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38 St. John's Place
Buffalo, New York 14201

September 28, 2012

Hon. Timothy Hogues
County Legislature
Old County Hall
Buffalo, New York 14202

Dear Legislator Hogues:

Attached please find a copy of the New York Civil Liberties Union report on the need for passing the Gender Expression Non-Discrimination Act to add gender identity as a protected category to the state Human Rights law.

Mark Poloncarz as County Executive has already issued an Executive Order, but of course it only covers county employees. It would be better if it were codified in law. Such a bill already passed the Legislature, sponsored by Maria Whyte. It passed unanimously, but Chris Collins pocket vetoed it.

I would love it if you and your colleagues would take up this issue again. The resources of Stonewall Democrats and Spectrum our transgender support group are available. For myself I worked for 23 years at New York State Crime Victims Board now the state office of Victim Services and I can give you a bit of anecdotal material on the subject of LGBT discrimination in its most violent form, that of violent attacks.

Thanking you in advance for your concern,

Very Truly your's

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# Advancing Transgender Civil Rights and Equality in New York:

## The Need for GENDA

New York Civil Liberties Union

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## The Need for GENDA


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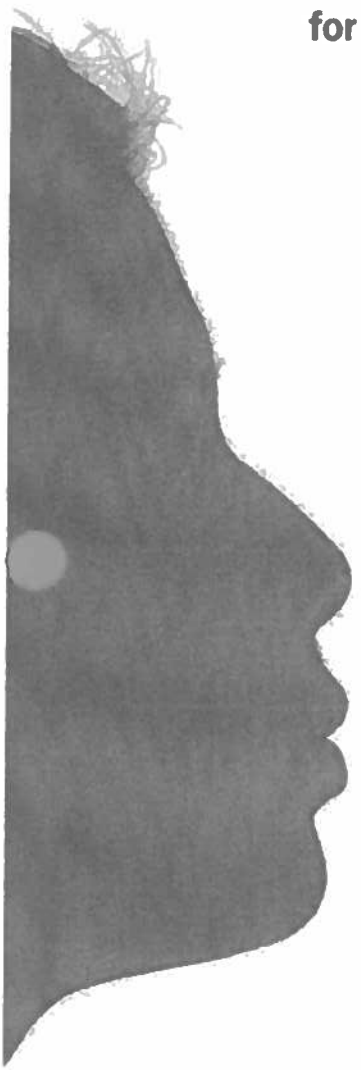
# Advancing Transgender Civil Rights and Equality in New York:

## The Need for GENDA



**For some New Yorkers, the simplest and most fundamental parts of their identity – their clothing, their speech, even their names – expose them to hostility and exclusion.**

People who do not conform to gender-based stereotypes, or whose gender presentation or identity differs from the one usually associated with their anatomical sex, often experience persistent discrimination and harassment. They face challenges earning a living, finding housing and enjoying the simple pleasures and necessities of life. Everyday activities like eating out, shopping or going to the movies carry the risk of mistreatment, refusal of service – or worse.

Currently, however, no statewide law explicitly prohibits discrimination against people whose appearance or identity does not conform to gender stereotypes. This means that people who are fired from their jobs, denied housing and services, and mistreated in the workplace, in stores and in restaurants merely because of their appearance or gender identity do not have clear legal protection. The Gender Expression Non-Discrimination Act (GENDA) would fix this problem by adding gender identity and gender expression to the categories currently included in New York State's antidiscrimination laws, such as sex, sexual orientation, race, religion and disability.

This report explains why the legislature should pass GENDA. It first defines the terms "gender identity" and "gender expression." It then shows how discrimination affects the everyday lives of transgender and gender non-conforming people, and examines successful efforts in other states and in jurisdictions within New York to combat this discrimination through civil rights laws.

We base our support for GENDA on New York State's proven commitment to respect and honor the dignity of all people. We encourage you to support GENDA because:

- Transgender and gender non-conforming people deserve freedom from harassment, mistreatment and exclusion.
- New York shows its respect for diversity and concern for ensuring that people enjoy fair treatment by prohibiting discrimination on the basis of many different personal characteristics, such as sex, religion, sexual orientation and disability. New York should correct the gap in its current anti-discrimination laws by including transgender and gender non-conforming people within its protections.
- There are hundreds of thousands of transgender and gender non-conforming people in New York State. Protecting and expanding their access to education, housing, employment and community life affects every New Yorker's well-being because it further promotes a more just society.
- Despite the pride New Yorkers take in ensuring fairness and freedom for all, New York has fallen behind 16 other states in enacting civil protections based on gender identity and expression.
- Ending discrimination is a matter of essential civil and human rights – it is a non-partisan issue that merits the support of every elected leader in New York State.

Enacting GENDA will not be a radical step or departure from long-held values. Many of New York's towns, cities and counties have already enacted laws that prohibit discrimination based on gender expression and gender identity.

All New Yorkers deserve the same protection: The right to be free from discrimination should not depend on a person's ZIP code.

## Understanding Gender Identity and Gender Expression

Kym Dorsey of Albany was born nearly a half-century ago – but, she says, 'Kym' is really only 5 years old. That's because Kym lived most of her life as Kenny, "a pretty gay boy" with curled hair and long eyelashes. "Growing up, I'm thinking, I'm just human. I didn't start embracing the word 'transgender' until age 40. I was just this pretty boy, with Kym trapped inside."

Kenny came of age in the 1970s, when blurred gender lines and sexual androgyny were pop media staples. He grew up and earned a degree in early childhood education; he worked as a substitute teacher and for eight years directed a day camp. But he always felt something was "uncompleted" in his life, as if a puzzle piece was missing.

In January 2007, he found it.

"You need to be who you were meant to be," Kenny's mother whispered to him, minutes before her death. In that moment, Kenny realized that something his grandmother had always said was true. All his life, she called Kenny, Kym. When he was 15, she showed him a birth certificate with his birth date, and the name "Kym Dorsey." Kenny had been born with male and female genitals, she said, and the doctor chose to surgically "correct" his gender to male. "God don't make mistakes," Kenny's grandmother told the teenage boy. "You are cut from the finest cloth. You are God's child."

Within days of his mother's death, Kenny found a doctor, started hormone therapy and began transitioning to Kym.

"Being a trans woman trapped in the wrong body, I understand the political agenda," Kym said. "But the baseline is, we are all human. We bleed the same. We are taxpayers – we have sisters, mothers, brothers, uncles. Who decides who's better, who's more deserving of humanity?

"I'm here for a purpose. For the next 50 years, I get to embrace what my grandmother taught me: God don't make no mistakes."

## Defining Terms

**Many see gender as simple. Women and men look, act and present themselves in distinct ways, recognized and reinforced by social norms. For them, physical anatomy dictates whether they are male or female, and this stays constant from birth onwards.**

**Others see gender as more complex. These individuals experience a difference between their inner selves and what others expect of their apparent anatomical sex. Some people feel more comfortable or authentic presenting themselves in ways that may challenge traditional gender boundaries. Some require medical or surgical interventions to resolve the conflict between their physical selves and how they feel inside. Some see "gender" as more dynamic than two poles called "male" and**

"female," and prefer not to be defined that way. Through the evolution of social understanding of gender and sex differences, a vocabulary has developed to describe people for whom these concepts may not be as simple as many assume.

Although most people use the words "gender" and "sex" as synonyms, the two terms actually have different meanings.[1] Sex refers to the physical characteristics of a person's body, including a person's genitals, secondary sex characteristics like breasts or facial hair, hormone levels and sex chromosomes.[2] In contrast, gender more accurately refers to a person's interior life – one's psychological sense of masculinity and/or femininity, and the traits associated with this psychological self-perception.[3] Most people consider their sex and gender the same: Most with physical sex characteristics associated with being male consider themselves men, and most with physical sex characteristics associated with being female consider themselves women. For some, however, physical sex and psychological gender differ. The main purpose of GENDA is to protect all people from mistreatment when that difference exists.

*Many transgender and gender non-conforming New Yorkers face severe, pervasive, daily discrimination due to their gender identity or expression.*

Gender identity means a person's understanding of his or her own gender.[4] Gender identity might be the same as a person's sex (like a person born with male anatomy who sees himself as male) or different (like a person born with male anatomy who sees herself as female).[5] Gender expression is defined as the way an individual expresses his or her gender, through behavior, appearance, name or other methods of self-presentation.[6]

Transgender, often shortened to "trans," means a self-perception of one's gender that differs from one's biological sex at birth. The phrase "transgender man" refers to a person born with female anatomy who understands himself to be male. Conversely, the phrase "transgender woman" refers to a person born with male anatomy who understands herself as female. The older term transsexual specifically describes someone who has undergone medical, hormonal and/or surgical treatment to alter the physical sex of his or her body, a process that is called transition.[7] People today rarely use the term "transsexual" to describe themselves.

