

Flushing the Potty Panic

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Abstract

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Article

In 1975, a very curious thing happened in an area of the country where one might not expect such a curious event to take place.

The city of Minneapolis, Minnesota, became the first jurisdiction in history of the United States of America to pass an ordinance guaranteeing the equal protection under the law of the right of sex and/or gender variant people to live their lives free of discrimination by others based on their “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness” (current citation as of 2011: City of Minneapolis Code of Ordinances, Title 7 “Civil Rights”, Chapter 139, Section 10, definition of “sexual orientation”).

In the over 35 year long time period since then, similar laws have been passed in 15 states, plus the District of Columbia, and over 100 county and municipal jurisdictions around the country. Of those 15 states and the District, all of these laws were passed in the last ten years, the sole exception being, again perhaps curiously for those of us who often regard any place that does not lie upon the Left and Right Coasts as “flyover country” and a bastion of conservative politics, the State of Minnesota, which adopted the definition used in Minneapolis statewide in 1993 (current citation: Minnesota Statutes, Chapter 363A “Human Rights”, Section 03, Subd. 44, definition of “sexual orientation”).

This is not only a testament to how the attitude of the people of this country toward sex and gender variance has evolved in recent years, but an even greater testament to the people of the City of Minneapolis and of the State of Minnesota for their leadership in protecting the rights of humankind, for which I think we all owe them a debt of gratitude.

[Figure] Map of LGBT Employment Anti-Discrimination Laws in the US

These jurisdictions, combined, represent approximately 40% of the entire population of the United States of America, a fact which might seem odd, given much of the rhetoric that surrounds the quest to expand the coverage of similar laws to the rest of the population of the United States, which often characterizes the opposition to such efforts as overwhelmingly in the majority.

As we speak, a similar bill, GENDA, or, the “Gender Expression Non-Discrimination Act”, is being considered, not for the first time, by the New York State Senate, having already passed the New York State Assembly by a wide margin, and having the support of the Governor, but that bill is being blocked by the Republican leadership, again, despite the fact that it is believed that a majority of the Senate intends to vote in the affirmative on that bill if the Republican leadership relents and allows the bill to go to the floor for a vote.

This is, unfortunately, unlikely to happen, as the current legislative session in the State of New York ends today, but along with the recent battle over a similar law, GIADA, the “Gender Identity Non-Discrimination Act”, in Maryland, and the continuing push for a sex and gender variance inclusive ENDA, or “Employment Non-Discrimination Act”, in the 112th United States Congress, it serves as an illustration that the push to expand the reach of anti-discrimination laws to additional states, as well as nationwide at the federal level, is in full swing.

The main point of contention over such laws, as many of us are only too well aware, is the idea that passing such laws will allow the unfettered access of men to sex-segregated spaces reserved for women. Many people in the general population, including a certain portion of the trans community itself, exhibit a strong fear that such laws will increase the likelihood that women and girls will be in danger of various sorts in places where we are all in a heightened state of vulnerability.

While the discussion of such places usually centers on public restrooms, such places also include spaces in which nudity is practically unavoidable, such as dressing rooms, which are disconcertingly often being constructed without individual partitions nowadays, locker rooms, and shower facilities. Less often recognized is the fact that the term “public accommodations”, as these things are known in the language of law, also includes hotels, homeless shelters, the ability to patronize businesses, and many, many more aspects of everyday life.

Even the main sponsor of ENDA in the previous, 111th, and current, 112th sessions of the United States Congress, Representative Barney Frank (D-MA4), a member of the LGBT community and the first member of Congress to retain a known trans person, Diego Sanchez, on his staff, has been widely reported for his discomfort with dealing with this issue.

The latest versions of ENDA, H.R. 1397 and S. 811, as introduced by Representative Frank and Senator Jeff Merkley (D-OR), respectively, both attempt to deal with this problem, at least in terms of how it relates to employment law, by requiring that the construction of the law proceed in the following manner:

“(3) CERTAIN SHARED FACILITIES- *Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee’s gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.*

(4) ADDITIONAL FACILITIES NOT REQUIRED- *Nothing in this Act shall be construed to require the construction of new or additional facilities.”*

While this has been seen by some commentators to be an acceptable compromise, it is seen by others as an attempt to create a new “separate but equal” standard, a legal concept which has already been rejected by the Supreme Court of the United States in *Brown v. Board of Education*, (347 U.S. 483 [1954]), most famously. It also may have the potential to lend a certain legitimacy to the idea of remanding trans people to the ghetto of a “third sex” or “third gender” status. If “separate but equal” is unconstitutional, what other options can we pursue?

