

# LGBTQ Issues in Philosophy



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## CALL FOR PAPERS



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## FROM THE EDITOR

Kory Schaff

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The APA Committee on LGBTQ People in the Profession is pleased to publish the fall 2017 edition of this newsletter, featuring three related articles on the theme "Bathroom Bills, 'Religious Freedom' Legislation, and Anti-LGBTQ Violence." In the wake of the recent Supreme Court decisions in *US v. Windsor* (2013) and *Obergefell v. Hodges* (2015) affirming marriage equality, religious and social conservatives in collaboration with state legislators have renewed their ongoing efforts to deny LGBTQ citizens a variety of rights in the public sphere.

In particular, these efforts have focused on passing legislation in three areas: (1) prohibiting municipalities and counties from passing measures aimed at protecting LGBTQ persons from discrimination in housing, employment, and health care; (2) denying trans persons access to public services such as health care and the use of restrooms based on their chosen gender identity; and (3) protecting the "religious liberty" of individuals who wish to decline selling goods and services to LGBTQ individuals on the basis that it violates their closely held religious beliefs. Thus, the battle for equality under the law has shifted from marriage rights for members of the LGBTQ community to "bathroom wars," and the consequences of these shifting battle lines are especially harmful to marginalized members of the community such as trans individuals, persons of color, and the poor.

In the first essay, "Targeting Trans: The Marriage Equality Backlash," Loren Cannon of Humboldt State University argues that recent forms of proposed legislation to severely limit the social participation and well-being of transgender persons is primarily a backlash from the *Obergefell* ruling that legalized same-sex marriage across the nation. Cannon describes a number of ways that transphobia has intensified during the first two years of the Marriage Equality Era. First, the rate of trans violence has risen since the summer of 2015. Second, three different kinds of proposed legislation has either been considered or passed, which aims to erode the social participation and well-being of transgender individuals: (1) reducing or prohibiting healthcare access for transgender persons, (2) reducing one's ability to correct the gender designation on personal documentation, and (3) passing notorious "bathroom bills," which have demonized and disregarded the well-being of trans women, "invisibilized" and disregarded the existence

and safety of trans men, gender-queer, and non-conforming individuals, and effectively ostracized trans participation in a number of different kinds of public spaces.

The second essay, "Resisting the Inadequate Resistance to House Bill 2 at a Private University in North Carolina," by Claire Lockard of Loyola University Chicago, recounts from a personal standpoint some of the theoretical and practical complexities confronting individuals and groups attempting to resist H.B. 2 in that state. While there are many critiques that queer and trans communities, activists, and scholars can make against such legislation and the broader violence against trans communities it perpetuates, Lockard offers an additional critique, not of H.B. 2's blatant transphobia, but of the transphobia that institutional denunciations of H.B. 2 can quietly reproduce. Relying on her own experiences resisting these "failures" of nonperformative speech-acts at a private university in North Carolina, Lockard explores the problem of resisting H.B. 2 at an institution that has officially denounced it: What are campus activists to do when they feel called to resist an injustice, but also to resist an inadequate or problematic institutional response to that injustice? Using insights from the theoretical work of feminist philosophers such as Sarah Ahmed and Maria Lugones, she claims that inadequate institutional responses to H.B. 2 can be considered symptoms of broader problems with institutional speech-acts whereby diversity work is often reduced to the circulation of policies and other documents that do not do what they say. These nonperformative speech-acts can contribute to the creation of what Ahmed calls institutional walls: the blockages that emerge when institutions are resistant to change because they believe they have already done all the diversity work they can or should do.

The last essay, "Potty Humors: Melancholic and Choleric Presidents, Sclerotic Voters, and the Federal Courts on Title IX in School Bathrooms," is by Richard Nunan of the College of Charleston. Nunan provides a close and detailed analysis of the legal challenges, constitutional issues, and philosophical problems that converge in three related areas: (1) North Carolina's "bathroom bills," (2) the Obama Administration's interpretation of Title IX's mandate for non-sex-discriminatory policies in educational institutions and subsequent rulings by federal courts, and (3) Attorney General Jeff Sessions's reversal of the Obama Administration's Title IX interpretation. He argues that while these so-called "bathroom bills" and other transphobic legislative measures have become the latest battleground in the efforts of conservatives to regain ground they lost in the war for marriage equality, they ultimately hasten the evolution of acceptance of trans identity by drawing

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increased attention to their mean-spirited targeting of this historically marginalized group.

Finally, the Committee on LGBTQ People in the Profession is pleased to announce that a new editor will assume responsibilities for the *APA Newsletter on LGBTQ Issues in Philosophy*. Grayson Hunt of Western Kentucky University ([Grayson.Hunt@wku.edu](mailto:Grayson.Hunt@wku.edu)) will be taking over for the 2018–2020 term. In the past two years, this newsletter has published timely and relevant articles on diverse topics ranging from the historic civil rights ruling of *Obergefell* in 2015, to the ethics and politics of healthcare issues facing the LGBTQ community, to the tragedy of the Pulse Nightclub shooting and the violence that its members face on a daily basis. As the outgoing editor, I wish to thank the committee, contributors, readers, and especially Erin Shepherd in the APA National Office, for all of their dedication, research, and hard work drawing attention to these significant issues.

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## ARTICLES

### *Targeting Trans: The Marriage Equality Backlash*

Loren Cannon

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Like many people, I celebrated the *Obergefell v. Hodges* ruling that was announced just two years ago on June 26, 2015. The day brought a sense of optimism that now seems difficult to imagine. Many expected a political backlash, but as I and others awed at pictures of the *White House* lit up in the colors of the rainbow, it was unclear how that backlash was going to present itself. As I discuss herein, much of what I take to be backlash from the *Obergefell* ruling that legalized same-sex marriage across the nation has come in the form of proposed legislation to severely limit the social participation and well-being of transgender persons. The breadth and depth of the proposals give evidence that, while the ruling itself was mute regarding the humanity and civil rights of transgender persons, we are seen as part of the LGBTQ collective and thus an appropriate target for those who feel that their worldview and belief system is eroded by LGBTQ equality in general.<sup>1</sup> I don't deny that many trans persons have benefited from the marriage equality ruling. Of course, many trans persons are also gay, lesbian, bisexual, fluid, and may desire to engage in same-sex marriage and should be able to do so and incur all the benefits thereof.<sup>2</sup> This is indisputable. However, in many other ways, the last two years have been extremely difficult for trans persons across the nation, and I fear that it would be naive to think that the storm of transphobia is completely over.

In this brief essay my focus will be to describe a number of ways transphobia has presented itself in the first two years of the Marriage Equality Era. First, by common measures used, the rate of trans violence seems to have risen since the summer of 2015. While it is difficult to

specifically account for the increase, it can at least be concluded that the political goals of marriage equality and transgender acceptance and safety are distinct enough that the *Obergefell* ruling certainly did not reduce a steady drumbeat of murders of trans individuals, mostly trans women of color. Secondly, I present my thoughts on three different kinds of proposed legislation that has sought to erode the social participation and well-being of transgender individuals. This *transphobic trio* includes three different kinds of proposed statutes: (1) those reducing or prohibiting healthcare access for transgender persons, (2) those reducing one's ability to correct the gender designation on personal documentation, and (3) the notorious *bathroom bills* whose debates have demonized and disregarded the well-being of trans women, "invisibilized" and disregarded the existence and safety of trans men as well as gender queer or non-conforming individual individuals, and have effectively ostracized trans participation in a number of different kinds of public spaces.

### I. TRANS-DIRECTED VIOLENCE

At a marriage-equality celebration event in Manhattan, former Vice President Joe Biden spoke of the continued challenges facing LGBTQ equality: "There are 32 states where you can get married in the morning and get fired in the afternoon." For many trans persons, the right to marriage equality has not affected the fact that one is more likely to be victim of employment discrimination, as well as tragic violence during one's lifetime. In the two years since the historic ruling, there has been an increase in the number of reported murders of transgender and gender nonconforming persons. According to GLAAD, 2016 surpassed 2015 in the murders of transgender persons with a total of twenty-seven reported murders. Those at GLAAD reassert something that is now becoming well known: "The victims of this violence are overwhelmingly transgender women of color, who live at the dangerous intersections of transphobia, racism, sexism, and criminalization which often lead to high rates of poverty, unemployment, and homelessness."<sup>3</sup> There seems little reason to believe that this year (2017) will bring any relief regarding trans-directed violence since at the time of this writing (mid-year) there have already been fifteen individuals who have lost their lives.<sup>4</sup> (Heartbreakingly, I have had to revise this count numerous times since the inception of this essay.) There are two reasons that this kind of violence is somewhat predictable. First, it can be argued that those whose identities and worldviews have been threatened by the *Obergefell* ruling, and who are prone to violence, are likely to target the most economically and socially vulnerable of those affiliated with the loose collection of letters and identities that attempt to pick out those in our "community." Numerous empirical studies verify that trans folks, particularly those with multiple marginalized identities, are both economically oppressed and socially devalued. Secondly, the events of the last two years have only made it obvious (if indeed there was any doubt) that the US continues to struggle with its legacy and contemporary practices of racism, sexism, and classism, along with transphobia, biphobia, and heterosexism. Given that the victims of such violence are overwhelmingly women of color, seriously addressing this problem requires addressing the racism, sexism, classism, and transphobia

that combine to make so many so vulnerable.<sup>5</sup> It requires recognizing that transphobia exists as a separate source of oppression and also that it combines with and magnifies the oppression of multiple other vectors. While single-issue proposals, like the right to marry, lend themselves to focused arguments, improving the well-being of those who are oppressed along multiple lines requires a different kind of approach. Barriers to flourishing include discrimination in housing, employment, health care, and in some areas police oversurveillance and profiling. While the Transgender Day of Remembrance serves an important role in bringing attention to this disgraceful level of violence, as does the practice of memorializing murdered individuals on social media sites, this mournful counting and naming is not sufficient to change the lives of those who are so often the focus of this violence and, unsurprisingly, neither is marriage equality.

## II. ANTI-TRANS LEGISLATION AND THE TRANSPHOBIC TRIO

Since the *Obergefell* ruling there has been a tidal wave of anti-trans sentiment, discussion, and proposed legislation across the country. According to the National Transgender Advocacy Group at the National Center for Transgender Equality (NCTE), over fifty such bills have been introduced in 2017 alone by state legislatures, and more are expected in the second half of the year. Looking at legislative proposals of 2016 makes it clear that this is the second year of anti-trans legislative frenzy. Taken together, the result of this proposed legislation is the severe reduction in opportunities for positive and respectful social participation. If the majority of these proposals were to find their way into state law, it would be nearly impossible to live as a trans person in certain locales. It is a legal onslaught seemingly meant to cleanse public spaces of all those who are neither cisgender nor gender conforming. NCTE has produced an analysis of the proposed legislation that involves the use of six different categories.<sup>6</sup>

- 1) Limit health care coverage of trans individuals
- 2) Limit trans individuals from changing identity documents
- 3) Prohibit trans individuals from using facilities consistent with their chosen gender
- 4) Mandate certain policies in school bills (usually also involving restroom and locker room use)
- 5) Preempt the passage of bills that protect LGBTQ individuals from discrimination
- 6) Identify *carve-outs* that allow discrimination of trans folks as exceptions to already enacted laws.

Because the last two types of legislation are being used to target LGBTQ persons more generally, for the purpose of this short essay I will consider the ramifications of those proposed laws that directly target trans individuals (folding the proposals regarding schools in with bathroom bills, generally).

## III. STATE-SANCTIONED HEALTHCARE DISCRIMINATION

The first category of proposed legislation includes those bills meant to decrease access to adequate healthcare. This kind of legislation may come in the form of prohibiting gender affirming surgeries in state prison (Arizona H.B. 2293), prohibiting such surgeries for those on Medicaid (Arizona H.B. 2294), allowing medical insurance to specifically exclude trans-related care (Minnesota H.F. 1183), and so-called “religious freedom” bills such as Arkansas H.B. 1628, which allow medical providers the option of refusing treatment to trans individuals due to their religious beliefs. It has been well established that access to gender-affirming medical interventions, including surgery and hormone replacement therapy (HRT), is medically necessary for many trans individuals. To deny this kind of medical care is in direct conflict with the recommendations of the American Medical Association, the American Psychological Association, the World Professional Association for Transgender Health, and other health professional organizations. In fact, to deny medically necessary healthcare to trans individuals in this way is to send the message and instantiate a policy that the health and well-being of these persons is of no moral importance. Targeting those in prison, already facing trans-directed violence and discrimination, and the poor, who are often economically vulnerable due to discrimination, is clearly an effort to target the already severely marginalized. Lastly, so-called “religious freedom” bills encourage discrimination by medical providers, adding to the already serious problem of trans healthcare access. The data gained for nearly a decade has been consistent; nearly one in three trans persons already experience healthcare-related discrimination, often to the point of having the provider refuse treatment or having the trans person simply give up on receiving respectful and appropriate healthcare.<sup>7</sup> If enacted, this “weaponization” of healthcare (in)access, in an attempt to bolster a transphobic and heterosexist ideology, will make this problem considerably worse. More substantially, providing government support for denying medically necessary healthcare to targeted groups is a form of state-sponsored violence. The potential consequences of being denied healthcare are well known, but for advocates of these policies, the harmful effects are simply seen as less important than attempting to maintain a worldview whose adherents have come to feel threatened by the *Obergefell* ruling.

