

## Summary of Gender Legislation and the Death of Consent<sup>1</sup>

*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<sup>2</sup>

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 become 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> This is not a minor concern. Heidi Hurd has spoken eloquently about the "moral magic" of consent.<sup>6</sup> 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".<sup>7</sup>

---

<sup>1</sup> The full 12 page submission surveying a variety of Canadian cases is available at [www.womanmeanssomething.com/deathofconsent](http://www.womanmeanssomething.com/deathofconsent)

<sup>2</sup> "Consenting Employees", *Louisiana Law Review* 66, no. 4 (2006): 975-976

<sup>3</sup> <http://angusreid.org/transgender-issues/#appendix>

<sup>4</sup> 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?"

<sup>5</sup> Another concern, possibly related, may be harm prevention.

<sup>6</sup> "The Moral Magic of Consent", *Legal Theory*, 2 (1996): 121-146

<sup>7</sup> 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

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."<sup>8</sup> 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.

### **Stripped Rights**

A survey of privacy-related cases in Canada (*Stanley v. RCMP*<sup>9</sup>, *R. v. Golden*<sup>10</sup>, *Stopp v. Just Ladies Fitness*<sup>11</sup>, and *R. v. Hornick*<sup>12</sup>) 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.

---

<sup>8</sup> Moore, Adam D. *Privacy rights: moral and legal foundations* (University Park, PA: Pennsylvania State Univ, 2011), 57.

<sup>9</sup> *Stanley v. Royal Canadian Mounted Police*, 1987 CanLII 98 (CHRT), <<http://canlii.ca/t/1g8mq>>

<sup>10</sup> *R. v. Golden*, [2001] 3 SCR 679, 2001 SCC 83 (CanLII).

<sup>11</sup> *Stopp v. Just Ladies Fitness (Metrotown) and D. (No. 3)*, 2006 BCHRT 557 (CanLII), <<http://canlii.ca/t/h06xb>>

<sup>12</sup> *R. v. Hornick* 2002 Carswell Ont 992, 53 W.C.B. (2d) 275, 93 C.R.R. (2d) 261

*Reasonableness:* Stopps citation of *LivingWell*<sup>13</sup> 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*<sup>14</sup> 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*)

---

<sup>13</sup> *LivingWell v. HUMAN RELATIONS COM'N*, 147 Pa. Commonwealth Ct. 116 (1992) 606 A.2d 1287

<sup>14</sup> Jeffrey Marvin, "Without a Bright-line on the Green Line", *New England Law Review* 50, 119 (2015).

## 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?<sup>15</sup>

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 Liaison, 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.<sup>16</sup> 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

---

<sup>15</sup> 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".

<sup>16</sup> Personal conversation with Senator Mitchell, Feb 15/2017.

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 same 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.<sup>17</sup> Even if we imagine that only one-third<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

*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

---

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> 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*".