

**THAILAND’S GENDER EQUALITY ACT: A SOLUTION
FOR THE UNITED STATES’ TRANSGENDER
BATHROOM DEBATE**

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ABSTRACT

Thailand officially recognizes and protects the equal rights of transgender people, a hotly debated issue in the United States that has no resolution in sight. This paper proposes Thailand’s Gender Equality Act (GEA) as one possible resolution to the debate in the United States over transgender bathroom use. The GEA prohibits state, private, and individual discrimination based on gender. Importantly, the GEA emphasizes that gender can be male, female, *or a different appearance from his/her own sex by birth*. So far, the battle over transgender people’s rights in the United States has been fought only on a state level, but federal legislation would unify transgender rights and definitively end the bathroom debate.

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GAVIN GRIMM AND THE CURRENT TRANSGENDER MOVEMENT

Gavin Grimm was a sophomore at Gloucester High School in Gloucester, Virginia, when he needed to use the bathroom.¹ He walked into the boys' bathroom, used it, and left without incident. For seven weeks, Gavin used the boys' bathroom just like every other male student. Then, parents of other Gloucester High School students heard what was happening and spoke out publicly against Gavin's bathroom use. The Gloucester County School Board heard the issue and voted to prevent Gavin from using the boys' bathroom. Why? Because Gavin was born a female.

Gavin's case underscored the polarizing issue² of transgender bathroom use in the United States.³ Parents and politicians have squared

¹ This is the story of Gavin Grimm, the central character of the current debate on transgender rights in the United States. Moriah Balingit, *Gavin Grimm Just Wanted to Use the Bathroom. He Didn't Think the Nation Would Debate It*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/local/education/gavin-grimm-just-wanted-to-use-the-bathroom-he-didnt-think-the-nation-would-debate-it/2016/08/30/23fc9892-6a26-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.9efec52a1887.

² Only one in five Americans (18%) can somewhat sympathize with both sides of the transgender bathroom debate, while roughly six in ten can sympathize with only one side. See Michael Lipka, *Americans are Divided Over which Public Bathrooms Transgender People Should Use*, PEW RES. CTR. (Oct. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use/>.

off with those supporting Gavin arguing that anti-discrimination and the mental and physical health and safety of the student demand they can use the bathroom matching their chosen gender. Meanwhile, those who argued against Gavin said his use of the boys' bathroom violates their basic sensibilities and religious faith.⁴ Although the United States Supreme Court was scheduled to hear Gavin's case in March 2017, they have since sent the decision back to the Fourth Circuit.⁵

According to a 2016 survey by the Williams Institute, a think tank out of the UCLA Law School, there are approximately 1.4 million adults in the United States who identify as transgender.⁶ This translates to roughly 0.6% of the American population and is double an estimate produced in 2011.⁷ North Dakota has the lowest percentage of transgender population at 0.3%, while the District of Columbia has the highest rate of transgender-identified adults at 2.8%.⁸ Not surprisingly, younger Americans are more likely to identify as transgender than older Americans. Of the more than two-hundred thousand people aged eighteen to twenty-four years who were surveyed, 0.66% self-identified as transgender.⁹ This number dropped to 0.58% for those aged twenty-five to sixty-four years, and 0.50% for those sixty-five years and older.¹⁰

As the numbers demonstrate, Gavin is not alone in his fight. His case may decide the futures of countless transgender children, parents, friends, and neighbors. Transgender rights are not an isolated issue that the United States can simply sweep under the rug or postpone to a future generation. Just as there have been movements for racial equality, female equality, and marriage equality, now is the time for transgender equality.

More than eight-thousand miles away,¹¹ the Southeast Asian country of Thailand is considered a destination for transgender

³ *Id.*

⁴ *Id.*

⁵ Adam Liptak, *Supreme Court Won't Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html>.

⁶ See ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

⁷ *Id.* at 3, 6.

⁸ *Id.* at 3.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ See *What is the Flight Time from Los Angeles to Thailand?*, FLIGHT DURATIONS, <https://www.flight-durations.com/Los-Angeles-to-Thailand> (last visited Feb. 25, 2017).

vacationers.¹² Although the exact transgender population in the “Land of Smiles” is difficult to pin down, transgender Thais walk openly in the streets of Bangkok, and have become famous actors, models, and movie stars.¹³ There are certainly still obstacles for transgender Thais, but recent changes have been welcomed by the Thai transgender community. There is a beauty pageant to celebrate those who have completed the male to female transition,¹⁴ certain schools now allow transgender students to choose their uniform based on their chosen gender,¹⁵ and a rural Thai school has revolutionized the transgender bathroom debate.¹⁶ Most importantly, the Thai Government has enacted the Gender Equality Act (GEA), which seeks to eliminate gender discrimination.¹⁷

In many ways, Thailand is far ahead of the United States in recognizing the rights of transgender citizens. This paper proposes Thailand's GEA as one possible solution to the current debate in the United States over transgender bathroom use. The GEA prohibits state, private, and individual discrimination based on gender. Importantly, the GEA emphasizes that gender can be male, female, *or a different appearance from his/her own sex by birth*.¹⁸ The battle over transgender rights in the United States has been fought on a state level, but federal legislation would unify transgender rights and definitively end the bathroom debate.

Section I of this paper will discuss basic vocabulary regarding transgender rights, including the distinction between transgender rights and the LGBT movement. Section II will briefly outline the debate in the United States over transgender bathroom use. Section III discusses

¹² See Jason Heidmann, *10 Hottest Gay Destinations for 2016*, ORBITZ (Dec. 26, 2015), <https://www.orbitz.com/blog/2015/12/look-ahead-10-hottest-gay-destinations-2016/>.

¹³ Jay Michaelson, *Thailand's Transgender People Aren't Just 'Ladyboys' Anymore*, HUMAN RIGHTS ASEAN (Feb. 2, 2015, 1:14 PM), <https://humanrightsinasean.info/article/thailand%E2%80%99s-transgender-people-aren%E2%80%99t-just-%E2%80%98ladyboys%E2%80%99-anymore.html>.

¹⁴ Flora Drury, *Sequins, Spangles and Tiaras: Beauty Pageant Full of Gorgeous Women with a Shocking Surprise – They Were All Born Men*, DAILY MAIL (Jan. 13, 2016, 12:25 PM), <http://www.dailymail.co.uk/news/article-3396006/Sequins-spangles-tiaras-beauty-pageant-gorgeous-women-shocking-surprise-born-men.html>.

¹⁵ Jonathan Head, *Bangkok University Transgender Students Get New Uniform Rules*, BBC NEWS (June 9, 2015), <http://www.bbc.com/news/world-asia-33060185> [hereinafter *Bangkok University Transgender Students Get New Uniform Rules*].

¹⁶ Jonathan Head, *Thai School Offers Transsexual Toilet*, BBC NEWS (July 29, 2008), <http://news.bbc.co.uk/2/hi/asia-pacific/7529227.stm> [hereinafter *Thai School Offers Transsexual Toilet*].

¹⁷ GENDER EQUALITY ACT [GEA] § 17 (B.E. 2558) (Thailand).

¹⁸ *Id.*

transgender rights in Thailand along with outlining some of the social, economic, and cultural obstacles that face transgender Thais. Section IV describes the main functions of the GEA along with the mechanisms it employs to protect transgender rights. Finally, Section V analyzes the rights of transgender Americans under current law and proposes the GEA as model legislation for the United States. This paper concludes that a GEA model would face stiff political opposition in the United States, but would ultimately promote anti-discrimination and equal rights for transgender Americans.

I. TRANSGENDER VOCABULARY

The fight for equal rights for transgender Americans must begin with a basic understanding of what it means to be transgender. First, distinguishing between the often confused terms of “sex” and “gender” is essential.¹⁹ “Sex” identifies a person based on their anatomy, biology, genitalia, or internal sexual organs.²⁰ “Gender,” however, has two components. First, one’s gender can be a social construct built on social and cultural expectations.²¹ Second, gender is a reflection of an individual’s self-image, the public’s perception of that self-image, and the individual’s expression of sexual roles.²² Subsequent classification as male or female is based on the gender symbols expressed in an individual’s clothing, body decoration, mannerisms, gait, or occupational choice.²³

Most people’s sex and gender align—their social construction matches their biological anatomy. Of course, there is some variation in how tightly these factors align, but for the most part their gender matches their sex. However, a transgender person faces a much more challenging road: their biological anatomy does not align with the gender roles with which he or she identifies.²⁴ This condition has been labeled by the

¹⁹ Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169, 172 (2008).

²⁰ *Id.*; see also Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem - A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 LAW & SEXUALITY 91, 94 (2006).

²¹ Allen, *supra* note 19, at 172.

²² Mann, *supra* note 20, at 95.

²³ Allen, *supra* note 19, at 172.

²⁴ *Id.*

American Psychiatric Association (APA) as gender dysphoria (GD).²⁵ A GD diagnosis has two parts: (1) an individual has an incongruence between their birth sex and their desired gender expression,²⁶ and (2) the incongruence results in emotional distress for the individual.²⁷ Although the APA has settled on a definition of GD or transgender, the American legal community has been unable to produce a single, standard definition.²⁸ Without a definition, it has been difficult, if not impossible, to protect transgender Americans as their own classification.²⁹ Section V of this paper will discuss this problem in more detail.