## IV. PROHIBITIONS ON IDENTITY DOCUMENTS

The second category of anti-trans legislation involves limiting trans individuals’ ability to change personal identification documentation, such as Indiana H.B. 1361 and Arkansas H.B. 1894. While this kind of legislation obviously disregards the identity claims of trans persons requesting such changes, it can also couple with so-called “bathroom laws” that restrict access to the gender identified on their birth certificates. It should be noted that while none of the above bills passed, there are still four states (Idaho, Kansas, Ohio, and Tennessee) that *already* prohibit birth certificate gender revision, and many other states still require a surgeon’s letter that attests that specific surgeries have been completed. With regard to the latter, this kind of rule

can, in some cases, require serious medical procedures that are neither medically necessary nor desired by the individual.<sup>8</sup> Not all gender transitions require the same procedures. Additionally, even if the medical intervention is required for the individual's well-being, it may be inaccessible for at least two reasons. First, these kinds of procedures are not always paid for by healthcare insurance or Medicaid, and these benefits are in danger of being decreased by the repeal of the Affordable Care Act or other specifically anti-trans legislation as discussed above. So those for whom the procedure is medically necessary may find the treatment inaccessible due to financial cost. In addition, a lack of access may result in rural or otherwise geographically remote areas due to a lack of skilled medical professionals. In cases such as these, correcting the birth certificate becomes practically impossible.

Correcting some documents, especially if it is a birth certificate, can lead to more easily changing other documents (e.g., driver's license, social security card, voter registration, military identification, immigration paperwork, housing/employment forms) and can make a person less vulnerable to transphobic violence, harassment, or discrimination due to being unnecessarily outed based on uncorrected gender designations. Yet, in addition to these serious yet practical concerns, having correct documentation is terribly significant in its own right. The importance and meaning of documentation is not limited to that which identifies gender, but also that which is related to other aspects of one's personhood. Carlos Alberto Sánchez's essay "On Documents and Subjectivity: The Formation and Deformation of the Immigrant Identity" focuses on the meaning of immigration documentation and its relationship to S.B.1070, an anti-immigrant bill passed in Arizona in 2010.<sup>9</sup> Sánchez gives a phenomenological account of identity documents, such as those allowing one to work and reside in the US, what they can mean to one who has had obtained them, and for those who wish to do so. As he explains, the meaning of the document far exceeds that of the material or physical existence of the document itself. Instead, documentation, whether it certifies a worker's or immigrant's legal status, or, I would add, the gender marker on one's driver's license or birth certificate, has a relation to identity, belongingness, and narrative. His focus was on Arizona S.B. 1027 (now somewhat revised), which required Arizona law enforcement officers to ask for documentation papers of any individual they suspected of being in the country illegally. It also required that such documentation, for those who *look* undocumented according to common racist stereotypes, be on one's person at all times. The effect of the bill was that those who *looked* like an undocumented worker—in this case, having brown skin, speaking Spanish, etc.—were likely to be approached and questioned by police whether or not they possessed official permission to reside and work within the US. Undocumented workers that appeared white were not targeted by the bill nor by the police. This is why the bill, in essence, required racial profiling. Those who did fit the profile were targeted to such a degree that simply participating in society, by driving, walking shopping, recreating, etc., was likely to attract negative attention from police officers and result in detention or worse. As Sánchez explains, to attain permission to work in the US cannot be

reduced simply to attaining a certain kind of document like a green card. Instead, it can signify the end of a long journey in which security for oneself and one's family, dignity, and belongingness are the goals, and a sense of a kind of identity is part of the result.

Having a green card is socially, culturally, politically, and existentially significant. It is significant in the first three senses because, obviously, to be given one is to exist within the space of the law; it is significant in the last sense, because to be given one is to be given the security of living freely within one's own existential possibilities.<sup>10</sup>

Due to the fact that this bill required police to stop all those who might have brown skin or a certain accent or a certain "being-in-the-world," the promise of documentation proved a lie; one's narrative changed from one of a successful journey to one of always being *Other*; social participation, meaningful recognition, and even many aspects of agency itself become impossible.

Many of the ways that documentation is relevant to the life, narrative, and identity of an immigrant (whether cisgender or not) that Sánchez describes are also relevant to the experiences of many trans persons (immigrant or not). Attaining a driver's license, immigration status paperwork, social security card, voter, military or employment ID, or birth certificate with one's appropriate gender marker and name is a reason for celebration, often in ways that memorialize the day that the name-change court order was given, or the new identification card was first handed over. From my own perspective, being pleased with this kind of event is not so much because the issuing office is seen as an authority on one's identity, but it is instead an outward sign of a certain kind of social recognition. It is, especially with the birth certificate, a *setting the record straight* so that one's life, and the human artifacts that are used as a physical representation to seen and unseen characteristics of that life, tells a story that is consistent with one's own experience. Indeed, the birth certificate records the first moment of physically being seen and recognized as oneself, of first experiencing this world as an individual human; it is the most significant and defining moment of one's life.

## V. BATHROOM BILLS

In the spring semester of 2016 I was teaching a course on trans theory. The class focuses on theory, but also includes a good bit of attention to reading and discussing a diversity of trans narratives as well as some attention to current events. From the late-night passage of H.B. 2 in North Carolina that required trans individuals to use certain public facilities that correspond to the gender designated on their birth certificate, to the outrage and boycotts that followed, to the cascade of states that threatened to pass similar legislation, it was difficult to keep a consideration of current events from consuming the course. In the rush for politicians to demonstrate their commitment to what are often mistakenly called "traditional values," trans persons were caught in the crosshairs of a legislative lunacy that would spread to communities across the nation.

Notoriously, North Carolina's H.B. 2, which was passed on March 23, 2016, restricted individuals in schools, including postsecondary education, and government facilities to use only those multi-occupancy restrooms that are consistent with the gender designated on their birth certificate. It also made it illegal for any local municipality in the State of North Carolina to pass nondiscrimination policies, which the City of Charlotte had done, on the basis of sexual orientation or gender identity or expression. On my analysis, it was the Charlotte bill that served as the "Enough is Enough!" moment in which the heterosexist and cisgender assumptions of the presumed majoritarian culture were so severely threatened that lawmakers felt that drastic and immediate action was necessary to avoid the proverbial slippery slope into a state of queer-sponsored heretical immorality. While this bill and its revised version are both clearly unacceptable in all aspects, it is the restrictions on public bathroom use that made North Carolina the subject of massive national boycotts. Backlash against the bill was swift and significant. Some estimate that boycotts cost the state upwards of \$400 million.<sup>11</sup> Indeed, whether or not economic boycotts are the best way to respond to such legislation, it was the economic backlash that may have persuaded some other states (Georgia and Indiana) from following in the steps of North Carolina.

Anti-trans legislative proposals regarding the use of bathrooms and locker rooms did continue in 2017. In this year alone, dozens of separate bills were introduced in legislatures across the country seeking to make using the restroom a crime in public spaces and schools. Such states include 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. While the bills all target the same population of individuals, there are some differences. For example, some bills such as North Carolina's stipulated that one may only use facilities (e.g., multi-use restrooms, locker rooms) that correspond with the gender identified on one's birth certificate (South Dakota, New York), while others instead stipulated that it was one's chromosomes and birth genitalia that is of relevance to legal bathroom use (Kansas, Kentucky). Of course, few such proposals ever seem to consider exactly how chromosomal tests are going to be administered, funded, and the test results policed for obvious reasons. Still other states attempted to prohibit policies that are supportive of trans individuals using facilities consistent with their identity (Texas, North Carolina, South Carolina), while others specifically allow businesses to restrict trans bathroom use (Washington) or attempt to make it easier for individuals to sue schools that do allow transgender individuals using a bathroom consistent with their identity (Virginia).

These sorts of bathroom bills represent an attempt at a kind of "social cleansing" of public spaces of trans individuals. Given the basic human activities of urination, defecation, and menstruation, coupled with needs to empty medical bags, wash one's hands, give oneself an injection, breastfeed in places that do not allow it in public, check or revise one's appearance for significant and trivial reasons, no one can reside in a location for more than a few hours

without needing to use a restroom. In this way, bathroom bills make social participation in the sense of having certain kinds of employment, attending school (secondary or postsecondary), accessing various types of public areas, even the right to publicly protest at government buildings, exceedingly dangerous or unlawful. As many gender nonconforming individuals can attest to, and contrary to the arguments posed in favor of these regulations, it is not cisgender girls and women who are regularly put in danger when using multi-user restrooms, but those that do not conform to rigid and traditional binary gender expectations. Forcing trans individuals to use a restroom that is inconsistent with identity not only disrespects that identity and one's epistemological competence with respect to this kind of self-knowledge, it also puts that individual at risk because they are outed for being trans and/or are seen as *Other* to those who would witness them in that bathroom. While arguments for such bills demonize trans women in a way that is reminiscent of Janice Raymond's trans-hysteria of some forty years ago, trans men's identities and experiences are ignored, as are the ramifications that we would now be required to use women's facilities.<sup>12</sup> Due to the increased level of surveillance that such proposals support, gender nonconforming individuals are also at risk. One can become targeted for harassment, police detention, and fines simply by appearing as if one is transgender and/or is gender nonconforming, after which one's guilt or innocence is largely determined by the shape of one's genitals at birth. Such a blatant reduction of personhood to genital characteristics would, thanks to years of feminist activism and scholarship, seem both ludicrous and immoral if applied to either cisgender women or men.

Still, amidst this anti-trans frenzy, there is some good news. Of the numerous bathroom bills proposed, few have actually passed into law as of early July 2017. North Carolina's replacement for H.B. 2 (H.B. 142) *did* pass, prohibiting local ordinances from mandating equal restroom access as well as a three-year moratorium on local ordinances of LGBTQ nondiscrimination policies. Additionally, Tennessee's H.B. 1111, which broadly mandates that all terms used in the law be interpreted "by their natural and ordinary meanings," became law in that state. The history of this bill (earlier proposed as H.B. 33, which failed) attempted to mandate that terms like "mother," "father," "husband," and "wife" must be interpreted in legal contexts according to *biological* distinctions. The intent of this bill seems clearly to lay the foundation for discrimination against those in same-sex marriages and families, but it could also be used to interpret the terms "boy," "girl," "man," and "woman" according to traditional cisgender meanings, thus encouraging restrictions of bathroom use. The fact that so few of these bills have passed is perhaps reason for measured optimism, but explanations for this are far from simple. Their failure may quite possibly be a response to the economic backlash that North Carolina received due to H.B. 2 or may involve recognition of the significant moral and practical harm inflicted by these bills. Additionally, there is also a solid argument that perhaps few of the lawmakers who are proponents of these bills are actually committed to the content of the bills themselves, but are instead committed to showing their constituencies that they support a heterosexist and transphobic worldview. Their

message to their conservative constituencies may be "Like you, I am outraged over the direction of the country and the legalization of same-sex marriage, and I am going to do something about it!" But conveying this message does not require actually passing a bill. Introducing such legislation and a few carefully produced commercials may be all that is needed to win votes. Nevertheless, as I compose this essay, politicians in Texas are debating their own bathroom bill and other state lawmakers may be doing the same. (It has just been reported that the Republican House speaker in Texas, Joe Straus, is considering not signing his state's bill for the reason that it might lead to transgender suicide. While I applaud Mr. Straus for acknowledging the horrifically high rates of suicide among trans individuals, I would hope that he is also considering the many other reasons why this legislation is unjust.<sup>13</sup>) Additionally, the new administration is not supporting President Barack Obama's directive to schools that bathroom access be tied to Title IV requirements, so there is now little reason to pass state-wide restroom/locker room restrictions for school-aged persons, since schools are free to enforce their own policies with less fear of litigation or liability. To the extent that denying the value and authenticity of trans lives is seen as a litmus test to one's degree of commitment to heterosexism and transphobia, I worry that the threat of discrimination in the use of such facilities is far from over.