Some individuals are gender non-conforming, meaning that their appearance and/or behavior simply do not "match up" to conventional perceptions of gender.[8] People who describe themselves as gender-queer or gender-variant do not see themselves as strictly male or strictly female, but have a gender identity that is both male and female, neither one or something else altogether.[9]

Some people are born with ambiguous genitals or certain hormonal conditions, and as a result, have bodies that are neither clearly sexually male nor clearly sexually female. These people are intersex. Some undergo surgical or medical treatment to change their physical sex characteristics to resemble more typical male or female anatomy; others do not.[10]

This nuanced range of physical reality, perception and expression is why GENDA protects against discrimination on the basis of both gender identity *and* gender expression.[11] The terms in this section provide context and a common language for the remainder of this report, which examines the forms of discrimination experienced by transgender and gender non-conforming people, the ways GENDA can address this discrimination and common myths advanced by those who do not support such anti-discrimination laws.

# Discrimination in Plain Sight

**Many transgender and gender non-conforming New Yorkers face severe, pervasive, daily discrimination due to their gender identity or expression. Such biases affect some of the most basic aspects of life: employment, housing, public accommodations and education.[12]**

## Employment

In November 1999, shortly after she made the decision to live as a transgender woman, Joann Prinzivalli testified before the Westchester County Legislature in support of a proposal to establish a county human rights commission. Portions of her testimony were broadcast on the local Fox station's evening newscast.

After the news of her televised testimony reached her employer, Prinzivalli was twice summoned before the company's board of directors. Less than two months later, Prinzivalli was fired from her job as chief underwriting counsel for a Texas-based title insurance company. She had worked with the company for more than six years; her good reputation was consistently confirmed in a series of positive job performance reviews.

Her termination was finalized on Jan. 15, 2000. The company did not specify a cause for firing her.

"I was essentially fired for appearing on TV as a transgender person," she said.

After being fired, she struggled to secure steady employment. Prinzivalli found temporary work to make ends meet until she landed a job at a small title agency, earning about half of her previous salary.

**Ongoing economic hardships have made getting and maintaining a job a challenge for all New Yorkers. Yet imagine going to a job interview and facing rejection based not on your qualifications, but because of stereotypes about how you should express your gender.**

**Unfortunately, New York State law does not explicitly prohibit employers from refusing to hire a qualified person because he or she does not conform to common gender stereotypes.[13] As a result, transgender and gender non-conforming individuals commonly face exclusion from and retaliation in the workplace. In a national survey of transgender and gender non-conforming people about their experiences of discrimination, conducted by the National Center for Transgender Equality (NCTE) and the National Gay and Lesbian Task Force (NGLTF) in 2011, an alarming 90 percent of respondents said they had experienced harassment or mistreatment in the workplace or had taken actions to avoid it.[14] Such mistreatment or harassment was not limited to "mere words": 47 percent of the survey respondents said they had experienced "an adverse job outcome, such as being fired, not hired or denied a promotion because of being transgender/gender non-conforming."[15] Specifically, 26 percent of respondents**

said that "they had lost a job due to being transgender or gender non-conforming."[16] Once hired, fear of being fired or harassed often forces a transgender person to hide his or her true gender identity or gender transition.[17]

## Housing

Moshay Moses grew up in Lynchburg, VA – home to Jerry Falwell's Liberty University – and came to New York in the 1980s, as a scholarship student at the Fashion Institute of Technology. As a child, she knew she was different from other boys, but she knew she couldn't talk openly about her identity.

"We had a Lil Sis Club," Moshay said, "We'd go into the woods and dress up. Even in second and third grade, we had to live back in the closet."

*Many transgender people are forced into homelessness.*

In New York, Moshay gradually transitioned to living as a woman. She began hormone therapy and took the name Moshay. Now, she counsels transgender youth at the Positive Health Project in Manhattan, in addition to her spiritual work as a reverend of the Holy Apostle Episcopal Church.

Life hasn't gotten significantly easier for the generation that's coming up and coming out now.

"Lots of my clients don't have regular housing or places where they can live freely," Moshay said. "One trans client was outed by her landlord, who harassed her until she left the building. Other girls can't get apartments, or even use a bathroom when they need to, without someone embarrassing them.

"Even in New York City, certain segments of town, certain streets aren't safe. You have to be careful where you walk. In Brooklyn, in Harlem, if you're not 'passable' enough" – if a person's identity doesn't conform to conventional gender stereotypes – "the attacks can be even fiercer, because you offend people" by being different.

**Transgender and gender non-conforming individuals also face discrimination when trying to obtain housing. Landlords or property sellers sometimes refuse to sell or lease to gender non-conforming applicants and evict tenants on the basis of their gender identity or expression.[18] No New York State law explicitly prevents such discrimination. As a result, many transgender people are forced into homelessness. In fact, according to the NCTE/NGLTF survey, 19 percent of respondents became homeless at some point because they were transgender or gender non-conforming, and 1.7 percent of respondents were homeless at the time of the survey.[19] This figure contrasts sharply with estimates that 0.002 percent of all people in the United States were homeless in January 2007.[20]**

## Public Accommodations

Sam moved to New York at 18, to attend a women's college near Ithaca. Neither the college nor a last-ditch effort to identify as female worked out, and Sam eventually settled in the Hudson Valley, where he is a farmer. "I work from sun-up to sundown, in all kinds of weather. I have a wonderful life," Sam says now.

Among Sam's many encounters with discrimination, one stands out: A few winters ago, Sam had a bad case of bronchitis, and sought treatment at a local walk-in medical clinic.

At the time, Sam's legal name was distinctively female – but he did not look conventionally feminine. "My appearance was confusing to people," Sam said, including to the clinic receptionist.

When Sam's name was called, the receptionist asked why Sam was there, which Sam explained: Chronic asthma leading to bronchitis meant that Sam needed antibiotics.

"Well, we can't help you," the receptionist said. "We don't know where to put you."

"Are you too busy to see me today?" Sam asked.

"We don't treat people like you here," the receptionist explained, sighing with impatience. "We don't know where to put people we can't place."

Suddenly, Sam realized that the issue was not his health, but how he looked. "You don't want me here because you can't tell if I'm a man or a woman. Unless you have gender-specific exam rooms or something, I don't know why my appearance is a problem. I just need some antibiotics."

Others in the waiting room heard the conversation; Sam heard whispers and chuckles, and felt as if people were taking apart his physical characteristics like a parlor game: Guess My Gender.

Eventually, Sam was seen by a doctor and received antibiotics, which did not resolve his bronchitis and required a return visit to the clinic. But Sam's initial experience was unforgettable:

"All I was asking for was treatment for a routine medical problem," Sam said. "But my appearance was so out of the routine that I was treated as a medical anomaly – as if my right to literally breathe were offensive."

**Public accommodations are facilities and businesses open to the public and can include doctors' offices, hospitals and medical clinics as well as restaurants, businesses and transportation centers. Anyone can access a place of public accommodation if he or she meets the venue's basic entrance requirements, such as paying an entrance fee, being older than 21 or being a paying customer.[21] Discrimination in these places can take the form of refusal of service, harassment or unequal treatment.[22]**

**Transgender and gender non-conforming individuals are harassed in public places for no reason other than simply being there: More than half (53 percent) of respondents to the NCTE/NGLTF survey reported experiencing verbal harassment or disrespect in a place of public accommodation.[23] Most people are able to patronize businesses, access transportation services and enjoy recreation areas with full peace of mind. Transgender and gender non-conforming people, however, regularly experience anxiety and fear harassment when seeking to do even mundane everyday activities.**

## Education

***Transgender teens often find themselves uniquely vulnerable to harassment from peers and even teachers and administrators.***

Anna, a mother of four, says that she always knew her second son, Ethan, was different than his big brother, Mark. Ethan never liked Mark's "boy" toys. At day care, Ethan always chose princess costumes and high heels from the school's costume bin. With neighborhood playmates, Ethan swapped his toys for other kids' castoff dress-up gear.

"We had no 'girl' things," Anna says now, "but Ethan was finding a way to acquire them."

The family soon grew to include two daughters, and a wardrobe of girls' clothing. By the time Ethan started kindergarten, in the fall of 2010, Ethan chose to wear two layers every day: girls' clothes over school clothes of T-shirts and jeans.

For Halloween, the school had a traditional costume parade. Ethan struggled in the costume aisle, his mom said, because he wanted a costume from the "girl" side, but understood, somehow, that he should be choosing from "boy" costumes. Finally, he chose a Cinderella costume – and then, agonized at home as to whether he could wear it to school. But his male kindergarten teacher, alerted by the family, made sure there would be no teasing, and Ethan wore the costume.

