Gender Legislation and the Death of Consent

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Summary Submitted to Senate Committee

Consent is a crucial component of privacy that empowers individuals and affirms human dignity.
It is consent that permits us to receive and express intimacy.
It is consent that regulates our respect for the privacy of others.
It is consent that bestows on individuals, rather than society,
the power to draw the precise boundaries around their own privacy.

-Steven Wilborn[1]

There is nothing more pivotal in the matter of personal privacy than consent. This is true not only in private places like our own dwellings, but in public places as well: change rooms, locker rooms, shelters, public showers, and camp cabins. Sadly, but perhaps inevitably, these spaces have became a battleground as lawmakers and the general public wrestle over competing rights related to sex, gender, privacy, and security. While a significant majority of Canadians approve generally of rights and protections for transgender individuals, the application of these rights to shared segregated spaces typically marked “women” and “men” have met with significantly less public approval.

An Angus-Reid Poll in 2016 found that while 84 percent of Canadians approve of transgender rights generally, when faced with a bathroom question to which there were three possible answers: Gender-Identity Based, “It depends”, or “Biologic sex”, only 41% supported full transgender rights.[2] Given the enormous disparity between general rights support and gender-identity bathroom support, it is likely that support would decrease further on the question posed of open change rooms or showers.[3] This disparity prompts questions; what are the public concerns? Are they legitimate? What is the case law on this topic?

I believe there is good reason to believe that the public concern has to do with the right of consent in the matter of bodily privacy, and especially for females.[4] This is not a minor concern. Heidi Hurd has spoken eloquently about the “moral magic” of consent.[5] Consent, she says, is a “capacity that on a daily basis turns trespasses into dinner parties, brutal batteries into football games, rape into lovemaking, and the commercial appropriation of name and likeness into biography”.[6]

Why is it that a peeping tom looking into a neighbor’s bedroom window would be justly arrested for invasion of privacy, but when athletes shower together naked no one would ever think of laying charges? In the former example, the peeping tom may not

even get a good glimpse of the nakedness he hopes for, while in the latter the body is viewed completely. One is a criminal invasion, the other a mundane, if awkward occurrence. What is the legal distinction between the two? The answer is simple: consent.

When a person steps into a locker room, change room, shelter or camp cabin, they are consenting to a set of unwritten, but well-understood, guidelines. There is no contract, assent, or signature, but consent is given nonetheless, and it is given the moment the person enters through the door marked “Women” or “Men”. In so doing, they consent not only to remove their clothes, but some of their privacy rights–all in accordance with the meaning of the sign on the door.

Adam Moore, in *Privacy Rights*, states, “One of our most cherished rights, a right enshrined in law and notions of common morality, is the right of individuals to control access to bodies, places, and location. Violations of this basic right are seen as some of the most serious of injustices.”[7] In this submission I will make the case that gender-policy legislation like Bill C-16 constitutes just such a serious injustice as it removes from persons, particularly females, the right of consent concerning their bodily privacy in spaces like change rooms and showers. In surveying some key cases, I will argue firstly, that freedom from being viewed in a state of undress by the opposite sex is consistently seen as a more serious invasion of privacy than being so seen by a member of the same sex. Secondly, the effects and past experiences of a group’s invasion of privacy are significant in determining the extent of protections. Thirdly, power of consent is not determined by universal expectations, but reasonable ones. And lastly, that privacy rights are not connected ultimately to places, but to persons. Finally, I will deal with some anticipated rebuttals to the conclusions drawn.

Prisons, Police and the Pussy Palace

The intersection of the reduced rights of arrest and incarceration[8], along with the well-articulated policies of policing, lead to some fascinating and fruitful avenues for exploring the legalities of privacy.[9] In *Stanley v. Royal Canadian Mounted Police* (1987)[10], four female members of the Alberta R.C.M.P. alleged sex discrimination due to a lack of work at lock-ups where the policy was that prisoners “must be guarded by persons of the same sex.” Evidence presented to the Human Rights Tribunal took seventeen days, with many expert witnesses being called. Dr. Orchard’s testimony was representative of many opinions. He stated that for male prisoners, “Being viewed by a female guard rather than a male guard increases the vulnerability tremendously and the humiliation and the feeling of degradation. It is an enormous magnification of that effect.”

