

# DISCRIMINATING GENDER: LEGAL, MEDICAL, AND SOCIAL PRESUMPTIONS ABOUT TRANSGENDER AND INTERSEX PEOPLE

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Janet Dolgin

## INTRODUCTION

Medicine and law have long assumed and re

gender<sup>2</sup> and have, in turn, developed explanations and rules for intersex and transgender communities.<sup>4</sup> Although open to challenge in recent years, the notion that a binary approach to gender and its correlates are inexorably grounded in biological truths is deeply embedded in Western culture. Yet, more than one percent of people are<sup>5</sup> intersex<sup>5</sup>, and transgender people

wanted medical care, to avoid unwanted care, to marry, to gain access to bathrooms and locker rooms that conform with gender identity and to join sports teams. Such differences in treatment shape and are shaped by the lens through which law, medicine, and society understand and respond to intersex and transgender individuals.

The medicalization of transgender and intersex people, especially since the second half of the twentieth century, has buttressed the binary gender perspective and has played a significant role in framing judicial responses in cases involving these populations. Medicalization offers a powerful frame for understanding and controlling variations in gender and sex; its effects have sometimes, but not always, been salutary. Medicalization has had different consequences for intersex and transgender people, depending on the particular issues at stake. Intersexade cry the medicalization and consequent treatment of intersex infants, treatment

Part I of this Article reviews efforts to define and explain intersex and transgender status. First, the Part summarizes social, medical, and

I. INTERSEX, TRANSGENDER

What really is the key to the answer? . . . the answer necessarily changes with time, with place, with technology, and with the many serious implications of any given answer. The answer is, in a critical sense, historical and specific to time and place. There is no final answer to what must count for humans as truly male,



3 FRPSOHWH H[WHUQDO JHQLW<sup>27</sup> D<sup>28</sup> OheD<sup>29</sup> areR<sup>30</sup> moreD PDQ D  
 OLNH0\ WR KDYH ZKDW DUH RIWHQ<sup>28</sup> UHIHUHG WR

While identification of a child as intersex can often be made by physical examination alone, in some cases non<sup>27</sup> appearing external genitalia can hide an internal ambiguity or an anomalous chromosomal sex. As a result, families and physicians face a dilemma concerning how to treat such infants. Prior to the advent of modern surgery, such individuals were left as they were born. . . [I]n 16th century England, Lord Coke<sup>28</sup> declared with UHVSHFW WR WKH ODZ RI LQKHULWDQFH WKDW <sup>3</sup> D K or female, and it shall succeed according to the kind of sex that doth SUHY<sup>29</sup> DLO ´

Others have resisted medical definitions of intersex. Responding to a New York Times SLHFH WKDW TXRWHG DQ <sup>3</sup> H[SHUW RG GLVRUGHUV ´ +LGD 9LORULD DQ LQWHUHVH[ SHUV

Disorder, disorder, disorder The word spins around in my mind, making a mockery of my selfH V W HHP , New York Times W KH SHUW V ´ at the meeting [referred to in the Times article], and everyone who VXSSRUWHG SDWKRORJL]LQJ PH LV VD\LQJ <sup>36</sup> XUH \RX\UH RK VR YHU\ ZURQJ <RX DUH<sup>30</sup> QRW RND\ <R

Intersex activists belonging to the Organization Intersex International Australia (OI ±Australia) have compiled a list of traits identified with transgender people as compared with traits identified with intersex <sup>32</sup> people.

7KH JURXS DVVRFLDWHV <sup>3</sup> WUDQV JHQGHU GLYH DPELJXLW\ LQ LQQDWH ELRORJLFDO VH[ FKDUDF SHRSOH DV VKRZLQJ <sup>3</sup> >Q@DWXUDO YDULDWLRQV >WKDW@ GR QRW PDWFK VRFLDO H[SHFWDWLRQ Further, transgender people exper<sup>31</sup> H GLIIHUHQFHV EHWZHHQ <sup>3</sup> D VH[ DVVLJQHG DW GHLOWKILBGGH<sup>31</sup> QIU ´ ZKLOH LQ GHVFULEHG DV KDYLQJ <sup>3</sup> SK\VLFD GLIIHUHQFHV´ body including genetic, chromosomal and hormonal differences HVSHFLDOO\ <sup>33</sup> H[SHUW R are professionals, lawmakers,

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27. Hermer, supranote 13, at 1956.  
 28. Id. at 196.  
 29. Id.  
 30. HIDA VICTORIA, BORN BOTH:







ODQJXDJH VXFK DV <sup>3</sup>'LVRUGHUV RI 6H[XDO 'HYHC  
 forges links with physicians<sup>46</sup>.

