THE CONSTITUTIONAL IMPLICATIONS OF BATHROOM ACCESS BASED ON GENDER IDENTITY: AN EXAMINATION OF RECENT DEVELOPMENTS PAVING THE WAY FOR THE NEXT FRONTIER OF EQUAL PROTECTION

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INTRODUCTION

Issues faced by those in the sexual minority[1] are at the forefront of controversial topics dividing much of the United States. Whether homosexuals are to be given the same civil rights with respect to marriage as heterosexuals, the military, and even complete equality in the eyes of the anti-discrimination statutes is still heavily debated. Although there have been notable victories in the battle for homosexual protection, complete equality is still dauntingly distant.[2] In light of the controversy facing civil rights for homosexuals, it is no surprise that the problems faced by transgender[3] individuals are given even less prominence in the media and the political milieu. Yet this is rapidly changing, and as the nation is recognizing that sexuality cannot be easily compartmentalized, the media and progressive municipalities are becoming more cognizant of the needs of transgender individuals.[4]

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[1] "Sexual minority," for lack of a more effective universal identifier, will be used to identify those individuals who do not conform to conventional gender norms in so much as they either do not identify with the biological gender with which they were born, or because they are attracted to those of the same biological gender. I realize that this term may offend those who consider themselves among the "gender majority" or may even resent the implication of being in the minority, and apologize for using this admittedly ambiguous short-hand.

[2] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding that same-sex intimate relationships are a fundamental right under the Due Process Clause of the Fourteenth Amendment, while declining to consider whether governmental recognition of same-sex relationships was protected); Watkins v. U.S. Army, 875 F.2d 699, 728 (9th Cir. 1989) (en banc) (holding that sexual orientation is a suspect classification), *cert. denied*, 498 U.S. 957, 957 (1990).

[3] *See* Part I *infra* for a discussion of what is generally meant by "transgender" and "gender identity."

[4] *See* SHANNON MINTER & CHRISTOPHER DALEY, NAT'L CTR. FOR LESBIAN RIGHTS & THE TRANSGENDER LAW CTR., TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S

Transgender individuals have made remarkable efforts to lobby for civil rights laws in the past decade.[5] "[T]hese efforts have been most successful at the local level."[6] "In 1975, Minneapolis, Minnesota passed the first local ordinance prohibiting discrimination against transgender people."[7] By the end of 2006, the number of local ordinances protecting transgender people had multiplied. There are now at least eighty-four such local ordinances.[8]

Bathroom access is one of the most critical issues faced by the transgender community. Undeniably, the issue is often perceived as frivolous, but undeservingly so.[9] This perception is particularly troublesome as the courts will likely be the stage for the battle over bathroom access since legislatures are reluctant to declare that the denial of bathroom access based on gender identity is discrimination, and few jurisdictions have agencies willing to draft appropriate statutory guidelines like the ones in San Francisco and New York City.[10]

This Comment argues that bathroom access based on gender identity is indeed a vital right for the transgender community, and one deserving of public as well as legislative attention. Transgender individuals should not be compelled to use the bathrooms designated

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TRANSGENDER COMMUNITIES 3 (2003), http://nclrights.org/publications/pubs/transrealities0803.pdf (highlighting the advancements made with respect to transgender issues in both the legal and social arenas).

[5] *See* Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 45 (2000) (delineating the recent successes of the movement for transgender rights).

[6] *Id.*

[7] *Id.* (citing MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, § 139.20 (2000)).

[8] Some of the municipalities that have enacted some type of transgender-protective anti-discrimination regulation are: Ann Arbor, Michigan; Atlanta, Georgia; Benton County, Oregon; Boulder, Colorado; Cambridge, Massachusetts; DeKalb, Illinois; Evanston, Illinois; Grand Rapids, Michigan; Harrisburg, Pennsylvania; Iowa City, Iowa; Jefferson County, Kentucky; Louisville, Kentucky; Los Angeles, California; Madison, Wisconsin; Minneapolis, Minnesota; New York City, New York; New Orleans, Louisiana; Olympia, Washington; Pittsburgh, Pennsylvania; Portland, Oregon; San Francisco, California; Seattle, Washington; St. Paul, Minnesota; Toledo, Ohio; Tucson, Arizona; West Hollywood, California. For an updated list of jurisdictions with transgender-protective laws, see Transgender Law & Policy Inst., Non-Discrimination Laws That Include Gender Identity and Expression, http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions (last visited Nov. 15, 2006). See Part V, *infra*, for a description of the San Francisco and New York City ordinances as they serve as particularly useful models for effective transgender-inclusive anti-discrimination laws.

[9] As stated by Lisa Mottet, there is concern that "courts will view denial of bathroom access as just a minor inconvenience that they do not want to micromanage. This was apparent in *Goins*. The court wanted to defer to the employer's handling of these issues and so it hid behind a vague notion of cultural practices instead of applying the law." Lisa Mottet, Transgender Civil Rights Project, Speech at Georgetown Symposium on Gender & Sexuality (Feb. 27, 2002), *in Access to Gender-Appropriate Bathrooms: A Frustrating Diversion on the Path to Transgender Equality*, 4 GEO. J. GENDER & L. 739, 744 (2003) (citing Goins v. W. Group, 635 N.W.2d 717 (Minn. 2001)).

[10] *See id.*

for their biological gender, nor should proprietors of public accommodations and employers be forced to provide gender neutral bathrooms or a restroom reserved for the "other" group, as such designations only perpetuate gender stereotypes and discriminatory behavior. Although the Comment urges attention to this issue at the national level, such groundbreaking statutory protection is unlikely. This Comment therefore proposes that reform begin with legislation drafted at the local level, and modeled after the regulatory guidelines passed in New York City and San Francisco.

Part I of the Comment details the technical definition(s) of what constitutes being transgender under current medical and psychological guidelines. Part II describes the place the transgender community holds within the constitutional framework with respect to equal protection. The section concludes that the transgender community should be considered a suspect class due to the immutability of gender identity and the history of discrimination faced by this group, but highlights that statutory protection, particularly at the local level, is even more urgent given that the United States Supreme Court is unlikely to bestow suspect class status on the transgender community. Part III details the history of the battle for equal rights by transgender individuals, both at the state and federal levels. The section also explains that while the transgender community is not considered a suspect class for purposes of federal statutory protection, such as Title VII, significant headway is being made in both state legislation and common law with respect to transgender rights. Part IV details the importance of bathroom access based on gender identity due to the safety, comfort, and individual liberty implications of not permitting such access to the transgender community. This part notes that despite the undeniable importance of bathroom access, it is the next frontier of equality for transgender individuals in that when decisions concerned bathroom access for preoperative transsexuals, both state and federal courts have denied protection. Finally, in light of the evident judicial reluctance to protect transgender rights, Part V reviews the success of the New York and San Francisco ordinances, and considers them as possible models for other municipal legislation which may ultimately pave the road to protection at the national level. This section concludes with a proposal for reform advocating restroom access based on gender identity.

I. WHAT IS TRANSGENDER?

The term "transgender" applies to a variety of psychological and physiological states, and it is thus difficult to create an all-

encompassing definition for transgender individuals. The concept is closely tied to one's "gender identity," a phrase coined by John Money, a psychologist and sexologist at Johns Hopkins University.[11] Money was the first to describe the term "gender role" as the "sameness, unity and persistence of one's individuality as male, female, or ambivalent, in greater or lesser degree, especially as it is experienced in self-awareness and behavior."[12] According to most sexuality experts, gender identity is the private experience of gender role, and gender role is the public expression of gender identity. Gender role is defined as everything that a person says and does to indicate to others, or to the self, the degree that one is either male, female, or ambivalent.[13]

According to recent medical theory, transsexual, also referred to as "transgender," individuals are clinically diagnosed with Gender Identity Disorder.[14] The section of the Diagnostic and Statistical Manual of Mental Disorders (DSM) entitled "Gender Identity Disorders" was replaced with the singular term "Gender Identity Disorder" (GID), upon the release of the DSM-IV, and the term "transsexualism" was eliminated.[15] Most important is that GID was reclassified as being a sexual disorder rather than a psychological one.[16]

Transsexualism, or being transgender, can be described as an incongruence between one's biological sexual differentiation and one's gender identity.[17] The criteria of the DSM-IV are often used to diag-

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[11] *See* SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 6 (1998) (describing the origins of the term "gender identity," and explaining that "[v]irtually all academic writing on sex and gender refers to a case first described by sexologist John Money in 1972").

[12] Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 17 n.71 (citing KESSLER, *supra* note 11, at 6–7, 13–14, and discussing the theory of gender proposed first by John Money, J. G. Hampson, and J. L. Hampson in 1955 and developed in 1972 by Money and Anke A. Ehrhardt that "gender identity is changeable until approximately eighteen months of age").

[13] *See* Anne Vitale, *Notes on Gender Role Transition: Rethinking the Gender Identity Disorder Terminology in the Diagnostic and Statistical Manual of Mental Disorders IV* (2005), http://www.avitale.com/hbigdatalkplus2005.htm (last visited Nov. 15, 2006) (defining gender role).

[14] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994) [hereinafter DSM-IV] (discussing the criteria for diagnosing patients with Gender Identity Disorder).

[15] *See generally id.* (employing the revised terminology).

[16] *See* Vitale, *supra* note 13 (arguing against the latter classification because much of an individual's gender identity may depend on biological factors outside of the individual's control).