The tribunal agreed, ruling against the sex-discrimination complaint brought by the female officers;

> If the general interest in personal privacy is an important one to us, the specific

> interest in not being viewed while in states of undress and using the toilet by strangers of the opposite sex must be said to be of particular importance. At the core of this aspect of the interest in personal privacy is a concern about "the inherent dignity of the human person", respect for which Chief Justice Dickson says in R. v. Oakes (1986)… is a principle 'essential to a free and democratic society'. The "dignity and worth of the human person" is declared in the preamble to the Canadian Bill of Rights… to be one of the governing values of this country… What goes into the definition of 'the inherent dignity of the human person' may be a matter of dispute, and may vary somewhat from society to society and from one age to another, but no one can deny… that in this society at this time the definition would include the interest in not being viewed while in states of undress or using the toilet by strangers of the opposite sex. As it was put in York v. Story… in respect of the interest in not being viewed in states of undress by strangers of the opposite sex, 'We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity'.

The privacy rights of prisoners in the United States have not always fared as well, particularly male prisoners. "However," says Karoline Jackson,

> it is interesting to note that female inmates' claims of invasions of privacy appear to have been taken more seriously with somewhat favorable results. In *Forts v. Ward*, 'female prisoners filed suit protesting the placement of male officers in housing areas where the female prisoners could be viewed while partially or completely undressed. The female inmates claimed that this placement deprived them of their constitutionally guaranteed right to privacy. In contrast to the arguments challenging the existence of male inmates' privacy rights, the state in this situation did not even dispute that the female inmates retained a constitutional right to privacy while incarcerated. Similarly, in *Rushing v. Wayne County*, the female inmate's right to privacy was not even contested by the state. In *Lee v. Downs* the court upheld a jury verdict for a female inmate who had been forced to disrobe in the presence of male guards. In *Torres v. Wisconsin Department of Health & Social Services*, the Seventh Circuit concluded that a state could exclude male guards from its female prisons in order to promote the female prisoners' rehabilitation without violating the guards' right to equal employment opportunities. The tone of these judicial decisions indicates that when a female inmate is the complaining party, her complaint will be seriously considered.[11]

Jennifer Weiser adds further detail on *Torres v. Wisconsin*, stating "The Seventh Circuit held that the trial court had applied too strict a requirement of empirical evidence, acknowledging that it is socially accepted wisdom that 'the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of stress to females'". This was a clear acknowledgment of the defendants' claim that

“the assignment of male guards to the women’s unit would undermine the prisoners’ rehabilitation because the women had suffered physical and/or sexual abuse at the hands of men.”[12]

This last point is an important one which resurfaces many times in the case law, suggesting that privacy laws do not merely take into account the written statute or even an absolute gender equality, but also the *effects* a potential loss of privacy would have on the group. This is clearly seen in *R. v. Hornick*,[13] a case of some notoriety in Canada. The Pussy Palace was a highly sexualized lesbian event “organized by women for women only” where 60 to 70 percent of the 355 women were topless when male police officers entered to make arrests under the Liquor License.

Judge Hryn was scathing in his indictment of the police; “As organizers and hosts, the Applicants’ personal reasonable expectation of privacy was not limited to their personal state of dress or undress but extended to their reasonable expectation of privacy with respect to the event as a whole, which event by definition would have nude or partially nude women present exploring their sexuality with the expectation that men were excluded”, and “The patrons that disrobed did so voluntarily but their intent was to be disrobed before women and not men.”

In his decision Hryn also cites *R. v. Golden*[14],

> The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can effect detainees: “humiliating,” “degrading,” “demeaning,” “upsetting,” and “devastating” … Some commentators have gone as far as to describe strip searches as “visual rape”… Women and minorites in particular may have a real fear of strip searches and may experience such a search as an equivalent to a sexual assault.

A fascinating aspect of the Pussy Palace case is that according to Kyle Kirkup (“Indocile Bodies”)[15] there were both MtF and FtM trans individuals at the event. Although it may be that these were so few in number that the judge overlooked their presence as inconsequential to the broader sex segregation concern (certainly a possibility given some of his statements), their presence strengthens the argument that in the intersection of sex/gender and consent, it is actually consent that is given priority. It was, preeminently, the “expectation” and their “intent” which led Judge Rhyn to dismiss the charges.