"The kids all knew," Anna said. "Anyone who knows this child knows."

Within two weeks, Ethan was only wearing girls' clothes to school. But Ethan was still Ethan, a boy in girl's clothes. And that's when the teasing began, Anna said. "It was awful."

Calm prevailed in the schoolroom, but the school bus was another matter. Children teased Ethan, "Why are you wearing girls' clothes? You're not a girl!" Parents called the school principal, saying that children shouldn't be allowed to dress in opposite-gender clothing. One PTA member threatened to report the parents for child abuse. The family began receiving anonymous hate mail and threatening phone calls from adults who said, "You're going to ruin his life!" But Ethan was happier as a girl than ever before.

The family sought therapy and was advised that Ethan should transition fully to life as a girl – and soon. "Was it a shock? No," says Anna. "Was it what we wanted to hear? Not really." She said her husband grieved the loss of his son, and they have concerns about the future, for their family and their child. Yet both parents understood how hard it was for Ethan to fiercely want to be a girl. "There was a way to fix it," Anna said. "Let her be a girl."

"He's not a boy who likes to pretend being a girl. He actually ***is*** a girl," Anna said.

That summer, Ethan took a new name, Olivia, and grew her hair long. Her parents met with the school to seek to change her name and gender.

Initially, the principal resisted formal changes – and expressed concern about what other parents might say, and which restroom Olivia might use, come September. But at a second meeting, the principal said that she had changed the child's name and gender on her school record.

"The issues are taken care of," the principal told the parents. "If there's a fuss about it, I'll take the heat." And Olivia was ready to enter first grade, where she has since been thriving.

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**Mistreatment that may begin with teasing or worse is not unique to grade school. Most teenagers battle with the physical and emotional turmoil of adolescent life. In addition to the general teasing, taunting and struggle to find one's niche in high school, a transgender or gender non-conforming teenager also must wrestle with defining and expressing his or her gender identity. Transgender teens often find themselves uniquely vulnerable to harassment from peers and even teachers and administrators. In response to a recent national survey, 78 percent of those who expressed a transgender or non-conforming gender identity in elementary, middle and high school reported being harassed.[24]**

**This harassment has devastating effects: 51 percent of students who were harassed based on gender identity or expression had attempted suicide.[25] The rate of suicide attempts for gender non-conforming students reporting physical assaults was even higher.[26] The NCTE/NGLTF report found that 64 percent of people who were assaulted by teachers, school staff or students attempted suicide, and 76 percent of those who were assaulted by teachers or staff had attempted suicide.[27]**

Discrimination continues well beyond elementary, middle and high school. College raises the issue of sex-segregated housing. Some transgender college students face exclusion from dorms altogether while others find themselves forced to live in dorms designated for their biological sex rather than their gender identity.[28] This subjects them to the risk of violence, harassment and embarrassment in restrooms and dorm rooms.[29] It should surprise no one that these kinds of school policies undermine transgender students' personal integrity and education, potentially triggering depression and other health problems.

Transgender people who pursue postgraduate studies may find that discrimination also follows them to graduate school. For example, one individual interviewed for the NCTE/NGLTF report described being denied access to classes and harassed by professors while enrolled in her doctoral program when she came out as transgender.[30]

As demonstrated above, transgender and gender non-conforming people face intense discrimination in almost all aspects of daily life – from getting and keeping a job and securing housing, to gaining access to public accommodations and getting an education. Legal protections are needed to ensure that prejudices do not lead to discrimination and harassment that prevent transgender and gender non-conforming New Yorkers from enjoying the same rights and privileges as their gender-conforming neighbors. Although these protections are in place in some parts of New York State, they vary from place to place, leaving many New Yorkers without any recourse against discrimination because of where they live, work or attend school.

## Current Anti-discrimination Laws Protect Some, But Not All, Transgender People

Increasingly, states are protecting their transgender and gender non-conforming residents with laws expressly prohibiting discrimination based on gender identity and expression. As of 2012, anti-discrimination laws in 16 states and the District of Columbia provide some protections for transgender and gender non-conforming people.[31] These laws most commonly ban discrimination in many of the same areas as GENDA will, including employment, housing, education, public accommodations, credit and insurance.[32] Despite differences in terminology and variances in the statutes' scope, all of the laws recognize the basic need for all people – regardless of gender identity or expression – to be protected from mistreatment.

Many cities and towns in New York State, including New York City, have recognized the right of transgender and gender non-conforming people to live free of prejudice and harassment and have enacted local anti-discrimination ordinances.[33] By one estimate, 60 percent of New York State residents currently enjoy at least some legal recourse against discrimination based on gender identity and expression.[34] But this leaves four in ten New York residents without these essential protections.

Some courts have extended limited relief to transgender and gender non-conforming plaintiffs by interpreting their state law discrimination complaints as legitimately based on sex or disability discrimination, which are illegal under existing New York law.[35] However, without a clear statutory basis for doing so, courts have been conflicted in finding that transgender and gender non-conforming people are protected from discrimination by existing human rights laws.[36]

Even the court decisions that have found that existing laws protect transgender or gender non-conforming people from sex discrimination are limited in their effect. They often only pertain to the court's geographic jurisdiction and are understood as applying only to the facts before the court. While helpful, these rulings are not an adequate substitute for a statewide law explicitly granting transgender and gender non-conforming people full protections. Further, currently no state agency has the explicit power to investigate complaints of discrimination based on gender identity or expression.[37] This needs to change. Indeed, when statutes lack express language about whether legal protections are meant to cover certain situations or groups of people, the courts regularly defer to the authority of the legislature to extend the scope of legal rights.[38]

Protection from discrimination should not depend on a person's ZIP code. New York State needs to declare with a unified voice that it will not tolerate people losing their access to homes, jobs, education and the opportunity to enjoy the same freedoms enjoyed by others simply because of who they are. Enacting GENDA will ensure that *all* New Yorkers enjoy the same legal protections, backed by the state government's authority.

## What GENDA Will Do

New York State human rights, civil rights and education laws currently prohibit discrimination on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status."[39] GENDA will amend these laws to bar "unlawful discriminatory practices" on the basis of "gender identity or expression."[40] GENDA will also add "gender identity and expression" to the list of biases that can lead to enhanced sentencing as enumerated in the Hate Crimes Act of 2000.[41]

This section of the report describes in more detail the specific discriminatory actions prohibited by current anti-discrimination law, and the impact GENDA will have on these laws. It also briefly considers the effect GENDA will have on existing hate crimes law.

### *Civil Provisions*

- **Employment:** The Human Rights Law's sections on "Unlawful Discriminatory Practices" prohibit employers, employment agencies and unions from discriminating in their hiring, firing, promotions, training and advertising, among other things.[42] Thus, when GENDA is enacted, an employer could not legally fire, refuse to hire or decline to promote an employee because that person identifies as, or is perceived as, being transgender or gender non-conforming.[43]

- **Housing and Real Estate:** Landlords, lessees and sellers of real estate, including public or subsidized housing and commercial real estate, may not refuse access to housing or property to anyone based on characteristics listed in the Human Rights Law, which, when GENDA is enacted, will include gender identity and expression.[44] Similarly, real estate agents will not be able to legally refuse service to anyone based on their gender identity or expression.[45] Prohibitions on discrimination in housing do not apply to buildings with only one or two units or if the owner also lives on the premises; this exemption will remain in place under GENDA.[46]

- **Public Accommodations:** Most for-profit businesses, service providers, non-profit organizations and public areas are considered "public accommodations" under New York State law.[47] Shops, parks, professional offices, restaurants, bus stations and entertainment centers, among other public venues, all fall under the Human Rights Law's definition of public accommodations.[48] When enacted, GENDA will prohibit such places from denying services or access to facilities, or from otherwise treating people differently because of their gender identity or expression. GENDA will additionally ban businesses or public venues from indicating that they are not open to some people because of their gender identity or expression.[49]

*GENDA's protections will prevent all schools, public and private, from permitting the harassment of any student on the basis of gender identity or expression.*

Many transgender and gender non-conforming people face particular discrimination in access to health care. As clinics and hospitals fall within the definition of public accommodations, they will be required to treat patients for routine and specialized care regardless of gender identity or expression under GENDA (unless, of course, the patient's medical needs fall outside the medical professionals' areas of expertise).[50] Health care professionals without training in health care specifically related to the medical and/or surgical transition process may refer patients with transition-related health needs to more qualified practitioners, but will not be allowed to refuse to provide routine care merely out of bias against transgender patients.[51]

- **Education:** State Human Rights Law bars discrimination in admissions to schools, colleges and universities or access to their classes or facilities.[52] Thus, when GENDA is enacted, New York schools will not be allowed to deny admissions and access on the basis of gender identity or expression. Similarly, GENDA's protections will prohibit all schools, public and private, from permitting the harassment of any student (by other students or by staff) on the basis of gender identity or expression.[53] The Human Rights Law does, however, allow private religious schools to limit admission to students who share their religious denomination or faith.[54] GENDA will not change this exemption.[55]

- **Credit:** Two separate sections of GENDA prohibit discrimination in financial matters and credit, including an outright ban on discrimination in the extension of credit.[56] Invasive questions intended to reveal a person's gender identity in the mortgage application process, and discrimination in lending and in considering sources of income for credit eligibility, also will be illegal under GENDA.[57]

- **Other Civil Provisions:**

**Emergency Workers:** GENDA will require fire departments and related authorities to allow all qualified personnel to serve as volunteer firefighters without regard to their gender identity or expression.[58]

**Civil Rights Law:** GENDA will amend the general civil rights law to add a blanket prohibition on the infringement of one's civil rights and to ban the harassment of anyone based on gender identity or expression.[59]

In sum, when passed, GENDA will ensure that all non-discrimination provisions currently protecting individuals from discrimination, such as that based on age, race and sexual orientation, would also ban discrimination on the basis of gender identity or expression.