One of the difficulties of researching transgender rights is their connection to sexual orientation—a reference to which gender an individual is physically or sexually attracted to in comparison with their own gender.³⁰ The Lesbian, Gay, Bisexual, and Transgender (LGBT) label combines gender identity with sexual orientation—Lesbian, Gay, and Bisexual refer to sexual orientation, while Transgender addresses one's gender identity. Research focusing *solely* on sexual orientation or *solely* on gender identity is challenging because statistics for the two categories are often combined.³¹ This paper does not discuss sexual orientation nor the rights of lesbian, gay, or bisexual Americans or Thais. Instead, it focuses solely on gender identity rights. All research, news, laws, court decisions, or other statistics included in this paper specifically refer to gender identity, not sexual orientation.

²⁵ *Id.*; see also *Gender Dysphoria*, AM. PSYCHIATRIC ASSOC. (2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

²⁶ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 453 (5th ed. 2013).

²⁷ *Id.*

²⁸ Amy Ballard, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 CARDOZO J.L. & GENDER 775, 777 (2012).

²⁹ *Id.* at 793. Frequently the term “transgender” is subclassified under “sexual orientation” even though a transgender person may be attracted towards either their original, biological gender or their new gender. *Id.*

³⁰ See *Sexual Orientation*, OXFORD DICTIONARY ONLINE (2016), https://en.oxforddictionaries.com/definition/sexual_orientation.

³¹ See *LGBT-Friendly Thailand?*, UNESCO, <http://unesdoc.unesco.org/images/0022/002277/227752E.pdf> (last visited Apr. 20, 2018).

II. TRANSGENDER RIGHTS IN THE UNITED STATES: THE BATHROOM DEBATE

Since November 2015, transgender rights in the United States have focused on bathroom use;³² whether transgender Americans may use the bathroom of their new gender or whether they must conform to their birth sex.³³ Across the United States, there are small pictographs directing millions of people to virtually identical bathrooms. The bathroom is, at its very root, a “bastion of segregation” where people are inherently sorted and categorized based on their gender.³⁴ As one commentator notes, the battle over who can use which bathroom goes hand-in-hand with the civil rights movement: “In the Jim Crow era, bathrooms—along with water fountains and lunch counters—were places that might be marked with ‘white only’ signs Because of the nature of things people do in the bathroom, it can be a space where they feel exposed or vulnerable and therefore [they] resist change.”³⁵

There is no consensus among the fifty states on which bathroom transgender Americans should use.³⁶ The National Center for Transgender Equality tracked at least forty-nine state-level bills introduced during the 2016 legislative session that targeted transgender Americans.³⁷ This patchwork of legislation has created a bizarre and confusing situation where transgender citizens cross state lines and find

³² For a timeline of the bathroom debate across the US, see Kevin Drum, *A Very Brief Timeline of the Bathroom Wars*, MOTHER JONES (May 14, 2016, 7:56 PM), <http://www.motherjones.com/kevin-drum/2016/05/timeline-bathroom-wars>. For a timeline of the history of the transgender rights movement, see *Milestones in the American Transgender Movement*, N.Y. TIMES (Aug. 28, 2015), <https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html>.

³³ Leah Libresco, *Seven Other States are Considering Restricting Bathrooms for Transgender People*, FIVETHIRTYEIGHT (Apr. 6, 2016, 4:50 PM), <http://fivethirtyeight.com/features/with-north-carolina-seven-other-states-are-considering-restricting-bathrooms-for-transgender-people/>.

³⁴ Alia E. Dastagir, *The Imaginary Predator in America’s Transgender Bathroom War*, USA TODAY (Apr. 28, 2016, 8:32 PM), <http://www.usatoday.com/story/news/nation/2016/04/28/transgender-bathroom-bills-discrimination/32594395/>.

³⁵ Katy Steinmetz, *Everything You Need to Know about the Debate Over Transgender People and Bathrooms*, TIME (July 28, 2015), <http://time.com/3974186/transgender-bathroom-debate/>.

³⁶ See Allen, *supra* note 19, at 176 (stating “the United States lacks an overarching gender recognition scheme”); Libresco, *supra* note 33 (overviewing legislation in various state governments addressing bathroom use).

³⁷ Libresco, *supra* note 33.

that their legal sex has “changed” based on the laws of the new jurisdiction.³⁸ This patchwork will be discussed further in Section V.

The transgender bathroom debate started after the Supreme Court legalized same-sex marriage in 2015,³⁹ and the new focus for LGBT rights turned to gender non-discrimination laws. First, voters in Houston, Texas, overturned an ordinance that would have allowed transgender Houstonites to use the bathroom matching their gender identity.⁴⁰ Next, the South Dakota Legislature passed a bill that would have required transgender students to use bathrooms and locker rooms that matched their birth sex.⁴¹ However, South Dakota Governor Dennis Daugaard vetoed the legislation, allowing local school districts to determine bathroom accommodations based on the interests of their students, regardless of biological sex or gender identity.⁴²

In March 2016, North Carolina became the main battleground for bathroom bills.⁴³ In reaction to a Charlotte ordinance passed the previous month preventing discrimination against LGBT people, the North Carolina Legislature called a special session to pass House Bill 2

³⁸ Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 823 (2005).

³⁹ The Supreme Court held that same-sex marriage was protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

⁴⁰ Libresco, *supra* note 33; Alexa Ura, *Bathroom Fears Flush Houston Discrimination Ordinance*, TEX. TRIB. (Nov. 3, 2015), <https://www.texastribune.org/2015/11/03/houston-anti-discrimination-ordinance-early-voting/> (emphasizing that “[a]s the first big LGBT fight since the U.S. Supreme Court legalized same-sex marriage in June, the Houston vote could prove to be a referendum on the Texas gay rights movement, which has pivoted to discrimination protections since the Supreme Court win”).

⁴¹ Greg Botelho & Wayne Drash, *South Dakota Governor Vetoes Transgender Bathroom Bill*, CNN (Mar. 2, 2016, 1:51 AM), <http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/>; Libresco, *supra* note 33.

⁴² Press Release, Gov. Dennis Daugaard, *Gov. Daugaard Vetoes HB 1008* (Mar. 1, 2016), <http://news.sd.gov/newsitem.aspx?id=19926> (Gov. Daugaard stating that “[a]s policymakers in South Dakota, we often recite that the best government is the government closest to the people This bill seeks to impose statewide standards . . . [and] removes the ability of local school districts to determine the most appropriate recommendations for their individual students . . .”).

⁴³ David Crary, *Debate Over Transgender Bathroom Access Spreads Nationwide*, ASSOCIATED PRESS (May 10, 2016, 3:58 PM), <http://bigstory.ap.org/article/76a9fed251e843f7b320cc45f5b594a1/debate-over-transgender-bathroom-access-spreads-nationwide>; *see also* Jim Morrill, *U.S. Justice Department: HB2 Violates Civil Rights Act*, NEWS & OBSERVER (May 4, 2016, 3:43 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article75607477.html> (calling HB2 the “law [that] sparked a national firestorm”).

(HB2).⁴⁴ HB2 not only overturned Charlotte's protection for transgender North Carolinians, but also mandated that students in state schools use bathrooms corresponding to their birth gender.⁴⁵ This blatantly discriminated against transgender North Carolinians. The Attorney General and the US Department of Justice became locked in several lawsuits with North Carolina about whether HB2 violated Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination), Title IX of the Education Acts Amendment of 1972 (prohibiting gender discrimination in public schools), and the Violence against Women Reauthorization Act (prohibiting sex discrimination).⁴⁶ A repeal bill was ultimately introduced in North Carolina's 2017 Legislature.⁴⁷

While legislation was hotly debated in state legislatures across the United States and the North Carolina lawsuit began, a county in eastern Virginia became the judicial focal point of the transgender bathroom debate. In a 5-3 decision released August 3, 2016, the Supreme Court stayed an order of the Fourth Circuit that allowed Gavin Grimm to use his public school's boys' bathroom even though he was biologically a girl.⁴⁸ The Supreme Court later vacated the Fourth Circuit's ruling and sent the case back to the Fourth Circuit for further consideration.⁴⁹ Gavin was born a female, but was diagnosed with GD and had undergone

⁴⁴ David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, THE ATLANTIC (Mar. 24, 2016), <http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/>. For the complete text of HB2, see H.B. 2, 2016-3 N.C. Adv. Legis. Serv. (LexisNexis), <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf>.

⁴⁵ H.B. 2 §§ 1.2, 3.3.

⁴⁶ As discussed in Section I, gender and sex are not synonymous. Therefore, the court will have to decide the extent of the protection of the above mentioned acts for transgender Americans. However, given the Trump Administration, it is unclear how long the AG and DOJ will continue challenging HB2. Joe Sterling et al., *North Carolina, U.S., Square Off Over Transgender Rights*, CNN (May 10, 2016, 7:17 AM), <http://www.cnn.com/2016/05/09/politics/north-carolina-hb2-justice-department-deadline/>.

⁴⁷ Colin Campbell, *Democrats File HB2 Repeal Bill – But Here's Why It Might Never Get a Vote*, NEWS & OBSERVER (Feb. 1, 2017, 3:20 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article130110789.html>.

⁴⁸ Gloucester Cty. Sch. Bd. v. G.G., 136 S. Ct. 2442, 2442 (2016).