Gym Jurisprudence and Locker Room Logic

Another area where the gender wars have played out is in the matter of women’s only gyms. In *Stopps v. Just Ladies Fitness*,[16] a Human Rights Case, the Tribunal dismissed a male’s complaint of sexual discrimination when he was not permitted to join Just Ladies Fitness in Burnaby, BC. The Tribunal cited the findings of a survey

taken of the female gym patrons, which "said that they felt uncomfortable going to a co-ed gym because they felt ogled, harassed, intimidated and stared at by the men." The tribunal stated, "Meeting the legitimate and demonstrated needs of an important sector of the community that has in the past suffered from a lack of equality and that still has legitimate needs with regard to safety and protection from intrusion or unnecessary exposure would in the Tribunal's opinion serve an overriding public interest."

The Tribunal's ruling borrowed heavily from a similar U.S. case, *LivingWell v. Human Relations Com'n*[17], notable for the Commonwealth Court's overruling of the prior Commission decision that did not permit women's gyms from excluding males. Summarizing, the Tribunal states about LivingWell,

The Commission argued that these women had no reasonable basis to feel embarrassed because society, as a whole, does not find it objectionable to exercise with the opposite sex. In answering this, the Court said:

> … Privacy interests are not determined by the lowest common denominator of modesty that society considers appropriate. What is determinative is whether a reasonable person would find that person's claimed privacy interest legitimate and sincere, even though not commonly held. Nothing in the record supports, nor does the Commission seriously challenge that these women do not sincerely hold these beliefs or that a reasonable person would not find these beliefs legitimate.

This is highly significant, as both American and Canadian courts have recognized legitimate sex-segregation boundaries of bodily privacy, even when fully clothed, and even when many men and women wouldn't share the same need for this level of privacy. "Privacy interests are not determined by the lowest common denominator of modesty that society considers appropriate." Citing Livingswell directly,

Just because "intimate areas" of these women's bodies are not exposed does not mean that they do not have a privacy interest worthy of recognition. The uncontroverted evidence is that if men were admitted, these women would suffer from extreme embarrassment, anxiety or stress and would not continue to exercise at LivingWell. The standard for recognizing a privacy interest as it relates to one's body is not limited to protecting one where there is an exposure of an "intimate area," but such a right may also be recognized where one has a reasonable basis to be protected against embarrassment or suffer a loss of dignity because of the activity taking place.

In 2011, a sex-discrimination case (*Demars v. Bramption Youth Hockey*)[18] was brought before the Human Rights Tribunal of Ontario concerning two sisters that were playing on teams with all boys in a youth hockey league. Most of the complaints were precipitated by the locker room policy which stated that once 12 years of age, boys and girls would no longer be able to change together but should either use separate facilities or change in shifts. The tribunal agreed with the girls and awarded

compensation as comparable changing facilities were not secured, the girls were often unable to fully participate in the team activities in the dressing room, and shifts in the dressing room were not adhered to.

The policy solution offered by the girls and their mother throughout years of discussion with the league was "boys wear no less than boxers, girls wear no less than T-shirt and shorts" in the locker rooms. But though the tribunal upheld the human rights complaint, it stated with clarity that it did not find the league's policy discriminatory:

Mr. McCurdie testified that the judgment was made that at age 12 the risks of mixed genders changing together were higher. Mr. McKee testified that the Policy wording: "seeks to balance rights and feelings", refers to how the players would feel about changing with the opposite gender in the same room. I am satisfied that the general purpose of the Policy was to ensure that all players' rights and feelings for modesty and privacy are respected when changing clothes in a safe and respectful environment.

While the case doesn't go into detail about bodily privacy rights, it is notable that in light of recognized sex discrimination, the Tribunal did not seek to establish the suggested boxers and t-shirts rule and defended the original policy. Together with *Stopps v. Just Ladies,* and *Livingwell v. Human Relations*, these cases demonstrate a considerable defense of bodily privacy rights against other rights, even when intimate areas would not be exposed.

