

THE SEARCH FOR THIRD OPTIONS IN A TWO-BATHROOM SOCIETY

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I. INTRODUCTION*

As a young child, Gavin Grimm wanted to play football with her twin brother. She wore her hair short and by the time she entered middle school, she wore mostly boys' clothes. "Once, he was forced to wear a dress to a sister's wedding and was so upset and traumatized that he spent the day 'catatonic.'"¹ "It's like myself wasn't really living,"² Gavin said. And "when he recalls his life before the transition, he said, it is as if he is recalling someone else."³ Gavin came out to his friends at the end of middle school, and to his parents at the end of his freshman year of high school. Gavin had used men's restrooms at restaurants, stores, and other public places, and he wanted to use the boys' bathroom at his school. This decision was the reasonable one to his family, to his friends, and even his high school principal, who gave the okay for Gavin to use the boys' bathroom.

Other people, such as Ralph VanNess, a security guard at the high school and pastor at Calvary Baptist Church, disagreed: "In my opinion, as a pastor . . . I do not believe that God makes mistakes . . . God puts us on this Earth as who we are."⁴ The Human Rights Campaign Foundation cites studies that point to "strong religious fundamentalism" as a corollary of "negative implicit evaluations of lesbians and gays."⁵ "Being orthodox Christian and scoring high on a right-wing authoritarianism scale has been shown to have a relationship to explicit negative attitude toward homosexuals. The three factors of religious fundamentalism, orthodox Christianity and right-wing authoritarianism

* The language that is used to describe transgender individuals and issues related to the trans movement has evolved over time. The author has made every attempt to ensure that the words used to describe transgender people and issues are accurate and appropriate; in some instances, where sources use terminology that was once appropriate but is now considered outdated, the language has not been removed: in part, to demonstrate progress over time, and in part, to retain the author's original words as they were published at the time. Throughout this Note, the term *transgender* is used to refer to individuals whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. For more information on both outdated and preferred terminology in how to fairly and accurately report on transgender people, See *GLAAD MEDIA REFERENCE GUIDE*, GLAAD - [s://www.glaad.org/reference/transgender](https://www.glaad.org/reference/transgender).

¹ Moriah Balingit, *Gavin Grimm Just Wanted to Use the Bathroom. He Didn't Think the Nation Would Debate it*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/local/education/gavin-grimm-just-wanted-to-use-the-bathroom-he-didnt-think-the-nation-would-debate-it/2016/08/30/23fc9892-6a26-11e6-ba32-5a4bf5aad4fa_story.html.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ MICHELLE A. MARZULLO & ALYN J. LIBMAN, HATE CRIMES AND VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE 11 (Hum. Rights Found. 2009).

also intercorrelate with each other.”⁶ Focus on the Family, a religious organization that meets all three of these factors, offers advice to parents who are struggling with transgender issues. Here’s what they suggest parents communicate to their children in response to questions about transgender issues:

Don’t think you have to understand everything about transgenderism or tell your children everything you know. **Here are a few simple truths to communicate:**

- *God made humans male and female.*
- *Individuals are born either male or female.*
- *Some people get hurt and confused, and they don’t like the way God made them.*
- *As a result, some people wish they were the opposite sex.*
- *Nobody can really change from one sex to the other.*⁷

Focus on the Family adds that,

If you don’t know the answer to a child’s question, say so. Then tell your child you’ll look for an answer. Let’s say your son asks, “Why does he want to be a lady?” The real answer, if we’re honest, is ‘I don’t know.’ None of us know all of the pain and false beliefs in the lives and hearts of persons who struggle with transgender issues.⁸

Focus on the Family says that “God wants us to live in truth about how He created us and who we are. We know God is powerful to save and transform lives – *including the gender-confused*. Tell your children this truth.”⁹

“In Gavin’s small community of Gloucester, Virginia, parents and students quickly caught wind of the debate, and soon, the school board “voted to require students to use bathrooms that aligned with their ‘biological gender’”¹⁰ and decided that it would be the practice of the Gloucester County Public Schools to provide separate “restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative private facility.”¹¹

⁶ *Id.* (citations omitted).

⁷ Jeff Johnston, *Talking to our Children About Transgender Issues*, FOCUS ON THE FAM. (2015), http://www.focusonthefamily.com/socialissues/sexuality/talking-to-your-children-about-transgender-issues#_ga=1.91751002.1180075942.1479756788.

⁸ *Id.*

⁹ *Id.* (emphasis added).

¹⁰ *Id.*

¹¹ *Transgender Bathroom Debate Likely Headed to Supreme Court*, CBS NEWS (May 31, 2016 8:39 PM), <http://www.cbsnews.com/news/transgender-bathroom-debate-likely-headed-to-supreme-court/>.

This debate is recurring in cities and towns across the United States, in store fitting rooms, public restrooms, public school bathrooms, and prisons. On one side, there is a strong need to protect against discrimination, particularly because transgender individuals experience hate violence “at alarmingly high rates and are often targets for fatal hate violence.”¹² The 2013 National Report on hate violence against lesbian, gay, bisexual, transgender, and HIV-affected communities by the National Coalition of Anti-Violence Programs (NCAVP) shows that,

Although hater violence has an adverse impact on all LGBTQ . . . communities, transgender people and communities are severely impacted by such violence. Transgender people also face disproportionate levels of poverty, homelessness, and unemployment while facing discrimination in employment, housing, public accommodations, health care, and abuse from police – all of which may increase their vulnerability to hate violence.¹³

The 2013 report states that transgender individuals were “3.7 times more likely to experience police violence compared to cisgender survivors and victims”¹⁴ and were 7 times more likely to experience police violence when interacting with the police.¹⁵ The circumstances in US prisons are no better for transgender inmates than they are outside of prison. A study of California prisons found that transgender women in men’s prisons were 13 times as likely to be sexually abused as the other inmates (Center for Evidence-Based Corrections, 2009).¹⁶

On the other side, are arguments like those made by the American Family Association (AFA) against Target after the retailer announced on April 19, 2016 that transgender individuals can use its bathrooms and dressing rooms in accordance with the gender they identify with.¹⁷ AFA President Tim Wildmon said “Target’s harmful policy poses a danger to women and children. Predators and voyeurs would take

¹² *Hate Violence*, The Anti-Violence Project (2016), https://avp.org/wp-content/uploads/2017/04/ncavp_transhvfactsheet.pdf.

¹³ *Id.*

¹⁴ *Id.*; See Paula Blank, *Will ‘Cisgender’ Survive?*, THE ATL. MONTHLY (Sep. 24, 2014), <http://www.theatlantic.com/entertainment/archive/2014/09/cisgenders-linguistic-uphill-battle/380342/> (for analysis of the term *cisgender* which “refers to people who feel there is a match between their assigned sex and the gender they feel themselves to be” and a suggestion that the term will not last for political and linguistic reasons, especially as the term itself “suggests a commonality among transgender and non-transgender people, at a time when transgender people are struggling for recognition”).

¹⁵ *Id.*

¹⁶ NAT’L CENTER FOR TRANSGENDER EQUALITY, LGBT PEOPLE AND THE PRISON RAPE ELIMINATION ACT 1 (2012).

¹⁷ See *Continuing to Stand for Inclusivity*, CORPORATE.TARGET.COM (Apr. 19, 2016), <https://corporate.target.com/article/2016/04/target-stands-inclusivity>

advantage of the policy to prey on those who are vulnerable.”¹⁸ This isn’t the only time the retailer has publicly moved away from segregation on the basis of gender. On August 7, 2015, Target issued a statement that they would begin to “phase out gender-based signage to help strike a better balance . . . in the kids’ Bedding area, signs will no longer feature suggestions for boys or girls, just kids. In the Toys aisles, we’ll also remove reference to gender, including the use of pink, blue, yellow or green paper on . . . our shelves.”¹⁹ Franklin Graham, president and CEO of the Billy Graham Evangelistic Association, responded by calling for a boycott of Target:

[T]hey won’t be using pink and blue colors to identify sexes . . . What’s next? Are they going to try to make people believe that pink or blue baby showers are politically incorrect? I have news for them and for everyone else – God created two different genders.²⁰

Although “clothing is known to be an important means by which young children learn sex roles”²¹, these *traditional differences* between boys and girls, like dressing boys in blue and girls in pink, are actually not so traditional. “Until World War I, little boys were dressed in skirts and had long hair. Sexual “color coding” in the form of pink or blue clothing for infants was not common in this country until the 1920s; before that time male and female infants were dressed in identical white dresses.”²² Throughout most of the 19th century, boys and girls alike wore dresses with short skirts and “perhaps part of the explanation is that it was not considered important to differentiate boys and girls at such an early age.”²³ The march toward gender-specific clothes was neither linear nor rapid.²⁴ Pink and blue arrived, along with other pastels, as colors for babies in the mid-19th century, yet the two colors were not promoted as gender signifiers until just before World War I—

¹⁸ Melanie Hunger, *Transgender Restrooms and Fitting Rooms? 162,000 Sign ‘Boycott Target Pledge’ in 1 Day*, CNSNEWS.COM (Apr. 22, 2016, 10:43 AM), <http://www.cnsnews.com/news/article/melanie-hunter/pro-family-group-calls-target-boycott-allowing-bathroom-changing-room>.

¹⁹ See *What’s in Store: Moving Away from Gender-based Signes*, CORPORATE.TARGET.COM (Aug. 7, 2015) <https://corporate.target.com/article/2015/08/gender-based-signs-corporate>.

²⁰ Rebecca Hains, *Target Will Stop Labeling Toys For Boys or For Girls*, WASH. POST: POST EVERYTHING (Aug. 13, 2015), https://www.washingtonpost.com/posteverything/wp/2015/08/13/target-will-stop-selling-toys-for-boys-or-for-girls-good/?utm_term=.0b1a7bf5b54b.

²¹ Jo B. Paoletti, *Clothing and Gender In America: Children’s Fashions, 1890-1920*, 13 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y, no. 1, 1987, at 138.

