

COMMENTS

Intersecting Intersectionalities and the Failure of the Law To Protect Transgender Women of Color in the United States

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I. INTRODUCTION

Many people in the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) community proudly tout the rapid advance of marriage equality across the United States during the past decade as a panacea affording the entire movement equality within United States society.¹ This is a false and dangerous simplification.² LGBTQ leaders are disproportionately gay, white, and cisgender.³ Many are men possessing

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1. Daniel Villareal, *LGBT Movement Warned Against Its Own Complacency*, ADVOCATE.COM (Jan. 25, 2013), <http://www.advocate.com/politics/2013/01/25/lgbt-movement-warned-against-its-own-complacency>.

2. *Id.*

3. Chong-suk Han, *They Don't Want to Cruise Your Type: Gay Men of Color and the Racial Politics of Exclusion*, 1 SOC. IDENTITIES 51, 51-52 (2007).

these same qualities, and the goals of many of these organizations reflect this demographic slant.⁴ There is a startling lack of representation of transgender people in many national LGBTQ organizations; people of color are underrepresented as well.⁵ The specific focus of this Comment is the idea that intersecting forms and origins of discrimination towards transgender women of color in the United States have created a situation where this vulnerable class of people face a heightened risk of discrimination and violence, while simultaneously being one of the least protected classes of individuals, and the least able to utilize the meager protections they have been afforded.⁶

Intersectionalities of various forms will form a large focus of this Comment. Intersectionality has become a very popular term in recent years, and has become a favored way for people to analyze the forms of prejudice, discrimination, and stratification that various groups face within society and other power structures.⁷ Legal scholars like Kimberlé Crenshaw have advanced the notion that looking at the marginalization of a particular class of individuals within society is accomplished more completely by using the concept of intersectionality.⁸

Using the critical lens intersectionality provides to look at complex problems faced by a marginalized group allows the writer to develop a more complete picture of the issues and challenges faced that are often compounded by each other while at the same time needing conflicting methods of resolution.⁹ This Comment is using the idea of intersectionality to look at the various problems faced by transgender women of color within society and the negative outcomes they face as a result. Part II will be a brief discussion of some of the intersecting identities that transgender women of color possess, namely their race, gender identity, gender, and transgender status. Part III will analyze the various origins of discrimination that transgender women of color face in the United States, and how these varying forms of discrimination

4. *Id.*

5. Jimmy Nguyen, *Op-ed: Our Groups Need More Color in Their Rainbow*, ADVOCATE.COM (Feb. 09, 2015), <http://www.advocate.com/politics/commentary/2012/02/09/oped-our-groups-need-more-color-their-rainbow>.

6. Gretchen Rachel Hammon, *Epidemic: Murders of Trans Women of Color Largely Ignored*, WINDY CITY TIMES (Feb. 18, 2015), <http://www.windycitymediagroup.com/lgbt/Epidemic-Murders-of-transwomen-of-color-largely-ignored/50509.html>.

7. Julia Roth, *Entangled Inequalities as Intersectionalities 2* (Research Network on Interdependent Inequalities in Latin Am., Working Paper No. 43, 2013), http://www.desigualdades.net/Resources/Working_Paper/43_WP_Roth_Online.pdf.

8. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244-45 (1991).

9. Roth, *supra* note 7, at 2.

intersect. This part will focus on the discrimination these women face from their families and communities, from government and the police force, and from society at large. Part IV will be a discussion of the various forms of discrimination that transgender women of color face by looking at discrimination based on race, gender identity, and class. Part V will seek to analyze how these various intersectionalities combine to give transgender women of color negative outcomes, specifically why they are so much more likely to be the victims of violence, as well as why these crimes are so often under-prosecuted in the United States criminal justice system. Finally, Part VI will look at some possible legal strategies to help transgender women of color and their advocates combat these forms of discrimination, and some much needed reforms that could help ease some of the discrimination these women face.

II. INTERSECTING IDENTITIES

Transgender women of color possess several intersecting identities as they live their lives in the United States.¹⁰ These include the fact that they are people of color, the fact that they are women, and the fact that they are transgender. Looking at the way these three identities intersect is a key in gaining a clearer understanding of what must be done to combat the varying discriminations each of them bring upon transgender women of color, and helping them attain equality in the United States.¹¹

The first identity discussed is race. Race is, and has always been, a very difficult subject in the United States.¹² People have been judged, categorized, and abused because of their race since before the United States existed.¹³ It is well documented that people of color, especially Black, Hispanic, and Native Americans, have disproportionately negative life outcomes when compared to their white compatriots.¹⁴ Statistics paint a revealing picture of the results of generations of pervasive systemic, structural, and social racism. Comparing the average

10. Natalie Reed, *Trans "People": Intersectionality And The Distribution of Risk*, FREE THOUGHT BLOG (Jun. 06, 2012), <http://freethoughtblogs.com/naliereed/2012/06/06/trans-people-intersectionality-and-the-distribution-of-risk/>.

11. *Id.*

12. Gary Younge, *The Truth About Race in America: It's Getting Worse, Not Better*, NATION (May 21, 2014), <http://www.thenation.com/article/179968/truth-about-race-america-its-getting-worse-not-better#>.

13. *Government: 1600-1775, Colonial Authority*, AM. ANTHROPOLOGICAL ASS'N, http://www.understandingrace.org/history/gov/colonial_authority.html (last visited Mar. 20, 2015).