[17] This should be contrasted from transvestitism, which is a desire to dress and express oneself as the opposite sex, but has no direct relationship to an ingrained desire to identify with and become the opposite sex. Essentially, transvestitism is more a mental fetish than a physical incongruity. HARRY BENJAMIN, THE TRANSSEXUAL PHENOMENON § 3 (Symposion 1999) (1966), *available at* http://www.symposion.com/ijt/benjamin/index.htm.

nose GID, and thus clinically label an individual as transgender.[18]

The Harry Benjamin Standards of Care describes the DSM-IV diagnosis of GID as "[a] strong and persistent cross-gender identification and a persistent discomfort with [one's] sex or a sense of inappropriateness in [one's] gender role of that sex[.] [Such a condition should be] diagnosed [as] Gender Identity Disorder . . . ."[19]

There has also been at least one instance in which a court recognized GID as a legitimate psychological disorder requiring the provision of public health care. In 1980, the Eighth Circuit overturned Iowa's statutory ban on Medicaid coverage for gender-related surgeries on the grounds that it removed treatment decisions from claimants' physicians, and gave the government the sole authority to determine appropriate treatment for GID.[20]

The Supreme Court's definition notably employs the Gender Identity Disorder framework of transgenderism. The Court adopted its own definition of a transsexual in *Farmer v. Brennan* as "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change."[21]

Undeniably, considering transgenderism as a disorder may more easily facilitate protection for this group. However, some transgender advocates reject the conception of transsexualism as a disorder, because they believe it labels their lifestyle as diseased.[22] Moreover, many transsexuals reject being identified as "transgender" for numerous other reasons.[23] However, a unifying identifier may serve to benefit, rather than hinder, the fight for equality by facilitating a

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[18] These criteria are: (1) there must be evidence of a strong and persistent cross-gender identification; (2) this cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex; (3) there must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex; (4) the individual must not have a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia); and (5) there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning. DSM-IV, *supra* note 14, at 537.

[19] HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 4 (6th ed. 2001).

[20] *See* Pinneke v. Preisser, 623 F.2d 546, 549 (8th Cir. 1980).

[21] 511 U.S. 825, 829 (1994) (quoting AM. MED. ASS'N, ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

[22] *See generally* LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE 1–79 (1998) (recounting the stories of transgendered people who have sought equality).

[23] One argument is that the use of the umbrella term causes the individual's identity and history to be marginalized. Another is that the term implies lack of gender barriers, whereas transsexual people themselves identify as men or as women. A third argument is that transgender individuals did not modify their gender at any point, and they have always had their gender identity, but only experienced physiological problems, and it is the latter which they desire to change.

common bond between certain individuals in the sexual minority and fostering recognition of the unique needs and concerns of this community. By attempting to categorize at least some of the characteristics of the transgender individual, the psychological community has permitted a more accessible understanding of what it means to be transsexual and provided a touchstone for solidarity among the transgender community and their supporters, which is crucial to wage a successful battle for equality.

II. THE CONSTITUTIONAL BASIS FOR TRANSGENDER PROTECTION

A. Introduction

The Fourteenth Amendment to the United States Constitution states that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[24]

The Supreme Court has interpreted the language of the Fourteenth Amendment to provide for the equal treatment of all citizens, particularly those in the minority or meeting the criteria of a suspect class.[25]

An important impetus for the grant of equal rights for all individuals was the recognition that one holds national citizenship in addition to one's state citizenship, and thus cannot be denied due process and equal protection by one's state.[26] The Supreme Court thereby recognized the necessity of protecting the liberties of individuals and groups from intrusion by the states.

Despite the recognition that all citizens deserve the protection of their "privileges and immunities," the Court has applied variable criteria for determining whether unconstitutional discrimination existed with respect to distinct groups. For example, discrimination based on race and alienage is subject to strict scrutiny where only discrimination that is necessary to achieve a compelling government jus-

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[24] U.S. CONST. amend. XIV, § 1.

[25] *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (holding that discrimination based on gender must meet "exceedingly persuasive" justification to survive validity under the Equal Protection Clause of the Fourteenth Amendment); Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the . . . Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

[26] *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 37–38 (1872) (acknowledging for the first time that individuals may be citizens of the United States without regard to their state citizenship).

tification is constitutionally acceptable. However, only "heightened scrutiny" is necessary to pass constitutional muster for purposes of discrimination based on gender.[27] The Court has also been reluctant to recognize a broader definition of gender for purposes of categorizing sexual minorities within the heightened protection granted under the Fourteenth Amendment. In *Lawrence v. Texas*, the Court deemed that homosexual relationships were only protected by the minimal rational basis standard of review.[28] Thus, the rights of homosexuals as a group were not deemed to be worthy of the heightened standard of review granted to women and men when they are discriminated against because of their biological gender.[29]

Although gender is notably a discrete biological category for purposes of constitutional protection under the Fourteenth Amendment, transgender individuals as a group have an argument for such protection. The Supreme Court's equal protection analysis has focused on the immutability of discrimination-inducing traits. One of the factors leading to its denial of suspect class status for homosexuals was the Court's focus on the behavioral aspect of discrimination against this group. Indeed the statute struck down in *Lawrence* was one that dealt with homosexual sodomy, and did not categorically deny rights to homosexual men as a group.[30] The soundness of this distinction is undoubtedly open to debate. However, the transgender community does not succumb to this pitfall for purposes of equal protection because such individuals do not belong to the "transgender" group by virtue of their behavior, but rather identify as transgender due to a physical or psychological immutable trait that is associated with Gender Identity Disorder. Thus the transgendered meet the criteria of a protected class for purposes of equal protection under the Fourteenth Amendment.[31]

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[27] *Compare* Hunt v. Cromartie, 526 U.S. 541, 546 (1999) ("[A]ll laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized."), *with Virginia*, 518 U.S. at 533 (holding that discrimination based on gender must meet "exceedingly persuasive" justification and "[t]he State must show 'at least that the . . . classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives"'") (citations omitted).

[28] 539 U.S. 558, 574 (2003).

[29] *See Virginia*, 518 U.S. at 533 (describing heightened scrutiny for gender-based classifications). The Court has, however, recognized that same-sex sexual harassment is a violation of Title VII. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that same-sex sexual harassment claims are actionable under Title VII).

[30] *Lawrence*, 539 U.S. at 574–75 (declining to employ an equal protection rationale so as to address sexual relations generally and not homosexual sodomy in particular).

[31] It should be noted, however, that the Supreme Court is not likely to recognize the transgendered as a suspect class, especially in light of its recent unwillingness to recognize new suspect classes. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–43 (1985) (holding that the mentally retarded are not a quasi-suspect class and thus a zoning ordinance barring an assisted living center for such individuals was not subject to strict scrutiny).

B. *Transgender as a Suspect Class*

Transgender individuals are a suspect class in light of the history of discrimination against such individuals and the immutability of their gender identity.[32] The Court in *Frontiero v. Richardson* emphasized that the immutability of a trait is determined largely by whether it is an "accident of birth" and thus is virtually impossible to change.[33] In so much as a physiological disorder can be considered inherited or unchangeable, albeit treatable, the GID classification bestowed on the transgendered designates transgenderism as an immutable trait.[34] Indeed, the federal courts have acknowledged the immutable quality of gender identity because it constitutes a physiological or psychological condition. The Seventh, Eighth, and Tenth Circuits have concluded that transsexualism is a serious medical and psychological problem that constitutes a serious medical need.[35] Likewise, several courts have held that transsexual inmates have a constitutional right to some type of medical treatment.[36]

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[32] *See* Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (describing four criteria for suspect class status: historical discrimination, immutability, political powerlessness, and disparate treatment not based on actual ability).

[33] *Id.* at 686. Some may argue that the ability to change one's gender belies the fact that the condition is not immutable. This criticism is misplaced, however, because the condition of not identifying with one's own biological gender is not alterable.

[34] *See* Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met*, 53 CLEV. ST. L. REV. 545, 556–57 (2005) (discussing the Court's emphasis on a group's inability to change a trait as an indicator of immutability and implying that the heredity of a trait may be of utmost importance in the analysis).

[35] *See, e.g.*, Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995) (holding that a transgender prisoner stated a cause of action for deprivation of medical treatment when prison officials failed to provide treatment for gender dysphoria); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988) (stating that transsexualism is a psychological disorder that constitutes a "serious medical need"); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987) (holding that the transsexual inmate stated a valid claim under the Eighth Amendment for the denial of medical treatment for her transsexualism); *see also* Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792, 799–801 (W.D. Mich. 1990) (determining that the transsexual plaintiff had a right to receive the same standard of care she received prior to incarceration, i.e., hormone therapy, because "transsexualism is not voluntarily assumed and is not merely a matter of sexual preference" and that the inmate suffered from "serious medical need").

[36] *See, e.g.*, *Zavaras*, 63 F.3d at 970 (holding that a transgender prisoner stated a cause of action for deprivation of medical treatment under the Eighth Amendment and was entitled to a general right to medical treatment); *Faulkner*, 821 F.2d at 413 (holding that a transsexual inmate stated a valid claim under the Eighth Amendment in connection with denial of medical treatment for transsexualism, "which if proven, would entitle her to some kind of medical treatment"). *But see* Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986) (holding that a transgender prisoner did not have a constitutional right to preoperative hormone therapy or a sex change operation); Rush v. Johnson, 565 F. Supp. 856, 869 (D. Ga. 1985) (denying Medicaid reimbursement for sex change surgery because the court "found reasonable the State's determination that transsexual surgery is not generally accepted by the professional medical community as a proven and effective treatment for the condition for which it is being used and that there is no authoritative evidence that the surgery is safe and effective. Thus, the State's determination

The transgender community is also a demonstrable suspect class because of the history of disparate treatment the group has suffered.[37] As Dylan Vade points out, "[t]ransgender people are discriminated against in many areas of life, from employment and housing, to health care and custody rights."[38] The Human Rights Commission of San Francisco reported that seventy percent of self-identified transgender respondents in San Francisco were unemployed.[39] The Transgender Law Center and the National Center for Lesbian Rights joint study on "Trans Realities" found that sixty-four percent of survey respondents reported annual incomes of $25,000 or less.[40] In Washington, D.C., forty-two percent of the transgender survey respondents were unemployed, and thirty-one percent reported an annual income of less than $10,000 per year.[41]

Furthermore, as Franklin Romeo explains:

> [T]ransgender people are disproportionately affected by poverty and frequently rely upon public assistance programs such as welfare, Medicaid, and foster care. Additionally, the combination of poverty and employment discrimination leads to a disproportionate number of transgender people participating in criminalized economies; therefore, gender nonconforming people are also disproportionately represented in the criminal justice system, court-mandated treatment programs, and prisons.[42]

California is the only state that protects transgender and gender minority students from discrimination and harassment.[43] There are

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that medically necessary services do not include [such] surgery . . . withstands judicial scrutiny.").