I have attempted to offer an overview on the recent anti-trans backlash since the marriage equality ruling of 2015. The quantity and content of the bills proposed support the judgment that it is trans and gender nonconforming individuals who are an obvious target of those who feel threatened by same-sex marriage and recognition of the humanity and value of lesbian women and gay men. I have not commented on so-called "religious freedom" bills that target transgender individuals as well as lesbians, gay men, and bisexual and queer folks. These may be a significant threat to LGBTQ equality in many locations and will lead to more court cases and more contested decisions. My focus here has been on anti-trans legislation because the sheer quantity of the proposals and the potential to decrease the well-being of trans persons does warrant more attention. As trans individuals, in the minds of some, we represent the most egregious deviation from the cisgender heterosexual norm. We represent *what the world is coming to*, and thus society must be protected from our very existence and participation in society. It has been over three years since *Time* magazine's article "Transgender Tipping Point," which featured Laverne Cox on the cover, and while there has been a great deal more visibility of trans individuals (especially those that are otherwise gender normative and wealthy), the legislative history of the last two years makes it clear that such visibility has not translated into acceptance, or a life that is free from discrimination and violence, especially for those most marginalized.<sup>14</sup>

**NOTES**

1. By the word "trans," I mean to include all of those individuals who identify as such. There are no necessary requirements attached to this inclusion. There are also times in this essay I use the term "gender non-conforming" since some of the proposed policies also affect individuals who do not conform to social expectations of the gender binary, even though they do not perhaps identify as trans. As I am trans myself, I tend to use the plural "we" or "us"

when discussing trans persons as a collective, but this should not be understood that I believe that all trans experience is the same or that I assume that only trans people will read this essay.

2. The ruling only affected same-sex relationships by extending the right to marriage to all citizens regardless of gender. The ruling said nothing regarding trans individuals that may be in heterosexual relationships, and/or identify as gay, lesbian, bisexual, pan/omnisexual, etc.
3. Alex Schmider, "2016 Was the Deadliest Year on Record for Transgender People," November 9, 2016, <https://www.glaad.org/blog/2016-was-deadliest-year-record-transgender-people>
4. "Violence Against Transgender Community in 2017," Human Rights Campaign, <http://www.hrc.org/resources/violence-against-the-transgender-community-in-2017>
5. I should mention here, that in using the term "vulnerable," I do not mean to suggest that trans persons or those of other marginalized identities are inherently physically or psychologically unfit, but that they are made vulnerable by the cultural conditions that relentlessly target individual and collective efforts to flourish.
6. See <http://www.transequality.org/action-center>
7. My evidence for this claim comes from one of the first studies regarding the transgender experience, titled "State of Transgender California, Results from the 2008 Transgender Economic Health Survey," by the Transgender Law Center, <https://transgenderlawcenter.org/pubs/the-state-of-transgender-california> and more recent publication, "Report of the 2015 Transgender Survey" by the National Center for Transgender Equality, <http://www.ustranssurvey.org/report>
8. Again, the American Medical Association's position on this issue is that genital or sex-reassignment surgery should not be required for a person to receive corrected documentation.
9. Carlos Alberto Sánchez, "On Documents and Subjectivity: The Formation and Deformation of the Immigrant Identity," *Radical Philosophy Review* 14, no. 2 (2011): 197–205.
10. *Ibid.*, 201.
11. Mark Abadi, "North Carolina Has Lost a Staggering Amount of Money Due to Its Controversial Bathroom Law," *Business Insider*, September 21, 2016, <http://www.businessinsider.com/north-carolina-hb2-economic-impact-2016-9>
12. Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (Boston: Beacon Press, 1979).
13. Paul J. Weber, Associated Press, "Texas House Speaker Didn't Want Suicide Over 'Bathroom Bill,'" *ABC News*, July 3, 2017, <http://abcnews.go.com/Politics/wireStory/texas-house-speaker-suicide-bathroom-bill-48419478>
14. Katy Steinmetz, "The Transgender Tipping Point," *Time*, May 28, 2014.

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## *Resisting the Inadequate Resistance to House Bill 2 at a Private University in North Carolina*

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In March of 2016, the North Carolina General Assembly passed the "Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations." Better known as House Bill 2 (H.B. 2), the bill was passed in order to nullify a Charlotte ordinance that extended civil rights protections to members of the LGBTQ community.<sup>1</sup> H.B. 2 required all people in North Carolina to use the

bathroom that matches the sex marker on their birth certificate, and it prohibited the creation of mixed-gender bathrooms.<sup>2</sup> The bill also prohibited individual counties from requiring employers to pay a higher minimum wage, or requiring them to provide paid sick leave. Lastly, it prevented the state's citizens from suing cities or counties for any type of workplace discrimination. Because trans people are already more likely to work minimum wage jobs and to live in poverty,<sup>3</sup> these latter two provisions of the bill, though less widely discussed by most critics of the bill, heavily impacted the trans community in North Carolina, particularly trans communities of color.<sup>4</sup>

The bill was amended in July of 2016 to restore the right to sue for workplace discrimination, but the statute of limitations for filing a lawsuit was changed from three years to one year, and there remains no state law to protect LGBTQ people from workplace discrimination.<sup>5</sup> On March 30, 2017, H.B. 142 repealed H.B. 2 with a few key stipulations: state-funded institutions still cannot regulate access to bathrooms at all unless they comply with General Assembly regulations, and cities cannot pass ordinances changing access to these facilities until December 1, 2020.<sup>6</sup>

H.B. 2 was part of the ongoing proposal and passage of anti-trans legislation in the US, prompting many states to introduce similar bathroom bills. The ACLU reports that twenty-six such bills have been debated across the country since the beginning of 2017.<sup>7</sup> There are many critiques that queer and trans communities, activists, and scholars have rightfully lodged against H.B. 2 and the broader violence against trans communities it perpetuates. Here I want to offer an additional critique, not of H.B. 2's blatant transphobia, but of the transphobia that institutional denunciations of H.B. 2 can quietly reproduce. These inadequate institutional responses to H.B. 2 can be thought of as symptoms of broader problems with institutional speech-acts as described by Sara Ahmed: diversity work is often reduced to the circulation of equality policies and other documents that do not do what they say.<sup>8</sup> These nonperformative documents can contribute to the creation of what Ahmed calls institutional walls: the blockages that emerge when institutions are resistant to change because they believe they have already done all the diversity work they can or should do.<sup>9</sup>

I write from my position as a cisgender queer white woman who was an undergraduate student in North Carolina the year that H.B. 2 was signed into law. I use my experiences here to explore the problem of resisting H.B. 2 at an institution that has officially denounced it: What are campus activists to do when they feel called to resist an injustice, but also to resist an inadequate or problematic institutional response to that injustice? In other words, how can we resist H.B. 2 on our campuses while also resisting the kinds of institutional statements, actions, and practices that *claim* to resist H.B. 2 and support the queer and trans community, but that actually further marginalize that community and falsely paint the institution as a beacon of progressive hope?

Trans Studies theorists have been working to center the experiences of trans students, staff, and faculty in order to

critique institutions of higher education and suggest ways that they can be more inclusive of trans communities. Erich Pitcher finds that even when working at outwardly trans-inclusive institutions, trans\* faculty members report many microaggressions that accumulate over time and become what Pitcher calls "minoritized stress."<sup>10</sup> Pitcher points out that these microaggressions can be interpersonal (like when people misgender or mispronoun trans academics), but they can also be "systemic and environmental" forms of microaggression that emerge from inhabiting spaces that do not accommodate trans bodies, like sex-segregated bathrooms.<sup>11</sup> Z Nicolazzo et al. identify trans-inclusive spaces on campuses as key factors for trans\* students' ability to form kinship networks.<sup>12</sup> Pitcher contends that while trans\* students and faculty often find ways to navigate and resist their marginalization on campus, "universities have much work to do in creating environments wherein trans\* people feel expected and welcome."<sup>13</sup>

To add to this conversation in Trans Studies about the ways that colleges and universities could better serve trans communities, and to address my own questions about how to resist an inadequate resistance to H.B. 2, I focus here on my own institution's initial response to H.B. 2. I first describe this response, using Sara Ahmed's work on nonperformative institutional speech-acts to argue that its denunciation of H.B. 2 shielded my university from critique by serving as evidence that they were doing all they could to fight transphobia. Next, I suggest that deploying Alison Bailey's idea of "strategic ignorance" might illuminate some additional useful strategies for resisting inadequate institutional resistance to H.B. 2, but that people of different identities are called to deploy this ignorance in different ways (and sometimes, not at all). I want to emphasize before I proceed that my position as a cisgender person informed and limited my own interpretations of and reactions to the institutional denunciation of H.B. 2. While my analysis is necessarily limited by my own experience, I hope that it can still be helpful to queer and trans students, staff, and faculty members looking for a variety of strategies as they navigate transphobia, homophobia, cisnormativity, and heteronormativity on their campuses.

## I. ELON UNIVERSITY'S NONPERFORMATIVE RESPONSE TO H.B. 2

In the spring of 2016 when H.B. 2 was passed, I was an undergraduate student at Elon University, a private, non-religiously-affiliated, mid-size university in suburban North Carolina. The university understands itself to have what it calls an "unprecedented commitment to diversity,"<sup>14</sup> but such a commitment is often not experienced by students as an authentic or meaningful one.<sup>15</sup> In fact, during my time there, minority students typically made jokes about this "unprecedented commitment" because of how much it clashed with our lived experience of the university. Elon was and is a very heteronormative and cisnormative campus. The university has, as far as I can tell from the limited available data, an extremely small number of queer students and an even smaller number of trans or genderqueer students who are out. The university has only recently begun collecting data on students' sexualities and gender identities: 4 percent of the Class of 2019 identifies as part of the



LGBTQIA community (though the distribution of students with these identities is not specified in the available data).<sup>16</sup> The numbers of LGBTQIA college students nationwide is unclear, so it is difficult to say how Elon compares to other institutions, or other institutions of its type. This number might also have been lower in previous years when I was a student there, but Elon was not collecting data at that time. In any case, the data alone gives an incomplete account of the campus climate for queer and trans students.

It is difficult to describe the feeling of being queer at Elon. In *Queer Phenomenology*, Sara Ahmed describes being on vacation with her partner at an island resort. She is taken aback when she walks into the resort's dining room and sees "couple after couple, taking the same form: one man sitting by one woman around a 'round table,' facing each other 'over' the table."<sup>17</sup> Struck by this repetition of straightness, Ahmed wonders, "How is it possible, with all that is possible, that the same form is repeated again and again? How does the openness of the future get closed down into so little in the present?"<sup>18</sup> This, to me, is what it felt like to exist as a queer person on Elon's campus: I was encountering the same form of heterosexuality over and over again, no matter which spaces I entered.

During my time as a student, I knew only a handful of other queer students, and I knew even fewer genderqueer and trans students. The queer and trans students who were on campus were, on the whole, fairly scattered from one another. The queer and trans peers and friends I did have often talked about how isolated we often felt from one another, and the ways we felt tokenized by the institution as symbols of how diverse the school was becoming. It is possible that the LGBTQIA community was larger than I ever realized, but that not many of us were out, or we did not feel safe or comfortable enough to form closer-knit communities.

Informing my experience of my own queerness at Elon, and the experiences of others in the queer and trans community, were echoes of what has become known as the Chick-Fil-A Controversy. During my first year on campus, a group of queer students on campus began advocating for the removal of Chick-Fil-A from campus because of the company's donations to anti-LGBTQIA organizations.<sup>19</sup> This campaign to remove Chick-Fil-A sparked massive backlash from conservative students. A member of the Student Government Association even initiated a "Chick-Fil-A Appreciation Day" as a way to intimidate the students pushing to remove it.<sup>20</sup> After an entire academic year of campus debates, online harassment of students proposing the restaurant's removal, and back-and-forth with SGA and Elon's administration, it was decided that Chick-Fil-A would remain on campus, but that Elon would establish a Gender and LGBTQIA Center the following year in order to improve campus climate for queer and trans students.

My experience as a first-year student embroiled in this debate about Chick-Fil-A set the tone for my experiences as a queer student throughout my time at Elon: there were pockets of safe, welcoming spaces to be queer, but as a whole, the campus was at best, overwhelmingly heteronormative and at worst, hostile to LGBTQIA students.

As the university worked to recover from the damage done to the community by the Chick-Fil-A debates, various reforms proposed by students, faculty, and staff were met with sympathy or even enthusiasm, only to be denied or ignored later on.