²² *Id.* at 136-37.

²³ *Id.* at 139.

²⁴ See Jeanne Maglaty, *When Did Girls Start Wearing Pink*, SMITHSONIAN.COM (Apr. 7, 2011) <http://www.smithsonianmag.com/arts-culture/when-did-girls-start-wearing-pink-1370097/?no-ist>.

and even then, it took time for popular culture to sort things out.²⁵

According to child development experts, children are just becoming conscious of their gender between ages 3 and 4, and they do not realize it's permanent until age 6 or 7. At the same time, however, they are the subjects of sophisticated and pervasive advertising that tends to reinforce social conventions. "So they think, for example, that what makes someone female is having long hair and a dress," says [Jo Paoletti, author of *Pink and Blue: Telling the Boys from the Girls in America*]. "They are so interested—and they are so adamant in their likes and dislikes."

In researching and writing her book, Paoletti says, she kept thinking about the parents of children who don't conform to gender roles: Should they dress their children to conform, or allow them to express themselves in their dress? "There is a whole community out there of parents and kids who are struggling with 'My son really doesn't want to wear boy clothes, prefers to wear girl clothes.'"²⁶

Today's society is a more complex one than that which existed in the 19th century, where boys and girls alike wore dresses with short skirts. The issues of gender identity and expression have become real struggles as Paoletti indicates, and today, an estimated 0.6 percent of adults, approximately 1.4 million, identify as transgender in the United States.²⁷ This estimate is double the estimated percentage of transgender adults from a 2011 study.²⁸

For Gavin Grimm and so many others, the issue of identity is entrenched within gender and sex roles. Gavin Grimm just wanted to use the boys' bathroom at his school. Similarly, in *Doe v. Reg'l Sch. Unit 26*,²⁹ where fifth grader Susan Doe was prevented from using the communal girls' bathroom at her school after prior approval, the Supreme Judicial Court of Maine held that

Decisions about how to address students' legitimate gender identity issues are not to be taken lightly. Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination . . .³⁰

The Maine court determined that Susan "was treated differently from

²⁵ See *id.*

²⁶ *Id.*

²⁷ See ANDREW R. FLORES ET AL., THE WILLIAMS INSTITUTE, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES 3 (2016).

²⁸ See *id.*

²⁹ 2014 ME 11, 86 A.3d 600 (2014).

³⁰ *Id.*

other students solely because of her status as a transgender girl”³¹ and that this was in violation of the Maine Human Rights Act, Section 4592(1), which provides that

It is unlawful public accommodations discrimination, in violation of this Act . . . [f]or any public accommodation or any person who is the . . . superintendent, agent, or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . sexual orientation . . . any of the accommodations. . . . [or] facilities . . . of public accommodation.³²

Gavin Grimm’s case has slowly been moving forward in the courts, and after a federal appeals court refused in May 2016 to reconsider a three-judge panel’s ruling on the matter, the Supreme Court announced on October 28, 2016 that they would hear the case.³³ The question the court was left to answer is whether discrimination based on gender identity can be banned.³⁴

The Gloucester County School Board had asked for a review by the full 4th U.S. Circuit Court of Appeals after a three-judge panel said in a 2-1 decision last month that a Virginia high school discriminated against a transgender teen by forbidding him from using the boy’s restroom. In his dissent of Tuesday’s decision denying the school board’s request for full-court review, Judge Paul V. Niemeyer urged the school board to ask the high court to hear the case, saying the “momentous nature” of the topic “deserves an open road to the Supreme Court . . . Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom.”³⁵

In March of 2017, however, the Supreme Court said it would not hear Gavin Grimm’s case, and “wiped off the books a lower court ruling in favor of the student . . . who said federal law allowed him to use school restrooms matching his gender identity.”³⁶ “It’s not a loss. It’s really just a temporary setback,” said Mara Keisling, the executive director of National Center for Transgender Equality noting that other cases

³¹ *Id.* at 17.

³² *Id.* at 15.

³³ See Adam Liptak, *Supreme Court to Rule in Transgender Access Case*, N.Y. TIMES, (Oct. 28, 2016), <http://www.nytimes.com/2016/10/29/us/politics/supreme-court-to-rule-in-transgender-access-case.html>.

³⁴ See *id.*

³⁵ CBS NEWS, *supra* note 11.

³⁶ Pete Williams, *Supreme Court Rejects Gavin Grimm’s Transgender Bathroom Rights Case*, NBC NEWS (Mar. 6, 2017 6:11 PM), <https://www.nbcnews.com/news/us-news/u-s-supreme-court-rejects-transgender-rights-case-n729556>.

involving a similar issue are working their way through the federal courts.³⁷ A month prior to the Supreme Court's decision to not hear Gavin's case, the Trump Administration rescinded both an Education Department letter stating that schools generally must treat transgender students in a manner consistent with their gender identity and guidance issued by the Obama Administration, which warned schools that failing to allow students to use bathrooms matching their gender identity could result in a loss of federal funding.³⁸ This past August, the U.S. Court of Appeals for the 4th Circuit said that due to procedural barriers, "it would not immediately take up his (Gavin Grimm) fight to use the boy's bathroom."³⁹ Although the case made its way through the courts while Grimm was in high school, because he graduated, the U.S. Court of Appeals for the 4th Circuit said . . . that a lower court must sort out whether Grimm still has enough of an affiliation to his alma mater to pursue the case."⁴⁰

"Because all of the prior litigation was conducted while Grimm was a student, the parties have presented us with nothing more than unsupported assertions regarding Grimm's continued connection to his high school and the applicability of the school board's policy," according to the order from Judge Paul V. Niemeyer, who was joined by Judges Allyson K. Duncan and Henry F. Floyd.⁴¹

Gavin Grimm's and Susan Doe's cases, along with a multitude of other cases on transgender bathroom rights, tackle the issue of whether existing law that bans against sex discrimination can also protect against gender identity-based discrimination.⁴² Gavin Grimm's case revolves around how the Obama Administration interpreted a federal regulation under a 1972 law that bans sex-based discrimination in schools receiving federal funds, in that the Obama Administration expanded sex-based discrimination to include gender discrimination.⁴³ The Department of Education has said that schools could lose federal money if they discriminate against transgender students, and this has resulted in school districts struggling with how to treat transgender students.⁴⁴ This became especially problematic after August 2016, when Federal Judge Reed O'Connor of the Federal District Court for the Northern District of

³⁷ *Id.*

³⁸ *See id.*

³⁹ Ann E. Marimow, *Case of Virginia Transgender Teen Gavin Grimm Put Off by Appeals Court*, WASH. POST (Aug. 2, 2017), https://www.washingtonpost.com/local/public-safety/case-of-virginia-transgender-teen-gavin-grimm-put-off-by-appeals-court/2017/08/02/4d49a254-77ad-11e7-8839-ec48ec4cae25_story.html?utm_term=.909093555970.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Liptak, *supra* note 33.

⁴³ *Id.*

⁴⁴ *See id.*

Texas blocked the Obama Administration from enforcing the new guidelines that were intended to expand restroom access for transgender students, ruling that “the government had not complied with federal law when it issued ‘directives which contradict the existing legislative and regulatory text.’”⁴⁵

This note will take the position that the treatment of transgender individuals and the discriminatory policies of states who refuse to abide by the recent order issued by the Obama Administration, which amended the Civil Rights Act of 1964 “to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation in places of public accommodation”⁴⁶ is comparable to and connected to the issue of transgender rights in prisons, where transgender individuals are commonly imprisoned with people of the same sex they were born into.⁴⁷ This is particularly relevant in today’s political climate: on Wednesday, February 22nd, 2017, President Donald Trump’s administration reversed the Obama order that allowed transgender students to use the bathroom that corresponded to their gender identity, leaving it “up to state and school districts to interpret whether federal sex discrimination laws apply to gender identity.”⁴⁸ The laws will continue to be in flux, as cases like Gavin Grimm’s attempt to reach the Supreme Court⁴⁹, but these discriminatory policies are endemic of the nature of discrimination against transgender people in that if we don’t allow people to use the bathroom or fitting room that they identify with, we are imprisoning that person in the body they were born with.

⁴⁵ Erik Eckholm & Alan Blinder, *Federal Transgender Bathroom Access Guidelines Blocked By Judge*, N.Y. TIMES, (Aug. 22, 2016), <http://www.nytimes.com/2016/08/23/us/transgender-bathroom-access-guidelines-blocked-by-judge.html>.

⁴⁶ H.R. 3185, 114th Cong. (2015-2016).

⁴⁷ See Maria L La Ganga, *US prohibits imprisoning transgender inmates in cells based on birth anatomy*, THE GUARDIAN, (March 24, 2016), <https://www.theguardian.com/us-news/2016/mar/24/transgender-prison-gender-identity-anatomy-doj-rules>; Massachusetts Department of Corrections Policy as an example of state policy that requires inmates be housed according to sex, and not gender. The Massachusetts DOC policy states that: “An inmate who is committed to the Department shall be placed in a gender-specific institution according to the inmate’s biological gender presentation and appearance”.

⁴⁸ See *Transgender Bathrooms: Trump Administration Reverses Obama Policies*, CBS NEWS (Feb 22, 2017 7:16 PM), <http://www.cbsnews.com/news/trump-transgender-bathroom-obama-policies/?ftag=CNM-00-10aac3a>. (Critics have quickly spoken out on this issue: House Minority Leader Nancy Pelosi called the Trump administration’s decision an “attack on transgender student protections”, saying “this is not a state issue”. Senator Tammy Baldwin tweeted, “A step backward by Trump, but federal law has not changed & schools continue to have a legal & moral obligation to protect all students.” Gary McCaleb, senior counsel for Alliance Defending Freedom, said, “No longer will federal officials distort federal law that is meant to equalize educational opportunities for women, and no longer will they force local officials to intermingle boys and girls within private areas like locker rooms, showers, hotel rooms on school trips, and restrooms.”).

