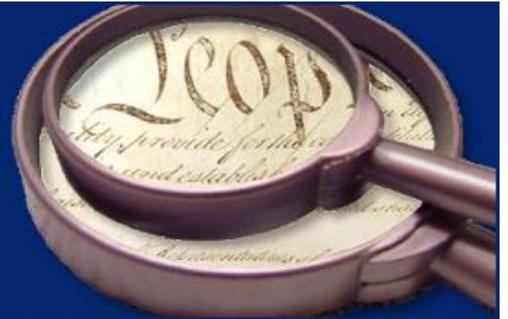




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Issue Brief

**The Transgender Tipping Point:
An Overview for the Advocate**

By Dr. Jillian T. Weiss

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The Transgender Tipping Point: An Overview for the Advocate

Dr. Jillian T. Weiss*

Time Magazine recently declared “The Transgender Tipping Point,” asserting that “another social movement is poised to challenge deeply held cultural beliefs.”¹ Until recently, however, transgender people have remained relatively hidden from public consciousness, due in part to the severe stigma against them. They have largely been regarded as strangers to the law, and are often without legal protection because of their transgender identity. Though there have been great strides in providing that protection under the current Administration, the conservative nature of law means it will take years to change the legal regime that routinely withholds rights from transgender people, and progress may be reversed if politics takes a turn to the right. Therefore, it is crucial that progressive advocates act now to advance and consolidate these civil rights gains for transgender people.

Estimates suggest there are approximately 15 million transgender people in the world today, with about 700,000 located in the United States. Transgender refers to people whose gender identity (internal sense of gender) or whose gender expression (social gender characteristics) is not that traditionally related to the sex they² were assigned at birth.³ Examples of well-known transgender people today include Chaz Bono, Laverne Cox and Janet Mock. Transgender identity is not a new phenomenon, and there is a long history of transgender communities reaching into prehistory.

* Dr. Jillian T. Weiss has a J.D. and a Ph.D. in Law, Policy & Society. Currently Professor of Law and Society at Ramapo College of New Jersey, her research area is gender identity and law. She has authored over 50 academic publications, presentations and other scholarly works, as well as approximately 40 articles and interviews for media organizations including The New York Times and Associated Press. Dr. Weiss provides legal representation to transgender employees in cases involving gender identity and gender expression discrimination. She also consults with private and public organizations regarding gender identity policy and employee gender transitions, including Harvard University, Boeing and New York City. Her volunteer work includes serving as a member of the Board of Directors of Lambda Legal, the oldest and largest U.S. national legal organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and policy work. She is also Chair of the annual Transgender Law Institute, currently held at the National LGBT Bar Association’s annual Conference.

¹ Katy Steinmetz, *The Transgender Tipping Point*, TIME MAGAZINE (May 29, 2014), <http://time.com/135480/transgender-tipping-point/>.

² While the pronoun “they” is traditionally used only to relate to a plural antecedent in standard English, some transgender people choose to use “they” in preference to the gendered pronouns “he” or “she.” Others prefer gender-neutral pronouns such as “ze” and “hir.” (To those who object that such pronouns sound disturbingly odd, note that the same objection was raised regarding the title “Ms.” when it was first introduced, but that objection is no longer considered valid.) However, most use standard pronouns to refer to their gender identity.

³ *Transgender* is an “umbrella” term that includes: people who receive medical treatment in aid of sex reassignment from that assigned at birth; those who identify as a sex different from birth assignment without medical treatment; those who consider themselves “gender non-conforming;” and those who live part-time or dress part-time in a different gender role. Many terms are used to refer to transgender persons, such as transsexual, cross-dresser, and neutrois (non-binary gender). The meaning of transgender is ambiguous, because different portions of the community attribute various shades of meaning to it. For further discussion, *see* Section C of this article, “Ethical Considerations.”

Until recently, transgender people have been considered strangers to the law, not entitled to protection from discrimination based on their gender identity or expression. Discrimination against transgender people has long been rampant in all areas of public and private life, including employment, education, housing, credit, public accommodations, child custody, out-of-home care for youth, incarceration, health care and marriage.⁴ When transgender people attempted to use laws for protection, courts told them that the state recognized only their sex assigned at birth, and legislators did not intend to protect them. However, this situation is changing, due in part to the willingness of some judicial officials to recognize that interpretations of law that exclude transgender persons from relief are incorrect and unjust.

This Issue Brief will review the changing landscape of law that can be used to protect transgender people. While the issues herein are novel and interesting on a theoretical level, the importance of this Brief lies in the practical use that advocates who are new to the issue can make of it to help transgender people. The intense suffering of many transgender people, particularly people with low income and people of color, cries out for relief. The emphasis here is on reference to information that can be used to demonstrate the existence of rights. Keep in mind that there are decades of legal decisions holding that transgender people have no protection, and these decisions will not be reviewed in detail. The following sections review selected changes in law regarding civil rights, government relations, health care and marriage. The brief finishes with a discussion of ethical considerations in transgender advocacy.