Given Elon's recent history of difficulty responding to the needs and requests of LGBTQIA students, many of us in the queer and trans community were saddened and angered, but not shocked, by the university's response to H.B. 2. There were a number of institutional and community responses to the bill. Here I focus on the most publicly visible "action" the university took. A day or so after H.B. 2's passage, Elon released a two-paragraph statement, explaining that the members of the university administration "wish to reaffirm that Elon remains committed to inclusion and equal protection for all people. Elon does not discriminate based on sexual orientation or gender identity. The new law does not apply to private institutions and will not impact Elon's policies and practices."<sup>21</sup> Duke University, another private school in North Carolina, responded similarly, saying that "activities on its campus will not be impacted by a new state law that prevents local governments from opening bathrooms for people to use based on their gender identity" and reiterating Duke's nondiscrimination policy.<sup>22</sup> I cannot explore it in more detail here, but I want to note briefly that private universities were in a privileged position that allowed them to refuse compliance without risking the loss of funding, while public universities were unable to ignore H.B. 2 without risking this loss.<sup>23</sup>

While it seems on the surface to say some of the right things, Elon's statement angered many in the queer and trans community who felt that the institution was opportunistically using the passage of H.B. 2 to tout its commitment to the LGBTQIA community's well-being, without doing meaningful work to make that community feel safe or supported in the wake of H.B. 2 (or more generally). Furthermore, the statement never used the words "queer" or "trans," and the university retains many policies that suggest what this omission points to: a distinct lack of commitment to the inclusion and protection of actual queer and trans people.

Sara Ahmed's account of non-performative institutional speech-acts can help us understand how statements like those from Elon function within higher education to preserve the status quo and deflect far more impactful trans-inclusive policies.<sup>24</sup> In her book *On Being Included: Racism and Diversity in Institutional Life*, Ahmed offers a critique of dominant diversity discourse in higher education. She argues that often, turning toward a discourse of diversity allows institutions to avoid taking adequate responsibility for systemic racialized and gendered oppression because the term "diversity" connotes a happy mixing of different groups rather than encouraging the transformation of dominant, unjust power structures. As part of this critique, Ahmed explores the ways that universities' statements of commitment to diversity can be understood as appearing to bring about what they name. For instance, a university with a stated commitment to antiracism can be read as being antiracist simply because they put out a statement saying that they have this commitment.<sup>25</sup> Ahmed explains

that “declaring a commitment to opposing racism could even function as a form of institutional pride: antiracism, as a speech act, might then accumulate value for the organization as a *sign of its own commitment*.”<sup>26</sup> For Ahmed, the problem is that these statements of commitment can then be used to “block the recognition of racism within institutions.”<sup>27</sup> We can easily imagine that when confronted with its own systematic racism, a university would issue a response that reads something like “we are not racist because we have made official, public statements claiming that we are not racists, we do not discriminate, and we are against racism.” Indeed, Elon has recently put out just such a statement after being sued by a former faculty member for racial discrimination. In their official response to this lawsuit, the university reiterated their nondiscrimination policy, effectively pointing to this equality statement as evidence that the allegations of racism could never be true.<sup>28</sup> This is a strategy used widely by institutions when they are accused of racist practices.

Ahmed understands these institutional commitments to diversity as a type of nonperformative speech-act described by J. L. Austin. For an utterance to be performative, it must do what it says, or bring something into effect. The speech must be uttered, as Ahmed explains, “by the right person, to the right people, in a way that takes the right form.”<sup>29</sup> For example, an apology is not a performative speech-act unless it is uttered by the sorry person to the person they have wronged, and it must be uttered sincerely. Ahmed departs from the traditional Austinian notion of nonperformatives, explaining that “in my model of the non-performative, the failure of the speech act to do what it says is not a failure of intent or even circumstance, *but it is actually what the speech act is doing*.”<sup>30</sup> For Ahmed, institutional commitments to diversity or antiracism are often taken up as performatives, as if they have brought about antiracism or diversity already. She explains that naming an institution as diverse or antiracist can actually be a way of keeping that institution nondiverse and racist because institutions can point to the statements as evidence for diversity and thus block future diversity efforts from making their way through the institutions. What these speech-acts are *doing* is *failing to bring about the effects they name*, which allows an institution to maintain the status quo. For Ahmed, nonperformatives are performing something: failure.

Ahmed’s focus is on institutional racism, and while I do not want to suggest that institutional racism and institutional homophobia or transphobia are perfectly analogous, I think Ahmed’s analysis of nonperformative institutional speech is helpful in understanding Elon’s response to H.B. 2. The first line of the statement reads, “In response [to the passage of H.B. 2], we wish to reaffirm that Elon remains committed to inclusion and equal protection for all people.”<sup>31</sup> This reaffirmation of commitment seems innocuous enough at first, and perhaps even reassuring or comforting to marginalized communities. But Ahmed reminds us to pay attention to the negative effects that institutional statements of commitment often have. Ahmed explains that “statements of commitment (to diversity and equality) can be used *in* or even as an institutional response to racism, often taking the form of an assertion disguised as a question: ‘how can we be racist if we are

committed to equality and diversity?’”<sup>32</sup> Or in Elon’s case, the implicit question is: How can we be homophobic and/or transphobic if we are committed to equality and diversity?

These statements make it increasingly difficult to challenge a university or institution because they render less visible the institutional injustices present. If a university is publicly committed to equality and diversity, people mistakenly believe that the university is already a welcoming place for marginalized communities or that the university does not need to do anything else in order to become more welcoming. After putting out an equality statement, the university can cite these statements in order to shut down critiques of its practices, or even avoid being sued for discrimination. In some cases, equality policies only exist because they are legally mandated.<sup>33</sup> These required policies are often in turn used as evidence of universities’ good diversity practices.

In Elon’s case, the post-H.B. 2 statement of commitment to equality was taken up as *evidence* of that commitment and equality, making it harder to recognize the very real instances of homophobia, transphobia, and heteronormativity that pervade the campus. And it was not only members of the university administration who took this statement as performative (and thus helped it fail to perform): when I expressed frustration at the inadequacy of Elon’s response to H.B. 2, many of my cisgender, straight peers would respond with “well, at least they said *something!*” One genderqueer person at Elon had a similar experience because they were frustrated when their peers insisted that the university’s response was well-formulated and swift, which was interpreted as a sign of *improvement* in Elon’s ability to navigate issues of LGBTQIA discrimination. The university’s declaration of support falsely became the performing of the support.

Another problem with Elon’s statement was that the nonperformative affirmation of diversity and nondiscrimination was followed by an emphasis on one resource the university does have for trans students: gender-neutral bathrooms. The statement reads, “In regard to the use of restrooms, we reaffirm our position that individuals should use facilities in which they feel most comfortable and align with their gender identity. To support the needs of our community, Elon maintains a list of more than 90 single-occupancy universal bathrooms on campus that protect the privacy of the users. A list can be found online.”<sup>34</sup> Here, not only does Elon’s statement of commitment position the university as authentically committed to queer and trans inclusion, it also seems to use the passage of H.B. 2 as an opportunity to highlight the apparent progress Elon has made toward queer and trans inclusion. This progress, incidentally, is not quite what it appears. Of these ninety bathrooms, at least fifteen are located in residence halls where only students who live there have unrestricted access to them. A colleague pointed out to me that there are entire regions of campus, including the academic buildings where most classrooms are, where there are no gender-neutral restrooms at all. This blocks access for students during class time, and also for faculty and staff who spend most of their time on campus in these academic areas.

Furthermore, even if all ninety of these bathrooms were accessible to every person on campus, by highlighting the privacy of these single-occupancy bathrooms, the statement can send a coded message to transphobic members of the Elon community: don't worry, the only gender-neutral restrooms we have are single-occupancy, so trans people will be kept separate from you! Terry Kogan argues that multi-use gendered restrooms were first established "in the spirit of manipulating public space to protect weak and vulnerable women."<sup>35</sup> This myth of weak and vulnerable women operates today in debates about bathroom accessibility for trans people. It is assumed that transwomen are "really" men trying to sneak into women's bathrooms in order to assault or attack them.<sup>36</sup> Of course, there are no reported cases of trans people attacking anyone in a bathroom, even though trans people are themselves at risk for being attacked in bathrooms.<sup>37</sup> Purposefully or not, by highlighting single-occupancy restrooms, Elon perpetuated the idea that for the safety of cisgender women, trans people must be restricted to single-use bathrooms.

There is one final problem with Elon's statement: the university claimed that "the new law does not apply to private institutions and will not impact Elon's policies and practices."<sup>38</sup> Here, a strange distancing strategy seems to be at work. Elon claims that because it is a private institution that does not practice discrimination, the university will be insulated from H.B. 2's effects. Faculty members criticized this way of responding to H.B. 2, putting out their own resolution that emphasized the ways that all Elon community members engage with the broader NC community.<sup>39</sup> But it is almost as if the authors of the original university statement imagine Elon as separate (or separable) from the state in which it is located. Indeed, many students, faculty, and staff speak of the "Elon Bubble," criticizing one another for failing to reach out to the Burlington, North Carolina, community and beyond. But with this H.B. 2 statement, the Elon Bubble is doing important work to create a perceived distance from an apparently inclusive and accepting university and a demonstrably discriminatory state government.

Elon's response to H.B. 2 seemed to help the university gain credibility as a progressive school in a not-so-progressive state, but this did not ring true to the trans and queer community (to the extent that we had a community during my last year at Elon). When I did try to utilize policies intended to help queer and trans students feel welcome on campus, I was often disappointed. For instance, I could not have a male-identified roommate in my on-campus apartment without us both outing ourselves as queer during a meeting with the assistant director of residence life. As the president of the queer-straight alliance, I was told by the Gender and LGBTQIA Center director that members of the administration did not want me to publicly share the news that certain housing could be made gender-neutral upon request; after serving on a task force designed to make recommendations about improving the experiences of LGBTQIA students, staff, faculty, and alumni, I was not given access to the report we wrote and then not invited to be a member of the implementation team that was tasked with making sure our recommendations were followed. So, in addition to my state of residence passing a dangerous

and discriminatory law, my university was capitalizing on this law in order to portray itself as supportive of queer and trans students in a way that not only felt disingenuous, but also dangerous (indeed, Elon continues to inaccurately promote itself as one of the "Top 10" universities for LGBTQIA inclusion, a manipulation of data that, in the wake of H.B. 2, I can only imagine will cause direct harm to students who take this ranking seriously).<sup>40</sup> These experiences are my own, but in my view they point to a broader lack of commitment to queer and trans people. With its statement about H.B. 2, Elon failed to address the concerns of queer and trans people who attend the university, accept jobs there, live in the surrounding area, and have family and children who use public schools or work for the state. Thus, it became necessary to resist trans and queer oppression in two forms: resisting H.B. 2 itself *and* resisting the university's unjustified use of their denouncement as evidence of their commitment to queer and trans inclusion.

This second type of resistance, which may not surprise those who have tried to enact it, was immensely difficult. One difficulty was that many straight, cis people on Elon's campus read the public statement as an unproblematic example of Elon speaking out against injustice, even though many in the queer and trans community were not so impressed. We understood the statement as a self-congratulatory denouncement without action, and the phrasing of the denouncement read to us as the university patting itself on the back for having no discrimination such as providing restrooms where gender would not be an issue.

## II. RESISTING HOUSE BILL 2 AT ELON UNIVERSITY

In response to Elon's nonperformative, self-congratulatory response to H.B. 2, some friends and I got together. I regret to say that we did not work together with queer and trans students across the state. I suspect that had we strategized with other North Carolina college and university students, we could have made a far larger impact at Elon. We were a group of queer students and allies. Although none of us were trans ourselves (Elon's trans and genderqueer population is extremely low as far as we know, though there is no available data for the 2015-2016 academic year), we wanted to highlight the ways that H.B. 2 impacts trans and gender nonconforming people in particular. We also wanted to make it clear to the campus community that H.B. 2 was not an injustice happening "out there," as the administration had implied. One action we took was to print up alternative bathroom labels, using binaries like "dog person" and "cat person." For one week, each morning a team of us relabeled the bathrooms using these alternative binaries. The signs also included the statement, "Think this binary is ridiculous? Or that it doesn't include you? This is exactly what H.B. 2 is doing to transgender people in our community. And 90+ single-occupancy gender-neutral bathrooms is NOT enough."

We also wanted to speak with the Gender and LGBTQIA center about Elon's response to H.B. 2. A friend and I set up a meeting, where we talked about various ways that we

felt our needs as queer students were not met throughout our time at Elon, and one point we emphasized was that the institutional response to H.B. 2 was self-congratulatory and stood in contrast to how we and others in the queer and trans community we had spoken with experienced Elon's climate. We were essentially told that we should be grateful for what the university was able to say and that we should not expect the Gender and LGBTQIA Center to speak critically of the institution in any way, even to affirm their response and challenge them to make further progress on policy changes. While the risks of speaking against one's own institution are high, we were disheartened to learn that even strategically working with Elon's response in order to push for progress seemed out of the question.

