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## A Different Kind of Privacy: "Bathroom Bills" and the Rights of Transgender People in Public Spaces

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*Feature Article***A Different Kind of Privacy: "Bathroom Bills" and the Rights of Transgender People in Public Spaces**

Sarah Nagy

In November of 2015, for the first time, the U.S. Department of Education's Office of Civil Rights intervened in a school district in defense of a transgender student's Title IX rights.<sup>1</sup> For over two years, a transgender high school student in Palatine, Illinois had been denied access to girls' locker rooms and restrooms because of her birth sex.<sup>2</sup> Following her complaint, the U.S. Board of Education's Office of Civil Rights issued an order mandating that her school either allow her free access to the girls' locker room or lose \$6 million in federal funding.<sup>3</sup> When the school refused to comply, the story exploded into a national controversy.<sup>4</sup>

The *Chicago Tribune* called the dispute a "national debate on equity vs. privacy" –a framing that reduces a complex controversy to a single set of opposing interests.<sup>5</sup> In reality, it represents a growing realm of conflict, one grounded in changing cultural norms of gender identity and expression, and a legal system unequipped to work outside a strict binary.<sup>6</sup>

## THE LEGAL AND POLITICAL CLIMATE

"Student A," as the student in Palatine has been referred to throughout the lawsuit, has since been granted access to the girls' locker room, pursuant to a settlement with the school district that required her to be willing to use a

<sup>1</sup> *Settlement Reached with Palatine, Ill., Township High School District 211 to Remedy Transgender Discrimination*, U.S. DEPARTMENT OF EDUCATION, Dec. 3, 2015, <http://www.ed.gov/news/press-releases/settlement-reached-palatine-ill-township-high-school-district-211-remedy-transgender-discrimination>.

<sup>2</sup> *Id.*

<sup>3</sup> Duaa Eldeib, *Transgender student who fought District 211 gets locker room access*, CHICAGO TRIBUNE, Jan. 15, 2016, <http://www.chicagotribune.com/suburbs/schaumburg-hoffman-estates/news/ct-transgender-student-deadline-district-211-met-20160114-story.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> The author acknowledges that the spectrum of transgender identity is broader than transition from one binary gender to another, and that nonbinary-identified individuals face many of the same problems as a result of harmful anti-transgender legislation. However, in discussing legislation that assumes a binary based on physical sex, I have chosen simply to use the term "transgender" to refer to all non-cisgender individuals affected by these issues.

partitioned area to change.<sup>7</sup> But similar incidents involving transgender students seeking fully gender-affirming school policies have been taking place all over the country in recent years, and legislatures have responded with dozens of attempts to write transgender-exclusionary school policies into state law.<sup>8</sup> A number of “bathroom bills” appeared before legislative committees in 2015 and 2016, all intended to restrict the use of single-sex-designated public facilities, such as restrooms and locker rooms, to individuals whose sex as designated at birth matches the sign on the door.<sup>9</sup> In places where such discriminatory legislation might pass, individuals whose designated sex at birth does not match their gender identity could be held civilly or even criminally liable for use of the “wrong” bathroom.<sup>10</sup> Many of these bills died quietly in committee. A few made their way further, but were struck down in Democrat-majority assemblies or vetoed by more sympathetic governors.<sup>11</sup>

However, on March 23, 2016, after a one-day emergency legislative session that bypassed normal lawmaking procedure, North Carolina governor Pat McCrory signed into law HB 2—a law that struck down North Carolina’s municipal anti-discrimination protections and outlawed the use of public bathrooms by transgender individuals.<sup>12</sup> The act changed the state of the contro-

<sup>7</sup> DEPARTMENT OF EDUCATION, *supra* note 1.

