of the mark is not likely to open a Pandora's box of litigation or unwarranted claims. This is a bet that proponents of gay rights should be willing to make.

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civil cases generally, the jury trial may be waived if no demand is made for a jury or if a demand has been made but all parties subsequently agree to waiver. Fed. R. Civ. P. 38(d); Fed. R. Civ. P. 39(a)(1).

C. Commodifying Equality

A third concern about the mark is that it could cause the concept of equality to slip from being an inalienable right to a commodity which employers guarantee only if the cost is low. Our earlier economic appeals for adoption might offend some who believe that right-minded employers should support non-discrimination simply because it is a basic human right. To commodify the value of equality is to suggest an invidious economic calculus.

To these concerns, we plead guilty. And we confess: we are commodifyers. But we are also pragmatists. We have the strong sense that non-discrimination in employment is consistent with robust capitalism. Once people see that employment equality does not "undermine" profitability, it will be very hard to take away. To our minds, securing this basic right a fewer years earlier is worth the psychological cost of commodification.

In many ways, the ship of commodification has already sailed. When HRC tries to convince employers to endorse ENDA or adopt the HRC 100% mark, its arguments in large part turn on the economic benefits, especially in recruiting talented employees. And this is as it should be. It is wrong to think that "corporate morality" is an oxymoron, but it is naïve to think that all moral arguments must scrupulously ignore their impact on a decision-maker's profitability.

D. Closeting Equality

A final concern about the mark is that it will not only commodify civil right norms, but also privatize the norms in ways that set back the larger cause. Gay, lesbian, and bisexual people, as well as gay rights scholars, know well the dangers of the closet. Or the animus that can drive this

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[130] But see Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, VA. L. REV. (1994); Ian Ayres & Barry Nalebuff, *Common Knowledge*, UCLA LAW REV (1997); BRUCE A. ACKERMAN & IAN AYRES, VOTING WITH

demand: "we don't care what gay people do in the privacy of their own *bedrooms*, just don't ask us to recognize them in the public sphere." Critics could complain that the mark responds to an analogous (and equally problematic) demand: "we don't care what you companies do for gay people in the privacy of your own *boardroom,* just don't ask us to recognize it in the public sphere." Instead of framing nondiscrimination as a public value, the mark may contribute to a reconceptualization of it as merely a private choice upon which the should not tread.

While worthy of consideration, this closeting concern is unlikely to arise. The adoption of the mark is itself a public act. While we allow licensees to selectively practice the mark, we as licensors – much like HRC with regard to corporate endorsers of ENDA – will maintain on the Internet a public data base of adopters.[131] Revealing the complete list of adopters also reveals those employers who have not adopted. So both the adoption and non-adoption of the mark become common knowledge. While a corporation could respond that the contours of its employment promises are private, the social meaning of certification marks is necessarily public.

And as argued earlier, the likely impact of private adoptions is to increase the demand for public mandates. The net result is that massive licensing of the mark would not denigrate equality to merely a private corporate choice shielded from public purview. Instead, non-discrimination in the shadow of many adoptions would increasingly fuel demands for universal, mandatory norms.

Conclusion

DOLLARS (2000), for circumstances in which non-transparency can promote social welfare.

[131] See http://www.hrc.org/Template.cfm?Section=Endorsing_ENDA&CONTENTID=17977&TEMPLATE=/ContentManagement/ContentDisplay.cfm

This article strives to do more than show the possibility of privatizing ENDA. It is performative as well. The Fair Employment Mark now exists and is open for business. The licensing agreement in the appendix can be copied, signed, and faxed by any employer to us and it will immediately take effect. Or employers can go to www.fairemploymentmark.org and license the mark with just a few clicks of the mouse. With the publication of this article, we hereby announce a formal licensing campaign. We intend to take the descriptive theory of Part III and use it to target employers who are more likely to be willing to adopt the mark. We hope within a year to have 100,000 workers covered.

While this article has been a sustained attempt at defending and explicating the feasibility of the Fair Employment mark as a specific means of privatizing ENDA, the article in a broader sense is a call for more explicit contracting. The earlier movement for non-binding policies was itself a useful form of incrementalism. Even these non-binding or probabilistically-binding policies signaled the employer's viewpoint that homosexuality was not *malum in se*. The policies at a minimum conveyed the employer's aspiration. These mere words strongly suggested that one's sexual orientation would not be *per se* disqualifying. At the very least, they allowed the possibility of non-legal enforcement. An employer who included sexual orientation in its non-discrimination policy but nonetheless countenanced blatant discrimination might be publicly ridiculed. But the time is now to take the next incremental step.

Instead of asking for non-discrimination *policies*, we should begin asking for non-discrimination *promises*. We should demand more than hortatory claims of non-discrimination. If non-discrimination means anything it should mean that an employer legally commits not to engage in disparate treatment. The current policies are too close to "cheap talk" that can actually boarder on

fraud. An applicant can read the pretty words of non-discrimination and then be surprised to learn that, since she was never in privity with the employer, she has no cause of action. Our claim is simply that these non-discrimination rights should now have legal remedies.

The next time you are at a meeting and you hear your own employer extol its non-discrimination policy, you should speak up and ask "Are you promising not to discriminate?" We are not posing a hypothetical. We call upon our academic readers to challenge their Deans and University presidents (as well as the non-profit boards on which they sit): "Is this institution willing to promise not to discriminate?" What are they going to say in response? "We take our non-discrimination policy very seriously, but no, we're not willing to promise not to discriminate on the basis of sexual orientation."[132] We are about to have a test – and you, gentle reader, are one of the subjects.

[132] As we script this conversation, we might suggest you make this retort: "And would you opt out of Title VII generally, given the chance?"