

## WORKPLACE RESTROOM POLICIES IN LIGHT OF NEW JERSEY'S GENDER IDENTITY PROTECTION

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'Always use the one that says WHITES ONLY,' as she pointed to the sign on the water fountain. . . . The same went for restrooms,<sup>1</sup> except it was even more confusing: aside from whether or not the sign read 'WHITE' or 'COLORED,' I had to make sure it read 'LADIES' instead of 'MEN.' It seemed like an awful lot to keep up with, when all I wanted was a drink of water or to go to the bathroom.<sup>2</sup>

### INTRODUCTION

From race-segregated facilities under Jim Crow, to the "potty politics"<sup>3</sup> surrounding the Equal Rights Amendment, bathroom access<sup>4</sup> has long been a struggle on many fronts.<sup>5</sup> Although access to

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1. "Restrooms," "bathrooms," "toilets," and "facilities" are terms used synonymously in this Note, as they are in many statutes across the nation. "Sex-specific," "sex-separated," and "gender-segregated" restrooms are synonyms to refer to bathrooms intended for only one sex (such as the women's room or men's room). In contrast, facilities to be used by any person of any sex or gender will be identified by the terms "gender-neutral" or "unisex." These are often single-stall bathrooms with a closed door and lock, but occasionally are restrooms with multiple enclosed stalls that can be used by anyone.

2. DARLENE FORD WOFFORD, *EDGEWISE: AN ASSIGNMENT TO REMEMBER 74* (2007) ("A water fountain's a water fountain, and a bathroom's a bathroom, ain't it?").

3. Opponents of the Equal Rights Amendment used the societal fear of unisex bathrooms as a tactic for ensuring the amendment's demise. *See generally* FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960* 390 (1999) (discussing types of arguments used in oppositions of the Equal Rights Amendment); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 68-69 (1989) (discussing the traditional distinction maintained between the sexes).

4. This Note uses the phrase "bathroom access" to refer to the struggle for safe and equal access to toilets and restrooms in the workplace. *See generally* MARC LINDER & INGRID NYGAARD, *VOID WHERE PROHIBITED: REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME* (1998) (exploring the evolution of restroom breaks in the workplace). Though not the precise subject of this Note, bathroom access in places of public accommodation is not only a continuing struggle for transgender persons, but

workplace restrooms has improved considerably as a result of the labor movement's efforts, some still struggle to find safe and non-controversial places to relieve themselves.<sup>6</sup> Though withholding bathroom access has been, and to some extent still is, a tool of oppression used against many individuals and communities,<sup>7</sup> the current workplace bathroom access debate centers around transgender<sup>8</sup> employees.<sup>9</sup>

To combat the overall bias against the transgender community in both employment and public accommodation settings, jurisdictions throughout the nation have enacted anti-discrimination laws to

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has become a problem for the public-at-large as the number of public restrooms shrinks. *See generally* Ralph Slovenko, *On Answering the Call of Nature*, 24 WAYNE L. REV. 1555 (1978) (discussing the social and public health concerns caused by decrease of available public toilets).

5. *See* Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN'S L.J. 263, 285 (1990) ("The basic nature of the need to eliminate waste, and the humiliation entailed in having to overcome obstacles to meet this need, make toilets the ideal choice, conscious or unconscious, for those bent on excluding outsiders from white male preserves.").

6. *See, e.g.*, MATT KAILEY, JUST ADD HORMONES: AN INSIDER'S GUIDE TO THE TRANSEXUAL EXPERIENCE 143-44 (2005) ("For a newly transitioning transsexual, the public restroom is the closest thing to hell. . . . Restroom use is probably the biggest single issue for a person transitioning on the job, and it's a major discussion point in any trans support group.").

7. *See* Banks, *supra* note 5, at 286-87 (highlighting situations where withholding restroom access is a means of oppression, such as denying lower-income airline passengers access to cleaner first-class restrooms, providing men with free urinals while women must otherwise pay to use toilets, and denying a transsexual access to law school restrooms).

8. For the purposes of this Note, "transgender" is an umbrella term used to describe those whose current gender identity or expression differs from their birth sex and "include[s] but is not limited to: transsexuals, cross-dressers, and other gender-variant people." N.J. DIV. ON CIVIL RIGHTS, GETTING THE EDGE IN COMPLIANCE: EQUALITY & DIVERSITY FOR GLBT EMPLOYEES 21 (2008), <http://www.state.nj.us/lps/dcr/downloads/Getting-EDGE-Compliance.pdf> [hereinafter GETTING THE EDGE IN COMPLIANCE]. The Law Against Discrimination (LAD) defines gender identity or expression as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth." N.J. STAT. ANN. § 10:5-5(rr) (West Supp. 2008).

For a more detailed explanation of the transgender identity, see Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 897-98 (2007) ("The term 'transgender' applies to a variety of psychological and physiological states, and it is thus difficult to create an all-encompassing definition for transgender individuals.").

9. *See generally* Paul VanDeCarr, *Trans Validation: Transgender Activists Are Claiming Mixed Results in Battles for Equality in New York and Maine*, ADVOC., May 10, 2005, at 15 ("Restrooms are among the most contested sites for transgender people.").

protect transgender persons.<sup>10</sup> On December 20, 2006, New Jersey joined the movement, including “gender identity or expression” to the list of protections under the Law Against Discrimination (LAD).<sup>11</sup> Because the LAD also prohibits pre-employment inquiries about a candidate’s sex or gender, and because some employees might seek to transition<sup>12</sup> many years after having been hired, all employers must be prepared to adhere to the LAD’s gender identity protection.<sup>13</sup>

The LAD’s compliance requirements leave many employers in a quandary, wondering which bathroom a transgender person is legally entitled to use and how to accommodate the transgender individual, while still maintaining harmony in the workplace and respecting other employees’ expectations of privacy. Should employers force a male-to-female transsexual to use the “men’s room” (in alignment with her biological sex at birth) or allow her to use the “women’s room” (in alignment with her current physical presentation or even legal status) or should she use some alternative “unisex” restroom?<sup>14</sup>

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10. States that ban employment discrimination on the basis of gender identity or expression include: California, CAL. GOV’T. CODE §§ 12900–12976 (West 2005); Colorado, COLO. REV. STAT. ANN. § 24-34-402 (West 2008); Hawaii, HAW. REV. STAT. § 378-2 (2004); Illinois, 775 ILL. COMP. STAT. 5/1-101 (2001); Iowa, IOWA CODE § 216.1 (2000); Maine, ME. REV. STAT. ANN., tit. 5, § 4551 (2002); Minnesota, MINN. STAT. § 363A.01 (2004); New Jersey, N.J. STAT. ANN. § 10:5-1 (West 2007); New Mexico, N.M. STAT. §§ 28-1-1 (2000); Oregon, OR. REV. STAT. § 659A.001 (2003); Rhode Island, R.I. GEN. LAWS § 28-5-1 (2003); Vermont, VT. STAT. ANN., tit. 21, § 495 (2003); Washington, WASH. REV. CODE § 49.60.010 (2008); and the District of Columbia, D.C. CODE § 2-1402.11(a) (2005).

In addition to state statutory schemes, nearly 100 other localities across the nation protect transgender individuals from employment discrimination, whether by statute, ordinance, or executive order. See TRANSGENDER LAW & POLICY INSTITUTE, SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE ANTI-DISCRIMINATION LAWS (2006), [http://thetaskforce.org/downloads/reports/fact\\_sheets/TI\\_antidisc\\_laws\\_7\\_30\\_07.pdf](http://thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_30_07.pdf) (including charts of local anti-discrimination laws).

11. N.J. STAT. ANN. §§ 10:5-3 to -34 (West 2007).

12. Transition means “[t]he process whereby an individual undergoes social and physical change (via *social, medical and legal* steps) to bring his body and public presentation into harmony with his innate sex or brain sex, achieving comfort with his body and social roles.” FTM Australia, Terms and Definitions, <http://www.ftmaustralia.org/resources/dictionary.html> (last visited Feb. 11, 2009).

During transitioning periods, transsexuals might face even more discrimination when using workplace restrooms because they may have some traits which still resemble their biological sex and thus might not be seen, or “pass,” as someone of the gender they wish to present.

13. See N.J. STAT. ANN. § 10:5-4 (West 2007).

14. The conundrum is this: if other female employees feel their privacy is violated sharing the restroom with a woman they know was born male (and might still be legally and biologically male), surely male employees will feel similarly uncomfortable about sharing the restroom with a person who might be biologically male but is presenting themselves as female and perhaps wearing heels, makeup, and a dress. Both of these situations put the transgender person at risk. See *infra* note 49 and

This Note will attempt to answer that question and will explore compliant workplace restroom policies that limit an employer's liability to LAD discrimination claims,<sup>15</sup> both by gender-variant employees as well as other employees who may claim that sharing a restroom with a transgender person violates their religious rights or equates to sexual harassment.<sup>16</sup>

Part I will explore the historical and present-day justifications for sex-separated bathrooms and longstanding societal notions of binary gender roles. Part II will detail the painful experiences many transgender people report about their encounters in public and workplace bathrooms. Part III will delve into the ways other oppressed communities have struggled to gain bathroom access, as well as look at current bathroom accommodation laws, policies, and practices. Part IV will address the LAD in general, detailing its broad application and the implications liberal construction has upon the gender identity or expression protection. Though no transgender bathroom access case has made it into the New Jersey court system, one can predict possible outcomes by looking at how the courts have dealt with sexual orientation and gender identity issues in the past. Part IV will also look at case law in other state and federal jurisdictions for guidance.

