

# The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science

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The debate over whether transgender individuals should be allowed to use the public restrooms (including locker rooms and changing rooms) that correspond to their currently expressed gender rather than their biological sex has been of recent interest nationally. The first state law addressing transgender access to restrooms was in North Carolina in 2016. This law prohibited transgender individuals from using the restroom that corresponded to their gender. The terms used in the bill and other legal documents caused it to be referred to as the “bathroom bill.” Shortly thereafter, such bills were proposed in many states. Proponents of the bills identify the need to protect public safety by mandating that individuals use the facility that corresponds to their biological sex. Opponents describe such bills as discriminatory. The debate about these bills incorporates ethics-related, legal, and biological arguments. In this commentary, we review the history of such bills in the United States as well as the ethics-related, legal, and evidence-based arguments raised in the debate.

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On March 23, 2016, the Public Facilities Privacy & Security Act,<sup>1</sup> also known as “House Bill 2” or “HB2,” was passed by the Republican majority of the North Carolina General Assembly and signed into law by Republican Governor Pat McCrory.<sup>1</sup> This was the first state law in the United States to address transgender access to restrooms. The law stipulated that individuals must use the restroom that corresponds with the designated sex listed on their birth certificates when in government buildings, such as schools. The Public Facilities Privacy & Security Act was passed in response to Ordinance 7056, which was approved on February 22, 2016, by the Democratic-majority Charlotte City Council.<sup>2</sup> The ordinance prohibited discrimination against homosexual and transgender individuals within the city and was scheduled to take effect on April 1, 2016.<sup>3</sup> The most controversial portion of the ordinance allowed individuals to use the restrooms that correspond to their gender identity, rather than their bio-

logical sex. In addition to invalidating Ordinance 7056, HB2 also prevented other cities in North Carolina from passing similar ordinances.

The legislative battle surrounding HB2 quickly gained national attention. On May 4, 2016, the Civil Rights Division of the U.S. Justice Department sent a letter<sup>4</sup> to the North Carolina Department of Public Safety stating that, by complying with the law, the Department of Public Safety was in violation of the nondiscrimination provision of the Violence Against Women Reauthorization Act of 2013,<sup>5</sup> Title VII of the Civil Rights Act of 1964,<sup>6</sup> and Title IX of the Educational Amendments of 1972.<sup>7</sup> A similar letter was delivered to the President, Board of Governors, and General Counsel of the University of North Carolina (UNC) system.<sup>8</sup> On May 9, 2016, Governor McCrory, North Carolina Senate leader Phil Berger, and North Carolina House Speaker Tim Moore filed lawsuits against the Justice Department<sup>9</sup> seeking a ruling that HB2 was not discriminatory and did not violate federal law.<sup>10</sup> In response, the Justice Department sued Governor McCrory, the North Carolina Department of Public Safety, and the UNC system for breach of federal civil rights laws.<sup>11</sup>

On August 26, 2016, U.S. District Judge Thomas Schroeder issued an injunction that prevented enforcement of HB2 within the UNC system until the

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Justice Department's case against North Carolina was resolved. This was in response to a lawsuit filed by Joaquín Carcaño, a transgender man who is an employee at UNC's Chapel Hill campus, along with several other plaintiffs.<sup>12</sup> Following protests and boycotts of the state by a variety of business and trade organizations, which cost North Carolina nearly \$400 million in revenue,<sup>13</sup> an effort between Democratic leaders in Charlotte and Republican state lawmakers was launched to repeal HB2. This effort required that the Charlotte City Council repeal Ordinance 7056, which also included nondiscrimination ordinances not involving transgender individuals. In return, the state General Assembly would repeal HB2. Although the Charlotte City Council repealed Ordinance 7056, the effort to repeal HB2 initially stalled when Republicans in the General Assembly insisted on a six-month cooling-off period, during which local governments would not be able to pass new ordinances regulating access to restrooms.<sup>14</sup> Because Democrats in the General Assembly refused to accept this condition, HB2 remained in effect.

Although at least 15 state legislatures considered bills similar to HB2 in 2016, none of them became law.<sup>15</sup> Eleven states filed suit against the Obama administration concerning the Department of Justice's new federal guidance on the right of transgender students to use the restroom consistent with their gender identity.<sup>16</sup> On February 22, 2017, the Departments of Education and Justice informed the U.S. Supreme Court that the Trump administration was instructing schools to cease following the guidance issued by the Obama administration concerning this matter.<sup>17</sup>

On March 6, 2017, the United States Supreme Court stated that it would not hear the case of *G. G. v. Gloucester County School Board*.<sup>18,19</sup> This case considered whether Mr. Grimm, a transgender male, could use the men's restroom at his high school. Instead, the Supreme Court vacated and remanded an earlier appeals court decision in favor of Mr. Grimm. The lower court will reconsider this case, taking the new guidance from the Trump administration into account.

On March 30, 2017, North Carolina's newly elected governor, Roy Cooper, signed House Bill 142 into law after its passage by the state legislature.<sup>20</sup> Because this bill repealed HB2, transgender individuals no longer have to use restrooms in government facilities that match the sex on their birth

certificates. However, House Bill 142 also grants the North Carolina General Assembly exclusive power in regulating access to multiple occupancy restrooms and changing facilities. It also prevents local governments from passing nondiscrimination ordinances until December 1, 2020.