I. The Meaning of Sex has Expanded to Include Gender and Gender Identity

There has been a change in the social understanding of sex over the past sixty years, and this has led to transgender people receiving increased legal protection. Early judicial opinions from the 1970s and 1980s said that transgender people did not receive protection from sex discrimination because sex discrimination then referred only to discrimination based on being a male or female, which was distinguished from a change in sex. For example, in *Ulane v. Eastern Airlines*,⁵ the U.S. Court of Appeals for the Seventh Circuit held, on this basis, that an airline pilot who alleged that she was fired because of transsexual status had no cause of action under the federal Civil Rights Act of 1964 (often referred to as “Title VII”). However, over time, the meaning of the term sex has been increasingly interpreted to include gender and gender identity.⁶

⁴ See generally GRANT, JAIME M., LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN, AND MARA KEISLING, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY*, (2011). This study found that transgender people were four times more likely to live in extreme poverty, had double the general rate of unemployment, and nearly all (90%) experienced discrimination at work. Most reported harassment in school (78%) and a significant number left school because of harassment (15%). Many transgender people experienced homelessness because of housing discrimination (19%), while 53% experienced harassment in places of public accommodation, 22% were denied equal treatment by a government agency or official, 29% reported police harassment, 19% were refused medical care, 57% reported significant family rejection, and 41% reported attempting suicide, a rate 25 times higher than the general population.

⁵ 742 F.2d 1081 (7th Cir. 1984).

⁶ Jillian T. Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is The “Plain Meaning” of “Sex” In Title VII Of The Civil Rights Act Of 1964?* 18 Temp. Pol. & Civ. Rts. L. Rev. 573, 597-617 (2009) (using shifting historical meanings to argue that sex includes gender and gender identity). While gender is often used interchangeably with sex in court decisions, it is generally agreed among academics that gender is now used to refer discretely to the social, psychological and behavioral elements of sex.

In 1989, in the case of *Price Waterhouse v. Hopkins*, the U.S. Supreme Court held that penalizing an individual for failing to conform to gendered norms of behavior constitutes a form of sex-based discrimination.⁷ This development was first recognized by an appellate court in 2000, in the decision of the U.S. Court of Appeals for the Ninth Circuit in *Schwenk v. Hartford*.⁸ There, a transsexual prisoner filed a civil rights suit against a male prison guard, seeking damages as a result of the guard's alleged attempted rape of the plaintiff under the federal Gender Motivated Violence Act.⁹ The Court noted that "*Ulane* has been overtaken by the 'logic and language of *Price Waterhouse*' and that Title VII prohibits discrimination based on 'sexual identity,' not just based on biological sex." In its 2008 decision in *Schroer v. Billington*, the U.S. District Court for the District of Columbia dismissed the spurious distinction between sex and change of sex.¹⁰ The Court noted that Title VII also included protection from religious discrimination, and that "no court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a change of religion." This developing understanding of sex as a term of art has opened the door to transgender people claiming rights based on laws referring to sex. Because the case law regarding many of the areas discussed below is less developed, the voluminous case law under Title VII should be referenced as analogous.

II. Substantive Issues

A. Civil Rights

1. Employment

Laws protecting transgender people from employment discrimination based on gender identity or expression have been passed in 18 states at the time of this writing.¹¹ A few other states have court rulings holding that transgender employees are included in other protected categories, such as sex or disability.¹² Over 140 municipalities have laws prohibiting employment discrimination based on gender identity. Examples of cities with strong laws include New York City, San Francisco and D.C.

While Title VII contains no specific protection for gender identity or expression, it has been interpreted by the U.S. Courts of Appeals for the Sixth and Eleventh Circuits as providing

⁷ 490 U.S. 228 (1989).

⁸ 204 F.3d 1187 (9th Cir. 2000).

⁹ 42 U.S.C. §13981(c).

¹⁰ 577 F. Supp. 2d 293 (D.D.C. 2008).

¹¹ These are California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maryland, Massachusetts, Maine, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont and Washington.

¹² See, e.g. *Jane Doe v. Electro-Craft Corp.*, No. 87-B-132 (N.H. Sup. Ct. 1988) (construing "sex"); *Buffong v. Castle on the Hudson*, 824 N.Y.S.2d 752 (N.Y. Sup. 2005) (construing *sex*); *Shepley v. Lazy Days RV Center, Inc.*, FCHR Order No. 06016 (Fla. Comm. Hum. Rel. 2006) (Fla. Human Relations Act) (construing *sex*); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (W.D. Pa. 2006) (construing *sex*). See also *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (N.J. Super. 2001) (construing disability.) There is controversy about assertion of disability causes of action. See Section C below, "Ethical Considerations." Also, note that the federal Americans with Disabilities Act (ADA) contains a specific transgender exclusion, except for gender identity disorders resulting from physical impairments.