14. *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RES. CTR. (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/>.

household net worth of American Black, Hispanic, Native American, and white populations shows a wide and persistent gap in the levels of wealth and savings held by each group.¹⁵ In fact, this gap between what whites earn as compared to Black, Hispanic, and Native American people has continued to increase in recent years; instead of making progress, the situation is getting worse.¹⁶ Similar disparities are seen across many social statistics including level of educational attainment, life expectancy, and incarceration rates.¹⁷

The negative aspects of these statistical facts are compounded by the more insidious, but no less damaging, impact that years of institutional and structural racism has played in creating and perpetuating negative stereotypes of people of color within the United States.¹⁸

The second core aspect of a transgender woman of color's identity is her womanhood. As with race, women have been discriminated against and oppressed by men for the vast majority of recorded history.¹⁹ This discrimination continues today.²⁰ Women still earn significantly less than their male counterparts, even though they have achieved equal educational attainment levels in recent years.²¹ Women have fought long and hard to achieve true equality in a system created and dominated by men.²² While this has come closer and closer to becoming a reality, women continue to face widespread discrimination and judgment from a society that is still male dominated.²³ Underreporting of domestic violence and sexual assault remains a huge issue, which is further exacerbated by a system that still seeks to place the burden of proof on

15. Mandi Woodruff, *The Income Gap Between Blacks and Whites Has Only Gotten Worse Since the 1960's*, BUS. INSIDER (Aug. 29, 2013), <http://www.businessinsider.com/the-income-gap-between-blacks-and-whites-2013-8>.

16. Rakesh Kochnar, et al., *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, FACTTANK (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

17. PEW RES. CTR., *supra* note 14.

18. Marcia McCormick, *The Equality Paradise: Paradoxes of the Law's Power to Advance Equality*, 13 TEX. WESLEYAN L. REV. 515, 538-39 (2007).

19. Gerda Lerner, *Placing Women in History: Definitions and Challenges*, 3 FEMINIST STUD. 5, 8 (1975).

20. Jessica Valenti, *For Women in America, Equality is Still an Illusion*, WASH. POST (Mar. 29, 2015), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/19/AR2010021902049.html>.

21. Sarah O'Brien, *78 Cents on the Dollar: The Facts About the Gender Wage Gap*, CNN MONEY (Apr. 13, 2015), <http://money.cnn.com/2015/04/13/news/economy/equal-pay-day-2015/>.

22. Sandy Levin, *The Fight for Women's Equality Continues*, HUFFINGTON POST (Sept. 17, 2013), http://www.huffingtonpost.com/rep-sander-/the-fight-for-womens-equality_b_3617838.html.

23. *Id.*

the woman, and that still objectifies and discredits her using outdated notions of proper femininity.²⁴

The last, most specific, most targeted, and least protected aspect of a transgender woman of color's identity is her being transgender. While transgender people have made strides in recent decades, they remain a very vulnerable segment of the population.²⁵ Many cisgender, heteronormative citizens of the United States have not met a transgender person. Extremely influential people, like Supreme Court Justice Ruth Bader Ginsberg, have admitted that it was getting to know gay and lesbian people on a personal level that normalized these minority groups to them.²⁶ It made them realize that gays and lesbians are just people who want to go about their lives like everyone else.²⁷ The same is true of transgender people, but because they remain foreign to many citizens of the United States, they are still frequently seen as oddities and objects of interest because of their transgender status, rather than as human beings deserving of love, respect, and protection under the laws of this country.²⁸ This is evidenced in myriad ways, from inappropriate questions received by transgender actress Laverne Cox during television interviews on major cable networks, to the persistent misgendering of the numerous transgender victims of murder and assault in news articles.²⁹ Studies continue to show that transgender people in the United States are significantly more likely to have negative life outcomes compared to their cisgender counterparts.³⁰ Additionally, transgender people are much more likely to suffer from depression and attempt or commit suicide; meanwhile, the medical establishment has only recently changed the

24. Tony Gonzalez, *Study: Sexual Assaults Greatly Underreported*, USA TODAY (Nov. 19, 2013), <http://www.usatoday.com/story/news/nation/2013/11/19/study-sexual-assaults-greatly-underreported-/3648197/>.

25. JAIME GRANT ET. AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, NAT'L. LGBTQ TASK FORCE (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

26. Paige Lavender, *Ruth Bader Ginsburg: Americans Wouldn't Need 'A Large Adjustment' To Welcome Legal Gay Marriage*, HUFFINGTON POST (Feb. 15, 2015), http://www.huffingtonpost.com/2015/02/12/ruth-bader-ginsburg-gay-marriage_n_6669000.html.

27. *Id.*

28. Karley Sciortino, *Ignorance or Insensitivity? Dealing with Transgender Culture*, VOGUE (Jan. 30, 2014), <http://www.vogue.com/872682/ignorance-or-insensitivity-dealing-with-transgender-culture-breathless-karley-sciortino-slutever/>.

29. *Id.*

30. Grant, *supra* note 25.

status of transgenderism so that it is no longer considered a mental illness.³¹

To properly understand the complex and vulnerable position of transgender women of color in the United States today, it is imperative to consider each of these three identities. To look at one or two and ignore the other would do a disservice to these women and the serious, systemic issues that they face on a daily basis. By looking at the various identities and the attendant origins and forms of discrimination transgender women of color encounter, a much clearer and more shocking picture emerges of the struggle transgender women of color face in trying to attain equality in the United States.

III. INTERSECTING ORIGINS OF DISCRIMINATION

Transgender women of color are a particularly vulnerable segment of the population of the United States because they face discrimination from various segments of society and government.³² This section of the Comment will attempt to highlight the three main origins of discrimination that transgender women of color face in society today, namely, in their family and home life, from the government at various levels, and from society at large. The last part of this section will look at some of the ways in which these differing origins of discrimination intersect.

A. *Family and Home Life*

The first area in which a transgender woman of color is likely to experience discrimination is often her home.³³ Many people are much less familiar with the ideas surrounding gender-nonconforming identities than they are with gay and lesbian issues.³⁴ This can make the process of coming out even more difficult for a transgender person than for someone who is gay or lesbian. Transgender youth face extremely high rates of domestic violence and expulsion from their homes because many communities continue to be unaccepting of transgender people.³⁵ While

31. Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity*, HUFFINGTON POST (Jun. 04, 2013), http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html.

32. Grant, *supra* note 25.

33. Grant, *supra* note 25, at 88.

34. Sharon Jayson, *What 'Transgender' Means, and How Society Views It*, USA TODAY (Sept. 05, 2013), <http://www.usatoday.com/story/news/nation/2013/08/22/transgender-primer-manning/2687869/>.