⁴⁹ See Liptak, *supra* note 33.

This note will explore the fundamental issues that are relevant to the battles that Gavin Grimm, Susan Doe, and countless others face, will consider the history of America's fight for transgender rights⁵⁰ and look at the Obama Administration's order which includes sex, sexual orientation, and gender identity "among the prohibited categories of discrimination or segregation in places of public accommodation."⁵¹ While the order explicitly "prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity,"⁵² this calls into question whether public facilities are separated on the basis of sex and gender⁵³ and is indicative of the fact that the basis by which we separate individuals will determine the effectiveness of the Obama Administration's order and how states will interpret it. This is particularly critical after the February 22nd letter sent by the Trump Administration to schools nationwide, effectively reversing the Obama Administration's policy "[leaving] schools and schools districts to interpret whether federal sex discrimination law applies to gender identity".⁵⁴

The issue of the transgender population's use of fitting rooms in stores and bathrooms in public spaces is part of an overarching theme on public places, and will be looked at in addition to public facilities that are separated for use on the basis of sex. This issue can be connected to the treatment of transgender prisoners (and the rape culture that this breeds, as well as discrimination, and a lack of dignity for transgender individuals).⁵⁵ In conjunction, this will be used to explore

⁵⁰ *Milestones in the American Transgender Movement*, Opinion, N.Y. TIMES, (Aug. 28, 2015), http://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html?_r=0.

⁵¹ H.R. 3185, 114th Cong. (2015-2016).

⁵² *Id.*

⁵³ See generally Terry Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007).

⁵⁴ CBSNEWS, *supra* note 48.

⁵⁵ See *Frequently Asked Questions*, NATIONAL PREA RESOURCE CENTER (Needs a last visited.), <https://www.prearesourcecenter.org/node/3927>. ("Being transgender is a known risk factor for being sexually victimized in confinement settings. The standard, therefore, requires that facility, housing, and programming assignments be made "on a case-by-case basis." Any written policy or actual practice that assigns transgender or intersex inmates to gender-specific facilities, housing units, or programs based solely on their external genital anatomy violates the standard. A PREA-compliant policy must require an individualized assessment. A policy must give "serious consideration" to transgender or intersex inmates' own views with respect to safety. The assessment, therefore, must consider the transgender or intersex inmate's gender identity – that is, if the inmate self-identifies as either male or female. A policy may also consider an inmate's security threat level, criminal and disciplinary history, current gender expression, medical and mental health information, vulnerability to sexual victimization, and likelihood of perpetrating abuse. The policy will likely consider facility-specific factors as well, including inmate populations, staffing patterns, and physical layouts. The policy must allow for housing by gender identity when appropriate."); See also 28 C.F.R. §115.42 (2017) (Use of

how, effectively, we treat transgender individuals as prisoners to their sex, which is emblematic of the overarching problem of transgender rights. This note will offer an overview for potential solutions regarding transgender rights, in both public places and prisons, and attempt to offer a basic understanding for the difficulties inherent to each of these solutions.

This note will begin by looking at a history of the separation between men and women in public facilities and how these “traditional” ideals of sex-separation have impacted both legislation and architecture.⁵⁶ Next, it will consider the history of transgender rights in this nation, and offer a comparison between strong and weak transgender rights law, in order to determine how different states and cities interpret protections against discrimination for transgender individuals. The note will look to cases involving transgender discrimination in public facilities, from fitting rooms to public bathrooms, in order to determine how different states institute protections against discrimination of LGBT populations, particularly for people who are transgender. This note will also consider the Equality Act of 2015, supported by President Barack Obama, which would amend the Civil Rights Act of 1964 to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation in places of public accommodation,⁵⁷ and also offer an analysis of the laws in place which are meant to protect against discrimination for transgender individuals. This note will also discuss prisons and the treatment of transgender individuals in prison, as well as

Screening Information for guidelines for assigning transgender inmates to gender-specific facilities: (a) The agency shall use information from the risk screening required by §115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) A transgender or intersex inmate’s own views with respect to his or her own safety shall be given serious consideration.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.).

⁵⁶ See Kogan, *supra* note 53.

⁵⁷ H.R. 3185, 114th Cong. (2015-2016).

policies that are in place in order to protect these high-risk individuals, and offer the connection that the treatment of transgender prisoners is emblematic of the treatment of transgender individuals, in that we systemically imprison transgender individuals in the bodies they are born with, as opposed to the gender that they identify with. Finally, this note will offer potential solutions to this problem of discrimination, and identify potential difficulties with these solutions.

II. A TWO-BATHROOM SOCIETY

The issues surrounding bathroom rights began earlier than Gavin Grimm's case and were present even before the New York Daily News announced the sex change surgery of Christine Jorgensen on December 1, 1952.⁵⁸ The front-page headline of the Daily News on that day read: "'Ex-GI Becomes Blonde Beauty: Operations Transform Bronx Youth,' and the story told how Jorgensen had traveled to Denmark for 'a rare and complicated treatment.'"⁵⁹ But Christine Jorgensen was not the first transsexual, and the publicity she received was not the first media coverage of a sex-change surgery.⁶⁰

Cross-gender identification, the sense of being the other sex, and the desire to live as the other sex all existed in various forms in earlier centuries and other cultures. The historical record includes countless examples of men who dressed or lived as women and females who dressed or lived as men. Transsexuality, the quest to transform the bodily characteristics of sex via hormones and surgery, originated in the early twentieth century . . . by the 1920s a few doctors, mostly in Germany, had agreed to alter the bodies of a few patients who longed to change their sex.⁶¹

Although it is important to consider the history of transsexuality, it is imperative to understand the reasoning behind the existence of a core issue for transgender individuals – a concept that is frequently left undiscussed – the question of why there exists separate bathrooms for men and women. Perhaps the answer is as simple as the following: "Given human biological needs, public buildings require public restrooms. Given two sexes and concerns for privacy and safety, the law needs to mandate that public buildings provide separate facilities . . . and, in turn that persons of one sex be prohibited from entering the

⁵⁸ JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* (Harv. U. Press 2004).

⁵⁹ *Id.*

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 5.

restroom designated for the other.”⁶² Because we have grown accustomed to separate bathrooms in movie theaters, in restaurants, in stadiums, and in schools, and because most of us are able to go into public places and use the restroom that matches our sex without incident, we don’t give it much thought.

But what do you do in the event that you are:

[A] wheelchair-user who needs the assistance of your opposite-sex partner in a public restroom facility, [or] you happen to be a transsexual person dressed in accord with your gender identity who is prohibited from using the workplace restroom designated for the sex with which you identify, [or] you happen to be a woman at a rock concert standing in a long line outside the restroom marked ‘Women,’ while no line exists outside the door marked ‘Men’, [or] you happen to be a parent tending an opposite-sex, five-year-old child when you or your child suddenly need a public restroom.⁶³

The solutions here are less clear, but each example serves to depict the types of harm that can be inflicted on people when we impose the requirement that public restrooms be separated by sex.⁶⁴ How we choose to dictate when and where a person may use which bathroom has a very real effect on those individuals for whom the choice between “Men’s” and “Women’s” isn’t quite as simple as what is listed under “Sex” on their birth certificates.

For Terry Kogan, Law Professor at the University of Utah College of Law, “each example illustrates how the seemingly ‘natural’ requirement that public restrooms be separated by sex inflicts real-life hardship on individuals responding to bodily functions.”⁶⁵ Kogan’s article⁶⁶ “demonstrates that the first laws mandating sex-separation of workplace toilet facilities at the end of the nineteenth century were rooted in the ‘separate sphere’ ideology of the early century, an ideology that considered a woman’s proper place to be in the home, tending the hearth fire, and rearing children.”⁶⁷ The separation of bathrooms owes its beginning to “the early nineteenth century ideology that advocated a cult of true womanhood, a vision of the pure, virtuous woman protected within the walls of her domestic haven.”⁶⁸

For Kogan, even the architecture of bathrooms and the way they are divided – separate, identical, frequently placed opposite or side by side – one for men and one for women – “confirms and naturalizes

⁶² Kogan, *supra* note 53, at 1, 3.

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 54.

⁶⁵ *Id.* at 5.

⁶⁶ Kogan, *supra* note 53.

⁶⁷ *Id.* at 5.

⁶⁸ *Id.* at 5.

gender distinctions by segregating the sexes within rigidly contained spaces. Subscribing to the popularly held belief that lavatory design responds to the function demands of anatomical difference, the public restroom perpetuates the notion that gender rests squarely on the foundation of anatomy.”⁶⁹ Perhaps even more problematic is the way that men’s and women’s bathroom are positioned, frequently opposite one another or next to each other, serving as “a powerful mechanism for contemporary society to perpetuate the view that sex is dimorphic: humans fall into two, and only two, categories: male and female.”⁷⁰ Unfortunately, this is a message that often “proves devastating to the identities, not to mention the basic biological needs, of both transgender and intersexual people.”⁷¹

In 1881, New York was the first state to adopt a ‘seat’ law, which was called “[a]n Act for the preservation of the health of female employees”, in an attempt to protect women’s sensibilities and morality.⁷² The law said that

[I]t shall be the duty of all employers of females in any mercantile or manufacturing business or occupation to provide and maintain suitable seats for the use of such female employees, and to permit the use of such seats by such employees to such an extent as may be reasonable for the preservation of their health.”⁷³

Here, we have our first hint that women must be kept safe by the use of proper restrooms, that employers of females must be aware of the need to maintain “suitable seats” in order to ensure that women (or their health) were not put in danger. It was during the Victorian Era that scientists “from a range of disciplines reached the common conclusion that ‘women were inherently different from men in their anatomy, physiology, temperament, and intellect’”.⁷⁴ Where the difference between the genders had previously been considered to be a question of appropriate social roles and how they differed between men and women, now turned into a question of what physical differences exist.⁷⁵

By 1920, 43 states (starting with Massachusetts and New York in 1887) had adopted legislation requiring that bathrooms in workplaces be separated on the basis of sex.⁷⁶ The passage of these laws followed a pattern on the part of the states to protect women.⁷⁷ Perhaps most telling

⁶⁹ *Id.* at 10 n.27.