## *Civil Enforcement*

GENDA will add gender identity and expression to the discrimination that the New York State Division of Human Rights (DHR) – the agency tasked with enforcing the state Human Rights Law – studies and works to prevent.[60] A person who faces discrimination based on gender identity or expression could then file a complaint with the DHR, which would investigate the claim and address it, dismiss it as unfounded or dismiss it and allow the aggrieved to file a private lawsuit.[61] As an alternative, a person who has experienced discrimination can file a lawsuit under the New York State Human Rights Law. GENDA will extend this right to victims of discrimination based on gender identity or expression.[62]

The DHR also has the authority under the Human Rights Law to conduct studies and issue publications about the extent and effects of discrimination, and make recommendations for regulatory policies to help enforce anti-discrimination laws.[63] GENDA will extend this research authority to discrimination based on gender identity and expression.[64]

## *Criminal Provisions*

New York's Hate Crimes Act of 2000 defines hate crimes as those in which the perpetrator selects his or her victim or commits the criminal act because of prejudice based on a protected aspect of the victim's identity, such as the victim's age, race, religion, disability or sexual orientation.[65] GENDA will add "gender identity and expression" to the list of biases that could give rise to a hate crime conviction, using the same definition of this term as appears in the Human Rights Law.[66]

*GENDA will ensure that all non-discrimination provisions currently protecting individuals from discrimination ... would also ban discrimination on the basis of gender identity or expression.*

Hate crimes begin with the actor, not the victim: Courts determine whether criminal acts constitute hate crimes based on the actor's beliefs and actions, regardless of whether the actor's beliefs or perceptions are accurate, and not on the victim's identity.[67] For example, if a person with a bias against Jewish people attacked someone on the erroneous belief that that person was Jewish, that act would constitute a hate crime based on religion, regardless of the victim's actual religion. When GENDA is enacted, crimes found to be motivated by discrimination based on the victim's perceived or actual gender identity or expression could be prosecuted as hate crimes, which carry heavier penalties than their non-bias-associated counterparts. For example, a Class B misdemeanor hate crime conviction would give rise to the more serious Class A misdemeanor penalties.[68]

A full analysis of the public policy issues of bias-based criminal law lies beyond the scope of this report. However, it is important to recognize that legitimate differences of opinion exist about the value of hate-crimes statutes among many groups of people, including those at risk for becoming victims of hate crimes, those at increased risk of arrest (who may have negative experiences with law enforcement) and those concerned about the implications of hate-crimes prosecution for freedom of expression.[69] The primary objection to the use of hate-crime statutes is the fear that because

the very groups the laws are intended to protect are subject to disproportionately high rates of law-enforcement surveillance and arrest, the hate-crimes statutes will be used against these groups in a similarly disproportionate manner. Transgender and gender non-conforming people who are particularly vulnerable to bias-based violence need any protection that hate crimes laws can provide.[70] Yet hate crime prosecutions are not without their complexities. For example, one study revealed that "transgender people of color are three times more likely to experience hate-based violence from police," the very people tasked with enforcing the hate crimes laws.[71] We encourage legislators and advocates alike to continue to study and identify ways to improve New York's response to violence motivated by intolerance and bigotry, and to ensure that those responses do not disproportionally target and negatively affect the very people that hate crimes laws are designed to protect.[72]

## Myths and Unfounded Concerns About GENDA

Two fear-based myths have been advanced by those opposed to protecting people from discrimination based on gender identity or expression. First, opponents express concern about the erosion of traditional gender roles; they contend that GENDA upsets expectations about how men and women should look, act and think about themselves. Second, opponents commonly express misplaced fears that gender identity anti-discrimination laws could threaten personal privacy and/or safety, particularly in sex-segregated areas like restrooms and locker rooms. This section examines each of these myths.

### Gender Roles

Some assert that enacting legal bans on discrimination based on gender identity and expression conflicts with long-held views that men and women have separate roles and duties. The idea of an individual presenting himself or herself in a manner associated with the "opposite" sex may seem confusing or inappropriate.[73] Some may disapprove of "crossing" gender lines because of personal or religious beliefs.[74]

Individuals have the freedom to hold whatever beliefs are meaningful to them, but we as a society have determined that people should not base employment or housing decisions, or access to education and public accommodations, on stereotypes or prejudice.[75] In New York State, the law prohibits employers, landlords and business owners from discriminating based on factors such as race, sex, religion, disability and sexual orientation.[76] They may not make decisions about who they hire, serve, rent to or educate based on negative stereotypes because these erroneous beliefs do not reflect the ability of individuals to work, maintain their property or use goods or services appropriately. GENDA simply requires that people give the same consideration to transgender or gender non-conforming individuals as they do to everyone else.

### The Lurking Predator: Debunking the Myth

Some opponents of GENDA contend that the proposed legislation would jeopardize the privacy and safety of people using restrooms.[77] Specifically, they assert that women will be more vulnerable to predators and that the public will feel uncomfortable with a law that extends anti-discrimination protections to all New Yorkers who need to use a restroom.[78] These arguments exploit fear and are not based in reality.

The claim that GENDA will render women vulnerable in restrooms depends on a pair of troublesome assumptions: First, that transgender people themselves are potential predators; and second, that predators, transgender or not, will use the change in the law to infiltrate women's restrooms and attack women.

No data suggest that transgender people are likely to be sexual predators.[79] Moreover, the vast majority of sexual assaults are perpetrated by family members, acquaintances or intimate partners of victims.[80]

Even more compellingly, no known reports link a single incident of misconduct with such a law's passage, in any of the U.S. jurisdictions, cities and counties with gender identity anti-discrimination laws. With some laws preventing discrimination against transgender or gender non-conforming people in place since the 1990s, decades have passed without a single reported incident.[81] Law enforcement officials in cities throughout New York State that have passed local legislation similar to GENDA have reported no decrease in safety.[82] In fact, in May 2011, Police Chief James M. Shepard of Rochester wrote to Governor Cuomo asserting that "our city simply has not experienced the negative effects that opponents of [GENDA] claim might happen" since a similar local anti-discrimination law was enacted in 2001.[83] That same month, Albany Police Chief Steven Krokoff wrote to Senate Majority Leader Dean Skelos attesting to "the positive effects" of Albany's local version of GENDA, which has existed since 2003.[84] Based on this experience, Chief Krokoff concluded that "[GENDA] is very much needed" and he urged its passage "so that everyone in New York State can feel and be safer."[85]

*"[GENDA] is very much needed so that everyone in New York State can feel and be safer."*

*–Albany Police Chief Steven Krokoff*

Further, many organizations dedicated to protecting the rights and safety of women openly support GENDA, including the National Organization for Women, which stated, "there has never been a reported problem regarding the security of women's restrooms in those jurisdictions in which similar laws have been adopted." Other supportive groups include the League of Women Voters, the New York State Coalition Against Sexual Assault, Family Planning Advocates of New York State, NARAL Pro-Choice New York and the Upper Hudson Valley Planned Parenthood, to name a few.[86]

GENDA does not condone, excuse or allow inappropriate acts in any restroom by any person. Such acts are illegal now, and will be illegal when GENDA is passed. As a civil rights bill, GENDA "doesn't change any of the laws available to the prosecutors to ensure that no one is using the restroom for any improper purpose."[87] A change in civil anti-discrimination law does not allow anyone to violate other laws.[88]

Unquestionably, all people should have the right to use the restroom without fear of an intrusion on their privacy or an attack. Ironically, violence in public restrooms is an important and relevant issue for transgender and gender non-conforming people, who face a very real risk of becoming the *victim* of a crime in this setting, not the perpetrator.[89] In one survey conducted by the San Francisco Human Rights Commission, 50 percent of transgender participants reported being harassed one or more times in the restroom.[90] In a widely reported incident, a transgender woman named Chrissy Lee Polis was severely beaten after being pulled out of a McDonald's bathroom by her hair.[91] Her assailant pled "guilty to first degree assault, and a hate crime [and] was sentenced to five years in prison."[92] Unfortunately, this attack was neither

unique nor unprecedented; news stories abound of attacks against transgender and gender non-conforming people in restrooms, regardless of whether the victim used a men's room or a women's room.[93]

Sadly, to avoid the discomfort and threats of harassment that too often follow transgender people to the bathroom, many routinely limit their fluid intake and the time they spend in public spaces altogether.[94] It is not acceptable for anyone in our state to have to suffer such physical and emotional discomfort because others harbor myths and baseless fears about them.