Beginning in the midtwentieth century, the medicalization of intersex people began routinely to result in assigning babies identified as intersex to one gender or the other and then subjecting infants to surgery to ~~shape~~ their genitals so that they would resemble genitals associated with the assigned gender as much as possible. John Money, a psychologist, publicized the belief that gender is culturally crafted and could thus be ~~VXFFHV VIXOO\ LPSULQWHG LI VKDSHG<sup>48</sup> HDUO\~~ Subsequent research has failed to demonstrate that early surgery ~~shape~~ ~~DQ LQWHUV~~ ~~Hitals, accompanied by~~ socialization within the ~~DVVLJQHG JHQGHU UHVXOWV LQ D<sup>49</sup>ETD~~ ~~W~~ ~~HU RU~~ <sup>3</sup> contrary, surgery to conform the appearance of genitalia to a gender ~~VHOHFWHG E\ GRFWRUV DQG R~~ ~~Uke~~ ~~S~~ ~~D~~ ~~U~~ ~~W~~ ~~H~~ ~~D~~ ~~U~~ ~~O~~ \ psychological difficulties that affect the child and the adult that child will become.<sup>50</sup> In the view of Suzanne Kessler, decisive and immediate gender ~~DVVLJQPHQW~~ <sup>3</sup> ~~VHUYHV WR PDLQWDLQ WKH FUHG~~ reassure ~~th~~ ~~SDUHQWV DQG UHIOHFWLYHO\ VXEVDQ~~ theory [that either male or female gender can be ~~LHQWL#j \$fi0Q 2r@ 'a"à~~ y

The case of David Reimer illustrated the worst consequences of surgery and gender reassignment during infancy or early childhood. Reimer was born male. After a surgical loss of his penis during infancy, Reimer was raised as a girl. When he was a teenager, Reimer reclaimed

DSM- H[SODLQV WKDW WKH <sup>3</sup>FRQGLWLRQ LV DVVRP  
 distress or impairment in social, school or other important areas of  
 IXQFWLRQ. <sup>61</sup>As a consequence, a person can be transgender and not be  
 considered to have gender dysphoria, pursuant to the 2013 edition of DSM.  
 This is a significant move away from compelled medicalization.

At one time, psychiatry presumed that there is no convergence between  
 transgender and intersex people. The fourth edition of the American  
 3V\FKLDWULF \$VVRFLDWLRQ¶V 'LDJQRVWLF DQG  
 Disorders (DSM-IV-TR) <sup>62</sup>GHILQH <sup>3</sup>JHQGHU LGHQWLW\ GLV  
 QRW RYHUODS ZLWK <sup>3</sup>D S <sup>63</sup>WHDU. The fifth edition of the  
 UHSODFHG VQGHUHGPIQWHLW\ GLVRUGHU' ZLWK <sup>3</sup>.

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[blog/2016/09/sex-reassignment-surgery-for-transgenders-should-it-be-covered-by-insurance/](http://blog/2016/09/sex-reassignment-surgery-for-transgenders-should-it-be-covered-by-insurance/) (last  
 visited July 21, 2017).

61. AM. PSYCHIATRIC ASS'N, DSM-5, supra note 8, at 452-53. The tone and impact of  
 DSM- <sup>¶</sup>V FKDUDFWHUL]DWLRQ RI WUDQVJHQGHU VWDWXV DV D S  
 transgender individual suffers distress) are not reflected in the vision of transpeople, as  
 categorized in the Americans with Disabilities Act (ADA) which excludes transgender people  
 from coverage. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2010). Far

allowed for the possibility that a person may be both transgender and intersex.<sup>64</sup>

The medicalization of intersex and transgender people has not been universal. Other societies have viewed gender and ~~sex~~ fluidly than has the United States and have envisioned variations in sex and gender identity less as matters of medical concern than as expected biological and social variations.<sup>65</sup>