35. *Id.*

it can still be a hard and gradual process for a family to come to terms with the fact that their child is attracted to members of the same sex, it can be just as, if not more, difficult for parents and other relatives to come to terms with the fact that their child, parent, or spouse actually has a gender identity that does not match their assigned sex.³⁶ It is still common for people to be cut off from family and friends once they announce that they are transgender.³⁷ Insecurity about the ongoing stability of their home and community life as well as the likelihood that some, most, or all of their former relatives and connections will abandon a person in the process of coming out as transgender and transitioning leads transgender people to higher rates of depression and suicide than faced by their cisgender peers.³⁸ There may not be a readily apparent legal remedy to fixing these situations, but bolstering antidiscrimination measures and creating and passing legislation, at all levels of government, that provides more protections for transgender citizens, is a necessary starting point. Additionally, the creation and/or expansion of services geared towards transgender citizens specifically, should be another integral component of efforts to better help them. If communities are unable to accept and support their transgender citizens, it is incumbent upon the local, state, and federal authorities to create adequate social safety nets for this vulnerable segment of the population.

B. Government

This section has two subsections. The first aspect to be discussed are the various levels of government themselves. Local, state, and the federal government are all important origins of discrimination against transgender people. Transgender people, likewise, see discrimination from all branches of the government. There are elements of active and passive discrimination within government at all levels. The second aspect of government originated discrimination is from police forces. This will be discussed as a separate section from the three branches of government because of the large impact that police departments have on transgender people, the level of direct contact that police departments have with the public, and the interplay of the police forces between the various branches of government.³⁹

36. *Id.*

37. Grant, *supra* note 25, at 88.

38. Stephanie Budge et. al., *Anxiety and Depression in Transgender Individuals: The Roles of Transition Status, Loss, Social Support, and Coping*, 81 J. CONSULTING & CLINICAL PSYCHOL. 545 (2013).

39. Grant, *supra* note 25, at 158-59.

1. The Three Branches

There are three branches of government in the United States' system.⁴⁰ State and local governments mirror the federal government in this respect, as all have their powers divided among executive, legislative, and judicial branches.⁴¹ These three branches all discriminate against transgender people in various ways. It is important to note that, as both the executive and legislative branches are elected by the public, the lack of action by a given governmental body does not mean that the entire government, be it at the local, state, or federal level, is against alleviating discrimination against transgender people. There has, in fact, been considerable progress made in the Democratic Party towards acceptance of and support for measures ending transgender discrimination.⁴²

The legislative branch is the branch tasked with creating laws.⁴³ In the first-past-the-post electoral system of the United States, only two parties vie for power and regularly contest elections as serious contenders.⁴⁴ It has become clear in the past few election cycles and sessions of Congress that a majority of Democratic legislators now support expanding antidiscrimination legislation to include gender identity, at least with regard to employment discrimination, at the federal level.⁴⁵ This would greatly improve the legal protections of transgender citizens of the United States. This is mirrored in state and local governments across the country, where Democrat-led state legislatures and city councils have passed their own laws expanding protections to cover gender identity.⁴⁶ Republicans remain, or their elected officials at any rate, largely opposed to enacting the legislation necessary to expand antidiscrimination legislation in this way.⁴⁷

40. U.S. CONST. art. I-III.

41. *State & Local Government*, WHITE HOUSE, <https://www.whitehouse.gov/1600/state-and-local-government> (last visited Mar. 29, 2015).

42. See *LGBT Equality: Progress in the LGBT Community*, DNC SERVICES CORP., <http://www.democrats.org/page/lgbt-equality> (last visited Nov. 16, 2015).

43. U.S. CONST. art. I, § 8, cl. 18.

44. Eric Black, *Why the Same Two Parties Dominate Our Two-Party System*, MINNPOST (Oct. 8, 2012), <https://www.minnpost.com/eric-black-ink/2012/10/why-same-two-parties-dominate-our-two-party-system>.

45. Amanda Terkel, *ENDA Now Has The Support Of Every Single Senate Democrat*, HUFFINGTON POST (Oct. 20, 2013), http://www.huffingtonpost.com/2013/10/30/enda-democrats_n_4177748.html.

46. Mitchell Sellers, *Discrimination and the Transgender Population: A Description of Local Government Policies that Protect Gender Identity of Expression* (Applied Res. Projects, TEX. ST. U.-SAN MARCOS, Paper 360 2011), <http://ecommons.txstate.edu/arp/360>.

47. Mario Tama, *Conservatives seize on the 'T' in LGBT to block gay rights bill*, MSNBC (Nov. 05, 2013), <http://www.msnbc.com/msnbc/enda-transgender-rights-conservatives>.

The United States Constitution, and the various state constitutions that follow it extensively, gives a lot of power to the legislative branch.⁴⁸ If meaningful, long-term action enshrining antidiscrimination protections for transgender citizens of the United States is going to be taken, it must be done via the legislative branch. Momentum is swinging the debate over transgender rights increasingly in favor of acceptance and creating antidiscrimination protections for this segment of the population, but it cannot come fast enough. As has been seen before, passing a law does not mean it will be enforced successfully, completely, or correctly.⁴⁹

In addition, the longer the federal government remains inactive when it comes to transgender issues, the more discrepancies will be created in the patchwork of state laws between states that do and do not afford transgender citizens protections.⁵⁰ The fact that twenty-one states and the District of Columbia have passed laws prohibiting employment discrimination because of a person's gender identity is proof that things are moving in the right direction, but this means that twenty-nine states do not offer similar protections.⁵¹ While workplace and employment discrimination are crucial categories in which transgender people need rights, other areas like access to healthcare, housing, and public accommodations see significantly less widespread protection at the state level, and none at the federal level.⁵² The inclusion of gender identity as a ground for bringing hate crimes charges, when signed into law by President Obama, became the first federal level protection for transgender individuals passed by the federal government, but is still not a universal protection among state governments.⁵³ Creating protections for transgender people in all of these areas must be accomplished so they are able to live more secure lives on a day to day basis.