Although activists have been advocating for national nondiscrimination laws for lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals for over 30 years, none has been passed.<sup>21</sup> In fact, 12 states have recently passed laws removing antidiscrimination protections for LGBTQ persons, which in some cases include legislation for nondiscriminatory restroom access.<sup>22</sup> Currently, 18 states and the District of Columbia have legislation that prohibits discrimination against transgender individuals in public accommodations: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.<sup>23,24</sup> However, as of February 18, 2018, bills aiming to limit restroom access based on sex have been introduced into 19 state legislatures: Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New Jersey, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming.<sup>25,26</sup> Most of these have failed to become law. However, bills are still under legislative consideration in six states<sup>25</sup> (Table 1).

## History of Sex-Segregated Restrooms

The first sex-segregated restrooms date to the 1700s in Paris.<sup>27</sup> In America, sex-segregated restrooms date to 1887, when Massachusetts enacted the first law mandating that workplace toilet facilities be separated by sex. Over the next 30 years, all other states adopted similar laws.

Contrary to widespread opinion, the rationale for sex-segregated restrooms is not rooted in biology and anatomical differences. According to Terry Kogan, the laws mandating sex separation "were rooted in the 'separate spheres' ideology of the early nineteenth century that considered a woman's proper place to be in the home, tending the hearth fire, and rearing children" (Ref. 28, p 5). At that time, the legislature was developing protective labor laws for women. The separation of restrooms was an extension of these special protections for women. The concept of sex-specific areas was evident in public transportation,

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**Table 1** Bills Currently Under Consideration in State Legislatures That Seek to Restrict Restroom Access Based on Gender

State	Bill Name	Summary	Gender Determination
IA	HF2164	Allows public and private entities to limit access to restrooms based on gender	Not specified
IA	SF2296	Allows schools to restrict access to multiple-occupancy restrooms based on gender	Birth certificate
KY	HB326	Stipulates that multiple-occupancy bathrooms in schools be restricted to one gender. Schools must also provide reasonable accommodation for individuals who do not want to use restrooms consistent with their gender	Anatomy and genetics at time of birth
MO	HB1755	Stipulates that all public multiple-occupancy restrooms must be “gender divided”	Not specified
MO	SB690	Stipulates that public school restrooms and locker rooms must be designated for the use of individuals of the same gender only	Birth certificate
OK	SB1223	Stipulates that multiple-occupancy restrooms and changing facilities in public schools be restricted to one gender. Schools must also provide reasonable accommodation for individuals who do not want to use restrooms consistent with their gender	Birth certificate
TN	HB0888	Stipulates that public schools must require students to use restrooms and locker rooms consistent with their gender	Birth certificate
WA	HB1011	Allows public and private entities to limit access to restrooms and changing rooms based on gender if an individual is transgender but preoperative or nonoperative	Anatomy

where public space was reserved for women (e.g., the ladies’ car on railroads).<sup>28</sup>

Kogan argues that the creation of sex-separate restrooms arose from the philosophical belief that women need protective havens in the dangerous public realm. In his article, he outlines four justifications for separating public toilets: the sex-separated water closet as a haven to protect the weaker body of the woman worker; the sex-separated water closet as necessary to provide workers with sanitary toilet facilities; the sex-separated water closet as a space to protect a worker’s privacy; and the sex-separated water closet as a space to protect social morality.<sup>28</sup>

Today, sex-segregated restrooms are universal and expected. Although gender equality has changed the view of a woman’s “proper place,” there remains a notion that women need to be protected. As our society’s understanding of gender and sexuality evolves, we have to consider whether sex-separate restrooms are justified.

### Rationale for Gender-Neutral or Gender-Inclusive Restrooms

Historically, transgender individuals have been expected to conform their behavior to their anatomical sex; however, this notion is discriminatory. Transgender individuals report frequent harassment specifically related to restroom use. According to the 2015 U.S. Transgender Survey, more than half (59%) of respondents avoided using a public restroom in the past year because they were afraid of confrontations or other problems they might experience.<sup>29</sup> Nearly one third (32%) of respondents limited the amount that they ate and drank to avoid

using the restroom in the past year. During that time, respondents reported being verbally harassed (12%), physically attacked (1%), or sexually assaulted (1%) when accessing a restroom.

Today’s society is faced with the question of whether transgender individuals should be expected to conform their behavior to anatomical sex. A growing understanding of transgenderism, including an evolution from a psychiatric illness (gender identity disorder), has led to different perspectives on the expectations of transgender individuals. The rationale for providing gender-neutral or -inclusive restrooms is simple: such facilities would allow transgender individuals’ acceptance as well as equality.