#### B. Visions of Family, Gender, Intersex, and Transgender: Culture and History

§ VRFLHW\¶V XQGHUVWDQGLQJV RI IDPLO\ JH relationships (those deemed appropriate and those deemed inappropriate)

LQYROYHV DQ LQWHUVH[ SHUVRQ<sup>1</sup> V<sup>8</sup> WSH TXHVW V SDVVSRUW DV<sup>3</sup>;´ L H QHLWKHU PDOH QRU IHPD ingraind in U.S. culture, though it has met some challenges in the last several decades. Still, it is often difficult for people to accept the possibility that a person could belong to a third or fourth gender category or that a person could transition from one gender to another.

This is not the case in all cultures. Before looking at the implications of shifting views of nature, the capacity of medicine to shape nature, as it were, and the binary gender presumption in the United States, this Article reviews visions of gender in societies that have offered a more fluid and flexible portrait of gender and gender identity than has been the case in the United States. Subsection one of this Section describes more fluid views of gender found elsewhere in the world. Subsection two briefly summarizes the history of the notion of the binary gender categorization in the West.

### 1. Diverse Views About Gender

In *Transgender History*, Susan Stryker explains:

Historically and crossculturally, there have been many different systems of organizing people into genders. Some cultures, including many Native American cultures, have had three or four social genders. Some attribute social gender to the work people do rather than to the bodies they live in.





Still, other cultures have recognized gender variance, though not always without prejudice, especially in the modern era.<sup>7</sup> The South American transvesties

- (1) All persons being citizens of Malta have the right to
- (a) the recognition of their gender identity;
  - (b) the free development of their person according to their gender identity;
  - (c) be treated according to their gender identity and, ~~partly~~, to be identified in that way in the documents providing their identity therein; and
  - (d) bodily integrity and physical autonomy.<sup>87</sup>

(YHQ PRUH WKH \$FW SURYLGHV WKDW WKH <sup>3</sup>ULJ  
 GSHQG RQ VKRZLQJ <sup>3</sup>SURFdr total D partia UgenitEIDO SURF

psychiatric diagnosis before providing for a change in gender on identity documents.<sup>87</sup>

## 2. Gender in the West Over Time: the Binary Presumption

In the United States and elsewhere in the West, the binary gender presumption has been central to visions of personhood, social roles, and family statuses and obligations for many centuries. Mostly, it has been taken-for-granted and thus virtually never challenged. However, in concert with changes in personhood, family relationships and gender more generally, especially during the last century, some challenges to the binary gender presumption are being voiced.<sup>88</sup> This section briefly summarizes understandings of gender in the West at a few points in time since the Medieval world. During the Middle Ages, gender roles and statuses grounded in gender separated men from women in many domains of life. Slowly, gender status became less central to everyday life, and gender roles became more flexible. That process, described in summary form here, was a precursor to the recognition and increasing acceptance of transgender and intersex people in the twenty-first century.

In the Medieval world, gender was clear and status in familial and public life. Georges Duby described private life geographically as a home or community of homes, enclosed by a wall.<sup>89</sup>



Images of the single woman<sup>108</sup> the woman who lived without a man echoed,  
 HYHQ DV WKH\ DSSHDUHG WR GLVWDLQ PRGHU  
 women in the world of work as well as that of home: the notion of the  
 VLQJOH ZRPDQ WKHYH\DDPDU RI :HVWHUQ μPRGHU  
 EHHQ FKDUDFWHULJHG E\ μD SOXUDOLW\ RI IRUP  
 WR D OLNH SOXUDOLW\<sup>108</sup> R We Bed Fve an early and  
 peculiar shift in the binary gender perspective—a fragmenting of images  
 ZLWKLQ WKH JHQGHU <sup>3</sup>ZRPDQ ‘ 7KDW SURFHVV



%\ WKH V KRZHYHU WKH WHUP <sup>3</sup>WUDQVJH  
 catchall phrase for all nonnormative forms of gender expression and  
 LGHQWLW\ ' DQG WKH <sup>11</sup>Word and Gender By the RPPXQLW  
 twenty-first century, mainstream society in the United States had begun to  
 assimilate and accept transgender people.<sup>121</sup> Mass media portrayed  
 transgender people with less prejudice than had been the case.<sup>122</sup> Legal  
 victories followed from the activism of transgender organizations.<sup>123</sup>