Finally, Part V will explore specific workplace policies that employers in New Jersey can adopt to limit liability to LAD claims. Because restroom access must be granted in accordance with the law, employers can develop other policies and procedures—such as mandatory diversity training and proper employee handbook language—to ease employees into the new terrain of using workplace restrooms that are not strictly divided by biological or birth sex.

#### I. THE HISTORICAL DEVELOPMENT OF WORKPLACE BATHROOM ACCESS

The fact that workplace restrooms are available at all is a result of the labor movement's efforts.<sup>17</sup> The Occupational Health and

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accompanying text.

15. In other words, policies that do not discriminate based on an employee's gender identity or expression, nor expose the company to other LAD claims.

16. At a June 14, 2007 regional meeting of the New Jersey Division on Civil Rights' Employer Advisory Council, employers expressed this very concern: that another female employee would file a hostile work environment claim because she had to share the bathroom with a former man. Regional Meeting of the Employer Advisory Council, New Jersey Division on Civil Rights, (June 14, 2007) (taking place at the offices of Wolff & Samson, P.C.). To date, only one such case has been filed and the court held in favor of the employer. *Cruzan v. Special School Dist. No. 1*, 294 F.3d 981, 983 (8th Cir. 2002) (discussed in depth *infra* Part IV).

17. See Terry S. Kogan, *Sex-Separation in the Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 15 (2007).

Safety Administration's (OSHA) regulations require employers to provide adequate restroom facilities for employees.<sup>18</sup> The restrooms must be within a reasonable distance from the work environment<sup>19</sup> and the employer must provide "timely access" to them.<sup>20</sup> Though policies may be in place to avoid the misuse of restroom breaks, employers are prohibited from imposing unreasonable restrictions on an employee's restroom use.<sup>21</sup>

While these regulations are positive in that they force employers to accommodate employees' basic human needs to relieve themselves, they also legally proscribe the very concept that drives the transgender bathroom access issue: sex-separation of toilet facilities.<sup>22</sup> OSHA requires toilet facilities "separate for each sex" unless the bathroom "will be occupied by no more than one person at a time [and] can be locked from the inside."<sup>23</sup> Because of this legal (and cultural) preference for sex-segregated bathrooms, those who do not fall strictly into male or female, or those who have "changed" their sex, cannot fall within the bathroom social construction. Thus, it is impossible to address transgender bathroom use without exploring the cultural preference for sex-segregated bathrooms in general.

#### A. *The Origin of Sex-Separated Restrooms*

Long before OSHA mandated sex-separated bathrooms, nearly

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18. 29 C.F.R. § 1910.141(d)(2) (2008) (requiring lavatories equipped with running water, hand soap and towels "in all places of employment" — except "unattended work locations," so long as employees in those work sites have transportation to reasonably nearby facilities).

19. See U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., STANDARD INTERPRETATIONS, 07/05/1983 - REASONABLE JUDGEMENT IS NEEDED IN EVALUATING THE PROXIMITY OF REQUIRED SANITARY FACILITIES, 1983 WL 507500 (Interpretation of § 29 C.F.R. 1910.141(c)).

20. U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., STANDARD INTERPRETATIONS, 04/06/1998 - INTERPRETATION OF § 29 C.F.R. 1910.141(C)(1)(I): TOILET FACILITIES, 1998 WL 34335013 ("Timely access is the goal of the standard.").

21. *Id.* In determining whether a restriction is reasonable, [c]areful consideration must be given to the nature of the restriction, including the length of time that employees are required to delay bathroom use, and the employer's explanation for the restriction. In addition, the investigation should examine whether restrictions are general policy or arise only in particular circumstances or with particular supervisors, whether the employer policy recognizes individual medical needs, whether employees have reported adverse health effects, and the frequency with which employees are denied permission to use the toilet facilities. Knowledge of these factors is important not only to determine whether a citation will be issued, but also to decide how any violation will be characterized.

*Id.*

22. See 29 C.F.R. § 1910.141(c)(1)(i) (2008) (requiring sex-separated toilets).

23. *Id.*

every state had enacted similar laws.<sup>24</sup> Though little is known about the legislative intent behind each of the state laws, “an examination of the statutes and related literature makes clear that the toilet laws were aimed primarily at protecting women . . . and were not intended as gender-neutral regulations.”<sup>25</sup> Some scholars use the label “urinary segregation”<sup>26</sup> to refer to the practice of maintaining separate bathrooms and insist the origin of sex-separated bathrooms is anything but “benign,”<sup>27</sup> but instead is “deeply bound up with early nineteenth century moral ideology concerning the appropriate role and place for women in society.”<sup>28</sup>

At the beginning of the twentieth century, when government officials investigated factories for sanitation, they looked at not only cleanliness, but also lighting, ventilation, and whether the restroom facilities were separated by sex.<sup>29</sup> In essence, sex-separated bathrooms became a matter of overall public health. Scientific discoveries at the time showed that working women were “unable to [physically] withstand strains, fatigues, and privations as well as [men],”<sup>30</sup> so sex-separated restrooms provided “a protective haven . . . where a woman could seek comfort and rest when her weak body gave out on the job.”<sup>31</sup> Maintaining separate facilities that were “properly screened” also provided more privacy to both men and women with regard to their bodies and bodily functions, an obsession derived from Victorian society.<sup>32</sup> By providing a separate space for the special needs of women and protecting the privacy of all workers, sex-separated bathrooms upheld “[l]ate nineteenth century concerns about germs and sanitation . . . [and] early nineteenth century

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24. Massachusetts passed the first sex-segregation restroom law in 1887. Kogan, *supra* note 17, at 15. By 1920, restrooms were segregated by sex in forty-three states. *Id.* at 39.

25. *Id.* at 40.

26. See, e.g., Jacques Lucan, *The Agency in the Letter of the Unconscious*, in *ECRITUS: A SELECTION* (Alan Sheridan trans., 1977).

27. Kogan, *supra* note 17, at 3.

28. *Id.* at 55.

29. *Id.* at 44.

30. *Id.* at 42 (quoting C.F.W. Doehring, *Factory Sanitation and Labor Protection*, 44 BULL. OF THE DEP'T OF LAB. 1-2 (1903)).

31. *Id.* at 44.

32. See *id.* at 47-48 (discussing that “concerns over such [bodily] functions became deeply intertwined with social morality”). However, mere sex-separation was not enough, so partitions were placed between toilets to provide workers with privacy “from everyone.” *Id.* at 49. Even more extreme, one highly regarded sanitation engineer wrote in 1913 that “close proximity of the fixtures separated only by a thin board partition, far from sound proof, and the common approach” would render otherwise sanitary sex-separated restrooms “morally objectionable.” *Id.* at 51 (quoting J.J. COSGROVE, *FACTORY SANITATION*, at ix (1913)).

ideological concerns of pure womanhood.”<sup>33</sup>

*B. The Continuation of Sex-Separated Bathrooms in Modern Society*

Some women find solace in women-only restrooms, which calm fears of unwanted sexual advances or assaults.<sup>34</sup> According to Professor Terry S. Kogan, “[s]ex-separated public restrooms convey subtle, yet potent messages about the nature of gender and gender difference . . . [and] foster subtle social understandings that women are inherently vulnerable and in need of protection . . . while men are inherently predatory.”<sup>35</sup> This heightened-notion that men are inherently aggressive coupled with a realistic need for self-protection in a culture that is relatively sexually violent, leads some women to resist sharing a restroom with male-to-female transsexuals, fearing that male perpetrators will disguise themselves in women’s clothing for the sole purpose of entering the women’s room and violating the female patrons.<sup>36</sup>

Though modern thinking has certainly progressed and women are not treated as inherently inferior as they once were, the current argument that sex-separated restrooms provide greater safety for women harkens back to the nineteenth century justifications for separate restroom facilities. For example, literature opposing transgender bathroom access focuses heavily on protecting the safety, privacy, and dignity of women and girls, yet rarely mentions

33. *Id.* at 52-53.

34. Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 16 (2000) (“Two common explanations for sex-segregated bathrooms are privacy and safety.”).

35. Kogan, *supra* note 17, at 56.

36. Though this fear is expressed somewhat frequently, in researching for this Note, no cases were found where men had intentionally entered a restroom disguised as a transsexual for the purposes of spying on women or assaulting them. Further, “[t]here is no evidence that allowing transgender people to have safe access to facilities that concord with their gender identities will increase the incidence of sexual assault.” DEAN SPADE, SYLVIA RIVERA LAW PROJECT, TOILET TRAINING: COMPANION GUIDE FOR ACTIVISTS AND EDUCATORS 2 (2005), [http://www.srlp.org/files/documents/toolkit/talking\\_points\\_gender\\_seg.pdf](http://www.srlp.org/files/documents/toolkit/talking_points_gender_seg.pdf).