<sup>8</sup> See, among many others, Mike Wynn, *Transgender bathroom bill passes KY Senate*, COURIER-JOURNAL, Mar. 1, 2015, <http://www.courier-journal.com/story/news/politics/ky-legislature/2015/02/27/transgender-bathroom-bill-passes-kentucky-senate/24130083/> (discussing a since-failed bill intended to retaliate against a gender-inclusive policy at a Kentucky high school); *Lambda Legal Warns South Carolina School District that Transgender Student Suspension Could Lead to Lawsuit*, LAMBDA LEGAL, Feb. 17, 2016, [http://www.lambdalegal.org/blog/20160217\\_sc-school-district-transgender-student-suspension-could-lead-to-lawsuit](http://www.lambdalegal.org/blog/20160217_sc-school-district-transgender-student-suspension-could-lead-to-lawsuit) (regarding a transgender student suspended for using the girls’ bathroom at a South Carolina high school).

<sup>9</sup> See *LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, AMERICAN CIVIL LIBERTIES UNION, *last updated* Mar. 23, 2016, <https://www.aclu.org/lgbt-nondiscrimination-and-anti-lgbt-bills-across-country#antitransbills>.

<sup>10</sup> See Mitch Kellaway, *Kentucky’s Transphobic Legislation Dies After ‘Last Ditch Effort’*, THE ADVOCATE, Mar. 25, 2015, <http://www.advocate.com/politics/transgender/2015/03/25/kentucky-s-transphobic-legislation-dies-after-last-ditch-effort> (noting that in its original form, Kentucky’s Senate Bill 76 allowed exemplary damages to be granted to those who reported transgender people in public restrooms).

<sup>11</sup> Greg Botelho and Wayne Drash, *South Dakota governor vetoes transgender bathroom bill*, CNN, Mar. 2, 2016, <http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/>.

<sup>12</sup> David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, THE ATLANTIC, Mar. 24, 2016, <http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/>; Public Facilities Privacy and Security Act, G.S. 115C-47 (2016), *available at* <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v1.pdf>.

versy from an intense but fairly quiet series of legal battles between activists and school administrators to a debate on the national stage about the right of transgender people to live their identities in all aspects of public life.

Proponents of bathroom bills claim that these laws protect cisgender individuals' right to bodily privacy and prevent sexual predators from taking advantage of vulnerable people in a state of undress.<sup>13</sup> Opponents of bathroom bills from both political parties express concern that such laws might lead to a loss of federal funding for states found to be in violation of federal anti-discrimination law.<sup>14</sup>

Those opponents' fears are well-founded: Even before North Carolina passed transgender-exclusionary legislation, federal agencies issued guidance indicating that failing to accommodate transgender individuals on the basis of their gender identity, rather than their birth-designated sex, is an actionable form of discrimination.<sup>15</sup> A flurry of federal lawsuits already surround HB 2, which the U.S. Department of Justice has ordered Governor McCrory to denounce, threatening to withhold vital federal funding to the state should he fail to comply.<sup>16</sup> Even the Obama administration has released a directive in support of transgender-inclusive school policy, urging anti-discriminatory change at the local level.<sup>17</sup>

<sup>13</sup> Alison Morrow, *Man in women's locker room cites gender rule*, KING 5 NEWS, Feb. 16, 2016, <http://www.king5.com/news/man-womens-locker-room-cites-gender-rule/65533111>.

<sup>14</sup> See Dana Ferguson, *Gov. Daugaard's statement on vetoing transgender bill*, ARGUS LEADER, Mar. 1, 2016, <http://www.argusleader.com/story/news/politics/2016/03/01/gov-daugaards-statement-vetoing-transgender-bill/81176266/>. South Dakota's "bathroom bill" passed both legislative chambers, but was ultimately vetoed, citing concerns that "[t]his law will create a certain liability for school districts and the state in an area where no such liability exists today." See also *Victory! Protect Students From Anti-Transgender Bill*, AMERICAN CIVIL LIBERTIES UNION, <https://action.aclu.org/secure/veto-hb-1008-south-dakota> (updated Mar. 7, 2016). See also CHICAGO TRIBUNE, *supra* note 3.

