

DYING WHILE TRANS: A CRITICAL ANALYSIS OF RESPECT AFTER DEATH LAWS

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I. INTRODUCTION

Transgender and gender non-conforming (“TGNC”) individuals face an overwhelming amount of restrictions if they decide to take steps to legally or medically transition. For example, the State Department requires medical certification of transgender-related healthcare in order to update the gender demarcation on an applicant’s passport, even if the applicant has already updated their gender markers on other identity

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documents.¹ In order to begin receiving gender affirming² healthcare, many health providers require sign-off from a therapist or counselor.³ The modern criteria are, of course, much improved from past criteria, which required an individual to live as their “target gender” for a number of years before they could access medical care.⁴ Once a TGNC individual has received the requisite medical authorization to begin transitioning, they will next have to overcome financial barriers: even in states that require insurers to provide coverage for transgender-related care, such coverage is often difficult to acquire.⁵

In addition to these hurdles, TGNC individuals also face the day-to-day reality that simply living as themselves can be dangerous. So far in 2019, at least twenty-one TGNC individuals have been violently killed.⁶ The violence against the TGNC community has become so rampant that the American Medical Association recently deemed it an “epidemic.”⁷ Finally, even after death, TGNC individuals continue facing discrimination—how do we ensure that a decedent’s gender is appropriately designated on their death certificate and reflected in their funeral proceedings?

This Note will explore a form of legislation, often called a Respect

¹ *Know Your Rights: Passports*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/know-your-rights/passports> (last visited Oct. 18, 2019, 1:30 PM).

² I use the phrase “gender affirming” rather than “sex change” or “sexual reassignment” for two reasons. First, when a TGNC individual receives counseling or medical treatment related to their gender, they are not *changing* their sex; rather, they are allowing their body to comport with their own internal sense of their gender. Second, it is important to note that cisgender individuals receive medical insurance coverage for the same procedures that TGNC individuals are denied coverage for because they are perceived as “cosmetic” rather than “medically necessary.” (E.g., mastectomies.) Many argue that gender affirming care *is* a medical necessity. See Madeline B. Deusch, *Overview of Gender-Affirming Treatments and Procedures*, UCSF: TRANSGENDER CARE AND TREATMENT GUIDELINES (June 17, 2016), <https://transcare.ucsf.edu/guidelines/overview>; *Letters from Health Care Providers*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/health-coverage-guide/health-care-provider-letters> (last visited Oct. 18, 2019, 2:12 PM).

³ Gaines Blasdel, *How to Get Started on Your Gender Transition*, VICE: HEALTH (Nov. 8, 2018, 9:54 AM), https://www.vice.com/en_us/article/j5zx3y/does-health-insurance-cover-transgender-care. See also THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 34 (2011), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>.

⁴ Blasdel, *supra* note 4.

⁵ *Getting Your Health Care Covered: A Guide for Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/health-coverage-guide> (last visited Oct. 18, 2019, 2:00 PM).

⁶ *Violence Against the Transgender Community in 2019*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> (last visited Oct. 18, 2019, 2:06 PM).

⁷ *AMA Adopts New Policies on First Day of Voting at 2019 Annual Meeting*, AMERICAN MEDICAL ASSOCIATION: PRESS RELEASES (June 10, 2019), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-first-day-voting-2019-annual-meeting>.

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After Death (“RAD”) law, that is intended to solve this problem. This type of legislation creates a mechanism by which some TGNC individuals can have their gender appropriately marked on their death certificates.⁸ Though these laws are well-intended, the way they have been written assumes certain things about the TGNC community that are often not true: that they have begun gender affirming care, that their loved ones have access to medical documentation about their transgender status, and that they have taken affirmative steps to change their legal name or the gender demarcation on their identity documents.⁹

These assumptions regularly appear in laws designed to protect the TGNC community. As a result, many—if not most—TGNC individuals are unable to access the protections that these laws seek to provide.¹⁰ Despite the gaps in coverage, laws offering even mild amounts of protection are often celebrated as major victories.¹¹ For example, in July 2018, New Jersey Governor Phil Murphy signed an RAD bill into law as part of a legislative package purporting to protect TGNC residents of New Jersey.¹² The package as a whole was lauded by one state politician as “certainly solidify[ing] New Jersey’s place as a leader in transgender civil rights.”¹³ That same politician cited the “discrimination, violence, depression, and suicide” impacting the TGNC community as reasons why this legislative package was necessary.¹⁴ Despite that reasoning, the laws in the package did nothing to directly address the roots of those problems: they did not make the state’s anti-discrimination laws more robust, they did not directly address suicide prevention for TGNC individuals, and they did not address the use of “gay- and trans-panic” defenses¹⁵ in criminal court.

⁸ See, e.g., Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)).

⁹ See *infra*, notes 82–88, and accompanying text.

¹⁰ *Id.*

¹¹ See, e.g., *C.A. Governor Signs Respect After Death Act*, TRANSGENDER LAW CENTER (Sept. 26, 2014), <https://transgenderlawcenter.org/archives/11140>.

¹² Babs Siperstein Law, ch. 58, 2018 N.J. Sess. Law Serv. (West) (2018) (codified as N.J. STAT. ANN. § 26:8-40.12 (2018)); Act concerning information included on death certificates, ch. 59, 2018 N.J. Sess. Law Serv. (West) (2018) (codified as N.J. STAT. ANN. § 26:6-7 (2018)); Act establishing the Transgender Equality Task Force, ch. 60, 2018 N.J. Sess. Law Serv. (West) (2018).