Lines Were Crossed on the Green Line

The evolution of technology has often left legislators playing catch-up with criminals in the area of privacy. While much attention has rightly been paid to privacy of information concerns, bodily privacy is another area under attack. Smartphones and miniature cameras have made voyeurism both easier and more serious. Jeffrey Marvin ("Without a Bright-line on the Green Line") states that

> on August 12, 2010, Michael Robertson, a passenger on the MBTA Green Line in Boston, used his cell phone camera to record a woman's crotch area for approximately one minute. The woman, like the other women targeted by Robertson's surreptitiously aimed cell phone camera, suffered from an unwanted privacy invasion. Unlike his previous victims, however, the woman in this instance was an undercover transit police officer acting as a decoy to catch Robertson in the act. Transit police officers arrested Robertson in a sting operation arising from passenger complaints filed the day before alleging Robertson took upskirt photographs of two unsuspecting women on the Green Line.[19]

However, a successful police operation was to be derailed by the courts, when the Massachusetts Supreme Judicial Court dismissed the case, agreeing with the defense

that on account of the female passenger being neither partially nude nor in a place with a reasonable expectation of privacy, there was no crime under the existing law–§ 105(b). There was immediate outrage at the dismissal. “Senator Therese Murray, the state senate’s highest-ranking member, called the decision a step backward for women’s rights, explaining she was ‘in disbelief that the courts would come to this kind of decision and outraged at what it means for women’s privacy and public safety.'”[20]

Thankfully, “the State Legislature acted the following day, passing ‘an emergency act amending § 105(b) to strengthen “laws relative to the expectation of privacy of one’s person.'”[21] In his excellent review, Marvin suggests many failings of the Supreme Judicial Court in its decision, one that was neither necessary nor warranted. Among them was the failure to consider that privacy rights are never attached to a place, but to a person, according to their consent. He gives the example of a yearly “No Pants Subway Ride” on the very same line in which “participants begin their public transit ride fully clothed and ‘then drop their pants as unsuspecting passengers look on’.”[22] Marvin remarks that due to consent being tacitly given, these bottom-less persons would have no legitimate privacy right if someone were to photograph them. In contrast, the upskirt victim, by virtue of wearing a skirt that covered her crotch area, was clearly not consenting to being photographed. Marvin concludes,

Although most jurisdictions have “Peeping Tom” or voyeurism laws, these laws often fail to recognize outright that a person’s expectation of privacy resides at the core of such prohibition, even when he or she is in a public space. When it come to protecting personal privacy rights from a voyeur’s sordid intrusion, enabling the expectation of privacy to remain attached the victim’s person–not their physical location–is a critical approach that states must embrace.[23]

This principle alerts us to the fact that sex segregation is not imposed in separate change rooms or showers simply because one is a women’s room and the other a men’s room. Rather, it is that the individuals within the one room have consented to different things about their bodily privacy than individuals in the other. The privacy right remains attached to the individuals and their consent, not to the spaces themselves.

Stripped Rights

While there are other cases that may prove helpful[24], the examples provided sufficiently establish that courts have ruled with considerable consistency on the matter of bodily privacy and consent. We may enumerate four principles of this consent: Sex differential, Effect, Reasonableness, and Person-Centric.

Sex Differential: The law has always treated sex as a significant differential aspect of privacy. If one has consented to bear oneself to females, it is an invasion to be viewed by males (*Hornick*). Even in situations where privacy rights are severely curtailed,

females prisoners often have the right to not be viewed by males or vice-versa.

Effects: One of the reasons that courts have not always upheld equality in the matter of sex discrimination is because of the variable effects that loss of privacy has on different groups. Females may be particularly susceptible to the detrimental effects of bodily privacy invasion due to past experiences of harassment or sexual assault.

Reasonableness: LivingWell established that for a privacy right to be protected it does not have to be a universal desire or expectation, only a reasonable one. Consent and bodily privacy are serious enough matters that they ought never to be reduced to a "lowest common denominator" approach.

Person-centric: Finally, Marvin reminds us in his review of *Robertson* that even in public places there is a reasonable right of privacy which cannot be divorced from one's body and person. It is not the place which is protected, it is the person(s) within the place.

Given these principles of sex differential, effects, reasonableness and person-centrism, it seems beyond dispute that the law upholds the right of the consent of persons, and especially women, in the matter of bodily privacy in spaces such as change rooms, locker rooms, shelters, public showers, and camp cabins.