⁴⁹ Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239, 1239 (2017); Robert Barnes, *Supreme Court Sends Virginia Transgender Case Back to Lower Court*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-sends-transgender-case-back-to-lower-court/2017/03/06/0fc98c62-027a-11e7-b9fa-ed727b644a0b_story.html?utm_term=.859b03f0fda2.

hormone therapy, legally changed his name to be more masculine, and subsequently lived all aspects of his life as a boy.⁵⁰

The Gloucester County School Board, in response to Gavin's use of the boys' bathroom, instituted a policy requiring students to use the bathroom of their biological sex.⁵¹ The District Court for the Eastern District of Virginia found that the policy did not violate Title IX's prohibition on sex discrimination because of an exception to Title IX allowing public schools to provide "separate toilet, locker room, and shower facilities on the basis of sex."⁵² However, the Fourth Circuit reversed, holding that Title IX was ambiguous as applied to transgender individuals, and thus the Court deferred to the Department of Education's (DoE) interpretation of Title IX's protection.⁵³ Since the DoE under President Obama interpreted Title IX's use of the word "sex" to apply to gender and biological sex, and therefore prohibited policies discriminating against transgender students, the Fourth Circuit found the Gloucester policy violated Title IX.⁵⁴ The Supreme Court granted certiorari to review the Fourth Circuit's deferral to the DoE's interpretation, and was scheduled to hear *Gloucester County School Bd. v. G.G.* in March 2017.⁵⁵ However, in the intervening months between the Supreme Court granting certiorari and the case actually being heard, Donald Trump was elected and became president.⁵⁶ President Trump withdrew the DoE's support of Title IX's inclusion of gender protection by rescinding President Obama's guidelines that protected transgender students.⁵⁷ In light of the Trump Administration's withdrawal of support for gender protection under Title IX, the Supreme Court vacated the Fourth Circuit's decision and remanded the case for further

⁵⁰ G.G. ex rel. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016), *stay granted*, 136 S. Ct. 2442, *cert. granted*, 137 S. Ct. 369, *remanded to* 137 S. Ct. 1239.

⁵¹ *Id.* at 715–16.

⁵² G.G. v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 744–45 (E.D. Va. 2015), *vacated*, 822 F.3d 709.

⁵³ *G.G.*, 822 F.3d at 721.

⁵⁴ *Id.* at 721–22.

⁵⁵ See Adam Liptak, *Supreme Court to Rule in Transgender Access Case*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/politics/supreme-court-to-rule-in-transgender-access-case.html>.

⁵⁶ Tessa Berenson, *Donald Trump Wins the 2016 Election*, TIME (Nov. 9, 2016, 2:56 AM), <http://time.com/4563685/donald-trump-wins/>.

⁵⁷ Daniel Trotta, *Trump Revokes Obama Guidelines on Transgender Bathrooms*, REUTERS (Feb. 23, 2017), <http://www.reuters.com/article/us-usa-trump-lgbt-idUSKBN161243>.

consideration,⁵⁸ thus kicking the can down the road for a definitive rule on transgender bathroom use.

III. TRANSGENDER RIGHTS IN THAILAND

Across the Pacific Ocean, the Southeast Asian country of Thailand has a global reputation of tolerance towards *kathoey*s, or “ladyboys.”⁵⁹ Thais often refer to *kathoey*s as those who are born physically male, but “have a female heart.”⁶⁰ Although transgender Thais include those transitioning from female-to-male, as well as those transitioning from male-to-female, the most visible transgender Thais, and thus the ones that are most discussed, are *kathoey*s (male-to-female). This term includes everyone from those who occasionally cross-dress to Thais who have completed gender-reassignment surgery.⁶¹ *Kathoey*s are a visible part of Thai society—working as travel agents, soap opera stars or immigration officials⁶²—and Thailand has advertised itself as a “pink” tourist destination, a country open to LGBT travelers.⁶³ Thailand has also become the most popular destination for patients seeking sex-reassignment surgery, with the medical tourism industry attracting more than two million visitors per year.⁶⁴ However, this outward appearance of acceptance and high visibility of transgender Thais is tainted by inner hostility and prejudice toward the LGBT community.⁶⁵ First, this paper

⁵⁸ *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (2017).

⁵⁹ Hannah Beech, *Where the ‘Ladyboys’ Are*, TIME (July 7, 2008), <http://content.time.com/time/world/article/0,8599,1820633,00.html>. One Thai hill-tribe has a myth that says “in the beginning there were three sexes: female, male and an intertwining of the two.” *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Dominique Mosbergen, *Two-Faced Thailand: The Ugly Side of ‘Asia’s Gay Capital’*, HUFFINGTON POST (Oct. 20, 2015, 9:05 AM), http://www.huffingtonpost.com/entry/lgbt-thailand_us_5616472ee4b0dbb8000d30a6.

⁶⁴ Thailand does not keep statistics of how many tourists came for sex-reassignment surgery specifically. However, at least 100 Thai doctors in more than 20 medical centers are qualified to perform the operations. Jason Gale, *How Thailand Became a Global Gender-Change Destination*, BLOOMBERG (Oct. 26, 2015, 5:55 PM), <http://www.bloomberg.com/news/features/2015-10-26/how-thailand-became-a-global-gender-change-destination>.

⁶⁵ *Id.*; UNITED NATIONS DEV. PROGRAMME (UNDP), U.S. AGENCY FOR INT’L DEV. (USAID), BEING LGBT IN ASIA: THAILAND COUNTRY REPORT 6 (2014), https://www.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Thailand_Country_Report.pdf.

will describe ways in which *kathoeys* and transgender Thais are accepted and embraced by general Thai culture. Then, it will discuss some of the underlying social contradictions to this tolerant attitude.

A. TRANSGENDER BEAUTY PAGEANT

Every year, Thailand hosts the world's most popular transgender beauty pageant.⁶⁶ Miss Tiffany Universe began in 1998 in response to the discrimination transgender Thais faced on a daily basis.⁶⁷ Much like a beauty pageant for women who were born female, Miss Tiffany Universe features various rounds from ball gowns to bikinis.⁶⁸ With simple rules—applicants must be Thai, and transgender between eighteen and twenty-five years old—the contest attracts hundreds of applicants each year from across Thailand.⁶⁹ Past pageant winners have become very successful, including the 2012 runner up who serves as the communications director of the Thai Transgender Alliance and the 2004 winner who is a successful actress in Hong Kong.⁷⁰ However, even with the exposure and confidence that comes from the Miss Tiffany Universe competition, many *kathoeys* still find themselves confined to the sex, entertainment, and hospitality industries.⁷¹ While *kathoeys* still struggle for acceptance outside of these industries, Thailand has seen some progress in its school system.

B. SCHOOL UNIFORM POLICIES

In 2015, Bangkok University implemented new guidelines for its uniforms, a normally unremarkable event considering Thai universities usually require an approved uniform.⁷² However, included in the new guidelines were illustrations of how *kathoeys* and “tomboys” could stay within the official dress code while also dressing according to their chosen gender.⁷³ Although Bangkok University said it was simply trying to enforce the dress code, which had been violated by transgender

⁶⁶ Drury, *supra* note 14.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*; UNDP, *supra* note 65, at 8.

⁷² *Bangkok University Transgender Students Get New Uniform Rules*, *supra* note 15.

⁷³ *Id.*

students who were wearing clothes matching their preferred gender, rather than their biological sex, the change in policy was met with enthusiasm by many in the transgender community.⁷⁴

Bangkok University is not alone. In 2015, Chulalongkorn University bucked the uniform trend and allowed a transgender student to wear a female uniform to her graduation.⁷⁵ This was the first time they had allowed a transgender student to wear a uniform different from his/her biological sex.⁷⁶ As promising as the moves by Bangkok and Chulalongkorn Universities are, there has not been complete acceptance of changing uniform standards. For example, King Mongkut's University of Technology North Bangkok forced a transgender woman to wear the male uniform at her graduation ceremony.⁷⁷ However, as discussed in Section IV, the Gender Equality Act looks to change such discrimination.

C. TRANSGENDER BATHROOMS

Thailand's transgender bathroom debate has focused around a rural 2,500 student high school in the impoverished area of north-east Thailand.⁷⁸ Kampong Secondary School took a poll and found that nearly 10% of the student body self-identified as transgender.⁷⁹ The transgender students were teased by the boys and the high school girls felt uncomfortable having them use the girls' restroom.⁸⁰ In response, the school built a new toilet dedicated to the transgender boys who felt like girls.⁸¹ This toilet included mirrors and sinks to allow them to preen their hair and apply face cream.⁸² In recognition of the complexities of gender, a sign featuring half a man and half a woman was affixed to the wall above the mirrors. The new bathroom has been welcomed by the transgender boys and has alleviated the tension between the students.⁸³

⁷⁴ *Id.*

⁷⁵ Melalin Mahavongtrakul, *Graduating with a Sense of Freedom*, BANGKOK POST (Oct. 11, 2015, 3:25 AM), <http://www.bangkokpost.com/print/760072/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Beech, *supra* note 59; *Thai School Offers Transsexual Toilet*, *supra* note 16.

⁷⁹ *See Thai School Offers Transsexual Toilet*, *supra* note 16.

⁸⁰ *Id.* This article only discusses transgender boys. While there may have been transgender girls at Kampong, this topic was not addressed.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Although the academic environment may be increasingly tolerant of transgender Thais in certain schools,⁸⁴ they still face major obstacles after graduation.⁸⁵ Even with the implementation of the GEA, a transgender Thai cannot currently change their legal documents to reflect his/her new gender identity.⁸⁶ The next section will discuss some of the challenges facing transgender Thais.