Sara Ahmed's work can again help us understand how students pointing out the problems with the response to H.B. 2 suddenly became problems themselves. In *The Souls of Black Folk*, W. E. B. DuBois describes the feeling of being a problem, explaining that he had to learn to see himself through the eyes of racist others.<sup>41</sup> In her 2015 blog post "Against Students," Ahmed explores another case of being a problem. She argues that university administration, faculty, and staff often turn marginalized students into problems: they deploy the figures of the consuming student, the censoring student, the over-sensitive student, and the complaining student in order to position students as the real threats to the status quo of the higher education system (rather than the corporatization of the university, or the whiteness of America's higher education system).<sup>42</sup> The H.B. 2 resisters at Elon were, it seems to me, categorized as the over-sensitive students: those who are "sensitive to that which is not over."<sup>43</sup> This inability to "get over" Elon's past and present homophobia and transphobia was framed as the real issue, the real barrier to progressivism. And our refusal to get over it made it easy for some at Elon to claim that if the over-sensitive students could just be satisfied with incremental progress, progress would actually be made. This shift in focus is, it seems to me, another way that nonperformative institutional speech-acts are actually performing failure: the statements against discrimination position those who would speak critically of these statements as the true impeders of reform, and thus help the critiques fail to gain traction.

### III. "STRATEGIC IGNORANCE" AS ANOTHER WAY OF RESISTING

None of our resistance strategies worked as well as we hoped they would. Elon has a very polite and nonconfrontational campus culture. Because students do not engage in protests very frequently, any act of resistance to the status quo risks being read as rude, loud, or extreme. Relabeling the bathrooms was read from within the institution as too confrontational and too critical of Elon when apparently all it had done was be supportive. And some outside the "Elon Bubble" who have more experience with campus protests than we did might suggest that this relabeling was actually not confrontational enough because it did not generate a direct institutional response. And talking directly with the Gender and LGBTQIA Center, the very place ostensibly constructed for this purpose, once again turned us into the problem: the over-sensitive (or better yet, the overly

critical) students were asking it to take on some of the work of becoming a "problem" for the university, and this was not something the Center was willing (or, to be more charitable, able) to do.

After participating in these efforts to resist Elon's problematic H.B. 2 response, I came to believe that a wider variety of strategies of resistance should have been used, depending on the identities of those resisting. As a queer person, I was, I think, only taken somewhat seriously when I tried to point out the shortcomings of Elon's statement regarding H.B. 2. I was heard as overly critical, overly sensitive, and insufficiently grateful for the progress that the university had made for queer and trans students (or rather, the progress that the university understood itself to have made). I was even heard this way by Elon's Gender and LGBTQIA Center because it was suggested that I did not have realistic expectations of Elon's institutional and public response.

It seems to me that our resistance efforts may have been more successful if we had undertaken different actions depending on our levels of privilege. For instance, straight and cisgender allies, less likely to be heard as complaining or ungrateful, could have taken a more direct tack by talking with administrators or student life professionals about reframing their denunciations of H.B. 2. But queer and trans students may have needed to get a bit more creative in our resistance. We might, for instance, have benefited from deploying Alison Bailey's concept of "strategic ignorance."<sup>44</sup> Thinking within the framework of epistemologies of ignorance, Bailey is interested not only in the ways that ignorance is socially produced by those in positions of power, but also in how "expressions of ignorance can be wielded strategically by groups living under oppression as a way of gaining information, sabotaging work, avoiding or delaying harm, and preserving a sense of self."<sup>45</sup> In other words, Bailey wants to explore the ways that ignorance can be used as a tool for the oppressed.

Bailey uses Maria Lugones's work on multiplicity and curdled logic to suggest that people of color can engage with white ignorance in advantageous ways and that we should see this engagement as resistance. In her essay "Purity, Impurity, and Separation," Lugones contrasts the "conceptual world of purity"<sup>46</sup> with the conceptual world of multiplicity. She argues that dominant logics understand identity as unified, pure, and separable into distinct parts, but that these dominant logics do not capture the experiences of living with multiple oppressed identities. The fundamental assumption underlying a logic of purity is that "there is unity underlying multiplicity"; a logic of purity, for instance, would suggest that people have one unified identity and one set of clear motivations for their actions.<sup>47</sup> Rather than conceptualizing identity through the logic of purity, Lugones centers the experiences of Latina writers in order to argue for a logic of curdling or multiplicity. This logic of multiplicity does not reduce identity into pure parts or assume one unified experience of the world.

The defiance of this dominant logic is, for Lugones, a source of hope for the future. She explains that "we [marginalized subjects] can affirm the positive side of our

being threatening or ambiguous . . . it [defying dominant logic] can become an art of resistance, metamorphosis, transformation."<sup>48</sup> In her view, people with marginalized identities actually have an opportunity to use their defying of dominant logic for political gain. For Lugones, resisting fragmentation and unity is what generates creativity and sets up the conditions for exploring more possibilities.<sup>49</sup>

Bailey applies Lugones's concept of curdled logic in order to show the ways that working with and taking advantage of the ignorance of dominant groups can, rather than being viewed only as submission, also be viewed as a kind of sneaky or undercover resistance. Although Bailey is thinking specifically about people of color using "strategic ignorance," she defines it fairly broadly as, "a way of expediently working with a dominant group's tendency to see wrongly."<sup>50</sup> She explains, for example, how Frederick Douglass tricked white boys into teaching him to read by pretending not to know the letters, and enticing the boys into showing him more and more complicated words. In Bailey's view, one way of using strategic ignorance is to play dumb as a means of gaining information or getting what you want.

A logic of purity would only understand Douglass's playing dumb as a submission to a harmful stereotype. But Bailey suggests that if we use a curdled lens to analyze this situation, we notice that at the same time Douglass played into the harmful stereotype, he also gained the information that would help him resist his own oppression in the long term. As Bailey explains,

Navigating the dominator's world requires that oppressed resisting subjects employ ways of knowing that reduce the risks of oppression. To extend Audre Lorde's metaphor, the master's tools may not be able to dismantle the master's house, but they might just come in handy when walking through his neighborhood, attending his schools, or working on his assembly line.<sup>51</sup>

We can, according to Bailey, understand "strategic ignorance" as a type of resistance to oppression that ensures the continued survival of oppressed groups, even if from one perspective it looks like compliance.

I wonder if queer and trans community members at Elon could have done (or might still do) something similar when confronting the institution about trans and queer oppression on campus. Many of us recognized Elon's statement as a nonperformative political move designed to position the university as a progressive safe haven for queer and trans students. But showing that we recognized this didn't seem to gain us much traction. In fact, it might have made the university less likely to take our concerns seriously. Maybe instead of revealing our knowledge, we could have pretended not to recognize the statement for what it was. Ahmed reminds us that while nonperformative institutional speech-acts can be frustrating, they can also be used as tools to nudge the institution forward: "if organizations are saying what they are doing, *then you can show they are not doing what they are saying*."<sup>52</sup> I can imagine queer and trans students at Elon using the

statement as a tool by pretending to take the institutional statement as an earnest one, and acting as though it were a promise. We could have suggested to the administration that since Elon *has* spoken out against H.B. 2, surely they are supportive of making various changes to campus that would improve the experiences of queer and trans students. Their denouncement of H.B. 2 could have been used as evidence for why Elon should follow up with establishing multi-stall gender-neutral restrooms, providing gender-neutral student housing in residence halls, or beginning a scholarship fund for LGBTQIA students. My own instinct is to be critical of nonperformative institutional speech, but it may have been in my best interest to act as though I took Elon's statement of commitment to diversity and inclusion seriously. I could have helped urge Elon to adopt more queer and trans-inclusive policies and commitments.

One complicating factor about deploying strategic ignorance is that we cannot always tell when it is being used or by whom. For instance, some administrators at Elon might have been taking strategically ignorant stances about the response to H.B. 2. Ahmed explains that many diversity practitioners use the limited language and frameworks of diversity because it "allows practitioners to work 'with' rather than 'against' an institution."<sup>53</sup> Similarly, it is possible that diversity practitioners at Elon were, in fact, critical of the institution's H.B. 2 statement (perhaps even its authors).

Because of this difficulty with strategic ignorance, it seems that differently positioned people within the institution may need to take different types of action. Perhaps straight, cis allies can be more direct in their critiques of the institution than queer and/or trans people. They are less likely to be heard as complaining or ungrateful, so after listening to the concerns of the LGBTQIA community, they could have taken on the work of seeking out administrators to talk with them about new ways to frame denouncements of anti-trans legislation. Allies might have written op-eds for the school newspaper, or talked with their friends about why it matters not just *that* Elon resists H.B. 2, but *how* that resistance is framed.

I want to emphasize that I am not suggesting that queer and trans students step back and have allies speak for us at all times. Rather, I want to explore the ways that strategically going along with university statements about oppression should be recognized as a form of resistance for people who might not be well-positioned to offer a more pointed critique. And while some queer and trans students may justifiably continue with more direct resistance strategies, I hope I have highlighted some additional opportunities for H.B. 2 resisters.

#### IV. CONCLUSION: ARE NONPERFORMATIVE RESPONSES THE LEAST OF OUR WORRIES?

I am left with many lingering questions about resisting injustice at universities and other institutions that might have an interest in portraying their values as progressive: How might straight, cis allies best use their privilege to convey the concerns of queer and trans students? By suggesting "strategic ignorance" as one useful strategy

for navigating non-performative institutional speech, have I in effect “blown its cover,” such that the strategy is less likely to be effective? If an institution doesn’t have enough allies willing to do their part, does the strategic ignorance of queer and trans students look too much like complicity with institutional norms? What sorts of denouncements of H.B. 2 might have been performative? Are there ways that statements like these do perform helpful functions and if so, what are they and how can they be used as leverage points for further progress? Is “strategic ignorance” too subtle of a strategy in a world where, for trans and genderqueer people, using the bathroom can become dangerous and traumatizing?

I am not optimistic about this. Now that we’re in the midst of the Trump administration, I am tempted to be much more grateful for Elon’s denouncement, as unhelpful and ineffective as it was. It is very easy, particularly at this moment, to feel something like: “At least Elon thinks trans and queer people are people and that they deserve equality. So many institutions do not, and it is only going to get worse in the next four years.” But Elon’s actions do not make it clear trans and queer people really are valued by the institution. I think now is a particularly important time to reveal the ways that problematic denouncements of injustice can allow for the perpetuation of those injustices, even by institutions that understand themselves as progressive. It can be exhausting, particularly for the queer and trans community, to resist universities’ use of their H.B. 2 denouncements to boost their diversity credentials while also resisting H.B. 2 itself, but I think efforts are more likely to be effective if we understand the dual nature of the problem and mobilize in multiple ways that are sensitive to relevant privilege and power differentials.

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**NOTES**

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2. “Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations,” House Bill 2, *General Assembly of North Carolina* Second Extra Session.
3. National Center for Transgender Equality and the National Gay and Lesbian Task Force, “National Transgender Discrimination Survey Preliminary Findings.”
4. *Youth Organizing Institute Blog*, “#Blacktranslivesmatter Queer and Trans People of Color Coalition Response to NC HB2.”
5. Campbell and Bonner, “Legislature Approves Limited Changes to HB2.”
6. An Act to Reset S.L. 2016-3, House Bill 142, *General Assembly of North Carolina*.
7. “Legislation Affecting LGBT Rights Across the Country,” last modified Monday, July 10 (updated weekly), <https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country#antitrans>; and Gill and Tannehill, “A User’s Guide to This Year’s Transphobic Legislation.”