¹³ Christian Hetrick, *New Jersey Lawmakers Send Transgender Rights Bills to Phil Murphy*, OBSERVER (May 28, 2018, 6:00 AM), <https://observer.com/2018/05/new-jersey-transgender-rights-bills/>.

¹⁴ *Id.*

¹⁵ These defenses make it so that an individual who kills an LGBTQ-identifying person can argue that their charge should be mitigated to manslaughter rather than murder because they were “provoked” by the discovery of their victim’s sexual orientation or gender identity. See AM. BAR ASS’N, RESOLUTION OF AUG. 12–13, 2013 (2013), <https://lgbtbar.org/wp-content/uploads/sites/6/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>; Cynthia Lee, Article, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008); see also Nico Lang, *James Dixon Pleads Guilty in Death of Islan Nettles*, THE ADVOCATE (April 5, 2016, 3:26 PM),

Instead, the three laws in the package (1) made it a little easier for transgender individuals to change the sex on their birth certificate by no longer requiring proof of a gender-affirming surgery,¹⁶ (2) enacted a RAD law,¹⁷ and (3) created a “Transgender Equality Task Force,” on which only one of seventeen seats is explicitly set aside for a TGNC individual.¹⁸

The drafters of RAD laws purport to solve problems plaguing TGNC individuals after they die, but even these “robust” packages like New Jersey’s ignore the systematic discrimination TGNC individuals face when alive. Additionally, RAD laws fail to address the issues inherent in other funeral regulations. RAD laws focus on the letter (“M,” “F,” or, increasingly “X”)¹⁹ placed on one’s death certificate, and they ignore other issues of bodily autonomy that are a part of funeral proceedings. This Note will discuss the passage of RAD laws around the country and propose a more comprehensive legislative solution to help New York State address these problems.

This paper is rooted in critical trans political theory—a body of work that draws from the insights of critical race theory. These critical political theories reject the assertion that legal recognition of a marginalized group is enough to provide protection from the systematic oppression and violence faced by the community in their day-to-day lives.²⁰ Instead, critical politics demands the transformation of our civil structures in order to create substantive change:

A critical trans politics is emerging that refuses empty promises of “equal opportunity” and “safety” underwritten by settler colonialism, racist, sexist, classist, ableist, and xenophobic imprisonment, and ever-growing wealth disparity. It is confronting the harms that come to trans people at the hands of violent systems structured through law itself—not by demanding recognition and inclusion in those systems,

<https://www.advocate.com/transgender/2016/04/05/james-dixon-pleads-guilty-death-black-trans-woman-islan-nettles>; James C. McKinley Jr., *Man Sentenced to 12 Years in Beating Death of Transgender Woman*, THE NEW YORK TIMES (April 19, 2016), <https://www.nytimes.com/2016/04/20/nyregion/man-sentenced-to-12-years-in-beating-death-of-transgender-woman.html>.

¹⁶ Babs Siperstein Law, ch. 58, 2018 N.J. Sess. Law Serv. (West) (2018) (codified as N.J. STAT. ANN. § 26:8-40.12 (2018))

¹⁷ Act concerning information included on death certificates, ch. 59, 2018 N.J. Sess. Law Serv. (West) (2018) (codified as N.J. STAT. ANN. § 26:6-7 (2018))

¹⁸ Act establishing the Transgender Equality Task Force, ch. 60, 2018 N.J. Sess. Law Serv. (West) (2018).

¹⁹ The letter “X” has been making its way onto identification documents both internationally and in the United States as a representation of non-binary gender—a gender that is neither exclusively “male” nor exclusively “female.” See, e.g., Andy Newman, *Male, Female or ‘X’: The Push for a Third Choice on Official Forms*, THE NEW YORK TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/nyregion/gender-neutral-birth-certificate.html>.

²⁰ See generally DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (rev. and expanded ed. 2015).

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but by working to dismantle them while simultaneously supporting those most exposed to their harms.²¹

Anchoring this paper in a critical trans political theory will demonstrate that legislation that fails to address systemic discrimination cannot provide relief for a group of people who have continually been told, even by supposed allies, that we cannot and should not exist.

This Note will begin by exploring the history of the laws regulating the final disposition of our bodies. These laws seek to balance the tension between the interest the decedent has in their own autonomy and the interest the decedent's family has in laying their loved ones to rest.²² This tension is felt very strongly by TGNC individuals, who often have a poor relationship with their legal next of kin and/or lack the resources required to take advantage of the laws that might protect them.²³

Next, this Note will explore RAD laws. This legislative model, which began in California in 2014, attempts to make it easier for one's gender to be properly marked on death certificates.²⁴ While some lawmakers and advocates would argue that these laws mark an important step forward in TGNC civil rights, I will use critical theory to illustrate why they fall short in protecting individuals' bodily autonomy. Moreover, by doing nothing to show respect for an individual's gender in life, these laws suggest that the best way for a TGNC individual to gain societal respect is to die.

Finally, I will detail the current statutory scheme in New York state that regulates the disposition of bodily remains. The most recent laws were enacted in 2005 through activism led in part by LGBTQ groups advocating for "domestic partners" to have the same power as "spouses" in managing the funeral arrangements of their partners.²⁵ Despite New York's progressive reputation, these laws have yet to be

²¹ *Id.* at 19.

²² See generally Tanya K. Hernandez, Article, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999); Ann M. Murphy, Article, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381 (2007).