protection for employment discrimination based on transgender status.¹³ Many federal district courts have held similarly. The U.S. Equal Employment Opportunity Commission (EEOC) has held that its offices and staff should interpret Title VII to include discrimination based on transgender status.¹⁴ Significantly, the EEOC decision held that there is no distinction between sex discrimination and gender stereotyping causes of action, and that discrimination based on gender identity or expression is *per se* sex discrimination. A recent federal executive order, enforceable through the Office of Federal Contract Compliance, prohibits discrimination by federal contractors based on gender identity or expression.¹⁵

It should be noted that some state and municipal laws offer less attractive enforcement mechanisms and remedies, and federal law may provide more relief. In addition, the EEOC has listed transgender issues as a priority area in its most recent strategic enforcement plan at the time of this writing, and has been more active in enforcement in this area than many state and municipal administrative bodies. Therefore, advocates for transgender persons should research which jurisdiction offers the best chance of relief for a transgender employee experiencing discrimination.

There are additional protections for public employees. The U.S. Court of Appeals for the Eleventh Circuit found that discrimination against a public employee based on transgender identity violates the Equal Protection Clause of the U.S. Constitution.¹⁶ There is also a line of cases finding that discrimination against public employees based on sexual orientation violates constitutional rights, and these are likely applicable to gender identity or expression as well.¹⁷ A federal executive order specifically prohibits discrimination against federal public employees based on gender identity or expression,¹⁸ and some states have similar orders.¹⁹ The federal Merit Systems Protections Board also provides protections for transgender federal civil service employees through the Office of Special Counsel.

2. Education

Transgender young people often experience several issues in education, including bullying in school, school discipline for gender expression, an unwillingness of school authorities to permit or acknowledge gender transition, and participation in gendered sports. There are anti-bullying laws and policies in many states,²⁰ and many of these explicitly include gender identity or expression.²¹ The U.S. Department of Education Office for Civil Rights promulgated a “significant guidance document” in 2014, specifically stating that transgender

¹³ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

¹⁴ *Macy v. Holder*, Appeal No. 0120120821 (E.E.O.C. Apr. 20, 2012).

¹⁵ Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 23, 2014).

¹⁶ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

¹⁷ See, e.g., *Miguel v. Guess*, 112 Wn. App. 536, 51 P.3d 89 (2002) (equal protection); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (First Amendment).

¹⁸ Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 23, 2014).

¹⁹ See Exec. Order No. 8 (Del. 2009); Governor’s Policy Statement (Ind. April 26, 2005); Exec. Order No. 07-24 (Kan. 2007); Exec. Order No. 2008-473 (Ky. 2008); Exec. Order No. 2007-24 (Mich. 2004); Exec. Order No. 33 (N.Y. 2011); Exec. Order No. 2003-10 (Pa. 2003); Exec. Order No. 1 (Va. 2014).

²⁰ See generally STOP BULLYING, <http://www.stopbullying.gov/> (last visited Oct. 31, 2014).

²¹ THE HUMAN RIGHTS CAMPAIGN, STATEWIDE SCHOOL ANTI-BULLYING LAWS & POLICIES (2014).

students are protected from violence in schools by Title IX of the United States Education Amendments of 1972.²² Schools have been held liable for not taking prompt and effective action when they are on notice of bullying based on sexual orientation, and it is likely that the same is true when bullying is based on gender identity or expression.²³

Students receive protection against discipline for gender expression under the First Amendment, as in *Doe v. Yunits*,²⁴ where a state court addressed discipline of a transgender student for wearing gender non-conforming clothing. Courts and administrative agencies have also ruled that denying a transgender student the use of gender-appropriate restrooms violates state human rights statutes.²⁵

Schools should accommodate transgender students by allowing them to use their preferred name whether or not they have had a legal name change. While some school administrators are under the misimpression that a court order is required to do so, the law generally permits use of any name so long as it is not for purposes of financial fraud. Some leave the student's legal name in the computer system but put the preferred name in classroom documents. Another option is for schools to simply make a note of the student's gender identity so that teachers and classmates are respectful.

Transgender students are increasingly being permitted to participate on gender-appropriate sports teams. The National Collegiate Athletic Association has adopted a policy permitting transgender men who have received a medical exception for treatment with testosterone to participate on male sports teams.²⁶ Transgender women who have completed one calendar year of testosterone suppression may participate on female sports teams.²⁷ More than half a dozen states have adopted rules to allow transgender high school students to compete on teams that correspond with their gender identities rather than the sex listed on their school records, and another half dozen more are considering similar regulations.²⁸ A California law is the first to specifically guarantee that transgender students are allowed to play school sports on gender-appropriate teams.²⁹

²² Catherine E. Lhamon, UNITED STATES OFFICE OF EDUCATION, OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, 5, (April 2014) (citing 20 U.S.C. § 1681 *et seq.*)

²³ See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996).