<sup>15</sup> In addition to the Department of Education's order stating that the school's refusal to accommodate a transgender student was a violation of Title IX, the Occupational Safety and Health Administration supports inclusion of gender identity protection under Title VII. See *A Guide to Restroom Access for Transgender Workers*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (2015), <https://www.osha.gov/Publications/OSHA3795.pdf> (recommending that employers allow transgender workers to use restroom facilities consistent with gender identity).

<sup>16</sup> Michael Gordon, *McCrory, NC lawmakers sue Justice Department over HB2; feds counter with lawsuit*, The Charlotte Observer, May 9, 2016, <http://www.charlotteobserver.com/news/politics-government/article76502777.html>.

<sup>17</sup> Julie Hirschfeld Davis, *Obama Defends Transgender Directive for School Bathrooms*, NEW YORK TIMES, May 16, 2016, <http://www.nytimes.com/2016/05/17/us/politics/obama-defends-transgender-directive-for-school-bathrooms.html>.

In April, the Court of Appeals for the Fourth Circuit found in favor of a transgender high school student in Virginia, who had been denied access to school bathroom and locker room facilities based on his gender.<sup>18</sup> He sued on Title IX and Equal Protection grounds, ultimately leading the Court to reverse the District Court's decision on grounds that Title IX's protection of gender equality in schools extended to transgender students.<sup>19</sup> The victory solidified federal support for transgender rights and extended Title IX protection to questions of gender identity for the first time.

### DEFINING SEX AND GENDER: STATUTORY LIMITS

As the modern understanding of gender expands to encompass non-traditional forms of gender expression, transgender individuals have gained greater freedom to live safely and successfully in a way consistent with their identities. Many transgender people now have greater access to medical transition, as well as more opportunities to change their state-issued identification documents to affirm their lived gender.

This growing freedom broadens people's options for successful transition, opens up more avenues for community support, and grants transgender individuals a greater political voice.<sup>20</sup> However, when state legislators attempt to work around these steps forward, as Governor McCrory did, it raises issues that a system legally and culturally dependent on a strict gender binary is ill-equipped to handle.

For example, because transgender people in many states have gained the right to legal recognition of their gender identities, legislation intended to limit transgender people's presence in public spaces inevitably runs into definitional problems. Legislators have attempted to set statutory definitions of "sex," using definitions such as gender markers on state-issued identification documents, individuals' genital anatomy at birth, or specific configurations of chromosomes, in order to determine which public facilities transgender individuals should be permitted to occupy.<sup>21</sup> However, due to the complexities of medical

<sup>18</sup> Holly Yan, *Transgender teen wins federal case over bathrooms, Title IX*, CNN, Apr. 21, 2016, <http://www.cnn.com/2016/04/20/us/virginia-transgender-bathroom-case/>.

<sup>19</sup> G.G. ex rel. Grimm v. Gloucester County School Bd., 2016 WL 1567467 (Apr. 19, 2016), at \*1.

<sup>20</sup> For an overview of the changing landscape of gender identity law in the United States, see *Equality Map LGBT Policy Tally Snapshot*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/equalitymap> (last visited Mar. 18, 2016).

<sup>21</sup> See HB 1748, 84th Leg. (Tx. 2015) (defining sex by the presence of absence of a Y chromosome); HB 4474, 99th Gen. Ass. (Il. 2016) (defining sex by anatomical sex as designated

transition and the vast range of differences in human biological sex, none of these definitions can truly be all-encompassing.<sup>22</sup>

Furthermore, most bathroom bills—both those that have passed into law and those that have failed—do not contain any language explaining how to *enforce* a prohibition on transgender people in public spaces. Enforcement must depend on cisgender people's ability to recognize that they are sharing a public facility with a transgender person, and by extension, some unspecified method of proving that one's physical anatomy is in fact permissible. At this time, no such method has been officially sanctioned.