[37] *See generally* MINTER & DALEY, *supra* note 4, at 3 (reporting a survey in which "the people who completed the survey face an array of legal challenges in expressing their gender identity due to bias and ignorance regarding transgender issues").

[38] Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 257 (2005).

[39] PATRICK LETELLIER & YOSEÑIO V. LEWIS, HUMAN RIGHTS COMM'N CITY & COUNTY OF S.F., ECONOMIC EMPOWERMENT FOR THE LESBIAN GAY BISEXUAL TRANSGENDER COMMUNITIES 10 (2000), http://www.sfgov.org/site/uploadedfiles/sfhumanrights/docs/econ.pdf.

[40] MINTER & DALEY, *supra* note 4, at 13.

[41] JESSICA M. XAVIER, THE WASHINGTON TRANSGENDER NEEDS ASSESSMENT SURVEY (2000), http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml.

[42] Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 714–15 (2005) (internal citations omitted).

[43] *See* Assemb. B. 537, 1999–2000 Reg. Sess. (Cal. 1999) (amending CAL. EDUC. CODE § 200 (2000)) ("It is the policy of the State of California to afford all persons, regardless of their sex, ethnic group identification, race, national origin, religion, mental or physical disability, or regardless of any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, equal rights and opportunities in the postsecondary institutions of the state.").

currently no laws that protect transgender people from discrimination in health care.[44]

In light of the overwhelming discrimination the transgender community faces, some scholars have recommended treating transgender individuals as a separate "gender-identity" protected class.[45] However, only Rhode Island recognizes "gender-identity and expression" as a discrete and unique protected class.[46] Indeed, many states have explicitly denied suspect class status to the transgender community.[47]

However, the psychological community's recent treatment of transgenderism as a physiological disorder, as opposed to merely a mental illness, indicates that transgenderism is an immutable trait.[48] People suffering from GID experience great discomfort regarding their assigned gender. Moreover, the diagnostic criteria for GID generally includes an ongoing desire since early childhood to be the "opposite" gender, a desire for a physical change in one's body, and a heterosexual desire in the gender with which one identifies.[49] "Increasingly, as the medical regulation of gender transitions has become more uniform and visible, courts have been willing to grant at least rudimentary legal protections to transgender litigants who are able to provide documentation of a GID diagnosis and related medical treatment."[50]

Given the consideration that the Supreme Court is unlikely to bestow suspect class status on the transgendered, if for no other reason than the fact that it has expressed its disinclination to create new sus-

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[44] *See* Vade, *supra* note 38, at 260 (discussing the dearth of transgender-protective laws in healthcare and employment).

[45] *See, e.g.*, Samantha J. Levy, Comment, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 167–68 (2002) (discussing the three main benefits of conceptualizing transsexual individuals as part of a "gender-identity class," including providing broad protection for all transgender people, attacking the discrimination that is currently happening, and educating society about the existence of a transgender population).

[46] H.R. 592OA, 2001 Jan. Sess. (R.I. 2001).

[47] *See, e.g.*, Mario v. P & C Food Mkts., Inc., 313 F.3d 758, 767 (2d Cir. 2002) (finding that "[i]t is also not clear that Mario, as a transsexual, is a member of a protected class" while holding that even if P & C denied Mario benefits based on discrimination, gender reassignment surgery is not covered by the employer's medical insurance or ERISA because it is not medically necessary); Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995) (deciding that transsexuals are not a protected class and thus discrimination against them merits only rational basis review); Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *3 (D. Utah June 24, 2005) ("Transsexuals are clearly not a protected class under Title VII."); Rush v. Johnson, 565 F. Supp. 856, 868 (N.D. Ga. 1983) (denying that transsexuals are a protected class).

[48] *See generally* DSM-IV, *supra* note 14, at 532–33 (referring to cross-gender identification and continual discomfort in one's assigned sex as "Gender Identity Disorder").

[49] *Id.* at 532–38 (describing early childhood behaviors of those with Gender Identity Disorder, including the manifestation of a desire to alter their bodies, and a later desire to adopt the social role and physical appearance of a member of the opposite sex).

[50] Romeo, *supra* note 42, at 726.

pect classes,[51] a call for statutory protection at local and state levels is even more necessary to make the needed headway in the battle for transgender equality. It is undeniable, however, that the conception of the transgender community as a suspect class would not only highlight the need for protective equal rights legislation for this group, and thereby facilitate the passage of such legislation, but would also enable judicial stringency in combating discrimination against transgender individuals in various contexts.

III. THE HISTORY AND PRESENT STATUS OF THE BATTLE FOR TRANSGENDER RIGHTS

A. Transgender-Protective Developments at the Federal Level

Federal courts are more willing to provide protection for transgender individuals than in the past. However, federal statutory authority is still overwhelmingly unfavorable toward transgender rights. Accordingly, a great number of federal decisions reviewing Title VII's express applicability to transsexuals have denied the statute's protection.[52] The same reluctance to extend federal statutory protection to transsexuals has also been exhibited with respect to ERISA coverage and the Americans with Disabilities Act (ADA).[53] The court in *Etsitty*

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[51] *See supra* note 31.

[52] *See, e.g.*, Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) (holding that "Title VII does not protect transsexuals"); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (holding that the word "sex" in Title VII's ban on sex discrimination in the employment context is to be given its plain meaning, which does not include discrimination against transsexuals); Kirkpatrick v. Seligman & Latz, Inc., 636 F.2d 1047, 1050–51 (5th Cir. Unit B Feb. 1981) (denying Title VII protection to a pre-operative transsexual after determining that the plaintiff, who was male at the time of the complaint, was fired for dressing like a woman in violation of the employee dress code, not because of her gender identity); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (holding that Title VII does not protect transsexuals against discrimination because it only bars discrimination based on "sex," and not "gender"); *Etsitty*, 2005 WL 1505610, at *3 ("Transsexuals are clearly not a protected class under Title VII."); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003), *aff'd*, No. 03-3344, 2004 WL 1166553 (6th Cir. May 18, 2004) (holding that an employer's requirement that a transsexual employee use the men's restrooms did not constitute sex stereotyping discrimination under Title VII since the requirement only made the employee comply with the accepted principles established for gender-distinct public restrooms); Sweet v. Mulberry Lutheran Home, No. IP02-0320-C-H/K, 2003 WL 21525058, at *3 (S.D. Ind. June 17, 2003) ("Sweet's intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex."); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (holding that Title VII does not protect against discrimination based on transsexualism).

[53] *See, e.g.*, *Johnson*, 337 F. Supp. 2d at 999, *aff'd*, No. 03-3344, 2004 WL 1166553 (6th Cir. May 18, 2004) (holding that discharging a transsexual plaintiff for refusing to use the men's rest-

v. Utah Transit Authority delineated the common rationale for denying extending such protection to the transgender community. It held that "transsexuals are clearly not a protected class under Title VII,"[54] and relied primarily on the rationale set forth in *Ulane v. Eastern Airlines*, which states that

> [T]o include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. . . .
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> . . . .
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> . . . [I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.[55]

Although there has been a trend among both state and federal courts to acknowledge that gender discrimination might surpass the mere protection of biological males and females against harassment and disparate treatment, the same courts have also been reluctant to acknowledge federal statutory protection for transgender individuals.[56]

This reluctance to designate transgender individuals as a protected class is not surprising. Federal jurisprudence has traditionally been hostile to recognizing transgender individuals as a protected class for purposes of protecting their civil rights. The hallmark decision denying such protection emerged in 1977, when the court in *Holloway v. Arthur Andersen & Co.* denied Title VII protection for transsexuals.[57] The court reasoned that Title VII does not extend to transsexuals because it only bars discrimination based on "sex," not

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room did not violate Title VII or the ADA); Mario v. P & C Food Mkts., Inc., 313 F.3d 758, 767 (2d Cir. 2002) (holding that the employer's medical insurance or ERISA does not cover gender reassignment surgery because such surgery is not medically necessary); James v. Ranch Mart Hardware, Inc., No. 94-2235-KHV, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994) (holding that employment discrimination based on transsexualism is not actionable under Title VII or the ADA).

[54] *Etsitty*, 2005 WL 1505610, at *3.

[55] *Id.* at *3–4 (quoting *Ulane*, 742 F.2d at 1086–87).

[56] *See, e.g.*, Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4–5 (W.D.N.Y. Sept. 26, 2003) (holding that the plaintiff's claim under Title VII for discrimination for failing to act like a man was discrimination based on sex and therefore actionable under Title VII, while acknowledging that if the discrimination complaint centered on discrimination based on the plaintiff's transsexuality she would not have been protected, as Title VII does not protect transgender individuals); Broadus v. State Farm Ins. Co., No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (finding that discrimination based on sexual stereotypes is impermissible, but questioning whether a transsexual is protected from sex discrimination and sexual harassment under Title VII).

[57] 566 F.2d at 663.

transsexualism.[58] It further stated that Congress intended to preserve protection from discrimination based on the traditional definition of "sex," which means either male or female for purposes of Title VII.[59]

Another preeminent decision emerged in *Ulane v. Eastern Airlines, Inc.*[60] The court expressly disagreed with the trial court's holding that transsexuals, as individuals with Gender Identity Disorder and not simply homosexuals or transvestites, are to be protected under Title VII.[61] The court held that Title VII does not protect transsexuals since "words should be given their ordinary, common meaning" and "sex," with respect to Title VII, meant anatomical gender.[62] Thus Title VII, according to the court, does not extend protections to groups such as homosexuals and transsexuals. Moreover the court found that Congress manifested an intention to exclude homosexuals from Title VII coverage and did not mean to include broad protection for individuals with GID.[63] Unlike *Holloway*, which the Ninth Circuit declared overruled,[64] *Ulane* continues to hold sway as relevant authority.[65] Courts have reconciled the tension between *Price Waterhouse v. Hopkins* and *Holloway* by generally holding that transgender plaintiffs are not a suspect class for purposes of Title VII, but Title VII itself merely declares impermissible disparate treatment of one sex.[66]

Courts often bypass equality and fairness concerns by either downplaying the harm to the transgender individual or by minimizing the effort necessary on the part of such individuals to conform to traditional societal gender roles.[67] For example, the court in *Etsitty*

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[58] *Id.* at 664 ("Holloway has not claimed to have [been] treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex.").