## Public Discomfort and Private Dignity

Everyone needs to use the bathroom, and everyone deserves access to a safe restroom. Yet GENDA opponents often exploit "bathroom politics" when they argue that protecting transgender and gender non-conforming people will make "traditional" restroom users uncomfortable or compromise their privacy.[95] To the extent these advocates are seeking privacy in public restrooms, many strategies are already employed to protect restroom users' privacy. For example, most restrooms, especially women's restrooms, have private, individual stalls.[96] Indeed, people use restrooms to attend to the most private of functions, and restrooms in workplaces, educational facilities and public accommodations are constructed with the intent to preserve users' privacy as much as possible, regardless of state and local laws or regulations.[97]

*New York's public policy should be founded on protecting its citizens' civil rights, rather than on baseless, unsupported fears.*

Similarly, locker rooms and spa facilities can safeguard personal privacy by providing curtains or stalls where people can change clothes in privacy, as they often already do.[98] Transgender users of public facilities wish profoundly for the right to use them discreetly and in peace, and this can be accomplished behind the privacy of a curtain or a locked bathroom stall door.[99] Enacting GENDA will go a long way towards ensuring fair, safe restroom access for everyone, transgender and "traditionally-gendered" alike.[100]

Years of experience in the jurisdictions that have already enacted gender identity and expression anti-discrimination laws prove that fears regarding restroom safety have not been borne out in fact.[101] No evidence links restroom misconduct with the use of facilities by gender non-conforming patrons.[102] Cities and states with gender identity protections maintain restrooms that are as safe as those in areas without such legal protections.[103] GENDA will not undermine existing New York State laws that make sexual assault a crime, with the force of the criminal justice system to deter its occurrence.[104] Moreover, GENDA will not affect the dedication of law enforcement officers, some of whom have voiced their support for transgender civil rights, to maintaining the safety of all New Yorkers. Indeed, the vast support for GENDA among women's organizations should go a long way to assuage the unfounded fear that transgender and gender non-conforming individuals pose an increased risk to women's privacy or safety in bathrooms or locker rooms.[105]

Concerns about restroom safety arise not out of any true risk, but out of discomfort, stereotypes, fear and unfamiliarity with transgender people. New York's public policy should be founded on protecting its citizens' civil rights, rather than on baseless, unsupported fears.

Tracy, a transgender woman, wanted to ride the A train in the New York City subway. When her subway card malfunctioned, she asked a transit employee for help. Instead of helping Tracy, the employee started calling Tracy names, yelling epithets about transgender people, and went on a long, public, angry tirade, making vulgar, harassing and discriminatory remarks about transgender people in front of other subway riders. When Tracy finally boarded the subway, two individuals who had heard the transit employee's rant followed Tracy and verbally harassed her until she left the train.[106]

## Moving Forward with GENDA

**GENDA will provide vital protection for transgender and gender non-conforming New Yorkers who face severe discrimination and harassment in their daily lives. Extending the same protections against discrimination in housing, employment, credit, education and access to public accommodations that other New Yorkers already enjoy will help to correct this injustice. We ask legislators to consider the following points as they work towards a decision about passing this comprehensive anti-discrimination law to address the epidemic of prejudice against transgender and gender non-conforming people.**

**Transgender and Gender Non-conforming People Deserve Freedom from Harassment and Exclusion Based on Gender Identity and Expression.**

A person's gender is both intimate and central to individual identity, but it does not alter an individual's character, worthiness or right to live free from discrimination. The discrimination experienced by transgender and gender non-conforming people causes very high rates of homelessness and unemployment, and limits access to health care. GENDA, like other civil rights laws, seeks to protect individuals from discrimination and to provide people who are subjected to discrimination with legal redress. Under this law, transgender and gender non-conforming people would have the same equal rights as all other New Yorkers. Like existing anti-discrimination laws, GENDA will only protect people against mistreatment. GENDA will not confer "special rights" on anyone, but would simply extend essential human rights protections to all New Yorkers.

**Ending Discrimination Is an Essential Civil and Human Right – An Issue that Merits the Support of Every Elected Leader in New York State.**

There can be no excuse for protecting some, but not all, New Yorkers from discrimination. Democrats and Republicans alike can recognize the need for basic human rights and equal opportunity in order to permit all New Yorkers to function as productive members of their communities.[107] Codifying the rights of all people to work, find homes, use transportation and conduct business regardless of gender identity or expression ultimately benefits all New Yorkers. Both parties can and should unite in support of these much-needed civil rights protections.

*There can be no excuse for protecting some, but not all, New Yorkers from discrimination.*

Dialogue about GENDA has shown that there are many ways in which New York law can better ensure the safety and well-being of all of its citizens. Enacting protections for transgender and gender non-conforming people in the vital areas of employment, housing, public accommodations and education will help to correct a grave injustice. It is the responsibility of elected officials to correct injustices wherever they exist in our civil and criminal laws. Enacting GENDA will communicate that New York's leaders no longer tolerate the use of discriminatory animus to interfere with the ability of transgender and gender non-conforming people to live, work and contribute to our state.

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[1] Many terms related to gender mean different things to different people, but this report uses the definitions provided in this section of the report throughout. For a guide to the terms defined in this section, as well as additional ones related to gender non-conforming people, *see* Gender Equity Resource Center at the University of California – Berkeley, *LGBT Resources – Definition of Terms*, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms (last visited March 5, 2012), [hereinafter *Berkeley LGBT Resource Center*].

[2] *See id.*

[3] *See id.*

[4] For grammatical clarity and consistency, this report uses the pronouns "he or she," and uses individuals' preferred gender pronouns. However, some transgender and gender non-conforming people avoid gender-specific pronouns or use gender-neutral alternatives.

[5] *See Berkeley LGBT Resource Center, supra* note 1. It is important to note that "different" does not necessarily mean "opposite"; "different" may also mean that a person does not identify fully as "male" or "female," regardless of the person's physical characteristics.

[6] *See* Spectrum Center at the University of Michigan – Ann Arbor, *LGBT Terms & Definitions*, http://internationalspectrum.umich.edu/life/definitions (last visited March 5, 2012).

[7] *See Berkeley LGBT Resource Center, supra* note 1. The term "transvestite," previously used to describe a cross-dresser, is "now considered pejorative and outdated." Fenway Health, Glossary of Gender and Transgender Terms (Jan. 2010), http://www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf (last visited April 22, 2012).

[8] *See id.*

[9] *See id.* Note that some who identify as gender non-conforming, gender queer or gender variant may consider themselves "trans." *See supra* note 6.

[10] *See id.*

[11] *See* Gender Expression Non-Discrimination Act, A. 05039/ S. 6349, 235th Leg., Reg. Sess. (N.Y. 2012) [hereinafter *GENDA*], § 3, *available at* http://www.assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=S06349&term=2011&Text=Y.

[12] This report draws heavily from a 2011 report published by the National Center for Transgender Equality and the National Gay and Lesbian Task Force on the treatment of transgender and gender non-conforming individuals in the United States. Unfortunately, very little data exist about the experiences of transgender and gender non-conforming people, either in the context of discrimination or otherwise. While this study presents a far more complete picture of discrimination that transgender and gender non-conforming people in the United States face than any other source currently available, its rarity highlights the need for more research in this area. *See generally* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011) [hereinafter *NCTE/NGLTF Report*].

[13] A few transgender employees have sought relief for discrimination at work claiming illegal sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (amended 2009), following a landmark Supreme Court decision holding a company liable for failing to promote a female employee because senior staff members criticized her for not conforming to stereotypes of how a woman

should look or behave. PriceWaterhouse v. Hopkins, 490 U.S. 298 (1989). Recently, some transgender employees have succeeded in showing they suffered sex discrimination prohibited by Title VII. *See, e.g.*, Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008). However, in some cases, federal courts have held that Title VII's sex discrimination protections do not apply to transgender people. Regardless of how federal courts may interpret Title VII, state laws barring discrimination based on gender identity and expression are critical in providing clear redress for employment discrimination.