More specifically, when a woman enters a change room labeled "women" it is with the expectation that what she will encounter behind those doors is female anatomy. By pushing through that door with that particular sign, she is signaling her consent to be willing to be exposed to breasts and vaginas, among other aspects of the female form. She further consents to baring her body to the eyes of other women, although in this matter she contains a greater amount of control. But until recently, there has been no question that her consent does *not* extend to be willing to be exposed to penises and other aspects of the male form, or to be viewed in a state of undress by males.

How do gender policies then, like Bill C-16, interact with a woman's consent? Effectively, they strip her altogether, leaving her naked, without rights or power under the law to protect her personal dignity. The sign to the woman's locker room may still say the same thing, but it no longer has an objective referent. On account of the loss of referent, it no longer communicates anything to her. Because it cannot communicate, she is incapable of consenting.

Except for the *likelihood* of meeting a male body there is no longer any viable distinction between the women's and men's spaces, thus there is no longer any viable consent or privacy right. As such, gender identity bills which allow for no objective criteria for entry into segregated spaces, constitute possibly the greatest attack on privacy rights ever known in our society. "If the general interest in personal privacy is an important one to us, the specific interest in not being viewed while in states of undress… by strangers of the opposite sex must be said to be of particular

importance." *(Stanley v. RCMP)*

Erecting a Glass Wall

I will anticipate a rebuttal by suggesting that many supporters of gender policies may tentatively agree with our conclusions up until these last paragraphs. However, they may reply that the law has also treated transsexuals and transgender individuals as their target gender for some time under the human rights category of "sex", and in some regions more recently under "gender". Thus, all the points which apply to women may be taken as true and would apply also to transwomen. And especially if there are greater privacy rights afforded to women on account of their vulnerability and victimization in society by males, how much more for transwomen, who suffer even greater stress and victimization?[25]

While it is beyond the limited scope of this submission to engage with the truth claim "transwomen are women", I do want to point out some insuperable difficulties the above view has in relation to a wide-ranging policy on privacy.

Firstly, it is hard to fathom under this view why sex or gender segregation would be of "particular importance" (*Stanley*). My personal experience in conversation with many gender policy advocates, including the Senate of Canada Government Liason, is that sex or gender segregation is *not* important. The Honorable Senator expressed that as a society we may be moving towards non-segregated spaces where being unclothed together will no longer be problematic or undesirable, with protection concerns being solved by simple emergency measures.[26] While I have never heard a gender-policy advocate articulate a strong preference for sex or gender segregation on the basis of privacy, it may be that some have. But on what potential grounds, we would further inquire? If there is no objective criteria for "men" or "women", it becomes difficult to come up with criteria for protecting the privacy of one *against* the other.

To venture a little further down this cul-de-sac, we anticipate the standard reply that gender is based on one's self-identification. But for whatever value self-identification may have in other matters relating to gender rights, it has none relative to bodily privacy rights. Bodily privacy is related de facto to the body. It reaches absurdity to imagine needing a locker room to safely undress one's brain, ego, or personality.

Secondly, privacy concerns take into account and legitimize the effects of privacy loss. Expert witness in *Stanley v. RCMP* stated "'being viewed by a female guard rather than a male guard' increases the vulnerability tremendously and the humiliation and the feeling of degradation. It is an enormous magnification of that *effect*.'" (emphasis mine) Again, *R. v. Golden* states that privacy loss can be "humiliating," "degrading," "demeaning," "upsetting,"…"devastating" or even be experienced as "visual rape".

Gender policy proponents are happy to claim these effects on behalf of transwomen should they have to use a male space. These effects are legitimized. But if a female

should claim these effects if bio-male transwomen were in their space, the effects are seen as illegitimate. As soon as one says that another's concerns based on effects are illegitimate, the efficacy of consent is severely diminished. For these and perhaps other reasons, one rarely hears a strong emphasis on consent when it comes to the application of gender-identity legislation to women's spaces.

Wide, But Not Unwieldy Consent

This leads us to one last anticipated rebuttal: in order to establish the right of consent with regard to bodily privacy for women who are uncomfortable with male genitalia in their space, we have removed consent from transwomen who may have similar concerns. The principle, some may say, is thus unequally applied and despite the legal evidence the argument fails.