There are actually those who believe that transpeople use the restroom in order to spy on others or to get some kind of sexual thrill. What most nontranspeople don’t realize is that the bathroom can be a terribly frightening place for transpeople and we usually want to get in, take care of business, and get out as quickly as possible. We have no interest in seeing or hearing what others are doing . . . Most transpeople, especially those who are new to transition, would prefer not to use public restrooms at all. I’ve known people who have refused liquid all day in order to avoid the restroom. Trust me when I say that we are there for one purpose only, just like everyone else is, and that we have no ulterior motives.

KAILEY, *supra* note 6, at 144.

any issues men might have with sharing a restroom with a female-to-male transsexual.<sup>37</sup> Even some transsexual women wish to maintain the “safe haven in a male dominated world” of a women’s restroom “where women can have their own space without needing to worry what a man might do (in front of them, to them, or to their daughters and young sons.)”<sup>38</sup> At the very least, these opinions expose an underlying belief that women and girls are more fragile than men, have a deeper need of privacy than men, and are more likely than men to be afraid or offended by the notion of sharing a restroom with a male-born transgender woman.

## II. THE IMPACT OF SEX-SEPARATED BATHROOMS ON THE TRANSGENDER COMMUNITY

Proponents argue that sex-separated restroom facilities ensure safety for women and children, but the threat of physical or sexual violence in restrooms exists for transwomen and transmen as well. Bathroom access is a “daily struggle” for many transgender people.<sup>39</sup> Transgender activist Leslie Feinberg notes: “As a rape survivor, I understand the need for safe space together—free from sexist harassment and potential violence. But fear of gender variance also can’t be allowed to deceptively cloak itself as a women’s safety issue.”<sup>40</sup> Generally, the types of discrimination transgender people

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37. See Press Release, Maryland Citizens for Responsible Government, Election Board Giving Gender ID Bill Referendum Green Light (Mar. 7, 2008), [http://notmyshower.com/Validation\\_Press\\_Release.pdf](http://notmyshower.com/Validation_Press_Release.pdf) (arguing a Montgomery County, Maryland bill allowing transgender bathroom access “could violate the privacy rights of the county’s 500,000 women and children”); see also Bob Unruh, *Bill Requires Hiring ‘Gays,’ Cross-dressers: ‘Perceived Sexual Orientation or Gender Identity’ Protected*, WORLDNETDAILY, May 12, 2007, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=55654](http://www.wnd.com/news/article.asp?ARTICLE_ID=55654) (“[F]emale employees would have to endure both systematic sexual harassment and a hostile work environment by being forced to share bathroom facilities with male employees who get their jollies from wearing a dress, high heels and lipstick.”). In response to a newly proposed amendment to Massachusetts’ anti-discrimination statute, the Massachusetts Family Institute wrote the following on its website:

Women and children would be put at risk since anyone, regardless of their biological sex, would be allowed access to sensitive areas such as single-sex bathrooms and locker rooms, as well as college dormitories. Nothing would prevent a male sexual predator from pretending that he is confused about his sex to gain access to a woman’s bathroom or to join a female-only fitness club.

Megan Woolhouse, *Patrick Backs Bill to Protect Rights of Transgendered: Antibias Statutes Would Be Amended*, BOSTON GLOBE, Mar. 5, 2008, at 4B.

38. Lisa Thompson & Sharon Gaughan, *The Fallacy of Gender Blind Bathrooms*, TS-SI SOCIETY, Sept. 9, 2007, <http://ts-si.org/content/view/2499/993>.

39. TRANSGENDER LAW CTR., PEEING IN PEACE: A RESOURCE GUIDE FOR TRANSGENDER ACTIVISTS AND ALLIES 3 (2005) [hereinafter PEEING IN PEACE].

40. LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF

most often face in public bathrooms are “harassment, assault, and questioning by police or security guards.”<sup>41</sup> The specific dangers transgender people face when using bathrooms range from “being yelled at”<sup>42</sup> to spending “23 hours in jail on a false trespassing charge”<sup>43</sup> to getting “the shit kicked out of [them] for using the ‘wrong bathroom.’”<sup>44</sup>

Finding a safe bathroom is such a profound part of the transgender experience that a user-generated database of gender-neutral (or single-use sex-separated) bathrooms is available on the Internet.<sup>45</sup> By visiting the Safe2Pee.org website, a transgender person can find nearly 1,900 bathrooms in almost 500 cities across North America that are gender-free.<sup>46</sup> This website can be a vital tool for a transgender person who might be leery of traveling to small towns and cities across the country that have a reputation for being hostile to the transgender community. But transgender people face problems using the bathroom even in progressive metropolitan areas. For example, the San Francisco Human Rights Commission conducted a survey of transgender people in 2002 and found that nearly half of the participants had been harassed or assaulted in a bathroom.<sup>47</sup>

While many gender rights advocates call for these gender-neutral restrooms, they acknowledge that unisex bathrooms do not completely eliminate harassment or violence, and “also [do] not lead to new or greater threats than already exist.”<sup>48</sup> When using sex-specific restrooms, members of the transgender community might experience varying degrees of discrimination in bathrooms depending on how their gender is expressed or perceived and whether they are male-to-female (MTF) or female-to-male (FTM) transsexuals. As one scholar notes:

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ARC TO RUPAUL 116 (1996). She continues: “[W]hen a man walks in, women immediately examine the situation to see if the man looks flustered and embarrassed, or if he seems threatening; they draw on the skills they learned as young girls in this society to read body language for safety or danger.” *Id.* at 117.

41. PEEING IN PEACE, *supra* note 39, at 8.

42. SAN FRANCISCO HUMAN RIGHTS COMM’N, GENDER NEUTRAL BATHROOM SURVEY (Summer 2001), [http://transgenderlawcenter.org/pdf/sbac\\_survey.pdf](http://transgenderlawcenter.org/pdf/sbac_survey.pdf) [hereinafter GENDER NEUTRAL BATHROOM SURVEY].

43. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 17 n.5 (2003)

44. GENDER NEUTRAL BATHROOM SURVEY, *supra* note 42.

45. See Safe2Pee.org: Bathrooms for Everyone, <http://safe2pee.org/beta> (last visited Feb. 20, 2009).

46. *Id.*

47. PEEING IN PEACE, *supra* note 39, at 3.

48. Simone Chess et al., *Calling all Restroom Revolutionaries!*, in THAT’S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION 316 n.2 (Mattilda, AKA Matt Bornstein Sycamore ed., 2004).

The perils for passing FTMs in the men's room are very different from the perils of passing MTFs in the women's room. On the one hand, the FTM in the men's room is likely to be less scrutinized because men are not quite as vigilant about intruders for obvious reasons. On the other hand, if caught, the FTM may face some version of gender panic from the man who discovers him, and it is quite reasonable to expect and fear violence in the wake of such a discovery. The MTF, by comparison, will be more scrutinized in the women's room but possibly less open to punishment if caught.<sup>49</sup>

Thus, the greater a transgender person's ability to "pass," the less likely he or she will be noticed when using a restroom aligned with his or her gender identity (and not his or her biological birth sex) and face some form of punishment, be it verbal harassment, physical assault, or apprehension by the police. Given this reality, it becomes increasingly important for transgender persons to learn the gender-specific etiquette associated with the restroom they are using.<sup>50</sup>

For a transgender employee in the process of transitioning, the bathroom issue might be the most daunting issue they face at work.<sup>51</sup> A transgender man who transitioned years ago (both physically and legally) might be able to begin a new job without anyone ever noticing he was once a woman, making the bathroom issue moot. But those who decide to transition after years of tenure with a company must deal with their coworkers' reactions to their new gender presentation and what may seem like a "sudden" change. Transgender author Kate Bornstein conveys what many transgender employees experience when transitioning in the workplace:

When I first went through my gender change, I was working for an IBM subsidiary in Philadelphia. The biggest quandary there was "which bathroom is it going to use?" To their credit, most of the people in my office didn't really care; it was the building manager

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49. Richard M. Juang, *Transgendering the Politics of Recognition*, in *THE TRANSGENDER STUDIES READER* 706, 711 (Susan Stryker & Stephen Wittle eds., Routledge 2006) (quoting JUDITH HALBERSTAM, *FEMALE MASCULINITY* 24 (1998)).

50. See, e.g., KAILEY, *supra* note 6, at 144-45.

Smiling at the person standing next to you at the sink, so common among women when they are brought together by fate and a mutual biological need, can wreak havoc in the men's room. It apparently signals one thing, with two very different outcomes—an immediate date in an adjoining stall or a black eye, the latter being much more likely. Since I was neither a lover nor a fighter at the beginning of my transition, I learned to lose the smile and stop acknowledging the other men at all. Men are goal oriented, and in most public restrooms, there is only one goal. So I taught myself to look straight ahead, take care of business, and get on with life, and I did just fine.

*Id.*

51. *Id.* at 144 ("Restroom use is probably the biggest single issue for a person transitioning on the job . . .").

who was tearing his hair out over this one. I suppose he felt I would terrorize the women in their bathroom, and lie in waiting for the men in their bathroom. Finally, a solution was reached: even though I worked on the 11th floor of a large office building, I would use a bathroom on the seventh floor. The seventh floor had been under construction, but for lack of funds they simply stopped construction; no one worked on that floor. Piles of plaster and wiring littered the floor, and pools of water lay everywhere. But there was a working bathroom in the very back of that floor, and that's where they sent me. No one ever cleaned it, no one kept it stocked. It was poorly lit and it was scary.<sup>52</sup>

Because the process of transitioning can be so difficult, most transgender rights organizations encourage transgender persons to plan their transition carefully and take an approach that considers the workplace climate.<sup>53</sup> The safest strategy for a transgender employee is to work closely with human resources personnel to develop a plan for transitioning at work and integrating themselves into the workplace restrooms.