The lack of consistency in proposed and existing anti-transgender legislation reflects both a lack of understanding about the realities of transgender experiences and shows just how little space exists within the law to embrace those realities. At the heart of the debate are complex questions about what happens when deeply-ingrained cultural beliefs about bodily autonomy clash in the legal sphere, and which takes precedence: the transgender individual's right not to disclose the physical details of their transition in order to make use of certain sex-segregated spaces, or the right of the cisgender individual to occupy private space free of certain kinds of bodies.

#### THE STATE OF ILLINOIS

Because of the controversy in Palatine and similar incidents in other school districts, transgender rights in public spaces were under discussion in Illinois even before the national debate surrounding the passage of HB 2 in North Carolina.<sup>23</sup> But progress in Illinois has been heartening. Illinois' own bathroom bill, introduced in January 2016 by Representative Tom Morrison, was defeated in committee in April.<sup>24</sup> Following the passage of HB 2, Chicago

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at birth); and HB 583 (Fl. 2015) (defining sex by the gender marker on a passport or state-issued identification).

<sup>22</sup> See *I Really Have to Go*, INTERACT: ADVOCATES FOR INTERSEX YOUTH, <http://interactadvocates.org/i-really-have-to-go/> (last visited Mar. 23, 2016) (speaking to issues of chromosomal sex designation for intersex individuals).

<sup>23</sup> See Kelsey Harkness, *Why These High School Girls Don't Want a Transgender Student in Their Locker Room*, THE DAILY SIGNAL, Dec. 21, 2015, <http://dailysignal.com/2015/12/21/why-these-high-school-girls-dont-want-transgender-student-a-in-their-locker-room/>; Laura Moser, *Will This Locker Room Saga Set a Precedent for Transgender Students All Over the Country?*, SLATE.COM, Dec. 8, 2015, [http://www.slate.com/blogs/schooled/2015/12/08/district\\_211\\_palatine\\_ocr\\_agreement\\_transgender\\_student\\_allowed\\_locker\\_room.html](http://www.slate.com/blogs/schooled/2015/12/08/district_211_palatine_ocr_agreement_transgender_student_allowed_locker_room.html).

<sup>24</sup> Rep. Morrison Discusses Need for HB 4474, ILLINOIS STATE REPRESENTATIVE THOMAS MORRISON, Feb. 2, 2016, <http://www.repmorrison54.com/2016/02/rep-morrison-discusses-need-for-hb-4474.html>.

Public Schools issued guidelines directing schools to allow transgender and gender-nonconforming students to make use of the facilities that match their gender identity.<sup>25</sup> Moreover, unlike many states, Illinois has statewide anti-discrimination legislation in place in the form of the Illinois Human Rights Act, which provides protection against discrimination based on sexual orientation and gender identity.<sup>26</sup> These protections, while not comprehensive, nonetheless create significant advantages for transgender victims of discrimination who seek legal recourse against their employers.

Illinois also has gender-affirming legislation pending further committee debate. Standing in contrast to the bathroom bill is House Bill 6073 (HB 6073), which would update the Illinois Vital Records Act to allow transgender individuals who have sought treatment related to gender transition from a medical professional to change the gender marker on their birth certificate.<sup>27</sup> Previously, transgender individuals seeking to update their birth certificates required proof of sex-reassignment surgery, an impossible requirement for some due to medical or personal reasons. Passage of the bill would make this vital change available to far more people, and help to modernize legal and statutory understanding of the transition process.<sup>28</sup>

HB 6073 would also be beneficial to transgender students seeking to change their gender markers in school records. According to Owen Daniel-McCarter, Policy and Advocacy Director at the Illinois Safe Schools Alliance, birth certificates are required to be kept on file in all K-12 schools in Illinois: it is “often the determinant for how someone’s roster and student information will be populated in the student database.”<sup>29</sup> Updating the law would grant

<sup>25</sup> Juan Perez, Jr., *CPS updates guidelines for transgender students and employees*, May 3, 2016, CHICAGO TRIBUNE, <http://www.chicagotribune.com/news/ct-cps-transgender-student-teacher-policy-met-20160503-story.html>.