D. SOCIAL, ECONOMIC AND CULTURAL OBSTACLES

Discrimination against transgender Thais stems mainly from Thai religious beliefs about sexual behavior.⁸⁷ Most Thais are Buddhists who live by the Five Moral Precepts.⁸⁸ The Third Precept is to avoid sexual misconduct.⁸⁹ Therefore, transgender Thais born with the wrong gender identity may be considered to have sinned in the past life and are doomed to lead an unhappy life because they will not find love.⁹⁰

According to a 2014 USAID/UNDP analysis of being LGBT⁹¹ in Thailand, which came out before the GEA went into effect, discrimination still exists in certain national laws and policies, social and cultural attitudes, and employment and housing.⁹² Many legislators come from conservative backgrounds and believe in traditional gender roles and a heterosexual family structure.⁹³ To this end, “legislation has traditionally been drafted based on a binary concept of gender.”⁹⁴ As explained in Section IV, this changed with the passing of the Gender Equality Act in 2015.

⁸⁴ Discrimination is still an issue for many Thai students. A 2014 study found that 25% of the 2,000 students surveyed had suffered some sort of harassment based on their sexual orientation or gender identity. In the United States, this number is only 17%. See Mosbergen, *supra* note 63.

⁸⁵ *Id.*; see also UNDP, *supra* note 65, at 7–8.

⁸⁶ Melalin Mahavongtraku, *Transgender Rights Takes Step Forward*, BANGKOK POST (Sept. 26, 2016, 4:30 AM), <http://www.bangkokpost.com/lifestyle/social-and-lifestyle/1095085/transgender-rights-takes-step-forward>.

⁸⁷ Natnicha Chuwiruch, *Their Visibility Belies Scorn, Harm Transgender Thais Face*, ASSOCIATED PRESS (June 5, 2016), <https://apnews.com/2414440da8c84f6d8735ca7623442d46>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* The inability to find love is seen as a result of being trapped in the incorrectly gendered body.

⁹¹ While this paper doesn't address inequalities for the lesbian, gay and bisexual communities, they are often grouped together with people who are transgender. UNDP, *supra* note 65.

⁹² UNDP, *supra* note 65, at 6–9.

⁹³ *Id.* at 21.

⁹⁴ *Id.* at 22.

IV. THE THAI SOLUTION: THE GENDER EQUALITY ACT

Current Thai politics are especially complicated because of a recent military coup, the twelfth coup since 1932.⁹⁵ This section will first provide a brief overview of the political situation in Thailand. Next, it will discuss a 2015 attempt to put a transgender protection provision in the new Thai constitution. However, this provision was not included in the final draft of the constitution that was approved in August 2016. Finally, this section will provide an overview and explanation of the GEA that was introduced on March 8, 2015, and went into effect on September 9, 2015.

On May 20, 2014, Thailand's military put the country under martial law.⁹⁶ General Prayuth Chan-Ocha instituted martial law to "restore order" after six months of political chaos and violence.⁹⁷ The military ruling body—the National Council for Peace and Order (NCPO)—then seized control of the government on May 22, installed General Prayuth as Prime Minister, dissolved the Thai Parliament, ordered activists and journalists to turn themselves in to the army, and suspended the 2007 Constitution, with the exception of recognizing the king as the head of state.⁹⁸ General Prayuth then banned any gatherings of more than five people, instituted a national curfew, and suspended normal broadcast media.⁹⁹

More than two years after the initial coup, General Prayuth and the NCPO allowed a vote to approve a new, military-backed

⁹⁵ Adam Taylor & Anup Kaphle, *Thailand's Army Just Announced a Coup. Here are 11 Other Thai Coups Since 1932*, WASH. POST (May 22, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/05/20/thailands-army-says-this-definitely-isnt-a-coup-heres-11-times-it-definitely-was/>.

⁹⁶ *Id.* The military claimed that their actions did not constitute a coup, but their actions were widely reported outside Thailand to be a coup. *Id.*

⁹⁷ Kim Hjelmggaard et al., *Thai Military Declares Coup, Detains Party Leaders*, USA TODAY (May 22, 3:17 PM), <http://www.usatoday.com/story/news/world/2014/05/22/thailand-military-coup/9428953/>.

⁹⁸ Greg Botelho et al., *Thai Military Takes Over in Coup—Again*, CNN (May 24, 2014, 5:48 PM), <https://www.cnn.com/2014/05/22/world/asia/thailand-martial-law>; Kate Hodal, *Thailand Coup Gets King Adulyadej Approval as Junta Dissolves Senate*, THE GUARDIAN (May 25, 2014, 1:47 PM), <https://www.theguardian.com/world/2014/may/25/thailand-coup-king-adulyadej-junta-senate>.

⁹⁹ *Why is Thailand under Military Rule?*, BBC (May 22, 2014), <http://www.bbc.com/news/world-asia-25149484>.

constitution.¹⁰⁰ The new constitution was approved by more than 60% of voters.¹⁰¹ Although 60% may seem like overwhelming approval from the Thai people, before the election, the military government passed the Referendum Act which banned any debate or criticism about the new constitution and arrested anyone who spread “false information” about the vote.¹⁰² Roughly two hundred thousand police officers were deployed to ensure there were no protesters.¹⁰³

The new constitution calls for a parliamentary system with an unelected prime minister and a military-appointed 250-member Upper House, which would serve a supervising role to the elected Lower House.¹⁰⁴ The election for the 500-member Lower House was specifically changed to hobble the ousted party¹⁰⁵ and make it difficult for a single party to win a majority of seats.¹⁰⁶ Critics say the new constitution entrenches military rule.¹⁰⁷

Further complicating the current political turmoil in Thailand was the recent passing of Thai King Bhumibol Adulyadej, a truly beloved figure who reigned for seventy years.¹⁰⁸ King Bhumibol was a unifying figure in Thai society who had previously given his blessing to the military government.¹⁰⁹ The problem of King Bhumibol's succession is extremely sensitive.¹¹⁰ King Bhumibol's sole surviving son is Prince Vajiralongkorn whose reputation is polar opposite to his father's: Prince Vajiralongkorn is seen as a womanizer, extravagant, self-indulgent, and

¹⁰⁰ *Thailand Referendum: New Constitution Wins Approval*, AL JAZEERA (Aug. 7, 2016), <http://www.aljazeera.com/news/2016/08/thailand-referendum-vote-favor-constitution-160807120506423.html>.

¹⁰¹ *Id.*

¹⁰² *Id.*; Ian Bremmer, *Here's What You Need to Know About Thailand's New Constitution*, TIME (Aug. 11, 2016), <http://time.com/4448655/thailand-constitutional-referendum/>.

¹⁰³ *Thai Referendum: Military-Written Constitution Approved*, BBC (Aug. 7, 2016), <http://www.bbc.com/news/world-asia-36972396>.

¹⁰⁴ AL JAZEERA, *supra* note 100; Charlie Campbell, *Thailand's Referendum is Only the State of a Long Struggle for the Country's Student Activists*, TIME (Aug. 5, 2016), <http://time.com/4440250/thailand-democracy-military-rule-constitution-referendum/>.

¹⁰⁵ Campbell, *supra* note 104.

¹⁰⁶ BBC, *supra* note 103.

¹⁰⁷ Campbell, *supra* note 104.

¹⁰⁸ Helen Regan & Feliz Solomon, *Thailand's King Bhumibol Adulyadej Dies Age 88*, TIME (Oct. 13, 2016, 10:21 AM), <http://time.com/4527699/thailand-king-dies-bhumibol-adulyadej/>.

¹⁰⁹ Kate Hodal, *Thai King Endorses Army Chief as New Leader*, THE GUARDIAN (May 26, 2014), <https://www.theguardian.com/world/2014/may/26/thai-king-endorses-army-chief-leader-military-coup>.

¹¹⁰ Regan & Solomon, *supra* note 108.

cruel to his children.¹¹¹ However, any discussion of the line of succession is heavily censored due to Thailand's strict *Lese Majeste* law, which forbids any defamation or insult of royal family members.¹¹² Thais are therefore stuck between a rock and a hard place—the military is systematically eliminating democratic institutions, while the one unifying figure in the country passed away and is about to be replaced by his unpopular son. However, any public discourse on any political matter is illegal and dissidents face harsh consequences for disobedience. Under Thailand's *Lese Majeste* law, a sixty-one-year-old was sentenced to twenty years in prison after he allegedly sent text messages that were offensive to the queen, a former magazine editor was sentenced to ten years for publishing two articles deemed offensive to the royal family, and a man faced fifteen years for posting images of the King's favorite dog on Facebook in a way that "mocked the king."¹¹³ Thais can be prosecuted under *Lese Majeste* even if they are not the ones making the offensive statement. For example, a cleaning lady was charged for posting the words "I see" in a Facebook exchange with a political activist that police say made defamatory comments and people have been charged for simply hitting the "like" button on a Facebook post that is deemed offensive.¹¹⁴

A. PROPOSAL TO INCLUDE TRANSGENDER PROTECTIONS IN THE NEW CONSTITUTION

With such a tumultuous political background, the drafting process of the military constitution came with a surprise: there was discussion about putting in a constitutional provision that would protect a

¹¹¹ *Thailand's Heir Apparent Maha Vajiralongkorn Raises Fears - and Eyebrows*, THE GUARDIAN (Oct. 13, 2016), <https://www.theguardian.com/world/2016/oct/13/thailand-maha-vajiralongkorn-crown-prince-king>. Given the strong lese majeste laws in Thailand, the media is not allowed to cover most of Prince Vajiralongkorn's exploits, however, he remains a hated figure, especially in the elite circles who will help him rule once he ascends to the throne. *Id.*

¹¹² Regan & Solomon, *supra* note 108. Interestingly, the new constitution solidifies the lese majeste laws, stating "the King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action." RATTHATHAMMANUN HAENG RATCHA-ANACHAK THAI [CONSTITUTION], ch. II, § 6, *translated in* Draft Constitution of the Kingdom of Thailand (2016), http://www.un.or.th/wp-content/uploads/2016/06/2016_Thailand-Draft-Constitution_EnglishTranslation_Full_Formatted_vFinaFalsepdf.