[59] *Id.* at 663 ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning.").

[60] 742 F.2d 1081 (7th Cir. 1984).

[61] *Id.* at 1085 ("While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.").

[62] *Id.*

[63] *Id.*

[64] The court in *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000), recognized the *Holloway* decision as overruled by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See infra* notes 84–86 and accompanying text for a discussion of *Price Waterhouse v. Hopkins*.

[65] *See, e.g.*, Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) (following the *Ulane* court's reasoning that "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation"); Sweet v. Mulberry Lutheran Home, No. IP02-0320-C-H/K, 2003 WL 21525058, at *2–4 (S.D. Ind. June 17, 2003) (relying on *Ulane* in holding that Title VII does not prohibit discrimination on the basis of a person's intention to change his or her sex).

[66] *See, e.g.*, Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *4–5 (D. Utah June 24, 2005) (deciding that to include transsexuals within the protection of Title VII would exceed statutory interpretation and that there is a difference between a woman who does not behave femininely and a man who is altering his appearance to look like a woman).

[67] *See supra* notes 64–65.

held that an employer's dismissal of a preoperative male-to-female transsexual was permissible because the employer was not forcing the plaintiff to change her appearance, but rather to abide by societal delineations of permissible bathroom facilities.[68] Elaborating on this point, the court stated that "[t]here is no evidence that the defendants required Plaintiff's appearance to conform to a particular gender stereotype, only that they required her 'to conform to the accepted principles established for gender-distinct public restrooms.' This is a legitimate non-discriminatory reason for dismissing her."[69] The court also expressly held that the *Price Waterhouse* prohibition against sex stereotyping discussed below should not be applied to transsexuals.

> There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes. . . . "This disorder is not meant to describe a child's nonconformity to stereotypic sex-role behavior as, for example, in 'tomboyishness' in girls or 'sissyish' behavior in boys. Rather, it represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness."[70]

Other decisions have also refused to apply the prohibition of discrimination based on gender stereotypes to transgender individuals. In *Broadus v. State Farm Insurance Co.*, the court stated that "[s]exual stereotyping which plays a role in an employment decision is actionable under Title VII."[71] However, the court refused to extend the protection of *Price Waterhouse* to transsexuals as "[i]t is unclear . . . whether a transsexual is protected from sex discrimination and sexual harassment under Title VII."[72] The court essentially dictated that transgender individuals, unlike biological males and fe-

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[68] *Etsitty*, 2005 WL 1505610 at *6 ("[A] complete rejection of sex-related conventions was never contemplated by the drafters of Title VII and is not required by the language of the statute or the Supreme Court opinion in *Price Waterhouse*.").

[69] *Id.* (citing Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003)) (internal citations omitted).

[70] *Id.* at *5 (citing DSM-IV, *supra* note 14, at 564). *But see* Doe v. United Consumer Fin. Servs., No. 1:01CV1112, 2001 WL 34350174, at *4 (N.D. Ohio Nov. 09, 2001) (holding that a transsexual employee may have a claim for discrimination based on gender stereotyping under *Price Waterhouse*, even though she did not have a claim under Title VII).

[71] No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)); *see also* Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *5 (E.D. La. Sept. 16, 2002) (refusing to hold that the discrimination was due to gender stereotypes, but rather that the plaintiff was fired because "[he] disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity").

[72] *Broadus*, 2000 WL 1585257, at *4.

males who identify with the gender with which they are born, are below protection for failing to meet a sexual stereotype.[73]

Notable decisions have rationalized the disparate treatment of the transgender community by emphasizing congressional intent in the formulization of anti-discrimination laws.[74] These courts propound that Congress intended to limit protection to members of either gender, and did not purposefully include groups whose gender identity surpasses traditional conceptions.[75]

The disinclination of the courts to provide equal protection for the transgender community is not improper in light of federal statutory authority, which is notably averse to providing equal rights and protection against discrimination for transgender individuals. Congress specifically excluded the transgender community from the ADA[76] and the Rehabilitation Act.[77]

The court in *Oiler v. Winn-Dixie Louisiana, Inc.* noted that from 1981 through 2001, thirty-one proposed bills were introduced in the United States Senate and the House of Representatives that attempted to amend Title VII to prohibit employment discrimination on the basis of affectional or sexual orientation.[78] None of these measures passed. The rejection of these proposed amendments indicates that Congress intended the phrase in Title VII prohibiting discrimination on the basis of sex to be narrowly interpreted.[79]

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[73] Other decisions refusing to extend *Price Waterhouse* to transsexuals include *Etsitty*, 2005 WL 1505610, at *3 (finding that statutory construction prohibited transgendered plaintiffs from receiving protections under Title VII), and *Oiler*, 2002 WL 31098541, at *6 (finding that plaintiff's actions were not like the actions of the plaintiff in *Price Waterhouse* because the plaintiff in *Price Waterhouse* simply did not act as her employer thought she should have; she never pretended to be a man or adopted a masculine persona).

[74] *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084–85 (7th Cir. 1984) (stating that it is the court's responsibility "to interpret . . . congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex" and thereafter holding that transsexuals were not meant to be protected under Title VII).

[75] *See* Plakio v. Congregational Home, Inc., 902 F. Supp. 1383, 1389–90 (D. Kan. 1995) (holding that, in the context of Title VII's prohibition against discrimination, "sex" means membership in class delineated by gender; it does not mean sexual orientation, preference, identity, affiliation, or behavior); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (stating that "sex," as used in Title VII, refers to an individual's distinguishing biological or anatomical characteristics, whereas "gender" refers to an individual's sexual identity).

[76] 42 U.S.C. § 12211(b)(1) (2000).

[77] 29 U.S.C. § 705(20)(F)(i) (2000).

[78] 2002 WL 31098541, at *4 n.53 (listing each of the thirty-one proposed bills that were unsuccessfully introduced).

[79] However, it is notable that the U.S. Supreme Court has held that same-sex sexual discrimination is actionable under Title VII. *See generally* Oncale v. Sundowner, 523 U.S. 75, 78 (1998) (refusing to exclude same-sex sexual harassment from Title VII protection). This belies that the Court's interpretation of what constitutes sex *discrimination* for purposes of Title VII will always be narrowly drawn based on conventional conceptions of gender relationships.

Despite the reluctance of Congress and many courts to recognize protection for the transgender community, there have been favorable developments. The Ninth Circuit, in dicta, has recognized that "sex" and "gender" are both protected under Title VII, thus enabling federal jurisprudence to recognize that discrimination can span beyond mere unfavorable treatment due to one's biological gender.[80]

In *Schwenk v. Hartford*, the defendant, a prison guard accused of sexually assaulting a transgender inmate, claimed that transsexualism is not an element of gender, but rather constitutes gender dysphoria, a psychiatric illness.[81] The court disagreed and stressed that the Gender Motivated Violence Act (GMVA), which parallels Title VII, prohibits discrimination based on gender as well as sex. "Indeed, for purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable."[82] The court held that the GMVA applied to transsexuals because the Act expressly stated that it protected "all persons within the United States."[83]

One of the most important victories for transgender equality was achieved in the Supreme Court's holding in *Price Waterhouse v. Hopkins*.[84] This influential decision shed light on the fact that gender categories are not as distinct as traditionally conceived. The Court held that gender stereotypes, such as requiring that a woman wear heels and make-up, are sex discrimination under Title VII.[85] The presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy is a bona fide occupational qualification.[86]

Although the specific facts of the case did not include transgender parties, it is not surprising that *Price Waterhouse* would provide protec-

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[80] *See* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (determining that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); *see also* Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1041 (9th Cir. 2005) (limiting employer defenses under amendments to Title VII, whereby an employer can no longer escape liability by merely showing motivations besides sex for discrimination).

[81] 204 F.3d at 1200.

[82] *Id.* at 1202.

[83] *Id.* at 1200 (citing 42 U.S.C. § 13981(d) (2000) (prohibiting "crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender"). Whether a particular act of violence was gender-motivated and thus fell within the Act's scope is determined in light of the totality of the circumstances. The GMVA has since been declared unconstitutional by *United States v. Morrison*, 529 U.S. 598, 617–18 (2000), because it exceeded Congress's Commerce Clause powers.

[84] 490 U.S. 228 (1989).

[85] *See id.* at 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .").

[86] *Id.* at 244.

tion, even if only implicitly, for such individuals. Discrimination against transgender individuals is based on:

> stereotypes about how men and women are "supposed" to behave and about how male and female bodies are "supposed" to appear. For the most part, in other words, anti-transgender discrimination is not a new or unique form of bias, but rather falls squarely within the parameters of discrimination based on sex, sexual orientation, and/or disability.[87]

Accordingly, cases subsequent to *Price Waterhouse* have held that it overrules precedent abridging transgender rights.[88] *Smith v. City of Salem* held that *Price Waterhouse* implicitly overrules cases like *Holloway*, *Ulane*, and *Sommers*.[89] *Smith* importantly recognized the inability of the biological definitions of sex to capture the spectrum of sex-stereotypes, and thus held that "discrimination because of 'sex' includes gender discrimination . . . ."[90] According to Thomas Ling:

> The court concluded that the source of contra-gender behavior was . . . irrelevant to a Title VII inquiry. It rejected the use of labels such as transsexual, homosexual, or transvestite to deny protections to transgender individuals under Title VII or the Equal Protection Clause. Thus, Smith's transsexual identity did not affect his well-pleaded claims of sex-stereotyping and gender discrimination.[91]

Ling argues that Title VII should protect transgender individuals because

> biology provides little insight into the boundaries of sex discrimination. Plaintiffs can only rarely claim discrimination on the basis of actual body parts . . . . By suggesting that Title VII protections only prohibit discrimination on the basis of biological sex, courts seem to ignore Congress's intent to prohibit "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[92]

Other recent federal case law has explicitly held that "sex" discrimination spans beyond clear cut categories of unfavorable treatment of females by males.[93] Some federal jurisprudence has even

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[87] Abigail W. Lloyd, Comment, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 153 (2005) (citing Currah & Minter, *supra* note 5, at 38–39).