### Potential for Abuse of More Permissive Restroom Entry Laws

Resistance to allowing certain individuals to use restrooms consistent with their gender identity has centered around three primary arguments. The first of these is that an individual’s gender identity is determined by their anatomical sex and individuals who claim a gender identity that is inconsistent with their anatomical sex have a mental illness. The second of these is the belief that transgender individuals are at increased risk of committing sexual assaults, possibly secondary to perceived mental illness. This is typified in a 2016 comment by David Omdahl, a Republican member of the South Dakota Senate, who stated about transgender individuals, “I’m sorry if you’re so twisted you don’t know who you are—a lot of people are—and I’m telling you right now, it’s about protecting the kids.” He then went on to imply that transgender individuals have a mental illness,

**Table 2** Sex Crime Cases Occurring in Restrooms or Changing Facilities

Year	Location	Dressed as Opposite Sex*	Description of Incident	Location of Incident	Perpetrator's Gender
2016	ID	No	Cell phone used to take photos of a victim <sup>32-34,36</sup>	Women's department store dressing room	Transgender woman
2016	WA	No	Undressed; did not identify as female, but stated new state law allowed him to be there <sup>32,35,36</sup>	Women's locker room at a public pool	Cis-gender man
2015	WA	Yes	Cell phone used to photograph a victim <sup>36</sup>	Women's restroom	Cis-gender man
2015	VA	Yes	Victim filmed <sup>32,35,36</sup>	Women's restroom at a mall	Cis-gender man
2015	Alberta	Yes	Victim filmed changing <sup>36</sup>	Women's changing room	Cis-gender man
2014	CA	Yes	Attempted sexual assault <sup>36</sup>	Women's restroom	Cis-gender man
2014	Ontario	Yes	Sexual assault of two women <sup>35</sup>	Women's shelter	Cis-gender man
2014	WA	Yes	Camera placed in a restroom <sup>36</sup>	Women's restroom	Cis-gender man
2013	Ontario	Yes	Mirror used to peer into an adjacent stall <sup>36</sup>	Women's restroom	Cis-gender man
2013	CA	Yes	Police allege perpetrator attempted to film women in restrooms <sup>34,36</sup>	Women's dormitory	Cis-gender man
2013	CA	Yes	Victim filmed <sup>32,34-36</sup>	Women's department store restroom	Cis-gender man
2012	WA	Yes	Showered for sexual gratification <sup>34,36</sup>	Women's locker room	Cis-gender man
2011	United Kingdom	Yes	Cell phone used to photograph victims and audio record them urinating <sup>34,36</sup>	Women's restroom	Cis-gender man
2011	OR	Yes	Locker room entered <sup>32,34,36</sup>	Women's locker room at a water park	Cis-gender man
2010	CA	Yes	Cell phone used to photograph women <sup>32,36</sup>	Locker room	Cis-gender man
2010	GA	Yes	Undressed in front of children <sup>32,36</sup>	Women's restroom	Cis-gender man
2009	CA	Yes	Loitering for several minutes <sup>32,36</sup>	Women's restroom	Cis-gender man
2008	IN	Yes	Cell phone used to photograph a woman <sup>32,36</sup>	Locker room	Cis-gender man
2004	PA	Yes	Locker room entered <sup>36</sup>	Women's locker room	Cis-gender man
2003	Japan	Yes	Observed nude women <sup>34</sup>	Women's resthouse	Cis-gender man

\* Individuals were transgender, falsely claimed to be transgender, or appeared as the opposite gender.

stating, “They’re treating the wrong part of the anatomy; they ought to be treating it up here,” as he gestured toward his head.<sup>30</sup> We are unaware of any studies assessing the relationship between transgender identity and perpetration of sexual crimes. However, studies have consistently replicated the finding that transgender individuals are often victims of sexual assault. Nearly half (47%) of respondents in the 2015 U.S. Transgender Survey had been sexually assaulted at some point in their lifetime and 10 percent of the incidents had happened in the past year.<sup>29</sup> The third argument used by opponents is that if people are allowed to use the restroom that is consistent with their gender identity, individuals (usually male) with sexual disorders such as pedophilic disorder, voyeuristic disorder, or exhibitionistic disorder will disguise themselves as members of the opposite sex to sneak into restrooms and commit sex crimes. Former Arkansas Governor Mike Huckabee embraced this notion at the 2015 National Religious Broadcasters Convention. In a controversial joke, Governor Huckabee stated, “Now I wish that someone told me that when I was in high school that I could have felt

like a woman when it came time to take showers in PE.”<sup>31</sup>

To assess the degree to which sexual predators may take advantage of transgender friendly restroom laws, we conducted a systematic search of PubMed, Nexis Uni, and Google to find cases of such behaviors. Although the searches of PubMed and Nexis Uni returned no pertinent results, the Google search returned websites for conservative organizations such as the Family Research Council, American Family Association, the Liberty Counsel, and Breitbart, which have compiled lists of alleged cases. These websites claim that the compiled incidents are evidence that transgender individuals or individuals taking advantage of transgender-friendly restroom provisions will prey upon victims in restrooms.<sup>32-36</sup> A thorough review revealed that only a small number of cases actually involved perpetrators who were transgender, perpetrators who falsely claimed to be transgender, or perpetrators who attempted to disguise themselves as a member of the opposite sex to gain restroom access. These are detailed in Table 2.

