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THE BAD, THE UGLY, AND THE UGLIER: HOW FEAR AND MISCONCEPTIONS ARE FLUSHING AWAY EQUAL RIGHTS AND TREATMENT FOR TRANSGENDER PEOPLE

Laura Falco

Texas A&M University School of Law, falcol@tamu.edu

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**THE BAD, THE UGLY, AND THE UGLIER:
HOW FEAR AND MISCONCEPTIONS ARE FLUSHING AWAY
EQUAL RIGHTS AND TREATMENT FOR TRANSGENDER PEOPLE**

Laura Falco*

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ABSTRACT

Our country has gone through multiple social changes over the years, and now we find ourselves in the middle of another change—one involving the transgender community. This community is and has been continuously fighting for equal rights and treatment. It is 2016 and the fight for equal rights in our country is at a tipping point. A tip in one direction would constitute a huge step in the fight for equal rights, but a tip in the other direction could result in unprecedented effects on transgender individuals and the rest of the LGBTQ community. The LGBTQ community just wants the same protection as everyone else, but opponents use fear and religion to excuse discrimination against an entire community.

People who consider themselves straight and identify with the gender assigned to them at birth may take the everyday equal protections they enjoy for granted. For transgender individuals, however, these basic human rights are not so easily enjoyed. Equal protection ordinances and bills give transgender people the opportunity to receive protection under the law and to exercise the same rights as everyone else. This paper takes a look at equal rights ordinances across the country and analyzes the arguments opponents have use to defeat those ordinances. This paper will further discuss what we as allies can do to overcome those arguments and obstacles.

I. INTRODUCTION

A transgender person is “someone whose body doesn’t match who they are on the inside, and so they transition and live as the gender they have always known themselves to be.”¹ The hate and fear-mongering, the personal, religion-based protests, and the legal actions against transgender people should spur all citizens to take a deeper look into why opposition to laws granting protected status to transgender people holds society back and prevents governments from protecting numerous citizens.

Fear is a dangerous accelerant; people automatically fear what is unknown, and fear breeds discrimination.² Fear may stem from a wide range of causes—lack of education, lack of understanding, and unfamiliarity—but people may harness this fear with statistics that show what transgender people experience on a daily basis and demonstrate that discrimination is still prominent in our

¹*Nondiscrimination Laws: Everyone Should be Treated Fairly*, FREEDOM FOR ALL AMERICANS, <http://www.freedomforallamericans.org/nondiscrimination-laws-everyone-should-be-treated-fairly/> (last visited Sep. 15, 2016) [hereinafter *Nondiscrimination Laws*].

² For a brief discussion of discrimination against LGBTQ individuals, see Lilia Cherchari, *LGBT Violence* (Apr. 21, 2015) (unpublished thesis, Columbia University) (available on Columbia University’s Academic Commons website).

society. Education is important, especially when dealing with something many people may not understand. Equality may come when people learn to accept each other as individuals. Learning about transgender people and who they are will help society replace fear with understanding. When that happens, the transgender community can hopefully live without the threat of violence, harassment, or discrimination. Ensuring that transgender people receive equal and respectful treatment requires overcoming fear of the unknown, and not allowing religious beliefs to bar someone from the same Constitutional protections as everyone else.

The fight for equal rights has been going on for many years. It started with the fight for African Americans to receive equal treatment, then women, then gay and lesbian individuals, and now transgender people.³ While these groups may still fight for equal rights and treatment, this paper focuses on the transgender community's fight and message. The fear mentioned above is hurting local and state governments from protecting those who identify as transgender. To help illustrate the trouble of getting equal right protection for transgenders, Part I analyzes some aspects as to why equal protection laws are needed. Part II examines one of the main arguments used by opponents to deny equal rights from transgenders, the bathroom ordinance argument. Part III takes a look at another argument to reject equal rights for transgenders, the religious freedom argument. Finally, Part IV will discuss solutions and steps to take to ensure all citizens are treated with respect and all receive the same rights given to us under the Constitution.

II. THE REASON FOR THE FIGHT FOR EQUAL RIGHTS

In 2016, there should be no opposition to equal rights. A community in our country and around the world, however, currently fights to receive equal treatment and the same rights as CIS people.⁴

A. *The Catalyst of the Equal Rights Discourse*

After the Supreme Court's decision in *Obergefell v. Hodges*,⁵ the equal rights fight has received more attention than ever in our society. Both good and bad attention; good for finally taking a step to recognize all marriages between two loving and consenting adults,⁶ and bad for releasing fear and hatred for major changes in our society. While *Obergefell* was a victory for the LGBTQ community, the fight for equal rights is still continuing. Transgender people face an appalling and scary future if society does not take a stand.

³ See generally Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102. MICH. L. REV. 1528 (2004) (discussing recognition of protected classes and heightened scrutiny).

⁴ CIS means Cisgender. Cisgender identifies a person whose self-identity conforms with the gender that corresponds to their biological sex. *Cisgender*, MERRIAM-WEBSTER: DICTIONARY (11th ed.).

⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-2608 (2015) (holding that "[t]he Constitution grants" gay and lesbian people "equal dignity in the eyes of the law.").

⁶ See *Id.*

Eighteen states and the District of Columbia passed laws that expanded protection against discrimination on the bases of “sexual orientation and gender identity” and protect transgender people under the law if they are discriminated against.⁷ Equal protection policies extend to major corporation and local municipalities.⁸ Having equal protection laws attract more workers and residents because there is a guarantee of protection under the law from discrimination.⁹

B. *The Start of the Anti-LGBT Bills*

Despite multiple states and some cities enacting non-discrimination laws, in 2015 more and more anti-LGBT bills have been passed, which would allow for open discrimination against transgender and homosexual individuals, have been filed in 26 different state legislatures.¹⁰ “These bills aim to restrict transgender people’s access to public accommodations, school activities, . . . [and] medical care.”¹¹ Indiana, for example, “recently proposed a law that would make it a crime for a person to enter a single-sex public restroom that does not match the person’s biological gender”¹²

Anti-LGBT bills generally “convey[] a message of hate and intolerance toward the . . . [LGBTQ] community.”¹³ Houston Equal Rights Ordinance, commonly known as HERO, was an ordinance put in place by the City Council that expanded protected classes covered under the City Charter to include sexual orientation and gender identity.¹⁴ However, both the Texas Governor and Lieutenant Governor supported repealing HERO.¹⁵ The public fear outweighed the acceptance and Houston voters subsequently rejected HERO.¹⁶ This is unfortunately the continuing trend in states and cities now. For example, both North Carolina and Mississippi have passed discriminatory bills that allow for the

⁷ *LGBT American Aren’t Fully Protected from Discrimination in 33 States*, FREEDOM FOR ALL AMERICANS, <http://www.freedomforallamericans.org/states/> (last visited Sep. 15, 2016).

⁸ See *Non-Discrimination Laws*, *supra* note 1.

⁹ *Id.*

¹⁰ Wudan Yan, *Seattle’s Absurd, Discriminatory Trans Bathroom Panic*, DAILY BEAST (Feb. 4, 2016, 12:01 AM), <http://www.thedailybeast.com/articles/2016/02/05/seattle-s-absurd-discriminatory-trans-bathroom-panic.html>.

¹¹ Wudan Yan, *Seattle’s Absurd, Discriminatory Trans Bathroom Panic*, DAILY BEAST (Feb. 4, 2016, 12:01 AM), <http://www.thedailybeast.com/articles/2016/02/05/seattle-s-absurd-discriminatory-trans-bathroom-panic.html>.

¹² *Id.*

¹³ *HERO’s Demise*, HOUSTON CHRONICLE (Nov. 5, 2015, 8:56 AM), <http://www.chron.com/opinion/editorials/article/HERO-s-demise-6611441.php> [hereinafter *HERO’s Demise*].

¹⁴ *Houston Anti-Discrimination HERO Veto Referendum, Proposition 1 (November 2015)*, BALLOTPEdia, [https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum_Proposition_1_\(November_2015\)](https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum_Proposition_1_(November_2015)) (last visited Sep. 15, 2016) [hereinafter *HERO Veto Referendum*].