²³ See generally Christine Colby, *Dying Trans: Preserving Identity in Death*, THE ORDER OF THE GOOD DEATH (Jan. 10, 2017), <http://www.orderofthegooddeath.com/dying-trans-preserving-identity-death>.

²⁴ Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)); Disposition of Remains Act, sec. 5, § 40, 2015 Ill. Laws 5821 (2015) (codified as amended at 755 ILL. COMP. STAT. 65/40 (2015)); Death Certificate Gender Identity Recognition Amendment Act of 2016, sec. 2, § 12, 2016 D.C. Reg. 2067 (codified as D.C. CODE ANN. § 7-211 (2016)); Act concerning information included on death certificates, ch. 59, 2018 N.J. Laws. (codified as N.J. STAT. ANN. § 26:6-7 (2018)); Act Relating to Health and Safety — Vital Records, 2018 R. I. Pub. Laws 565 (codified as 23 R.I. GEN. LAWS § 23-3-16 (2018)).

²⁵ See N.Y. PUB. HEALTH LAW § 4201(1)(b) (2018) (defining domestic partner as one who is in a formal relationship with the decedent, or who "is dependent or mutually interdependent on the other person for support"). This reform was necessary in the gay community before same-sex marriage became legal.

amended to account for TGNC individuals. I will examine how the current legal framework functions and propose a solution to help TGNC New Yorkers.

TGNC individuals face enough challenges in our daily lives that respect after death is far from the forefront of our minds. However, if legislators around the country see this as a next step for TGNC civil rights, it is important that they fully commit to reshaping this aspect of our legal system. The RAD model introduced by California, which has so far been adapted by Illinois; New Jersey; Washington, D.C.; and Rhode Island remains incomplete. In order to better serve New York's TGNC population, the New York State legislature should adopt a modified version of California's RAD law. This law would address the gender demarcation on a decedent's death certificate, as well as their presentation in funeral proceedings. This more comprehensive RAD law would also increase the likelihood that a decedent's chosen family would be able to counter any incorrect, gendered assertions put forth by their legal next of kin. The necessity for this protection arises when a TGNC individual dies estranged from their legal or biological family, but their next of kin automatically gains control over funeral proceedings. This law would also direct state or city agencies to conduct a TGNC-inclusive public education campaign to increase awareness of individual rights after death.

II. BACKGROUND

To understand how modern disposition of remains laws are particularly harmful towards the TGNC population, we must first understand their history. Like much of American legislation, disposition of remains laws stem from early English common law and vary from state to state.²⁶ The English common law said that next of kin, and not decedents' directives, controlled the disposition of remains, and American courts initially followed suit.²⁷ In an early California case, for example, a Mr. Enos died while estranged from his wife and daughter and living with a Ms. Rachel Snyder.²⁸ In his will, he left instructions that Ms. Snyder should direct the manner of his burial.²⁹ His wife and daughter brought suit, asserting their rights as Mr. Enos' next of kin to

²⁶ Murphy, *supra* note 22, at 396.

²⁷ *Id.*; see also Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 255 (1986); Michael H. Scarmon, Note, *Brotheron v. Cleveland: Property Rights in the Human Body—Are the Goods Of Interred with Their Bones?*, 37 S.D. L. REV. 429, 437 (1991–1992).

²⁸ Enos v. Snyder, 131 Cal. 68, 68 (Cal 1900).

²⁹ *Id.*

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dispose of his body.³⁰ The Supreme Court of California held in favor of Mr. Enos' estranged family members, finding that "there is no property in a dead body, that it is not part of the estate of the deceased person, and that a man cannot by will dispose of that which after death will be his corpse."³¹ The California Supreme Court found that a corpse is not "property" in which a decedent can maintain an interest.³² They determined that the next of kin should maintain control over human remains by citing to an 1882 English case,³³ as well as the fact that California had previously named it a misdemeanor for a decedent's next of kin to forego properly disposing of their body.³⁴ Bodily autonomy was not an issue in disposition of remains laws prior to the 1900s, as corpses were seen as items to dispose of to prevent scavenging, not as departed loved ones who deserved to be treated with respect.³⁵

Later jurisprudence began to discuss a family's right to their loved one's remains as "a quasi right in property" in order to find jurisdiction in tort claims.³⁶ These claims arose when funeral homes would mishandle a body in preparation for their funeral, burial, or cremation.³⁷ Quasi property rights were acknowledged as a legal fiction, but they began to embody the next of kin's right to determine the manner of burial, and their right to have the corpse delivered to them "in the same way as it was when life left it."³⁸

The laws began shifting again in the 1960s when cadaveric transplants became possible, and the National Conference of Commissioners on Uniform Law drafted the Uniform Anatomical Gift Act ("UAGA").³⁹ This law made it easier for someone to choose to donate their body or their organs upon death.⁴⁰ The state-by-state adoption of this law marked a dramatic shift: legislatures were accepting the idea that one may dictate at least part of their own bodily disposition at death.⁴¹ Case law after the UAGA began noting that

a person has some interest in [their] body, and the organs thereof, of such a nature that [they] should be able to make a disposition thereof, which should be recognized and held to be binding after [their]

³⁰ *Id.* at 69.

³¹ *Id.*

³² *Id.*

³³ *Williams v. Williams*, L.R. 20 Ch. Div. 659 (1882).

³⁴ *Enos*, 131 Cal. at 172.

³⁵ *Murphy*, *supra* note 22, at 385.

³⁶ *See, e.g., Spiegel v. Evergreen Cemetery Co.*, 186 A. 585, 586 (N.J. 1936).

