In The Aftermath of the "Reset" of HB2
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In the aftermath of the "reset" of HB2 Gov. Roy Cooper has made four claims, on Capital Tonight, Spectrum Cable, April 10, 2017.

1.) Under the law, as HB2 was repealed and replaced by HB142, those persons claiming to be transgendered will still be able to use the changing room/restrooms of their own choice. This will doubtless be a surprise to the managers of HB 142 who assured the public that HB142 preserved the privacy and security of women and children. An April 12, 2017 blog post by Professor Robert Joyce of the UNC School of Government advises local governments that while they may not adopt "policies" individual managers may allow biological males into women's changing rooms and, if they don't they may be liable to that biological male.

Governor Cooper's claim may also surprise state employees since Governor Cooper has not rescinded Governor McCrory's Executive Order dated April 12, 2016 on the usage of changing rooms and restrooms in state offices under the Governor's control.

2.) Governor Cooper claims that HB142 now allows local government (cities and counties) to enact protected classes for their own employees. This is really a surprise since HB2 specifically provided that this was already allowed. HB142 made no change there. See Section 3.1(c) (last clause) of HB2.

3.) Governor Cooper claims that under HB142 cities and counties can now enact ordinances requiring their bidders to have additional protected classifications for the contractors' employees and vendors. This position was taken by the University of North Carolina School of Government the day after HB142 became law. This would be a surprise to the managers of HB142 since House leadership did not intend this change.

Here is the opinion of the School of Government through Professor Norma Houston and a response:

> **Perhaps the more significant impact on city and county contracting authority is the repeal of the prohibition under HB2 against imposing anti-discrimination requirements on bidders.** For example, under HB2, a city or county could not require bidders to provide a statement that the bidder does not discriminate on the basis of sexual orientation, transgender, or gender identity because state law under HB2 did not prohibit discrimination on those grounds. Now, with the repeal of HB2, there does not appear to be a legal barrier to a city or county imposing such an anti-discrimination requirement on bidders.
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> Can a city or county require a contractor to have an anti-discrimination policy relating to the contractor's suppliers or subcontractors that includes nondiscrimination on the basis of sexual orientation, transgender, or gender identity?

- Pre-HB2: Yes
- HB2: No
- Post-HB2: Yes

But Governor Cooper and the School of Government are wrong for this reason:

Even though the "prohibition under HB2 against imposing anti-discrimination requirements on bidders" is "repeal[ed]," the former version of those statutes (G.S. 160A-20.1(a) and G.S. 153A-449(a)), now resurrected, forbids cities/counties to "require a private contractor under this section to abide by any restriction that the city could not impose on all employers in the city, such as paying minimum wage or providing paid sick leave to its employees, as a condition of bidding on a contract."

As to bidders, requiring nondiscrimination policies in employment would be in violation of this restored version of the statutory language because the city "could not impose [such employment nondiscrimination policies] on all employers in the city," at least not until December 2020. That is prohibited by Section 2 of HB142, which disables cities from "enact[ing] or amend[ing] an ordinance regulating private employment practices." The locality could not "require" a bidder "to abide" by restrictions in the ordinance because the local government cannot "impose" such restrictions on all employers in the locality until 2020.

Since Section 2 of HB142 forbids "enact[ing] or amend[ing] an ordinance . . . regulating public accommodations," a city also cannot require a bidder to abide by a public accommodations nondiscrimination policy because it cannot impose such policies on all employers in the city. (Certainly, in any city, there is at least one employer that is also a public accommodation. Until 2020, the city cannot "impose" a public accommodations nondiscrimination policy on that employer, and consequently "all employers.")

4.) Governor Roy Cooper will push for statewide LGBT as a protected classification even before December 2020. In other words he will keep the pot boiling for the elections of 2017 (municipal), 2018(legislative), 2019 (municipal) and 2020 (legislative). This should come as no surprise except to those who thought they were putting the issue to rest for almost four years.

This claim (or promise) by the Governor requires more explanation and a look at the actual law of discrimination.

The Truth about Discrimination and State Law

North Carolina state law on non-discrimination is the same or very similar to that of 28 other states.[1] For visual proof please examine the two maps below compiled by the ACLU and Transequality. On each map the gray states like North Carolina do not have extra special rights based on "sexual orientation" or "gender identity."