[14] *NCTE/NGLTF Report*, *supra* note 12, at 51.

[15] *Id.*

[16] *Id.* One respondent to the NCTE/NGLTF survey reported, "I was fired from my job after 18 years of loyal employment after a fellow employee saw me dressed [in a gender non-conforming way] while attending counseling and reported me to the boss. I was forced on to public assistance to survive." *Id.*

[17] *Id.* (finding that "[l]arge majorities [of transgender survey respondents] attempted to avoid discrimination by hiding their gender or gender transition (71%) or delaying their gender transition (57%)").

[18] *See id.* at 106 (stating that nineteen percent of respondents had been "denied a home or apartment and 11% [were] evicted because they were transgender or gender non-conforming").

[19] *See id.*

[20] U.S. Dept. of Hous. and Urban Dev., The 2007 Annual Homelessness Assessment Report to Congress 12 (July 2008), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1001&context=occasional_spp_ papers (estimating there were 671,888 homeless persons in the U.S. in January 2007); *see* U.S. Census Bureau, National Intercensal Estimates (2000 – 2010): Table 1: Intercensal Estimates of the Resident Population by Age and Sex, April 1, 2000 to July 1, 2010, *available at* http://www.census.gov/popest/data/intercensal/national/nat2010.html (estimated U.S. population in 2007 was 301,231,207); *see also* Bruce Link et al., *Lifetime and Five-year Prevalence of Homelessness in the United States*, 65 Am. J. Pub. Health 1907, 1910 (1994).

[21] N.Y. Exec. Law § 292 (9).

[22] *See NCTE/NGLTF Report*, *supra* note 12, at 124.

[23] *Id.*

[24] *Id.* at 33.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* Lara E. Pomerantz, *Winning the Housing Lottery: Changing University Housing Policies for Transgender Students*, 12 U. Pa. J. Const. L. 1215, 1215-16, 1250-51 (2010) (describing a Utah college student's exclusion from dorms altogether, a Pennsylvania university's policy of housing transgender students with roommates of the same anatomical sex rather than gender identity and the prevalence of housing transgender students in more expensive "single" rooms without a roommate).

[29] *See NCTE/NGLTF Report*, *supra* note 12, at 33. The report found that "[n]ineteen percent [] of respondents expressing a transgender identity or gender non-conformity in higher education reported being denied access to gender-appropriate housing. Five percent were denied campus housing altogether. Eleven percent [] lost or could not get financial aid or scholarships because of gender identity/expression." *Id.*

[30] *Id.* at 39.

[31] Jurisdictions that prohibit discrimination based on gender identity and expression in at least some ways include California, Colorado, Connecticut, the District of Columbia, Hawai'i, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. *See* Nat'l Gay and Lesbian Task Force, State Nondiscrimination Laws in the U.S. (2012), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf.

[32] *Id.* A few states include additional protections for its trans-identified residents, such as the express right to serve on a jury.

[33] New York cities and counties that have enacted local protections on the basis of gender identity and expression include Albany, Binghamton, Buffalo, Ithaca, New York City, Rochester, and Westchester, Suffolk, and Tompkins counties. Empire State Pride Agenda, Quick Facts: Answers to Common Questions – Gender Expression Non-Discrimination Act (2012), http://www.prideagenda.org/Issues-Explained/Transgender-Equality-and-Justice/Quick-Facts.aspx (last visited March 5, 2012).

[34] *See* U.S. Census Bureau, State & County QuickFacts, *available at* http://quickfacts.census.gov/qfd/index.html. This figure was derived by tallying the population of each jurisdiction that has enacted local protections on the basis of gender identity and expression, and dividing that total number by the number of New York State residents according to the 2010 U.S. Census.

[35] *See* Tronetti v. TLC Healthnet Lakeshore Hosp., 2003 U.S. Dist. LEXIS 23757, 14, 17 (2d Cir. 2003) (transgender woman stated claim for sex stereotyping employment discrimination); Rentos v. OCE-Office Sys., 1996 U.S. Dist. LEXIS 19060, 26 (S.D.N.Y. 1996) (transgender woman stated viable sex discrimination and sexual harassment claims under N.Y. law); Buffong v. Castle on Hudson, 824 N.Y.S.2d 752 (Sup. Ct. Westchester Cnty. 2005) (discrimination against transgender people is sex discrimination prohibited by N.Y. Human Rights Law); Doe v. Bell, 754 N.Y.S.2d 846, 851 (Sup. Ct. N.Y. Cnty. 2003) (finding that a foster care agency is obligated under New York disability discrimination law to make reasonable accommodations of transgender client's needs by allowing her to wear skirts and dresses); Maffei v. Kolaeton Indust. Inc., 626 N.Y.S.2d 391, 396 (Sup. Ct., N.Y. Cnty. 1995) (discrimination against and harassment of transgender person because of their change of gender is sex discrimination prohibited by N.Y. law); Richards v. U.S. Tennis Assn., 400 N.Y.S.2d 267, 272 (Sup. Ct. N.Y. Cnty. 1977) (not allowing transgender woman to play in women's U.S. Open Tournament constituted prohibited sex discrimination under N.Y. law).

[36] *See, e.g.*, Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43 (N.Y. App. Div. 1st Dept. 2005) (refusing to consider whether transgender people are protected under N.Y. Exec. Law § 296); *c.f.* Buffong v. Castle on Hudson, 824 N.Y.S.2d 752 (Sup. Ct. Westchester Cnty. 2005).

[37] *See infra* notes 60-64 and accompanying text (describing the New York State Division of Human Rights).

[38] *See, e.g.*, Hernandez v. Robles, 7 N.Y.3d 338, 379 (2006) ("It may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits.... Because the New York Constitution does not compel such a revision of the Domestic Relations Law [to read the New York marriage laws as including same-sex couples], the decision whether or not to do so rests with our elected representatives."). In June 2011, the Legislature indeed amended the Domestic Relations Law to permit same-sex couples to marry. N.Y. Dom. Rel. Law § 13.

[39] *See* N.Y. Exec. Law § 296. The prohibition against discrimination based on sexual orientation was added to New York State law in 2002, with the passage of SONDA, the Sexual Orientation Non-Discrimination Act. SONDA did not include protection against discrimination on the basis of gender identity or expression. Nearly a decade later, the Dignity for All Students Act (Dignity), amended the Education Law to prohibit discrimination and harassment based on, among other things, gender identity and expression in elementary and secondary public schools. N.Y. Educ. Law § § 10-18. Dignity does not address discrimination and harassment in higher education. Dignity takes effect in July 2012.

[40] *See GENDA, supra* note 11; *e.g.*, N.Y. Exec. Law § 296 (3-b). GENDA will mirror previous amendments to the Human Rights Law by adding gender identity and expression to the existing list of characteristics in § 296 (3-b).

[41] N.Y. Penal Law § 485.00 (2000).

[42] N.Y. Exec. Law § 297(1) – (9) (2010).

[43] Significantly, GENDA's protections refer to *actual or perceived* gender identity or expression, which means that they apply whenever a person acts on bias related to gender identity or expression regardless of whether the victim actually identifies as transgender or intends to appear gender non-conforming. For example, a woman denied a lease by a landlord who thought her very short hair looked "too mannish" could seek relief under GENDA even if she did not actually see herself as male, transgender, or gender non-conforming. *See GENDA, supra* note 11, § 3. GENDA defines "gender identity or expression" as "having or being perceived as having a gender identity, self image, appearance, behavior or expression whether or not that gender identity, self image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth." *Id.*

[44] *See* N.Y. Exec. Law § 296 (2-a) (a), (b), and (c) (prohibiting discrimination based on gender identity or expression in publicly subsidized housing; analogous provisions under section (5) of the Executive Law would bar such discrimination in private housing). GENDA will prohibit anyone selling or leasing a property from misrepresenting that property's availability because of bias against the prospective buyer or tenant, or from questioning the buyer or tenant about his or her gender identity. N.Y. Exec. Law § 296 (5). Prohibitions on discrimination in advertising appear throughout the Human Rights Law, including this section. *See GENDA, supra* note 11, § 5.

[45] *See GENDA, supra* note 11, § 11.

[46] *See* N.Y. Exec. Law § 296 (5)(a); *GENDA, supra* note 11, § 11.