²⁴ 2000 WL 33162199, at * 3-4 (Mass. Super. Ct.), *aff'd sub nom, Doe v. Brockton Sch. Comm.*, No. 2000-J-638 (Mass. App. 2000).

²⁵ *Doe v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014); *see also Mathis v. Fountain-Fort Carson School District 8*, Charge No. P20130034X (Col. Div. Civ. Rts., June 17, 2013).

²⁶ For clarification on terminology, *see supra* Section C.1.

²⁷ NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, NCAA Inclusion of Transgender Student-Athletes 13 (NCAA 2010), available at http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

²⁸ *Changing Sex, and Changing Teams*, New York Times (May 6, 2013).

²⁹ *See* section 221.5 of the California Education Code (2013).

3. Housing

The U.S. Department of Housing and Urban Development (HUD) has enacted regulations prohibiting taxpayer-subsidized housing providers, including those who have loans insured by the Federal Housing Administration (FHA), from inquiring into or discriminating against renters based on sexual orientation or gender identity.³⁰ Under another HUD rule, FHA-insured mortgage financiers are prohibited from making loan decisions based on sexual orientation or gender identity.³¹ The HUD regulations also clarify the definition of “family” to include LGBT families.³² Based on these rules, HUD filed a federal lawsuit against an RV Park that discriminated against a transgender person.³³ Several states have similar rules.³⁴

4. Credit

As previously mentioned, FHA-insured mortgage financiers are prohibited from making loan decisions based on sexual orientation or gender identity. The U.S. Court of Appeals for the First Circuit has ruled that the federal Equal Credit Opportunity Act and a similar state law prohibit discrimination based on gender expression in other areas of lending.³⁵ It is likely that many other federal and state courts would be open to the argument that, based on an analogy to Title VII cases, discrimination in lending based on gender identity or expression would violate the federal and state credit opportunity acts.

5. Restroom Accommodations

While there are some unfavorable precedents from previous decades, courts have recently showed favor to arguments that transgender people are entitled to gender-appropriate restroom facilities in public places. As noted above in the education context, courts and administrative agencies have ruled that denying a transgender student the use of gender-appropriate restrooms violates state human rights statutes. Under the regulations in force in New York City, D.C. and San Francisco, denial of gender-appropriate restroom accommodations in public places violates those ordinances. The EEOC has recently taken the stance in several complaints before it that denial of gender-appropriate restroom facilities in the workplace is a violation of Title VII. In *Freeman v. Realty Resources Hospitality*,³⁶ the Maine Superior Court ruled that the Maine Human Rights Act protected transgender persons from discrimination, including ensuring appropriate access to restrooms. However, despite these promising signs, transgender legal

³⁰ 24 C.F.R. § 5.105. *See also* 77 F.R. No. 23 (February 3, 2012).

³¹ 24 C.F.R. § 203.33.

³² 24 C.F.R. § 5.403; § 574.3.

³³ United States Dept. of Housing and Urban Dev. v. George Toone and In Toone Services, LLC, FHEO Nos. 06-12-1130; 06-121363-8 (ALJ) (2013). The action was settled prior to court decision.

³⁴ These include California, Connecticut, Colorado, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont. *See* Secretary Julian Castro, *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, U.S. DEP’T. OF HOUSING AND URBAN DEV., <http://www.hud.gov/lgbthousingdiscrimination>. Some municipalities also have similar regulations, such as D.C., New York City and San Francisco.

³⁵ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

³⁶ *Freeman v. Realty Resource Hospitality, LLC, d/b/a Denny’s of Auburn*, No. CV-09-199 (State of Maine Androscoggin Superior Court, May 27, 2010).

advocates consider this a legal area that contains some serious potential minefields. Litigation should be very carefully considered, including consulting national experts in the field, before rushing ahead with a lawsuit in a jurisdiction with conservative courts that could result in more difficult precedents. It should be noted that dressing rooms present an even more sensitive situation, and litigation in that context must be considered even more carefully.

B. Government relations

1. Identity documents

The failure of identity documents to reflect the appropriate name and sex of a transgender person can cause constant outing, creating risks of violence and denial of services such as gender-appropriate health benefits or housing, and marriage licenses. These identity documents include birth certificates, driver licenses, and passports, among many others. Many jurisdictions permit changing such documents to reflect the appropriate information. However, the evidence required and procedural difficulties vary substantially. For example, some jurisdictions permit document changes with the provision of a letter from a mental health professional stating that the person has undergone treatment and is now of the specified gender. Others require affidavits of surgeons specifying descriptions of the specific surgical treatment completed.³⁷ Some jurisdictions require a lengthy court process for change of name with publication in a newspaper of record, which can raise safety concerns and prevent access by low-income persons. Others permit the transaction to be handled by going to a local administrative agency, such as a motor vehicle department or a passport agency. You can find state by state lists of how to change birth certificates³⁸ and driver licenses³⁹ online, as well as how to change passports,⁴⁰ immigration documents,⁴¹ and social security accounts.⁴² The patchwork quilt of laws and agencies governing identity documents makes this one of the most difficult tasks accompanying gender transition.