⁷⁰ *Id.* at 10 n.29.

⁷¹ *Id.*

⁷² Act of May 18, 1881, ch. 298, 1881 N.Y. Laws 402.

⁷³ *Id.*

⁷⁴ Kogan, *supra* note 53, at 26 (internal quotation marks omitted).

⁷⁵ *See id.*

⁷⁶ *Id.* at 39.

⁷⁷ *Id.* at 40.

a sentiment about the need to protect women comes from *Factory Sanitation* (1913), an essay and adjoining catalog of workplace bathrooms/book by J.J. Cosgrove, a sanitary engineer who published a number of books and pieces used as literature to teach sanitation and plumbing architecture. This section, referred to by Terry Kogan in his essay, *Sex Separation in Public Restrooms*, is indicative of the nature of what made separation on the basis of gender a necessity:

Moral decency requires that where males and females are employed, separate accommodations shall be provided which, in every sense of the word, will be private. Ignoring the obvious filth of this double accommodation for “men” and “females,” close proximity of the fixtures separated only by a thin board partition, far from sound proof, and the common approach, such accommodations would be morally objectionable even if they were sanitary, clean, well lighted and well ventilated.

Apply the golden rule in business. You would recoil with horror at the thought of your daughter being forced to avail herself of such accommodations. Treat other men’s daughters, then, as you would like them treat yours.⁷⁸

J.J. Cosgrove gives the real reason that we need to separate men and women: moral decency, and the need to treat other men’s daughters as your own. Cosgrove is not worried about cleanliness or how sanitary bathrooms are, but rather about invoking “a vision of woman as pure and virginal.”⁷⁹ This, then, is the crux of why we separate bathrooms on the basis of sex: first, the vision of women must be left pure and unvarnished, second, it is necessary to “vindicate the social morality of true womanhood”⁸⁰; third, “the vulnerable, weak bodies of women needed special protection in the dangerous public realm; sex-separation was one aspect of providing “adequate” sanitary toilet facilities . . .”⁸¹; and, finally, it was necessary to separate men and women for modesty, in order to “protect a woman’s privacy when engaged in intimate bodily functions.”⁸²

These reasons make sense in the scheme of Victorian society and for the development of the different intellectual eras, but what then, is the solution when it comes to transsexuals who are not allowed to use the restroom designated for the gender they identify as; what is the solution for students like Gavin Grimm; and, what is the solution for an individual who wants to use a fitting room in a store that is designated

⁷⁸ *Id.* at 51. (internal quotation marks omitted)

⁷⁹ *Id.*

⁸⁰ *Id.* at 54.

⁸¹ *Id.*

⁸² *Id.*

for the gender that they identify with but is not allowed to do so due to store policy? For Terry Kogan,

[T]he damage done by our regime of sex-separate public restrooms goes beyond these daily challenges faced by many. Sex-separated public restrooms convey subtle, yet potent messages about the nature of gender and gender difference, messages that date back two hundred years. Separate public restrooms for men and women foster subtle social understandings that women are inherently vulnerable and in need of protection when in public . . . Moreover, the two-restroom model teaches that there are two, *and only two sexes*, a message highly problematic to the public's acceptance of transsexual and intersexual people.⁸³

III. TRENDS IN TRANSGENDER RIGHTS LAW

Men's bathrooms and women's bathrooms are separated on the basis of a history that has taught us of the need to protect women, that women and men must be separated in order to not offend women's sensibility and morality, and for modesty.⁸⁴ From the examples Terry Kogan discusses above, it is clear that this separation is not quite so easy for a large percentage of the population: from the disabled to parents of young children to transgender individuals. This separation of the sexes into two bathrooms is both metaphorical and literal: there are two (and only two) sexes that must be kept separate in order to not offend our Victorian sensibilities and fears of tainting the purity of women. But this separation is also incredibly problematic and difficult for the parents of children like Coy Mathis, who despondently asked his mother, Kathryn, "when am I going to get my girl parts?"⁸⁵ "When are we going to the doctor to have me fixed," he wanted to know.⁸⁶ At the time he asked these questions, Coy was three years old.

For parents like Kathryn, who have watched their child play dress up with princess outfits and butterfly wings and tutus from the age of one and a half onward, this separation of bathrooms on the basis of sex is painful and troubling. "Kids are coming out as trans earlier than ever: A survey of the San Francisco school district found that 1.6 percent of high school students and, incredibly, one percent of middle-school students identified as transgender."⁸⁷ The struggles that increasingly

⁸³ *Id.* at 56. (emphasis added).

⁸⁴ See Kogan, *supra* note 53.

⁸⁵ Sabrina Rubin Erdely, *About a Girl: Coy Mathis' Fight to Change Gender*, ROLLING STONE (Oct. 28, 2013), <http://www.rollingstone.com/culture/news/about-a-girl-coy-mathis-fight-to-change-change-gender-20131028>.

⁸⁶ *Id.*

⁸⁷ *Id.*

younger and younger children are facing with gender identity, has speedily brought the trans-rights movements to a new arena: public schools.⁸⁸

[A]lthough 623 American colleges and universities have already adopted nondiscrimination policies to cover gender expression, high schools and middle schools are being forced to grapple with the question of how to deal with trans students in their locker rooms, athletic fields and bathrooms. It's a haphazard fight raging at district, county and state levels . . . This past winter [2013], educators in Massachusetts, Maine and Portland, Oregon, issued guidelines to accommodate trans students, allowing them to use bathrooms and play on sports teams corresponding to the gender with which they identify. But in August, California trumped them all by becoming the first state to pass legislation spelling out that transgender students can choose which bathrooms, locker rooms and sports teams they wish, based on their gender identity.

The national headlines have inspired debate over whether this is a laudable move to recognize the needs of trans kids – or a wrongheaded manifestation of overindulgent parenting. After all, what does a child really know about authentic identity, or about what's best for them? However, any reasonable discussion on the subject has been drowned out by conservative Republicans, who have staked out a position that is reflexively anti-trans. “Is that not the craziest thing you’ve ever heard?” Mike Huckabee asked at October’s right-wing Values Voter Summit, speaking of California’s anti-discrimination-schools law; California Republicans have already targeted its repeal as a top priority. Earlier this year, House Republicans tried to strip the Violence Against Women Act of its protections for transgender women, and Arizona state Rep. John Kavanagh introduced a bill that would have made it a crime for trans people to use their preferred bathrooms. Fox News commentators vehemently oppose any accommodation of trans kids in schools, something Bill O’Reilly calls ‘anarchy and madness.’”⁸⁹

Jeff Johnston, a *gender-issues analyst* for Focus on the Family⁹⁰, is

[A] proud ‘ex-gay’ – now a married father of three boys – who blames what he calls the “sexual brokenness” of LGBT people on a combination of poor parenting, molestation and original sin. In his newsletters for Focus, Johnston treats trans people in particular with amused pity. “Male and female are categories of existence,” he wrote . . . “It is dehumanizing to categorize individuals by the ever-proliferating alphabet of identities based on sexual attractions or

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

behavior or ‘gender identity’ – LGBBTTQIAAFPBDMSM – however many letters are added.”

But despite all the opposition from groups like Focus on the Family,

The movement toward early transition continues forward, driven largely by a school of thought within the medical community based around the idea of harm prevention. Indeed, studies show that the threat to transgender people is very real: One study showed more than half report being bullied in school; 61 percent are physically assaulted; 64 percent are sexually assaulted. Trans people have sky-high rates of unemployment, homelessness, substance abuse and suicide: Forty-one percent of transgender people attempt suicide, with trans teenagers the highest at-risk group. Given those staggering odds, many clinicians are anxious to try something – anything – that might mitigate that harm.⁹¹

In 2008, a bill passed in the Colorado legislature that would expand the state’s anti-discrimination law to include transgender individuals. Focus on the Family fought hard for the veto of this proposal, “warning that the law would expose women and children to dangerous perverts who would now freely lurk in public restrooms.”⁹² The proposal passed and Colorado became one of (then) seventeen states to prohibit discrimination of transgender individuals. This was wonderful news for Coy Mathis and her family, and Coy was allowed to go to school as a girl. By the end of kindergarten and into first grade, “she was thriving: happy, succeeding in school and coming home with her backpack full of birthday-party invitations.”⁹³

But, unfortunately, as is so frequently is the case, Coy’s battle was far from over: one evening in December 2012, Coy’s principal called Kathryn and her husband to inform them that Coy would no longer be permitted to use the girls’ bathroom at school.⁹⁴ Despite the proposal passing in Colorado legislature and despite the warm environment that the other children and staff members at Coy’s school had provided, a “debate had been brewing for months” regarding Coy’s bathroom use⁹⁵ because while kindergarten students had a gender-neutral bathroom in their classroom, first-graders had separate boys’ and girls’ bathrooms down the hall.

Some parents were already touchy about Coy; one mom had complained . . . about her “moral issues” with Coy’s upbringing – how would they react to Coy using the girls’ room? As later

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

explained in legal documents, the superintendent of the Fountain-Fort Carson school district was concerned about the precedent Coy's access to the girls' bathroom would set.