We were able to locate only one report of a transgender individual committing a sexual offense (taking photos) in a dressing room. Instances of cis-gender men dressing as women to gain access to women in various stages of dress also appear to be an extremely rare phenomenon based on our review. Of the incidents in which cis-gender males dressed as women to gain access to female facilities, 11 occurred in restrooms and 7 occurred in other female facilities.

Whether the advent of transgender-inclusive restroom laws results in an increase in sexual assaults in restrooms on a population level is unknown at this time. Although several police departments report no observed increase in sexual violence or public safety problems in jurisdictions that have nondiscrimination laws,<sup>37</sup> we are unaware of the existence of any formal studies assessing the relationship between transgender-inclusive restroom laws and rates of sexual assaults in those jurisdictions. There may be incidences of sexual assaults after the passage of more permissive laws, but we have not found any studies supporting an increase in such assaults.

### Ethics-Related Implications

Nondiscrimination bills regarding restroom access raise several ethics-related concerns. Advocates of a bill make utilitarian arguments (i.e., the best course of action is to implement a bill, because it benefits the majority) and raise the harm principle as a reason to limit a transgender person's autonomy with regards to his or her choice of restroom. Opponents to these laws make arguments about human rights and the principles of respect for persons, justice, and autonomy; these arguments are supported by consequentialist rationales. In other words, opponents to restroom access bills believe that the laws are ethically problematic because they have negative consequences for the transgender community.

Human rights form the basis for how we respect the dignity of others. Divan *et al.*<sup>38</sup> said, "providing equal access to public facilities, and developing and implementing anti-discrimination laws and policies that protect trans people in these contexts, including guaranteeing their safety and security, are essential to ensure that trans individuals are treated as equal human beings" (Ref. 39, p 3). Those in favor of allowing transgender people to use the restroom that is consistent with their gender identity argue that transgender rights are human rights.<sup>39</sup> They state that, like all people, transgender people have fundamental

rights to life, liberty, equality, health, privacy, and expression; laws that interfere with their ability to safely express their gender identity interfere with each of these rights.<sup>38</sup>

Opponents to these bills also make arguments based on the principle of justice, which can be described as "fair, equitable and appropriate treatment in light of what is due or owed to persons" (Ref. 40, p 226). The principle of justice arises from Aristotle's principle of formal equality, which says that "equals should be treated equally, and unequals unequally" (Ref. 40, p 227). In other words, people should be treated differently only if there is a relevant reason to do so. For example, a man should not be paid more than a woman to work at a cash register just because he is a man. The disparate salaries would be a form of injustice because his sex is not relevant to the work that he performs. However, there are instances when it is justifiable to treat people differently. For example, when a person engages in a criminal act and infringes on the rights of others, it is acceptable to restrict his freedom of movement by imprisoning him.

The problem with Aristotle's principle is that it requires specification and interpretation and lacks the substance needed to apply to more complex situations. For example, two general justice arguments are made about legislation. Advocates of equal access to restrooms say that transgender women are not different from biological women in any relevant way; therefore, to be just, transgender women should be allowed to access the women's restroom. Conversely, advocates of equal access laws say that these two groups should be treated differently because they are unequal in a very relevant way: biological sex characteristics.

Opponents to legislating equal access to restrooms also argue that such laws violate the principle of respect for persons. This principle requires the protection of vulnerable individuals. The political aspects of vulnerability are related to social, economic, and cultural factors.<sup>41-43</sup> In other words, a person is vulnerable on the basis of

... being a member of a population or a group with special needs or barriers to care from a variety of conditions or circumstances and are less able than others to safeguard their own needs and interest and/or are at high relative risk of suffering poor physical, psychological, and social health [Ref. 42, p 283].

Ekmekci<sup>43</sup> argues that transgender individuals are vulnerable from a political perspective, because they

are susceptible to exploitation because of disadvantages resulting from social isolation, high incidence of disease, and lack of social supports and health services.

Opponents state that equal restroom access laws create discriminatory environments and fuel stigmatization and transphobia, which in turn lead to worse health outcomes. For example, Reisner *et al.*<sup>44</sup> found that those who had experienced public accommodation discrimination within the past 12 months reported high rates of physical and emotional symptoms. Testa *et al.*<sup>45</sup> found that gender minority external stressors, including rejection, victimization, and discrimination, related to increased risk of suicidal ideation through the experience of internalized transphobia and negative expectations of others' treatment of them. Similarly, Seelman and colleagues<sup>46</sup> found that the suicide rate of transgender college students who had been denied gender-congruent restroom access was 1.45 times higher than those who had not been denied access.

Opponents of the bills also point to several studies that show how discrimination against transgender people leads to violence, poverty, and isolation. Discrimination has also been shown to interfere with transgender people's access to social and economic support systems as well as health care.<sup>38,47-50</sup> Opponents assert that, because transgender individuals are vulnerable and because equal restroom access legislation creates discriminatory environments that lead to violence and poor health and socioeconomic outcomes, on the basis of the principle of respect for persons, society should protect this group by ensuring that transgender rights laws include protections that cover public accommodations, including restrooms.<sup>44</sup>

The second component of the principle of respect for persons is that autonomous beings should be able to act autonomously, or by their own deliberation and choices. Based on this, opponents to equal restroom access argue that a person should be allowed to decide which gender he chooses to express and to act in accordance with that gender. However, there are some restrictions to autonomy. For example, people should be allowed to label themselves however they wish: Republican, Jewish, heterosexual, man, or woman. However, others do not necessarily have to respect this self-identification if it has meaningful consequences for them. If it does have meaningful consequences, based on the principle of harm, there

may be grounds to restrict such self-identification.<sup>51</sup> Advocates of legislating equal access to public accommodations say that there are grounds to restrict this self-identification if it guarantees biological men access to the women's restrooms, because their presence jeopardizes the safety of the biological women and young children.