The executive branch is in charge of supervising and enforcing laws that have been enacted by the legislative branch.⁵⁴ The executive branch, be it the President of the United States, the fifty governors, or myriad heads of county and local governments, is a single figure elected by the public in a given constituency.⁵⁵ While not given direct power to enact

48. U.S. CONST. art. I.

49. *Civil Rights Act*, HISTORY.COM (2010), <http://www.history.com/topics/black-history/civil-rights-act>.

50. *Maps of State Laws & Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps (last visited Apr. 1, 2015).

51. *Id.*

52. *Id.*

53. *Obama Signs Hate Crimes Bill into Law*, CNN (Oct. 28, 2009), <http://www.cnn.com/2009/POLITICS/10/28/hate.crimes/>.

54. U.S. CONST. art. I.

55. *Id.*

legislation, the executive branch is tasked with directing the government and agencies under their control on how to implement various laws.⁵⁶ This is a crucial function, and gives an executive branch the opportunity to use existing laws to expand or contract protections for transgender people within the margins of the applicable statutes.⁵⁷ An excellent case in point is President Obama himself, who has directed various government agencies to change their existing practices to make life easier for transgender people on various levels.⁵⁸ Many state governors have adopted similar tactics to ensure at least some protections for transgender people living in their states.⁵⁹

While these are admirable steps to be sure, they have several shortfalls. First, these measures are limited to actions taken by executive branch agencies, or agencies under executive control, and are often limited in scope.⁶⁰ Many actions are only applicable to federal employees or state employees in which the president or a governor has taken executive action.⁶¹ Second, any executive action or policy changes are not permanent.⁶² Many are given time frames at the end of which they will expire unless renewed.⁶³ In addition, these actions can be taken by one executive head and reversed by a subsequent one.⁶⁴ While the same could be said of a law passed by Congress and enacted into law by the President or a governor, it takes much more to repeal or change a law than it does to revoke an executive order or direct a change in a specific agency's operations, which can be done quickly and without any review.⁶⁵ In short, while the executive branch can be a useful tool for advancing limited measures of equality and security towards transgender citizens of the United States on a temporary basis, it should not be counted on to provide the lasting changes that are required to achieve true equality

56. Robert Longley, *Presidential Executive Orders*, ABOUT.COM, <http://usgovinfo.about.com/od/the-president-and-cabinet/a/Presidential-Executive-Orders.htm> (last visited Apr. 2, 2015).

57. *Id.*

58. *Obama's Quiet Crusade for Transgender Rights*, BLAZE (Jun. 21, 2014), <http://www.theblaze.com/stories/2014/06/21/obamas-quiet-crusade-for-transgender-rights/>.

59. *Governor Deval Patrick Signs Executive Order Prohibiting Discrimination for Transgender State Employees*, MASS. TRANSGENDER POL. COALITION (Feb. 17, 2011), <http://www.masstpc.org/governor-deval-patrick-signs-executive-order-prohibiting-discrimination-for-transgender-state-employees/>.

60. Todd Garvey & Vivian Chu, *Executive Orders: Issuance, Modification, and Revocation*, CONGRESSIONAL RES. SERV. (Apr. 16, 2014), <https://www.fas.org/sgp/crs/misc/RS20846.pdf>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

because of the transitory and limited nature of its power in these areas. What one President or governor could do under their watch, another could just as easily undo; they could even go so far as to direct state agencies to act in ways that make life harder for transgender people in the same areas where a previous administration had sought to make things easier.

Another impact that the President, governors, and their executive counterparts at county and local levels of government have is that they often count as focal points for media interactions and with the public at large. This means that they can be an effective force towards changing public perceptions about transgender people and advocating for increased rights and protections for them.⁶⁶ This is a crucial element of soft power that the executive branch possesses because it has a single leader who is the head of the government.⁶⁷ President Obama doing something as simple as speaking about the need for transgender rights and protections in his last State of the Union address added volume and amplified the national dialogue on transgender rights in this country.⁶⁸ It was a historical first as no other President had ever mentioned the word transgender in a State of the Union address, and an excellent example of an executive head using his soft power to advance the conversation about an important topic, but it was still just a comment in a speech.⁶⁹ As with their direct abilities in influencing the actions of agencies under their control, a president or governor opposed to transgender rights could just as easily use this soft power and media presence to advocate for fewer rights for transgender citizens of the United States, or simply ignore the issue.

The judicial branch has seen a wide variety of opinions dealing with transgender rights from employment discrimination issues, to healthcare issues, and prisoners' rights.⁷⁰ The issues facing transgender people dealing with discrimination from the judiciary can be significant; however, the judiciary has been a significant platform for advancing the rights of transgender people in recent history. Decisions prohibiting employment discrimination against people because of their transgender identity, and against discriminatory bathroom policies for school

66. Katy Steinmetz, *Why It's a Big Deal That Obama Said 'Transgender,'* TIME (Jan. 21, 2015), <http://time.com/3676881/state-of-the-union-2015-barack-obama-transgender/>.

67. U.S. CONST. art. II.

68. Steinmetz, *supra* note 66.

69. *Id.*

70. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that the employer did not have a sufficiently important governmental interest to support termination of the employee based on gender nonconformity).

districts, have been part of an advancement of transgender rights through the legal system outside of the legislative and executive branches.⁷¹ In important ways, though, these supportive legal precedents are insufficient. Courts, because of the role they play in the United States government, can only address issues once they have happened.⁷² Additionally, because there are fifty different state court systems as well as the federal court system and specialty courts, there are different standards that have been adopted across the country.⁷³ Given the various ways in which transgender people are discriminated against, and the various claims that can arise from these forms of discrimination, the patchwork of court decisions can become very confusing.⁷⁴ Furthermore, the court systems in the United States, of all types and at all levels, are strained by heavy caseloads.⁷⁵ As a result, the process of initiating litigation, going through all parts of the trial, and seeing all possible appeals through to the end can take years.⁷⁶ These issues all make the various court systems in the United States vital vehicles for changes to the laws and to their enforcement, as well as the overturning of laws that create unacceptable discrimination. However, the judicial system itself is not well suited to create quick moving and systemic change because of the role it plays in the governmental system of the United States.