"The district also had to take into consideration that this would not be an isolated request, and that it was probable that it would be faced with one or more requests in the future," the superintendent wrote. "And perhaps by a student much older and more physically mature than Coy." The terrifying prospect of this hypothetical older, maturer student was key to their analysis. As attorney William Kelly Dude would write in the accompanying position paper, while perhaps it seemed acceptable for a harmless six-year-old like Coy to enter the girls' room, he vividly described what a future infiltrator could look like: "a male high school student with a lower voice, chest hair and with more physically mature sex organs who claims to be transgender and demands to use the girls' restroom" – a menacing portrait of an impostor . . . That hairy deviant would soon be Coy herself, as Dude would write the Mathises: "As Coy grows older and his male genitals develop . . . at least some parents and students are likely to become uncomfortable with his continued use of the girls' restroom." The decision had come down swiftly: For the protection of the district as a whole, Coy was to be banned from the girls' restroom.⁹⁶

Ultimately, after a long battle, Coy was allowed to use the girls' bathroom and in a fourteen-page ruling, Director Steven Chavez of the Colorado Civil Rights Division said that telling Coy "that she must disregard her identity while performing one of the most essential human functions . . . creates an environment that is objectively and subjectively hostile."⁹⁷ Victories like Coy's are, luckily, growing more common and individual districts and cities (and states) are creating strong transgender rights laws to protect against discrimination.

Much like Colorado instituted protections against transgender discrimination that would help to decide Coy's case, New York City instituted similar protections. However, New York City now offers not just strong legal protections for transgender individuals, but even guidance for how employers and other individuals can violate the law. On December 21, 2015, the New York City Commission on Human Rights released guidance that

[M]akes clear what constitutes gender identity and gender expression discrimination under the NYC Human Rights Law, making it one of the strongest in the nation in protecting the rights of transgender and gender non-conforming individuals . . . [the] guidance provides bold and explicit examples of violations, sending a clear message to

⁹⁶ *Id.*

⁹⁷ *Id.*

employers, landlords, business owners, and the general public what the City considers to be discrimination under the law.⁹⁸

This guidance lists several ways employers, landlords, and business owners might violate the law, which includes the following:

- **Intentionally failing to use an individual's preferred name, pronoun or title.** For example, repeatedly calling a transgender woman “him” or “Mr.” when she has made it clear that she prefers female pronouns and a female title.
- **Refusing to allow individuals to use single-sex facilities, such as bathrooms or locker rooms, and participate in single-sex programs, consistent with their gender identity.** For example, barring a transgender woman from a women's restroom out of concern that she will make others uncomfortable.
- **Enforcing dress codes, uniforms, and grooming standards that impose different requirements based on sex or gender.** For example, enforcing a policy that requires men to wear ties or women to wear skirts.
- **Failing to providing employee health benefits that cover gender-affirming care or failing to provide reasonable accommodations for individuals undergoing gender transition, including** medical appointments and recovery, where such reasonable accommodations are provided to other employees. (Federal and New York laws already require certain types of insurance to cover medically-necessary transition-related care.)⁹⁹

Violations of the New York City Human Rights Law can result in civil penalties of up to \$125,000 dollars and penalties of up to \$250,000 dollars for violations that are the result of “willful, wanton, or malicious conduct.”¹⁰⁰ Further, there is no limit to the amount of compensatory damages the Commission can award to a victim of discrimination.¹⁰¹

New York City's Human Rights Law now goes further in protecting the rights of transgender and gender non-conforming people than many other places with gender identity protections. Cities such as Washington, D.C., San Francisco, CA, and Philadelphia, PA, do not articulate such specific protections under their laws.¹⁰²

⁹⁸ NYC Commission on Human Rights Announces Strong Protections for City's Transgender and Gender Non-Conforming Communities in Housing, Employment and Public Spaces, NYC.GOV (Dec. 21, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/961-15/nyc-commission-human-rights-strong-protections-city-s-transgender-gender>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* As of 12/21/2015, New York City was the first state to implement such specific

Unfortunately, in other places, transgender rights law is not nearly as strong and all-encompassing. In Virginia, Delegate Mark Cole filed two different bills in an attempt to ensure that individuals only use the bathroom that matches their biological sex. HB 663 would require

[T]he Director of the Department of General Services and local school boards to develop and implement policies that require, respectively, that every restroom designated for public use in any public building on property that is owned, leased, or controlled by the Commonwealth and every public school restroom, locker room, and shower room *is designated for use by a specific gender to solely be used by individuals whose anatomical sex matches such gender designation.*¹⁰³

It defines anatomical sex as “the physical condition of being male or female, which is determined by a person’s anatomy.” Alternatively, HB 781 would require

[T]he Director of the Department of General Services and local school board to develop and implement policies that require, respectively, that every restroom designated for public use in any public building on property that is owned, leased, or controlled by the Commonwealth and every public school restroom, locker room, and shower room *designated for student use and accessible by multiple students at the same time be designated for and only used by males or designated for and only used by females on the basis of their biological sex.*¹⁰⁴

Violating either HB 781 or HB 663 would result in a civil penalty not to exceed \$50.¹⁰⁵ Attempts to pass similar bills in Texas, Kentucky, Florida, Nevada, and Indiana have been unsuccessful despite repeated efforts.¹⁰⁶

Disparities between how different states and cities treat transgender protections serve to create many problems in the treatment of legal claims by transgender individuals, which will continue to be

protections for transgender individuals.

¹⁰³ *Restroom facilities; use of facilities in public building or schools*, Va. H.B. 663 (2016).

¹⁰⁴ *Restroom facilities; use of facilities in public building or schools, definition of biological sex*, Va. H.B. 781 (2016).

¹⁰⁵ HB 781 and HB 663, *supra* notes 103-104.

¹⁰⁶ Zack Ford, *Indiana Lawmaker Introduces ‘Pay to Pee’ Bill for Transgender People*, THINK PROGRESS (Dec. 30, 2015), <https://thinkprogress.org/indiana-lawmaker-introduces-pay-to-pee-bill-for-transgenderpeople-1920bf6cfb9e#.owy0g8i9o>. See Indiana Senate Bill No. 35 which “Provides that student facilities in school buildings must be designated for use by female students or male students, and may be used only by the students of the biological gender for which the facility is designated. Makes it a Class A misdemeanor if: (1) a male knowingly or intentionally enters a single sex public facility that is designed to be used by females; or (2) a female knowingly or intentionally enters a single sex public facility that is designed to be used by males.”

considered in more depth later on alongside a discussion of the Equality Act of 2015, which was supported by the Obama administration, and would amend the Civil Rights Act of 1964 to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation in places of public accommodation.¹⁰⁷

IV. BEYOND DISPARITY, AND INTO DYSPHORIA

The disparities in how transgender individuals are treated in different states, counties, and cities is clearly problematic: a transgender individual may be allowed to use a bathroom designated for the gender that they identify with in one state, but not in the next. This is particularly striking and difficult for parents like Coy's, who frequently have to uproot their children in search of school districts and schools where their children's needs will be met, without causing irreparable social and mental harm to their children and their families. And although "reluctant parents and uncomfortable peers might pressure schools to restrict transgender students, the law and evolving notions of gender identity are trending the other way. Court decisions, human rights commissions, and the U.S. Department of Education have predominantly sided with transgender students on access and nondiscrimination."¹⁰⁸ Edwin Darden argues that given the circumstances and what is at stake for transgender children and their families, "principals, teachers, superintendents, school boards, and attorneys have a duty to embrace policies and practices that respect a student's wishes while factoring in pragmatic concerns of propriety and safety."¹⁰⁹

In Colorado, the Civil Rights Commission ruled in favor of Mathis after she was told her only options were to use the boys' room, the nurse's bathroom, or the staff bathroom.¹¹⁰ Maine saw a similar case in the case of Nicole Maines, who was born Wyatt, but had identified as a girl starting as young as two years old. Throughout most of elementary school, Nicole was allowed to use the girls' bathroom, but in the fifth grade, a boy followed her into the bathroom, telling her that his "grandfather had told him that if Nicole could use the girls' bathroom, so could he."¹¹¹ After two separate incidents, the school district decided that Nicole would have to use a single-stall, unisex, staff bathroom for

¹⁰⁷ Equality Act, *supra* note 51.

¹⁰⁸ Edwin C. Darden, *The Law Trends Toward Transgender Students*, 96 PHI DELTA KAPPAN 76 (2014).

¹⁰⁹ *Id.* at 76.

¹¹⁰ *Id.*

¹¹¹ *Id.*

the rest of the school year and continuing in middle school.¹¹² The Maine Human Rights Commission ruled that discrimination occurred when the district barred Nicole's use of the girls' bathroom, and Nicole and her parents took the case to the Maine Supreme Judicial Court which ruled that the Maine Human Rights Act "included the right of a transgender student to use the bathroom of choice,"¹¹³ holding that "decisions about how to address students' legitimate gender identity issues are not to be taken lightly."¹¹⁴

"While bathroom issues are the most prominent conflict, questions also can arise out of rooming arrangements, field trips, proms, and dances, or over whether to insist that a child be in the process of gender reassignment to trigger policies."¹¹⁵ These questions are frequently repeated and in a variety of circumstances because transgender "discrimination permeates every aspect of daily life, whether on the job (such as workplace harassment, the denial of a promotion, or termination of employment), in the heightened risk of violence (such as rape), or in the home (such as the potential for discriminatory implementation of marriage laws and custody determinations)."¹¹⁶ In *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, Professor Taylor Flynn makes the claim that transgender rights cases, like Coy Matthis' and Nicole Maines', are critical because they "challenge the sex system by presenting the court with people for whom gender and anatomical birth sex in some way diverge."¹¹⁷ Flynn points out that

[T]he typical conceptualization of sex, a doctor's peek at a newborn's genitals, is simply a form of shorthand that adequately describes sex in most cases. It is, though, an oversimplification that fails to capture the multitude of factors that constitute sex. Most crucially, this shorthand overlooks a person's gender identification, one's internal sense of being male or female.¹¹⁸

The medical and psychological communities normally define sex by relying upon a number of markers that include external characteristics, reproductive organs, chromosomes, hormones, and psychological identification.¹¹⁹ But when a doctor merely looks at a newborn's sex

¹¹² *Id.*

¹¹³ *Id.* See *Doe supra* note 29.

¹¹⁴ *Id.* See *Doe supra* note 29.