Advocates of legislation also make utilitarian arguments in favor of these laws. Utilitarians assert that the most ethical course of action is the one that promotes the greatest utility, or, generally speaking, the greatest good for the greatest number of people. Predictably, the utilitarian material principle of justice is, "to each person according to rules and access that maximize social utility." Because there are more cis-gender people than there are transgender people, it may be of greater utility to maximize the comfort of cis-gender people.

In summary, opponents to equal restroom access make arguments about human rights and the principles of respect for persons, justice, and autonomy, whereas advocates of the bills raise utilitarian arguments and the harm principle. Opponents argue that, like all people, transgender people have fundamental rights to life, liberty, equality, health, privacy, and expression, and it is only by respecting persons that we can ensure social, economic, and cultural influences that promote human and societal flourishing. Furthermore, the fact that discrimination against transgender individuals has been associated with poor health and socioeconomic outcomes is compelling. Based on these data, it seems likely that legislation that prohibits transgender individuals' access to gender-congruent facilities would lead to worse health and socioeconomic outcomes for this population. However, to date, no empirical studies have looked at the relationship between the restrictive legislation and markers of health and well-being for transgender individuals.

As described above, there is also little evidence that respecting a person's self-identification as a certain gender and allowing that person to use the restroom consistent with that gender causes harm to others. The discomfort that some cis individuals who encounter an obviously transgender individual in the restroom may feel is a minor harm that pales in comparison to the results of the discrimination that transgender individuals may experience as a result of the denial of access. If this is true, then the consequences of the bills are not substantial enough to justify re-

stricting a transgender individual's right to express his gender identity by using gender-congruent facilities. However, the relationship between legislation regarding restroom access and rates of sexual assault against cis-gender individuals in public restrooms has not been studied empirically. Therefore, opponents' theoretical arguments require strengthening by additional research into this area.

## Legal Implications

### Constitutional Arguments

Several constitutional arguments have been made in both support and opposition to legislation governing access to public accommodations. These arguments are based on the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the right to privacy as derived from the penumbra of the First, Fourth, Fifth, and Ninth Amendments. Although the Fourteenth Amendment to the United States Constitution promises equal protection and due process for all people, the Equal Protection Clause was only recently applied to transgender rights.<sup>52</sup>

Courts apply one of three standards to Equal Protection cases: rational-basis review, intermediate scrutiny, or strict scrutiny. If a law infringes on a fundamental right or targets a suspect class, courts turn to strict scrutiny, under which "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Suspect classes include race, national origin, and religion.<sup>53</sup> Although Judge Jed Rakoff of the Southern District of New York ruled in 2015 that gender identity or transgender individuals constitute a "quasi-suspect" class, other courts have not adopted this view.<sup>22</sup> Because gender is not a suspect class, it does not invoke strict scrutiny; however, it does warrant intermediate scrutiny because there is "real danger" that seemingly reasonable policies in fact reflect "archaic and overbroad generalizations . . . [or] outdated misconceptions [about gender]."<sup>53</sup> The Equal Protection Clause has been raised both by supporters and opponents of equal restroom access bills: whereas advocates of the laws say that, for example, a transgender woman is not being treated any differently than any other biological male by being mandated to use either a male or single-stall restroom, opponents argue that she is not being awarded the same protection that other females receive.

Advocates of transgender rights have also pointed to the landmark decision in *Obergefell v. Hodges*, which holds that the fundamental right to marry is guaranteed to same-sex couples by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In *Obergefell v. Hodges*, the majority opinion stated that "the Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity" (Ref. 54, p 2593). As Skinner-Thompson says, "The court's recognition that both due process and equal protection require that individuals be permitted to self-determine—to define and express themselves—has unmistakable extension to rights for the transgender community."<sup>55</sup> Therefore, although the Supreme Court has yet to address restroom access, *Obergefell v. Hodges* may have set an important precedent.

Proponents of restroom laws cite these laws as protecting Constitutional rights to privacy: "a woman has a reasonable expectation [of privacy] that she will not encounter men in the restroom."<sup>54</sup> However, public restrooms are already designed to protect privacy by providing individual stalls. In addition, social norms already require people to keep their eyes to themselves when in public restrooms. Therefore, it seems that the privacy argument must not be about privacy in the typical sense, but rather "modesty" or "gender privacy" (i.e., not being seen by members of the opposite sex).<sup>51,53</sup> Regardless, denying access to restrooms consistent with a person's gender alienates people in "a manner that is disproportionate to the privacy concerns at stake."<sup>51</sup>

Opponents to the restroom laws also raise concerns about privacy. The restroom laws presuppose that someone will enforce the law, perhaps by using information from a birth certificate. Not only would this be incredibly intrusive and difficult to enforce, but also the Due Process Clause of the Fourteenth Amendment prevents the government from disclosing a person's intimate and sensitive information, including whether they are transgender.<sup>55</sup> If transgender people were forced to use restrooms that did not correspond with their genders every time they used a public restroom, it would identify them as transgender every time.