2. The Police

Police departments play a pivotal and multifaceted role in the United States.⁷⁷ They are charged with keeping peace, order, and security in their jurisdictions.⁷⁸ They also investigate crimes and provide evidence gathering and collection for the state against defendants in criminal trials.⁷⁹ Police forces are also given the power to arrest people suspected

71. *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

72. U.S. CONST. art. III.

73. Joe Palazzolo, *Conflicts Mount Between State and Federal Courts*, WALL STREET J. (Feb. 10, 2015), <http://www.wsj.com/articles/conflicts-mount-between-state-and-federal-courts-1423614120>.

74. *Sexual Orientation and Transgender Discrimination*, KATZ, MARSHALL & BANKS, LLP., http://www.kmblegal.com/legal_topics/discrimination/sexual-orientation-and-transgender-discrimination/ (last visited Apr. 4, 2015).

75. *Overloaded Courts, Not Enough Judges: The Impact on Real People*, PEOPLE FOR AM. WAY, http://www.pfaw.org/sites/default/files/lower_federal_courts.pdf (last visited Mar. 31, 2015).

76. *Id.*

77. *Principles of Good Policing: Avoiding Violence Between Police and Citizens*, U.S. DEPT. JUS., <http://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf> (last visited Mar. 31, 2015).

78. *Id.*

79. *Id.*

of crimes, and to use lethal force when necessary to protect themselves and members of the public, and to stop crimes.⁸⁰ Unfortunately, many minority groups feel uncomfortable going to seek help from the police in their area because they or members from their community have experienced discrimination, hostility, and violence from the very police department whose job it is to protect them as well as enforce the law.⁸¹ A large problem is that many police forces are untrained in dealing with, and even outright biased against, transgender suspects as well as with transgender members of the public who may come to them with problems.⁸² Police will also often assume that transgender people in certain areas are engaging in sex work, and will use dubious evidence of alleged crimes, or the intent to commit them, to arrest transgender people when the same set of circumstances would not have been likely to result in the arrest of a cisgender person.⁸³

It is important for police to develop connections within the communities that they police because of the dual role that they play as peacekeepers and criminal deterrents.⁸⁴ Police need to develop trust between themselves and their community so that they can be helpful resources and provide protection and support to all citizens.⁸⁵ Police have routinely failed to establish this trust with transgender communities.⁸⁶ Police violence towards and targeting of transgender people is a well-documented problem.⁸⁷ This is not actually based on explicit transgender discrimination within the law, but is rather a product of transphobia amongst the ranks of police departments.⁸⁸ Police officers do not understand transgender people, and are often unaware that the massive discrimination and ostracism many transgender people face lead them into committing crimes of survival like prostitution.⁸⁹ Police arrest

80. *Id.*

81. Rebecca Kaplan, *How do Police Improve Relations with Minority Communities*, CBS NEWS (Dec. 07, 2014), <http://www.cbsnews.com/news/are-police-doing-enough-to-improve-relations-with-minority-communities/>.

82. Michelangelo Signorile, *Escalating Police Violence and Transgender People*, HUFFINGTON POST (Dec. 06, 2011), http://www.huffingtonpost.com/michelangelo-signorile/escalating-police-violenc_b_1131343.html.

83. Grant, *supra* note 25, at 158.

84. *Principles of Good Policing: Avoiding Violence Between Police and Citizens*, *supra* note 77, at 31.

85. *Id.*

86. Grant, *supra* note 25, at 158-59.

87. Signorile, *supra* note 82.

88. Grant, *supra* note 25, at 160-62.

89. Jordan Flaherty, *Are Police Profiling Transgender Americans?*, AL JAZEERA AM. (Oct. 16, 2013), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/16/rise-in-transgenderharassmentviolencebypolicelinkedtoprofilng.html>.

transgender people for prostitution and other crimes and come to see them suspiciously regardless of what a specific transgender person is actually doing.⁹⁰ Transgender people then lose trust in the idea that the police will be there for them because they only see police officers as a threat and someone who may arrest them rather than as a positive force who can help them in times of need.⁹¹

It is imperative that police departments around the country do a better job of understanding the transgender people that live in their communities. This cycle can only be stopped through a concerted effort on the part of the police through training and education programs, and involvement with the transgender population in their communities.⁹² It is important to create good working relationships and familiarity between transgender communities and the police in their areas because transgender people are at a significantly higher risk of being victims of crime than other segments of the population.⁹³

C. *Society at Large*

Society itself still plays a large role in the discrimination that transgender people face on a daily basis. Society is pervasive and ever-present. Society's views are represented by the delegates elected to serve in government, and in the attitudes of politicians and individual police officers who are supposed to represent and protect transgender people. Unfortunately, modern society in the United States is still a place in which transgender people face widespread discrimination. This is due to several different reasons. Society in the United States is set up based on a gender and sex binary, which means that it has been designed to accept cisgender males and females.⁹⁴ Transgender people do not fit this mold, and as such are stuck outside the standard social structure.⁹⁵ This results in many people being unfamiliar with the fact that there are transgender people in general and what to do when one of their own friends or family members comes out as transgender.⁹⁶ What is more, society is still set up

90. *Id.*

91. Grant, *supra* note 25, at 162.

92. *Principles of Good Policing: Avoiding Violence Between Police and Citizens*, *supra* note 77, at 31.

93. *Id.*

94. Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 87 (2008).

95. Katherine King, *Outside the Binary*, KENYON COLLEGIAN (Nov. 06, 2014), <http://kenyoncollegian.com/2014/11/06/outside-the-binary/>.