¹¹⁵ Darden, *supra* note 108, at 77.

¹¹⁶ Taylor Flynn, "Transforming" the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 COL. L. REV. 392, 393 (2001).

¹¹⁷ *Id.* at 394.

¹¹⁸ *Id.*

¹¹⁹ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 Ariz. L. Rev. 266, 271-92 (1999). See "Transforming" the Debate, *supra* note 116, at 394.

organs, they grasp no information about that child's gender identification.¹²⁰ Flynn says that "this oversight is critical because gender identification is generally accepted within the medical and psychological professions as more integral to a person's sex than anatomical birth sex."¹²¹

"Transgender rights litigation presents an opportunity to broaden judicial understandings of sex by helping courts comprehend that gender identity, rather than anatomy, is the primary determinant of sex."¹²² Flynn hopes that explaining that self-identification is the central component of sex "may effect change by encouraging courts and society to conclude that the determination of one's sex should rest with the individual and not the state."¹²³ Flynn's essay, published in 2001, said that "a substantial impediment to remedying [transgender] discrimination has been the reasoning of many lower courts that Title VII of the Civil Rights Act of 1964 applies to discrimination based on anatomical sex, but not gender."¹²⁴ In 1989, the Supreme Court held in *Price Waterhouse v. Hopkins*¹²⁵ an employer violated Title VII when "the employer relied on gender role stereotypes of how a woman is supposed to present herself"¹²⁶, but many lower courts continued to hold that Title VII applies to anatomical sex. *Hopkins* presented a relatively tame case (compared to those we see today) where Ann Hopkins, a senior manager at an accounting firm sued her employer for sex discrimination under Title VII because she was denied partnership:

Evidence submitted at trial included comments from the firm's partners stating that Ann was 'macho', should take 'a course at charm school,' and should 'walk more femininely, talk more femininely, dress more femininely, wear make-up [and] have her hair styled . . .'. The Supreme Court held that comments such as these constituted evidence of impermissible *gender role stereotyping*.¹²⁷

V. FOLLOWING THE TRANSGENDER STRUGGLE ON ITS PATH TO THE FEDERAL GOVERNMENT

In the fifteen years since Flynn's essay was published, there has been a shift in the treatment of transgender individuals in the legal system. "On January 1, 2014, California became the first state to legally

¹²⁰ Flynn, *supra* note 110, at 394.

¹²¹ *Id.*

¹²² *Id.* at 395.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 490 U.S. 228 (1989).

¹²⁶ Flynn, *supra* note 116, at 396.

¹²⁷ *Id.* at 396, 397. Emphasis added.

require school districts to let transgender students choose their bathroom, pick a sports team to play on, and use their self-identified locker room.”¹²⁸ The trend among states has been to follow this path. “Still, a law cannot necessarily change someone’s mind. In March 2014, a transgender student in the West Contra Costa Unified School District near San Francisco was sexually assaulted . . . leaving the boys’ bathroom at Hercules Middle/High School.”¹²⁹ But despite opposition from some religious groups and school districts and attacks on transgender individuals, the “U.S. Department of Education’s Office for Civil Rights (OCR) has made it clear that harassment or discrimination against transgender students qualifies as a violation of Title IX of the Education Amendments of 1972.”¹³⁰

Much progress has been made since Flynn’s article was published: in July 2013, OCR and the U.S. Department of Justice’s Civil Rights Division

[S]ettled a complaint involving a transgender middle school student in the Arcadia (Calif.) Unified School District. The OCR and the justice department said the district ‘prohibited the student from accessing facilities consistent with his male gender identity, including restrooms and locker rooms at school, as well as sex-specific overnight accommodations at a school-sponsored trip to an off-site academic camp.’¹³¹

Ultimately, Arcadia agreed to allow the student to use the bathroom, locker room, and sleeping quarters consistent with his identity.¹³² “In addition, the district agreed to amend its policies, train staff, and provide appropriate supports for all transgender students.”¹³³ In The Law Trends Toward Transgender Students, Edwin Darden concludes that “the heads-up educator should recognize that the law is moving toward acceptance and nondiscrimination. While opponents of transgender access experience isolated victories, the overwhelming evidence is unmistakable.”¹³⁴

Although the trends over the past few decades do speak to moving towards acceptance and nondiscrimination, as Edwin Darden suggests, it would be problematic to ignore the current climate in places like North Carolina. Most recently, on December 22, 2016, North Carolina legislators failed to repeal the state’s ‘bathroom bill’, and “for now, House Bill 2 stands as the law in North Carolina. Signed by the

¹²⁸ Darden, *supra* note 108, at 77.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

governor in March [2016], HB2 bans people from using public bathrooms that don't correspond to their biological sex as listed on their birth certificates."¹³⁵ The reactions toward this bill were not insignificant, with "businesses cancelling plans to expand and the NBA moving its all-star game from Charlotte to another city."¹³⁶ Singers like Demi Lovato, Bruce Springsteen, and Nick Jonas cancelled concerts in the state¹³⁷, "the Justice Department filed a suit challenging the measure, and the state's public university system pledged to defy the statewide law . . . And the NCAA said it would relocate several college athletic championship events for the 2016-17 season that were scheduled to take place in North Carolina."¹³⁸

Whether these ramifications will be enough to substantially challenge and change the law is yet to be seen, but "as long as HB2 is on the books, thousands of LGBT people who call North Carolina home, especially transgender people, are being discriminated against and will never feel safe," said Simone Bell, Southern Regional Director of Lambda Legal.¹³⁹

Perhaps most alarming are the statistics from LGBT-friendly places like New York. Although New York has strong protections against discrimination for transgender individuals, the findings of the 2011 National Transgender Discrimination Survey¹⁴⁰ were startling: of 531 respondents from New York, 74% reported experiencing harassment or mistreatment on the job, 20% lost a job, 20% were denied a promotion, and 37% were not hired.¹⁴¹ "Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (75%), physical assault (35%) and sexual violence (12%). Harassment was so severe that it led 14% of respondents to leave a school in K-12 settings or leave higher education."¹⁴² Transgender individuals felt increased levels of economic insecurity as well as housing discrimination and instability.¹⁴³

¹³⁵ Ralph Ellis, Holly Yan & Nick Valencia, *North Carolina Legislature Fails to Repeal 'Bathroom Bill'*, CNN (Dec. 22, 2016), <http://www.cnn.com/2016/12/21/politics/north-carolina-bathroom-bill-hb2/index.html>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Jaime M. Grant et al., *Injustice at Every Turn: A Report of The Nat'l Transgender Discrimination Survey*, NAT'L CTR FOR TRANSGENDER EQUALITY AND NAT'L GAY AND LESBIAN TASK FORCE (2011).

¹⁴¹ *Id.* See Report, *Findings of the National Transgender Discrimination Survey for New York*, http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_state/ntds_state_ny.pdf.

¹⁴² *Id.*

¹⁴³ See *id.* The New York Results from the National Transgender Discrimination Survey also show that it is likely that due to discrimination in the workplace and at school, survey respondents experience poverty and unemployment at significantly higher rates than the general population. 25 percent of respondents had to move back in with family or friends and 18 percent became

Perhaps most alarming of all is the fact that 36 percent of respondents “reported attempting suicide at some point in their life, 22 times the rate of the general population of 1.6%.”¹⁴⁴

Despite these alarming statistics, lawmakers like Senate Leader Phil Berger of North Carolina still say the issues transgender individuals face are primarily social and that the left is attempting “to force radical social engineering and shared bathrooms across North Carolina, at the expense of our state’s families, our reputation and our economy.”¹⁴⁵ The problem with statements like this goes back to the history of why we have separate bathrooms for men and women and the architecture behind this decision, in that bathrooms are not actually divided on the basis of anatomy or sex.

Despite common intuitions, the historical and social justifications for the ubiquitous practice of separating public restrooms by sex were based not on a gender-neutral policy related to simple anatomical differences between men and women. Rather its origins were deeply bound up with early nineteenth century moral ideology concerning the appropriate role and place for women in society¹⁴⁶ . . . [S]ex-separated public restrooms convey subtle, yet potent messages about the nature of gender and gender difference, messages that date back two hundred years. Separate public restrooms for men and women foster subtle social understandings that women are inherently vulnerable and in need of protection when in public, while men are inherently predatory. Moreover, the two-restroom model teaches that there are two, and only two sexes, a message highly problematic to the public’s acceptance of transsexual and intersexual people.¹⁴⁷

Although the states have been tackling the issue of transgender discrimination (and sometimes, taking it school district by school district), as of 2015, the Human Rights Campaign noted that 31 states did not have laws explicitly prohibiting discrimination against transgender individuals.¹⁴⁸ In response to the necessity for a uniform protection against transgender discrimination for all states, the Obama Administration supported the Equality Act of 2015, which would amend the Civil Rights Act of 1964 and “prohibit discrimination against LGBT

homeless because of their gender identity, while 19 percent were denied a home or apartment. 53 percent of respondents were verbally harassed or disrespected in public places like hotels, restaurants, buses, airports, and government agencies. 49 percent reported being uncomfortable seeking police assistance.

¹⁴⁴ *Id.*

¹⁴⁵ Phil Berger, *Roy Cooper Kills HB2 Repeal – Again*, PhilBerger.org (Dec. 21, 2016), http://www.philberger.org/roy_cooper_kills_hb2_repeal_again.

¹⁴⁶ Kogan, *supra* note 53, at 55.

¹⁴⁷ *Id.* at 56.