### Role of the Forensic Psychiatrist

Forensic psychiatrists may be asked to assist in cases involving transgender individuals and public

facilities in the following manner: to determine whether an individual is transgender; to determine emotional damage in a transgender individual who has been harassed in relation to a public facility; to educate the trier of fact about the likelihood that creating gender-inclusive restrooms will result in sexual assaults; or to determine the needs of a transgender individual in a correctional setting. In light of the recent legislation, forensic psychiatrists have been asked to opine the potential dangers in the establishment of gender-inclusive restrooms. More specifically, expert opinions may be sought to assist legal decision makers in assessing the risks and benefits of creating such laws.<sup>56</sup>

The forensic psychiatrist working in this area should be familiar with the relevant Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) diagnoses. The diagnosis gender identity disorder was removed, and gender dysphoria disorder was added. Transgenderism is no longer considered a mental illness. However, forensic psychiatrists may be asked to determine whether an individual is truly transgender or is malingering a transgender identity. Organizations such as The World Professional Association for Transgender Health (WPATH) and The Endocrine Society have issued clinical practice guidelines for the treatment of transsexual persons.<sup>57,58</sup> Although these guidelines may be useful in understanding transgender individuals, there is no standard gender screening tool or instrument used to diagnosis a transgender identity. Therefore, the diagnosis is largely based on self-report. Collateral information from previous providers, families, and significant others may be helpful in understanding the individual's reported transgender experience.

In addition to familiarity with the presentation of a transgender individual, forensic psychiatrists should be familiar with psychiatric comorbidities in this population. When the forensic question relates to the risk of sexual offending, the forensic psychiatrist should perform a psychosexual evaluation that includes a review of systems for the paraphilic disorders as well as the determination of identified risk factors for sexual offending.

Most forensic psychiatrists do not have experience working with transgender individuals. The most common setting for a forensic psychiatrist to encounter a transgender individual is in the correctional setting. In this setting, a forensic psychiatrist may be asked to opine about the risks involved in

placing the individual in sex-congruent facilities. Although the courts will decide whether transgender individuals should have access to gender-neutral restrooms, the forensic psychiatrist can provide answers about the psychiatric implications of such decisions.

## Conclusions

From a scientific and evidence-based perspective, there is no current evidence that granting transgender individuals access to gender-corresponding restrooms results in an increase in sexual offenses. However, the arguments for and against legislating access to public accommodations are not simply answered by science. The basis for differing opinions includes whether transgender individuals are mentally ill and whether there are legal and ethics-related justifications for gender-inclusive restrooms.

Psychiatrists, not unlike the general public, have struggled to conceptualize transgender individuals. The DSM-5 adopted the new term gender dysphoria to replace gender identity disorder, which defined transgender as a mental illness. This significant change, now only four years old, is not understood by the community at large. As psychiatrists, we must educate others about what constitutes a mental illness (i.e., gender dysphoria) and what is considered a healthy variant of gender expression (i.e., transgenderism). As forensic psychiatrists, we may be asked to opine about whether gender-inclusive restrooms pose risks for transgender individuals and their cisgender peers. It is important to be aware of societal bias as well as our own bias when performing these evaluations. As the debates continue in this area, we should remain focused on evidence-based data to provided competent, objective opinions.

## References

1. General Assembly of NC House Bill 2 (2016)
2. Charlotte, N.C., Code of Ordinances 7056 (2016)
3. Lacour G: HB2: how North Carolina got here. *Charlotte Magazine*. March 2017. Available at: <http://www.charlottemagazine.com/Charlotte-Magazine/April-2016/HB2-How-North-Carolina-Got-Here/>. Accessed February 23, 2018
4. DOJ Letter to NC Dept of Public Safety re HB 2. May 4 2016. Available at: <http://files.eqcf.org/cases/doj-letter-to-nc-dept-of-public-safety-re-hb-2//>. Accessed February 23, 2018
5. Violence Against Women Reauthorization Act of 2013, 42 U.S.C. §§ 13701–14040 (2013)
6. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964)
7. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972)