¹¹³ *Lese-Majeste Explained: How Thailand Forbids Insult of its Royalty*, BBC (Oct. 6, 2017), <http://www.bbc.com/news/world-asia-29628191>.

¹¹⁴ *Id.*

“third gender.”¹¹⁵ The military appointed a Constitution Drafting Committee tasked with replacing the 2007 Constitution.¹¹⁶ The Committee saw that gender was more than a binary system and wanted to give Thais the freedom to change their gender while maintaining constitutional protections.¹¹⁷ Constitutional protection was welcomed by gender rights activists, although critics were still skeptical that constitutional protection would not translate into reality.¹¹⁸

Thailand's constitution was poised to join an expansion of transgender rights across the globe.¹¹⁹ However, the 2016 Constitution that was approved by referendum did not include explicit protection for a third gender. Section twenty-seven is the closest the new constitution comes to protecting gender equality:

Section 27. All persons are equal before the law and shall enjoy equal protection under the law.

Men and women shall enjoy equal rights.

Unjust discrimination against a person on the grounds of the difference in . . . sex . . . that does not violate the provisions of this constitution . . . shall be prohibited.¹²⁰

Interestingly, although the new constitution does not include protections for a third gender, the GEA was announced less than two

¹¹⁵ Amy Lefevre, *Thailand to Recognise “Third Gender” in New Constitution – Panel*, REUTERS (Jan. 15, 2015, 3:37 AM), <http://www.reuters.com/article/thailand-politics-idUSL3N0UU1BS20150115>.

¹¹⁶ *Id.*

¹¹⁷ Madison Park & Kiki Dhitavat, *Thailand's New Constitution Could Soon Recognize Third Gender*, CNN (Jan. 16, 2015, 9:41 AM), <http://edition.cnn.com/2015/01/16/world/third-gender-thailand/>. Committee spokesperson Kamnoon Sittisamarn said, “[i]t is a human right if you were born a male or female and you want to have a sex change or lead a life of a different gender” and “[p]eople should have [that] freedom to change sex and they should be equally protected by the Constitution and the law and treated fairly.” *Id.*

¹¹⁸ *Draft of Thailand's New Constitution Would Protect Rights of Gay and Transgender People*, U.S. NEWS (Jan. 16, 2015, 4:19 AM), <http://www.usnews.com/news/world/articles/2015/01/16/draft-of-new-thai-constitution-would-protect-lgbt-rights>.

¹¹⁹ Park & Dhitavat, *supra* note 117. India's Supreme Court recognized the right to gender self-identification in 2014. *Id.* Nepal, Pakistan and Bangladesh have also implemented policies that recognize a third gender. *Id.* Australia allows a third gender option on their passports. *Id.* More than 20 other countries have also passed legislation expanding the rights of transgender people according to a 2012 report from the Global Commission on HIV and the Law. *Id.*

¹²⁰ RATTHATHAMMANUN HAENG RATCHA-ANACHAK THAI [CONSTITUTION], ch. III, § 27, *translated in* Draft Constitution of the Kingdom of Thailand (2016), http://www.un.or.th/wp-content/uploads/2016/06/2016_Thailand-Draft-Constitution_EnglishTranslation_Full_Formatted_vFinaFalsepdf.

months after reports surfaced in January 2015 that the draft constitution may include gender protections.¹²¹ Perhaps the Constitution Drafting Committee viewed the GEA as an appropriate alternative that rendered constitutional protection superfluous. Perhaps the Committee balked at the notion of the monumental step of including gender protection in the constitution. Regardless, the GEA is a significant step forward for transgender rights in Thailand and explicitly prohibits any state or private discrimination based on gender identity.

B. GENDER EQUALITY ACT

The GEA is divided into four main parts. Part One provides definitions.¹²² Part Two creates two committees: the Gender Equality Promotion Committee and the Committee on Consideration of Unfair Gender Discrimination.¹²³ Part Three allows for the inspection of unfair gender discrimination.¹²⁴ Part Four creates a Gender Equality Promotion Fund and provides compensation and remedies for injured parties.¹²⁵

1. *GEA Part One: Definitions*

The most important definition in the first section of the GEA is that of “unfair gender discrimination”:

Any act or omission of the act which causes division, discrimination or limitation of any right and benefit either directly or indirectly without justification due to the fact that the person is male or female or of a different appearance from his/her own sex by birth.¹²⁶

The inclusion of the emphasized language is vital for transgender Thais. It explicitly protects people who change their gender, a significant change from previous protections that only protected gender discrimination between males and females. The importance of this protection goes beyond just preventing gender discrimination. It also symbolizes official recognition that transgender Thais are equal in the eyes of government and society.

¹²¹ GENDER EQUALITY ACT [GEA] § 17 (B.E. 2558) (Thailand) (“given on the 8th day of March B.E. 2558 2015”).

¹²² *Id.* § 3.

¹²³ *Id.* §§ 5, 13.

¹²⁴ *Id.* § 26.

¹²⁵ *Id.* §§ 24, 28.

¹²⁶ *Id.* § 3 (emphasis added).

The heart of the GEA is the prohibition of “the establishment of policy, rule, regulation, notification, project, or procedures either by *government agencies or private organizations or any individual* with the characteristics of unfair gender discrimination.”¹²⁷ The application of the GEA beyond government agencies further solidifies the equality of transgender Thais in society. Prohibiting discrimination by private groups or individuals ensures that Thai society and culture progress to accept transgender Thais in all walks of life. If the GEA had restricted the protection to only government action, then transgender Thais could still be subjected to discrimination in their day-to-day life. In fact, according to the United Nations Development Program (UNDP), general societal discrimination in cultural attitudes, religion, employment, and housing were some of the largest obstacles facing gender and sexual orientation minorities.¹²⁸ The expansion of national protections through the GEA should help alleviate these obstacles.

2. GEA Part Two: Committees

The GEA creates two committees: the Gender Equality Promotion Committee (GEPC) and the Committee on Consideration of Unfair Gender Discrimination (CCUGD).¹²⁹ The GEPC focuses primarily on promoting gender equality through policy recommendations and research. Meanwhile, the CCUGD is a quasi-judicial body that investigates gender discrimination claims, conducts a quasi-trial, and can impose appropriate remedies if it finds there has been unfair gender discrimination.

a. The Gender Equality Promotion Committee (GEPC)

The GEPC is the larger committee, consisting of the Prime Minister as the Chair, the Minister of Social Development and Human Security as Vice-Chair, eleven members from various government departments, and nine expert members appointed from women's organizations and gender equality groups.¹³⁰ Six of these experts must

¹²⁷ *Id.* § 17 (emphasis added).

¹²⁸ UNDP, *supra* note 65, at 7–8.

¹²⁹ GEA §§ 5, 13. The GEA gives the acronyms of SorTorPor and WorPorLor for the GEPC and the CCUGD respectively. *Id.* §§ 5, 13. For convenience, this paper uses its own acronyms to prevent confusion.

¹³⁰ *See id.* §§ 5, 13.

have experience working in the field of gender equality and three must be experts in legislation, human rights, social science, or psychology.¹³¹ There are many other guidelines for the expert members' personal lives as well: they must be Thai, older than thirty-five, be in good financial standing, have a clean record including no history of gender discrimination, and not be a serving politician.¹³² The members serve three-year terms, but cannot serve more than two consecutive terms.¹³³

As its name suggests, this committee is responsible for promoting gender equality. The GEA gives the GEPC numerous powers to pursue this end. One of the primary functions of the GEPC is to advise the government on how to promote gender equality.¹³⁴ The GEPC is tasked with establishing policies, measures and action plans to promote gender equality on all levels of society: public, private, and individual.¹³⁵ The GEPC also encourages research and data collection to improve understanding of gender discrimination and seek ways to prevent it.¹³⁶ The committee works with victims and victim advocate groups to establish guidelines and provide compensation and relief to victims of unfair gender discrimination.¹³⁷ Finally, the GEPC must submit a report to the Prime Minister's Cabinet once a year detailing progress they have made in promoting gender equality.¹³⁸

All of the duties of the GEPC are intended to "promot[e] accessibility to social, economic, and political rights" of transgender Thais.¹³⁹ Therefore, the GEPC is specifically tasked with addressing the injustices and inequalities that transgender Thais face on a daily basis: housing inequality, workforce discrimination, uniform discrimination, bathroom discrimination, cultural biases and hostilities, and religious intolerances.¹⁴⁰ The GEA even recognizes that there is a systemic cultural problem of "bias based on sex inequality and violence due to gender

¹³¹ *Id.* § 5.

¹³² *Id.*

¹³³ *Id.* § 7.

¹³⁴ *Id.* § 10 (assigning duties to the GEPC including "providing the Cabinet with policy recommendations and proposals for improvement of laws, rules, and regulations so as to be in accordance with the objectives of [the GEA]").