¹⁵ *Houston Voters Reject Equal Rights Ordinance*, LGBT BAR ASSOCIATION OF GREATER NEW YORK (Nov. 2015), <http://le-gal.org/houston-voters-reject-equal-rights-ordinance/> [hereinafter *Houston Voters Reject*].

¹⁶ See *HERO Veto Referendum*, *supra* note 11.

outright discrimination of LGBT individuals in public facilities, in employment, and other areas.¹⁷

On the other hand some cities are rising above the hate and misunderstanding and are taking the necessary steps to ensure equal rights for all in the community. For example, in Fayetteville, Arkansas, voters approved Ordinance 5781, a measure seeking to prohibit discrimination based on sexual orientation or gender identity.¹⁸ The way Fayetteville framed the language of the ordinance showed voters this law is extending the basic rights everyone deserves to include sexual orientation and gender identity.¹⁹

C. Anti-LGBT Bills are a Violation of Federal Law

The Supreme Court has not yet ruled on the level of scrutiny for gender identity under equal protection and due process claims.²⁰ *Lawrence v. Texas*, a huge case for the gay rights movement “decriminalized consensual homosexual relations between adults,” and created a “new regime of heightened regulation of homosexuality.”²¹ Laws dealing with race and religion generally undergo strict scrutiny²² (also known as “the most rigid scrutiny”) while sex undergoes intermediate scrutiny.²³ This may be the time to take a step forward and label gender identity as at least intermediate scrutiny. Gender identity is related to somebody’s sex and should be treated the same under the law.²⁴ As cities and state legislatures continue to pass anti-LGBT laws allowing for discrimination, if

¹⁷ Both North Carolina and Mississippi passed discriminatory bills that allowed for the outright discrimination of transgender, gay, lesbian, and bisexual people in public facilities, in employment, and other areas. Both of these bills and the contemplated lawsuits against them continue. President and Obama and federal agencies rendered opinions against the laws. Juliet Eilperin, *Obama: North Carolina, Mississippi Laws Limiting LGBT Protections are “Wrong” and “Should be Overturned,”* WASH. POST (Apr. 22, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/04/22/obama-north-carolina-mississippi-laws-limiting-lgbt-protections-are-wrong-and-should-be-overturned/>

¹⁸ See FAYETTEVILLE, ARK. CODE OF ORDINANCES art. XXIX, §§ 33.410 – .414 (2015) (codifying Ordinance 5781). See generally *City of Fayetteville LGBT “Uniform Civil Rights Protection Ordinance,” Ordinance 5781 (September 2015)*, BALLOTPEDIA, [https://ballotpedia.org/City_of_Fayetteville_LGBT_%22Uniform_Civil_Rights_Protection_Ordinance,%22_Ordinance_5781_\(September_2015\)_\(last_visited_Sep._27,_2016\)_\[hereinafter_Ordinance_5781\]](https://ballotpedia.org/City_of_Fayetteville_LGBT_%22Uniform_Civil_Rights_Protection_Ordinance,%22_Ordinance_5781_(September_2015)_(last_visited_Sep._27,_2016)_[hereinafter_Ordinance_5781]).

¹⁹ See *Ordinance 5781*, *supra* note 15.

²⁰ See generally Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528 (2004) (discussing heightened scrutiny and sexual orientation).

²¹ *Id.*; see also *Lawrence v. Texas*, 538 U.S. 558 (2013) (O’Connor, J., concurring).

²² Hunter, *supra* note 16, at 1529. Strict scrutiny is a form of judicial review that applies to laws that may disadvantage or “prejudice . . . discrete and insular minorities.” *United State v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938). To pass muster under strict scrutiny review, the legislature must have passed the law to further a compelling governmental interest and must have narrowly tailored the law to achieve that interest. Hunter, *supra* note 16, at 1529; see also *Korematsu v. United States*, 323 U.S. 214 (1944).

²³ See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976). To survive intermediate scrutiny, the challenged law must “serve important government objective and must be substantially related to the achievement of those objectives.” *Id.* at 197.

²⁴ See *Id.*

laws regulating gender identity are given intermediate scrutiny then the government must show a strong state interest for passing the law.²⁵ These anti-LGBT bills are unconstitutional because they violate the equal protection clause and due process clause under the Constitution.

Justice O'Connor in *Lawrence* wrote that "[m]oral disapproval of a group [of people] cannot be a legitimate governmental interest," and therefore cannot "justify by itself a statute" that discriminates against gay people.²⁶ Morality alone should not deprive people of equal rights. Gender identity needs to be given at least intermediate scrutiny because the primary arguments against allowing equal rights are based solely on moral beliefs. Cities and states should have to show what state interest these anti-LGBT laws are protecting. In *Griswold v. Connecticut*, the Supreme Court recognized privacy as a component of substantive due process.²⁷ Nonetheless, the Supreme Court has repeatedly avoided the question of having to classify gender identity or even sexual orientation.²⁸ Instead the Court continues to default to this heightened scrutiny, which is just a little bit higher than the rational basis test.²⁹ It is now time to make gender identity a suspect class so that laws relating to someone's gender identity have to follow one of the scrutiny tests.

"There's a reason that civil rights measures and issues of human rights aren't voted on by the majority. Often these are issues that impact the minority. It's not appropriate to have the majority vote on the rights of the minority."³⁰ This quote gets to the heart of what is going on; a majority of citizens who are being fed false and misleading information are voting on the basic human rights of a minority of the city or state's population. The LGBT community is a minority in our society, some may say that their political power is getting stronger, but that quote shows that when it comes to basic human rights there needs to be a check on the majority to ensure the rights of the minority are not being trampled on.³¹ When a law infringes on a fundamental right afforded to a group of people it should be subjected to some amount of scrutiny and that the law is narrowly tailored to serve a compelling state interest.³² The Fourteenth Amendment promises that no person shall be denied equal protection under the law.³³ "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."³⁴

²⁵ See *Id.*

²⁶ *Lawrence*, 538 U.S. at 582-83.

²⁷ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

²⁸ See *Obergefell*, 135 S. Ct. 2607-2608.

²⁹ *Lawrence*, 538 U.S. at 579.

³⁰ *Jacksonville, Florida, LGBT Anti-discrimination Referendum (2016)*, BALLOTPEdia, [https://ballotpedia.org/Jacksonville,_Florida,_LGBT_Anti-discrimination_Referendum_\(2016\)](https://ballotpedia.org/Jacksonville,_Florida,_LGBT_Anti-discrimination_Referendum_(2016)) (last visited Sept. 15, 2016) (quoting Jimmy Midyette, leader of the Jacksonville Coalition for Equality).

³¹ See *id.* See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (holding that because gay people could find "protection against discrimination only by enlisting the . . . [majority of the state] to pass . . . laws" on their behalf, gay people were not treated equally under state law).

³² Hunter, *supra* note 16, at 1529.

³³ *Romer*, 517 U.S. at 631.

³⁴ *Shelley v. Kramer*, 344 U.S. 1, 22 (1948).

D. Violence and Harassment Against Transgender People

Compared to the rest of the population transgender people face a higher rate of violence.³⁵ “According to the United States Department of Justice, more than 50 percent of transgender people are victims of sexual violence during their life[time].”³⁶ Yet one misconception people have is that equal rights laws will allow predators to enter women’s bathrooms and commit crimes. However, Jim Ritter, who works for the Seattle Police Department, said that he has “‘never heard of, read about, or [seen] . . . a transgender person sexually assault[ing] anyone in the men’s or women’s restroom”³⁷ Ritter’s experience shows that “transgender individuals are far more likely to be the victims of crime than the perpetrators”³⁸ It is not only physical assaults, ten percent of transgender people have “experienced physical assault” in bathrooms, “70 percent . . . have experienced verbal harassment in bathrooms”³⁹ This demonstrates that transgender people face a high-risk harassment from strangers.⁴⁰

Not only do transgender people face a higher risk of physical violence but they also face verbal harassment. For example, Shadi Petosky is a transgender woman who was detained by the TSA in an Orlando airport because they did not believe that she was a woman.⁴¹ She live tweeted her detainment by TSA agents, that she missed her flight, and was humiliated in front of multiple people.⁴² This happened because the TSA agents did not believe her to be a woman, even though she looked and identified as one.⁴³ One TSA agent even told her “get back in the machine as a man or it [is] . . . going to be a problem.”⁴⁴ She describes on Twitter that she just wants the same privileges as CIS people,⁴⁵ to not be treated differently because she is transgender.⁴⁶ Nobody should be treated this way, left to feel humiliated and hopeless.