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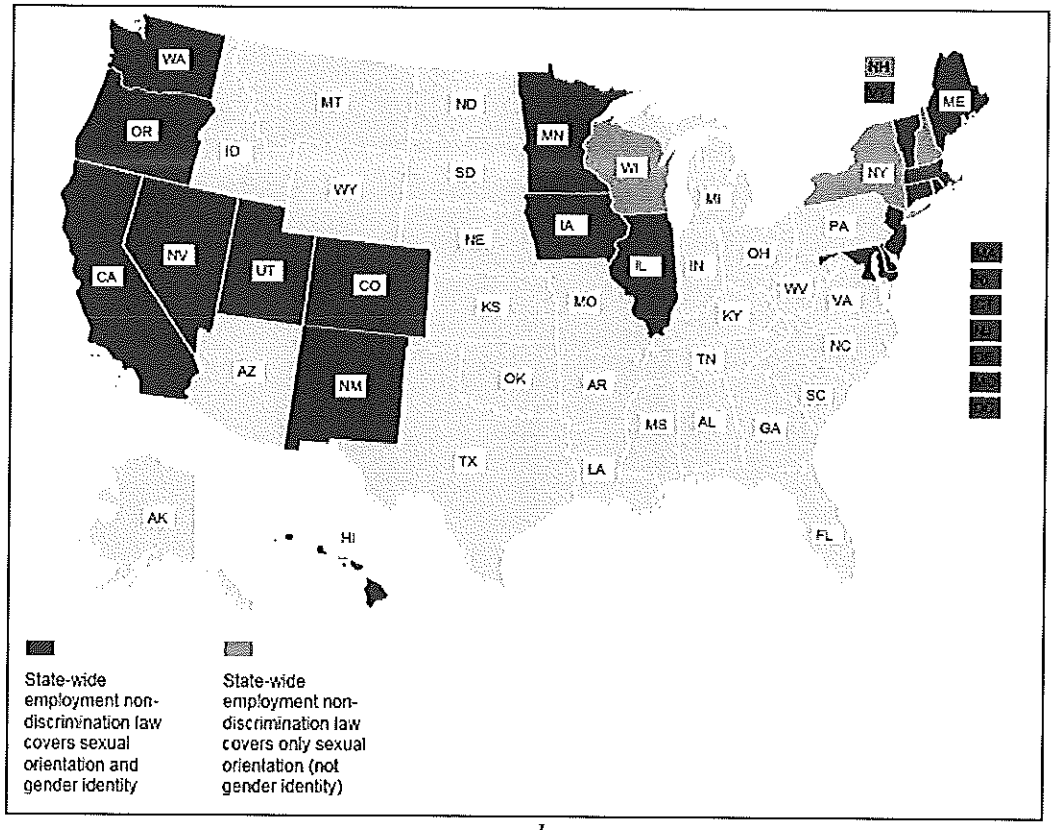
[1] *See* http://paulstam.info/wp-content/uploads/2016/05/I-WANT-TO-HELP-PAYPAL.pdf. Also see https://www.aclu.org/map/non-discrimination-laws-state-state-information-map.