³⁷ *Id.*

³⁸ Remigius N. Nwabueze, Article, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV. 19, 31 (2002).

³⁹ Theodore Silver, Article, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 691 (1988).

⁴⁰ *Id.* at 693.

⁴¹ *Hardiman*, *supra* note 27, at 226.

death, so long as this is done within the limits of reason and decency, as related to the accepted customs of [human]kind.⁴²

Although the surviving next of kin generally had a right to immediate possession of a decedent's body for preservation and burial, "a decedent's wishes will be taken into account when a dispute erupts over the ultimate disposition of remains and, in some cases, given effect over the objections of family members."⁴³

Since the introduction of the UAGA, states have begun introducing legislation allowing individuals even more control over the final disposition of their remains.⁴⁴ These laws can be separated into two broad categories: Priority of Decision Laws and Personal Preference Laws. Priority of Decision Laws do two things. First, they declare whether or not an individual may specify their wishes concerning the treatment of their remains.⁴⁵ Although a person residing in a state with a Priority of Decision law may sometimes specify how they would like their body to be treated after death, these laws are distinct from Personal Preference Laws, described *infra*, because they do not overtly provide the mechanism by which to do so. Instead, Priority of Decision laws often allow the decedent to declare an agent to oversee their funeral proceedings.

Second, Priority of Decision laws will list the hierarchy of individuals who may decide upon the disposition of a corpse if the decedent themselves did not give instructions.⁴⁶ Generally, these statutes list the order of priority as (1) a designated agent, (2) the decedent's spouse, sometimes with room for a statutorily defined "domestic partner,"⁴⁷ (3) the decedent's surviving adult children, (4) the decedent's surviving parents, etc. These laws usually follow the state's intestate succession laws.⁴⁸ Some of these laws likely have their roots in the laws that once determined which relative had the duty to pay for the cost of burial.⁴⁹

Personal Preference Laws follow the same general structure as Priority of Decision laws, but they specify that the decedent themselves has the right to make decisions about their remains beyond declaring an

⁴² *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978).

⁴³ *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. App. Div. 2000) (citing *Briggs v. Hemstreet-Briggs*, 681 N.Y.S.2d 853 (N.Y. App. Div. 1998); *Stewart v. Schwartz Brothers-Jefferson Memorial Chapel*, 606 N.Y.S.2d 965 (N.Y. Civ. Term 1993)).

⁴⁴ See generally *Who Has the Legal right to Make Decisions About Your Funeral?*, FUNERAL CONSUMERS ALLIANCE, <http://funerals.org/?consumers=legal-right-make-decisions-funeral> (last visited Sept. 27, 2018, 9:40 AM).

⁴⁵ See, e.g., GA. CODE ANN. § 31-21-7 (2012).

⁴⁶ *Id.*

⁴⁷ See, e.g., N.Y. PUB. HEALTH LAW § 4201 (2018).

⁴⁸ See, e.g., KAN. STAT. ANN. § 65-1734 (2011).

⁴⁹ *Murphy*, *supra* note 22, at 403.

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agent.⁵⁰ The statute in Illinois is particularly decedent friendly, noting that anyone may provide written directions for the disposition of their remains via the following means: a will, a prepaid burial contract, a power of attorney form, a cremation authorization form, or other “written instrument.”⁵¹ As a result of a 2015 amendment, the statute is also noticeably sympathetic to TGNC residents, specifying that

[t]he directions may include instructions regarding gender identity, including but not limited to, instructions with respect to appearance, chosen name, and gender pronouns, regardless of whether the person has obtained a court-ordered name change, changed the gender marker on any identification document, or undergone any transition-related medical treatment.⁵²

As I will explore below, this amendment acknowledges the difficulties TGNC individuals may face in obtaining name changes, changing their gender markers, and undergoing gender affirming medical treatment, and it is an effective first step in respecting decedents’ gender identity in their funeral proceedings.

Recent disposition of remains case law continues to highlight the doctrinal tension between the rights of the decedent and the rights of the surviving family members.⁵³ For example, in the New York case *Brannam v. Edward Robeson Funeral Home*, the decedent left instructions in his will that his long-time companion and mother of three of his children was to be his executor, oversee his cremation, and gain control over his ashes.⁵⁴ Instead, the decedent’s estranged wife contacted the funeral home to assert her rights as legal next of kin.⁵⁵ The funeral home refused to turn the body over to the decedent’s executor, even when presented with a copy of his will and instructions.⁵⁶ Only after the executor obtained a court order did the funeral home comply with the decedent’s wishes rather than his next of kin.⁵⁷

This underlying doctrinal tension also appears in the common practices of funeral directors. Funeral homes continue to embrace the mentality that the funeral consumer is the “person called upon to make the arrangements for burial or cremation of a spouse, parent, child, other relative or friend” rather than the deceased individual.⁵⁸ Although resources for funeral pre-planning are beginning to become available as

⁵⁰ See, e.g., OR. REV. STAT. § 97.130 (2011).

⁵¹ 755 ILL. COMP. STAT. 65/40 (2015).

⁵² *Id.*

⁵³ Murphy, *supra* note 22, at 410.

⁵⁴ Hernandez, *supra* note 22, at 972.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 973.