¹³⁵ *Id.* §§ 10(1)–(2), 10(4).

¹³⁶ *Id.* §§ 10(5)–(6).

¹³⁷ *Id.* § 10(3).

¹³⁸ *Id.* § 10(6).

¹³⁹ *Id.* § 10.

¹⁴⁰ *Id.* § 17 (allowing an exception for "compliance with religious principles" that may allow unfair gender discrimination).

which obstruct entitlement of various rights.”¹⁴¹ The official recognition of the realities of many transgender Thais is essential. Now that the government recognizes there are cultural and societal hurdles, the GEPC can begin to address them and work to truly promote gender equality throughout Thailand.

b. The Committee on Consideration of Unfair Gender
Discrimination (CCUGD)

The CCUGD is smaller than the GEPC and consists of a chairperson and eight to ten committee members.¹⁴² These members cannot simultaneously be on the GEPC.¹⁴³ Three members must be experts with experience working with and protecting victims of unfair discrimination or promoting gender equality.¹⁴⁴ The remaining members should have backgrounds in human rights, legislation, social science, psychology, and labor affairs.¹⁴⁵

The CCUGD essentially functions as a trial court. It has the power to hear and decide any complaints of unfair gender discrimination and can establish temporary measures to protect the victim or mitigate the discrimination.¹⁴⁶ Decisions of the CCUGD may require the concerned parties to take necessary actions to end and prevent unfair gender discrimination.¹⁴⁷ If the CCUGD decides it is necessary, then the decision may require there be compensation or remedy provided to the injured party.¹⁴⁸ The details of this process will be described below.

3. *GEA Part Three: Inspection of Unfair Gender Discrimination*

Chapter Three of the GEA begins by prohibiting all policies, rules, regulations, notifications, projects, or procedures by government agencies, private organizations, or individuals that have the *characteristics* of unfair gender discrimination.¹⁴⁹ Therefore, even if a

¹⁴¹ *Id.* § 10.

¹⁴² *Id.* § 13.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* § 14.

¹⁴⁷ *Id.* § 20(1) (granting the powers of GEA § 20 which authorize the CCUGD to issue such orders).

¹⁴⁸ *Id.* § 20(2).

¹⁴⁹ *Id.* § 17.

private policy is not explicitly discriminatory, the CCUGD can still find that the policy violates the GEA and eliminate it.¹⁵⁰ This is an important distinction that moves the GEA beyond being simply a façade that still allows discrimination.

Chapter Three allows any person who thinks they have suffered, or is likely to suffer, harm caused by unfair gender discrimination to submit a complaint to the CCUGD, so long as there is not a pending or final court decision.¹⁵¹ Although the decision of the CCUGD then becomes final, the individual can still take legal action in court to seek compensation beyond monetary damages awarded by the CCUGD.¹⁵² If the unfair gender discrimination was intentional or caused by serious negligence, then the victim can also seek financial compensation up to four times the amount of actual damages.¹⁵³

Once the CCUGD receives a complaint, it has the authority to enter residences or other premises to collect evidence using a search warrant.¹⁵⁴ It can also summon people, objects, and documents to aid in its deliberations.¹⁵⁵ In addition to the CCUGD's independent fact-finding responsibilities, the parties to the claim must provide facts, evidence and responses to any inquiries the committee may have.¹⁵⁶ This is similar to US courts where parties must present evidence supporting their claim or defense. The Court can also request material from the parties,¹⁵⁷ similar to US courts. However, the CCUGD also has powers comparable to a federal legislative committee, whereby it can investigate and collect evidence independently from the parties.¹⁵⁸ Such a hybrid system has the ability to make a decision based on independent evidence as well as potentially biased evidence. If the CCUGD has a question, they may to gather evidence and determine an answer.

The GEA includes consequences for violating an order of the CCUGD, essentially imbuing the committee with quasi-judicial power. Any person who violates the final orders of the CCUGD (i.e., anyone who does not provide the remedy or compensation as required by the

¹⁵⁰ *See id.* § 20.

¹⁵¹ *Id.* § 18.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* § 22.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

CCUGD) *shall* be subject to imprisonment up to six months or a twenty-thousand baht fine (the equivalent of \$565 US dollars).¹⁵⁹ Additionally, any individual who does not cooperate with the CCUGD's collection of evidence shall be subject to imprisonment of up to three months and a ten-thousand baht fine (the equivalent of \$282 US dollars).¹⁶⁰

Although the GEA prohibits unfair gender discrimination and provides a mechanism to enforce this prohibition, there are some exceptions where gender discrimination may be allowed: protection of an individual's safety and welfare, compliance with religious principles, and national security.¹⁶¹ Although the GEA lists these exceptions, it does not elaborate on what they may entail. Unfortunately, given that the GEA has only been in effect since September 2015, it is currently unknown if these exceptions have been used to circumvent the GEA's prohibitions.

4. *GEA Part Four: Compensation and Remedies*

When the CCUGD rules that there has been unfair gender discrimination, the injured party is entitled to receive compensation.¹⁶² To receive compensation, the injured party must submit a written request within one year of the CCUGD's decision to the Department of Women's Affairs and Family Development.¹⁶³ This entitlement is non-transferable, but a minor or "incompetent" person who is unable to submit a request may have a parent, guardian, spouse, or caregiver submit a request on his/her behalf.¹⁶⁴

The injured party has a right to monetary compensation for numerous consequences that result from the unfair gender discrimination.¹⁶⁵ First, they may receive compensation for any loss of income during the time when they were unable to work as usual.¹⁶⁶ The GEA creates broad boundaries on loss of income compensation to ensure that even unfair gender discrimination that may have only *affected* the work environment, but did not entirely preclude the victim from

¹⁵⁹ *Id.* § 34.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* § 17.

¹⁶² *Id.* § 24.

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 25.

¹⁶⁵ *Id.* § 26.

¹⁶⁶ *Id.*

working, can still result in compensation.¹⁶⁷ Second, the injured party may receive compensation for the loss of any commercial opportunity where the loss may be calculated in monetary terms.¹⁶⁸ Again, the GEA does not restrict the types of commercial opportunities that qualify. This is vital for the elimination of unfair gender discrimination. The broad, inclusive language of the GEA grants the Department discretion to find discrimination even in cases that do not fit the mold.

Third, compensation may be awarded for “expenses on medical care *including physical and mental rehabilitation*.”¹⁶⁹ Official recognition of the serious mental and emotional detrimental effects of gender discrimination is significant and will help transgender individuals lead normal lives.¹⁷⁰ Finally, the GEA allows for compensation and remedy in “other forms and characteristics.”¹⁷¹ Any monetary compensation received under the GEA does not preclude the injured party from filing a lawsuit to collect other forms of compensation.¹⁷²

Lastly, in part to help with compensation, the GEA created the Gender Equality Promotion Fund (Fund).¹⁷³ The Fund is financed through government subsidies and financial support from agencies involved with promoting gender equality, donations, fines from violations of the GEA, benefits from Fund investments, and any other income.¹⁷⁴ The Fund can be spent for general promotion of gender equality by government or private entities.¹⁷⁵ Additionally, it can be used to assist, compensate, remedy, or mitigate unfair gender discrimination.¹⁷⁶ The Fund provides resources for the Thai government

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (emphasis added).

¹⁷⁰ *See* Susan Scutti, *Transgender People More Likely to Develop Depression and Anxiety*, MED. DAILY (June 21, 2013, 4:56 PM), <http://www.medicaldaily.com/transgender-people-more-likely-develop-depression-and-anxiety-247044>. According to the “minority stress theory,” health disparities between sexual minorities can be explained by the stigmatization of a hostile and homophobic culture. *Id.* A study by the American Public Health Association found that transgender Americans expressed above average signs of clinical depression (44.1%), anxiety (33.2%) and somatization (27.5%). Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the American Population*, 103 AM. J. PUB. HEALTH 943, 943 (2013).

¹⁷¹ GEA § 26.

¹⁷² *Id.* §§ 18, 27.

¹⁷³ *Id.* § 28.

¹⁷⁴ *Id.* § 29.

¹⁷⁵ *Id.* § 30.

¹⁷⁶ *Id.*

as well as Thai businesses and non-profits to end gender discrimination. Without the Fund, it would be much more difficult to provide the education and resources necessary to eliminating some of the social, cultural, and economic obstacles that transgender Thais face on a daily basis.

C. IMPLEMENTATION OF THE GEA: TOO EARLY TO SEE RESULTS

As of this writing, the GEA has been in place for just over two and a half years and it is still too early to know if it is working. Additionally, the instability of the present Thai government, along with the tight *Lese Majeste* laws, could mean a very slow revelation of information regarding the success of the GEA. Although there are still instances of discrimination preventing transgender Thais from working outside of the “traditional” transgender roles (beauty industry, entertainment, etc.), more change could be on the horizon.¹⁷⁷ Since the implementation of the GEA, the Thai government has been working on a law that would officially recognize transgender individuals in addition to male and female genders.¹⁷⁸ However, progress has stalled as some officials struggle to look beyond the traditional binary system of gender.¹⁷⁹ Only the passing of time will give the world a better sense of whether the GEA is positively impacting the social, economic, and cultural standing of transgender Thais.