The daily threat of violence transgender people face is quite terrifying. The U.N. Human Rights division reported that LGBT people face a “disturbingly elevated risk of homicidal violence”⁴⁷ “[T]ransgender women . . . face 4.3

³⁵ See Stephen Peters, *FBI Releases Hate Crime Report Ahead of First-ever Congressional Forum on Anti-transgender Violence*, HUMAN RIGHTS CAMPAIGN (Nov. 16, 2015), <http://www.hrc.org/blog/fbi-releases-hate-crimes-report-ahead-of-first-ever-congressional-forum-on>.

³⁶ Yan, *supra* note 8.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ See Margarita Noriega, *Transgender Woman Live-Tweets her Expulsion from Orlando Airport*, VOX (Sep. 22, 2015, 3:03 PM), <http://www.vox.com/2015/9/21/9367327/transgender-shadi-petosky-twitter-orlando-airport>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ CIS stands for Cisgender. Cisgender identifies a person whose self-identity conforms with the gender that corresponds to their biological sex. *Cisgender*, MERRIAM-WEBSTER: DICTIONARY.

⁴⁶ Noriega, *supra* note 34.

⁴⁷ Saurav Jung Thapa, *Gender-Based Violence: Lesbian and Trans Women Face the Highest Risk But Get the Least Attention*, HUMAN RIGHTS CAMPAIGN (Nov. 30, 2015),

times the risk of [being killed] . . . than the general population of women.”⁴⁸ The FBI also started to gather data on hate crimes committed against transgenders.⁴⁹ While this research is new and only a few years have been recorded, it still shows how much work needs to be done to make sure transgender people can live safely.⁵⁰ Thousands of crimes are committed against transgenders because they are transgender.⁵¹ “[M]any states still lack LGBT-inclusive hate crime[] laws,” and law enforcement needs to “fully and accurately report incidents” where hate constitutes the basis of crime.⁵² Law enforcement officers may incorrectly categorize a lot of crimes against transgender people as “[hate crimes] based on either sexual orientation or gender,” and it is currently not mandatory to report these incidents to the FBI.⁵³

E. Stigmas and Stereotypes About Transgender People

There has been an unfortunate stigma relating to those who identify as transgender, this stigma conveys a sense of transphobia in our society and culture.⁵⁴ Especially for transgender women, who are accused of being “dangerous,” “confused men,” and “predators.”⁵⁵ Stigma has been defined as “the co-occurrence of . . . labeling, stereotyping, separation, status loss, and discrimination.”⁵⁶ The goal of using stigmas is to dehumanize a group of people and to take away their power.⁵⁷ There are three different types of stigmas: structural,⁵⁸ interpersonal,⁵⁹ and individual.⁶⁰ Interpersonal and structural stigmas are prominent in the world of law making. Both of those types of stigmas include

<http://www.hrc.org/blog/gender-based-violence-lesbian-and-trans-women-face-the-highest-risk-but-get>.

⁴⁸ *Id.*

⁴⁹ Peters, *supra* note 29.

⁵⁰ Peters, *supra* note 29.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Tanya L. Tompkins et al., *Reducing Stigma Toward the Transgender Community: An Evaluation of a Humanizing and Perspective-Taking Intervention*, 2 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 34, 35 (2015). Transphobia is defined as “emotional disgust toward individuals who do not conform to society’s gender expectations.” *Id.* at 35 (quoting D. Hill & B. Willoughby, *The Development and Validation of the Genderism and Transphobia Scale*, 53 SEX ROLES 531, 533 (2005)).

⁵⁵ *Id.* at 34.

⁵⁶ *Id.* (quoting B.G. Link & J.C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 363 (2001)).

⁵⁷ *Id.*

⁵⁸ See Jaclyn Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 SOC. SCI. & MED. 222, 222 (2015).

“Structural stigma refers to the societal norms and institutional policies that constrain access to resources . . .” *Id.* at 222-23.

⁵⁹ *Id.* at 223. “Interpersonal stigma refers to direct or enacted forms of stigma such as verbal harassment, physical violence, and sexual assault due to one’s gender identity or expression.” *Id.*

⁶⁰ *Id.* Individual stigma “includes the feelings people hold about themselves or the beliefs they perceive others to hold about them that may shape future behavior such as the anticipation and avoidance of discrimination.” *Id.*

discrimination in employment and health care, and in equal protection of the law.⁶¹ These stigmas are dangerous. Strangers and family members are harassing and assaulting transgender people because they do not conform to society's idea of what gender is and how each gender should appear.⁶² Transgender people are continuously seen as "others" and not normal.⁶³

Stigma operates as a form of "symbolic violence," in which governments, institutions, and businesses enact violence and discrimination through laws and policies that target transgenders.⁶⁴ Because gender identity or being transgender is not seen as a protected class,⁶⁵ the result is leaving transgender people without legal recourses against discrimination. Stigmas and stereotypes against transgender people are being used to support the unsubstantiated claims of the majority.⁶⁶ Some in the majority are using these stigmas to entice fear into the public in order to legalize discrimination.⁶⁷ This imposes an idea that the feelings and beliefs of the cisgender majority are more important than providing equal rights and access to resources for transgender people.⁶⁸

Many people are misinformed about transgender people, including lawmakers like South Dakota State Representative Mark Willadsen, who called transgender people "unfortunate" and suggested that transgender kids suffer from confusion.⁶⁹ South Dakota State Senator David Omdahl said of transgender people, "I'm sorry if you're so twisted you don't know who you are. . . ."⁷⁰ Senator Omdahl went on to imply that transgender people need to receive treatment for mental illnesses.⁷¹

All the information discussed so far shows why equal rights for transgender people is so important right now, and will continue to be important until all citizens are protected under the law. The issues transgender face on a daily basis is unlike anything faced by the majority of the population. It is because of those reasons: the stigmas, the violence, and the harassment; that equal rights ordinances are needed at either the city or state level to ensure protection for all.

⁶¹ *Id.*

⁶² *Id.* at 225. The author of this article has seen videos released on news stations and social media portraying a transgender women being mocked and assaulted on a subway, and another video of a young transgender boy being strangled by his own mother.

⁶³ Hughto et al., *supra* note 53, at 224.

⁶⁴ *Id.* (citing D. VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* (2007)).

⁶⁵ See Hunter, *supra* note 16, at 1529.

⁶⁶ *Id.* at 225 (citing L. Westbrook & K. Schilt, *Doing Gender, Determining Gender Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER SOC. 32, 32 (2013)).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Zack Ford, *How Lawmakers Candidly Justify the Anti-Transgender Bills They Support*, THINKPROGRESS (Feb. 8, 2016), <http://thinkprogress.org/lgbt/2016/02/08/3747263/south-dakota-transphobia-on-parade/>.

⁷⁰ *Id.*

⁷¹ *Id.*

II. THE “BATHROOM ORDINANCE” ARGUMENT

“No men in women’s bathrooms.” That is the crux of the “bathroom ordinance” argument. Government officials and the public arguing that giving transgenders the right to use the bathrooms or locker rooms of the gender they identify with will lead to a record number of assaults on women.⁷² The argument asserts that if transgender women use women’s restrooms, men will dress as women with the motive of going in and assaulting whoever they find.⁷³ Even though it is illegal for a person to go into a bathroom for the purpose of committing a crime.⁷⁴ Those who argue this position want others to believe that equal rights ordinances will permit predators to enter women’s bathrooms and assault women.⁷⁵ For some reason, this argument only focuses on the “threat” to women and girls, but not on the “threat” to men and boys.