⁵⁸ Funeral Rule Statement of Basis and Purpose and Regulatory Analysis, 47 Fed. Reg. 42,260 (Sept. 24, 1982) (codified at 16 C.F.R. Part 453).

a form of consumer protection for the decedent,⁵⁹ “[f]uneral homes generally maintain a familial approach to death which focuses on the needs of the biological family and spouse rather than upon the articulated preferences of a testator.”⁶⁰

III. DISPOSITION OF REMAINS LAWS IN CALIFORNIA, ILLINOIS, AND NEW YORK, AND THEIR IMPACT ON THE TRANSGENDER AND GENDER NON-CONFORMING COMMUNITY

Against this backdrop, where an average American citizen will have some difficulty retaining bodily autonomy after death, the TGNC community is fighting to gain its footing. In 2012, a well-known transgender activist in California, Christopher Lee, died suddenly.⁶¹ Christopher had been living openly as a transgender man for twenty years, and had acquired a California license to match his identity.⁶² This means that Christopher had to petition the court to acquire a legal name change and bring that court order to the Social Security Administration.⁶³ Then, Christopher must have gotten a licensed psychologist or psychiatrist to sign a Medical Certification and Authorization form, affirming that he had completed his “gender identification” process, and brought this authorization form and his court order to the DMV.⁶⁴

Despite having gone through the lengthy process to update his California driver’s license, Christopher’s death certificate listed him as

⁵⁹ See, e.g., *Bill of Rights for Funeral Preplanning*, NAT’L FUNERAL DIRS. ASS’N, <http://www.nfda.org/consumer-resources/preplanning-a-funeral/bill-of-rights-for-funeral-preplanning> (last visited Dec. 18, 2019, 1:41 PM).

⁶⁰ Hernandez, *supra* note 22, at 973.

⁶¹ Simon Davis, *Transgender People are Misgendered, Even in Death*, VICE: POST MORTEM (Jan. 21, 2015, 11:00 AM), https://www.vice.com/en_us/article/exm3v4/transgender-people-are-misgendered-even-in-death-120.

⁶² *Id.*

⁶³ Cal. Code Regs. tit. 13 § 20.04 (1999); see also *How to Change Your Name on Your Driver License and/or Identification Card*, subheading of *Driver License (DL) and Identification (ID) Card Information*, STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, [HTTPS://WWW.DMV.CA.GOV/PORTAL/DMV/DETAIL/DL/DL_INFO - TWO504](https://www.dmv.ca.gov/portal/dmv/detail/dl/dl_info_-_two504) (last visited Jan. 18, 2019, 1:49 PM).

⁶⁴ *DL 329, Medical Certification and Authorization (Gender Change)*, STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES (Dec. 5, 2018), <https://www.dmv.ca.gov/portal/wcm/connect/683f91d7-5c27-4260-970e-c23139bb8e22/dl329.pdf?MOD=AJPERES> [<https://perma.cc/STA8-D8GS>]. See also *ID Documents Center: California*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (last updated Nov. 2018), <https://transequality.org/documents/state/california>.

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“female.” His friends, and the broader TGNC community in California, were outraged.⁶⁵ They urged the California legislature to pass the nation’s first RAD Act.⁶⁶ California’s RAD Act,⁶⁷ along with the RAD laws that followed in Illinois,⁶⁸ Washington, D.C.,⁶⁹ New Jersey,⁷⁰ and Rhode Island⁷¹ have been proclaimed as progressive victories for the TGNC community.⁷² However, an overwhelming amount of TGNC individuals lack the legal and financial resources to take advantage of these laws’ protections.⁷³

A. Towards a Critical Trans Political Theory

The American LGBTQ civil rights movement began with small grassroots organizations meeting in secret and publishing underground magazines to spread news about bar raids and to call for political activism.⁷⁴ The 1990s and 2000s brought on a new era of LGBTQ community organizing: as more LGBTQ individuals “came out” in their professional lives and anti-discrimination employment policies were put in place, well-funded “L” and “G” groups began fighting for legal reform.⁷⁵ Even today, these advocacy groups often frame issues of LGBTQ equality into terms that their members can identify with, and ignore the issues impacting the most marginalized in the community:

The mostly white, educationally privileged paid leaders can imagine themselves fired from a job for being gay or lesbian, harassed on the street (often by an imagined assailant of color), excluded from Boy

⁶⁵ Davis, *supra* note 61.

⁶⁶ *Id.*

⁶⁷ Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)).

⁶⁸ Disposition of Remains Act, sec. 5, § 40, 2015 Ill. Laws 5821 (2015) (codified as amended at 755 ILL. COMP. STAT. 65/40 (2015)).

⁶⁹ Death Certificate Gender Identity Recognition Amendment Act of 2016, sec. 2, § 12, 2016 D.C. Reg. 2067 (codified as D.C. CODE ANN. § 7-211 (2016)).

⁷⁰ Act concerning information included on death certificates, ch. 59, 2018 N.J. Laws. (codified as N.J. STAT. ANN. § 26:6-7 (2018)).

⁷¹ Act Relating to Health and Safety—Vital Records, 2018 R. I. Pub. Laws 565 (codified as 23 R.I. GEN. LAWS § 23-3-16 (2018)).

⁷² See, e.g., *C.A. Governor Signs Respect After Death Act*, TRANSGENDER LAW CENTER (Sept. 26, 2014), <https://transgenderlawcenter.org/archives/11140>; but see *New Jersey Now Has Respect After Death Laws*, NECROPOLITICO (Aug. 2, 2018), <https://necropolitico.wordpress.com/2018/08/02/122/>.