[Figure] Family Restroom Sign in Germany

One that has been suggested is that we advocate for all public facilities to be single-occupant, fully private, unisex accommodations. This is a practice which has become more commonplace in the modern era since the passage of the Americans With Disabilities Act in 1990; however, that law specifically proscribes considering “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders” as disabilities (current citation: <http://www.ada.gov/pubs/ada.htm>).

It is often noted that there is something of a burgeoning trend to provide similar facilities for “family” usage, which, while it has proven to be a boon for many fathers out alone with female children who need to use a public restroom, has also been very helpful for many trans people. At least one website has been created to list restrooms that may be “safe”, at Safe2Pee, where many such family and unisex restrooms accessible by the public may be found.

Unfortunately, it should also be noted that at at least one prominent location, a shopping mall near my home, the Hamilton Mall, near Mays Landing, New Jersey, access to the family restroom is controlled from a remote location, and will be summarily denied if the person requesting access via intercom and security camera does not have a child with them, so this may not be a solution for trans people even where such facilities exist. When this happened to me, I was so disgusted (and in need of timely access to a restroom) that I did not bother to take the time to find someone in a management capacity to discuss my objections to their policy. I imagine they believe they are preventing pedophiles from attacking children, but it is hard to see how their policy accomplishes such a goal when the family restroom is already single-occupancy.

I have not experienced such issues at any of the other large shopping centers in the South Jersey and Philadelphia, Pennsylvania areas, although for the most part, I do not use such family facilities anymore unless I have a particular need for the usually larger and cleaner spaces provided for them, since I have long since become accustomed to using sex-specific facilities. The exception is when I am accompanying my six-year-old, who hasn’t yet been instructed not to call me “Daddy” when we’re in public. Additionally, I am on the road a lot, so the ability to duck into a family restroom and change clothes or touch up my appearance, if need be, can sometimes be useful.

While it would be very nice, in my opinion, as a person who doesn’t particularly like shared public restrooms in the first place, much less shared shower facilities, to have all public restrooms constructed like our current disabled access and family restrooms, I think that we can all easily see that the economic outlay required for such facilities may be too great for our legislators, or for the public, to accept. Anyone who has undertaken a renovation of any room that includes plumbing in their home will be viscerally aware that such rooms are usually, by far and away, the most expensive in the

building, and anyone who has attempted to design or plumb such facilities needs to contend with the constraints of the realities of efficient water and waste flow that determine space and distance limitations closely. As the old saw goes, anyone smart enough to be a good plumber is probably doing something else.

Abigail Jensen, in her article about the arguments over terminology in our community and its relevance to the structure of anti-discrimination legislation, believes, as some do, that the ideal situation would be to eliminate sex-segregated facilities altogether. She recognizes, however, that such an ideal is highly unlikely to be accepted generally, and instead seems willing to live with the ENDA compromise.

The ENDA compromise seems fairly easy to digest, apart from its reification of “separate but equal”. Under this proposed compromise, which I will again note would only have effect as regards facilities provided in the course of employment but which would certainly be a powerful precedent for extending the compromise generally, employers would be required to provide trans people with restroom, dressing room, locker room, and shower facilities appropriate to their gender identity, as that term is defined in the text.

Interestingly, and perhaps significantly, the text specifically excludes restroom access in the quote above, and focuses solely upon shared dressing and shower facilities, presumably because with the common knowledge that most shared toilet facilities that are sex-segregated for women contain individual, locking stalls rather than open urinals, it is seen that restrooms do not generally require public nudity. Employers would not be required to construct new facilities if existing facilities may be partitioned sufficiently.

[Figure] Women's Restroom Sign in Williamsburg, VA, US

Before I continue further, though, I would like to take a few moments to address the concerns of those for whom no amount of allowing access for men into women’s spaces is acceptable. The more reasonable opponents of restroom freedom for all people of sex and/or gender variance, at least, recognize that trans people should use the restrooms of their target sex/gender, but usually draw the line at allowing cross-dressers, who are usually defined as those people who do not pursue transition but like to temporarily have experiences that are usually limited to another sex or gender. Many others, however, seek to limit such access only to those who have received sexual reassignment surgery of some sort. Usually what this boils down to is that they believe that only trans women who do not have penises should be allowed to use women’s facilities.

First of all, I would like to note that only in very few jurisdictions in this country is it an illegal act for a person merely to enter, or even use for the purposes which such facilities are designed, a sex-segregated facility that is not dedicated to their sex and/or gender. In a follow-up to her article and discussions thereof spanning several websites, Abigail Jensen gave a good summary of the problems of sex-segregation of facilities by law:

“Here’s my bottom line: If we truly believe that allowing discrimination based on someone’s failure to conform, physically or in dress, mannerisms, makeup, etc., to sex or gender “norms” or stereotypes is wrong, then there is no principled way to ban anyone from using any sex-segregated facility without violating that principle. Any such attempt will necessarily be based on the person’s failure to conform to one of those norms.