7KH VDPH GHFDGHV VDZ WKH HPHUJHQFH R  
 PRYHPHQW ' <sup>124</sup>





themselves as male or female.<sup>139</sup> 7KH JRYHUQPHQW ¶V UHVS RQV reflects a strict, though largely unexamined, commitment to the binary gender perspective.<sup>140</sup> It also reflects a presumption of harmony between the two sexes or gender identities, or to a presumption of harmony between the two so long as the applicant does not resist being categorized as either female or male. More particularly, the Department of State has taken contrasting positions in response first, to intersex people seeking to be acknowledged as such, and second, to transgender people requesting to have their gender identity acknowledged on their passports.<sup>141</sup> The first group threatens the binary-gender presumption more than the second. *Zzyym v. Kerry*<sup>142</sup> the government stated explicitly that its primary interest in rejecting requests from intersex people to be recognized through a gender other than female or male has been its interest in safeguarding the passport system for categorizing gender.<sup>143</sup>

*Zzyym* supported their claim to be neither male nor female with medical evidence and

child, surgery was performed<sup>48</sup> R Q WKHP WR <sup>3</sup>PDNH 'DQD¶V ERG  
 ELQDU\ VH[ V<sup>50</sup> Surgery Ref W Zy m with irreversible physical  
 changes but, still, s DWHQWO\ <sup>3</sup>LQ<sup>51</sup> Raised as a Co, Zy m



,W >D SDVVS RUW @ LV QRW IRU H[DPSOH WKH SO  
document that the government uses for specific purposes. And one of  
those purposes is that when a passport holder crosses the borders of the  
United States, the State Department uses a computerized system to link  
that person with critical law





Under the Policy, then, transgender individuals must procure an amended birth certificate in order to obtain a new state ID. Plaintiffs maintain that WKLV UHTXLUHPHQW SODFHV ³RQHURXV DQG LQ V obstacles to prevent transgender persons from correcting the gender on GULYHU ¶V OLFHQV.H and standards contrast with the





distinguished S.Y. 195 The wif

WRGD\7KLV FRQFOXVLRQ DSSDUHQWO\ QHFHVVD  
 marriage reflected a social shift since Corbett





Yet, intersex people pose a challenge to those who favor segregating bathrooms, locker rooms and to some extent, sports activities by biological sex. The intersex advocacy group InterACT<sup>231</sup> has pointed to intersex FKLOGUHQ DV <sup>3</sup>SURRI WKDW SK\VLRRORJLFDO VH[ HYLGHQW¶ DQ\ PRUH WKDQ HLVOJHQGHUHQHURQWLDW of intersex people challenges traditional views of sex as binary<sup>232</sup>. Thus, quite as much as is the case for

Many nations that have begun to meet the needs of transgender people still cling to a binary vision of gender, but at least eight nations have accepted a nonbinary notion of gender and now provide for an <sup>3</sup>X Q V S H F L I L H G ´ J H Q G H U <sup>336</sup> In Malta, Ireland, Argentina, New Zealand, Denmark, and Colombia, people can obtain new gender designations on official documents without submitting supporting medical documentation.<sup>237</sup> In most of these nations, society and the law have also begun to offer bathroom and locker room access to transgender people on the basis of gender identity.<sup>238</sup> School children in Malta, Norway, Argentina, and Ireland can use bathrooms and locker rooms consistent with their gender identities.<sup>239</sup> \$ Q G L Q 1 R U Z D \ W K H Q D W L R Q ¶ V <sup>3</sup> V G L U H F W V V F K R R O V W R D O O R Z W U D Q V J H Q G H U J L U H [ S O D Q D W L R Q I R F X V H V R Q <sup>3</sup> L Q F O X V L Y H Q H V V ´ Z I R X W Z H L J K V <sup>3</sup> D Q \ F R Q F H U Q V D E R X W F R P S H W L W L Y

choose to be identified as both genders or who do not identify with the male or female gender.