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- 8 DOJ Letter to UNC re HB 2. Available at: <http://files.eqcf.org/cases/doj-letter-to-unc-re-hb-2/>. May 4, 2016/. Accessed February 23, 2018
9. McCrory v. United States, No. 5:16-CV-238-BO (E.D.N.C. Sept. 1, 2016)
10. McCrory, NC Lawmakers sue justice department over hb2; feds counter with lawsuit. Charlotte Observer. May 10, 2016. Available at: <http://www.charlotteobserver.com/news/politics-government/article76502777.html/>. Accessed February 23, 2018
11. United States v. North Carolina, No. 1:16CV425 (M.D.N.C. December 16, 2016)
12. Carcaño, v. McCrory, No. 1:16cv236 (M.D.N.C. Aug. 26, 2016)
13. Abadi M: North Carolina has lost a staggering amount of money over its controversial “bathroom law.” Business Insider. September 21, 2016. Available at: <http://www.businessinsider.com/north-carolina-hb2-economic-impact-2016-9>. Published 2016/. Accessed February 23, 2018
14. Graham D: How did North Carolina’s deal to repeal H.B. 2 fall apart? The Atlantic. December 22, 2016. Available at: <https://www.theatlantic.com/politics/archive/2016/12/hb2-fail-north-carolina/511463/>. Accessed February 23, 2018
15. Young N: How the Bathroom wars shaped America. Politico. May 18, 2016. Available at: <http://www.politico.com/magazine/story/2016/05/2016-bathroom-bills-politics-north-carolina-lgbt-transgender-history-restrooms-era-civil-rights-213902>. Accessed February 23, 2018
16. Schuster MA, Reisner SL, Onorato SE: Beyond bathrooms: meeting the health needs of transgender people. *N Engl J Med* 375: 101–3, 2016
17. Somashekhar S, Brown, Balingit M: Trump administration rolls back protections for transgender students. Washington Post. February 22, 2017. Available at: [https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643\\_story.html?tid=a\\_inl&utm\\_term=.6ac12c70cc72/](https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?tid=a_inl&utm_term=.6ac12c70cc72/). Accessed February 23, 2018
18. *G. G. v. Gloucester County School Board*, 853 F.3d 729 (4th Cir. 2017)
19. Liptak A: Supreme Court won’t hear major case on transgender rights. New York Times. March 6, 2017. <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html>. Accessed February 23, 2018
20. General Assembly of North Carolina House Bill No. 142/S.L. 2017–4; 2017
21. Scout N: Transgender health and well-being: Gains and opportunities in policy and law. *Am J Orthopsychiatry* 86:378–83, 2016
22. Ulrich L: Explaining bathroom bills, transgender rights, and equal protection. Constitution Daily. May 6, 2016. Available at: <https://constitutioncenter.org/blog/explaining-bathroom-bills-transgender-rights-and-equal-protection>. Accessed February 23, 2018
23. National LTBGQ Network: State Nondiscrimination Laws in the U.S. Last updated, May 21, 2014. Available at: [http://www.thetaskforce.org/static\\_html/downloads/reports/issue\\_maps/non\\_discrimination\\_5\\_14\\_new.pdf/](http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_5_14_new.pdf/). Accessed February 23, 2018
24. Know Your Rights: Transgender People and the Law. 2018. Washington DC: American Civil Liberties Union. Available at: <https://www.aclu.org/know-your-rights/transgender-people-and-law>. Accessed February 23, 2018
25. State Action Center: Take action against anti-trans legislation now! 2018. Washington DC: National Center for Transgender Equality. Available at: <http://www.transequality.org/action-center>. Accessed February 23, 2018
26. National Conference of State Legislatures: “Bathroom Bill” legislative tracking. Washington DC: NCSL. Available at: <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>. Published 2018/. Accessed February 28, 2018
27. Rhodan M: Why do we have men’s and women’s bathrooms anyway? Time. May 26, 2016. [time.com/4337761/history-sex-segregated-bathrooms/](http://time.com/4337761/history-sex-segregated-bathrooms/). Accessed February 23, 2018
28. Kogan TS: Sex-separation in public restrooms: law, architecture, and gender. *Mich J Gender & L* 14:1–54, 2007
29. James SE, Herman JL, Rankin S: Executive Summary of the Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality, 2016 <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf/>. Accessed February 23, 2018
30. Ford Z: How lawmakers candidly justify the anti-transgender bills they support. ThinkProgress. February 8, 2016. Available at: <https://thinkprogress.org/how-lawmakers-candidly-justify-the-anti-transgender-bills-they-support-dcc29561fcb7/>. Accessed February 23, 2018
31. Stern MJ: Mike Huckabee says he would have pretended to be trans to shower with girls in school. Slate. June 2, 2015. Available at: [http://www.slate.com/blogs/outward/2015/06/02/mike\\_huckabee\\_says\\_he\\_would\\_have\\_pretended\\_to\\_be\\_trans\\_to\\_shower\\_with\\_girls.html/](http://www.slate.com/blogs/outward/2015/06/02/mike_huckabee_says_he_would_have_pretended_to_be_trans_to_shower_with_girls.html/). Accessed February 23, 2018
32. Family Research Council: Issue Brief- Bathroom Incidents. Washington, DC: Family Research Council, April 2017. [downloads.frc.org/EF/EF16F27.pdf](http://www.familyresearch.org/EF/EF16F27.pdf). Accessed February 23, 2018
33. Wildmon T: 10 examples of men abusing target’s dangerous policy. Tupelo, MS: American Family Association. September 29, 2016. Available at: <http://www.afa.net/the-stand/faith/2016/09/10-examples-of-men-abusing-targets-dangerous-policy/>. Published 2017/. Accessed February 23, 2018
34. Liberty Counsel: The truth about “transgender” bathrooms. Orlando, FL: Liberty Counsel, 2017. [www.lc.org/transgender](http://www.lc.org/transgender). Accessed February 23, 2018
35. Huston W: Top twenty-five stories proving target’s pro-transgender bathroom policy is dangerous to women and children. Breitbart. April 23, 2016. Available at: <http://www.breitbart.com/big-government/2016/04/23/twenty-stories-proving-targets-pro-transgender-bathroom-policy-danger-women-children/>. Accessed February 23, 2018
36. Woman Means Something Campaign: Violence Database. Vancouver, BC, Canada: Woman Means Something Campaign, 2016. Available at: <http://womanmeansomething.com/violencedatabase/>. Accessed February 23, 2018
37. National Center for Transgender: What Experts Say. School Officials Agree: Policies Protecting Transgender Student Do Not Compromise the Privacy or Safety of Other Students. Washington, DC: National Center for Transgender Equality 208. Available at: <https://transequality.org/what-experts-say/>. Accessed February 23, 2018
38. Divan V, Cortez C, Smelyanskaya M: Transgender social inclusion and equality: a pivotal path to development. *J Int AIDS Soc* 19(Suppl 2):20803, 2016
39. Powell T, Shapiro S, Stein E: Transgender rights as human rights. *AMA J Ethics* 18:1126–31, 2016
40. Beauchamp T, Childress J: Principles of Biomedical Ethics. New York: Oxford University Press; 2001
41. Silvers A: Historical vulnerability and special scrutiny: precautions against discrimination in medical research. *Am J Bioeth* 4:56–7, 2004
42. Brock D: Health resource allocation for vulnerable populations, in *Ethical Dimensions of Health Policy*. Danis M, Clancy C, Churchil L, eds. New York: Oxford University Press; 2005