[47] N.Y. Exec. Law § 292 (9). The definition of public accommodations in § 292 (9) expressly excludes some types of facilities, even though the public may in fact have access to them. Specifically, any type of school, public or private, does not constitute a public accommodation. N.Y. Exec. Law § 292 (9).

although some sections of the Education Law forbid discrimination in education, *see* N.Y. EDUC. LAW § 313 (3) (defining unlawful discriminatory practices in education), as discussed below. Libraries also are excluded from the definition of public accommodations. *See* N.Y. EXEC. LAW § 292 (9). Private homes are by definition private and not open to the public. *See* N.Y. EXEC. LAW § 292 (9). Finally, clubs that are considered "distinctly private," as well as religious corporations (including churches and other places of worship), also do not fall within the definition of a "public accommodation." *See* N.Y. EXEC. LAW § 292 (9); Gifford v. Guilderland Lodge, 707 N.Y.S.2d 722, 723 (N.Y. App. Div. 3d Dept. 2000) (holding that in sex discrimination action, Elks lodge was not a place of public accommodation because it met exemption criteria as a private club established under a benevolent order).

[48] *See* N.Y. EXEC. LAW § 292 (9).

[49] *See GENDA, supra* note 11, §7.

[50] N.Y. EXEC. Law § 292 (9); *see also* Cahill v. Rosa, 89 N.Y.2d 14, 21-22 (N.Y. 1996) (holding that private health care providers' offices constitute places of public accommodation and such providers may not deny access to services to patients on the basis of membership in a protected class; however, they may refer patients to other providers for nondiscriminatory reasons).

[51] *See Cahill*, 89 N.Y.2d at 23.

[52] *See GENDA, supra* note 11, §§ 10, 17, 18 (amending N.Y. EDUC. LAW § 313 (3)).

[53] *See GENDA, supra* note 11, §§ 10-11 (amending N.Y. EXEC. LAW § 296 (4)). The Dignity for All Students Act will prohibit discrimination and harassment based on gender identity or expression in public elementary and secondary schools, but does not reach institutions of higher education. *See supra* note 39.

[54] N.Y. EDUC. LAW § 313 (1) (a).

[55] *See GENDA, supra* note 11, § 17.

[56] *See id.* §§ 7, 14 (amending N.Y. EXEC. LAW § 296-a (1-3)).

[57] *See id.* § 14 (amending N.Y. EXEC. LAW § 296-a (1-3)).

[58] *See id.* § 12 (amending N.Y. EXEC. LAW § 296 (9) (a)).

[59] *See id.* § 15 (amending N.Y. CIV. RIGHTS LAW § 40-c). The provision in the current N.Y. CIV. RIGHTS LAW, authorizing the state's attorney general to seek monetary penalties for violations of civil rights on behalf of affected citizens, will also apply when the alleged discrimination is based on gender identity or expression, when amended by GENDA.

[60] *See* N.Y. EXEC. LAW § 297 (3).

[61] *See* N.Y. EXEC. LAW § 297 (2), (3).

[62] *See GENDA, supra* note 11, § 4 (amending N.Y. EXEC. LAW § 295 (9)).

[63] *See* N.Y. EXEC. LAW § 295 (9).

[64] *See GENDA, supra* note 11, § 4 (amending N.Y. EXEC. LAW § 295 (9)).

[65] *See* N.Y. PENAL LAW § 485.05 (1) (a).

[66] *See GENDA, supra* note 11, § 23. The definition of "gender identity or expression" as used in the Penal Code provisions of GENDA is the same as the definition GENDA will use to amend the Human Rights Law, which is, "having or being perceived as having a gender identity, self image, appearance, behavior or expression whether or not that gender identity, self image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth." *Id.*

[67] *See* N.Y. PENAL LAW § 485.05 (1) (b).

[68] *See GENDA, supra* note 11, § 20 (amending N.Y. PENAL LAW § 485.10 (2)). The "hate crimes" provision increases by one degree any misdemeanor or nonviolent felony found to be bias-motivated, mandates longer minimum sentences for violent felonies, and permits a court to require a person convicted of a hate crime to participate in hate crime prevention programs. GENDA will also add gender identity and expression to the definition of "aggravated harassment," a misdemeanor, which includes hitting someone or threatening to do so because of bias against that person based on a protected characteristic. *See GENDA, supra note 11*, § 21 (amending N.Y. PENAL LAW § 240.30 (3)).

[69] *See generally* Susan B. Gellman and Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crimes Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421 (2004) (outlining the central tenets of the arguments for and against hate crimes).

[70] *See NCTE/NGLTF Report, supra* note 12, at 3, 80.

[71] *See* Nat'l Coalition of Anti-Violence Projects, *Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer, and HIV Affected Communities in the United* States (2010), at 20 ("Transgender people of color are three times more likely to experience hate violence *from police*.") (emphasis added).

[72] *See id.* at 41-42 (recommending both that lawmakers reduce barriers to police protection for transgender and gender non-conforming people, and that decision-makers develop strategies for addressing bias-based violence beyond the criminal law and criminal justice system).

[73] *See, e.g.*, Dale O'Leary, *Legalizing Deception: Why "Gender Identity" Should Not be Added to Anti -discrimination Legislation*, CATHOLIC EXCHANGE (Jun. 25, 2009), *available at* http://catholicexchange.com/2009/06/25/119728 (rebutting the concept that "sex" can be changed because of its chromosomal component and describing expressing a gender identity not in conformity with anatomical sex as an attempt at public deception).

[74] *See, e.g.*, THE ASSOCIATION OF POLITICALLY ACTIVE CHRISTIANS, MEMORANDUM IN OPPOSITION TO GENDER EXPRESSION NON-DISCRIMINATION ACT (2008), *available at* http://www.apacny.net/APACGENDA.

[75] The New York Human Rights Law allows certain religious institutions (that is, primarily churches, places of worship and religious schools) to give preference to people who share their faith when making hiring and admission decisions. However, private employers, landlords and other individuals and organizations must not discriminate on the basis of any protected characteristic. *See* N.Y. EXEC. LAW § 296.

[76] *See id.*

[77] *See, e.g.*, *supra* note 74 (stating that "GENDA will compromise the safety and privacy of women and girls by allowing cross-dressing individuals to access opposite-sex public bathrooms"). *C.f.* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 144 (2010) [hereinafter *Levi & Redman*] (observing that "[w]hether as a matter of safety or privacy, the underlying message emerging from these cases is that transgender people are perceived to be sexually threatening"; the authors then go on to examine and describe the many ways in which transgender people are the *targets* of violence in restrooms, not the perpetrators); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 810 (2008) ("These [assertions] hang on an overall [flawed] assumption that non-transgender women are safer from sexual violence in spaces that exclude . . . transgender people.").

[78] GENDA will allow an individual to use the bathroom that best corresponds to his or her gender identity. This means, for example, that a transgender man (an anatomic female whose gender identity is male) would have the right to use a men's room.

[79] *See, e.g.*, Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Generation of Equal Protection*, 9 U. PA. J. CONST. L. 895, 924 (2007) [hereinafter *Elkind*] ("[T]here is no evidence that transgender individuals are more likely to be sexual predators than the general population, and such criminal activity can be accomplished without permissive bathroom-access laws."); Mercedes Allen, *Flushing the "Bathroom Bill" Fear Once and For All*, THE DAILY KOS (Mar. 21, 2011), [hereinafter *Allen*] http://www.dailykos.com/story/2011/03/21/958842/-Flushing-the-Bathroom-Bill-Fear-Once-and-For-All ("The conflation of trans people with sexual predators is a fallacy.").

[80] *See* Jennifer Truman & Michael Rand, *National Crime Victimization Survey*, U.S. DEP'T. OF JUSTICE. OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (Oct. 2010), at 7, *available at* http://www.bjs.gov/content/pub/pdf/cv09.pdf (finding that nearly 80% of all incidents of rape and sexual assault against women and girls is committed by intimate partners, relatives, friends or acquaintances).

[81] *See, e.g.*, WASH. REV. CODE § 9A.36.083 (1993) (providing a remedy for malicious harassment in Washington State where a law similar to GENDA exists); Minnesota Dep't. of Hum. Rights, *How Minnesota Protects Gender Identity* (2006), *available at* http://www.humanrights.state.mn.us/education/articles/rs06_4gender_protections.html (explaining how Minnesota, the first state to add gender identity to its anti-discrimination laws, began protecting transgender citizens in 1993). *See also* Empire State Pride Agenda, *Quick Facts: Answers to Common Questions – Gender Expression Non-Discrimination Act* (2009), http://www.prideagenda.org/Issues-Explained/Transgender-Equality-and-Justice/Quick-Facts.aspx; (explaining that precedent for GENDA exists in 16 states and Washington D.C., local New York laws, Fortune 500 Company policies); *supra* notes 31-38 and accompanying text.