2. Child custody

In the area of child custody, there are two different issues to be addressed. One is the challenge to the fitness of a transgender parent, and the other is the challenge to the legal parental status of transgender parents.⁴³

³⁷ However, the American Medical Association has adopted a resolution stating that transgender people should be permitted to change identity documents without requiring surgery.

³⁸ *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/changing-birth-certificate-sex-designations-state-by-state-guidelines>.

³⁹ *Driver's Licenses Policies by State*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, http://transequality.org/Resources/DL/DL_policies.html.

⁴⁰ *U.S. Passports and International Travel: Gender Reassignment Applicants*, U.S. DEP'T. OF STATE, <http://travel.state.gov/content/passports/english/passports/information/gender.html>.

⁴¹ *Policy Memorandum No. 602-0061: Adjudication of Immigration Benefits for Transgender Individuals*, U.S. DEP'T. OF HOMELAND SECURITY (April 10, 2012), http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf.

⁴² *RM 12012.200 Changing Numident Data for Reasons Other Than Name Change*, U.S. SOCIAL SECURITY ADMIN. (Sept. 30, 2013), <https://secure.ssa.gov/poms.nsf/lnx/0110212200>.

⁴³ See *Protecting the Rights of Transgender Parents and Their Children*, AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL CENTER FOR TRANSGENDER EQUALITY, (March 2013), https://www.aclu.org/files/assets/aclu-tg_parenting_guide.pdf.

The universal standard for decisions by a court about child custody is the “best interests of the child.” It is not uncommon for the allegation to be made during court proceedings that exposure of a child to a transgender parent will cause psychological harm to the child. In such situations, courts should look at traditional factors, such as parenting skills. In one case, for instance, the court upheld a transgender parent’s shared parenting plan because there was no evidence in the record that the parent would not be a “fit, loving and capable parent.”⁴⁴ There are about ten reported opinions in which transgender and other gender-nonconforming parties were involved in custody disputes that reached favorable conclusions for the transgender party.⁴⁵ It is crucial, in such child custody situations, to consider obtaining the services of a competent forensic psychologist who can assess the individual situation and also apprise the court of the studies showing that transgender parentage does not cause harm to children.⁴⁶

Transgender people may form a family with a spouse or partner in many ways, including through sexual intercourse, insemination (of partner’s or donor sperm), surrogacy and adoption. In the event of a breakup or death in the family, the legal status of transgender parents may be challenged, especially when they are not biologically related to the child. Some courts have recognized the validity of post-transition marriage, and recognition of that validity is an important step in securing parental rights.⁴⁷ In light of a flurry of recent federal court decisions striking down bans on same-sex marriage, arguments in favor of validity can be expected to be more successful. The specific question of parental rights in post-transition marriages, however, is still unsettled. Where marriage is restricted to different-sex couples, reliance on marriage to establish parental rights is even more risky. Successful arguments have been made in courts, challenging the validity of a post-transition marriage and removing the presumption of parentage and adoption validity. Changing gender markers on legal documents does not guarantee the validity of the marriage. In all states, second-parent adoption and clear agreements about parentage, especially where assisted reproduction is involved, are important steps in helping to secure parental rights.

Custody issues have also arisen in the situation where a non-transgender parent is raising a transgender child. These issues have been raised by child welfare authorities, who may believe that the child is being misled or mistreated by parents, and by spouses in custody cases, who may believe that the child is going through a temporary phase. Transgender Youth and Family Allies is an organization that provides information to parents of transgender children about how to avoid and address such situations.

3. Youth in out-of-home care

Transgender children in child welfare, juvenile justice and homeless systems of care often face obstacles from staff unfamiliar with transgender issues. These obstacles may include resistance to or denial of the right to wear gender-appropriate clothing, denial of privileges due to

⁴⁴ Mayfield v. Mayfield, 1996 WL 489043 (Ohio App. 5th Dist. Aug. 14, 1996).

⁴⁵ Shannon Shafron Perez, Comment, *Is It A Boy Or A Girl? Not The Baby, The Parent: Transgender Parties In Custody Battles And The Benefit Of Promoting A Truer Understanding Of Gender*, 9 Whittier J. Child & Fam. Advoc. 367, 377 (2010).

⁴⁶ See, e.g., Green. R. *Transsexual’s Children*, 2 International Journal of Transgenderism, 4, (Dec. 1998).

⁴⁷ See *supra* Section 4.

assertion of transgender identity, and harassment or physical violence from staff or other children. Some systems seek to change the gender identity of the transgender children in their care or to deny them transgender health care. Because these facilities are often gender-segregated, issues of gender-appropriate housing can also arise. The Child Welfare Protection League has published comprehensive “Best Practices Guidelines” for serving LGBT youth in out-of-home care.⁴⁸ Because these children are under state care, constitutional protections apply and should protect these transgender children from violations of their right to gender autonomy.⁴⁹ These constitutional protections include, as detailed in other contexts above, protection of liberty interests under the Due Process Clause, right to equal treatment and care under the Equal Protection Clause, and the right to free expression under the First Amendment.