⁷³ See generally NATIONAL CENTER FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY, (Dec. 2017) [hereinafter 2015 Survey], <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

⁷⁴ TERESA THEOPHANO, GLBTQ ARCHIVE, DAUGHTERS OF BILITIS, (2004), http://www.glbqtarchive.com/ssh/daughters_bilitis_S.pdf; Craig Kaczorowski, *Mattachine Society*, GLBTQ ARCHIVE (2004), http://www.glbqtarchive.com/ssh/mattachine_society_S.pdf.

⁷⁵ ERIC MARCUS, MAKING GAY HISTORY 246, 345–47 (rev. and updated ed. 2002).

Scouts or kept out of military service. They do not imagine themselves as potentially imprisoned, on welfare, homeless, in the juvenile punishment and foster care systems, in danger of deportation, or the target of continuous police harassment.⁷⁶

Rather than taking a critical view of the issues facing the LGBTQ community and coming up with holistic solutions, donor-funded organizations tend to promote quick-, partial-, or non-fixes.⁷⁷

For example, one of the biggest problems facing the LGBTQ community has been difficulty accessing healthcare.⁷⁸ Healthcare has been a major focus for gay men living with AIDS and for the members of the TGNC community who seek gender-affirming treatment.⁷⁹ Instead of pushing for healthcare reform, the leaders in the LGBTQ law reform movement began pushing for “marriage equality” as a quick fix.⁸⁰ Partnered individuals can now share healthcare benefits provided by employers, but this solution does not provide relief for non-partnered or under-employed individuals.⁸¹

The LGBTQ law reform movement’s focus on formal equality rather than transformational change ignores that TGNC individuals have disproportionately low access to legal protections and face a high rate of discrimination and violence.⁸² Data collected by the National Center for Transgender Equality (“NCTE”) in their 2015 National Transgender Discrimination Survey (“2015 Survey”) shows large economic disparities between the surveyed TGNC population and the general U.S. population: “Nearly one-third (29%) of respondents were living in poverty, compared to 12% of the U.S. population. A major contributor to the high rate of poverty is respondents’ 15% unemployment rate—

⁷⁶ Spade, *supra* note 20, at 34–35.

⁷⁷ *Id.* at 35 (“Because such [privileged] figures shaped and continue to shape the ‘gay agenda,’ those [more extreme] issues do not receive the resources they warrant and require.”)

⁷⁸ *Id.* at 33.

⁷⁹ *Id.*; Marcus, *supra* note 75, at 245–246; see also *Getting Your Health Care Covered: A Guide for Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/health-coverage-guide> (last visited Oct. 18, 2019, 2:00 PM).

⁸⁰ Spade, *supra* note 20, at 33.

⁸¹ See Morgan Bassichis, Alex Lee, Dean Spade, *Building and Abolitionist Trans Movement with Everything We’ve Got*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX*. (Nat Smith & Eric A. Stanley eds., 2011); see also DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* 63–64 (2007) (“Indeed, current concerns about gay and lesbian marriage, spousal benefits, and so on, are deeply middle-class concerns and, while important, the focus on such issues has drowned out the insistence by other activists that gay and lesbian organizations also consider issues of poverty, welfare reform, and racism, which also have significant impact on gay- and lesbian-identified people.”).

⁸² See generally 2015 Survey, *supra* note 73; see also Spade, *supra* note 20, at 46 (“Trans populations are disproportionately poor because of employment discrimination, family rejection, and difficulty accessing school, medical care, and social services.”); *Violence Against the Transgender Community in 2019*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> (last visited Oct. 18, 2019, 2:06 PM).

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three times higher than the unemployment rate in the U.S. population at the time of the survey (5%).”⁸³ Additionally, in the year prior to participating in the survey, 30% of respondents who were employed reported “being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace due to gender identity and expression, such as being verbally harassed or physically or sexually assaulted at work.”⁸⁴ The 2015 Survey also indicates a “clear and disturbing pattern” of transgender people of color experiencing even deeper inequality than the white respondents.⁸⁵

When it comes to identity documents, the NCTE reported that only 11% of respondents have corrected their name and gender on all of their forms of identification, and 68% reported that none of their photo IDs indicated their correct name or gender.⁸⁶ This disparity is related to a lack of healthcare access. More than half (55%) of survey respondents who sought healthcare coverage for transition-related surgery—a procedure many states require proof of in order to update the gender marker on identification documents—were denied that coverage.⁸⁷ Cost of new identity documents is also a large barrier: 35% of those who have not changed their legal name and 32% of those who have not updated their gender demarcation reported having not done so because they could not afford it.⁸⁸

As is explored further below, RAD laws that are passed in states with Personal Preference Disposition of Remains laws theoretically provide enough formal protection to allow TGNC individuals to have their gender identity properly reflected on both their death certificates and in their funeral proceedings, but the laws fail to account for these day-to-day challenges. When so many in the TGNC community are focused on staying safe from violence, finding a job where they will not be harassed, and fighting with their insurance for coverage for gender-

⁸³ 2015 Survey, *supra* note 73, at 3.

⁸⁴ *Id.* at 11.

⁸⁵ The likelihood of poverty for transgender people of color ranged from 38% (black respondents) up to 43% (Latinx respondents) compared to 12% of the U.S. population as a whole. *Id.* at 4.

⁸⁶ *Id.* at 7. We should also consider that the requirements for updating one’s documentation vary wildly from state to state. As Dean Spade explains, [O]ne person born in New York and living in New York might have a birth certificate she cannot change from “M” to “F” because she has not had genital surgery; a driver’s license that correctly reflects “F” because she got a doctor’s letter; Social Security records that say “M” because she cannot produce evidence of surgery; a name change order that shows her new feminine name; and a Medicaid card that reads “F” because the agency had no official policy and the clerk felt the name change order and driver’s license were sufficient. Another person with the same medical evidence might have a completely different set of documents because she was born in California and currently lives in Massachusetts.