¹⁴⁸ Gabrielle Levy, *Forget SCOTUS: The Next Fight Over Gay Rights Will Be in Congress*, USNEWS, (Jul. 23, 2015), <http://www.usnews.com/news/articles/2015/07/23/equality-act-continues-push-for-lgbt-rights>.

persons in categories ranging from employment and housing to education and jury service, and would broaden where discrimination would be illegal in a 'public accommodation' to include everything from shopping centers and banks to travel agencies and funeral parlors".¹⁴⁹ Given today's political climate, however, it is difficult to predict what will happen to the Equality Act.¹⁵⁰

VI. A DUAL IMPRISONMENT: TRANSGENDER IN PRISON

In 2013, 72% of anti-LGBT homicide victims were transgender women.¹⁵¹ According to *Injustice At Every Turn*, a report by the National Center for Transgender Equality and The Task Force:

- Transgender people are four times more likely to live in poverty.
- Transgender people experience unemployment at twice the rate of the general population, with rates for people of color up to four times the national unemployment rate.
- 90% of transgender people report experiencing harassment, mistreatment or discrimination on the job.
- 22% of respondents who have interacted with police reported harassment by police, with much higher rates reported by people of color. Almost half of the

¹⁴⁹ *Id.*

¹⁵⁰ See Liam Stack, *Trump Victory Alarms Gay and Transgender Groups*, N.Y. TIMES, (Nov. 10, 2016), http://www.nytimes.com/2016/11/11/us/politics/trump-victory-alarms-gay-and-transgender-groups.html?_r=0. (Mr. Trump has also promised to nullify all of Mr. Obama's executive orders, including one that bans anti-L.G.B.T. discrimination by federal contractors and another that protects the rights of transgender students, said Rea Carey, executive director of the National L.G.B.T.Q. Task Force.);

("Gay and transgender leaders said they were especially alarmed when Mr. Trump chose Mike Pence, who has a long opposition to gay rights, as his running mate . . . As governor of Indiana, Mr. Pence opposed gay marriage and signed into law a bill that made it legal for businesses to cite religious freedom when refusing service to gay and transgender people, for example a bakery that refused to bake a cake for a same-sex wedding. As member of Congress, Mr. Pence voted against employment nondiscrimination protections for gay and transgender people and also voted against the repeal of 'don't ask, don't tell'... He also argued for public funding of conversion therapy and said federal funding for H.I.V./AIDS treatment should be renewed only if the government could certify that no money went to 'organizations that celebrate and encourage the types of behaviors that facilitate the spreading of the H.I.V. virus'");

See also Human Rights Campaign, *Donald Trump: Opposes Nationwide Marriage Equality*, <http://www.hrc.org/2016RepublicanFacts/donald-trump-opposes-nationwide-marriage-equality>.

(On Transgender Equality, "Trump has expressed support for North Carolina's HB2, he's said he would rescind the Obama Administration's guidance that transgender students be treated with dignity and allowed to use restrooms that match their gender identity, and when it comes to governors like Pat McCrory that write discrimination into state law, Trump has made it clear he would not enforce federal civil rights laws to ensure transgender Americans are treated equally under the law.").

¹⁵¹ GLAAD, *Transgender FAQ*, <http://www.glaad.org/transgender/transfaq>.

respondents (46%) reported being uncomfortable seeking police assistance.

- 41% of respondents reported attempting suicide, compared to 1.6% of the general population.
- Transgender people still cannot serve in the US Military.
- Transgender people, particularly transgender women of color, face shockingly high rates of murder, homelessness, and incarceration. Most states and countries offer no legal protections in housing, employment, health care, and other areas where individuals experience discrimination based on their gender identity or expression.¹⁵²

But despite these alarming statistics, perhaps most alarming of all is the treatment of transgender individuals in prison. Being transgender is a known risk factor for being sexually victimized in confinement settings.¹⁵³

The National Inmate Survey, conducted by the federal Bureau of Justice Statistics, estimated that 4% of state and federal prison inmates and 3.2% of jail inmates reported being sexually victimized by other inmates or staff during the previous year. That same survey, released in 2014, showed that 34.6% of transgender inmates in prisons and 34% in jails reported being sexually assaulted during the same time frame.¹⁵⁴

In 2003, President George W. Bush signed into law the Prison Rape Elimination Act. Regulations implementing the law were finalized in 2012 and required that housing decisions regarding transgender inmates be made on a case-by-case basis.¹⁵⁵ In March 2016, the US Department of Justice released new guidelines that prohibit corrections agencies from placing transgender prisoners into men's or women's units solely based on the sex organs they were born with.¹⁵⁶ "Federal regulations have required prisons and jails to consider transgender inmates' gender identity since 2012 – and those prisoner's views on where they would feel safest. However, most agencies continue to have

¹⁵² *Id.*; see also Ellen Mitchell and Brandon Carter, *Trump Officially Bans Transgender People From Military*, The Hill, (Aug. 25, 2017), <http://thehill.com/policy/defense/348045-trump-signs-order-barring-transgender-people-from-enlisting-in-military>. (stating that President Trump 'officially signed a presidential memo . . . instructing the Defense Department to stop accepting transgender people who want to enlist in the military.' The memo not only bars transgender individuals from enlisting, but also instructs the Secretary of Defense on how to handle transgender people currently serving, including ordering the Pentagon to stop paying for gender reassignment surgeries).

¹⁵³ National Prea Resource Center, *supra* note 55.

¹⁵⁴ Maria L La Ganga, *US Prohibits Imprisoning Transgender Inmates in Cells Based on Birth Anatomy*, THE GUARDIAN, (Mar. 24, 2016), <https://www.theguardian.com/us-news/2016/mar/24/transgender-prison-gender-identity-anatomy-doj-rules>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

blanket policies or practices that put inmates in cells based on their genitalia.”¹⁵⁷ The new policies, enacted on March 24, 2016, state that

In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems . . .

A policy must give “serious consideration” to transgender or intersex inmates’ own views with respect to safety. The assessment, therefore, must consider the transgender or intersex inmate’s gender identity – that is, if the inmate self-identifies as either male or female. A policy may also consider an inmate’s security threat level, criminal and disciplinary history, current gender expression, medical and mental health information, vulnerability to sexual victimization, and likelihood of perpetrating abuse. The policy will likely consider facility-specific factors as well, including inmate populations, staffing patterns, and physical layouts. The policy must allow for housing by gender identity when appropriate . . .

The Department recognizes that the decision as to the most appropriate housing determination for a transgender or intersex inmate is complicated. Facilities may consider several methods to make these assessments. Best practices include informing decisions on appropriate housing through consultation by facility administration, classification and security staff, and medical and mental health professionals. However, a facility should not make a determination about housing for a transgender or intersex inmate based primarily on the complaints of other inmates or staff when those complaints are based on gender identity.

Importantly, the facility shall not place transgender inmates in involuntary segregated housing without adhering to the safeguards in Standard 115.43.¹⁵⁸

It has yet to be seen what effects these new policies will have on the treatment of transgender individuals but for transgender inmates in states like Massachusetts, where the prison policy is that inmates “shall be placed in a gender-specific institution according to the inmate’s biological gender presentation and appearance,”¹⁵⁹ it is safe to presume that they will face less discrimination and less danger so long as the prisons actually enact the new policies. Prison policies regarding transgender individuals in states like Massachusetts leave inmates at a

¹⁵⁷ *Id.*

¹⁵⁸ National Prea Resource Center, *supra* note 55.

¹⁵⁹ US Prohibits Imprisoning Transgender Inmates Based on Birth Anatomy, *supra* note 154.

high risk for sexual assault, and imprison these individuals not just by way of incarceration, but also by imprisoning them in the bodies that they are born into, leaving them prey to sexual assault and violence. “Whatever else one might say about our incarceration or people sentenced to it,” Harper Jean Tobin, National Center for Transgender Equality Director of Policy said, “rape is never part of the punishment. And yet it has become far too common – and has been for decades – for transgender women.”¹⁶⁰

In an essay written in 2000¹⁶¹ for the Michigan Journal of Gender and Law, Darren Rosenblum wrote the following:

A transgendered woman, who has undergone extensive hormonal therapy and cosmetic surgery, is convicted and imprisoned. Because she still has a penis, albeit a nonfunctioning one, prison officials categorize her as a male, and place her in a men’s prison. “You were born a boy, and you’re going to stay a boy,” the prison doctor says, rejecting continuation of her long-term estrogen treatment. Her body begins to regain the masculinity she had largely escaped. Bruised by the changes, her body no longer feels like her own, but one imposed on her by the criminal justice system. Her femininity stands out among the male prisoners who repeatedly rape and beat her. Trapped, not only in her body, but in a prison that refuses to recognize and respect her gender identity, she castrates herself with glass and used razors. The prison hospital’s hands forced, it finishes the job. Then, to compensate for the lost masculinity, the doctor orders testosterone replacement treatments. After this fails to restore her masculinity, the prison doctors return her to the estrogen treatments that preceded her incarceration.

In the past sixteen years, it seems that little has changed, despite more recent attempts by the Department of Justice to come up with more humane mechanisms for placing transgender inmates in appropriate facilities. Rosenblum notes that “transgendered people commonly speak of their situation as being ‘trapped in the wrong body’, a prison metaphor that reflects the doubly incarcerated nature of transgender prisoners’ experiences.”¹⁶² It thus seems that the treatment of transgender prisoners is emblematic of the treatment of transgender individuals, in that we systemically imprison transgender individuals in the bodies they are born with, as opposed to the gender that they identify with.

More recently, in April 2015, the New York Times published an article about Ashley Diamond, a transgender woman who was

¹⁶⁰ *Id.*

¹⁶¹ Darren Rosenblum, “*Trapped*” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 500 - 501 (2000).