<sup>26</sup> Illinois Human Rights Act, 775 ILCS 5, available at <http://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2266&>.

<sup>27</sup> HB 6073, 99th Leg. (Il. 2016), available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=88&GA=99&DocTypeId=HB&DocNum=6073&GAID=13&LegID=95603&SpecSess=&Session=>.

<sup>28</sup> Ellyn Fortino, *State Bill Would Modernize Process to Change Gender on Illinois Birth Certificates*, PROGRESSILLINOIS, Feb. 15, 2016, <http://progressillinois.com/quick-hits/content/2016/02/15/state-bill-would-modernize-process-change-gender-illinois-birth>.

<sup>29</sup> Interview with Owen Daniel-McCarter, Illinois Safe Schools Alliance, March 19, 2016. The Illinois Safe Schools Alliance is a Chicago-based organization that works to promote safety, support and healthy development for lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth in Illinois schools and communities. See <http://www.illinoisafeschools.org/about-us>.

greater freedom to transgender students who began to transition before or during their time enrolled at Illinois schools.

Daniel-McCarter describes the current state of transgender rights in Illinois as “a totally different landscape” from previous attempts to pass gender-affirming legislation in the state.<sup>30</sup> “Some of the things that were discussed on the [House] floor in 2007 [when legislators and activists first attempted to pass a bill similar in scope to HB 6073] would never be uttered. . . at this point. I do think we’re in a really different position now.”<sup>31</sup>

## CONCLUSION

Following the great steps forward LGBT rights have taken in recent years, transgender issues are finally gaining a strong place in national conversations about civil rights. Contrary pieces of legislation—some affirming the right of transgender individuals to express their gender identities, and others trying to keep cisgender individuals as separated from transgender experiences as possible—are moving through the same legislative chambers at the same time. School districts, municipalities, and state assemblies are all caught in similar controversies.

The federal government appears prepared to support transgender individuals under existing anti-discrimination laws, and has upheld transgender people’s right to occupy public spaces consistent with their identities in employment and now in education.<sup>32</sup> For many, U.S. Attorney General Loretta Lynch’s announcement of the Justice Department’s filing of a complaint against the state of North Carolina, which drew parallels between Jim Crow and the civil rights movement to the movement against transgender discrimination, represented a watershed moment in the recognition of transgender rights as a national civil rights question.<sup>33</sup>

<sup>30</sup> Interview with Owen Daniel-McCarter, Illinois Safe Schools Alliance, March 19, 2016. The Illinois Safe Schools Alliance is a Chicago-based organization that works to promote safety, support and healthy development for lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth in Illinois schools and communities. See <http://www.illinoissafeschools.org/about-us>.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, U.S. DEPARTMENT OF JUSTICE, Dec. 18, 2014, <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>.

<sup>33</sup> The Justice Department, Justice Department Files Complaint Against the State of North Carolina to Stop Discrimination. . . , YOUTUBE (May 10, 2016), <https://www.youtube.com/watch?v=GUKC8saQPro>; see also Jay Michaelson, *How Loretta Lynch Helped the Transgender*



Moving forward, however, activists must continue to speak strongly for the normalization of transgender experiences in American culture, leading the way by working for changes in law that allow transgender individuals to defend their rights against opposition. Transgender people, and particularly transgender students, must be allowed to participate in the formation of their own rights. With gender-affirming policy and legislation will come the ability to express their lived gender identities safely and successfully.

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*Movement Come of Age*, THE DAILY BEAST, May 10, 2016, <http://www.thedailybeast.com/articles/2016/05/10/how-loretta-lynch-helped-the-transgender-movement-come-of-age.html>; see also Amber Phillips, *How Loretta Lynch's speech brought some transgender advocates to tears*, THE WASHINGTON POST, May 11, 2016, <https://www.washingtonpost.com/g00/news/the-fix/wp/2016/05/11/loretta-lynchs-speech-just-made-her-a-hero-to-transgender-activists>.