SPADE, *supra* note 20, at 79.

⁸⁷ 2015 Survey, *supra* note 73, at 8.

⁸⁸ *Id.* at 7.

affirming healthcare, can we really expect anyone to use their limited resources to affirmatively plan for their death—especially when those deaths are so often sudden or violent?

*B. Disposition of Remains Laws and their Impact on Bodily
Autonomy*

Understanding the basics of the day-to-day discrimination faced by TGNC individuals is crucial to understanding the shortcomings inherent in RAD laws. As this section explores, the law passed in California in 2014 and adapted by Illinois the next year relies on the false assumption that TGNC individuals want to, and are able to, gain access to gender affirming care. The laws also assume that TGNC individuals will take an affirmative step to expend their limited resources on planning for their funeral when the realities suggest that they often lack the basic resources needed to stay alive. This section will focus on the laws regulating funerals in California and Illinois, and the final section will analyze how New York can better serve its TGNC community.

California and Illinois both have Personal Preference disposition of remains laws.⁸⁹ Illinois' provides that "unless a decedent has left directions in writing for the disposition or designated an agent to direct the disposition of the decedent's remains," the responsibility flows to (1) an executor or legal representative of the decedent's estate, (2) the decedent's surviving spouse, (3) the decedent's adult children, and continuing down the line of potential individuals.⁹⁰ Similarly, California's disposition of remains statute provides that a decedent may either leave direct instructions regarding their body disposition preference, or designate an agent before allowing that right to flow to the decedent's next of kin.⁹¹

California's RAD act did not alter anything in California's disposition of remains laws: theoretically, any person in California already had the power to leave instructions as to their disposition preferences by making a written declaration.⁹² Instead, the legislators focused their attention on death certificates and amended Section 102875 of their Public Health Law.⁹³ The original Respect After Death Act starts by mandating that "a person completing the [death] certificate

⁸⁹ CAL HEALTH & SAFETY CODE § 7100 (2012); 755 ILL. COMP. STAT. 65/5 (2018).

⁹⁰ 755 ILL. COMP. STAT. 65/5 (2018).

⁹¹ CAL HEALTH & SAFETY CODE § 7100 (2012).

⁹² One can "direct, in writing, the disposition of his or her remains and specify funeral goods and services to be provided" so long as "the directions [are] set forth clearly and completely" and "arrangements for payment...have been made." CAL HEALTH & SAFETY CODE § 7100.1 (1998).

⁹³ Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)).

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shall record the decedent's sex to reflect the decedent's gender identity."⁹⁴ The process for filling out the death certificate varies slightly depending on whether an individual dies at home, in a hospital or nursing home, or in some other setting, but the "person completing the [death] certificate" is usually a licensed funeral director.⁹⁵ A funeral director in California will typically receive a body after an attending physician provides medical information about a death into California's Electronic Death Registration system.⁹⁶

In order to accomplish the RAD act's mandate, the law explains that an "informant" shall report the decedent's gender identity to the person filling out the death certificate. The term "informant" is not statutorily defined, but it refers to "a family member or anyone who can supply the necessary information" in order to complete the personal information about the deceased individual.⁹⁷ As discussed above, funeral directors are inclined to listen to a decedent's next of kin.⁹⁸ This means that if a TGNC decedent's long-time roommate or unmarried partner attempts to "inform" the funeral director about their loved one's true gender, they may be easily overridden by an unsupportive family member.

The law provides that anyone may present the person completing the death certificate with "a birth certificate, a driver's license, a social security record, a court order approving a name or gender change, a passport, an advanced health care directive, or proof of clinical treatment for gender transition, in which case the person completing the certificate shall record the decedent's sex as that which corresponds to the decedent's gender identity as indicated in that document."⁹⁹ This section of the law seems to be the legislature's attempt to protect against the scenario where an unsupportive family member attempts to override the decedent's other informant. However, the provision only provides an effective shield if (1) that the decedent was able to acquire gender affirming healthcare before they died and (2) that they used proof of that healthcare to update the gender markers on at least one of their identity documents. Alternatively, if no identity documents have been

⁹⁴ *Id.*

⁹⁵ NAT'L CTR. FOR HEALTH STATISTICS, PHYSICIANS' HANDBOOK ON MEDICAL CERTIFICATION OF DEATH 34 (2003), https://www.cdc.gov/nchs/data/misc/hb_cod.pdf (noting that "the funeral director is responsible for completion of the personal information about the decedent").

⁹⁶ *Death Certificate Instructions*, BAY AREA FUNERAL CONSUMER'S ASS'N, <http://www.ba-fca.org/DeathCertificateInstructions.html> (last visited Mar. 2, 2019, 3:52 PM).

⁹⁷ *Id.*; see also *Copy of State of California Certificate of Death*, BAY AREA FUNERAL CONSUMER'S ASS'N, <http://www.ba-fca.org/DeathCertificate.pdf> (last visited Jan. 18, 2019, 2:52 PM).

⁹⁸ See *supra* notes 58–59 and accompanying text.

⁹⁹ Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)).

updated, the decedent's roommate, partner, or friend must to access to medical documentation about the decedent's transgender status, if such documentation exists.