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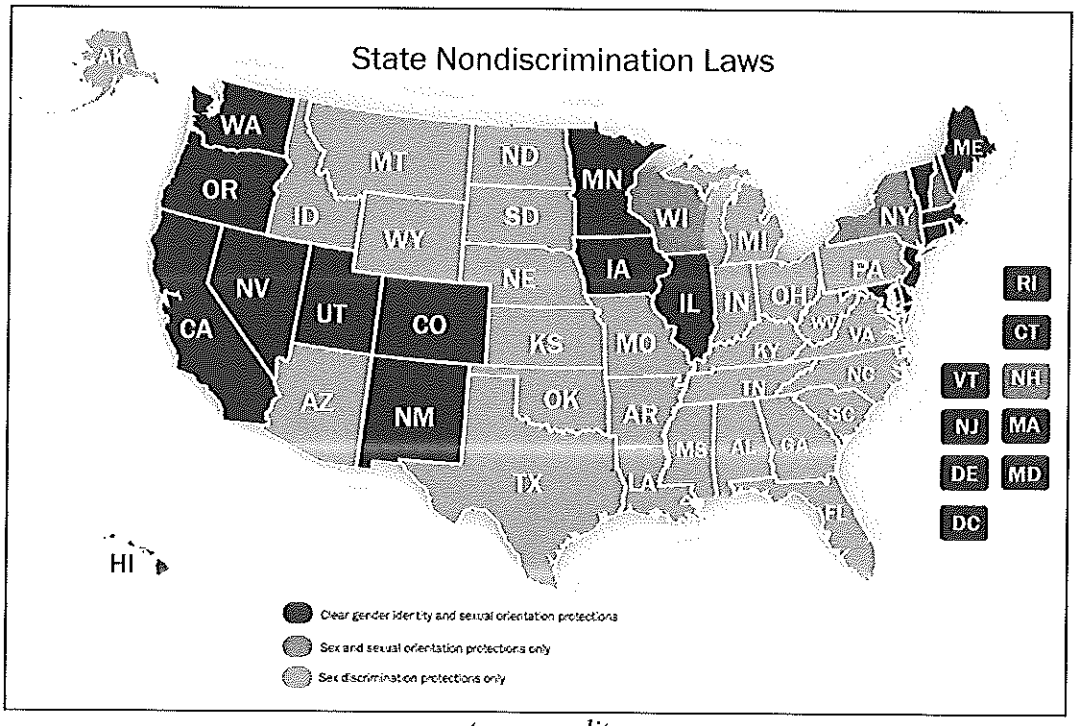

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Proponents of the Charlotte type discrimination ordinance said it has been enacted in 200 cities nationwide. Their leader, Chris Sgro, used 100 cities. Some of those cities are in states marked gray. Whether it is 100 or 200 means that about 10,000 other cities and towns located in 28 states nationwide do not have classifications based on sexual orientation or gender identity.

NORTH CAROLINA LAW PROTECTS THE RIGHTS OF LGBT PERSONS. LGBT PERSONS HAVE THE SAME RIGHTS THAT OTHERS DO. Let me explain in detail:

North Carolina residents have all of the rights that come from the United States Constitution and Statutes, the North Carolina State Constitution and Statutes, and local ordinances. These rights are available in full to *almost* everyone.

Article I Section 1 of the North Carolina Constitution provides as follows:

The equality and rights of persons.

> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

There are exceptions. Aliens do not have the right to vote, whether here legally or illegally. Children do not have the right to enter into most contracts nor the right to vote nor the right to buy alcohol. Those who by mental disease are not able to conduct their own affairs may be declared incompetent by a Court. Their rights are protected and enhanced by the appointment of a Guardian. Convicted criminals lose some of their rights. But even convicted criminals have the right in most circumstances to not undress or use the bathroom or shower in the presence of a person of the opposite sex.[2]

Each of us has the same rights when facing the same circumstances. For historical reasons the exercise of these rights has been protected by additional constitutional or statutory provisions.

Article I Section 19 of the North Carolina Constitution provides:

Law of the land; equal protection of the laws

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The 14th Amendment (Section 1) to the United States Constitution provides:

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[2] The North Carolina Department of Public Safety, Adult Correction and Juvenile Justice stated in a memo on May 10, 2016, that, "Convicted criminals and inmates do have privacy rights when it comes to their using the restroom or changing clothes and they have the right to not be observed by members of the opposite sex while using the restroom or changing clothes. The specific policy language is included in the Prison Rape Elimination Act (PREA), with which the Division of Adult Correction...Community Corrections and Juvenile Justice...abides."

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Private v. Public

Some acts of discrimination are appropriate for private persons but are not appropriate for a government. I may prefer to vacation in the mountains but the government must not say that I must go to the mountains rather than to the beach.

When Romeo met Juliet, he discriminated on the basis of (biological) sex when he chose a particular biological female. When Juliet met Romeo she discriminated on the basis of (biological) sex, choosing a particular biological male. Homosexual or lesbian persons exercise private discrimination by choosing a partner of the same sex.

Discrimination based on some factors may be reasonable (like choosing the mountains over the beach) or even wise. Indeed, a "discriminating" person is defined as one who is discerning, one who notes "differences with nicety," one who has "excellent taste or judgment." But other types of discrimination are improper for a government or for a provider of public accommodations. These types of discrimination are not allowed by NC law.