A. Houston, Texas

The Houston City Council passed an equal rights ordinance in May 2014, that would have “banned discrimination based on sexual orientation and gender identity[,] [] [classes that are] . . . not covered by federal anti-discrimination laws.”⁷⁶ This ordinance prohibited “discrimination based on sex, race, color, ethnicity, national origin, age, familial status, marital status, . . . [] religion, disability, genetic information, and pregnancy”⁷⁷ Although these classifications receive protection at the federal level, Houston wanted to include them directly in the city code.⁷⁸ This ordinance protected citizens from discrimination in “housing, public accommodations, and private employment.”⁷⁹

The amount of signatures needed to put the ordinance to a referendum vote was received, which lead to fights in the Texas Supreme Court.⁸⁰ After the battle in the Texas Supreme Court, which required the City of Houston to reword the ballot question and send it back to the voters, the arguments against this proposed law increased.⁸¹ Dan Patrick, the Lieutenant Governor of Texas, said that: “[i]t was about protecting our grandmoms, and our mothers and our wives

⁷² See *HERO Veto Referendum*, *supra* note 11.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *HERO Veto Referendum*, *supra* note 11.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *In re Woodfill*, 470 S.W.3d 473 (Tex. 2015); *In re Williams*, 470 S.W.3d 819 (Tex. 2015). Litigants in *Woodfill* filed their case to force the City of Houston to honor the referendum vote and either repeal HERO or put HERO to a vote. *Woodfill*, 470 S.W.3d at 481. The Supreme Court of Texas agreed and told the City of Houston to honor the signatures. *Id.* In *Williams*, the Texas Supreme Court construed the language of the petition. *Williams*, 470 S.W.3d at 820. The relators contested the wording of the referendum, arguing that the city’s charter required “an up or down vote on the ordinance itself rather than a vote on its ‘repeal.’” *Id.* at 820-21. They also argued that the phrase “Houston Equal Rights Ordinance” should be removed. *Id.* The Supreme Court of Texas agreed with the relator’s first argument, but not their second argument. *Id.* at 823.

⁸¹ *Woodfill*, 470 S.W.3d at 481; See *HERO Referendum Veto*, *supra* note 11.

and our sisters and our daughters and our granddaughters . . . I'm glad Houston led tonight to end this constant political-correctness attack on what we know in our heart and our gut as Americans is not right.”⁸²

The language that appeared on the referendum ballot for HERO read: “Are you in favor of [HERO] Ord. No. 2014-530, which prohibits discrimination in city employment and city services, city contracts, public accommodations, private employment, and housing based on an individual's sex, race, color, ethnicity, national origin, familial status, marital status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy?”⁸³

On November 3, 2015, 27.45% of voters turned out to vote, the highest turnout the city since 2003; 60.97% of voters voted against HERO, while only 39.03% of voters voted in favor.⁸⁴ Although HERO was defeated, the huge business community in Houston supported HERO and what it stood for.⁸⁵

A small group of extremists used lies and scare tactics to entice voters to defeat the ordinance. Opponents launched a smear campaign to prevent the ordinance from passing, in which they called HERO the “bathroom ordinance” or the “Sexual Predator Protection Act.”⁸⁶ The opposition said their goal was to protect women and children.⁸⁷ The ordinance was described as “‘filthy, . . . disgusting[,] and . . . unsafe.’”⁸⁸ This campaign was built on bad faith and was intended to deceive voters because Jared Woodfill,⁸⁹ Dr. Steven Hotze,⁹⁰ and Pastor Ed Young⁹¹ knew they had enough influence to impact voters.⁹² All three knew that HERO had nothing to do with criminals invading restrooms, but they still used it to their advantage to make voters afraid.⁹³ And unfortunately, it worked.

The attack did not stop there. An opponent group called Campaign for Houston, made up of families and parents who oppose forcing female family

⁸² Manny Fernandez & Mitch Smith, *Houston Voters Reject Broad Anti-Discrimination Ordinance*, N.Y. TIMES (Nov. 3, 2015), http://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html?_r=0.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Houston Voters Reject*, *supra* note 12.

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ Jared Woodfill is a politician from Texas who is a former Harris County GOP Chair. David Jennings, *Jared Woodfill Asks for Your Help!*, HOUSTON CHRONICLE (June 27, 2014, 10:17 PM), <http://blog.chron.com/bigjolly/2014/06/jared-woodfill-asks-for-your-help/>.

⁹⁰ Dr. Steven Hotze is an author, radio host, and activist in the Houston GOP. Dylan Baddour, *Houston GOP Activist Steven Hotze: “Kids Will be Encouraged to Practice Sodomy in Kindergarten,”* HOUSTON CHRONICLE (July 15, 2015, 3:55 PM), <http://www.chron.com/news/politics/texas/article/Houston-GOP-activist-Steven-Hotze-Kids-will-be-enc-6386471.php>.

⁹¹ Pastor Ed Young is the Senior Pastor of Fellowship Church and has also written multiple books. Kate Shellnutt, *Texas Pastor Criticized for Live Lion During Service*, HOUSTON CHRONICLE (Apr. 10, 2012, 12:11 PM), <http://blog.chron.com/believeitornot/2012/04/texas-pastor-criticized-for-live-lion-during-service/>.

⁹² *See generally* HERO's Demise, *supra* note 10.

⁹³ *Id.*

members to “share restrooms in public facilities with gender-confused men,” launched an attack campaign against HERO as well.⁹⁴ Campaign for Houston believed that under HERO, men could call themselves “women” on a whim and use women’s restrooms whenever they wanted.⁹⁵ Going into the bathroom to assault someone has and will always be illegal.⁹⁶ The language of the ordinance expanded the level of equal right protections to sexual orientation and gender identity at the city level.⁹⁷

Signs and billboards read “NO Men in Women’s Bathrooms” all over Houston.⁹⁸ The attack continued with TV advertisements that “depicted a young girl being followed into a bathroom stall by a mysterious older man.”⁹⁹ This campaign would cause anyone with children to be fearful and it was a misleading attack focused on issues many voters are uneducated on.¹⁰⁰ The opposition focused on a fear that people bear toward transgender people and the stigma that transgender people are sick and mentally ill people who are perverted.¹⁰¹ And by focusing on an outdated stereotype and stigma that transgender women “troubled men,”¹⁰² when in reality, transgender people just want to receive the same rights as everyone else.¹⁰³ Transgenders are no different from anyone else and deserve to be treated with respect and dignity. At this point in time, no lawsuits or campaigns exist to bring back HERO.¹⁰⁴

After opponents defeated the ordinance in Houston, the Lieutenant Governor of Texas spoke with pride about voters, saying: “I want to thank the voters in the City of Houston for turning out in record numbers to defeat Houston Prop 1—the bathroom ordinance. The voters clearly understand that this proposition was never about equality—that is already the law. It was about allowing men to enter women’s restrooms and locker rooms—defying common sense and common decency.”¹⁰⁵ This law was enacted in the first place because

⁹⁴ *HERO Veto Referendum*, *supra* note 11.

⁹⁵ *Id.*

⁹⁶ See TEX. PENAL CODE ANN. § 42.07, 22.01.

⁹⁷ *HERO Veto Referendum*, *supra* note 11.

⁹⁸ Alexa Ura, *Bathroom Fears Flush Houston Discrimination Ordinance*, TEX. TRIB. (Nov. 3, 2015), <http://www.texastribune.org/2015/11/03/houston-anti-discrimination-ordinance-early-voting/>.

⁹⁹ *Id.*

¹⁰⁰ A reasonable person may not know everything about transgender people or what rights the Constitution grants to every person. Many politicians could use this to further their positions on major issues.

¹⁰¹ Tompkins et al., *supra* note 49, at 35 (citing D. Quinn, S. Kahng & J. Crocker, *Discreditable: Stigma Effects of Revealing Mental Illness History on Test Performance*, 30 PERS. & SOC. PSYCHOL. BULL. 803, 803 (2004)).

¹⁰² Justin Moyer, *Why Houston’s Gay Rights Ordinance Failed: Fear of Men in Women’s Bathrooms*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/>.