### III. BATHROOM ACCESS STRUGGLES IN OTHER OPPRESSED COMMUNITIES

In addition to the transgender struggle against bathroom discrimination, many other communities have had their own unique bathroom access issues as well. For example, women have long fought for “potty parity.”<sup>54</sup> Under Jim Crow laws, blacks were required to use separate toilet facilities.<sup>55</sup> And, though many workplaces and places of public accommodation have been forced to make their restrooms accessible to the disabled through the Americans with Disabilities Act,<sup>56</sup> access is still a challenge for many.<sup>57</sup>

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52. Kate Bornstein, *Gender Terror, Gender Rage*, in THE TRANSGENDER STUDIES READER, *supra* note 49 at 243.

53. See, e.g., LAMBDA LEGAL, TRANSGENDER PEOPLE IN THE WORKPLACE (2005), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31986950>.

54. “Potty parity” is a phrase used to describe the movement for equal and adequate restrooms for women. See Terry Carter, *Spelling Out Relief: Female Workers Argue Lack of Job-Site Toilet Facilities Unfair*, 86 ABA J. 23, 24 (2000) (calling Professor John Banzhaf III the “father of potty parity” because of his work to increase the ratio of women’s toilets to men’s toilets).

55. See, e.g., Banks, *supra* note 5, at 264 n. 3 (citing *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977); *Dawling v. City of Norfolk, Va.*, 260 F.2d 647 (4th Cir. 1958); *Jones v. Marva Theatres*, 180 F. Supp. 49 (D. Md. 1960); *King v. City of Montgomery*, 168 S.2d 30 (Ala. 1964)).

56. 42 U.S.C. §§ 12101-12213 (2006).

57. This Note will only explore restroom inequities for women and race-segregated bathrooms under Jim Crow due to space constraints. For a detailed look at workplace

A. *Bathroom Access as a Weapon of Oppression Against Women*

“Restroom inequity is a form of ‘subtle sexism’ or sex discriminatory behavior that goes unnoticed because it is considered to be normal, natural, or acceptable, but that still has the effect of maintaining a lower status of women.”<sup>58</sup> Further, the lack of bathroom facilities has been an excuse to keep women out of areas traditionally dominated by men. For example, history suggests that women were only allowed into Yale Medical School after a female applicant’s wealthy father donated money to build a women’s restroom.<sup>59</sup>

The long line for the women’s restroom has been a longstanding joke in society. Because the line for women’s rooms tends to be twice as long as the men’s line,<sup>60</sup> many jurisdictions have begun implementing potty parity laws. In one of the few scholarly pieces dealing with restroom inequity,<sup>61</sup> Sarah A. Moore identifies four types of restroom disparity women face: unequal restrooms, inadequate restrooms, missing women’s restrooms, and no restrooms at all.<sup>62</sup>

Potty parity laws typically attempt to remedy the “unequal restroom” disparity. California passed the first potty parity law in

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restroom issues for disabled workers, see for example, Marianne D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans With Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1317 (2006).

58. Sarah A. Moore, Note, *Facility Hostility? Sex Discrimination and Women’s Restrooms in the Workplace*, 36 GA. L. REV. 599, 602 (2002).

59. See Kim Baserga, *The Early Years of Coeducation at the Yale University School of Medicine*, 53 YALE J. BIO. & MED. 181, 184-85 (1980).

60. John F. Banzhaf III, *Final Frontier for the Law?*, NAT. L. J., Apr. 18, 1988, at 13 (citing Donald P. Baker, *Relief Sought From Restroom Traffic: Va. Delegate Hopes His Bill Will Lead to More Stalls for Women*, WASH. POST, Feb. 4, 1988, at C6); see also Banks, *supra* note 5, at 274 (“[A] restroom stop takes a woman up to 2.3 times as long as it takes a man.”).

For explanations on why the line to the woman’s room is longer, see Banks, *supra* note 5, at 274-75 stating:

[M]ore women take small children to the bathroom than men. Other factors contributing to longer bathroom stays for women are menstrual periods; urinary tract infections, more common in women than in men, which require more frequent trips to the toilet; pregnancy, which reduces bladder capacity; and finally, clothing (women have more clothes to manipulate than men do).

*Id.* Others use stereotypes of women to assume vanity plays a role in the long lines. According to Banks, “at least one critic claimed that taking mirrors out of women’s bathrooms would substantially shorten women’s bathroom stays.” *Id.* at 275.

61. Restroom inequity means the restrooms are unequal in some way, whether because of long waiting lines, cleanliness, or absence. See generally Moore, *supra* note 58, at 599-601.

62. *Id.* at 602.

1987<sup>63</sup> and other jurisdictions soon followed, such as Wisconsin, Texas, Chicago, New York City, Minnesota, Pennsylvania, Tennessee, and Washington.<sup>64</sup> These laws regulate restroom inequalities to varying degrees. For example, Chicago's law requires more women's toilets than men's toilets, while Texas requires a two-to-one ratio of women's to men's toilets.<sup>65</sup> These laws attempt to reduce the wait time for the women's restroom, but there are other factors that can make a women's bathroom unequal, such as when women are required to walk a significantly greater distance from the work area to the restroom.<sup>66</sup>

An inadequate facility is another type of restroom inequity identified by Moore.<sup>67</sup> These facilities lack hand soap, sinks, running water, or trash receptacles.<sup>68</sup> While men might be able to forego these basic amenities, women's genitalia differ and thus they risk infecting themselves or others by spreading bacteria and germs obtained when using the restroom without washing their hands.<sup>69</sup> Women also have menstrual cycles and need waste receptacles for disposing sanitary napkins. Whether these facilities are inadequate purposefully or due to gross ignorance, women are often faced with unsanitary bathroom conditions.

One mode of restroom inequity that often is done purposefully with an intent to demean or intimidate women is what Moore calls "missing women's restrooms."<sup>70</sup> Frequently in occupations traditionally dominated by men, such as firefighting and cab driving, women who enter the field will be forced to use the men's bathroom.<sup>71</sup> By violating the basic social construct of sex-separated bathrooms and forcing female employees to use men's restrooms that are not sanitary or fit for women, a clear message is sent that the woman is

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63. Helen Tierney, WOMEN'S STUDIES ENCYCLOPEDIA 107 (rev. ed., 1999).

64. See Moore, *supra* note 58, at 632-34. Many other jurisdictions have rejected attempts to pass potty parity laws. See Banks, *supra* note 5, at 275-76 (listing Illinois and Oregon as two states that "killed" potty parity bills).

65. Moore, *supra* note 58, at 633.

66. See Moore, *supra* note 58, at 600 (describing the long trip to the women's restroom in the capitol building); see also Banks, *supra* note 5, at 274 ("[T]here are several reasons why women need more toilets. . . . Although [many] state plumbing code[s] call[] for equal restroom space for women and men, urinals occupy less space than toilet stalls, and, as a result, men's restrooms often have more facilities. . . . [E]lderly and the physically disabled take longer to use the bathroom, and there are more elderly and disabled women in the country than men.").

67. Moore, *supra* note 58, at 600-01.

68. See *id.* at 600.

69. See *id.* at 601.

70. *Id.* at 601-02.

71. *Id.*

operating in a man's world and it will not be an easy journey.<sup>72</sup>

Moore outlines a final and more problematic type of restroom inequity, which is "no restrooms at all."<sup>73</sup> Under this scenario, a woman is not afforded the "luxury" of relieving herself without washing her hands in or being forced to use the men's room. Rather, she must hold it or seek relief in the outdoors.<sup>74</sup> While this generally works for male employees who, due to their genitalia, have a much easier time urinating outside, for women, the task is stressful and daunting, provides little privacy, and is also unsanitary.<sup>75</sup> This, too, deters women from entering certain occupations generally held by men.

These restroom inequities lead to other forms of discrimination and hostility against women. Female employees who complain about inadequate facilities are often seen as petty nuisances and those who must go to unusual lengths to find a restroom are often criticized for taking long breaks.<sup>76</sup> Similar to transgender author Kate Bornstein's workplace bathroom experience,<sup>77</sup> one female construction worker recounted how at first she was told there were no restrooms on the job-site, only to find out later that the odd-numbered floors had "men only" restrooms.<sup>78</sup> The foreman then required her to climb a ladder (only men were allowed to use the elevator) nearly twenty floors to use a women's room, only to criticize her for being gone too long.<sup>79</sup> When the female worker suggested she be allowed to use the men-only restrooms, the foreman told her she just had to "learn to be

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72. *Id.* at 601 ("[T]here are cases where forced sharing of restrooms effectively operates to keep women out of male-dominated careers."). *See also* Banks, *supra* note 5, at 285 ("The toilet incidents . . . reflect men's continuing hostility toward women trying to enter traditionally male structured and dominated occupations. . . . [T]he toilet was used to reinforce the notion that women are unwanted, unassimilated, and alien to that environment.").