[88] *See generally* Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (arguing, implicitly, that *Price Waterhouse* overruled previous cases). Notably, *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at *4 (D. Utah June 24, 2005), which is post–*Price Waterhouse*, rejected the idea that the latter case called for a protection of transgender rights.

[89] *Smith*, 378 F.3d at 572.

[90] *Id.*

[91] Thomas Ling, Smith v. City of Salem: *Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 280 (2005) (internal citations omitted).

[92] *Id.* at 280–81 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)) (citations omitted).

[93] *See, e.g.*, Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78–79 (1998) (holding that same sex discrimination is actionable under Title VII); Cruzan v. Special Sch. Dist. No. 1, 294 F.3d 981, 984 (8th Cir. 2002) (holding that the school's policy of allowing a transgender male

gone as far as acknowledging that transgender individuals are protected under federal civil rights statutes.[94]

Despite these fortuitous decisions, federal case law has not universally embraced a protective stance with respect to the transgender community. The same dichotomy is evident in state jurisprudence.

B. State Law Status of Transgender Rights

States that have handled the issue of gender identity discrimination have varied in their approach to analyzing whether it constitutes sex discrimination.

There has been favorable precedent in various states acknowledging the civil rights of transgender individuals.[95] New York has been at the forefront of the movement toward judicial recognition of transgender equality. The state's jurisprudential response to the newly adopted broad language in New York City's anti-discrimination amendment of 2002 shed light on the courts' willingness to protect transgender rights given sufficient statutory authority.

In *McGrath v. Toys "R" Us, Inc.*, the New York Court of Appeals, commenting on the adoption of the 2002 amendment, remarked that

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to use the women's faculty restroom did not create a hostile work environment); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 (1st Cir. 1999) (declaring that standards of liability under Title VII apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs. A man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity.); Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *10 (D. Ariz. June 03, 2004) (denying defendant's motion to dismiss with respect to the plaintiff's Title VII and Title IX claims because there was sufficient evidence that the plaintiff was denied bathroom access based on her gender identity); Massey v. Banning Unified Sch. Dist., 256 F. Supp. 2d 1090, 1094 (C.D. Cal. 2003) (recognizing that the Equal Protection Clause protects against discrimination based on sex identity); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355–56 (D. Nev. 1996) (holding that Title VII protects all persons, whether male or female, heterosexual or homosexual, from discrimination based on sex).

[94] *See generally Smith*, 378 F.3d at 572–73 (acknowledging protection under Title VII); Schwenk v. Hartford, 204 F.3d 1187, 1200 (9th Cir. 2000) (recognizing protection under the GMVA); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (upholding a claim under Title VII); Miles v. N.Y. Univ., 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997) (acknowledging discrimination protection under Title IX).

[95] *See, e.g.*, Lie v. Sky Publ'g Corp., No. 013117J, 2002 WL 31492397, at *8–9 (Mass. Supp. Oct. 7, 2002) (finding a prima facie case of sex discrimination when a transgender woman was forced to wear men's clothing); Doe v. McConn, 489 F. Supp. 76, 79–81 (S.D. Tex. 1980) (holding unconstitutional a state statute that made it illegal "for any person to appear on any public street, sidewalk, alley, or other public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex," as an interference with personal liberty rights under the Fourteenth Amendment (citing HOUSTON, TEX., CODE § 28-42.4 (1980))); City of Chicago v. Wilson, 75 N.E.2d 522, 523 (Ill. 1978) (holding unconstitutional a Chicago ordinance that prohibited a person from wearing clothing of the opposite sex with intent to conceal his or her biological gender).

"the City Council determined that, in its view, the Code already protected transsexuals but was concerned that, without the amendment, the law could be misinterpreted as excluding this class of individuals from coverage."[96] Thus the court concluded that the new legislation had merely "eras[ed] any doubt" on the matter.[97] This "was the first public accommodation case that went to verdict under the New York City Human Rights Law, and was the first judgment in favor of transsexuals."[98] The court described the decision, which held that the discrimination case brought by three transsexuals served a significant public purpose, as "a groundbreaking verdict [that] can educate the public concerning substantive rights and increase awareness as to the plight of a disadvantaged class."[99]

Of perhaps even more importance is Judge Joan B. Lefkowitz's Westchester County Supreme Court opinion in *Buffong v. Castle on the Hudson.*[100] This very recent New York state court opinion was the first time a New York state judge explicitly held that New York Human Rights Law protects transgender individuals. The judge made it clear that "[c]ase law supports the view that a transgendered person states a claim pursuant to New York State's Human Rights Law on the ground that the word 'sex' in the statute covers transsexuals."[101]

New York's favorable treatment of transgender rights emerged years prior to the 2002 amendment. In 1996, the Southern District of New York declared transgender individuals a protected class under New York's human rights law.[102] The New York Supreme Court had adopted the same protective interpretation of the state's human rights law the year before in *Maffei v. Kolaeton Industry, Inc.*[103] When a transgender woman was subjected to a hostile work environment, the court held that the plaintiff had sufficiently stated a claim under the New York City Human Rights Law's prohibition of gender discrimination in employment, despite the failure of the Code to expressly cover transsexuals.[104] The court stated that the contrary holdings of the federal courts under Title VII were unduly restrictive and should

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[96] 821 N.E.2d 519, 526–27 (N.Y. 2004).

[97] *Id.* at 526.

[98] *Id.* at 527.

[99] *Id.*

[100] No. 11634/05, 2005 WL 4658320 (N.Y. Sup. Ct. Aug. 9, 2005).

[101] *Id.* at *1 (internal citations omitted).

[102] Rentos v. Oce-Office Sys., No. 95 CIV. 7908 LAP, 1996 WL 737215, at *8–9 (S.D.N.Y. Dec. 24, 1996) (noting that this does not necessarily mean that such individuals are protected under federal law, such as Title VII, but stating that "'[t]here is nothing precluding a court of this state from making a more expansive interpretation' of state law than that given to Title VII" (citing Nicolo v. Citibank N.Y. State, N.A., 554 N.Y.S.2d 795, 798 (N.Y. Sup. Ct. 1990))).

[103] 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995).

[104] *Id.* at 394–95.

not be followed in interpreting state and local statutes.[105] The New York City Commission on Human Rights had reached the same conclusion in administrative decisions.[106]

New Jersey has also demonstrated judicial recognition of transgender rights as early as 1976. In *M.T. v. J.T.*, the New Jersey Supreme Court was asked to determine whether a transgender woman was legally female for the purposes of marriage.[107] The case, which was one of the first in the nation to recognize the validity of a transgender marriage, relied heavily on both medical evidence documenting the procedures the woman had undergone as well as how long she had lived as a female.

Like the New York anti-discrimination law, the New Jersey civil rights law has also been broadly interpreted. In *Zalewski v. Overlook Hospital*, the court held that the New Jersey Law Against Discrimination applied to sexual harassment of a heterosexual male by other heterosexual males when the harassment was based on gender stereotyping.[108] Judge Menza noted that we should not "condone severe sexual harassment of a person because he is perceived or presumed to be less than someone's definition of masculine."[109] In 2001, the New Jersey Law Against Discrimination was held to include protection of transgender individuals. The court in *Enriquez v. West Jersey Health Systems* stated that:

> It is incomprehensible to us that our Legislature would . . . condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the [New Jersey Law Against Discrimination] includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.[110]

Aside from the aforementioned examples of the New York and New Jersey civil rights laws, a handful of other states have also provided legislative transgender protection. For example, in California,

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[105] *Id.*

[106] *See, e.g.*, Arroyo v. N.Y. City Health & Hosp. Corp., No. EM01120-04-12-89-DE, 1994 WL 932424, at *5 (N.Y. City Comm'n Human Rights 1994) (acknowledging that a transsexual may have a hostile work environment discrimination claim but dismissing the complaint in this case because the supervisor was not adequately aware of the gender disorder of the complainant). In furtherance of the dismissal of the discrimination claim, the administrative law judge stated that the "[c]omplainant [failed to] cite any authority for the proposition that the general enforcement of sex-specific restrooms constitutes gender-based discrimination." *Id.*

[107] *See* 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976) (holding that after a person born with the physical characteristics of a male underwent successful surgery to become a female, and was thereafter physically and psychologically female, she was female for the purpose of marriage).

[108] 692 A.2d 131, 132 (N.J. Super. Ct. Law Div. 1996).

[109] *Id.* at 136.

[110] 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001).

the Poppink Act of 2000 clarified the disability coverage of the Fair Employment and Housing Act and explicitly eliminated the ADA gender and transsexuality exclusions.[111]

Approximately eighty-four cities and a number of counties have also enacted ordinances protecting the rights of transgender people.[112] However, local ordinances that prohibit transgender discrimination do not ultimately carry much weight in the courts since state laws trump local ones.

New York is exemplary in that the state's courts are willing to stretch explicit legislative language to protect transgender rights. However, the absence of such language often makes it simple to deny these rights, as is evident in the federal decisions construing Title VII. It is then undeniable that statutory protection is fundamentally important in order to make lasting inroads in the battle for transgender equality.

Despite the gains in transgender protection in the United States, not all states have been so receptive and progressive. Moreover, states such as New York have not been consistent in protecting transgender rights.

One of the most damaging recent decisions came from Minnesota in 2001. In *Goins v. West Group, Inc.*, the Minnesota Supreme Court concluded that the defendants' designation of restroom use on the basis of "biological gender," rather than biological self-image, was not discrimination.[113] The court incorporated the lower district court's analysis that the plaintiff was not to be permitted to use the women's facilities because "[i]n significant ways she is functionally different than females with respect to the most common objective criteria related to bathroom use."[114] Similarly, the lower district court found that the plaintiff's hostile work environment claim failed because "West's policy was reasonable and did not rise to a sufficiently pervasive level of harassment."[115] The Supreme Court agreed with West that restroom use can be designated based on "biological gender" not because of any statutory authority but because of "cultural preference."[116] The court decided that, "where financially feasible, the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for

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[111] CAL. GOV'T CODE § 12926(*l*) (2005).