96. Judith Whisler, *Transgender Story Did Belong on Front Page*, CINCINNATI.COM (Mar. 3, 2015), <http://www.cincinnati.com/story/opinion/letters/2015/03/03/letter-transgender-teen-identity-opinion/24306575/>.

based on this cisgender binary. Everything from public restrooms, to gym locker rooms, to military service, school, and government and legal systems are set up to recognize two genders that are assigned based on someone's birth sex by a physician at their birth.⁹⁷ People still make transphobic jokes on a regular basis, and acts of violence are committed against transgender people at a rate much higher in proportion to their cisgender counterparts.⁹⁸

Transgender women face discrimination from cisgender women when using gym locker rooms.⁹⁹ Transgender people have a very difficult time accessing public bathrooms safely, and many people make blatantly transphobic arguments when expressing their opposition to the idea of allowing transgender people to use bathrooms that match their expressed gender identity.¹⁰⁰ Advocates for state and federal bills prohibiting discrimination against transgender people have faced stiff opposition and uphill battles because they form such a small minority of the population.¹⁰¹

Transgender representations in society have become more commonplace, normalized, and positive with characters played by both trans and cisgender actors.¹⁰² This more public acknowledgment of the fact that transgender people exist, and the increasing visibility of transgender people, is what is needed to make them seem less alien to the rest of society.¹⁰³ People tend to be scared of what they do not know, and meeting a member of an alien group firsthand can be one of the primary ways to make people more comfortable with someone whose life they are unfamiliar with.¹⁰⁴ As transgender people make up such a small element of society, it is imperative that transgender advocates are given adequate platforms from which to advance their points of view to large audiences so that people become aware that transgender people exist in

97. *Understanding Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/quick-links/understanding-gender/> (last visited Mar. 31, 2015).

98. Meredith Talusan, *Being Transgender in a Transphobic Society Leads to Moments of Sheer Desperation*, GUARDIAN (Apr. 02, 2015), <http://www.theguardian.com/commentisfree/2015/apr/02/being-transgender-in-a-transphobic-society-leads-to-moments-of-sheer-desperation>.

99. Emanuella Grinberg, *Planet Fitness Revokes Woman's Membership After Transgender Complaint*, CNN (Mar. 09, 2015), <http://www.cnn.com/2015/03/07/living/feat-planet-fitness-transgender-member/>.

100. *Id.*

101. Tama, *supra* note 47.

102. Natalie Jarvey, *What's Behind the Rise of Transgender TV*, HOLLYWOOD REP. (Sep. 25, 2014), <http://www.hollywoodreporter.com/news/whats-behind-rise-transgender-tv-735016>.

103. *Id.*

104. Lavender, *supra* note 27.

society and are fundamentally the same as cisgender people.¹⁰⁵ They are human beings who want to be respected, to be left to their own devices, and to be given the chance to find their happiness.

Unfortunately, the widespread ignorance of transgender issues and antitransgender bias leads to negative coverage from news outlets when a transgender person is a victim of crime or even interviewed on a television show.¹⁰⁶ Repeated instances of articles on the murders of transgender women focusing on the fact that they are transgender, using their birth name and gender instead of their chosen name and preferred gender identity, and whether or not they engaged in any illicit activity rather than the fact that they were murdered show that society still views transgender people as curiosities instead of people whose rights and safety are being violated.¹⁰⁷ Likewise, as transgender people like Laverne Cox become famous and get interviewed on television programs, they are routinely subjected to wildly inappropriate lines of questioning about the status of their genitalia and other elements of transition.¹⁰⁸ While some have argued that explaining what goes on in someone's transition is helpful in making cisgender people understand everything that transgender people must go through in order to make their body match their gender identity, this is an inappropriate venue to do so.¹⁰⁹ It reinforces the fact that some elements of society see transgender people as oddities and focuses more on the fact that their bodies do not match their preferred gender identity rather than their humanity.¹¹⁰ Additionally, it creates this idea that every single transgender person has to get a certain number or type of surgeries, hormone replacement therapies, or other forms of treatment in order to properly be considered transgender.

IV. INTERSECTING FORMS OF DISCRIMINATION

In addition to intersecting identities and origins of discrimination, transgender women of color must deal with intersecting forms of discrimination that make life in the United States particularly difficult.

105. *International Transgender Day of Visibility: March 31, 2014*, HUFFINGTON POST (Mar. 31, 2014), http://www.huffingtonpost.com/2014/03/31/transgender-day-of-visibility_n_5063796.html.

106. Katy Steinmetz, *Laverne Cox Talks to TIME About the Transgender Movement*, TIME (May 29, 2014), <http://time.com/132769/transgender-orange-is-the-new-black-laverne-cox-interview/>.

107. Mitch Kellaway, *Ohio Murder May Mark Sixth Killing of a Trans Woman in U.S. This Year*, ADVOCATE.COM (Feb. 16, 2015), <http://www.advocate.com/politics/transgender/2015/02/16/ohio-murder-may-mark-sixth-killing-trans-woman-us-2015-0>.

108. Steinmetz, *supra* note 106.

109. *Id.*

110. *Id.*

Transgender women of color face discrimination based on each of their identities. They face racial discrimination, discrimination based on their gender, and discrimination based on their gender-identity. Each of these forms of discrimination has received some form of protection under the law, but each also carries certain preconceived notions and stigmas that make it harder to succeed in a society that is still dominated largely by straight, white, cisgender men.

Race has been an issue in the territories of the United States since before this nation was created.¹¹¹ Equality has been slow in coming, and is under constant attack by overt and insidious means.¹¹² The fact that there is still a large and growing gap in wealth between white and nonwhite people is just one of many disturbing factors that prove that race-based discrimination is still a serious threat to equality in this country. Other statistics showing that a Black or Hispanic person is more likely to be convicted than a white person, and more likely to receive a longer prison sentence if people of each race group who have committed the same crimes are compared shows, at least, an implicit bias in society against minority groups.¹¹³ While the Civil Rights Act of 1964, the Voting Rights Act, and other antidiscrimination measures were all important steps in trying to create true equality between the races, they did not go far enough, and recent Supreme Court decisions have gutted important provisions of the Voting Rights Act that were implemented to prevent the disenfranchisement of minority voters.¹¹⁴

There are also deeply entrenched racial stereotypes held by white society, which still have a stranglehold on the various power structures in this country, that persist in creating an atmosphere where minority groups are feared, distrusted, and hated for no other reason than their skin color and the negative stereotypes associated with it.¹¹⁵ This leads to de facto discrimination and segregation in employment, housing, and

111. *Government*, *supra* note 13.