8. Sara Ahmed, *One Being Included: Racism and Diversity in Institutional Life*.
9. *Ibid.*, 26.
10. Pitcher, “‘There’s Stuff That Comes with Being an Unexpected Guest’: Experiences of Trans\* Academics with Microaggressions,” 688.
11. *Ibid.*, 691.
12. Nicolazzo et al., “An Exploration of Trans\* Kinship as a Strategy for Student Success.”
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15. Elon Student-Led Inclusive Community Alliance, “Letter to the Editor: Elon SLIC Alliance on Chick-Fil-A”; Ringelberg, “Swimming Against the Tide”; Groves, “Report: Elon University Lacks Economic Diversity.”
16. “Elon University Strategic Plan 2014-2015 Progress Report: An Unprecedented Commitment to Diversity and Global Engagement.”
17. Ahmed, *Queer Phenomenology: Objects, Orientations, Others*, 82.
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19. Wilder, “University Has Chick-Fil-A Debate.”
20. Kansky, “Elon Chick-Fil-A Appreciation Day Shows Division on Campus.”
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22. Duke Today Staff, “Duke Issues Statement About NC Law Limiting LGBT Protections.”
23. Thank you to Andrea Pitts for prompting me to consider the additional constraints places on public universities in the state.
24. Thanks to Andrea Pitts for suggesting I frame the problem in this way.
25. Ahmed, *On Being Included*, 115.
26. *Ibid.*, 116.
27. *Ibid.*
28. Groves, “Former Elon Professor Sues, Claims Discrimination.”
29. Ahmed, *On Being Included*, 116.
30. *Ibid.*, 117. Emphasis in original.
31. Anderson, “Elon Statement Regarding NC Legislative Action.”
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33. *Ibid.*, 86.
34. Anderson, “Elon Statement Regarding NC Legislative Action.”
35. Kogan, “Public Restrooms and the Distorting of Transgender Identity,” 1214.
36. *Ibid.*, 1223.
37. Brady, “When a Transgender Person Uses a Public Bathroom, Who Is At Risk?”
38. Anderson, “Elon Statement Regarding NC Legislative Action.”
39. Elon University Faculty, “Faculty Resolution Regarding HB2: The Public Facilities Privacy & Security Act.”
40. Ringelberg, “A Closer Look at Elon’s Campus Pride Ranking.”
41. DuBois, *The Souls of Black Folk*, 2.
42. Ahmed, “Against Students.”
43. *Ibid.*
44. Bailey, “Strategic Ignorance,” 77.
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46. Lugones, "Purity, Impurity, and Separation," 126.
47. Ibid.
48. Ibid., 144.
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## *Potty Humors: Melancholic and Choleric Presidents, Sclerotic Voters, and the Federal Courts on Title IX in School Bathrooms*

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Bathroom bills and other transphobic legislative measures have become, as many have observed, the latest battleground in social conservatives' efforts to regain some of the lost ground in the marriage equality war. It is an odd and ultimately quixotic enterprise in a culture that becomes increasingly secular as a direct result of these misguided efforts to impose a loosely evangelical Christian religious orthodoxy on public policy. Just as newspapers are now reporting increasing acceptance of same-sex marriage even among conservative communities, the day will come when there is broad acceptance of the moral legitimacy

of trans identity. Politically engaged social conservatives ultimately hasten that evolution by drawing increased attention to their mean-spirited targeting of a long-abused “discrete and insular” minority.<sup>1</sup>

In the meantime, however, there is a serious question as to just how far the targeting efforts might go, and how prolonged they might be with respect to our legal environment, especially with the current ascendancy of Trumpism: an unreflective (and largely headless) lashing out at “others” as the alleged sources of social ills. As is becoming increasingly apparent, Donald Trump’s impulsive populist demagoguery is more a reflection of such attitudes embedded in a fearful, insular, and equally unreflective segment of the electorate, than their root cause. (Trump’s rhetoric, however, together with that of increasingly right-wing Republicans, certainly fans the flames and reaffirms these attitudes). To what extent might our social institutions put the brakes on transphobic legislative excesses in the meantime?

In this article I review the three most widely publicized recent developments in this area with regard to the legal landscape, and what they might portend in the near term: (1) North Carolina’s “bathroom bills”; (2) the Obama Administration’s interpretation of Title IX’s mandate for non-sex-discriminatory policies in educational institutions, its fallout in Gavin Grimm’s Fourth Circuit case, and in the preliminary injunction issued by a Texas federal district court judge; and (3) Jeff Sessions’s reversal of the Obama Administration’s Title IX interpretation, in his capacity as Donald Trump’s attorney general. (This was almost certainly done at Sessions’s own initiative. Trump himself appears to be indifferent to policy questions governing sex and gender, except to the extent that they afford him opportunities to score points with Republican lawmakers and conservative voters who Trump and his acolytes assume to be ripe for endless manipulation.)

### I. NORTH CAROLINA’S H.B. 2 AND H.B. 142

In the short run, the news is not good. This is particularly in evidence in the North Carolina case, where newly elected Democratic Governor Roy Cooper signed H.B. 142 into law to replace H.B. 2, the original product of the state’s Republican legislature, which incurred so much popular antipathy and corporate retaliation. Despite campaigning against incumbent Republican Pat McCrory with a promise to repeal that odious bill, Cooper signed a replacement bill, also crafted by the Republican legislature, which was arguably just as bad.

The original provocation for H.B. 2 was a Charlotte municipal ordinance that prohibited LGBTQ discrimination within the city’s borders. H.B. 2 nullified this particular ordinance and any other local ordinance that might provide greater protection than state law did. This was on top of the more famously notorious element of H.B. 2: requiring that individuals had to use public multiple-occupancy restrooms that corresponded to their “biological sex” as listed on their birth certificates, a provision that applied not just to highway rest stops and facilities in government office buildings, but also in public K-12 schools and universities. The replacement bill modifies this practice in name, but

not in deed. Instead of ordering *individuals* to conform to prescribed bathroom behavior by requiring state agencies to enforce anti-trans usage policies in all multiple-occupancy bathrooms, the legislature’s new dispensation prohibits state *agencies*, all the way down to local boards of education, from regulating “access to multiple occupancy restrooms, showers, or changing facilities.” So, in the event of public hostility towards trans users of multiple-occupancy bathrooms, of *any* kind, the agencies that function as the custodians of those bathrooms have to await permission to institute protective policies. Such permission is unlikely to be granted in the foreseeable future in North Carolina’s overtly transphobic, heavily Republican, and heavily gerrymandered, state legislature.

Even more critically, because more broadly, the new legislation imposes a ban on any future local ordinances or administrative initiatives designed to protect LGBTQ residents against any employment or public accommodation discrimination. Under H.B. 142, this ban, which didn’t exist prior to H.B. 2, will be in force through 2020, with the potential for future extensions by a hostile state legislature. In other words, just for starters, advocates of local anti-discrimination measures are being asked to wait for permission *for almost four years*.

This last feature of the bill may prove its eventual downfall in the federal courts. On April 14, 2017, Jeff Sessions, behaving true to form, dropped the federal suit against H.B. 2 instituted nearly a year earlier by Loretta Lynch on behalf of the Obama Administration, on the specious excuse that the lawsuit was now irrelevant, since the North Carolina legislature had nullified H.B. 2, even though H.B. 142 bears many of the same constitutional defects. Joaquin Carcaño and his fellow citizen plaintiffs, with the support of the ACLU and Lambda Legal, have already filed notice, on April 28, 2017, that they will amend their previous complaint to replace H.B. 2 with H.B. 142.<sup>2</sup>

The central difficulty for the North Carolina legislature, as I see it, is that this kind of preemptively anti-democratic move by a state government has already been litigated unsuccessfully before the US Supreme Court in *Romer v Evans*,<sup>3</sup> more than two decades ago. There the issue was a 1992 amendment to the Colorado State Constitution: “Neither the state nor its subdivisions could enact or enforce any ‘statute, regulation, ordinance or policy’ according anti-discrimination protection to lesbians, gay men or bisexuals.” The Court’s decision turned partly on the inability of Amendment 2 to satisfy even the low-level deferential rational basis standard of judicial review, and partly on its anti-democratic nature. In his majority opinion, Anthony Kennedy framed the issue in this way:

[The amendment’s] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests. . . . The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . . A law declaring that in general



it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. . . . A State cannot so deem a class of persons a stranger to its laws. (*Romer v. Evans*, 633, 635)

It is just conceivable, I suppose, that today's Court might circumvent applying the rational basis standard to H.B. 142's targeting of trans-identified individuals' access to public accommodations for the exercise of basic bodily functions, if it chooses to buy into the fiction that H.B. 142 doesn't actually do that because, unlike H.B. 2, the new bill no longer overtly prohibits individual choice of most appropriate public access multiple-occupancy bathrooms. But even then it is unlikely that the Court would regard a bill that excludes LGBTQ individuals generally from access to democratic means of vindicating their equal protection rights at the local level for such a prolonged (and potentially indefinite) period as constitutionally permissible. To do otherwise would be to reverse the *Romer* precedent.

**II. GAVIN GRIMM AND THE OBAMA ADMINISTRATION'S READING OF TITLE IX'S BATHROOM PROVISION**

During the 2013-2014 academic year, his first year in high school, Gavin Grimm began hormone therapy treatment as part of a parentally supported transition to more fully realize his own sense of his true gender identity. When he returned for his sophomore year, school administrators were supportive of Grimm's request to be treated as a boy, allowing him to use the boys' bathrooms at the school. (Locker rooms were not an issue, as Grimm did not participate in the school's physical education program.) This continued without incident for seven weeks, until community members complained to the local school board, which then issued a mid-year directive requiring all students to use bathrooms and locker rooms assigned to their biological sex. For students like Grimm, the board carved out a private bathroom exception: "students with gender identity issues shall be provided an alternative appropriate private facility." This policy, of course, ignores the message it delivers to trans students: that they are freakish anomalies unfit to consort with other students with whom they share a gender identity, a policy which brings racially segregated bathrooms of the Jim Crow era to mind (although the parallels are not identical).

While Grimm and the school administration were trying to accommodate themselves to the new regime, Emily Prince, a D.C.-area trans rights lawyer, wrote to the US Department of Education on December 14, 2014, the day the Gloucester County School Board's new policy went into effect, inquiring as to the DOE's interpretation of the relevant provision of the 1972 Education Amendments to Title IX, which states, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (20 U.S.C. §1681(a)). More specifically, the Department of Education's Title IX implementation regulations take this particular Title IX language to require provision for "separate toilet,

locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex" (34 C.F.R. §106.33). So, the relevant question becomes, what does the DOE mean by "sex" in this context?

On January 7, 2015, the DOE's Office for Civil Rights (OCR) issued an administrative opinion letter responding forthrightly to Price's query about how DOE's implementation regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex in those situations [sex-segregated restrooms, locker rooms, shower facilities], a school generally must treat transgender students consistent with their gender identity."<sup>4</sup> Under this gloss, not previously explicit in DOE regulations, the Gloucester County School Board's bathroom policy was in clear violation of the DOE's understanding of Title IX. On the strength of that interpretation, Deirdre Grimm, Gavin's mother, filed suit on his behalf against the school board in June 2015, at the end of his sophomore year. The suit was based in part on the new Title IX interpretation, a matter of statutory and administrative law, and in part on a constitutional claim under the Fourteenth Amendment's equal protection clause.

In September 2015 Robert Doumar, in the East Virginia Federal District Court, ruled against Grimm's request for a preliminary injunction against the school board's policy on Title IX grounds. Judge Doumar reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. In making this argument, he relied on the Department of Education's official implementation language permitting restroom facilities segregated by sex. Doumar argued that the new interpretation of that language issued by the DOE was mistaken, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone.<sup>5</sup> This lack of judicial deference to executive branch interpretation of the language of its own administrative law, at the district court level, is quite unusual. The Obama Administration argued that it was merely resolving statutory ambiguity. Finally, exhibiting a lack of imagination and empathy echoed later in the US Supreme Court, Doumar also contended that requiring Grimm to use the unisex restrooms while his lawsuit was pending was not unduly burdensome, that it was at least less burdensome than requiring other students made uncomfortable by his presence in the boys' restroom to themselves use the unisex restrooms. (Doumar did not address Grimm's equal protection claim.)

In its April 2016 review of the District Court dismissal of Grimm's preliminary injunction request, the Fourth Circuit Court remanded the question to the District Court for further consideration, pointing out first that federal courts already have a standard for deference to administrative interpretation of administrative law in place. That standard is articulated in *Auer v. Robbins*, 519 US 452 (1997), which requires that an agency's interpretation of its own ambiguously worded regulations be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. The Fourth Circuit declined to regard the interpretation as unreasonable:

We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board’s reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department’s interpretation—determining maleness or femaleness with reference to gender identity.” (*G.G. v. Gloucester Co. School Board* 20)

Conceding that, the Court points out that at least the Obama Administration’s DOE/OCR interpretation has the virtue of providing a clear resolution of the ambiguity, while the School Board’s approach does not:

It is not clear to us how the regulation would apply in a number of situations—even under the Board’s own “biological gender” formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident?” (*G.G. v. Gloucester Co. School Board* 20)

Paul Niemeyer, the lone Fourth Circuit panel dissenter in this case, argued that the OCR standard would render enforcement of bathroom segregation impossible because it “would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity.”<sup>6</sup> But Henry Floyd, the author of the majority opinion, points out that this is no less true of the board’s standard, despite its vague expression of “amorphous” safety concerns (*G.G.* 25, fn8). If the issue is hypothetical concern about sexual responses “prompted by students’ exposure to the private body parts of students of the other biological sex,” such arguments apply with equal plausibility to the presence of gay and lesbian students in traditionally segregated bathrooms (*G.G.* 28, fn11). In his concurrence, Senior Judge Andre Davis went further, arguing that the Fourth Circuit could itself order a preliminary injunction, instead of remanding (*G.G.* 37, ff.).