[112] *See* Transgender Law & Policy Inst., *supra* note 8 (providing an updated list of jurisdictions with transgender-protective laws).

[113] 635 N.W.2d 717, 722 (Minn. 2001).

[114] Jenifer M. Ross-Amato, *Transgender Employees & Bathroom Destination*—Goins v. West Group, Inc., 29 WM. MITCHELL L. REV. 569, 573 (2002) (citing Goins v. West Group, Inc., No. 98-18222, slip op. at 10 (Minn. Dist. Ct. Jan. 14, 2000)).

[115] *Id.*

[116] *Goins*, 635 N.W.2d at 723.

restroom designation based on biological gender."[117] The court stated that the Minnesota Human Rights Act (MHRA) only protects "[the plaintiff's] right to be provided an adequate and sanitary restroom," and not complete discretion as to bathroom choice.[118]

However, Minnesota's human rights statute indicates that protection for transgender individuals may be permissible under the MHRA and thus the allegation in *Goins* should be considered a violation of the Act.[119] The language of the MHRA encompasses transgender individuals and provides that the definition of "sexual orientation" includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[120]

The *Goins* holding has even had an impact in New York, where the 2002 amendment to the New York City anti-discrimination law should have protected transgender individuals. This result is not unprecedented given the Minnesota court's circumvention of the broad language of the MHRA. In *Hispanic Aids Forum v. Estate of Bruno*, the court agreed with the reasoning and holding in *Goins* by refusing to hold that denying bathroom access based on gender identity constituted sex discrimination under New York civil rights statutes.[121] In *Bruno*, the plaintiffs alleged that the defendants refused to execute a lease renewal because the plaintiff's transgender clients were using the common area restrooms that did not coincide with their biological sex and that the other tenants in the building were complaining. "[T]he only discernible claim set forth in the complaint is that plaintiff's transgender clients were prohibited from using the restrooms not in conformance with their biological sex, as were all tenants."[122] However, the court stated that if the allegations with respect to the building's other common areas were correct, the transgender individuals may have a claim for violations of their civil rights.[123]

Judge Saxe's sole dissent noted that

> [t]his puzzling ruling, in effect, amounts to the preemptive issuance of an advisory opinion on a question not yet before the court, a question which might not necessarily be presented at all in this litigation . . . whether it constitutes discrimination when a transgender indi-

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[117] *Id.*

[118] *Id.* at 723 n.2.

[119] MINN. STAT. § 363.A04(1) (2005); MINN. STAT. § 363.A08(2) (2004).

[120] *Goins*, 635 N.W.2d at 722 (quoting MINN. STAT. § 363.A03(44) (2005)).

[121] Hispanic Aids Forum v. Estate of Bruno, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005).

[122] *Id.* at 47.

[123] *See id.* ("Inasmuch as plaintiff makes vague allusions to a connection between defendants' refusal to renew the lease and plaintiff's refusal to prohibit its transgender clients from using the building's common areas, including the main entrance, we grant leave to replead if plaintiff chooses to pursue those assertions with an adequate degree of specificity.").

vidual is prevented from using the restroom corresponding with his or her adopted gender.[124]

Other states have also demonstrated an unwillingness to recognize transgender rights.[125] The denial of transgender rights has been particularly evident in the context of marriage. The dismissal of the assertion that even post-operative transgender individuals are members of the gender with which they identify indicates the judicial reluctance to protect the transgender community simply because they are "transgender," as opposed to biological males or females who adopt the characteristics of the opposite gender.

In the case of *In re Estate of Gardiner*, the Supreme Court of Kansas held that a post-operative male-to-female transsexual is not a woman within the meaning of the state statutes recognizing marriage, and a marriage between a post-operative male-to-female transsexual and a man is void as against public policy.[126] The court expressly stated that "[t]he words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals."[127] This reasoning has been followed in other state court decisions. In *Kantaras v. Kantaras*, the District Court of Appeals of Florida held that, as a matter of first impression, the law does not provide for or allow a post-operative female-to-male transsexual person to marry a female and any marriage that is not between persons of the opposite sex, as determined by their biological sex at birth, will be invalidated: "We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth."[128] In the case of *In re Ladrach*, the Ohio court found that a post-operative male-to-female transsexual was not permitted to marry a male since one's "true sex" is determined at birth.[129] "[T]here is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative

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[124] *Id.* at 48 (Saxe, J., dissenting).

[125] *See* Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994) (deciding that discharging plaintiff on the basis of transsexualism does not violate the District of Columbia Human Rights Act because the District's Commission on Human Rights had defined the term to mean the state of being male or female and the conditions associated therewith); Jane Doe v. Boeing Co., 846 P.2d 531, 536 (Wash. 1993) (holding that gender dysphoria is not a protected handicap under the state anti-discrimination law); K. v. Health Div., Dep't of Human Res., 560 P.2d 1070, 1072 (Or. 1977) (endorsing the view that a "'birth certificate' is an historical record of the facts as they existed at the time of birth," rather than "a record of facts as they presently exist," and refusing to issue a new birth certificate for a female-to-male transsexual).

[126] *See* 42 P.3d 120, 137 (Kan. 2002) (denying inheritance rights to male-to-female transsexual wife of intestate decedent).

[127] *Id.* at 135.

[128] 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

[129] 513 N.E.2d 829, 831 (Ohio Prob. Ct. 1987).

male to female transsexual person and a male person."[130] More recently, an Ohio appellate court agreed with the decision in *Ladrach* and affirmed a trial court's denial of a marriage license to a post-operative female-to-male transsexual and a female.[131] The court concluded that the term "male" as used in the marriage statute does not include a female-to-male post-operative transsexual.[132]

Similarly, in *Littleton v. Prange*, the Court of Appeals of Texas held that marriage between a man and a post-operative male-to-female transsexual was not valid, and thus the transsexual lacked standing to bring a claim as the man's surviving spouse under wrongful death and survival statutes.[133] The *Littleton* court noted that transsexuals still "inhabit[] . . . a male body in all aspects other than what the physicians have supplied."[134]

Moreover, several states' laws, much like the ADA, have excluded transsexuals from disability protection. These include Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas, and Virginia.[135] As of the date this Comment was written, there are only four states that explicitly protect transgender people in employment.[136] California is the only state that explicitly protects transgender and gender non-conforming students from discrimination and harassment.[137] There

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[130] *Id.* at 832.

[131] *In re* A Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *5 (Ohio Ct. App. Dec. 31, 2003).

[132] *Id.* at *6.

[133] 9 S.W.3d 223, 231 (Tex. App. 1999).

[134] *Id.*

[135] *See* SHANNON MINTER, REPRESENTING TRANSSEXUAL CLIENTS: AN OVERVIEW OF SELECTED LEGAL ISSUES (2003), http://www.transgenderlaw.org/resources/translaw.htm (listing states denying disability protection for transgender individuals).

[136] CAL. GOV'T CODE § 12920 (2005) ("It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation."); MINN. STAT. §§ 363A.03(44), 363A.04(2) (2005) (prohibiting "discrimination because of . . . sexual orientation" which "means . . . [among other definitions] having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"); N.M. STAT. ANN. § 28-1-2(Q) (West 2000 & Supp. 2003) ("'[G]ender identity' means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth."); R.I. GEN. LAWS § 11-24-2.1(*l*) (2006) ("'Gender identity or expression' includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.").

[137] *See supra* note 42 and accompanying text.

are no laws that protect transgender people from discrimination in health care.[138]

Despite the dearth of state statutory protection for transgender individuals, the issue of transgender rights is achieving recognition in public discourse, and grassroots initiatives are proving incrementally successful in this effort.

C. Recent Developments in Transgender Protection

Transgender individuals may very well be considered the last frontier of groups facing open and often unopposed discrimination. A 2002 survey conducted by the San Francisco Human Rights Commission indicated that nearly half of all transgender respondents reported having been harassed or assaulted in public restrooms.[139]

Like for many such groups in the past, the larger victory of equality often follows long fought battles by a few champions of these rights. The efforts are also slow to yield results because the majority is reluctant to make concessions or to even recognize that the problem exists. The few champions that do exist in the battle for transgender rights, however, have been very active and at least somewhat successful in their efforts. For example, the San Francisco-based advocacy group, People in Search of Safe Restrooms, has been at the forefront of the battle for transgender rights.[140] Aside from the initiatives of such advocacy groups, one of the other most formidable recent developments are the numerous movements on college campuses lobbying for equal protection for the transgender community.[141]

Ordinances in New York City and San Francisco have officially protected the transgender community by broadening sex discrimination to include discrimination based on gender identity. As discussed above, New York City passed an amendment strengthening its anti-discrimination law to prohibit discrimination against individuals

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[138] *See* Vade, *supra* note 38, at 260 (describing the deficiency in transgender-protective laws).

[139] *See* JAMISON GREEN, HUMAN RIGHTS COMM'N CITY & COUNTY OF S.F., INVESTIGATION INTO DISCRIMINATION AGAINST TRANSGENDERED PEOPLE 43 (1994), http://www.sfgov.org/site/uploadedfiles/sfhumanrights/docs/tgreport.pdf (addressing the absence of laws facilitating redress of discrimination against transgendered individuals).

[140] *See generally* People in Search of Safe Restrooms, http://www.pissr.org/aboutus.html (last visited Nov. 17, 2006) (underscoring its commitment to establishing gender-neutral bathrooms).