Prior to the passage of HB2 the personal characteristics subject to extra scrutiny for discrimination have generally been race, color, national origin, sex (biological) and religion. That was true before the passage of the HB2 and HB142 and is true today. (Other personal traits like age, disability, and familial status are also used where appropriate to the statute.

Equality NC, Human Rights Campaign claim that LGBT persons just want the same rights that everyone else already has. This is not true.

WE ALL HAVE THE SAME RIGHTS WHEN CONFRONTING THE SAME SITUATION.

One problem with "identity"-based preferences (like "sexual orientation" or "gender identity") is subjectivity. That subjectivity translates to rule other than by law. The "identity" actor determines the law. The law that codifies the right becomes nothing more than "law cover" for the individual, a tool of individualized empowerment. Here is why:

"I want to be a Cherokee," said Sen. Elizabeth Warren, whose tenure at Harvard improved its diversity rating. But that did not turn her into a Native American. "I want to be a girl" said the biological boy who won All-State Honors in the 2016 Alaska Girls Track and Field Competition.

IS "SEXUAL ORIENTATION" A REASONABLE AND DEFINABLE TERM TO USE IN DISCRIMINATION LAW? NO. "Sexual orientation" is inherently undefinable and undefined.

What is the meaning of the word "orientation?" Is it purely subjective? Is it what is in a person's mind or does it relate to behavior?

What is meant by "sexual orientation?" Some have the "orientation" or "behavior" of wanting or having more than one sexual partner. For centuries we have had laws against bigamy and polygamy and there are civil consequences for adultery. Those laws are being challenged in some Western states. There are tens of thousands of polygamous marriages in those states that are not being prosecuted. In addition there are millions of Americans who see nothing wrong with polygamy or adultery, either because of their cultural background or their own personal desires.

How would special rights for those claiming "sexual orientation" work?
Extra scrutiny for discrimination on the basis of "sexual orientation" would mean that a job applicant who states to his or her prospective employer or current employer that he or she has a polygamous marriage or is in a polygamous or adulterous living situation, or wishes to have multiple sexual partners, would have extra special rights to be hired or to not be fired. If the desire (or behavior) of having multiple sexual partners is not a "sexual orientation" what could be?

There are many good reasons why an employer might not want to employ a person whose "sexual orientation" is to polygamy or adultery. The employer should have the right to make that decision. Similarly, an employee should have the right to choose to work only for those employers who make that very reasonable decision.

"Gender Identity" is not a reasonable or even definable term. President Obama's Departments of Justice and Education proved that "gender identity" is purely subjective. While the Trump administration has withdrawn the Obama directive, that does not mean that the term now has an objective component. Just ask National Geographic or the Boy Scouts of America who will now determine "sex" based on what is on an application rather than on reality.

In the case of *G.G. ex rel. Grimm v. Gloucester Cnty. School Bd.*, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), (first stayed and then vacated and remanded by the U.S. Supreme Court, March 2017) "gender identity" was the issue.

On May 13, 2016, the United States Departments of Justice and Education had issued a joint letter to public schools nationwide, explaining a school's obligation under Title IX regarding transgender students and "gender identity."[3]

> "[g]ender identity refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth...Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex...Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity." (*emphases added*).

[3] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

"Gender Identity" is **purely subjective.** Only the individual determines whether "he," "she" or "s(he)" is female or male that day.

To see where this is headed, please see Facebook's policy on updating a user's gender identity on the user's profile page: *https://www.rt.com/usa/236283-facebook-gender-custom-choice/.* Facebook offers 58 pre-populated options to choose from OR a user can create and type in the user's unique chosen "gender."

Legal lines are more acceptable when drawn on the basis of benign and immutable characteristics - e.g., race, color, national origin, sex (biological) and disabilities. Religion is included as a suspect class because of its place in the First Amendment to the U.S. Constitution and Article I Section 13 of the NC Declaration of Rights.

If individuals are allowed to justify and demand acceptance of their behavior or orientation by wholly self-determined "identity" claims then the law becomes lawless.

HB2 codified the preexisting state law on discrimination and the preexisting state law on local authority. While HB2 was repealed by HB142 the same common law now applies which, in North Carolina, does not include LGBT as "protected classes." Those wanting to change this have the burden of demonstrating why their proposals are for the public good and what they actually intend by their proposals.