¹⁰³ See Vincent J. Samar, *A Gewirthian Framework for Protecting the Basic Human Rights of Lesbian, Gay, Bisexual, and Transgendered (LGBT) People*, in GEWIRTHIAN PERSPECTIVES ON HUMAN RIGHTS, 157, 157 (Per Bauhn ed., 2016).

¹⁰⁴ See *HERO Veto Referendum*, *supra* note 11.

¹⁰⁵ *Hero Veto Referendum*, *supra* note 11.

transgender people are continuously harassed, discriminated, and assaulted.¹⁰⁶ Transgender people need the protection of the City, and of the law. It has always been illegal for a man to enter a women's restroom for the purpose of assaulting someone; this ordinance was not going to let that become legal.¹⁰⁷ Rather, this ordinance simply would let transgender people use the restroom of the gender they identify with.

B. Fayetteville, Arkansas

It was a different story in Fayetteville, Arkansas, where voters passed the Uniform Civil Rights Protection Ordinance on September 8, 2015.¹⁰⁸ The election results for this ordinance were 52.79% of voters voted "Yes" and 47.21% "No."¹⁰⁹ This ordinance made discrimination based on sexual orientation or gender identity illegal, just like discriminating against someone based on his or her race or sex.¹¹⁰ The language from the ordinance is as follows: "The right of an otherwise qualified person to be free from discrimination because of sexual orientation and gender identity is the same right of every citizen to be free from discrimination because of race, religion, national origin, gender and disability"¹¹¹ This provided protection for the LGBT community in employment, housing, and in the use of public facilities.¹¹²

The opponents of this ordinance believed that it posed a threat to women and children from sexual predators who could now gain access to women's bathrooms.¹¹³ The main argument here, similar to Houston, was that sexual predators would abuse the ordinance to gain access to women's bathrooms.¹¹⁴ Again, this is dangerous reasoning. It incites fear and brings up a terrible stereotype that transgender people are excessively sexual and predators.¹¹⁵ When in reality, transgender people are more likely to be attacked in bathrooms, or anywhere.¹¹⁶ While the opposition's campaign was not as vicious in Fayetteville as it was in Houston, there was still a multitude of TV advertisements convince voters to vote "[n]o."¹¹⁷ Opponents also pointed to a provision in the Arkansas Constitution as evidence that this ordinance was unconstitutional and uncalled for.¹¹⁸ The Article stated that: "No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience"¹¹⁹ Fayetteville's ordinance had a better chance of passing because this is the second

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Ordinance 5781, supra* note 15.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Ordinance 5781, supra* note 15.

¹¹⁵ *Id.*

¹¹⁶ Peters, *supra* note 29.

¹¹⁷ *Ordinance 5781, supra* note 15.

¹¹⁸ *See id.*; ARK. CONST. art. 2, § 24.

¹¹⁹ ARK. CONST. art. 2, § 24.

time Fayetteville tried to enact an equal rights ordinance.¹²⁰ This time around, the City Council listened to the voters concerns and made the necessary changes to the ordinances, like lessening the penalties for a violation.¹²¹

The ordinance in Fayetteville also created the Uniform Civil Rights Protection Ordinance to monitor “allegations of discrimination.”¹²² The seven-member committee consisted of “two business representatives, two rental owner[s] and manager[s] . . . , one . . . human resource[] or employment law [expert][,] and two other [representatives] . . . , one of whom must be gay, lesbian, bisexual or transgender.”¹²³ The committee, known as the Civil Rights Commission, can only schedule hearings if mediation attempts by the City of Fayetteville fail.¹²⁴ If the Commission determines a violation has occurred a fine will be issued.¹²⁵ This committee angered the opposition as well because one member was to be a member of the LGBTQ community.¹²⁶ Opponents believed that it gave too much power to a biased group and would circumvent due process of law.¹²⁷ The goal of this ordinance is to protect members of the LGBTQ community,¹²⁸ however, it makes sense for someone from that community to sit on the committee to give a personal perspective to issues at hand. Not having an LGBTQ person on the committee might even raise due process concerns; that member should be there to give real life experiences and a voice for the LGBTQ community.¹²⁹

C. *Seattle, Washington*

The “bathroom” argument gained so much momentum that, in Seattle, even though Washington State (House Bill 2661) had an anti-discrimination bill in place since 2006 a Republican state senator is now challenging its validity.¹³⁰ House Bill 2661 was enacted for the “protection of the public welfare, health, and peach of the people of [Washington], and in fulfillment of the provision of the Constitution of this state concerning civil rights.”¹³¹ The Bill went on to include sexual orientation and gender identity as protected classes and prohibited discrimination.¹³²

However, in 2016 Senate Bill 6443 was introduced, which would eliminate the current law and prevent the Human Rights Commission from ever revisiting the subject again.¹³³ This bill would make it permissible for anyone to

¹²⁰ *Ordinance 5781*, *supra* note 15.

¹²¹ *Ordinance 5781*, *supra* note 15.

¹²² *Ordinance 5781*, *supra* note 15.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *See generally id.*

¹³⁰ Yan, *supra* note 8; *see also* WASH. ADMIN. CODE § 162-32-060.

¹³¹ *Id.*

¹³² Yan, *supra* note 8.

¹³³ Yan, *supra* note 8.

stop transgender individuals from using the restroom of their choice.¹³⁴ It is an alarming thought that suddenly the public gets to decide who can what restroom and who cannot; that someone could kick out and discriminate against someone because they are transgender.¹³⁵ An eight-year old transgender girl had this to say about Seattle's proposed law: "That's stupid. Are they trying to get me hurt?"¹³⁶

Seattle could start a trend where voters will continue to challenge other equal protection ordinances.¹³⁷ In any of the other numerous cities and eighteen states that have passed anti-discrimination ordinances, none of them have led to any sort of outbreak of sexual assaults in restrooms.¹³⁸ The direction Seattle is going is extremely frightening and would add to the already high amount of harassment transgender people face.¹³⁹

D. The "Bathroom" Argument Flows into Title IX

The "no men in women's bathrooms" argument does not stop at bathrooms. It also extends into locker rooms and school activities.¹⁴⁰ In Texas, public school superintendents voted in favor for a rule discriminating against transgender athletes.¹⁴¹ This rule would use of a student's birth certificate rather than the student's gender identity to place them on a school team or activity.¹⁴² This makes it nearly impossible for a transgender student to compete in sports, since it is already very difficult for young people to get their gender changed on their birth certificate.¹⁴³

The University Interscholastic League Transgender Rule took effect in August of 2016.¹⁴⁴ This rule is in violation of Title IX, but that did not stop the superintendents.¹⁴⁵ Title IX states that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹⁴⁶ Title IX extends beyond sports and also addresses gender-based discrimination.¹⁴⁷ Title IX protects any person from discrimination regardless of their gender identity or gender expression.¹⁴⁸ The

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *Houston Voters Reject*, *supra* note 12.

¹³⁹ *See Peters*, *supra* note 29.

¹⁴⁰ *See Lindsay Gibbs, New Texas Policy Violates Title IX by Discriminating Against Transgender Athletes*, THINKPROGRESS (Feb. 29, 2016), <http://thinkprogress.org/sports/2016/02/29/3754750/texas-trans-student-athletes-title-ix/>.

¹⁴¹ *Lindsay Gibbs, New Texas Policy Violates Title IX by Discriminating Against Transgender Athletes*, THINKPROGRESS (Feb. 29, 2016), <http://thinkprogress.org/sports/2016/02/29/3754750/texas-trans-student-athletes-title-ix/>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See UIL*, Subchapter J, § 360.

¹⁴⁵ *See Id.*; *see also* 20 U.S.C. § 1681(a).

¹⁴⁶ 20 U.S.C. § 1681(a).

¹⁴⁷ *Title IX: The Basics*, KNOW YOUR IX, www.knowyourix.org/basics/ (last visited Sep. 26, 2016).