On May 13, 2016, shortly after the Fourth Circuit’s remand on the injunction question, the Obama Administration reaffirmed the DOE/OCR Title IX interpretation more formally in a “Dear Colleague” letter issued jointly by the Departments of Justice and Education, again taking the position that the prohibition against discrimination “on the basis of sex” in Title IX’s §1681 requires access to sex-segregated facilities based on gender identity. In light of the Fourth Circuit’s advice, and the Obama Administration’s reaffirmation of its interpretive gloss on Title IX’s sex discrimination language, the Eastern Virginia District Court then reversed itself and granted Gavin Grimm’s preliminary injunction request a month later.

But on August 3, just prior to the start of the 2016-2017 school year the US Supreme Court inserted itself, granting an emergency stay of the District Court’s preliminary injunction against implementation of the school board’s restrictive bathroom policy. Less than three months later, the Court followed this up by granting *certiorari* to review

the policy’s merits, with oral arguments scheduled for March 28, 2018.

### III. THE OBAMA ADMINISTRATION’S READING OF TITLE IX AND ORIGINAL INTENT

The Supreme Court may have felt compelled to take up *G.G. v. Gloucester Co. School Board* as much out of concern about jurisdictional conflict between federal courts, as by the dispute actually before it from the Fourth Circuit Court in Richmond, although that was not a formal reason for the Court’s decision to review the case. The reasons explicitly given for that decision were the procedural question: Should the courts accept an executive branch interpretation of administrative law in the form of a “Dear Colleague” letter as authoritative? as well as the substantive question, should this particular interpretation of Title IX’s sex discrimination language be accepted as a reasonable interpretation of the statute? The Supreme Court avoided the more comprehensive challenge from the school board plaintiffs: that the policy of judicial deference to executive branch interpretation of its own regulations set forth in *Auer* should be reversed.

The separate jurisdictional conflict issue arose on August 21, 2016, when Reed O’Connor, a forum-shopped North Texas Federal District Court judge with a prior history of defying the Obama Administration, granted thirteen plaintiff states, state agencies, and school authorities preliminary injunctive relief against Obama Administration’s May 13, 2016, interpretation of Title IX’s mandate for non-sex-discriminatory policies in educational institutions and Title VII’s prohibition of sex discrimination in employment contexts.<sup>7</sup> O’Connor applied the injunction nationwide, which is a pretty breathtaking scope of authority for a district court to take upon itself, when the complaining parties were confined to thirteen states.<sup>8</sup>

O’Connor granted his injunction partly on procedural grounds concerning inadequate notice by the executive branch, but also, and much more contentiously, on grounds of contradicting existing legislative and regulatory texts concerning the plain meaning of “sex” in Title IX’s (and Title VII’s) language about discriminatory practices. The first of these concerns blends into the second in O’Connor’s language:

Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are “compulsory in nature”. . . . The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. As such, Defendants should have complied with the APA’s [Administrative Procedure Act] notice and comment requirement. Permitting the definition of sex to be defined in this way would allow Defendants to “create de facto new regulation” by agency action without complying with the proper procedures. (*Texas v. US* 26-27)

The idea that “merely clarificatory” interpretation of statutory language would not have compulsory legal

consequences, while the Obama Administration's interpretation is "legislative" because the "Plaintiffs . . . are legally affected in a way they were not before . . . the [Obama Administration] issued the [new] Guidelines" (27) is a pretty incoherent contention on its face. Interpretive policies might reasonably be accompanied by grace periods for adjustments, but interpretations with no consequences are pointless.

O'Connor's ruling on the merits of the interpretation is a much more philosophically interesting argument because it invites questions about the appropriateness of interpretive discretion over time. "Auer deference is warranted only when the language of the regulation is ambiguous," O'Connor informs us (*Texas v. US* 30).<sup>9</sup> But the relevant Title IX DOE implementation language is not ambiguous, in his view: "It cannot be disputed that the plain meaning of the term sex as used in §106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth." Since it is unlikely that, back in the early 1970s, either Title IX legislators or Nixon Administration DOE officials ever gave any thought to the idea that gender might be distinct from biological sex or from physical genitalia, O'Connor offers this categorical denial on the strength of what commonly recognized usage would have been at the time: "When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent" (*Texas v. US* 30).

As an interpretive principle, this presumption has its attractions. It gives the appearance of judicial deference to the deliberations of elected officials in the absence of more direct evidence of their intentions, and provides a seemingly neutral substitute for more ideologically motivated opinions that individual judges might otherwise craft. In actuality, it constitutes a socially or politically conservative form of judicial activism disguised as judicial deference. The assertion that legislators thought *X*, in the absence of any evidence that *X* even occurred to them, let alone that they endorsed *X*, is not deference but an expression of judicial preference for *X*. One of the most notorious problems with original intent is the unreflective presumption that it exists in the first place. Different legislators frequently vote for particular legislative compromises for different reasons, precisely because statutory language almost always *is* a compromise. The idea that there ever was a clearly recognizable underlying intent is just a pious fiction offered as a distraction from the subsequent judicial choices that are actually being made, quite ahistorically, or rather, heavily dependent on the cultural history of the present moment, as it has influenced the judge or judges in question.

O'Connor's decision is a nice illustration of this point. If, contrary to fact, *X* were to have occurred to legislators or administrative actors of a particular era, how should we expect them to have behaved with regard to *X*? Bear in mind that the legislators in question were less politically divided than they are today. Both Democrats and Republicans voted for Title IX. Although both houses had Democratic majorities, the Senate supported the Education

Amendments of 1972 overwhelmingly (88-86), and the House of Representatives by a much larger margin than the party split (275-125, where Democrats enjoyed a 255-180 edge). A Republican president signed the bill into law and directed his administration to formulate implementation regulations, including the language at issue in *Texas v. US*. Imagine what might ensue, if the question were framed to Republican executive branch appointees during the pre-Watergate Nixon era, or to the bill's Democratic and Republican legislative authors, in such a way that contemporary cultural attitudes were brought to bear, if they were informed of the view that a sense of one's own gender identity, and consequently one's gender presentation, might not depend exclusively on genitalia. How might they respond to that contention? Would they simply dismiss it out of hand, as Reed O'Connor apparently has done?

It's not actually clear that they would. In the first place, Nixon-era Republicans don't much resemble contemporary Republican legislators or political appointees. The Republican Party of that era was still significantly laced with moderate Nelson Rockefeller Republicans (who are now almost all Democrats). Richard Nixon himself was no Barry Goldwater. The Reagan Administration, and more importantly, the rhetoric of Gingrich's Republican Revolution, and polarizing aspects of both the Bill Clinton and George W. Bush administrations, the extreme gerrymandering of congressional districts, and the unobvious Republican race-baiting rhetoric employed during the Obama years have all contributed to a cesspool of political viciousness that Nixon-era administrative employees or legislators would probably find pretty alien.

In addition to the problem of indulging in culturally ahistorical attributions to people who arguably did not much resemble 2017 Republicans, there is the further question of just how we are to evaluate the hypothetical in question. Should we apply our best guesses about the political sensibilities of earlier Republican administrative appointees directly involved in the crafting of Title IX implementation language? Or should we make such guesses about the political sensibilities of the various legislative factions who supported Title IX in the first place? The latter is a much taller order, and probably not something of which any flesh-and-blood federal judge is actually capable.

And to what should we apply those guesses? Should we rely on early 1970s attitudes about "transsexuals," when the most sympathetic popular view might have been that such individuals were a species of circus freaks burdened with an unfortunate psychological affliction that was more to be pitied than censured? (Thinking about trans identity had not evolved much since Ed Wood's exploitation "documentary" *Glen or Glenda?*, amateurishly but somewhat sympathetically cobbled together twenty years earlier to capitalize on Christine Jorgensen's notoriety.) Or should we ask those administrative appointees or legislators from a bygone era to reflect instead on contemporary accounts of trans identity by contemporary trans theorists like Kate Bornstein, Dean Spade, Shannon Minter, Julia Serano, Rachel McKinnon, and other non-trans-phobic

feminist gender theorists? Somehow, we should then ask these time-traveling legislators or administrators to bring their own political sensibilities to bear on the issue, so understood. Otherwise, the principle of original intent has no traction left.

Of course, this task is impossible. We cannot reliably resurrect the political sensibilities of such people from the cultural graveyard of the early 1970s and apply them to contemporary cultural debates quite alien to that era. But why would it be any more sensible to rely on prevailing attitudes concerning trans-identified individuals from that earlier era? If the *Carolene Products* footnote 4 rhetoric about a judicial responsibility to protect “discrete and insular minorities” from majoritarian tyrannies means anything, as it did in US Supreme Court vindication of the rights of oppressed groups in the 1950s through the 1970s, it means not relying exclusively on hostile majoritarian characterizations of those minorities in the first place. The Warren Court defied prevailing racist sentiment about the intellectual abilities and appropriate social roles for African Americans in *Brown v. Board of Education*, and prevailing sexist sentiment about the proper social roles for women and girls throughout the 1970s. When judges like Reed O’Connor make decisions to reaffirm different majoritarian tyrannies today, they are acting on their own initiative, their own cultural sensibilities, against the principle expressed in *Carolene Products*, not out of judicial deference to the imaginary content of nonexistent original intent of elected officials.

#### IV. THE PHENOMENON OF NATIONALLY APPLICABLE DISTRICT COURT INJUNCTIONS

O’Connor’s ruling was also noteworthy because despite the social conservatism, and alleged judicial conservatism, of its content, it was strikingly nonconservative in its reach: a district court issuing a nationally applicable injunction. The injunction’s reach was sufficiently unusual that O’Connor had to resort to a 1979 Supreme Court precedent, *Califano v. Yamasaki*,<sup>10</sup> for an alleged authority for such comprehensive action: “Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction” (*Califano v. Yamasaki*, 705).

The question at issue is just how far that jurisdiction extends. O’Connor uses the language of the earlier decision to contend that even a district court could sometimes issue nationally applicable injunctions: “[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” This is because “federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction” (O’Connor quoting *Califano v. Yamasaki*, 702, 705, at *Texas v. US*, 36). But *Califano* is an implausible precedent for O’Connor’s action for two reasons. First, the injunction applied there covered Hawaii residents only, a region which clearly falls within the Hawaii Federal District Court’s geographic jurisdiction. That court certified a class protected by the injunction consisting of “all social security old age and disability benefit recipients resident in the State of Hawaii, who are being or will be subjected to adjustment

of their social security benefits pursuant to 42 U.S.C. 404 (a) and (b) without adequate prior notice of the grounds for such action and without a prior hearing on disputed issues relating to such actions” (*Califano v. Yamasaki*, 688).

The other sense in which this case is an inappropriate precedent has to do with the line quoted by O’Connor to the effect that injunctive relief is restricted only by the extent of the violation established, not by “the geographical extent of the plaintiff class.” That line concerns the possibility that plaintiffs in a case may be similarly affected because of their activities in multiple jurisdictions, not just the one governed by a particular court, in which case they may also receive protection covered by the injunction in those other jurisdictions.<sup>11</sup> That is not the issue in *Texas v. US*, since the actions of school boards, school administrators, and even state legislatures are confined to their own jurisdictions. Thus, *Califano* is a very narrowly tailored precedent for expanding the scope of injunctions beyond the established geographic boundaries of the court issuing the injunction, limited to providing relief on the plaintiff complaint before the court within its customary geographic jurisdiction, and applied in other jurisdictions only to the extent that those local plaintiffs are directly affected in those jurisdictions via the complaint before the court. The plaintiffs themselves are customarily expected to have residence or evidentiary connections to the presiding court’s geographic jurisdiction.

Geographic latitude is not cast more broadly than this because it would otherwise invite forum shopping of precisely the sort that has occurred in *Texas v. US*, where numerous government plaintiffs involved with school jurisdictions far beyond the court’s North Texas boundaries joined the litigation. If such behavior runs unchecked, federal district courts in one part of the country can potentially interfere with higher court deliberations in another part of the country, as was theoretically in play with O’Connor’s injunction with regard to Fourth Circuit deliberations in Richmond on the G.G. case. It would also empower federal district courts to interfere nationally with executive and legislative branch policies, which would be a pretty extraordinary power to invest in district courts.

The US Supreme Court has yet to address this issue of District Court overreach. In the wake of the Trump Administration’s rescinding of the Obama Administration’s interpretation of the meaning of “sex” in Title IX (discussed below), the various state plaintiffs withdrew their Texas federal court suit on March 3, 2017, so it is no longer a live case.