*B. The Right to Choose One's Bathroom or Locker Room in Conformity with One's Gender Identity*

,Q D ODZ UHYLHZ DUWLFOH UHIHUUHG WR RI FDVH WKDW >WUDQVJHQGHU L<sup>242</sup>Q CHAYH@ XDOV @ changed. However, the issue continues to be hotly disputed in courts and within society. And, while transgender litigants have won some bathroom access cases in the United States in the last few years, that trend may be reversing, at least in part due to the 2016 change in the federal administration.<sup>243</sup>

Access to school and public bathrooms can significantly impact the everyday life ±

against discrimination on the basis of gender identity. Although some courts have responded affirmatively to that challenge and have interpreted understandings of gender. Moreover, the antidiscrimination laws on which litigants have relied have generally depended upon and supported the presumption that people are either male or female.

### 1. Public Bathrooms

Cases involving transgender people seeking to use bathrooms conforming with their gender identity rather than their sex at birth are more likely to reinforce a binary categorization of people (here, regarding gender) than were bathroom access cases involving blacks precluded from access to public facilities. Indeed, some transgender people have favored the binary gender presumption and have stressed the importance of having separate bathrooms for men and women.

Laverne Cox, a transwoman, was asked during an ABC interview why she continues to struggle with the public restroom issue. Cox answered:

Well I, as a transgender American, I often find myself, especially in public spaces, I remember recently, I was doing a TV show, and I was on



[p]eople all over the internet seem to be wondering: Is my claim to use the PHQ ¶ V URRP OHJLWLP <sup>251</sup>with the conditions of males G WR (or transmanliness) such that the arrest was deserved? What do I look like? Trans people and trans people alike have been making arguments on list serve, comment boards, and in emails to me with varying levels of blame about my arrest. To some, whether or not I am to blame depends on whether or not what I did was illegal (which it was not). To others, whether or not I am to blame depends on how much I look like a man. And a third set seem to be saying that the fact this experience happened to me means that it was deserved, because I failed to pass as a man and that is my shortcoming.

7KH WKLUG H[SODQDWLRQ IRU <sup>3</sup>EODPH' RIIHUH G gender perspective as the assessor of appropriate (trans)gender conduct.

## 2. School Bathrooms and Locker Rooms

More than a decade after Spade wrote about his having been arrested IRU XVLQJ D SXEOLF PHQ ¶ V URRP \*DYLQ \*ULPP \* \* LQ FRXUW SDSHUV VXHG KLV Fright QLW ¶ V WR XVH WKH ERV ¶ E <sup>252</sup>W \*DYLQ ¶ V DWDKLV DWF ~~ZRRO~~ D himself, attracted significant media attention.<sup>253</sup>

Gavin, whose sex at birth was female, began to transition in 2014, before his sophomore year of high school. After talking with school officials about his transition, Gavin initially agreed to use a bathroom in the RIILFH RI WKH VFKRRO QXUVH DQG WR VDWLV ¶ requirement through a home school program. For a short time in 2014, \*DYLQ ZDV SHUPLWWHG WR XVH <sup>254</sup>Gavin's ¶ V EDW H[SODLQHG WKDW KLV SHHUV GLG QRW REMHFWR ¶ to . . . use the restroom in peace, and I have had no problems from students to do that ± R Q O \ IURP <sup>255</sup>Responsibly to pressure from community

251. Dean Spade, *Legit 2 Quit*, "What was He Wearing?", PISS & VINEGAR, <http://www.makezine.org/2legit.html> (last visited July 2017).

252. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015), *rev'd*, 822 F.3d 709 (4th Cir. 2016), *acated* Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (mem.).

253. \$ /H[LV VHDFK -XO \ ' I \$ U' <sup>3</sup>WDYDLQV JHUQERU \$1' EDWKU yielded over 2,200 results in the Lexis News file.

254.