112. *Id.*; Dana Liebelson, *The Supreme Court Guttled the Voting Rights Act. What Happened Next in These 8 States Will Not Shock You*, MOTHER JONES (Apr. 08, 2014) <http://www.motherjones.com/politics/2014/04/republican-voting-rights-supreme-court->

113. Joe Palazzolo, *Racial Gap in Men's Sentencing*, WALL STREET J. (Feb. 14, 2013), <http://www.wsj.com/articles/SB10001424127887324432004578304463789858002>.

114. Liebelson, *supra* note 112.

115. Laura Green, *Stereotypes: Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, 11 PERSPS. ON MULTICULTURALISM & CULTURAL DIVERSITY (1998-99), <http://www.ferris.edu/jimcrow/links/VCU.htm>.

education that is very difficult for even well-meaning legislatures to tackle successfully with new legislation.¹¹⁶

Women have also long faced discrimination, albeit based upon their gender. Women earned the right to vote country-wide less than a century ago.¹¹⁷ They are still, despite multiple bills having been passed to try and fix it, paid significantly less than their male counterparts.¹¹⁸ Women are the victims of sexual assault every day, and are still not taken seriously, or told that they need to do a better job of keeping themselves out of situations where they are likely to be assaulted by dressing more conservatively, or not being alone with men, or saying no and fighting back.¹¹⁹ It has taken decades for women to gain the rights and freedoms from men that they have, but it has not gone far enough. The Equal Rights Amendment should still be passed guaranteeing true equality for women before the law.¹²⁰ The United States has done a dreadful job of equalizing the playing field with no serious attempts to pass paid maternity/paternity leave, a consistent reduction in recent years of welfare programs to help single-parent households, which are very often lead by a single-mother, and consistent and ever more insidious attacks on abortion rights in this country.¹²¹ Transgender women, while not dealing with every issue in the same way, are still women in this country, and they still face discrimination on a daily basis because of their gender.

The transgender community faces rampant discrimination. They are discriminated against in virtually every major aspect of life. Education, housing, employment, and access to medical care are just a few of the many areas in which transgender people have reported facing a discriminatory environment, and many states as well as the federal government have few if any protections for them.¹²² Their small numbers and regular ostracism from power structures and larger communities have left transgender people particularly unable to advocate effectively on their behalf, and they have met stiff opposition from various elements of

116. Reniqua Allen, *Our 21st-Century Segregation: We're Still Divided By Race*, GUARDIAN (Apr. 03, 2013), <http://www.theguardian.com/commentisfree/2013/apr/03/21st-century-segregation-divided-race>.

117. *The Fight for Women's Suffrage*, HISTORY.COM, <http://www.history.com/topics/womens-history/the-fight-for-womens-suffrage> (last visited Apr. 02, 2015).

118. O'Brien, *supra* note 21.

119. Susan Thistlethwaite, *The Hunting Ground: Stop Victim Blaming and End Campus Rape*, HUFFINGTON POST (Mar. 26, 2015), http://www.huffingtonpost.com/rev-dr-susan-brooks-thistlethwaite/the-hunting-ground-stop-victim-blaming-and-end-campus-rape_b_6943488.html.

120. *Why We Need the Equal Rights Amendment*, EQUAL RTS. AMEND., <http://www.equalrightsamendment.org/why.htm> (last visited Apr. 03, 2015).

121. *Id.*

122. Grant, *supra* note 25, at 2-8.

society when trying to get antidiscrimination measures passed or enlarged to include them.¹²³

Transgender people are the victims of persistent, insidious stereotypes held by society at large just like racial minorities and women. People often raise ridiculous arguments when transgender people try to use bathrooms that match their preferred gender identity, equating them with pedophiles and rapists who they claim will dress up as women, pretend to be a transgender woman, and attack their victims.¹²⁴ Transgender people are still not allowed to serve in the military, even though the policy of “don’t ask, don’t tell” was lifted for lesbians and gays.¹²⁵

V. IMPACT, RESULTS, AND THE NEED FOR REFORMS

Transgender women of color make up a small portion of the population of the United States. The intersection of their identities with all of the various origins and forms of discrimination make life very difficult for many of these women. It has created an environment in which these women face massive amounts of discrimination, and often have very limited support outside of the transgender community, which is facing the same situation. The inability to find outside support networks, and the absence of robust protections for transgender people within the legal system, lead to a much higher risk of negative life outcomes for transgender people, and especially transgender women of color.¹²⁶ These women are often faced with continual job insecurity and uncertainty over their housing situation.¹²⁷ The lack of employment often leads transgender people into committing crimes of survival such as prostitution, theft, and fraud to make money for food and shelter.¹²⁸ These crimes lead to much higher arrest rates for transgender people than for the population at large, and prison is an awful place for them.¹²⁹ Transgender women, especially, are at risk of attacks from inmates and guards because they are often put in male prison facilities even though

123. Tama, *supra* note 47.

124. Grinberg, *supra* note 99.

125. Juliet Eilperin, *Transgender in the Military: A Pentagon in Transition Weighs Its Policy*, WASH. POST (Apr. 09, 2015), http://www.washingtonpost.com/politics/transgender-in-the-military-a-pentagon-in-transition-weighs-its-policy/2015/04/09/ee0ca39e-cf0d-11e4-8c54-ffb5ba6f2f69_story.html.

126. Grant, *supra* note 25, at 10.

127. *Id.* at 51, 106.