[82] *See* Letter from Chief James M. Shepard, Chief of Police, City of Rochester, NY, to Honorable Andrew M. Cuomo, Governor, New York (May 4, 2011) (on file with Empire State Pride Agenda) [hereinafter *Letter from Chief Shepard*]; Letter from Chief Steven Krokoff, Chief of Police, Albany, NY to Honorable Dean Skelos, State Senate Majority Leader, New York (May 6, 2011) (on file with Empire State Pride Agenda) [hereinafter *Letter from Chief Krokoff*]. These letters were supplied by Christopher Argyros, Transgender Rights Organizer, of the Empire State Pride Agenda.

[83] *Letter from Chief Shepard*, *supra* note 82.

[84] *Letter from Chief Krokoff*, *supra* note 82.

[85] *See id.*

[86] *See* Press Release, Empire State Pride Agenda, Pride Agenda Hails Assembly Leadership for Passing Statewide Transgender Civil Rights Bill (June 14, 2011), *available at* http://www.prideagenda.org/Press-and-Publications/Press-Releases/Press-Release/c/459.aspx; Memorandum from Betsey Swan, League of Women Voters, Memorandum to Members Re: Finishing the Job (2011), *available at* http://archive.constantcontact.com/fs078/1102704766323/ archive/1104619615347.html (endorsing GENDA and transgender civil rights); National Organization for Women – New York State, *NOW-New York State's Issues* (2005), http://www.nownys.org/genda.html; Upper Hudson Planned Parenthood, *Choice Remarks* 4 (Fall 2009), *available at* http://www.plannedparenthood.org/uhpp/files/Upper%20Hudson/Fall09%281%29.pdf; *see also* Empire State Pride Agenda, "GENDA Myths Busted: Gender Segregated Facilities" *available at* http://prideagenda.org/Portals/0/issues/transgender/GENDA%20Myths%20Busted.pdf (listing a wide variety of groups working to end sexual violence across New York State that support GENDA).

[87] Ethan Jacobs, *LGBT Advocates Fight Back Against "Bathroom Bill" Rhetoric*, EDGE BOSTON (Apr. 25, 2009), http://www.edgeboston.com/index.php?ch=news&sc=&csc2=news&csc3=&id=90367 (quoting Jennifer Levi, Director, Transgender Rights Project, Gay and Lesbian Advocates and Defenders). *See also Allen, supra* note 79 ("[It is] ludicrous to speculate that a [non-transgender] sexual predator would risk drawing attention to himself by cross-dressing, in order to access a washroom that he'd have better luck just sneaking into when no one is looking.").

[88] *See GENDA, supra* note 11; Lambda Legal, *Equal Access to Public Restrooms*, at 2 *available at* http://data.lambdalegal.org/publications/downloads/trt_equal-access-to-public-restrooms.pdf [hereinafter *Lambda Legal*].

[89] *See NCTE/NGLTF Report, supra* note 12, at 35 (finding that 26 percent of transgender students surveyed stated that they had been denied restroom access in educational settings) and *id.*, at 56 (finding that 22 percent of transgender employees reported being denied restroom access at work). *See also* S.F. HUMAN RIGHTS COMM'N, GENDER NEUTRAL BATHROOM SAFETY SURVEY (2001), at 2-3, *available at* http://transgenderlawcenter.org/pdf/sbac_survey.pdf (finding that 47 out of 125 transgender people surveyed specifically related bathroom harassment including being slapped, dragged out of bathrooms and yelled at).

[90] *See Levi & Redman, supra* note 77, at 136.

[91] Jessica Anderson, *18-Year-Old Charged in McDonald's Beating*, THE BALTIMORE SUN (Apr. 24, 2011), *available at* http://articles.baltimoresun.com/2011-04-24/news/bs-md-co-mcdonalds-beating-rally-20110424_1_assault-charges-transgender-woman-initial-charges.

[92] Erin Sherbert, *Chrissy Lee Polis Update: Teonna Monae Brown gets Prison Time for Beating of Transgender Woman*, SF WEEKLY BLOGS (Sep. 15, 2011), http://blogs.sfweekly.com/thesnitch/2011/09/chrissy_lee_polis_teonna_monae_brown.php.

[93] *See, e.g.*, Jordan Rubenstein, *College Student Assaulted for Using the "Wrong" Bathroom*, CHANGE.ORG (Nov. 26, 2010), http://news.change.org/stories/college-student-assaulted-for-using-the-wrong-bathroom; KTLA News, *Transgender Student Attacked on CSULB Campus Speaks Out* (April 30, 2010), http://www.ktla.com/news/landing/ktla-csulb-student-slashed,0,5414609.story (reporting an incident where a transgender male student was slashed with a knife in a men's restroom; attacker carved the word "it" into his chest).

[94] *See Lambda Legal, supra* note 88, at 3.

[95] *See, e.g.*, Leslie Wolfgang, *Transgender Bill Invades Women's Privacy in Bathroom*, The Hartford Courant (April 24, 2011), *available at* http://articles.courant.com/2011-04-24/news/hc-op-wolfgang-transgender-bill-0424-20110424_1_gender-expression-transgender-gender-identity ("The 'Bathroom Bill,' as the Family Institute of Connecticut calls it, would extend our sexual discrimination laws to people who disagree with the gender they had at birth and would allow them access to places where they would make other people uncomfortable or worse."). This is not the first time that civil rights opponents have argued for the sanctity of restrooms. A similar sentiment was heard half a century ago in the South, when civil rights advocates sought to desegregate restrooms. *See* Jill Weinberg, *Transgender Bathroom Usage: A Prevailing of Biology and Physical Difference in the Law*, 18 BUFF. J. GENDER, L. & SOC. POL'Y 147, 152 (2009-2010) (finding that business owners and entire communities opposed desegregation of restrooms with the belief that certain groups of people were inferior and impure; "[a]lthough religious rights organizations have mocked the comparison between Jim Crow laws to transgender bathroom usage, legal commentators have thought otherwise"); *Allen, supra* note 79 (explaining that with the advent of HIV/AIDS, similarly misguided beliefs spread about gay men in bathrooms, borne by scientifically groundless fears that that HIV could spread from toilet seats).

[96] Parents already frequently bring young children of any sex into public restrooms so they can monitor and assist them, and stall doors already protect users from any potential compromise to privacy the presence of children of a different sex might cause. *See, e.g.*, Jennifer Hollander, "Should Older Boys Be Allowed in Women's Restrooms?" SILICON VALLEY MOMS BLOG (May 1, 2010), *available at* http://www.zenmamawannabe.com/2010/06/should-older-boys-be-allowed-in-womens-restrooms/.

[97] *See generally* New York City Comm'n on Hum. Rights, Guidelines Regarding Gender Identity Discrimination (2006), at 7, *available at* http://www.nyc.gov/html/cchr/pdf/GenderDis_English.pdf. This guide provides many easy and helpful suggestions for avoiding discriminatory practices and for making restrooms available to transgender users.

[98] *See generally* YMCA of the USA, Involving the Transgender Community (2010).

[99] *See* Patricia Leigh Brown, *A Quest for a Restroom That's Neither a Men's Room nor a Women's Room*, New York Times (March 4, 2005), *available at* http://www.nytimes.com/2005/03/04/national/04bathroom.htm.

[100] *See generally* Jody Marksamer, *The Problem*, Transgender Law Center Safe Bathroom Access Campaign (2005), http://transgenderlawcenter.org/trans/pdfs/SBAC%20Fact%20Sheet-lem%20handout.pdf (examining the perils for a transgender person to use a public bathroom under the current legal regime).

[101] *See supra* note 86.

[102] *See id.; see also Elkind, supra* note 79.

[103] *See Elkind, supra* note 79.

[104] *See* N.Y. Penal Law §§ 130.00 – 130.96; N.Y. State Police, Vision, Values, and Mission (2011), http://troopers.ny.gov/Introduction/ (stating that New York State police mission priorities are "[t]o prevent and detect crime and other violations of law, pursue criminal investigations and arrest criminals" and "[t]o provide for the safety and security of individuals and groups of citizens in furtherance of their rights, duties and responsibilities").

[105] *See supra* note 86.

[106] *See* Bumpus v. N.Y.C. Transit Auth., 50254(U) slip op. (Sup. Ct. Kings Cnty. 2008), *available at* http://law.justia.com/cases/new-york/other-courts/2008/2008-50254.html.

[107] For example, in a recent landmark decision honoring the rights and needs of all students to be able to attend school without fear of discrimination and harassment, the New York State Senate voted across party lines to pass the Dignity for All Students Act, which honors the rights and needs of all public school students – including transgender and gender non-conforming students. *See* Senate Majority Press, *Providing All Students with a Safe Learning Environm ent* (June 23, 2010), *available at* http://www.nysenate.gov/press-release/providing-all-students-safe-learning-environment.

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