¹⁴⁸ *Id.*

Superintendents are taking direct steps to discriminate against students because of their gender identity.¹⁴⁹ Schools are supposed to take steps to address discrimination, violence, and harassment, not create situations of discrimination against its own students.¹⁵⁰ Title IX was enacted to protect individuals from sex-based discrimination in federally funded educational programs and activities.¹⁵¹ And in April 2014, the Department of Education Office for Civil Rights issued a document clarifying a school's obligation under Title IX, which included an extension of protection for transgender students from discrimination in education.¹⁵²

Moving past these stigmas will allow our society to become more inclusive of transgenders and pass policies that are non-discriminatory and provide equal protections in employment, housing, health care, and public facilities.¹⁵³ We cannot overcome these stigmas and stereotypes unless our government officials, school officials, and other leaders step up to protect citizens and students.

III. THE RELIGIOUS ARGUMENT

Freedom of religion is one the most fundamental rights in America.¹⁵⁴ Religion, morals, and common decency constitute the core of another argument to deny transgender people equal rights.¹⁵⁵ Religious freedom should not give people an automatic right to discriminate against others. This argument spans a range of religious motives and refuses to give into a political correctness agenda.¹⁵⁶ But, criminalizing behavior is not sufficient enough to establish that a type of behavior should actually be criminal.

A. Religious Leaders

Some religious leaders believe that personal religion-based arguments are illogical when it comes to discriminating against others.¹⁵⁷ For example, Reverend Will Reed, a pastor at Servants of Christ United Methodist Church, recognized the concerns people expressed, but believes that people should “treat[] others the way we want to be treated”¹⁵⁸ Other religious leaders,

¹⁴⁹ See Gibbs, *supra* note 111.

¹⁵⁰ See *Id.*

¹⁵¹ See Title IX: *The Basics*.

¹⁵² Bryk, *supra* note 7, at 752.

¹⁵³ See Title IX: *The Basics*, *supra* n.147.

¹⁵⁴ See U.S. CONST. amend. I.

¹⁵⁵ *Houston Anti-Discrimination HERO Veto Referendum, Proposition 1 (November 2015)*, BALLOTPEdia, [https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum_Proposition_1_\(November_2015\)](https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum_Proposition_1_(November_2015)) (last visited Sep. 15, 2016) [hereinafter *HERO Veto Referendum*].

¹⁵⁶ *Id.*

¹⁵⁷ *HERO Veto Referendum*, *supra* note 11.

¹⁵⁸ *Id.*

however, are at the front of this religious crusade against equal rights.¹⁵⁹ This argument was prominent in the bills recently passed by the North Carolina and Mississippi legislatures.¹⁶⁰ The law in Mississippi is called the “Protecting Freedom of Conscience from Government Discrimination Act,” but is more commonly known as the “Religious Freedom Act.”¹⁶¹ Supporters of these types of anti-LGBT bills, who identify as Christians or as other peoples of faith, believe the bills are necessary because they feel that the Supreme Court disowned their religions in *Obergefell*.¹⁶² The Governor of Mississippi said that the bill “merely reinforces the rights which currently exist to the exercise of religious freedom as stated in the First Amendment”¹⁶³ There is, however, a way that we can balance religious freedom and protect transgender people from discrimination at the same time.

B. *The Religious Exemption under Title IX*

The scope of Title IX has been expanding since its enactment due to the need for protection against discrimination for categories of people.¹⁶⁴ But, on the other hand, the religious exemption within Title IX has also been “liberally granted.”¹⁶⁵ Unlike Title VII, which deals with discrimination in employment where the religious exemption has been interpreted narrowly,¹⁶⁶ however, under Title IX, a religious institution merely needs to show that complying with Title IX is inconsistent with its religious beliefs to receive a religious exemption.¹⁶⁷ Religious institutions continue to deny transgender students of faith a religious education because of how broadly courts interpret the religious exemption under Title IX.¹⁶⁸ When a religious institution accepts federal funding, like any other educational institution, it needs to follow the same laws.¹⁶⁹ Title IX was enacted

¹⁵⁹ See Avianne Tan, *Mississippi’s Religious Freedom Bill: What to Know About the New ‘Sweeping Anti-LGBT Law,’* ABC NEWS (Apr. 6, 2016, 2:44 PM), <http://abcnews.go.com/US/mississippi-religious-freedom-bill-sweeping-anti-lgbt-law/story?id=38170420>, 2 (last visited April 20, 2016).

¹⁶⁰ Avianne Tan, *Mississippi’s ‘Religious Freedom’ Bill: What to Know About the New ‘Sweeping Anti-LGBT Law,’* ABC NEWS (Apr. 6, 2016, 2:44 PM), <http://abcnews.go.com/US/mississippi-religious-freedom-bill-sweeping-anti-lgbt-law/story?id=38170420>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Amanda Bryk, *Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students Under Title IX*, 37 CARDOZO L. REV. 751, 761 (2015).

¹⁶⁵ *Id.* at 778.

¹⁶⁶ *Id.* at 774.

¹⁶⁷ *Id.* at 777.

¹⁶⁸ *Id.* at 783-84.

¹⁶⁹ *Id.* at 753 n.7 (citing Mitch Smith & Monica Davey, *Illinois District Violated Transgender Student’s Rights*, U.S. SAYS, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/us/illinois-district-violated-transgender-studentsrights-us-says.html>).

to protect students from discrimination,¹⁷⁰ and the religious exemption threatens this goal.

C. Arguments at the City Level

Campaign for Houston continued their argument against HERO by saying that it limited free speech and freedom to exercise religion.¹⁷¹ Allowing transgender people to have basic rights, however, does not interfere with someone's freedom to exercise their religion. This argument is very similar to the religious argument used to undermine the gay rights movement and the one that was very prominent when *Obergefell* came down from the Supreme Court.¹⁷² But, the Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁷³ Denying transgender people equal protection just because somebody's religion prohibits the lifestyle of transgender people directly contradicts the Equal Protection Clause.

In Fayetteville, Arkansas, voters instead approved an equal rights amendment.¹⁷⁴ The opposition still unleashed an attack campaign against allowing an equal rights ordinance.¹⁷⁵ Opponents believed that this ordinance was a threat to personal freedom of religion.¹⁷⁶ They further argued that equal rights protections "could be used to deny constitutional rights to freedom of religion and persecute business owners for operating according to their consciences."¹⁷⁷

This argument resembles the arguments in *Burwell v. Hobby Lobby*, where Hobby Lobby argued that the Religious Freedom Restoration Act of 1992 (RFRA), which prohibits the government from substantially burdening a person's exercise of religion, allowed Hobby Lobby to refuse to pay for birth control for their employees.¹⁷⁸ In *Hobby Lobby*, the Supreme Court agreed with Hobby Lobby that for-profit corporations could use RFRA to refuse government requirements that circumvent their religious principles.¹⁷⁹

Those people that use religion to deny transgender people equal rights use the same idea—that the government cannot force them to accept something that goes against their religious beliefs.¹⁸⁰ However, equal protection laws do not force people to provide contraception to their employees, nor force a pastor to perform a gay marriage; they just let transgender people live their lives without fear. Constitutional rights are rights that people acquire from birth.¹⁸¹

¹⁷⁰ Bryk, *supra* note 7, at 752.

¹⁷¹ *Hero Veto Referendum*, *supra* note 11.

¹⁷² Michael Stokes Paulsen, *The Wreckage of Obergefell*, 256 FIRST THINGS 33, 36 (2015).

¹⁷³ U.S. Const. amend. XIV, § 1.

¹⁷⁴ *Ordinance 5781*, *supra* note 15.

¹⁷⁵ *Ordinance 5781*, *supra* note 15.

¹⁷⁶ *See Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

¹⁷⁹ *Id.* at 2785.

¹⁸⁰ *Ordinance 5781*, *supra* note 15.

¹⁸¹ James D. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 790 (2009).

Transgender people deserve equal protection under the law; religious beliefs should not stop that.

There is more than one type of religion in our country, thanks to the First Amendment, and the freedom to express that religion is important.¹⁸² But, no correlation exists between the right to express one's religion and the ability to discriminate against people based on their sexual orientation or gender identity.