[141] *See, e.g.*, Brett Genny Beemyn, *Making Campuses More Inclusive of Transgender Students*, 3 J. GAY & LESBIAN ISSUES EDUC. 77, 80–86 (2005) (describing needs of transgender students and recommending steps for accommodating these needs by universities); Fred A. Bernstein, *On Campus, Rethinking Biology 101*, N.Y. TIMES, Mar. 7, 2004, § 9, at 1 (detailing efforts of transgender students to obtain gender neutral facilities such as restrooms and locker-rooms and highlighting progress made at Brown, Sarah Lawrence, and Wesleyan Universities).

based on "gender identity, self-image, appearance, behavior or expression . . . [whether or not it] is different from that traditionally associated with the legal sex assigned to that person at birth."[142] San Francisco has adopted similar regulations.[143]

New York City's Board of Health also announced in early November 2006 that it is contemplating a much-lauded policy change of permitting transsexuals to change the gender on their birth certificates without first undergoing gender reassignment surgery.[144] The measure, which is likely to be approved, would only require that an individual has lived as one of his or her adopted gender for at least two years, and there are no other medical requirements. This is a tremendous boon to those in the transgender community who could not or would not undergo surgery, but who wished to use photo identification that is consistent with the gender with which they identify. Enabling a change in one's gender on a birth certificate permits one to obtain a passport, driver's license, and other government identification with that designated gender. This would solve the problem many have when presenting identification that states one's gender inconsistently with the way one presents him or herself.

Yet transgender individuals are still "[s]trangers to the [l]aw."[145] Despite these positive developments, it is crucial that this group is recognized as a suspect class for purposes of nation-wide equal rights protection. The battle for bathroom access based on gender identity would be most efficiently and effectively waged in such a legal environment.

IV. THE CRITICAL ISSUE OF BATHROOM ACCESS

A. The Necessity of Declaring Discriminatory the Denial of Bathroom Access Based on Bona Fide Gender Identity

Given the often blatant discrimination faced by the transgender community on a daily basis, uniform national protective legislation is both an unlikely and overly ambitious goal. "Transgender people face severe discrimination in virtually every aspect of social life—in employment, housing, public accommodations, credit, marriage, parenting and law enforcement,"[146] and much of this discriminatory treatment is fueled by ignorance of what it means to be transgender

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[142] N.Y. CITY, N.Y., CODE § 8-102(23) (2005) (amended Apr. 30, 2002).

[143] *See, e.g.*, S.F., CAL., CODE §§ 12A, 12B, 12C (2006) (broadening the definition of gender discrimination); S.F., CAL., POLICE CODE art. 33 (2006) (addressing gender discrimination).

[144] Damien Cave, *New York Plans to Make Gender Personal Choice*, N.Y. TIMES, Nov. 7, 2006, at A1.

[145] Lloyd, *supra* note 86, at 150.

[146] Currah & Minter, *supra* note 5, at 37–38.

and how accommodating the needs of this community may compromise others in the sexual majority. Reform will probably be achieved gradually and should be targeted to areas where the transgender individual's rights are most compromised before universal acceptance and equality is achieved. The problem of bathroom access based on gender identity is both a natural and effective place to begin the battle for equality, compassion, and understanding of the transgender community.

As the discrimination faced by the transgendered is often intrinsically tied to their gender, which bathroom to use is a fundamental and unnecessarily complicated choice that highlights the discord between the transgender individual's personal identity and society's label of what is acceptable. By tackling this isolated issue and permitting bathroom access based on gender identity, society will not only accommodate the needs of the transgendered, and thus permit them the same privileges of personal comfort and dignity afforded the majority, but will also permit a gradual acclimation and acceptance by the mainstream to the transgender community.

There is a variety of safety, comfort, and equality implications for permitting bathroom and facility access based on gender identity.[147] For transgender youth, for instance, placement in a gender-specific facility can mean being forced to share sleeping quarters and bathrooms with members of their biological gender, which can have consequences ranging from humiliation to sexual assault.[148] Undeniably, assault on transgender individuals while using bathrooms designated for those of the opposite biological gender is more common than may be presumed.[149] However, if protection is statutorily mandated, the transgendered not only have a layer of protection against unjust arrest and harassment, but also a possible hate crime claim including an avenue for sentence elevation based on aggravating circumstances.[150]

It is therefore critical that the transgender community be permitted to use bathrooms designated for the gender with which they identify. Since gender conforming individuals, no matter their sexual

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[147] *See generally* Lloyd, *supra* note 86, at 154 (discussing the trouble transgender people have in ensuring courts, and other segments of society, recognize their injuries and their rights).

[148] *See* Anne Tamar-Mattis, Comment, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 LAW & SEXUALITY REV. 149, 159 (2005) (discussing problems faced by transgender youth in foster care when they are not permitted to use facilities designated for those of the gender with which they identify).

[149] *See* Patricia Leigh Brown, *A Quest for a Restroom That's Neither Men's Room Nor Women's Room*, N.Y. TIMES, Mar. 4, 2005, at A14 (detailing assault on transgender individuals due to use of women's restroom).

[150] *See, e.g.*, Nicholas Confessore, *Transgender Group Reaches Agreement on Restrooms*, N.Y. TIMES, Apr. 2, 2005, at B3 (detailing arrest and acquittal of transgender individual after passage of the broad language constituting gender discrimination to the New York City civil rights law).

orientation, can simply use the facilities designated for those of their biological gender with whom they identify, the transgender individual will only achieve true equality once he or she is permitted the same liberty and personal dignity.

B. Bathroom Access as Fundamental Indicator of Equality for Transgender Individuals

The issue of bathroom access is paramount to the fight for equality by the transgender community, and this assertion is bolstered by the fact that many cases dealing with transgender equal protection have been in the context of bathroom access. However, although obvious strides have been made in the battle for transgender rights, when judicial decisions concerned bathroom access for preoperative transsexuals, both state and federal courts have overwhelmingly denied protection.[151] Indeed, the cases dealing with a transgender plaintiff's discharge for wearing inappropriate attire are often motivated by bathroom access issues.[152] For instance, in *Boeing*, the court held that gender dysphoria is not a protected handicap under anti-discrimination law and, moreover, that the plaintiff transsexual was fired for wearing gender-inappropriate attire as opposed to for being a transsexual.[153] The court emphasized that this was particularly important as the plaintiff may have used the male restroom. The court stated that "Doe was told her attire would be deemed unacceptable

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[151] *See, e.g.*, Sommers v. Budget Mktg., Inc., 667 F.2d 748, 748–49 (8th Cir. 1982) (finding that the transgender individual's use of women's restroom led to disruption and refusing to hold that the transgendered are a protected group for purposes of Title VII); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) (holding that Title VII does not protect from discrimination against transsexuals as it bars discrimination based on "sex" and not "gender" and citing employer affidavit that the transgender individual's use of men's restroom caused "personnel problems"); Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *3 (D. Utah June 24, 2005) (holding that dismissal of preoperative male to female transsexual was permissible because of the employer's concern about complaints due to her using female restrooms); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003) (holding that discharge of pre-surgical transsexual woman who was fired after she refused to use men's restroom did not amount to a violation of Title VII or the Americans with Disabilities Act); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (stating that the transgender community is not a protected class under Title VII in claim instigated by an employer who forbade transgender plaintiff from using women's restroom); Goins v. West Group, Inc., 635 N.W.2d 717, 723 (Minn. 2001) (holding that the plaintiff was not to be permitted to use the women's facilities because she was not a biological female); Hispanic Aids Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005) (agreeing with the reasoning and holding in *Goins* and refusing to hold that denying bathroom access based on gender identity constituted sex discrimination under New York civil rights statutes).

[152] *See* Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 367 (1999) (discussing *Jane Doe v. Boeing Co.*, 846 P.2d 531, 536 (Wash. 1993), in which bathroom access issues played a factor in the court's decision).

[153] *Jane Doe*, 846 P.2d at 536 ("Boeing discharged Doe because she violated Boeing's directives on acceptable attire, not because she was gender dysphoric.").

when, in the supervisor's opinion, her dress would be likely to cause a complaint were Doe to use a men's rest room at a Boeing facility."[154] In both *Holloway v. Arthur Andersen & Co.* and *Sommers v. Budget Marketing, Inc.*, disruption created by a transsexual's bathroom use was cited by the employer as a reason for termination.[155]

Even when discrimination is present, defendants often escape unscathed by simply demonstrating merely perfunctory consideration of the transgender plaintiff's rights. For instance, in *Doe v. City of Minneapolis*, a biological female identifying as male and in the process of becoming one through hormone therapy claimed that he was discharged from his job with the police department when he was assigned to a shift in which no unisex bathroom was available.[156] He brought suit against the city, alleging sexual orientation discrimination, disability discrimination, and retaliation under the Minnesota Human Rights Act. The court held for the defendants in light of the fact that city officials held numerous meetings on the issues raised by having a transgender employee and that they sought guidance from the department of human rights as to how best to respond to the plaintiff's requests regarding bathroom and locker room facilities. Thus, the court found that there was no evidence that the city willfully or maliciously violated the plaintiff's rights.[157]

There have been exceptions to this reluctance to grant bathroom access based on gender identity, but they have been few. For example, in *Cruzan*, the court held that the school's policy of allowing a transgender male to use the women's faculty restroom did not create a hostile work environment.[158] The court reasoned that the school district's policy was not directed at the female teacher who asserted the claim; the teacher had convenient access to numerous restrooms other than the women's faculty restroom, and the plaintiff did not engage in any inappropriate conduct other than merely being present in the women's faculty restroom.[159]

There are numerous reasons for the obstinacy to furnish bathroom access based on gender identity. As the court said in *Etsitty*,

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[154] *Id.* at 533–34.

[155] *Sommers*, 667 F.2d at 748–49; *Holloway*, 566 F.2d at 661 n.1; *see also Dobre*, 850 F. Supp. at 286 (noting that plaintiff, a male-to-female transsexual, was forbidden by her employer from using the women's restroom). *But see* Kastl v. Maricopa County Cmty Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *9–10 (D. Ariz. June 3, 2004) (denying Defendant's Motion to Dismiss with respect to transsexual plaintiff's Title VII and Title IX claims because there was sufficient evidence that the plaintiff was denied bathroom access based on her gender identity).

[156] Doe v. City of Minneapolis, No. C2-02-817, 2002 WL 31819236, at *1 (Minn. Ct. App. Dec. 17, 2002).

[157] *Id.*

[158] Cruzan v. Special Sch. Dist. No. 1, 294 F.3d 981, 982 (8th Cir. 2002).