73. Moore, *supra* note 58, at 600.

74. *Id.*

75. *See* Banks, *supra* note 5, at 265 n.5. ("Public toilets are full of bacteria, often on toilet seats, faucets, flush and door handles, floors, sinks, toweling, and soap dishes. . . . [Y]ou [can] . . . get a urinary-tract infection or boils from toilet seats or salmonella or shigella from touching handles.").

76. *See* SUSAN EISENBERG, WE'LL CALL YOU IF WE NEED YOU: EXPERIENCES OF WOMEN WORKING CONSTRUCTION 126 (1998).

77. *See supra* note 52 and accompanying text.

78. EISENBERG, *supra* note 76, at 126. For case law on how the federal courts have dealt with similar issues arising from female construction workers being denied access to the restroom, see *Lynch v. Freeman*, 817 F.2d 380, 381 (6th Cir. 1987), where the circuit court overturned the district court's decision that held though the "portable toilets were dirty, often had no toilet paper . . . and were not equipped with running water or sanitary napkins" there was no barrier to equal employment opportunities for the female employee.

79. EISENBERG, *supra* note 76, at 126.

faster.”<sup>80</sup> Under current OSHA standards, this practice should no longer survive, as all restrooms must be within reasonable proximity to an employee’s work area.<sup>81</sup> However, time and time again, the courts have held against female plaintiffs who were denied workplace bathrooms.<sup>82</sup>

*B. Race-Segregated Bathrooms During Jim Crow*

Under Jim Crow laws, blacks were forbidden to use “whites only” restrooms, drinking fountains, and a variety of other public accommodations.<sup>83</sup> Many of the justifications provided for the segregation were similar to those justifying sex separation, such as protection of a certain group, privacy, cleanliness,<sup>84</sup> and morality.<sup>85</sup> Racially-segregated facilities “taught both whites and blacks that certain kinds of contacts were forbidden because whites would be

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80. *Id.*

81. *See supra* note 19 and accompanying text. The Equal Employment Opportunity Commission (EEOC) also attempts to resolve the worksite bathroom access issue for women through 41 C.F.R. § 60-20.3(e) (2008), which states that an “employer may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associated facilities.” An employer may only do so if it can prove that providing restrooms would be “unreasonable.” *Id.*

82. *See* Mary Anne Case, *All the World’s the Men’s Room*, 74 U. CHI. L. REV. 1655 (2007) (discussing *DeClue v. Central Ill. Light Co.*, 223 F.3d 434 (7th Cir. 2000)). In *DeClue*, plaintiff argued that failing to provide her a nearby restroom was the equivalent of a hostile work environment. 223 F.3d at 440. The court dismissed her case, but said that her case might have had merits had she argued disparate treatment instead. *Id.*; *see also* *Hulbert v. Memphis Fire Dep’t*, No. 99-5358, 2000 WL 924318 (6th Cir. 2000) (finding that fire department’s failure to provide shower facilities supported plaintiff’s prima facie discrimination claim but there was no real evidence of losses); *Austin v. Minn. Mining & Mfg. Co.*, 193 F.3d 992 (8th Cir. 1999) (failing to provide female plaintiff with a portable toilet when she worked one-fifth of a mile from nearest restroom was not severe enough to establish harassment claim); *Kline v. City of Kansas City Fire Dep’t*, 175 F.3d 660 (8th Cir. 1999) (finding that deficient restrooms for women did not support hostile work environment claim); *Epps v. City of Pittsburgh*, 33 F. Supp. 2d 409 (W.D. Pa. 1998) (finding that female firefighter failed to allege that city’s policy of not providing separate sleeping, shower, and bathroom facilities for women firefighters was result of purposeful discrimination).

83. *See generally* HARREL R. RODGERS, JR. & CHARLES S. BULLOCK, III, *LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES* 56-57 (1972); 2 James R. Grossman, *A Chance to Make Good*, in *TO MAKE OUR WORLD ANEW: A HISTORY OF AFRICAN AMERICANS FROM 1800*, at 83-84 (Robin D.G. Kelley & Earl Lewis eds., 2000).

84. *See* BILL ELDER, *ALL GUTS AND NO GLORY: AN ALABAMA COACH’S MEMOIR OF DESEGREGATING COLLEGE* 20 (2007) (recalling his mother said, “Some colored people are not clean and they leave germs on water fountains, toilet seats, and eating utensils.”); Richard A. Wasserstrom, *Racism and Sexism*, in *RACE AND RACISM* 319 (Bernard P. Boxill ed., 2001) (“The point of maintaining racially segregated bathrooms . . . was to make sure that blacks would not contaminate bathrooms used by whites.”).

85. Wasserstrom, *supra* note 84, at 319.

degraded by the contact with the blacks.”<sup>86</sup>

As is now well-known, very rarely were these facilities “separate but equal.”<sup>87</sup> In the workplace, blacks had to travel great distances to use the restroom, while white restrooms were generally “just off the shop floor.”<sup>88</sup> Much like the experiences of women in traditional male occupations, blacks were criticized and demeaned for taking extra time to make it to the restroom.<sup>89</sup> After the Civil Rights Act of 1964<sup>90</sup> and the success of civil rights leaders, such as Martin Luther King, Jr. and Rosa Parks, places of public accommodation began to desegregate and employers began to integrate workplace drinking fountains, lunchrooms, locker rooms, and toilet facilities. Unlike the hostile and violent responses by whites to desegregation in general society, some recall an easier process when integrating workplace facilities.<sup>91</sup>

In 1964, soon after the Civil Rights Act passed, the Harvard Graduate School of Business Administration published a workplace integration guide for employers.<sup>92</sup> The guide provided employers with suggestions for recruiting “Negroes,”<sup>93</sup> as well as preparing white employees for the introduction of “Negroes” into the work environment. Noting that the large majority of employers interviewed had faced no significant problems while integrating the workplace, the guide provides the following illustration:

[A] large industrial company with several Southern plants decided to desegregate its shower rooms. This involved the unlocking of a door between the “Colored” shower room and the unmarked shower room adjacent to it. On the first day, three Negroes asked for lockers on the formerly white side. The local personnel manager . . . called the corporate personnel director . . . and asked what he should do. He was promptly instructed to give the Negroes the lockers which they had requested. The next day [he] called again to say about six Negroes had used the white showers, and about ten

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86. *Id.*

87. The phrase used to justify racially segregated schools and public accommodations, as upheld by *Plessy v. Ferguson*, 163 U.S. 537 (1896).

88. CHARLES LEMERT, *SOCIAL THINGS: AN INTRODUCTION TO THE SOCIOLOGICAL LIFE* 161 (4th ed. 2008).

89. Wasserstrom, *supra* note 84 at 319.

90. Pub. L. No. 88-352, 78 Stat. 241, July 2, 1964.

91. See DAWN DAY WACHTEL, *INST.. OF LABOR AND INDUS. RELATIONS, THE NEGRO AND DISCRIMINATION IN EMPLOYMENT* 29 (1965) (noting that within a few weeks of integrating the workplace, “the Negro becomes accepted or rejected on his own merits as an individual and any initial tensions tend to disappear”).

92. HARVARD GRADUATE SCHOOL OF BUSINESS ADMINISTRATION, *THE MANAGEMENT OF RACIAL INTEGRATION IN BUSINESS 76-78* (Georges F. Doriot ed., 1964) [hereinafter *HARVARD BUSINESS GUIDE*].

93. The term “Negro” is used only to reflect the language at the time of both segregation and integration.

whites had gone home without showering. [The corporate director] merely replied, “Well, I guess we’ve got six clean colored boys and ten dirty white ones today.” Within a week the showers were fully integrated and no one was going home without showering. On two occasions during the first week, someone repainted “Colored” on one shower room, and both times the company [simply] painted over it without a word.<sup>94</sup>

While the Harvard Guide detailed relatively easy workplace desegregation stories, other employers certainly struggled much more to desegregate their bathroom facilities.<sup>95</sup>

C. *The Relationship Between Women’s Restroom Inequities, Race-Segregated Facilities, and the Transgender Bathroom Issue*

Some scholars note the differences and similarities between race-segregation and sex-separation of restrooms, particularly since both are societal constructions based on some actual biological differences—race is based upon color of the skin and ancestry, while gender is based upon sex.<sup>96</sup> One such scholar is Richard A. Wasserstrom, who claims that while race-segregation of facilities was done to protect whites from “dirty” and “less than fully developed” humans, sexual segregation “seems to have more to do with the mutual undesirability of the use by both sexes of the same bathroom at the same time.”<sup>97</sup> This argument, however, overlooks the ways in which the seemingly benign practice of sex-separated bathrooms has negatively impacted women, for example, by serving as a tool for keeping them out of male-dominated professions.

The subtlety of some of the sexist justifications for sex-separated bathrooms is what makes integrating transgender people into gender-specific restrooms so difficult. Sex-segregated facilities are so much a part of today’s world that “non-trans[gender] persons who would likely balk at racial restrictions on bathroom use often see no problem with excluding persons based on their gender expressions or

94. HARVARD BUSINESS GUIDE, *supra* note 92, at 77.

95. *See, e.g.*, EMILY YELLIN, OUR MOTHERS’ WAR: AMERICAN WOMEN AT HOME AND AT THE FRONT DURING WORLD WAR II 201-203 (2005) (detailing how white workers protested against sharing bathrooms with black workers, eventually causing Western Electric in Baltimore to re-segregate the restrooms).