43. Ekmekci PE : Do we have a moral responsibility to compensate for vulnerable groups? A discussion on the right to health for LGBT people. *Med Health Care Philos* 20:335–41, 2017
44. Reisner SL, Hughto JMW, Dunham EE, *et al*: Legal Protections in public accommodations settings: a critical public health issue for transgender and gender-nonconforming people. *Milbank Q* 93:484–515, 2015
45. Testa RJ, Michaels MS, Bliss W, *et al*: Suicidal ideation in transgender people: gender minority stress and interpersonal theory factors. *J Abnorm Psychol* 126:125–36, 2017
46. Seelman KL, Colon-Diaz MJP, LeCroix RH, *et al*: Transgender noninclusive healthcare and delaying care because of fear: connections to general health and mental health among transgender adults. *Transgender Health* 2:17–28, 2017
47. United Nations Development Programme: Health Policy Project, Asia Pacific Transgender Network, Blueprints for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific. Available at: <http://www.who.int/hiv/pub/transgender/blueprint-trans-asia.pdf>. New York, 2015
48. Global Commission on HIV and the Law: Overview of the Asia-Pacific Regional Dialogue: February 16–17, 2011. Available at: <http://hivlawcommission.org/index.php/regional-dialogues-main/asia-pacific/>. Accessed February 23, 2018
49. Transgender Europe: Trans Murder Monitoring 2015. Berlin: Transgender Europe, May 8, 2015. Available at: <http://tgeu.org/tmm-idahot-update-2015/>. Accessed February 23, 2018
50. Transgender and Intersex Africa: Transilience Project by SHE. Pretoria, South Africa: Transgender and Intersex Africa, October 13, 2014. Available at: <http://transgenderintersexafrica.org.za/?p=272>. Accessed February 23, 2018
51. LaBossiere M: Arguments for Bathroom Bills. *Talking Philosophy*. May 13, 2016. Available at: <http://blog.talkingphilosophy.com/?p=9540>. Accessed February 23, 2018
52. Darmer M: “Immutability” and stigma: towards a more progressive equal protection rights discourse. *Am U J Gender Soc Pol’y & L* 18:439–53, 2010
53. Moffitt R: Keeping the john open to the Jane: how California’s bathroom bill brings transgender rights out of the water closet. *Geo J Gender & L* 16:475–503, 2015
54. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)
55. Skinner-Thompson S. Bathroom bills and the battle over privacy. *Slate*. May 10, 2016. Available at: [http://www.slate.com/blogs/outward/2016/05/10/in\\_the\\_battle\\_over\\_bathroom\\_privacy\\_transgender\\_people\\_s\\_needs\\_matter\\_more.html](http://www.slate.com/blogs/outward/2016/05/10/in_the_battle_over_bathroom_privacy_transgender_people_s_needs_matter_more.html). Published 2016/. Accessed February 23, 2018
56. Dietz E: Bathroom Bills, Bigotry, and Bioethics. *The Hastings Center*. March 31, 2016. Available at: <https://www.thehastingscenter.org/bathroom-bills-bigotry-and-bioethics/>. Accessed February 23, 2018
57. Coleman E, Bokting W, Botzer M: Standards of care for the health of transexual and gender-nonconforming people, version 7. *Int J Transgenderism* 13:165–232, 2012
58. Hembree WC, Cohen-Kettenis P, Delemarre-van de Waal HA, *et al*: Endocrine treatment of transexual persons: an Endocrine Society clinical practice guideline. *J Clin Endocrinol Metab* 94: 3132–54, 2009