V. THE GENDER EQUALITY ACT AS A SOLUTION FOR THE UNITED STATES

A. OVERVIEW: TRANSGENDER AMERICANS

While there has generally been increased acceptance of transgender Americans, their legal status varies greatly from state to state. This patchwork makes it difficult to know what documentation is necessary to officially change one's gender. In eight states (Alabama, Georgia, Kentucky, Louisiana, North Carolina, Oklahoma, Tennessee, and Wyoming), gender reassignment surgery is required to officially

¹⁷⁷ Ana Salvá, *An LGBTI Oasis? Discrimination in Thailand*, THE DIPLOMAT (Nov. 1, 2016), <http://thediplomat.com/2016/11/an-lgbti-oasis-discrimination-in-thailand/>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

change gender.¹⁸⁰ Other states require a court order (Texas), surgery and a court order (Iowa, Montana, and South Carolina), or a physician to certify the change (Colorado, Indiana, Michigan, Maryland, Nebraska, Nevada, Utah, and West Virginia).¹⁸¹ The majority of states, twenty-seven states plus the District of Columbia, allow an individual to officially change their gender with only a healthcare provider's certification of the change.¹⁸²

On the federal level, the Obama Administration updated the requirements to change an individual's gender on their passport in 2010.¹⁸³ The new requirements allow an American who has either had appropriate clinical treatment and completed their gender transition, or is having the appropriate treatment, to receive a passport that matches their new gender.¹⁸⁴ The Department of State leaves open the definition of "appropriate clinical treatment" to the applicant's physician.¹⁸⁵ This leeway respects the individual and their transition process. According to the Transgender Law Center, changing one's gender for social security records and benefits is similarly easy: fill out a form and present either a medical certification of "appropriate clinical treatment for gender transition" or a valid ten-year passport with the new gender.¹⁸⁶ Therefore, a federally-issued passport is the best choice for transgender Americans because it can subsequently be used to change their gender for future identification documents and government programs.

However, transgender rights are back up for debate under the Trump Administration. Although President Trump issued a statement saying he would protect LGBT rights, draft executive orders were released that called for overturning President Obama's protection of the

¹⁸⁰ Emanuella Grinberg & Dani Stewart, *Transgender Americans Rush to Change IDs for Trump Era*, CNN (July 26, 2017, 10:56 AM), <http://www.cnn.com/2017/01/31/health/transgender-gender-change-id/>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Surgery No Longer a Requirement for Changing Gender on Passport*, CNN (June 9, 2010, 10:07 PM), <http://www.cnn.com/2010/US/06/09/passports.transgender/>; see also U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, GENDER DESIGNATION CHANGE, <https://travel.state.gov/content/passports/en/passports/information/gender.html> [hereinafter PASSPORT REQUIREMENTS].

¹⁸⁴ PASSPORT REQUIREMENTS, *supra* note 183.

¹⁸⁵ *Id.*

¹⁸⁶ TRANSGENER LAW CTR., ID PLEASE! QUICK GUIDE FOR CHANGING FEDERAL IDENTITY DOCUMENTS TO MATCH YOUR GENDER IDENTITY (2016), <https://transgenderlawcenter.org/archives/13376>.

LGBT community.¹⁸⁷ As of the time of writing this paper, these executive orders have not been signed. However, on February 22, 2017, President Trump's Administration issued a joint letter from the Justice Department and Education Department rescinding the Obama Administration's protections of a transgender student's choice of bathroom, the protections upon which transgender students across the United States, including Gavin Grimm, were relying.¹⁸⁸ The status of LGBT rights under President Trump continues to be a pressing and unresolved issue.¹⁸⁹

Despite the confusion regarding LGBT rights under the Trump Administration, acceptance has begun to take root across the country on the state level. In the California State Senate, the Gender Recognition Act of 2017 (SB 179) revolutionized the official recognition process for transgender Californians. Introduced by Senator Toni Atkins, SB 179 created a third-gender option for official state documents: "non-binary."¹⁹⁰ California became the first state to have such a category.¹⁹¹ SB 179 went farther than simply allowing a third option on official documents. Californians under the age of eighteen are able to change their gender identity¹⁹² and the bill eliminates the requirement that an individual undergo treatment.¹⁹³ As Berkeley Professor Laura Nelson

¹⁸⁷ Juliet Eilperin & Sandhya Somashekhar, *White House Says LGBT Protections for Federal Workers Will Remain*, DENVER POST (Jan. 31, 2017, 11:21 AM), <https://www.denverpost.com/2017/01/31/lgbt-protections-federal-workers/>.

¹⁸⁸ Jeremy W. Peters et. al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html?_r=0.

¹⁸⁹ *Id.* President of the Human Rights Campaign Chad Griffin said, "Donald Trump has done nothing but undermine equality since he set foot in the White House. Donald Trump has left the key question unanswered – will he commit to opposing any executive actions that allow government employees, taxpayer-funded organizations or even companies to discriminate?" Rachael Revesz & Lucy Pasha-Robinson, *Donald Trump Says He Will Not Repeal Barack Obama's Landmark LGBT Protections*, THE INDEPENDENT (Jan. 31, 2017, 1:30 PM), <https://www.independent.co.uk/news/world/americas/donald-trump-repeal-barack-obama-lgbt-landmark-protections-executive-order-a7554996.html>. Since taking office, President Trump banned transgender Americans from serving in the military. Helene Cooper & Thomas Gibbons-Neff, *Trump Approves New Limits on Transgender Troops in the Military*, N.Y. TIMES (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html>.

¹⁹⁰ Katy Murphy, *Transgender Rights: Will California Become First State with Third-Gender Marker?*, MERCURY NEWS (Jan. 26, 2017 4:41PM), <http://www.mercurynews.com/2017/01/26/california-could-soon-add-third-nonbinary-gender-marker-to-state-ids/>.

¹⁹¹ James M. Nichols, *California Becomes First State to Legally Recognize a Third Gender*, HUFFINGTON POST (Oct. 17, 2017), https://www.huffingtonpost.com/entry/california-third-gender-option_us_59e61784e4b0ca9f483b17b9.

¹⁹² *Id.*

¹⁹³ *Id.*

says, “[t]hese specific issues become increasingly important in the current context where people are feeling like civil rights may be mov[ing] backwards.”¹⁹⁴ Such a breakthrough is monumental for transgender Californians and Americans.

In addition to SB 179, transgender advocates in the United States received another piece of welcome news in early 2017. On January 30, 2017, the Boy Scouts of America (BSA) changed their policies to allow transgender boys to join their Cub and Boy Scout programs.¹⁹⁵ Rather than relying on birth certificates, the BSA will now accept and register applicants based on the gender indicated on their application.¹⁹⁶ The BSA joins the Girls Scouts in allowing transgender youth to participate fully in their single-gender programs.¹⁹⁷ Such inclusivity at a young age instills tolerance and acceptance in the community—a crucial step for permanently changing social and cultural values.¹⁹⁸

B. LEGAL PROTECTIONS OF TRANSGENDER AMERICANS

The patchwork of case law on transgender rights is as sporadic as the patchwork of rights under state law. Specifically, there is very

¹⁹⁴ Sydney Fix, *State Bill Proposes Nonbinary Option on Birth Certificates, Driver's Licenses*, DAILY CALIFORNIAN, <http://www.dailycal.org/2017/01/31/state-bill-proposes-nonbinary-option-birth-certificates-drivers-licenses> (last updated Feb. 1, 2017).

¹⁹⁵ *BSA Addresses Gender Equality*, BOY SCOUTS OF AM. (Jan. 30, 2017), <http://www.scoutingnewsroom.org/press-releases/bsa-addresses-gender-identity/>.

¹⁹⁶ *Id.*

¹⁹⁷ On the Girl Scouts website, they specifically address transgender girls joining the program:

Placement of transgender youth is handled on a case-by-case basis, with the welfare and best interests of the child and the members of the troop/group in question a top priority. That said, if the child is recognized by the family and school/community as a girl and lives culturally as a girl, then Girl Scouts is an organization that can serve her in a setting that is both emotionally and physically safe.

Frequently Asked Questions - Social Issues, GIRL SCOUTS, <http://www.girlscouts.org/en/faq/faq/social-issues.html> (last visited Feb. 4, 2017).

¹⁹⁸ The Girl Scouts specifically demonstrated their commitment to inclusivity and acceptance of transgender Girl Scouts in 2015 when the Girl Scouts of Western Washington returned a \$100,000 donation whose donor requested the money not be used to support transgender girls. To recoup their loss, the group set up an Indiegogo crowd funding page. Instead of the \$100,000 donation from one donor, they raised \$338,282 from more than seven thousand donors. See Sarah Larimer, *Girl Scouts Choose Transgender Girls Over \$100,000 Donation*, WASH. POST (July 1, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/30/girl-scouts-choose-transgender-girls-over-100000-donation/?utm_term=.cbd4a3ce7b6a; *Girl Scouts is #ForEVERYGirl*, INDIEGOGO, <https://www.indiegogo.com/projects/girl-scouts-is-foreverygirl#> (last visited Apr. 20, 2018).

little case law on the rights of transgender public school students.¹⁹⁹ Cases on transgender rights were relatively rare until the late 1990s,²⁰⁰ and most of the subsequent cases have involved either Title IX, Title VII, the Equal Protection Clause of the Fourteenth Amendment, or some combination.²⁰¹

One of the first transgender rights cases came from Texas. In 1999, the Texas Court of Appeals held that a transgender woman who had undergone all the necessary surgeries and changed her legal name could not recover for wrongful death of her husband because she was not born a woman.²⁰² Six years later, *Barnes v. Cincinnati* became the first case to find in favor of a transgender plaintiff under a Title VII employment discrimination claim.²⁰³ In *Barnes*, the Sixth Circuit held that the firing of a transgender, pre-operative, male-to-female police officer violated Title VII's prohibition against employment discrimination because he was fired for not being masculine enough.²⁰⁴

In addition to court cases like *Barnes*, there have been many administrative decisions by the Equal Employment Opportunity Commission (EEOC) regarding transgender rights in the workplace. In 2012, the EEOC ruled in *Macy v. Holder* that discrimination based on transgender status is *per se* discrimination and actionable under Title VII.²⁰⁵ This ruling brought gender under Title VII's blanket protection against discrimination based on sex.²⁰⁶ As discussed previously, the DoE under President Obama included gender under the protections of Title IX against sex discrimination, although that debate has now been reopened by the Trump Administration.