Subsequent to O’Connor’s decision, however, a similar issue has arisen on the liberal end of the political spectrum, beginning with James Robart’s decision in Seattle to grant national injunctive relief in the form of a temporary restraining order against the Trump immigration ban executive order of January 27, 2017, in the Western District of Washington. That injunction, issued within a week of Trump’s initial ban against entry of all foreign nationals from seven predominantly Muslim countries, was promptly upheld by the Ninth Circuit in a three-judge *per curiam* decision on February 9, 2017.<sup>12</sup> After such swift court action, the Trump Administration withdrew its initial ban, recrafted its language to be less overtly hostile to

Islam, and issued a revised ban against six nations (having withdrawn Iraq from the list) on March 6, 2017. The second ban was challenged in turn by Maryland and Hawaii federal district courts. The Maryland injunction was subsequently upheld in an *en banc* review by the Fourth Circuit, on First Amendment establishment clause grounds, and the Hawaii injunction upheld in the Ninth Circuit, but on statutory rather than constitutional grounds: such a sweeping executive order probably exceeded presidential authority under the Immigration and Nationality Act.<sup>13</sup>

These cases are of interest with respect to the present discussion because of the national sweep of the Washington, Minnesota, Maryland, and Hawaii district court injunctions. Unlike *Texas v. US*, the Maryland and Hawaii cases, via their respective Circuit Court reaffirmations, remained live issues, and were subsequently taken up by the US Supreme Court in *Trump v. International Refugee Assistance Project* and *Hawaii v. Trump*.<sup>14</sup> On June 26, 2017, the Court agreed to review both cases on the merits and consolidated them, but also partially reversed the lower court injunctions in the meantime. They allowed the injunctions to remain in place for individual plaintiffs who had already established US ties, and for future similarly situated foreign nationals applying for entry from any of the six countries still designated as falling under Trump's ban. But they struck down the injunction for any such foreign nationals "who lack any bona fide relationship with a person or entity in the United States" (*Trump v. IRAP & Hawaii* 9).

What is striking about the Supreme Court's response is its failure to address the question of the national scope of the Hawaii and Maryland district court injunctions. Although the Supreme Court called for a balancing test between competing interests, and thus narrowed the scope of the injunctions considerably, it did not restrict the national scope of the injunctions with respect to foreign nationals petitioning for entry when they possessed a genuine relationship with, say, a family member resident in the US, or a US university which had extended an invitation to the petitioner as a student, researcher, or faculty member.

The only (oblique) comments on the inadvisability of district court injunctions of national scope came from Clarence Thomas in partial dissent, joined by Alito and Gorsuch. Thomas's first instinct would be to quash the injunctions in their entirety. He conceded that they might be maintained for the particular plaintiffs already involved in the litigation, but not for an amorphous class of foreign nationals who might in future claim some relationship with US persons or institutional entities, in part, because he anticipated a flood of such litigants clogging the courts with an unworkable standard for establishing a relationship, and, in part (citing *Califano v. Yamasaki*, 702) because "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" (*Trump v. IRAP & Hawaii* dissent 3). The implication of this quoted passage, not made explicit by Thomas, and certainly not in the Court's *per curiam* decision, is that injunctions should be quite limited in scope. Whether that rules out national injunctions issued by lower courts, outside class action suits, is simply unclear (Thomas also notes on 3 that "no class has been certified" in *Trump v. IRAP* or *Trump v. Hawaii*). What Thomas

might have said if Reed O'Connor's national injunction against the Obama Administration's reading of "sex" as including self-determined gender identity for Title IX purposes were before the Court instead of the immigration ban cases is, of course, also unclear.

The Supreme Court generally, and Thomas in particular, may be wary of taking a firm position on the issue of broad national injunctions issued by lower courts because of our current political circumstances: a mercurial and unpredictable president surrounded by a dubiously inexperienced set of high level executive branch appointees, likely at any time to entertain constitutionally, or statutorily, outrageous policies. Turning a blind eye to lower court injunctions of perhaps overly broad scope has its advantages. Lower courts can act quickly to slow Trump Administration excesses, and buy the Supreme Court some time to deliberate on the novel issues that may come before it in the near future. The Court may also be mindful of what can happen when it intervenes in haste, the most famous recent example being *Bush v. Gore*. The Court's swift intervention into the 2000 presidential election results in Florida, when it really did not need to put itself in the position of effectively appointing George W. Bush on its own initiative, resulted in roughly half the nation, and the bulk of legal commentators at the time, concluding that the Court had behaved badly, a result that probably still makes the Court somewhat cautious about precipitous action.

The negative side of this judicial pragmatism is that it does open the door for lower courts to be broadly, rather than narrowly, obstructionist to administrative policies for which they have ideological distaste. The Trump Administration's immigration ban was so clearly motivated by political calculations rather than genuine national security concerns, and so clearly antithetical to both our laws and the political traditions we like to think we (mostly) embrace, that the sweeping lower court injunctions were welcomed. But if such judicial behavior becomes frequent, it will inevitably injure the reputation of the federal courts, and embroil them in political disputes at a level we like to think the courts are above. Even though that's not really true, even of the Supreme Court, maintaining the fiction does help the courts to sustain some distance from the ideological warfare into which American politics has now descended, and from the majoritarian tyrannies we are capable of exercising against discrete and insular minorities.

## V. THE TRUMP ADMINISTRATION'S REVERSAL OF THE OBAMA TITLE IX INTERPRETATION

So what will happen next with transphobic public and school restroom policies? The short-term prospects are not good. On February 22, 2017, the legal terrain shifted again when Jeff Sessions, eleven days after becoming Donald Trump's attorney general, coordinated with Secretary of Education Betsy DeVos to jointly rescind the Obama Administration's interpretation of Title IX's sex discrimination language. The next day the Supreme Court responded to this, Sessions's first significant official act, by inviting briefs from both sides in *G.G. v. Gloucester County School Board* as to how it should proceed. Two weeks later, on March 6, the Supreme Court sent the case back to Fourth Circuit, preferring to

hear from the lower court on the merits, despite responses from both the Gloucester School Board and Gavin Grimm that the Supreme Court should proceed.

Such a response is not that unusual for the Court. There were really two issues before it: (1) whether federal courts should be deferential to executive branch interpretation of its own administrative law, in this case Title IX single-sex school bathroom implementation regulations; and (2) whether Title IX's statutory language which gave rise to this interpretation in the first place, the language prohibiting any federally supported education program from engaging in discriminatory policies based on sex, should be regarded as including gender identity as part of the word "sex" for regulatory purposes "on the merits"—i.e., regardless of administrative interpretation. The Fourth Circuit had really addressed only the first of these, obliquely, by issuing the temporary injunction against the school board's policy in the first place because of the presence of the Obama Administration's inclusive interpretation of Title IX single-sex school bathroom implementation regulations. Sending the case back, while bathroom bill debates are still going on in other jurisdictions, is a prudent way for the Supreme Court to get more input from the lower courts.

That's where matters rest at present writing, except for the formal judicial action of the Fourth Circuit vacating the District Court's June 2016 preliminary injunction against the school board policy, the injunction which was itself provoked by the Fourth Circuit's reversal of the District Court's original position (deferring to the school board) back in April 2016. That injunction, which would have permitted Gavin Grimm to use the boys' restrooms at his high school during his senior year, had the injunction itself not been stayed by the Supreme Court in August 2016, was finally laid to rest near the end of Grimm's senior year on April 7, 2017. Grimm had presumably long since given up hope of being treated like any other male at his high school. The order to vacate was accompanied by an eloquent concurrence by Andre Davis, joined by Henry Floyd. As a brief coda to this sad chapter in our legislative and judicial history, it is well worth reading.<sup>15</sup>

The merits of the case, the two issues summarized above, are still before the Fourth Circuit, not yet addressed, and the Court has refused to fast-track its deliberations. Oral arguments will not be scheduled earlier than fall 2017, and Gavin Grimm has now graduated. In light of the Fourth Circuit's near unanimous *en banc* confirmation of its initial support of an injunction against the Gloucester School Board's misguided policy, perhaps it will eventually rule positively on (2), and take the position that Title IX's statutory language should indeed include gender identity as part of the word "sex" for regulatory purposes. But that is a tall order, requiring the Fourth Circuit to take a position on bathroom policies not unlike the Supreme Court's 1954 ruling on the fiction of "separate but equal" racial segregation of public schools, a novel reading of the language of existing law in light of new cultural developments. It is more likely that the Fourth Circuit will simply reaffirm (1), citing *Auer*, and defer to the new executive branch reading of the law, however odious the individual judges on the Fourth Circuit bench may find Jeff Sessions's behavior in this matter. That would be the more conventional approach. If instead the Fourth

Circuit decides to press the US Supreme Court on (2), the Supreme Court is not likely to affirm, given its own current collective politics. But as I said at the outset, the negative public exposure of hostile legislative and administrative transphobia, even if reaffirmed in the federal courts in the short run, may ultimately hasten the evolution toward more tolerant policies.

NOTES

1. See Harlan Fiske Stone's famous footnote 4 in *US v. Carolene Products* 304 US 144 (1938), at 152, in which Stone asserted that the Supreme Court did not need, in that particular decision, to assess, in cases involving "statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." The implication, of course, relied on by the Court in a number of cases since, is that a higher standard of judicial review might be in play when majoritarian tyrannies target such minorities, a natural inference with respect to the legislative and administrative initiatives under review here.
2. *Carcaño v. Cooper*, NC Federal Middle District 1:16-CV-00236-TDS-JEP; formerly *Carcaño v. McCrory*.
3. 517 US 620 (1996).
4. [http://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf)
5. *G.G v. Gloucester Co. School Board*, No. 4:15cv54 (Eastern District of Virginia, Sept. 17, 2015), at 8, as reported in *G.G v. Gloucester Co. School Board*, No. 15-2056 (4th Circuit, April 19, 2016), at 17.
6. The Court as a whole subsequently declined to conduct an *en banc* review (a review by all members of the Fourth Circuit bench), again with Niemeyer as the only dissenter.
7. On December 31, 2016, O'Connor blocked a fictitious interpretation of the Affordable Care Act for a "likely" violation of the Religious Freedom Restoration Act because its nondiscrimination clause allegedly violated doctors' religious freedoms by forcing them to perform gender transition procedures and abortions, again by means of a national injunction. (What the ACA actually requires is nondiscriminatory treatment of trans patients and women who previously had abortions. They can't be denied general medical care or health insurance coverage because of their prior medical histories.)
8. *Texas v. US* (2016), Civil Action 7:16-cv-00054-O. In addition to Texas, litigants include varying State authorities for Arizona, Alabama, Georgia, Kentucky, Louisiana, Maine, Mississippi, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin.
9. Citing *Christensen v. Harris County*, 529 US 576 (2000), at 588, elaborating on the 1997 *Auer* decision.
10. 442 US 682 (1979).
11. For a more detailed commentary on this point, see Vikram David Amar & Courtney G. Joslin, "The Problem With the Texas Federal Court's Nationwide Order Regarding Bathroom Access for Transgender Students," *Verdict*, September 9, 2016, <https://verdict.justia.com/2016/09/09/problem-texas-federal-courts-nationwide-order-regarding-bathroom-access-transgender-students>
12. *Washington v. Trump*, 2017 WL 462040 (WD Wash., February 3, 2017), and *Washington v. Trump*, 847 F. 3d 1151 (2017). A similar national injunction was undertaken almost simultaneously in a Minnesota federal district court.
13. *International Refugee Assistance Project v. Trump*, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 1018235 (D Md., March 16, 2017), reviewed in 857 F. 3d 554 (three dissenters to the full Fourth Circuit review); *Hawaii v. Trump*, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 1167383 (D Haw., Mar. 29, 2017); reviewed in 857 F. 3d 554 WL 2529640 (June 12, 2017), unanimous 3-judge panel on Ninth Circuit.
14. Case numbers 16-1436 and 16-1540 were granted cert. on June 26, 2017, and consolidated as 582 U. S. \_\_\_ (2017). Since

scheduled for US Supreme Court oral argument on October 10, 2017. Referred to hereafter as Trump v. IRAP & Hawaii.

15. <https://www.ca4.uscourts.gov/Opinions/Published/161733R1.P.pdf>

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## CALL FOR PAPERS

The *APA Newsletter on LGBTQ Issues in Philosophy* invites members to submit papers, book reviews, and professional notes for publication in the **fall 2018** edition. Submissions can address issues in the areas of lesbian, gay, bisexual, trans, gender, and sexuality studies, as well as issues of concern for LGBTQ people in the profession. The newsletter seeks quality paper submissions for anonymous review. Reviews and notes should address recent books, current events, or emerging trends. Members who give papers at APA divisional meetings, in particular, are encouraged to submit their work by the appropriate deadlines.

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