¹⁶² *Id.*; see Marzullo & Libman, *supra* note 5.

imprisoned at the age of 33 in Georgia.¹⁶³

Ms. Diamond, 36, had lived openly and outspokenly as a transgender woman since adolescence, much of that time defying the norms in [her] conservative Southern city. But on the day she arrived at a Georgia prison intake center in 2012, the deliberate defeminizing of Ms. Diamond began. Ordered to strip alongside male inmates, she froze but ultimately removed her long hair and the Hannah Montana pajamas in which she had been taken into custody, she said. She hugged her rounded breasts protectively.¹⁶⁴

Ms. Diamond was a first-time inmate at the age of 33. Her major offense was burglary and she was

[S]ent to a series of high-security lockups for violent male prisoners. She had been raped at least seven times by inmates, her lawsuit asserts . . . She has been mocked by prison officials as a ‘he-she thing’ and thrown in solitary confinement for ‘pretending to be a woman’. She has undergone drastic physical changes without hormones. And, in desperation, she has tried to castrate and to kill herself several times.¹⁶⁵

Ms. Diamond entered the Georgia prison system in 2012, just before federal standards under the Prison Rape Elimination Act “established special protections for transgender inmates, recognizing them as an especially vulnerable group whose prison placement should be carefully considered and continually reviewed. Georgia itself committed to evaluate each inmate individually during intake to identify ‘risk factors associated with sexual assault,’ and has declared zero tolerance for sexual assault . . . ”¹⁶⁶ And although Ashley Diamond identifies and declares herself a transgender woman, “she was assigned to a high-security prison for men, where within a month she was brutally attacked – punched, stomped, raped and knocked unconscious – by six gang members.”¹⁶⁷ While in prison, Ashley was unable to get any of the hormones she needed, and without access to feminine dress and grooming, “her appearance and her gender identity were suddenly and painfully unaligned”.¹⁶⁸

Ashley Diamond was lucky, because after suing Georgia in February 2015 for access to hormone therapy and protection against prison rape, she was paroled in August after serving less than four years

¹⁶³ Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men’s Prison*, N.Y. TIMES, (Apr. 5, 2015), http://www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens-prison.html?_r=0.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

of her twelve year sentence.¹⁶⁹ Diamond’s federal lawsuit was backed by the Justice Department, and, “had become a thorn in the side of the Georgia Department of Corrections, maintaining in frequent legal filings that corrective steps taken in response to her complaints were inadequate.”¹⁷⁰ Ms. Diamond’s lawyer, Chinyere Ezie of the Southern Poverty Law Center said, “I think we’re seeing a bit of a pattern . . . Departments of correction nationwide are being dragged kicking and screaming into the future, using early release to avoid making substantive changes that will affect transgender inmates’ lives.”¹⁷¹

Although Darren Rosenblum’s 2000 article was written sixteen (16) years ago, it appears oddly prophetic given the decisions facing prisons and department of corrections today. Or perhaps, it merely shows how slow-moving progress has been in the arena of transgender inmates’ rights and protections. In 2000, Rosenblum said, “Once imprisoned, transgendered people find fighting for their gender identity a monumental task, as they confront the gender segregation, transphobia, and limited resources of the prison system. Transgendered prisoners’ needs challenge even the most reform-minded institutions in their goal to provide humane treatment.”¹⁷² The solutions Rosenblum offered in *Trapped in Sing Sing* are relevant today, and perhaps even more so given the recent policies and standards instituted by the Prison Rape Elimination Act.

First, because prisoners are divided into men’s and women’s facilities and housing areas, “the obvious conundrum of categorizing the transgendered for placement purposes arises directly from this policy of segregation. This seemingly simple classification is an intractable problem when categorizing a transgendered person.”¹⁷³ This means that how inmates are processed is critical for transgender individuals. Rosenblum argues that

[P]re-sentence reports provide sentencing judges with a portrait of the prisoner, and such reports should include a space for the presentencing officer to discuss gender issues more fully than currently permitted. Prisoners should be allowed to present medical, psychological, and even physical evidence to support their assertions of gender identity . . . Prison authorities should designate a sensitive, knowledgeable, and sympathetic person to deal with transgendered

¹⁶⁹ Deborah Sontag, *Transgender Inmate Who Sued Georgia Gets Unexpected Parole*, N.Y. TIMES, (Aug. 31, 2015), <https://www.nytimes.com/2015/09/01/us/transgender-inmate-who-sued-georgia-gets-unexpected-parole.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Rosenblum, *supra* note 161, at 516.

¹⁷³ *Id.* at 520.

prisoner requests to prevent the arbitrary denial of appropriate treatment. Treatment of transgendered people should be standardized within prison systems to maximize the rationality of the practices assumed.¹⁷⁴

Next, and this seemingly flows from the necessity of designating sensitive and sympathetic staff members to deal with requests from transgender inmates, “speedy and dignified treatment is essential for the sensitive handling of the pre-incarceration proceeding. In one case, an inmate was isolated for two weeks while prison authorities tried to determine whether she was a man or a woman.”¹⁷⁵ Under PREA, however, “facilities may use segregation in isolation, solitary confinement or protective custody only as a last resort. This means taking other steps to prevent abuse such as permitting transgender people to shower separately and exploring alternatives such as moving an aggressor to another cell or facility.”¹⁷⁶ However, “facilities must justify any use of isolated segregation for more than 30 days.”¹⁷⁷

Even within the community of transgender inmates, “pre- and non-operative transsexuals face the most serious problems related to placement because they are likely to be placed with their initial gender, regardless of the extent of their non-genital physical transformations.”¹⁷⁸

For example, one pre-operative transgendered woman testified that she was the victim of “attempted and completed acts of violence and sexual assault” and “harassment by prison officers and [was] forced to strip in front of officers and other inmates.” Another pre-operative transgendered woman who works as a street prostitute was harassed and arrested by the police, even though she was not working at that time, and the officers had not witnessed any work-related behavior. Without any evidence of criminal conduct, the policemen arrested her and took her to jail. They put her in the cell furthest from the guard station with forty-six men. She was finally released eight hours later, after being raped by nearly all of the men in the cell.¹⁷⁹

Rosenblum argues that “the most sweeping solution to gender segregation would be the establishment of co-correctional facilities”¹⁸⁰, where men and women prisoners would be placed in the same prison but would be separated by hall or cell or section. Advocates argued that

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Lambda Legal, *FAQ: Answers to Common Questions About Mistreatment of TGNC Incarcerated People*, <http://www.lambdalegal.org/know-your-rights/article/trans-in-prison-faq>.

¹⁷⁷ *Id.*

¹⁷⁸ Rosenblum, *supra* note 161, at 522.

¹⁷⁹ *Id.* at 525.

¹⁸⁰ *Id.* at 526

these institutions would pose many benefits¹⁸¹, including geographical proximity, access to the same opportunities, and would perhaps even better behavior among inmates. The problem with co-correctional prisons was due to the “overwhelmingly male population” which “led to security problems between men and women, which required placing women under higher levels of control and denying them resources.”¹⁸² It seems that co-correctional facilities would, however, “benefit transgendered prisoners by lifting the iron curtain between the sexes. Placing a transgendered prisoner in a co-correctional facility would permit the transgendered person to live as she wished.”¹⁸³

Long-term changes to prison systems will not immediately help currently incarcerated transgender inmates, and in order to help those inmates, prisons must adhere to certain practices in order to improve the conditions for their inmates. Protecting transgender individuals from rape by committing themselves to prosecuting and appropriately responding to such violence will be critical in helping at-risk inmates¹⁸⁴; identifying both potential attackers and targets to deal with the situation head-on¹⁸⁵; and enforcing the goals and standards set forth by PREA will all be of assistance.

VII. WHAT COMES NEXT FOR TRANSGENDER INDIVIDUALS

It is clear that the problems that transgender individuals face are many and serious, and despite the attempts of PREA and the Equality Act of 2015 and more recent federal regulations for prisons, there remains more to be done, particularly in changing and volatile political environments. The effects of these new federal regulations have yet to be seen, but as Darren Rosenblum suggests in *‘Trapped’ In Sing Sing*, the path to appropriate placement for transgender inmates may begin with the modification of prison procedures.¹⁸⁶ For example, “concerns about the discomfort that may result from sharing cell could be addressed by placing the transgendered inmate in a smaller, single bed cell”¹⁸⁷ may prove beneficial. To avoid discomfort among the general prison population and not only cellmates, prison officials should take more active roles in placement by “survey[ing] prisoners to determine the most tolerant cellmate before placement . . . In a prison where a transgendered prisoner would be housed, sensitivity training of

181 *Id.* at 527.

182 *Id.* at 527.

183 *Id.* at 528.

184 *Id.* at 528.

185 *Id.* at 528.

186 *Id.* at 533.

187 *Id.*

prisoners and prison officials could ease the integration of the transgendered prisoner into the prison population.”¹⁸⁸ Although a more difficult and more long-term solution, Rosenblum offers that prison authorities may choose to “create special wards for transgendered inmates,”¹⁸⁹ which would allow for the maximization of comfort and safety, for both the needs of transgender inmates and the general population.

While the challenges transgender inmates face are perhaps the most serious and horrifying, there is still more work to be done in terms of securing protection against discrimination for transgender individuals in general. Although part of securing these protections is dependent on the changes occurring in our political environment, some of the changes and protections ought to be instituted by individual cities and states, to continue the path towards progress and equal rights certain places have already provided to their transgender citizens.

Instituting strong protections like those New York City provides for transgender individuals requires creating strict rules and ensuring that violations of these laws are, in fact, subject to hefty penalties.¹⁹⁰ New York City has said that violations of these protections for transgender individuals include such acts as intentionally failing to use an individual’s preferred name, pronoun or title; or refusing to allow individuals to use single-sex facilities (such as bathrooms or locker rooms) consistent with their gender identity.¹⁹¹ Violations of these rules can result in huge monetary penalties, and in fact, there is no limit to the amount of compensatory damages that may be awarded to a victim of discrimination.¹⁹²

There is no doubt that even instituting these strong protections will not immediately alleviate all the harms and discrimination incurred by transgender individuals; but for children like Gavin Grimm and Coy Mathis and transgender inmates like Ashley Diamond, who, often from a young age are aware that they feel different from their peers, these protections will surely begin to help them and their families deal with the undoubtedly difficult road ahead and help to protect them from discrimination, sexual assault, and abuse.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 534.

¹⁹⁰ NYC Office of the Mayor, *supra* note 98.

¹⁹¹ *Id.*

¹⁹² *Id.*