¹⁹⁹ Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 PENN ST. L. REV. 187, 187 (2016).

²⁰⁰ Ballard, *supra* note 28, at 784.

²⁰¹ See *G.G. ex rel. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016) (Title IX), *stay granted*, 136 S. Ct. 2442, *cert. granted*, 137 S. Ct. 369, *remanded to* 137 S. Ct. 1239. See generally Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895 (2007) (Title XI, Title VII, Equal Protection Clause); Buzzelli, *supra* note 199 (Title IX, Equal Protection Clause).

²⁰² *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

²⁰³ *Barnes v. City of Cincinnati*, 401 F.3d 729, 729 (6th Cir. 2005); Ballard, *supra* note 28, at 784.

²⁰⁴ *Barnes*, 401 F.3d at 738.

²⁰⁵ Buzzelli, *supra* note 199, at 195; *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012).

²⁰⁶ Buzzelli, *supra* note 199, at 195.

There is currently a circuit split as to whether transgender citizens are a protected class under the Equal Protection Clause. Only the Sixth and Eleventh Circuits have held that transgender citizens are part of a protected class.²⁰⁷ Being part of a protected class is significant because it requires the reviewing court to apply a higher level of scrutiny when reviewing state action.²⁰⁸ The court uses intermediate scrutiny when reviewing laws that affect “quasi-suspect” classes, including gender.²⁰⁹ However, some federal courts have refused to elevate transgender discrimination to this level of scrutiny.²¹⁰ Therefore, the debate is whether state discrimination against transgender Americans should be reviewed under intermediate scrutiny (whereby the justification for the law must be exceedingly persuasive and substantially related to an important government purpose) or the lower rational basis test (requiring only that the law rationally further a legitimate state interest).²¹¹ Until the Supreme Court rules on this issue, there will continue to be legal uncertainty.²¹²

C. THE GENDER EQUALITY ACT AS A SOLUTION IN THE UNITED STATES

One solution to the disjointed and uncertain nature of transgender rights in the United States would be for Congress to adopt legislation similar to Thailand’s Gender Equality Act. A United States GEA (US-GEA) would advance transgender rights in three prominent ways. First, it would prohibit any gender discrimination by the government, private organization, or individuals. Considering the current confusion over where gender identity stands in the pantheon of protected classes, clarity is essential. Second, it would provide a framework, other than the court system, through which victims could obtain compensation, relief, or recognition of the discrimination. The committee structure established by the GEA provides a mediation-esque approach that could help heal communities and promotes understanding. This alternative to

²⁰⁷ *Id.* at 197–98; *see also* Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 575–76 (6th Cir. 2004).

²⁰⁸ Buzzelli, *supra* note 199, at 196–97.

²⁰⁹ *Id.* at 197.

²¹⁰ *Id.*

²¹¹ *Id.* at 197; United States v. Virginia, 518 U.S. 515, 533 (1996).

²¹² *Know Your Rights: Transgender People and the Law*, ACLU, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited Apr. 20, 2018).

the adversarial court system may be more appropriate for such a sensitive and personal topic. Third, a US-GEA would clarify any distinction between sex, gender identity, and sexual orientation. Issues involving transgender Americans are often clumped together with studies and advocacy focused on sexual orientation. A clear distinction between the two pursuits would likely bring greater attention to difficulties that are unique to transgender Americans.

Implementing a US-GEA would greatly advance the cause and treatment of transgender Americans by granting them equal rights to non-transgender Americans. Additionally, a US-GEA would unify the current amalgamation of rulings that have come up under Title VII, Title IX, and the Equal Protection Clause. This legislation would give states and court systems a single reference point for claims arising in employment, public education, or any action by the government. It would also definitively raise gender discrimination into the public consciousness as a scourge worth eliminating.

However, the implementation of US-GEA would have some obstacles. First, the US Constitution, through the Fourteenth Amendment, only prohibits discrimination by the state.²¹³ Therefore, US-GEA would have to be more narrowly tailored to only prohibit discrimination by the government, rather than include private organizations and individuals. If a ban on individual or private discrimination were preferred, a constitutional amendment would be required granting Congress that power. Such a discussion is beyond the scope of this paper.

Second, there is still a strong state-level resistance to transgender equality. As of January 27, 2017, at least eleven states have introduced anti-transgender legislation.²¹⁴ This number is likely to increase as there were nearly forty pieces of anti-transgender legislation introduced in sixteen state legislatures in 2016.²¹⁵ However, amidst this onslaught of

²¹³ U.S. CONST. amend. XIV, § 1 (“No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added).

²¹⁴ Ashley Dejean, *Transgender Rights are Under Attack in These 11 States*, MOTHER JONES (Jan. 27, 2017, 11:00 AM), <http://www.motherjones.com/politics/2017/01/transgender-rights-bathrooms-state-legislature-texas-arizona-wyoming-kansas>. Those states are Alabama, Arizona, Kansas, Kentucky, Missouri, South Carolina, South Dakota, Texas, Virginia, Washington and Wyoming. *Id.*

²¹⁵ *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, ACLU, <https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country?redirect=lgbt-nondiscrimination-and-anti-lgbt-bills-across-country> (last visited Apr. 20, 2018).

anti-transgender legislation, public opinion supports allowing transgender Americans to choose which bathroom they want to use. A poll released on August 25, 2016, by the Public Religion Research Institute found that 53% of Americans opposed laws requiring transgender individuals to use bathrooms corresponding to their birth sex.²¹⁶ Republicans were split evenly (44% approved of said laws—44% disapproved—12% were undecided), while Independents and Democrats heavily disapproved (Independents: 37%—51%—12%; Democrats: 27%—64%—8%).²¹⁷

Finally, given the divisiveness of Congress under the Trump Administration,²¹⁸ it is doubtful that members of both sides will come together to enact US-GEA legislation. Even though President Trump had issued repeated statements that he supported LGBT rights,²¹⁹ he still revoked DoE's support of gender protection under Title IX. Further, he announced in July 2017 that he would end President Obama's policy allowing transgender Americans to serve openly in the U.S. military.²²⁰ However, given the public support for transgender rights, and opposition to the state-level bathroom bills, the fight for equal rights for transgender Americans is far from over. Time will tell.

D. THE GEA WOULD RESOLVE THE BATHROOM DEBATE IN THE UNITED STATES

A US-GEA would definitively resolve the conflict over which public bathroom transgender Americans may use. By prohibiting discrimination based on gender identity, transgender Americans would

²¹⁶ Betsy Cooper et al., *Majority of Americans Oppose Laws Requiring Transgender Individuals to Use Bathrooms Corresponding to Sex at Birth Rather than Gender Identity*, PUB. RELIGION RES. INST. (Aug. 25, 2016), <http://www.prii.org/research/poll-lgbt-transgender-bathroom-bill-presidential-election/>.

²¹⁷ *Id.*

²¹⁸ Tim Wallace & Alicia Parlapiano, *Crowd Scientists Say Women's March in Washington Had 3 Times as Many People as Trump's Inauguration*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/interactive/2017/01/22/us/politics/womens-march-trump-crowd-estimates.html> (stating that an estimated 470,000 people protested President Trump in the Women's March); *see, e.g.*, Andy Newman, *Highlights: Reaction to Trump's Travel Ban*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/nyregion/trump-travel-ban-protests-briefing.html> (discussing protests across the United States in response to President Trump's executive order banning certain people from entering the country).

²¹⁹ Eilperin & Somashekhar, *supra* note 187.

²²⁰ Jeremy Diamond, *Trump to Reinstate US Military Ban on Transgender People*, CNN (July 26, 2017, 9:23 PM), <http://www.cnn.com/2017/07/26/politics/trump-military-transgender/index.html>.

be free to choose the bathroom that best fits their own gender expression. The GEA creates a dynamic system to address unfair gender discrimination through its use of two committees. The GEPC promotes gender equality by advising the legislature and executive branches on policies that would discourage discrimination and encourage equal treatment. Meanwhile, the CCUGD acts as a quasi-judicial committee that can conduct fact-finding and ultimately reward remedies for any unfair gender discrimination. Such a system would work in the United States because it has many advisory boards that provide recommendations to policy makers as well as a quasi-judicial system of mediation and arbitration. The biggest hurdle in a US-GEA implementation would be political opposition. However, with growing support of transgender equality, public pressure could force the hand of legislators. Regardless of the political outcome, it is important to remember that transgender Americans are our family, friends, neighbors, and coworkers. As Gavin Grimm pleaded to the Gloucester School Board, "I am just a human. I am just a boy. Please consider my rights when you make your decision."²²¹

²²¹ Balingit, *supra* note 1.