D. *The Free Exercise Clause*

The Free Exercise Clause of the First Amendment proclaims that "Congress shall make no law . . . prohibiting the free exercise [of religion]" ¹⁸³ "[T]he Free Exercise Clause protects individuals from government infringement on . . . personal religious beliefs and practices" ¹⁸⁴ The goal of The Free Exercise Clause is to "allow for religious pluralism and tolerance of . . . [a variety or religions] by protecting individuals' freedom to pursue personal religious beliefs" ¹⁸⁵ However, enacting equal protection laws does not infringe on an individual's right to freely practice their religion. There is a difference between someone stating "I cannot do that, it's against my religion" and "you cannot do that, it's against my religion."

In order for an individual to win a free exercise claim, he or she must show a substantial burden on his or her exercise of religion.¹⁸⁶ Further, that person must demonstrate a "government action[[]], pressuring him or her to commit an act forbidden by the religion[,] or preventing him or her from engaging in conduct or having a religious experience" ¹⁸⁷ Based on that reasoning, it is inadequate for a person to claim that a government action subjectively goes against that person's religious behavior.¹⁸⁸ "Chilling effects are . . . not objectively discernable and are therefore not constitutionally cognizable."¹⁸⁹ Moreover, the First Amendment does not protect people against discriminatory harassment.¹⁹⁰ A person cannot discriminate against another because they find their behavior subjectively offensive.¹⁹¹ Therefore, the argument that equal protection laws interfere with a person's freedom to express their religion is an inadequate argument and will most likely not stand in a courtroom.¹⁹²

¹⁸² See U.S. CONST. amend I.

¹⁸³ U.S. CONST. amend. I.

¹⁸⁴ Gretchen Adel Myers, *Allowing for Cultural Discussion of Queerness and Pansexuality: Sex/Gender/Sexual Belief Systems, The Religion Clauses, and the Ideal of Pluralism*, 38 STETSON L. REV. 409, 442 (2009).

¹⁸⁵ *Id.*

¹⁸⁶ George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 583 (2007).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 583-84.

¹⁸⁹ *Id.* at 584 (quoting *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1395 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994)).

¹⁹⁰ *Id.* at 604.

¹⁹¹ *Id.* (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

¹⁹² See *Id.*

IV. THE SOLUTION—WHAT CAN WE DO?

Freedom and equality are sacred human desires.¹⁹³ Freedom and equality are characteristics built into our country. Yet, inequality still ravages our country.¹⁹⁴ In the twenty cities and eighteen states that have equal rights laws, there has been no report of bathroom assaults performed by transgenders or by men masquerading as transgender.¹⁹⁵ Arguments based on the premise that transgender women are really just dangerous men playing “dress-up” simply lack any factual basis.¹⁹⁶ More and more petitions are being raised to repeal equal rights; calling these laws “dangerous legislation that could give a man — including a sexual predator, rapist, or child molester—the right to be in a women’s restroom”¹⁹⁷ There are steps supporters of equal rights can take to stop anti-LGBTQ laws.

A. *Attack the Attack Campaigns—Statistically and Economically*

Getting over these false, yet persuasive, arguments will be a huge obstacle for proponents to overcome.¹⁹⁸ In Houston, supporters for HERO ran a very polite campaign compared to their counterparts.¹⁹⁹ However, polite civil rights campaigns lack effectiveness against such harsh attacks.²⁰⁰ HERO supporters never adopted the scare tactics used by their ideological opponents.²⁰¹ Maybe if there was more of an effort to disprove the idea that equal protection will allow men to enter women’s bathrooms, it could illustrate to opponents that citizens will not be affected by the baseless fear mongering that is still present in our society. Proponents should use the statistics from the cities and states that expanded equal rights to protect transgenders to show to voters that there is no truth to the assertion of an increase in bathroom assaults.²⁰²

The second way to attack anti-LGBT bills is the economic repercussions that occur when discriminatory bills are passed. Recently in North Carolina, a dangerous law, called House Bill 2, has been passed that forces transgender people to use the bathroom for their birth-assigned gender and overrides any local LGBTQ nondiscrimination ordinances.²⁰³ Governor McCrory called this piece of

¹⁹³ See *Obergefell*, 135 S. Ct. at 2593.

¹⁹⁴ See *Id.*

¹⁹⁵ Dominic Holden, *Why America’s Top LGBT Group is Losing an Argument Over Bathrooms*, BUZZFEEDNEWS (Dec. 22, 2015, 10:55 AM), <http://www.buzzfeed.com/dominicholden/hrc-bathroom-strategy#.nbQ86DRYb>.

¹⁹⁶ See *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *HERO Veto Referendum*, *supra* note 11.

¹⁹⁹ See *HERO Veto Referendum*, *supra* note 11.

²⁰⁰ See *Id.*

²⁰¹ See *Id.*

²⁰² See Brynn Tannehill, *Debunking Bathroom Myths*, HUFFINGTON POST (Nov. 28, 2015, 8:29 AM), http://www.huffingtonpost.com/brynn-tannehill/debunking-bathroom-myths_b_8670438.html.

²⁰³ Dominic Holden, *North Carolina Enacts Law to Allow LGBT Discrimination*, BUZZFEEDNEWS (Mar. 23, 2016, 12:28 PM), http://www.buzzfeed.com/dominicholden/north-carolina-lgbt-discrimination?utm_term=.yvYwOXzJ0#.dcGK6Oadl.

legislation “bipartisan,” even though Senate Democrats walked out of the vote.²⁰⁴ Governor McCrory believes that this legislation will “stop the breach of basic privacy and etiquette, [and] ensure privacy in bathrooms and locker rooms.”²⁰⁵ He also emphasized the need to protect women and others from transgender people.²⁰⁶

There has been immense backlash because of North Carolina’s actions; companies threaten to leave, the American Civil Liberties Union and other advocacy groups have filed a lawsuit, musicians have canceled shows, and San Francisco has toyed with the idea of banning travel to North Carolina.²⁰⁷ Due to this backlash, Governor McCrory issued an Executive Order that lessened the harshness of House Bill 2.²⁰⁸ This Executive Order stated that employers and businesses had the right to implement their own bathroom policies.²⁰⁹ North Carolina may start to suffer economically because of the radical steps the state legislature has taken.²¹⁰ The state is losing business and economic opportunities that ultimately affect its citizens.

House Bill 2 makes it mandatory for someone who transitioned into a man to use the women’s restroom.²¹¹ Most recently North Carolina has been sued by the Department of Justice for violating the Civil Rights Act, Governor McCrory instead of repealing the anti-LGBTQ law sued the Department of Justice back.²¹² The Department of Justice explained that House Bill 2 could not be enforceable because it violates “protections barring workplace discrimination based on sex.”²¹³ Repeating a lie over and over does not make it true. The violence transgender people face continues to rise,²¹⁴ and laws like the one in North Carolina will continue to fuel this trend.²¹⁵ However, Alliance Defending Freedom, a religious legal group, praised North Carolina for taking the steps to prioritize “privacy rights and safety of North Carolina citizens” and to stop a “special interest group[] that desire[s] to impose their agenda to create a

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Margaret Chadbourn, *ACLU Sues Over Controversial North Carolina Transgender Bathroom Law*, YAHOO! NEWS: GOOD MORNING AM. (Mar. 28, 2016, 12:43 PM), <https://gma.yahoo.com/aclu-sues-over-controversial-north-carolina-transgender-bathroom-152040012--abc-news-topstories.html>.

²⁰⁸ See N.C. Exec. Order No. 93 (Apr. 12, 2016).

²⁰⁹ *Id.*

²¹⁰ See Chadbourn, *supra* note 150.

²¹¹ See Holden, *supra* note 146.

²¹² *US government: North Carolina LGBT law Violates Civil Rights*, YAHOO! NEWS (May 4, 2016), <https://www.yahoo.com/news/us-government-north-carolina-lgbt-law-violates-civil-201924529.html>.

²¹³ *Id.*

²¹⁴ *National Report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Communities*, NATIONAL COALITION ANTI-VIOLENCE PROGRAMS (June 9, 2015), http://www.avp.org/storage/documents/Reports/MEDIARELEASE_2014_NCAVP_HVREPORT.pdf.