In addition, any such attempt will give someone, whether a court, government official, doctor, therapist, facility owner or fellow patron, the arbitrary power to enforce such norms by deciding who is and who isn't feminine or masculine enough to use a given facility. Moreover, the power to determine whether I am a man or a woman, or am feminine or masculine enough to be considered one or the other, is not something I am willing to cede to anyone. Nor do I think anyone else should be required to give up that power."

Females are a suspect class in our society. I think you will find very few people who will debate this point seriously. This is the main reason why so many people continue to find little difficulty with the sex-segregation of public facilities, even if they have no other reason to do so. When it comes to trans people, however, opinions and perceptions of us as to whether we are "truly" men, or "truly" women, range all across the spectrum. Adding into this the ideas held by many that we are in some way "deviant", "perverted", or "evil", and it is not hard to see why trans people, and trans women in particular, are a suspect class that is at even greater risk than the female population as a whole.

I have spoken with many people in our community who feel that the best solution for the case of cross-dressing men, upon whom the bulk of the objection falls, is to somehow educate the males of our society that they should not feel in any way threatened by the sight of a person in feminine or androgynous attire or a person with feminine or androgynous mannerisms in the men's room, and therefore, men should under no circumstances be allowed into women's spaces. I think this is an overly idealized perspective. If it were such a simple operation to achieve, would we not now be enjoying a society where the oppression of all people by means of normative standards of gender was far less than it remains even today, given the decades of modern feminist, not to mention LGBT, consciousness-raising and activism?

Isn't this just merely another way of saying, "Everyone should just be nicer to everyone else," and sticking our heads in the sand? Even if it were ultimately possible to accomplish that goal, and I believe it is possible, it would inevitably take many, many years to achieve any measurable success, a period far too long for people who are living with palpable danger to their person in the absence of immediate legal protection to contemplate.

The general pattern of language that is used in anti-discrimination laws that protect trans people bans discrimination on the basis of actual or perceived gender identity, expression, appearance, behavior, or other gender-related characteristics, regardless of whether or not traditionally associated with a person's sex as assigned at birth. Much of the objection to this language centers on the validity of the concept of gender identity, but it is important to understand that the bulk of the protection provided by such laws hinges more upon one's presentation of their gender to the rest of the world, that is, one's expression of that gender through their appearance and behavior, including one's dress and their mannerisms, than it does, except for in certain circumstances, on the concept of gender identity.

These laws are not specifically designed for the sole purposes of the protection trans people, but for the protection of all people whose presentation may cause others to make incorrect, or even correct, assumptions about their sex and/or gender. They protect cis people as well as trans people. They protect anyone at all who might be perceived by others as being in any way transgressive of the

normative standards of gendered characteristics that have long ruled our society, as well as those who just choose for whatever reason to live their lives without devoting an absurd amount of their energy to meeting the high standards of presentation that are often regarded as preferable. As pointed out by Abigail so eloquently, there is no other possible way to structure these laws such that they would remain effective and invulnerable to challenges of constitutionality, let alone based on sound legal and moral principles.

Gender identity, as a protected characteristic, primarily comes into play when a person reveals to someone else that they are trans, or that they intend to transition, yet still retain an otherwise unremarkable presentation, such as an employee making their supervisor aware of such identity or impending transition.

Since the passage of that first ordinance in Minneapolis over 35 years ago, there have been no documented incidents of a male predator attempting to use such a law as a defense against criminal charges resulting out of actions taking place in a sex-segregated facility. None. With the pressure upon legislators that is so heavily applied by opponents of such legislation, we can be sure that had any such incidents arisen, they would have been widely publicized, and would be cited as examples at every subsequent attempt to pass similar legislation.

[Figure] Signing of the Civil Rights Act of 1964 by President Lyndon B. Johnson

It is no coincidence that similar fears and objections have attended the push to pass many different kinds of anti-discrimination laws, particularly those which ended the segregation in our society by race with the passage of the Civil Rights Act of 1964 and similar legislation, and the failed attempt to pass the Equal Rights Amendment to put the definitive word to the subject of oppositional sex discrimination, in addition, even more notably, to those anti-discrimination laws which included sexual or affectional orientation as a protected class.

This empirically demonstrated, unbroken history of the lack of the societal disturbance always predicted by opponents to be caused by these laws is proof enough that allowing access to segregated facilities not designed for one's sex or gender carries with it no reason to fear increased danger to women and girls.

Often, those opponents will make the claim that making it "legal" for men to enter women's facilities is in and of itself an impermissible danger, yet they make these claims without ever noticing that in most jurisdictions, it is, and always has been, legal for men to enter and use women's facilities, and vice versa. It is only societal custom that maintains the separation, and one other thing.