4. Transgender People in Detention and Incarceration Facilities

Transgender people who are incarcerated in jails and prisons, and those detained in immigration holding facilities, face serious risk of harm from other detainees. However, prisons are restricted from subjecting prisoners to certain kinds of risks under the Eighth Amendment to the Constitution and prison officials, and the government that employs them, can be subject to liability for “deliberate indifference” to a transgender prisoner’s needs for protection and health care.⁵⁰

Because jails, prisons, and immigration holding facilities are always gender-segregated, rarely are transgender people in detention or incarceration facilities allowed gender-appropriate housing without certain kinds of surgical intervention. Transgender women who have had genital surgery and are living as women are generally classified and housed according to their reassigned sex. Transgender men who have had genital surgery, however, even though living as men, may be placed in female prisons if there is a serious risk of violence. Transgender people who have not had genital surgery are generally classified according to their birth sex for purposes of prison housing. This situation puts male-to-female transgender women at particular risk of violence. Accordingly, transgender women in male prisons or detention centers are sometimes separated from other prisoners. This is referred to as “administrative segregation,” and often involves solitary confinement. While this provides greater protection than being housed in the general population, it results in exclusion from recreation, educational and occupational opportunities, and association with others. Solitary confinement for long periods of time is increasingly being seen as inappropriate because of its severe effect on mental health.

These routine practices may be changing in light of conflicts with the Prison Rape Elimination Act (PREA), which requires that prisons make such housing decisions on a case-by-case basis. PREA calls for statistics to be gathered on prison sexual assault, including prison sexual assault of transgender people. It applies to immigration detention facilities as well. PREA also requires that people in detention and incarceration facilities be granted adequate access to complaint mechanisms. It also created the National Prison Rape Elimination Commission and charged it with developing standards for the elimination of prison rape. Those standards went

⁴⁸ SHANNAN WILBER, CAITLIN RYAN, AND JODY MARKSAMER, CWLA BEST PRACTICE GUIDELINES, (2006).

⁴⁹ See Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, 5 *Journal of Race, Gender & Ethnicity*, 1 (2010).

⁵⁰ *Farmer v. Brennan*, 511 U.S. 825 (1994) (finding liability for failure to protect transgender prisoner).

into effect in 2012 and require that all people in detention and incarceration facilities be screened for risk of sexual victimization and given individualized determinations. The standards explicitly recognize that gender non-conforming people have additional risk and state that a transgender prisoner's own views with respect to safety shall be given serious consideration.⁵¹ The regulations also require that transgender people in detention and incarceration facilities have an opportunity to shower separately from others, and that their placement and programming assignments be assessed at least twice per year. In addition, transgender people in incarceration facilities may not be placed in involuntary administrative segregation, including solitary confinement, unless there is no other means of protection possible, and then only up to 30 days in length. They are also entitled to access to programs while in segregation.

Because these regulations are fairly new, it is likely that many prisons and detention centers are not following the regulations correctly. It is, nevertheless, a sign of progress for the safety and health of transgender people living in prisons and detention facilities. In another sign of progress, an increasing number of localities – including Cook County, IL, Cumberland, ME, Denver, CO and Washington, DC – have had success with policies that classify prisoners by gender identity rather than sex assigned at birth.⁵² Finally, in recent cases, courts have found that transgender prisoners are also entitled to transgender-related health care, such as provision of hormones in appropriate cases.⁵³

C. Health care

There is increasing acceptance of the principle that one cannot be excluded from health care simply because of transgender status. Fifteen states have laws prohibiting gender identity discrimination in health care facilities.⁵⁴ Nine state insurance commissioners have issued bulletins advising that they interpret the state statute prohibiting gender identity discrimination to also prohibit discrimination in health care insurance.⁵⁵ More significantly, the U.S. Department of Health and Human Services (HHS) has indicated that it interprets the Affordable Care Act, Section 1557,⁵⁶ prohibiting sex discrimination, to include discrimination based on gender identity.

⁵¹ 28 C.F.R. § 115.42.

⁵² See *Transgender Prisoners In Crisis*, LAMBDA LEGAL (2013),

http://www.lambdalegal.org/sites/default/files/publications/downloads/transgender_prisoners_in_crisis.pdf.

⁵³ *Battista v. Clarke*, 645 F. 3d 449 (1st Cir. 2011) (ordering provision of hormone therapy); *Fields v. Smith*, 653 F. 3d 550 (7th Cir 2011) (striking down Wisconsin Inmate Sex Change Prevention Act); *Adams v. Fed. Bureau of Prisons*, 716 F. Supp. 2d 107 (D. Mass. 2010) (reversing policy preventing transition-related care unless evidence of start prior to incarceration). See *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012), granting an incarcerated person's request for sex reassignment surgery, which has been reversed, pending an *en banc* hearing.