96. Wasserstrom, *supra* note 84, at 318-20.

97. *Id.* (“What seems to be involved — at least in part — is the importance of inculcating and preserving a sense of secrecy concerning the genitalia of the opposite sex. . . . which is fostered by the general prohibition [of] public nudity.”). *But see* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 275 (1979) (“Wasserstrom . . . might also be questioned in light of the deep social image of women as dirty and impure and contaminating.”).

transgender identity.”<sup>98</sup> Members of society have come to accept sex-separated restrooms as a necessary part of protecting individual privacy and do not contemplate the nineteenth century justifications that were rooted in sexism and paved the way for our current bathroom practice. Though combating subtle forms of oppression is often more difficult than fighting blatant bigotry, if society has overcome the beliefs that were engrained into our minds after centuries of slavery and oppression, surely we can find a solution to make transgender people safe and welcome in public and workplace restrooms.

#### IV. NEW JERSEY’S EXPANSIVE LAW AGAINST DISCRIMINATION

New Jersey’s Law Against Discrimination (LAD),<sup>99</sup> the first statewide civil rights statute in the United States,<sup>100</sup> has been applied broadly<sup>101</sup> in order to achieve the “overarching goal . . . [of] nothing less than the eradication ‘of the cancer of discrimination.’”<sup>102</sup> Not only is the LAD one of the most progressive state statutory schemes in the nation, it is also far more inclusive than any federal anti-discrimination law.<sup>103</sup>

##### A. *The Development of Gender Identity or Expression Protection in the LAD*

New Jersey has protected individuals from sexual orientation-

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98. Juang, *supra* note 49, at 710.

99. N.J. STAT. ANN. § 10:5-1 to -42 (West 2007).

100. The LAD was enacted in 1945. *See id.*; New Jersey Division on Civil Rights, About Us, <http://www.state.nj.us/lps/dcr/about.html> (last visited Feb. 17, 2009) [hereinafter DCR Website].

101. The New Jersey Legislature expressly directs that the LAD should be “liberally construed.” N.J. STAT. ANN. § 10:5-3 (West 2007).

102. *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J. 1988) (quoting *Jackson v. Concord Co.*, 253 A.2d 793, 799 (N.J. 1963)).

103. The LAD protects individuals from employment discrimination on the basis of “race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait [and] . . . service in the Armed Forces . . . .” N.J. STAT. ANN. § 10:5-12(a) (West Supp. 2008). On the federal level, Title VII of the Civil Rights Act only protects individuals on the basis of “race, color, religion, sex or national origin.” 42 U.S.C. § 2000(e)(2) (2000). The Americans with Disabilities Act (ADA) protects those with disabilities that “substantially limit[] one or more of the major life activities of” the would-be plaintiff. 42 U.S.C. § 12102 (2)(A) (2006). The Age Discrimination in Employment Act (ADEA) protects those over age 40. 29 U.S.C. § 631 (2006). Civil service employees often enjoy more protection than available to the general public under federal law, with the Civil Service Reform Act of 1978 protecting individuals on the basis of marital status and political affiliation. 5 U.S.C. § 2302 (2006).

based discrimination since 1991,<sup>104</sup> but only added gender identity or expression to the LAD on December 20, 2006.<sup>105</sup> The purpose of the amendment was to codify a previous decision by the New Jersey Appellate Division, which expanded protection to transsexuals despite the absence of explicit statutory language granting such protection.<sup>106</sup> In *Enriquez v. West Jersey Health Systems*, a doctor's employment contract was not renewed because she was in the process of transitioning from a male to a female.<sup>107</sup> The doctor sued under the LAD, claiming gender discrimination because of her transgender status, and disability discrimination<sup>108</sup> because of her gender dysphoria diagnosis.<sup>109</sup> The Appellate Division ultimately held in her favor<sup>110</sup> and doubted whether the legislature would "ban discrimination against heterosexual[s], . . . homosexual[s], . . . bisexual[s, and]. . . against . . . [those] who are perceived . . . by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men and women who seek to change their anatomical sex."<sup>111</sup> The court concluded that "sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman."<sup>112</sup>

While the Appellate Division's holding in *Enriquez* essentially granted employment discrimination protection to those gender-variant employees who choose to undergo sexual reassignment surgery (SRS), the 2006 amendments to the LAD went a step further by creating the gender identity or expression protection. Most agree that this includes transsexuals, cross-dressers,<sup>113</sup> intersex persons,<sup>114</sup>

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104. NEW JERSEY JUDICIARY, FINAL REPORT OF THE TASK FORCE ON GAY AND LESBIAN ISSUES 9 (2001), <http://www.judiciary.state.nj.us/taskforce/law.pdf>.

105. S.B. 362, 212th Leg., 2006 Sess. (N.J. 2006)

106. See *Enriquez v. W. Jersey Health Syss.*, 772 A.2d 365, 367 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 785 A.2d 439 (N.J. 2001).

107. *Id.* at 368-69.

108. See Catherine P. Wells & Margaret O'Rourke Wood, *Gender Identity Gains Protection*, N.J.L.J., Apr. 9, 2007, at S-2.

109. Gender dysphoria, or gender identity disorder (GID), is a diagnosis under the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) and is characterized by feelings of being born into the wrong sex. See Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN'S L.J. 226, 232 n.49 (1998). For a more detailed explanation of GID, see *id.*

110. Initially the court found the doctor had not asserted sexual orientation discrimination, but it later reversed itself. *Enriquez*, 772 A.2d at 372.

111. *Id.* at 373.

112. *Id.*

113. Historically cross-dressers have been called "transvestites" but such a term is now considered inappropriate and offensive. See GETTING THE EDGE IN COMPLIANCE, *supra* note 8, at 21.

114. *Id.*

and those who favor androgyny.<sup>115</sup> Thus, transgender employees who are not in the process of physically transitioning, or those who simply opt to retain their biological sex but otherwise present themselves as the opposite sex, are now protected under New Jersey's LAD.<sup>116</sup> The LAD amendment is even more expansive<sup>117</sup> than the holding in *Enriquez* because there is no reliance upon a diagnosis of a disability classification in order to receive protection. As a result, even plaintiffs who have never been diagnosed with a gender identity disorder, or who decide not to pursue SRS, will fall within the protected class.<sup>118</sup> Ultimately, this legislative-defined transgender protection will be more inclusive to those who cannot afford a diagnosis from a professional psychiatrist or the costly sex-reassignment surgery.

*B. Using Case Law From Other Jurisdictions as Guidance for  
New Jersey Employers*

Because no cases have appeared before New Jersey courts specifically dealing with transgender bathroom access, it is important to compare the outcomes of such cases in other jurisdictions to predict how a New Jersey court might decide. This case law depends heavily upon whether or not the state or local jurisdiction has gender identity protection written into its anti-discrimination statute, as there is no real gender identity protection at the federal level.<sup>119</sup>

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115. Tricia B. O'Reilly & M. Trevor Lyons, *LAD Expansion: Gender Identity and Gender Expression*, N.J. LAWYER, Mar. 26, 2007. While the LAD does not provide a list of those intended to receive gender identity or expression protection, the Division on Civil Rights articulates that transsexuals, cross-dressers and intersex persons would be among those protected. See GETTING THE EDGE IN COMPLIANCE, *supra* note 8, at 21.

116. Some employment law practitioners predict that because the LAD does not explicitly enumerate which persons are protected under the gender identity or expression classification, the amendment will "spawn litigation over precisely who falls within the protected class." Wells & Wood, *supra* note 108, at S-3.

117. This expansion appears to be purposeful. In fact, earlier versions of the bill used the term "transgender," but it was subsequently amended to instead protect based on "gender identity or expression." JILLIAN T. WEISS, TRANSGENDER WORKPLACE DIVERSITY: POLICY TOOLS, TRAINING ISSUES AND COMMUNICATION STRATEGIES FOR HR AND LEGAL PROFESSIONALS 32-36 (2007). The more expansive language serves several purposes, including overcoming the fact that "transgender" is a term that has changed significantly in meaning over the last several decades. *Id.*

118. *See id.*

119. Though Title VII of the Civil Rights Act of 1964 prohibits sex discrimination, federal courts have generally refrained from including transgender persons as part of the protected class. Robert J. Nobile & Leonard Colonna, *Transgender Employees: Dealing with the Restroom Dilemma*, 11 H.R. ADVISOR, Sept./Oct. 2005, at 2. The U.S. Supreme Court has never directly ruled on a transgender bathroom case, but it has held that Title VII's sex protection could support a discrimination claim when an

### 1. Sex-Separated Restrooms Likely to Remain

In jurisdictions without gender identity protection written into the anti-discrimination statute, courts have found no discrimination occurs when bathrooms are sex-segregated.<sup>120</sup> In those jurisdictions, transgender people have little recourse if they are denied access to a bathroom that matches their gender identity, but not their birth sex.<sup>121</sup> Transgender plaintiffs in those jurisdictions have generally tried to bring their claims under Title VII of the Civil Rights Act of 1965, but have been unsuccessful.<sup>122</sup> For example, in *Etsitty v. Utah Transit Authority*, a biological male was hired as a bus driver, but was fired after he told his employer he was a transsexual and began wearing women's clothing.<sup>123</sup> The Transit Authority justified the firing because they feared allowing Etsitty to use the women's restroom would upset coworkers or would cause a problem when the transgender bus driver used public restrooms along the bus route.<sup>124</sup> The U.S. District Court found that there was no violation of Title VII and that the employer's concern about limiting liability regarding the bathroom issue was a legitimate justification of the firing.<sup>125</sup>

Even in jurisdictions providing gender identity protection to transgender persons,<sup>126</sup> the bathroom access issue is not easily resolved. In these jurisdictions, courts have still held that sex-

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individual is discriminated against because they fail to conform to gender stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Even more specifically, the Court of Appeals for the Sixth Circuit recently held that discrimination against transsexuals is equivalent to sex discrimination and thus violates Title VII. *See Wells & Wood*, *supra* note 108, at S-2 (citing *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004)).