²¹⁵ See Holden, *supra* note 146.

genderless society.”²¹⁶ If North Carolina continues to enforce this bill, the state may lose millions of dollars in federal funding.²¹⁷

B. Hypocrisy Within the “Bathroom” Argument

The Human Rights Campaign and other transgender rights groups should begin to put transgender people at the front of the campaign. Let the public hear the stories of the harassment and discrimination they face on a daily basis.²¹⁸ All transgender people want is privacy, dignity, and respect just like everyone else.²¹⁹

To point out that by not allowing transgender people to use the bathroom corresponding with their self-identified genders is doing exactly what “the bathroom ordinance” argument does not want to happen by forcing people who dress and act like one gender to use a restroom designated for people of another gender.²²⁰ This seems to create an even bigger problem than “the bathroom ordinance” argument, and yet it is not being discussed the problem. Those who argue so adamantly against having “men in women’s restrooms” fail to recognize that passing anti-LGBTQ bills will place men in women’s restrooms.²²¹ Going to the bathroom is a private event and citizens should not police bathrooms to make sure each person using the bathroom has the appropriate genitals.

C. Mandatory Reporting of Hate Crimes

To get a better picture on what exactly transgender people are suffering and fighting against, reporting hate crimes needs to be mandatory.²²² There needs to be a complete picture so that we can better protect every citizen and give every citizen the right to be protected.²²³ The statistics cited and discussed above do not paint a complete picture of what is happening in society.²²⁴ Not every crime is accurately categorized as a hate crime, and even then not all hate crimes get reported to the FBI.²²⁵ Under the Uniform Crime Reports, the FBI has partnered with 18,000 universities, county, state, tribal, and federal law enforcement agencies to gather crime statistics.²²⁶ Yet, the agencies partnered with the FBI with Uniform Crime Reports voluntarily report data on crimes brought to their attention.²²⁷ The hate crime section of the Uniform Crime Reports was created when Congress passed the Hate Crime Statistics Act; the purpose of this Act was to collect data about “crimes that manifest evidence of prejudice based on race,

²¹⁶ Holden, *supra* note 146.

²¹⁷ *See Id.*

²¹⁸ Holden, *supra* note 146.

²¹⁹ *See* Holden, *supra* note 146.

²²⁰ Tannehill *supra* proposed note 145.1.

²²¹ *See id.*

²²² *See* Peters, *supra* note 29.

²²³ *See id.*

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *Uniform Crime Reports*, FBI, https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/resource-pages/aboutucr_final.

²²⁷ *Uniform Crime Reports*.

religion, sexual orientation, or ethnicity.”²²⁸ To better conform to the purpose Congress set out when it passed this Act, reporting hate crimes needs to include those crimes being committed due to gender identity and should be mandatory for all law enforcement agencies.

In order to amend this issue, there should be training programs for law enforcement to make sure that officers can identify and look for characteristics of what constitutes a hate crime and which category of hate crime it is.²²⁹ After that, the next step should be to make reporting those crimes categorized as hate crime mandatory to the FBI.²³⁰ This will help ensure that there is a full picture of violent patterns against transgender people and what can be done to alleviate how many crimes are occurring.²³¹

D. *Education and Understanding*

The most important thing to do to begin to resolve this issue our society faces is to educate people. Education will help citizens to see and understand that transgender people are not sexual predators; that they are not men dressing up as women to prey on others; that transgender people need to be able to use the restroom and other public accommodations safely.²³² Moreover, education will increase the understanding that passing an anti-discrimination ordinance does not give anyone a defense for entering a restroom to harass someone or to commit a crime.²³³

It is not just the general public that needs additional education, but members of law enforcement also need additional education and training.²³⁴ What must be emphasized is that a man entering a women’s bathroom to upset women, make them uncomfortable, or assault them is absolutely not protected under an equal rights law.²³⁵ These laws protect those who actually identify as transgender.²³⁶ If people become more educated about transgenders and what it means to be someone who identifies as transgender, then society can better understand and become more accepting of each other.²³⁷

Unless we educate society that not all women conform to society’s commonly-held ideals about gender, women who identify as a woman but defy societal norms will be followed into bathrooms by men to ensure that they are

²²⁸ *Id.*; 28 U.S.C. § 534.

²²⁹ *See Id.*

²³⁰ *See Id.*

²³¹ Peters, *supra* note 29.

²³² *See Id.*

²³³ *See Id.*

²³⁴ *See Id.*

²³⁵ Zack Ford, *No, Transgender Protections Do Not Justify Men in Women’s Restrooms. A State Agency Just Said So*, THINKPROGRESS (Feb. 29, 2016), <http://thinkprogress.org/lgbt/2016/02/29/3754688/washington-transgender-protections/>.

²³⁶ *Id.*

²³⁷ *See Id.*

women.²³⁸ This has already occurred with these new anti-LGBTQ laws in Mississippi and North Carolina.²³⁹

E. *Make Gender Identity a Protected Class*

Gender identity needs to be given a heightened scrutiny level of classification when it comes to laws regulating gender identity and their rights. Having this heightened scrutiny will give a more precise and detailed inquiry into whether these laws have a legitimate justification besides the moral conventions of a facet of people.²⁴⁰ If a state wants to pass a law that infringes on a protected classes rights then the state must show that the law furthers an important government interest by means that are substantially related to that interest.²⁴¹ This standard is intermediate scrutiny and it already applies to gender classifications and should now be expanded to include gender identity.²⁴²

When this occurs then what happened in Mississippi and North Carolina will not be so easily passed. It will be hard for a state to use personal religious freedom as an important government interest to infringe upon the rights of a protected class.²⁴³ It will also be difficult for a state to use misinformation about bathrooms to pass these laws without the statistics to show there is an issue that needs to be resolved by the government.²⁴⁴

IV. CONCLUSION

Houston was the worst-case scenario on what happens when a city tries to protect all its citizens but the voters react with fear, hatred, and misunderstanding.²⁴⁵ It is time that society grows from this and remedies the mistakes. There is still a long way to go but the future is hopeful. History repeats itself and we find ourselves in the middle of a new turning point and stepping stone in making our society better and much safer for everyone.

These equal protection laws are important. These protections do not require a person to change their beliefs, but rather ensure equal treatment for everyone and to be free from discrimination.²⁴⁶ Confusion or anxiety should not justify discrimination in any aspect of life. No threat from transgender people exists and anti-LGBTQ bills punish an innocent group of people.²⁴⁷ The argument that equal protection laws will allow predators to go into bathrooms to assault

²³⁸ *See Id.*

²³⁹ *See Id.*

²⁴⁰ *See Hunter, supra* note 16, at 1534.

²⁴¹ *Craig*, 429 U.S. at 199.

²⁴² *Id.*

²⁴³ *See Id.*

²⁴⁴ *See Id.*

²⁴⁵ *HERO Veto Referendum, supra* note 11.

²⁴⁶ *Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964*, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm> (last visited Sep. 26, 2016).

²⁴⁷ Brynn Tannehill, *Debunking Bathroom Myths*, HUFFINGTON POST (Nov. 28, 2015, 8:29 AM), http://www.huffingtonpost.com/brynn-tannehill/debunking-bathroom-myths_b_8670438.html.

people makes no sense. A predator is not going to be able to use equal protection ordinances as a defense for their crimes.²⁴⁸ Religion also cannot be misused in order for people to freely discriminate against transgender people.²⁴⁹ Gender identity is not optional and it needs to receive protection under the law.

Anti-LGBT laws are going to continue to be passed unless supporters take a stand and stop blatant discrimination. As Andreja Pejic, a transgender model states: “I would like them to understand that we are people. We’re human beings, and this is a human life. This is reality for us, and all we ask for is acceptance and validation for what we say that we are. It’s a basic human right.”²⁵⁰

²⁴⁸ *See Id.*

²⁴⁹ HERO Veto Referendum, *supra* note 11.

²⁵⁰ Katharine Zarrella, *Andreja Pejic is in Her Own Skin for the Very First Time*, VOGUE (July 24, 2014, 7:00 PM), <http://www.vogue.com/13268577/model-andreja-pejic-sex-reassignment-surgery/>.