⁵⁴ These are California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, as well as D.C. and Puerto Rico. See also *Health Care and Transgender People*, National Center for Transgender Equality, NATIONAL CENTER FOR TRANSGENDER EQUALITY (March 2014), http://transequality.org/Resources/HealthCareRight_UpdatedMar2014_FINAL.pdf.

⁵⁵ These are California, Colorado, Connecticut, Illinois, Massachusetts, Oregon, Vermont, and Washington, as well as D.C. Maryland has protection for state employees. However, some of these do not apply to certain areas of coverage, such as state employees, self-insured companies, or Medicaid.

⁵⁶ 42 U.S.C. § 18116.

There has also been significant movement toward ending discrimination in the provision of transgender-related health care. HHS's interpretation of the Affordable Care Act as prohibiting discrimination based on gender identity will likely apply to hormone replacement therapy and psychotherapy. However, it remains unclear whether this non-discrimination provision will apply to transition-related surgery.⁵⁷ While many insurers still have exclusions for any transgender-related medical care, there is an increasing trend towards voluntary renunciation of such exclusions, and the American Medical Association (AMA) has called for an end to such exclusions.⁵⁸ The federal Office of Personnel Management is allowing, but not requiring, insurers to add coverage through their Federal Employee Health Benefit plans. With regard to Medicare, HHS has issued a ruling stating that its previous blanket exclusion of transgender-related health care is no longer reasonable under the Agency's standards.⁵⁹ Such care may include provision of hormones (such as estrogen or testosterone), mastectomy or genital surgery. Facial feminization surgery (FFS) and breast augmentation surgery are also often considered crucial by transgender women because of the risks of denials of service and violence involved in gender ambiguity. But while the status of FFS and breast augmentation are important safety considerations, these generally do not fall within the "reasonable and necessary" care clause found in all health insurance policies to date. As shown by the Affordable Care Act interpretations and the efforts of state insurance commissioners, there has been significant movement in ending discrimination against transgender people in health care, but there is also uncertainty as to how the rules and regulations will be applied to all forms of transgender health care.

D. Marriage

In jurisdictions that recognize marriage equality, there is no issue regarding the marital status of a transgender person, regardless of the sex of their partner. In jurisdictions not recognizing marriage equality, however, the situation is more complex. If the jurisdiction also refuses to recognize gender transition for purposes of marriage, then the marriage can only be valid if a transgender person seeks to marry someone of the opposite sex based on sex assigned at birth. In such jurisdictions, a transgender woman can never marry a man, regardless of medical treatment, surgery, or changes in birth certificate.⁶⁰ The same is true of a transgender man marrying a woman.⁶¹ However, if the state does recognize gender transition for purposes of marriage, then a post-transition opposite-sex marriage is valid based on the reassigned sex (i.e., a

⁵⁷ HHS indicated on its website in June 2014 that it does not consider this to require transition-related surgery, but the site was subsequently removed. See *Questions and Answers on Section 1557 of the Affordable Care Act*, U.S. DEP'T. OF HEALTH & HUMAN SERVICES, http://www.hhs.gov/ocr/civilrights/resources/laws/section1557_questions_answers.html.

⁵⁸ See American Medical Association (AMA), Policy H-180.980 (opposing the denial of coverage based on sexual orientation or gender identity); see also AMA Policy H-185.950 (supporting public and private health insurance coverage for treatment of gender identity disorder as recommended by patient's physician).

⁵⁹ See Department of Health and Human Services Departmental Appeals Board Appellate Division NCD 140.3, *Transsexual Surgery*, Docket No. A-13-87, NCD Ruling No. 2576 (May 30, 2014).

⁶⁰ See, e.g., *In re Gardiner*, 42 P.3d 120 (Kan. 2002) (holding that sex reassignment is not recognized for purposes of marriage under Kansas law).

⁶¹ See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004), *rev. den.* 898 So. 2d 80 (Fla. 2005) (holding that sex reassignment is not recognized for purposes of marriage under Florida law).

transgender woman may marry a man, and a transgender man may marry a woman).⁶² If the marriage occurred pre-transition, there is nearly universal agreement that such a marriage remains valid, though both spouses are now of the same sex, and despite state laws against same-sex marriage. Thus, if one partner of a married opposite-sex couple transitions to another gender, the marriage is generally presumed to be valid. The U.S. Customs and Immigration Service has issued a policy memorandum recognizing a transgender person's marriage to a person of the opposite sex under certain conditions.⁶³