120. *See Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Sommers v. Budget Mktg., Inc.* 667 F.2d 748 (8th Cir. 1982) (finding that transgender use of restroom led to disruption); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (finding that transgender use of men's room led to "personnel problems"); *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at \*7 (D. Utah 2005) (firing preoperative male-to-female was permissible because of employer's concerns about complaints from her using the lady's room) ("Concerns about privacy, safety and propriety are the reason that gender specific restrooms are universally accepted in our society."); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ. 02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. 2004); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp 284 (E.D. Pa. 1993) (allowing employer to forbid transgender woman from using women's room); Patricia Leigh Brown, *A Quest for a Restroom That's Neither Men's Room Nor Women's Room*, N.Y. TIMES, Mar. 4, 2005, at A14.

121. *See Etsitty*, 2005 WL 1505610, at \*3.

122. *See supra* note 119.

123. *Etsitty*, 2005 WL 1505610, at \*1.

124. *Id.* at \*1-2.

125. *Id.* at \*6.

126. *See supra* note 10.

segregated facilities are legally permissible.<sup>127</sup> For example, New York City has recognized that “[n]othing in the Human Rights Law prohibits restrooms from being designated by gender,” but will find “discriminatory conduct related to gender identity has occurred” if a person is not allowed to use a restroom consistent with his or her gender identity or is required to provide identification to prove his or her gender before using a sex-segregated restroom.<sup>128</sup> Minnesota has similarly held that the Minnesota Human Rights Act (MHRA) “neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender.”<sup>129</sup> A federal district court in Illinois also found that an employer had a right to deny a female employee a position cleaning men’s bathrooms because fundamental privacy rights are implicated when someone of the opposite sex enters a sex-specific restroom.<sup>130</sup>

Similarly, in New Jersey, the LAD protects notions of privacy and allows restrooms to be gender-specific.<sup>131</sup> A review of cases from jurisdictions with gender identity protection indicates that nowhere has the practice of maintaining sex-specific bathrooms been banned. Thus, in jurisdictions that adopt gender identity protection in the future, it is unlikely that, despite fears, employers will be forced into

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127. See *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001) (designating workplace restrooms and restroom use based on biological gender does not constitute sexual orientation discrimination in violation of the Minnesota Human Rights Act); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (App. Div. 2005) (finding that New York’s Human Rights Law does not forbid sex-segregated facilities).

128. NEW YORK CITY COMM’N ON HUMAN RIGHTS, GUIDELINES REGARDING GENDER IDENTITY DISCRIMINATION 7 (Dec. 2004); see also *Hispanic AIDS Forum*, 792 N.Y.S.2d at 47 (finding no violation when a landlord did not renew a tenant’s lease because the tenant failed to ensure that all biological males were using the men’s restroom). The Court held that “they were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms—their biological sexual assignment.” *Id.*

129. *Goins*, 635 N.W.2d at 723.

130. See *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1423 (N.D. Ill. 1984).

A defendant in privacy rights cases may satisfy its burden of proving a factual basis for a sex-based hiring policy by showing that the clients or guests of a particular business would not consent to service by a member of the opposite sex, and that the clients or guests would stop patronizing the business if members of the opposite sex were allowed to perform the service.

*Id.* at 1416. At least one other jurisdiction has held similarly. See *Brooks v. ACF Indus.*, 537 F. Supp. 1122, 1132 (S.D.W. Va. 1982) (“[W]hile using any of the bathhouses, the male employees had legitimate privacy rights that would have been violated by a female’s entering and performing janitorial duties . . .”).

131. In one case, the District Court of New Jersey upheld employment grooming policies that include sex-specific language, as long as the policies target both male and female employees evenly. *Wisely v. Harrah’s Entm’t, Inc.*, No. 03-1540, 2004 U.S. Dist. Lexis 14963 (D.N.J. 2004). One could infer that sex-specific restroom policies would also be permitted, as long as they are not facially discriminatory, are evenly applied, and do not discriminate based on gender identity or expression. See *Wells & Wood*, *supra* note 108, at 3.

creating unisex bathrooms. Rather, allowing a transgender person to use the restroom that matches his or her current gender identity or outward gender expression is most likely to legally suffice.<sup>132</sup>

## 2. Using Minnesota's *Cruzan*<sup>133</sup> as a Guide for New Jersey Employers in Limiting Liability

Minnesota's case law provides a good guideline for New Jersey employers because like the LAD, the Minnesota Supreme Court in *Goins v. West Group*<sup>134</sup> concluded that Minnesota's Human Rights Act does not preclude the socially-accepted practice of sex-segregated bathrooms.<sup>135</sup> At the same time, in *Cruzan v. Minneapolis Public School System*, the United States District Court for the District of Minnesota held in favor of a school board that was sued by a non-transgender teacher who claimed a gender-based hostile work environment because she objected to sharing the restroom with a male-to-female transsexual librarian.<sup>136</sup> These two cases address the two most common fears expressed by employers regarding the transgender bathroom access issue: 1) that gender identity protection will lead to the elimination of all gender-specific bathrooms and 2) that employers who allow transgender persons to use the bathroom that matches their gender identity or expression (not their birth sex) will be vulnerable to lawsuits from employees who claim a hostile work environment or religious discrimination.<sup>137</sup>

In *Cruzan*, the plaintiff teacher sued not only for hostile work environment, but also for religious discrimination, claiming that because it violated her religious beliefs to share a bathroom with a person of the opposite sex, it thus violated her religious beliefs to share a restroom with a transgender person.<sup>138</sup> While the Minnesota court dismissed her claim,<sup>139</sup> some employment law practitioners

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132. *See id.*

133. *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964 (D. Minn. 2001), *aff'd sub nom.*, *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002).

134. 635 N.W. 2d 717 (Minn. 2001).

135. *Id.* at 726. It is unlikely that New Jersey would follow the ultimate decision in *Goins*, which upheld an employer's right to keep a transgender person from using the restroom that matched his or her gender expression and not biological sex. But reading *Goins* in conjunction with *Cruzan* demonstrates that while a jurisdiction allows sex-separated restrooms, employers will not face liability from unhappy non-transgender employees should they decide to allow transgender employees to use a bathroom in alignment with their gender identity or expression.

136. *Cruzan*, 165 F. Supp. 2d at 968-69.

137. *See supra* note 16.

138. *Cruzan*, 165 F. Supp. 2d at 967.

139. *Id.* The court relied upon federal law, which holds that to establish a claim of religious discrimination, a plaintiff must prove "(1) she had a bona fide religious belief that conflicted with an employment practice; (2) she informed the [employer] of her

speculate that a similar claim might be actionable in New Jersey because the courts are more progressive and the LAD expressly prohibits both religious discrimination and sex discrimination.<sup>140</sup> However, New Jersey uses the “severe or pervasive” standard for determining hostile work environment and looks to the surrounding circumstances to determine whether the hostile work environment exists.<sup>141</sup> A plaintiff would need to prove that the alleged anti-religious hostile work environment amounted to being denied an “accommodation, advantage, facility, or privilege” to prove an LAD violation.<sup>142</sup> To prove a hostile work environment based on sex or religion, a plaintiff would have to prove “the complained-of conduct (1) would not have occurred *but for* the employee’s gender [or religion]; and it was (2) *severe or pervasive* enough to make a (3) *reasonable woman* believe that (4) the conditions of employment are altered and the *working environment is hostile or abusive*.”<sup>143</sup> Thus, an employee who merely claims being offended or inconvenienced by having to share a restroom with a transgender person likely does not have an actionable claim under New Jersey law.

#### V. PROPOSED WORKPLACE RESTROOM POLICIES FOR NEW JERSEY EMPLOYERS

Because of society’s deeply engrained notions of gender and an almost universal practice of sex-separated bathrooms, any employer who implements a workplace restroom policy that breaks down the “urinary segregation” is sure to create instability in the workplace unless it is done correctly. Though the myth that another employee could easily file a hostile work environment suit if transgender employees are integrated into workplace gender-specific restrooms has been debunked,<sup>144</sup> for mere business purposes an employer should handle transgender bathroom access issues carefully.