PHPEHUV WKH VFKRRO ERDUG LQWHUYHQHG SUH  
 WKH ER\|V URRP ,Q 'HFHPEHU in favor of WK ERDUG  
 resolution that provided, in part:

It shall be the practice of the [Gloucester County Public Schools] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding





the rights of transgender people in public spaces and not forcing them to  
 H [ L V W R Q W K H P D U J L Q V , W ¶ V D E R X W J R Y H U Q P H Q V  
 and experiences of transgender people, as well as the simple recognition of  
 their humanity. His case is part of a larger movement that is redefining  
 and broadening the scope of civil and human rights so that they extend to a  
 vulnerable group that has traditionally been unrecognized, unrepresented,  
 and unprotected.<sup>283</sup>

At that time (early 2017), Gavin Grimm was a high school senior. That  
 spring he graduated. Yet, his attorneys filed a brief with the Fourth  
 Circuit, claiming that Grimm, as an alumnus visiting the school, would be  
 V X E M H F W W R W K H V P K R R O ¶ V E D W K U R R P U X O H V

Although G.G. involved a transgender boy, the 2016 Fourth Circuit  
 opinion in the case offers one of the very few<sup>284</sup> decisions (among those  
 considering the applicability of Title IX to transgender students seeking the  
 right to use bathrooms conforming with their gender identity) that mentions  
 intersex people.<sup>285</sup> Judge Floyd, writing for the Fourth Circuit, concluded  
 that the federal regulation at issue in the case contained ambiguities, and  
 then asked about the application of the federal rule to several groups,  
 distinct, at least in some regard, from the transgender community:

It is not clear to us how the regulation would apply in a number of  
 situations ± H Y H Q X Q G H U W K H % R D U G ¶ V R Z Q <sup>3</sup> E L R O R J L F D  
 For example, which restroom would a transgender individual who had  
 undergone sex reassignment surgery use? What about an intersex  
 individual? What about an individual born with XX-Y sex chromosomes?  
 What about an individual who lost external genitalia in an accident?<sup>286</sup>

In the same year that the Fourth Circuit held for Gavin Grimm, a  
 federal district court in Ohio held for an eleven-year-old transgender girl  
 Z K R Z D Q W H G W R X V H W K H J L U O V ¶ E D W K U R R P L C  
 school.<sup>287</sup> The girl (Jane Doe) ( K H U H L Q D I ) had transitioned  
 socially, but not physically.<sup>288</sup> 7 K H J L U O ¶ N i g h t F i k E r n o

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283. Id.

284. Associated Press, *Transgender Teen Argues Case Still Relevant After Graduation*,  
 NEWS (May 8, 2017 5:51 PM), <https://www.usnews.com/news/best-states/virginia/articles/2017-05-08/transgender-teen-argues-case-still-relevant-after-graduation>.

285. Even in other contexts, there are few to no Title VII or Title IX cases involving intersex  
 people. Writing in 2010, Ilana Gelfman noted the existence of only one sex discrimination case in  
 the employment context with an intersex plaintiff. Gelfman, *supra* note 242, at 723. And that  
 case, *Wood v. C.G. Studios Inc.*, 660 F. Supp. 176 (E.D. Pa. 1987), was dispositive to the  
 Pennsylvania Human Relations Act. Gelfman, *supra* note 242, at 723.

286. G.G., 822 F.3d at 72021.

287. % G R I ( G X F R I W K H + L J K O D Q G / R F D O 6 F K ' L V W Y 8 6 ' H  
 878-79 (S.D. Ohio 2016).

288. Id. at 855.

School in Ohio<sup>287</sup> agreed to refer to Jane by her female name but refused to change official records to reflect that name. Further, school policy provided

Jane used the office bathroom during first grade. Her parents told the principal that this practice had negative mental health consequences for Jane.<sup>288</sup> During second grade, she was required to use a lounge to use the restroom.<sup>289</sup> Further, Jane said that members of the school lounge to use the restroom.<sup>290</sup> Thus, the issues facing Jane included but went beyond her access to bathrooms corresponding to her









reassignment during childhood would be identified for purpo



of Justice under the Trump administration.<sup>331</sup> Students may still receive protection under state law, but not all states offer such protection.<sup>332</sup>

Among the states, California is the most inclusive of transgender

VWXGHQWV T ZLVK LQJ WR SDUWLFLSDWLRQ LQ VSRU



transgender people.<sup>842</sup> Whether that trend will continue in the years ahead, however, is uncertain. During the first months of the Trump administration, the Departments of Education and Justice rescinded interpretive guidelines issued during the Obama administration that had included gender identity as