On the contrary, however, we uphold as much as possible the consent of all, including trans individuals. However, a careful reading of the cases and rulings does not establish consent as an all-pervasive power. It functions as the strongest personal aspect of bodily privacy law as it operates in a particular context in relation to *other rights*. In prison cases, male prisoners have been accorded sometimes more, sometimes less privacy as courts weighed other concerns and rights: the employment rights of guards, the need for prison safety, etc. In *Demars vs Brampton Hockey*, the girls consented to be in the some change room as the boys, and this would have had considerable team benefits, but the judge upheld the existing policy while ruling in their favor. Any boys who were not comfortable changing with the girls were not forced. These situations are not, of course, perfectly analogous. However, they do illustrate that personal rights rarely occur in a vacuum and that there are practical exigencies to consider.

If the only consideration was consent in the matter of bodily privacy, the policy everywhere would be banks of individual, fully enclosed, and locked unisex spaces. Each pool and sports facility would have thirty single-user change rooms with showers. Every shelter would have individual rooms, like a hotel. The idea is not undesirable; it is impractical.

There are some people, particularly the sexually abused, who will find it emotionally stressful to undress with anyone, regardless of sex or gender. The physically disabled or disfigured may face similar effects. Younger people, who have yet to progress through pubertal changes, may experience stress or embarrassment changing with older members of the same sex. Some people may feel uncomfortable if they knew that they were unclothed with members of the same sex who were same-sex attracted. The consent of these individuals is not invalid, but segregation in these spaces is required on the basis of practicality as well as privacy.

Here we apply the principle of personhood. The sex segregation of locker rooms and showers are not ultimately attached to the rooms themselves. Sex segregation is

simply the most useful category in protecting individual consent. Any individual with a legitimate reason ought to be allowed to use a separate enclosed space if it is at all possible. We uphold their right of consent as much as possible. In the same way we uphold the right of consent for trans individuals as well.

But as rights do not occur in a vacuum, they must be weighed against other concerns–usually other's rights. Transwomen represent 0.3% or perhaps 0.4% of the population.[27] Even if we imagine that only one-third[28] of females would feel significant discomfort with biological males in their segregated spaces, that is still 17% of the population, some 42 times larger than the transwoman population. If we agree that consent in bodily privacy is important, it stands to reason we should be against policies that remove the right of consent from a much larger group in order to grant consent to a much smaller group.[29]

Fortunately, there is a solution which upholds the consent of both groups. Policies dealing with privacy-related segregation should work towards ensuring that facilities have third spaces which are fully enclosed, lockable, and unisex. In many cases these are already present in the form of disabled or family spaces. Governments may need to pressure facilities to provide more if trans individuals (those who have not yet had full sex-reassignment surgery) should require them. If consent-privacy truly is a concern for gender policy advocates, this solution should be embraced by both groups. Anything else spells the death of consent, and with it, the death of privacy.[30]

Privacy interests are not determined by the lowest common denominator of modesty that society considers appropriate. What is determinative is whether a reasonable person would find that person's claimed privacy interest legitimate and sincere, even though not commonly held. Nothing in the record supports, nor does the Commission seriously challenge that these women do not sincerely hold these beliefs or that a reasonable person would not find these beliefs legitimate

– LivingWell v. Human Relations

[1] "Consenting Employees", *Louisiana Law Review* 66, no. 4 (2006): 975-976

[2] http://angusreid.org/transgender-issues/#appendix

[3] Notably, no public poll of which I am aware has ever asked the question, "do you support the right of an individual to use an open change-room or shower of their chosen gender identity?"

[4] Another concern, possibly related, may be harm prevention.

[5] "The Moral Magic of Consent", *Legal Theory*, 2 (1996): 121-146

[6] Heidi M. Hurd, *"Was the Frog Prince Sexually Molested?: A Review of Peter*

Westen's The Logic of Consent", Michigan Law Review 103, (2005): 1329

[7] Moore, Adam D. *Privacy rights: moral and legal foundations* (University Park, PA: Pennsylvania State Univ, 2011), 57.

[8] Clearly, rights are much more severely reduced under incarceration compared to arrest. But under arrest police have the right to strip search individuals in certain situations.