128. Victoria Law, *Anti-Transgender Violence: How Hate-Crime Laws Have Failed*, TRUTH-OUT (Sep. 18, 2011), <http://www.truth-out.org/news/item/3320:antitransgender-violence-how-hatecrime-laws-have-failed>.

129. Grant, *supra* note 25, at 163.

they present as female and that is their sincerely held gender identity.¹³⁰ Once they have been arrested the first time, these women become part of the cyclical system that is recidivism in the United States because now they must contend with the stigma of being a former convict as well as being a transgender woman of color.¹³¹ Police departments come to see transgender women of color as likely criminals, and many officers treat transgender women in openly transphobic ways, approaching them in an aggressive manner and assuming they have committed crimes rather than asking how they are doing and whether they need assistance.¹³² This breeds and perpetuates distrust between the transgender community and the police.

Transgender women of color face an epidemic of violence in this country. They are murdered at a terribly high rate given their numbers within the total population. While statistics are spotty because of reporting issues, which include police departments reporting the victims by birth name and gender rather than their chosen name and expressed gender identity, and failure to even report some of the crimes, there were at least twelve confirmed murders of transgender women in this country in 2015.¹³³

The law may not be enough to bring true equality in the eyes of society; that will take time, visibility, and a robust and honest dialogue. The law can however, and must, be changed to increase protections and support for transgender people within the existing social and power structures. There have already been signs from various state and federal courts that judges are more receptive to arguments based on suits arising under existing laws that transgender women should not be placed in all male prison facilities as it is a violation of the Prison Rape Elimination Act and the Eighth Amendment of the Constitution, and that it is discrimination to deny employment or fire an employee just because they are transgender.¹³⁴ This, however, will not be enough. Other courts have found that it is permissible to discriminate based on gender identity where the law does not explicitly prohibit it, and some jurisdictions do

130. Christopher Mathias, *New York's Largest Jail to Open Housing Unit for Transgender Women*, HUFFINGTON POST (Nov. 18, 2014), http://www.huffingtonpost.com/2014/11/18/rikers-transgender-women_n_6181552.html.

131. Stephanie Slifer, *Once a Criminal, Always a Criminal?*, CBS NEWS (Apr 23, 2014), <http://www.cbsnews.com/news/once-a-criminal-always-a-criminal/>.

132. Flaherty, *supra* note 89.

133. Katie Speller, *7 Transgender Women Have Been Murdered in 2015 and No One Is Talking About It*, HUFFINGTON POST (Feb. 24, 2015), http://www.huffingtonpost.com/2015/02/24/transgender-women-murdered_n_6746800.html; *Stop Trans Murders*, NATIONAL LGBTQ TASK FORCE, <http://www.thetaskforce.org/stop-trans-murders/> (last updated Mar. 1, 2016).

134. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

not believe that placing a transgender inmate in a prison facility matching their birth gender violates any laws or constitutional rights.¹³⁵ The judiciary can only deal with current legislation and the interpretation of it when a lawsuit is brought on a specific issue.

The legislatures and governors of various states have moved forward in creating more robust protections against discrimination based on gender identity in various areas of life.¹³⁶ This is, undoubtedly, a step in the right direction. It is also, however, woefully inadequate. Other states have done little to nothing to protect their transgender citizens, and some have specifically targeted individual cities who have passed gender identity antidiscrimination measures with statewide bills prohibiting inclusion of gender identity in antidiscrimination legislation, even when done voluntarily by a municipal government.¹³⁷

There are so many areas in which transgender people face discrimination and oppression within society, that the patchwork of laws giving protection in certain areas fluctuates widely from state to state.¹³⁸ It is not enough to count on the states to protect their transgender populations. Just like Black people in the Civil Rights Movement, women, and gays and lesbians in the fight for same-sex marriage movement, federal action must be taken to ensure more complete and robust protection of this vulnerable minority. Employment discrimination is one field, but so are housing, access to healthcare, and access to public accommodations.¹³⁹ It is imperative that the federal government does its duty to protect the transgender community from the unjust bias of an ignorant society who does not understand or refuses to validate their struggle.

In addition to national legislation generally prohibiting discrimination against the transgender community, the federal government must expand social welfare programs to more explicitly include transgender people. In areas where there is not as much direct government control, they should robustly use their ability to tie funding for other programs important to individual states to increasing state protections for transgender people. Hate crimes legislation must be expanded and more robustly enforced to deter people from committing acts of violence against members of the transgender community.

135. *D.B. v. Orange County*, No. 6:13-cv-434-Orl-31DAB, 2014 WL 4674136 (M.D. FL. 2014).

136. *Maps of State Laws & Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps (last visited Apr. 1, 2015).

137. *Id.*

138. *Id.*

139. *Id.*

VI. CONCLUSION

The gay and lesbian communities have largely won their fight for gay marriage; as they turn to new battles like the religious freedom legislation being passed in numerous states, they must keep in mind the more fundamental struggle for survival and visibility faced by the transgender community. We must use the platforms we have gained, and the access to power structures that we have taken, to give voice to the struggles of the transgender community. They do not need us to advocate for them; they need us to stand alongside them and champion their cause as loudly, consistently, and passionately as they have fought for ours. We are all part of the LGBTQ community, and we have all fought together to be allowed to live in peace amongst our heterosexual, cisgender compatriots.

The gay and lesbian communities, especially the white elements of each, must understand that we do not face the same intersectionalities of identity, discrimination, and oppression that our transgender and LGBTQ people of color do. We blend most easily into the white-dominated power structures of society in the United States. We must not allow our having been given a seat at the table and an acquiescence to some of our demands to dull our fighting spirit and divide us from fellow elements of our queer community that have not made equal progress. The fight for protections for transgender people is a fight for their lives, much like we all did as little as fifty years ago. We must remember that even as we gain greater acceptance, it was within a broader community that we found strength in numbers. As the murders of transgender women of color continue unabated, and are covered in insulting and transphobic ways, the gay and lesbian communities, as well as our straight allies, must turn our attention to the struggle of transgender people and fight for their equality and protection as they helped us fight for ours.