Regardless of the legality of any particular person's presence in any particular space, whether sex-segregated or not, whether of the "appropriate" sex or a differing sex, it is always been, and will always remain, an unlawful practice to engage in actions prohibited by law. No anti-discrimination legislation will ever make it any less illegal to murder, rape, assault, or otherwise molest another person, nor will any anti-discrimination law will ever nullify the presence in our society of the existing ordinances and statutes making disorderly conduct illegal.

Sex and/or gender variant people have no demonstrated history whatsoever of using their status, under applicable anti-discrimination laws or otherwise, as protection for engaging in illegal activity.

Trans women do not enter women's restrooms, dressing rooms, locker rooms, and showers for the purposes of disturbance, but for the purposes which those facilities were designed, and neither do trans men enter men's facilities for nefarious purposes, it should be noted. Even if such a situation were to ever arise, it would not make any illegal activity they might engage in any less illegal.

The only real result of anti-discrimination legislation in this country has been to protect the classes of people they are designed to protect from discrimination and violence at the hands of those who view them as subhuman, and to allow the population as a whole to personally experience the fact that sex and gender variant people are no more interested in disrupting society, as a class, than any one else.

[Figure] Historical Site Marker detailing Plessy v. Ferguson

Unfortunately, no matter how much we might wish that the entirety of the population revise their opinion on sex and gender variance so that they are more accepting, there will always be those who refuse to do so. These people are human beings as well, and deserve a certain amount of respect for the fact that they are deeply disturbed by the presence of others who they perceive as unlike them. We should not ridicule these people, but have compassion for them. There are also those who are uncomfortable in shared facilities, and there is no reason why their discomfort cannot or should not be acknowledged in a humane manner.

I believe the solution is very simple. Do not create "separate but equal" facilities designed to relegate sex and gender variant people to a ghetto, as proposed by ENDA, but provide out of the total number of public sanitary facilities a certain percentage of fully private facilities for the minority of people who will never be comfortable in shared facilities, either because they desire privacy, or because they cannot overcome their fear of the possibility of molestation based solely on the fact of being in the presence of a person with a differently shaped body, or differently pitched voice.

In order for this to be effective, we must adopt the paradigm set forth by the Americans With Disabilities Act, rather than the compromise language of ENDA, which creates no requirement for additional or new facilities. I am certain that any attempt to do so would create a loud hue and cry that it places an onerous burden on establishments to expend capital. This is exactly the same objection that was raised during the debate over the necessity for the ADA. We passed ADA successfully over 20 years ago, and hardly anyone gives it a second thought in this 21st Century. The objections, as did the objections to all previously enacted anti-discrimination laws, failed to accurately predict the effects of the law.

Yes, a new anti-discrimination law requiring the construction of new facilities would demand certain outlays of capital, but with the current state of our economy, with so many businesses struggling and so many workers unemployed, I cannot help but see this as a massive opportunity to create economic growth. As we did with the ADA, we can allow existing facilities to opt for the ENDA compromise rather than reconstruction and for buildings of historical import to remain in their original condition under many circumstances, requiring only that new installations comply with the new law. The end result of this would be to create an economic incentive for any establishment which constructs new facilities, enabling them to draw on a wider customer or client base, making them more competitive relative to those places which do not upgrade.

This proposal neatly side-steps any question of creating "separate but equal" facilities for suspect

classes, and places the power to choose which facilities are appropriate for each person into their own hands, a principle which ought to appeal to all those who value freedom, liberty, and individual choice, three of the most treasured hallmarks of Usamerican society. Crafting legislation to implement this proposal should be fairly straightforward, given that we have the pre-existing template of the ADA to work from.

One thing is sure. No form of discrimination in this country was ever ended by waiting around for a majority of the public to become comfortable with the idea. Every gain we have made in the fight to provide truly equal protection under the law of the rights of all people has been made only through the hard work of activism against an overwhelming tide of discrimination.

Prominent figures in the Usamerican LGBT community banded together in 2009 to draft and adopt a set of principles to guide our quest for equality. These principle have come to be known as the Dallas Principles. I am going to remind us of the first five of those eight principles, as they directly bear on this subject:

1. *Full civil rights for lesbian, gay, bisexual and transgender individuals must be enacted now. Delay and excuses are no longer acceptable.*
2. *We will not leave any part of our community behind.*
3. *Separate is never equal.*
4. *Religious beliefs are not a basis upon which to affirm or deny civil rights.*
5. *The establishment and guardianship of full civil rights is a non-partisan issue.*

The time has come for us to unite, and we must do so behind a stance which protects all people, cis and trans alike, maximizing the rights of all without trampling the rights of any. We can do this, we should do this, and we must do this. I hope that you agree.

[Figure] Personal Seal of Gemma Catherine Seymour, Unihan characters for yin-haan

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