[9] I will not attempt here to review the literature on trans individuals and their placement in the prison system. According to Benish Shah ("Lost in the Gender Maze", *Journal of Race, Gender and Ethinicity* 5, Issue 1, Feb 2010) some courts have upheld placement on the basis of biological sex (*Kantaras v. Kantaras*, Florida; *Littleton v. Prague*, Texas). Tewksbury and Potter, "Transgender Prisoners– A Forgotten Group" in *Managing Special Populations in Jails and Prisons*, ed. Sam Stojkavic,(Kingston, NJ: Civic research Institute, 2005) make mention of some prisons which have separate sections for gay and transgender prisons.

[10] Stanley v. Royal Canadian Mounted Police, 1987 CanLII 98 (CHRT), <http://canlii.ca/t/1g8mq>

[11] Jackson, Karoline E. "The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review," *Indiana Law Journal*: Vol. 73 : Iss. 3 , Article 5 (1998)

[12] Weiser, Jennifer "The Fourth Amendment Right of Female Inmates to Be Free from Cross-Gender Pat-Frisks," *Seton Hall Law Review*: Vol. 33 : Iss. 1 , Article 2. (2003)

Martin Geer ("Protection of Female Prisoners: Dissolving Standards of Decency" *Scholarly Works* (2002) 385.) agrees, stating that "recent judicial tendencies show more concern with the privacy rights of female inmates than with male inmates regarding the observation and touching of intimate body parts."

[13] R. v. Hornick 2002 Carswell Ont 992, 53 W.C.B. (2d) 275, 93 C.R.R. (2d) 261

[14] R. v. Golden, [2001] 3 SCR 679, 2001 SCC 83 (CanLII). I am quoting from the Hornick case as it strips out many citations and parentheses within the original quote in Golden.

[15] "Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law." *Canadian Journal of Law and Society*, vol. 24 no. 1, (2009), 107-125. *Project MUSE*, muse.jhu.edu/article/267560.

[16] Stopps v. Just Ladies Fitness (Metrotown) and D. (No. 3), 2006 BCHRT 557 (CanLII), <http://canlii.ca/t/h06xb>

[17] LivingWell v. HUMAN RELATIONS COM'N, 147 Pa. Commonwealth Ct. 116 (1992) 606 A.2d 1287

[18] Demars v. Brampton Youth Hockey Association, 2011 HRTO 2032 (CanLII), <http://canlii.ca/t/fnrcp>

[19] "Without a Bright-line on the Green Line", *New England Law Review* 50, 119 (2015).

[20] Ibid., 130

[21] Ibid., 130-131

[22] Ibid., 141

[23] Ibid., 142

[24] McKale v. Lamont Auxiliary Hospital 1987, C.H.R.R. D/4038.

[25] I grant that this is true and tragic, however there has been significant abuse of statistics among some gender-policy advocates. The most comprehensive survey done to date is of 27,715 respondents in the 2015 US Trans Survey, which found that 1% of the sample "was physically attacked in a restroom in the last year" (p226). One of the most frequently cited studies on trans victimization in bathrooms is Herman (*"Gendered Restrooms", 2013*) in which being stared at is included under the category "verbally threatened" and being physically removed from a restroom is included under the category "assaulted". Between 2 and 4% of the trans individuals in this study had been what most would categorize as "assaulted".

[26] Personal conversation with Senator Mitchell, Feb 15/2017.

[27] This is based on Flores, WIlliams Institute (2016) which found that all trans individuals were 0.6% of the U.S. population. Given that historically MtF constitute a larger group than FtM, we have allowed for more than half of the total trans group to be MtF.

[28] Not only is this a safely defensible number, it is likely considerably low. I base this opinion on the Angus-Reid findings mentioned in the opening of the article, in which general trans rights support plummeted from 84% to 41% when considering bathrooms. Surely change rooms, with open nudity, would plunge further. It is my anecdotal experience that support for trans people using bathrooms of their choice is significantly higher than for them to use the change room of their choice. If I were truly making an informed guess, I would say that 70% of women would not be comfortable with a biological male who identified as a woman in their change room or shower.

[29] Not to mention that these two competing rights do not have the same value *in relation to privacy*. Privacy is a defensive right; it inherently concerns one's self. One does not have a privacy right to change with another person.

[30] To deal substantively with gender policy issues outside of privacy is far beyond the scope of this article. However, it is important to note that Moore (*Privacy Rights*, 128) states that consent is the highest possible factor in privacy, trumping even public interest: "*Consent trumps everything*".