[159] *Id.* at 984.

"[c]oncerns about privacy, safety and propriety are the reason that gender specific restrooms are universally accepted in our society."[160] Notably, the reasoning of the court in *Cruzan v. Special School District No. 1*, one of the few exceptions to the courts' reluctance to provide bathroom access based on gender identity, was marked by the dismissal of the unrealized fear that such designation of bathroom use would result in disruption. [161]

Many individuals express their discomfort in sharing a restroom with a transgender person as fear, which likely stems from stereotypes linking transgender people with sexual predators.[162] Such an association is even asserted by the ADA. In a provision specifically excluding certain individuals from coverage, the Act includes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."[163] However, this fear is misplaced because there is no evidence that transgender individuals are more likely to be sexual predators than the general population, and such criminal activity can be accomplished without permissive bathroom-access laws.[164]

There are solutions to quell the fear of facilitating the acts of sexual predators by permitting bathroom access based on gender identity. When the Minnesota legislature considered the 1993 amendment to the MHRA, discussed in *Goins*, critics voiced fears that a law prohibiting discrimination on the basis of sexual orientation would sanction the actions of sexual predators.[165] "To dissuade those fears, the legislature adopted an amendment to the definition of 'sexual orientation' excluding 'a physical or sexual attachment to children by an adult.'"[166] The legislature therefore recognized that sexual misconduct is not necessarily associated with sexual orientation, and was never intended to be approved by the legislature.[167]

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[160] Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *7 (D. Utah June 24, 2005).

[161] In Cruzan, the court indicated that the fears of using a bathroom with a transsexual are unfounded when there are no actual allegations of abuse supporting them. *See* Ross-Amato, *supra* note 113, at 584 (discussing *Cruzan*, 294 F.3d at 984).

[162] *See* Keller, *supra* note 151, at 369 (discussing misconceptions about the transgender community which often incite discrimination).

[163] 42 U.S.C. § 12211(b)(1) (2000).

[164] *See* DELANO GARVEY, SEXUAL VILLAINY: A SEX OFFENDER PROFILE, http://www.geocities.com/CapitolHill/Lobby/6027/research.htm (describing the typical sex offender as a single middle-aged Caucasian male who is unlikely to report a history of mental illness).

[165] *See* Ross-Amato, *supra* note 113, at 582–83 (discussing legislative history of the Minnesota Human Rights Act).

[166] *Id.* at 583 (quoting MINN. STAT. § 363.01(41)(a) (2000)).

[167] *Id.*

People unwilling to share a restroom with a transgender person may also express their fear as a loss of privacy, but multi-user restrooms are not a place where individuals typically have a high expectation of privacy.[168] Notably, the comfort of one gender in the presence of another was not sufficient to ban female journalists from male locker rooms in the context of professional athletics.[169] Privacy rights are not compelling enough to survive violations of equal protection and discrimination based on sex because the ends are not substantially related to the means, as there are ways of preserving privacy while still permitting female access. The need for female journalists to do their jobs is by no means more compelling than the necessity for transgender people to have bathroom access free from fear of harassment, violence, and arrest. In the case of transgender bathroom access, individuals still use private stalls and thus their privacy is adequately protected.[170]

The issue of bathroom access based on gender identity needs to be addressed in more depth than it has received thus far due to its fundamental importance to the fight for equality for the transgender community. This is especially paramount since many of the cases addressing equal protection of those in the gender minority have involved issues of bathroom access. As the effort for equality will no doubt be gradual, reform will presumably come from the local level, as it has up until this point, and should be modeled on the statutory mandates in New York City and San Francisco.

V. PROPOSAL FOR REFORM

Local legislators should tailor regulations permitting bathroom access based on gender identity modeled on the recent New York and San Francisco ordinances, which have experienced notable success in ameliorating discrimination and producing positive results for those cities' transgender communities.

Both the New York City and San Francisco regulations are constructive models for their broad conception of "gender" and expansive view of gender discrimination.[171] The City of San Francisco has

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[168] *See generally* Keller, *supra* note 151, at 370 (noting that public or workplace restrooms are intended to be shared, hence the limited expectation of privacy).

[169] *See* Ludtke v. Kuhn, 461 F. Supp. 86, 96–98 (S.D.N.Y. 1978) (holding that female journalists should be given access to male athletic locker rooms).

[170] Furthermore, fear of sexual predators is not a sufficient reason to prohibit bathroom access based on gender identity. Sexual predators will enter restrooms and other prohibited places if they so choose, and the fact that they may do so legally if they identify as one of the opposite biological gender will not make them more likely to commit violent crimes that are themselves illegal.

[171] *See* N.Y. CITY, N.Y., CODE § 8-102(23) (2006) ("The term 'gender' shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behav-

also issued comprehensive guidelines, specifying that discrimination on the basis of gender identity includes denying people access to bathrooms, locker rooms, and housing appropriate to their gender identity; deliberate misuse of pronouns; and, where there are gender-specific dress codes, forcing transgender people to conform to dress codes that are inappropriate to their gender identity.[172]

The 2002 amendment to the New York civil rights law specifies that the term "gender" includes "actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."[173] Accordingly, discrimination based on gender identity would be considered impermissible sex discrimination under New York law.

The broad conception of gender under New York law has not only been proven effective in combating discrimination in the judicial arena, but has also had groundbreaking practical implications in the real world setting.[174]

A recent arrest and acquittal of a transgender individual made national news and proved a marker of the success accomplished through the recent amendment.[175] This event was not only indicative of the power municipal legislation can have in influencing the national legal environment, but also underscored the daily battles fought by the transgendered in everyday activities the majority takes for granted, such as simply choosing a public restroom.

The battle for equal protection for transgender individuals is just beginning, and some commentators believe that courtroom battles are best waged "in favor of more palatable, easier cases such as discrimination in the context of public accommodations, health care, lending, recreational sport, prison, and the 'quasi-employment' context where discrimination comes from some non-employer entity" as opposed to "messy, controversial cases like the right of a transgender

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ior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."); S.F., CAL., CODE §§ 12A, 12B, 12C (2006) (finding discrimination based on gender identity "inimical to the public welfare"); S.F., CAL., S.F. POLICE CODE art. 33 (2006) ("It is the policy of the City and County of San Francisco to eliminate discrimination based on . . . gender identity . . . within the City and County.").

[172] *See* S.F. HUMAN RIGHTS COMM'N, COMPLIANCE GUIDELINES TO PROHIBIT GENDER IDENTITY DISCRIMINATION § 4 (2003), http://www.ci.sf.ca.us/site/sfhumanrights_page.asp?*id*=6274.

[173] N.Y. CITY, N.Y., CODE § 8-102(23) (2006).

[174] *See, e.g.*, McGrath v. Toys "R" Us Inc., 788 N.Y.S.2d 281, 288–89 (N.Y. 2004) (highlighting the success of the fight for transgender rights due to the recent amendment).

[175] *See* Nicholas Confessore, *Transgender Group Reaches Agreement on Restrooms*, N.Y. TIMES, Apr. 2, 2005, at B3 (detailing acquittal of male to female transsexual for using women's restroom, in light of the passage of the amendment to the City's civil rights law).

person to use the bathroom of his of her choice."[176] Although the bathroom issue may be considered frivolous by some, its paramount importance to the battle for transgender equality and inherent presence in many cases involving transgender rights is undeniable. Thus the issue is simply unavoidable when discussing transgender discrimination and must be handled accordingly.

The proposal for a third category of gender neutral facilities is not the solution. The proper means of attaining transgender equality is not to segregate the group into an extraneous "other" category, but to treat transgender individuals as the majority is treated and to permit each person bathroom access based on his or her gender identity.

Gender neutral bathroom access is both cost prohibitive and ignores the underlying problem faced by transgender individuals with respect to bathroom access. Individuals should be considered as members of the gender group with which they identify and not as an abnormal "other" denied recognition among existing societal groups. Creating a third group of gender neutral bathrooms for transsexuals only bolsters the assertion that such individuals do not "fit in."

Indeed, forcing the transgender plaintiff in *Goins* to use the gender neutral bathroom was the catalyst for her claim against her employer. She was treated differently from other employees not because of her biological gender, as the employer did not request proof of this, but because her appearance was not consistent with her employer's notion of what was traditionally "female."[177]

Unisex itself is an instrument of discrimination. A gender neutral bathroom "offers a stark example of what outsider status is like: if society is composed only of those who enter the women's room and those who enter the men's room, requiring someone to use a third bathroom tells them they are outside society."[178]

As most relevant statutes, including the MHRA and the New York and San Francisco ordinances, do not categorize individuals but rather provide a broad conception of gender identity, classification of restrooms according to biology or sex is an unworkable standard for restroom designation. These categories are too restrictive and impractical. "Self-selection of restroom use, based on outward appearance and comfort level, is the only workable standard for restroom designation."[179]

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[176] Lloyd, *supra* note 86, at 193.

[177] *See* Ross-Amato, *supra* note 113, at 596 (discussing traditional notions of gender identity).

[178] Keller, *supra* note 151, at 368.

[179] Ross-Amato, *supra* note 113, at 594–95.

CONCLUSION

Bathroom access is an issue at the heart of the battle for transgender rights. The traditional conception of gender as either male or female is not only an oversimplification of reality; it fosters and perpetuates discrimination against the gender minority who do not fit the stereotypical mold. The New York and San Francisco ordinances not only bespeak the variety of what constitutes "gender," but also acknowledge that gender discrimination is not necessarily simply unequal treatment of one gender by the other. These regulations should be models for other municipal legislation. They illuminate the battles faced by the transgender community in modern society, and call for reform at the local level, which may very well influence the national legal environment.

The battle for transgender rights is only at its inception, but such legislation will no doubt facilitate further discussion and help build on the numbered successes achieved thus far. The solution is not segregating transgender individuals into a superfluous third category of gender neutrality, but bestowing the same rights and privileges on this group as are bestowed on others. It is only when the gender minority becomes incorporated into the mainstream that stereotypes will be conquered and the goal of equal rights truly realized.