##### A. *The Benefits and Challenges of Accommodating Transgender Employees*

“Transgender employees who do not feel valued or safe at work

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belief; and (3) she suffered an adverse employment action.” *Id.* (citing *Seaworth v. Pearson Autobody*, 203 F.3d 1056 (8th Cir. 2000)). Among other things, the court held that Cruzan “fail[ed] to meet her burden of showing the existence of an adverse employment action,” which had to amount to more than “a mere inconvenience without any diminution in title, salary or benefits.” *Id.* at 967-68. Thus plaintiff failed to establish the prima facie case for religious discrimination. *Id.* at 968.

140. See O’Reilly & Lyons, *supra* note 115, at 2.

141. Taylor v. Metzger, 706 A.2d 685, 692 (N.J. 1998).

142. Walz v. Egg Harbor Twp. Bd. of Educ., 187 F. Supp. 2d 232, 243 (D.N.J. 2002).

143. Lehmann v. Toys ‘R’ Us, Inc., 626 A.2d 445, 453 (N.J. 1993).

144. See *supra* Part IV.B.2 and accompanying notes.

may not be able to perform”<sup>145</sup> as well as they would in jobs where they felt welcomed, and this can affect the productivity and morale of an entire unit, department, or company.<sup>146</sup> By mishandling bathroom access issues, employers risk losing significant sums of money through decreased workforce productivity, high turn-over rates from disgruntled employees who quit, and increased costs for defending against unnecessary LAD violation claims. Thus, transgender rights advocates argue that not only is granting transgender bathroom access the morally right and legally compliant thing to do, but also the smartest business decision.<sup>147</sup>

Many employers, such as American Airlines, Apple Computer, IBM, and Lucent Technologies,<sup>148</sup> have successfully implemented policies that integrate transgender employees into workplace restrooms and maintain an overall positive work environment for all employees. The strategies that employers use to accommodate transgender persons will depend upon the unique circumstances of each individual business or organization. A company’s size might play an important role. For example, large corporations might already maintain a combination of single-stall and multiple-stall bathrooms, thus making it easier to allow transgender access to the sex-specific restrooms because any employee who does not wish to share facilities with a transgender person could simply use a single-toilet bathroom with a door lock. At the same time, larger companies are likely to be faced with the challenge of having employees who might not know each other well. When individuals have a personal relationship with each other, they will probably be less likely to care about maintaining absolute sex-segregation in the restrooms.<sup>149</sup>

Small businesses might only have a single toilet in the entire workplace, thus making the question of which bathroom a transgender employee should use rather moot. In that circumstance,

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145. HUMAN RIGHTS CAMPAIGN FOUNDATION, TRANSGENER ISSUES IN THE WORKPLACE: A TOOL FOR MANAGERS 12 (2004), <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf> [hereinafter HRC GUIDE].

146. *Id.*

147. *Id.* A vice president at IBM claims that “[t]he contributions that are made by the IBM members of the GLBT community accrue directly to our bottom line.” *Id.* at 8.

148. *Id.* at 22.

149. For example, most private bathrooms at home are used by all family members, friends, and visitors regardless of sex. Further, gay rights organizations frequently encourage lesbian, gay, bisexual, and transgender (LGBT) individuals to come out of the closet because heterosexual people are less likely to be homophobic (or transphobic) when they personally know an out LGBT friend or family member. *See generally* Human Rights Campaign, Coming Out, [http://www.hrc.org/issues/coming\\_out.asp](http://www.hrc.org/issues/coming_out.asp) (last visited Jan. 14, 2009) (providing a resource for LGBT and “straight-supportive people” to learn about issues involved in coming out).

the transgender employee's issues will most likely not be related to bathroom access and will depend upon the workplace culture the employer has created. For the many other businesses and organizations that utilize only multiple-stall, single-sex bathrooms, these employers must "handle restroom access issues with respect to their known transgender employees . . . [and] find solutions that are safe, convenient and respect the transgender employee's dignity."<sup>150</sup> In this setting, where only multiple-stall bathrooms exist, the LAD would require that the employer allow gender-variant persons to use the restroom that matches their gender identity or expression.<sup>151</sup>

*B. Integrating Transgender Persons Into Sex-Separated Bathrooms*

1. An Interactive Process With the Transgender Employee

The Sylvia Rivera Law Project, a transgender legal advocacy group, advocates that allowing transgender people to use restrooms that align with their gender identities or expressions "will protect them from the harassment . . . they frequently face when trying to access such facilities."<sup>152</sup> Similarly, legal practitioners seem to agree this is a proper solution under the LAD.<sup>153</sup> This requires allowing those who fall within the protected class to use the restroom that matches their gender identity or expression, regardless of their biological birth sex or whether they have undergone sex-reassignment surgery.<sup>154</sup> Thus, much like when dealing with employees with disabilities, employers must undergo an "interactive process" to determine how a transgender person wishes and needs to be accommodated.<sup>155</sup>

The litigation surrounding this issue will likely be focused on

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150. HRC GUIDE, *supra* note 145, at 22-23.

151. *See* Wells & Wood, *supra* note 108, at S-3.

152. SPADE, *supra* note 36.

153. *See* Wells & Wood, *supra* note 108, at S-3. New Jersey employers should avoid the temptation to simply create an entirely new third category of restrooms for gender-variant employees. In doing so, a number of legal issues could arise. For example, if the restroom is not easily accessible and is at a significantly further distance than the other restrooms, OSHA guidelines might be violated and the transgender employee might feel they are being treated as an "other." Such a strategy might also be viewed as a strategy to intimidate and keep transgender employees out of the workplace much like women have been kept out of traditionally male occupations through restroom inequities. *See supra* Part III.C and accompanying notes. And while some individual transgender employees might not mind using a distant unisex restroom, a employer who bases its policies solely upon a specific individual risks being sued by future employees who might find such a policy offensive.

154. *See* Wells & Wood, *supra* note 108, at S-3.

155. *See* HRC GUIDE, *supra* note 145, at 15-16.

what individuals fall within the protected class.<sup>156</sup> Though there seems to be consensus that transsexuals, cross-dressers, and intersex persons will be protected,<sup>157</sup> it is unclear if those who scoff at traditional concepts of gender and identify as gender-free or gender-queer will be protected. Again, the interactive process between an employee and an employer can help determine the level of accommodations needed to match each individual employee's gender identity or expression.<sup>158</sup>

## 2. An Interactive Process With Non-Transgender Employees

Advocacy groups claim that “[m]ost employees will accept an employer’s right to set workplace policies”<sup>159</sup> and will not respond negatively to policies that allow transgender employees to use the bathroom along with everyone else of the same gender expression. To make transgender integration into the workplace issues go as smoothly as possible, employers should similarly engage in an interactive process with their non-transgender employees to both hear their concerns and reinforce that discrimination will not be accepted. This interactive process might include training to teach employees about transgender issues and the LAD requirements and to provide “clear guidance regarding appropriate workplace behavior and the implications of failing to comply with anti-discrimination policies that include gender identity or expression.”<sup>160</sup>

These trainings can also work to break down some of the underlying assumptions and fears that cause individuals to feel uncomfortable using the restroom with someone of the opposite sex. For example, while it may or may not be true that women are less likely to be assaulted in a women-only public restroom,<sup>161</sup> the reality is that workplace restrooms are usually available only to employees, managers, owners, and occasionally clients for use. Because of the limited number of individuals using the restroom and the fact that employees likely know each other fairly well, the threat of violence should not be nearly as great as in a public setting. Walking female employees through this thought process should help them feel less concerned about sharing the restroom with a male-to-female

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156. See Wells & Wood, *supra* note 108, at S-3.

157. See *supra* note 10 and accompanying text.

158. HRC GUIDE, *supra* note 145, at 23.

159. *Id.* at 26.

160. *Id.* at 17.

161. Levi, *supra* note 34, at 16 n.66 (noting another commentator’s argument that “single-sex bathrooms are actually less safe than unisex bathrooms because an attacker knows that only members of the ‘victim’ sex will be inside”).

transsexual than they might feel regarding a public bathroom,<sup>162</sup> and thus make bathroom integration easier.

By adopting clear written policies and language in the employee handbook manual, an employer can make sure that all employees are well aware that the company respects transgender persons (and the law) and can advise them of how to behave appropriately. Further, these policies could contain appropriate procedures for reporting bathroom incidences, such as harassment, invasion of privacy, or violence, should they occur.<sup>163</sup> This will demonstrate the employer is taking proactive measures to ensure the safety and privacy of all employees, regardless of sex, gender identity, or gender expression.

Ultimately, there is no single strategy that can be used for all workplaces.<sup>164</sup> Rather, an employer must factor in issues such as the culture of the workplace, the current restroom configuration and layout, and the number of employees in the workplace. For most employers, the simplest solution will probably be to maintain restroom access exactly as it currently exists, but allow any employee to use the restroom based on their gender identity or expression and not their biological or birth sex.

Regardless of the strategy utilized, the LAD commands no discrimination based on gender identity or gender expression.

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162. Some even argue that sex-specific bathrooms do nothing to protect women from predatory men because a “would-be assailant has a reasonable expectation that he will find potential victims, and only potential victims, in a ladies’ room.” Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. CONTEMP. LEGAL ISSUES 1 (1998).

163. See HRC GUIDE, *supra* note 145, at 22-28.

164. Even transgender advocates concede that each individual business will have its own unique strategy for accommodating transgender employees. *See id.* at 18.