III. Ethical considerations

A. Terminology

There are various nomenclatures used by different segments of the LGBT community to refer to transgender people, and disagreements about who is under the transgender “umbrella.” It is most important to show respect for a person's gender identity or expression as they self-identify. For example, the term “transvestite” was more widely used in the past and is still used by some, but for the most part, is not preferred as it was a 19th-century medical term that facilitated a pseudo-scientific understanding of sexuality. Therefore, unless someone specifically identifies that way, it would be considered derogatory to identify a transgender person as a transvestite. Similarly, some prefer to identify as a *transsexual* man or woman, rather than a transgender man or woman. Those self-identifications should be respected. Further, some community members consider gay people who dress in drag, whether for performance or as part of a gay identity, to be within the transgender umbrella. Others are offended by this idea. In non-U.S. cultures, those who would here be considered transgender or transsexual may identify as gay, though it is in such instances a reference to gender identity, rather than sexual orientation alone. Because of this, it is important to ask, if you are not sure, how a transgender person identifies their gender identity or expression. If unsure, it is generally considered appropriate to ask whether someone identifies as transgender, or prefers some other label or no label at all.

A person who transitions from male to female has a female gender identity. Therefore, if we are to respect their gender identity, they are considered a transgender woman. Conversely, one who transitions from female to male has a male gender identity, and is considered a transgender man. Generally, failure to adhere to this convention is considered highly offensive to transgender people. In addition, many transgender people do not feel that they were correctly assigned a sex at birth. Therefore, any formulation that implies they “used to be a man,” or “changed sex,” may not be looked upon favorably by some. They would prefer to say that they were “assigned” male at birth, but that they were always female, or vice versa for a transgender man. For similar reasons, the term “biological sex” has some problematic implications as well.

⁶² See, e.g., *Beatie v. Beatie*, 2014 Ariz. App. LEXIS 156 (Ariz. Ct. App. 2014); see *Radtke v. Misc. Drivers*, 867 F. Supp. 2d 1023 (D. Minn. 2012); see *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); see *In Re Lovo-Lara*, 23 I. & N. Dec. 746 (BIA 2005); see *In re Heilig*, 816 A.2d 68 (Md. 2003).

⁶³ See *Adjudication of Immigration Benefits for Transgender Individuals Policy Memorandum 602-0061*, U.S. CUSTOMS AND IMMIGRATION SERVICE (April 10, 2012), http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf (marriages are recognized if the transgender person legally changed gender, subsequently married, and the marriage is recognized in the jurisdiction where it was entered into).

The fact of transgender identity does not necessarily imply any particular sexual orientation. Just because someone transitions from male to female does not automatically mean that they prefer male partners, or vice versa. They may also be bisexual, meaning that they may have romantic interest in someone of any sex.

B. Legal Claims

With regard to the use of disability statutes to provide protection for transgender people based on the presence of “gender dysphoria” in the Diagnostic and Statistical Manual of the American Psychiatric Association, one should exercise caution. Some transgender people are offended by the idea that their identity is considered a “disability.” Others feel that, if it is useful to use that category to obtain vital assistance from the courts, then they will do so. Yet others feel that there should be no stigma attached to a disability, and have no issue with it at all. Thus, in considering such an issue, transgender advocates should be sure that a transgender person to whom they are offering assistance is in agreement with whatever decision is made.

It might seem to be a good idea, in representing a transgender person, to find out their surgical status. This, however, may be controversial, and discretion is advised. Although a case may seem to be bolstered by the fact that a transgender person has had certain types of medical or surgical treatment, in many situations, such as employment discrimination or changing a U.S. passport, the information is in fact irrelevant. Requesting disclosure of such information when unnecessary is generally considered problematic. However, in other cases, such as those involving change of birth certificate or validity of marriage in certain jurisdictions, it may be necessary to elicit such information. An advocate should consider whether surgical status is a necessary legal criterion before requesting the information, and certainly before disclosing the information in a public complaint or in discovery. In the discovery phase of litigation, a vigorous argument for the privacy of such information should be made to the court.

C. Resources

There is a network of non-profit organizations around the country that has expertise in transgender issues and may be able to provide legal assistance or referrals to local private law firms for further assistance. These organizations include Lambda Legal Defense and Education Fund, the Transgender Legal Defense and Education Fund, the Transgender Law Center, the National Center for Lesbian Rights, and Gay and Lesbian Advocates and Defenders. The National Center for Transgender Equality, which specializes in policy advocacy, may be able to provide helpful information about substantive issues. Each organization has different resources and capacities, and a call to all of them to request information and assistance is advisable.

IV. Conclusion

Transgender people facing legal issues are particularly vulnerable because the law has long been hostile to their claims. This is, however, changing in certain jurisdictions. Judicial and law enforcement officers are beginning to understand that being transgender is a matter of gender identity and gender expression, rather than an illness or character defect. The laws are slowly

changing to recognize that discrimination based on transgender identity or expression is prohibited sex discrimination. The law regarding civil rights, government relations, health care, and marriage are moving towards this recognition. It is important that the public recognize that the severe oppression faced by transgender people can and will be changed as people in the larger community come to understand and advocate for the right of transgender people to live with the equal dignity and equal rights promised by the Constitution of the United States.