Finally, the law declares that if none of the listed identity or medical documents are presented, and if "the person with the right, or a majority of persons who have equal rights, to control the disposition of the remains" disagree with another informant as to the gender identity of the decedent, that the gender marker on the death certificate shall correspond with the gender declared by whoever is in control with the individual's disposition of remains.¹⁰⁰ This provision essentially codifies the funeral director's inclination to grant more weight to the decedent's legal next of kin than to another loved one.

California's RAD law was declared a major victory for the transgender community.¹⁰¹ Previously, an "informant" would provide the decedent's biographical information, and there was no route for anyone else to provide alternate information.¹⁰² Now that the RAD law is in effect, anyone may present the funeral director with a limited set of documents to influence whether an "M" or an "F" appears on the death certificate.¹⁰³

In practice, however, this law provides little protection, especially when considering how this new system would impact an average transgender individual. Without documentary evidence of a decedent's transgender status, "the person with the right, or a majority of persons who have equal rights, to control the disposition of the remains" have the power to declare the decedent's gender.¹⁰⁴ In other words, if an unmarried transgender individual dies before beginning a legal or medical transition, without providing directions as to their burial pursuant to California's Health and Safety Code section 7100.1, and without declaring "[a]n agent under a power of attorney for health care who has the right and duty of disposition" pursuant to California's Health and Safety Code section 7100(a)(1), their legal next of kin has the power to alter their gender.¹⁰⁵

Considering that 68% of TGNC individuals surveyed in 2015 reported that none of their identification documents correctly reflected

¹⁰⁰ *Id.*

¹⁰¹ *See, e.g., C.A. Governor Signs Respect After Death Act, supra* note 72.

¹⁰² Act of Sept. 23, 2002, ch. 827, 2002 Cal. Stat. 5252 (not explicitly providing any process by which a decedent's biographical information is to be recorded).

¹⁰³ Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)) (listing "a birth certificate, a driver's license, a social security record, a court order approving a name or gender change, a passport, an advanced health care directive, or proof of clinical treatment for gender transition" as acceptable documents).

¹⁰⁴ Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)).

¹⁰⁵ *Id.*

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their name and gender,¹⁰⁶ the list of documents that someone may present to the funeral director is too limited to allow for someone to present adequate proof of a gender transition in the face of unsupportive next of kin. Transitioning from one gender presentation to another is a primarily social endeavor (e.g., changing the way one dresses or styles their hair, asking close friends or family members to call them by a different name and/or different pronouns) rather than a legal or medical one. It is not uncommon for TGNC individuals to wait before expending financial resources to legally change their name or to begin medical treatment to affirm their gender with hormone replacement therapy or surgery.¹⁰⁷ This means that many transgender individuals do not have any documentation commemorating a transition.

If the decedent's informant is unable to provide documentation commemorating a gender transition, and the decedent's next of kin does not approve of their gender presentation, there is nothing the informant can do to override the next of kin's wishes. California's RAD law only allows for persons with equal rights to control the disposition of the decedent's remains to bring suit against one another to determine which of those persons shall have the power to assert the gender of the decedent:

[A]ny one of those persons [with the right to control the disposition of a decedent's remains] may file a petition, in the superior court in the county in which the decedent resided at the time of his or her death, or in which the remains are located, naming as a party to the action those persons who otherwise have equal rights to control the disposition and seeking an order of the court determining, as appropriate, who among those parties shall determine the gender identity of the decedent.¹⁰⁸

This judicial mechanism may be useful, for example, in situations where the right to determine the disposition is shared by the decedent's parents, one of whom may have accepted their child's gender while the other did not. But the mechanism does not allow for the decedent's friends or chosen family, who may know more about the decedent's wishes than their biological family, to protect their bodily autonomy.

Illinois passed its version of a RAD law in 2015.¹⁰⁹ Like

¹⁰⁶ 2015 Survey, *supra* note 73, at 7.

¹⁰⁷ *Id.* at 8. See also Spade, *supra* note 20, at 79–80 (“The vast majority of trans people do not undergo surgery, both because it is prohibitively expensive and because many people do not want or need it... According to a 2009 study, 80 percent of transgender women and 98 percent of transgender men have not undergone genital surgery. Because it is difficult to include people in prisons, people without secure housing, and other highly vulnerable people with exceptionally poor access to health care in such studies, I would suggest that these survey results may even overestimate the number of trans people who have genital surgery.”).

¹⁰⁸ CAL HEALTH & SAFETY CODE § 102875(a)(1)(C) (2018).

¹⁰⁹ Disposition of Remains Act, sec. 5, § 40, 2015 Ill. Laws 5821 (2015) (codified as amended

California's law, it did not amend the state's disposition of remains hierarchy.¹¹⁰ The law also did not amend the state's laws surrounding the gender demarcation on death certificates.¹¹¹ Instead, the Illinois RAD law clarified the directions a decedent can leave for their own funeral:

The directions may include instructions regarding gender identity, including, but not limited to, instructions with respect to appearance, chosen name, and gender pronouns, regardless of whether the person has obtained a court-ordered name change, changed the gender marker on any identification document, or undergone any transition-related medical treatment.¹¹²

As of this writing, this Illinois law is the only disposition of remains law that specifically notes that one's gender may be declared on funeral instructions regardless of any legal name-change or medical treatment. This statute is a step forward in acknowledging and planning for the difficulties TGNC individuals face in acquiring such things. However, the law still relies upon a transgender individual affirmatively planning for their own funeral. If someone dies before leaving funeral instructions, the same hierarchical structure that threatens to misgender a transgender decedent in California would do the same to a transgender decedent in Illinois.

IV. A PROPOSAL FOR NEW YORK STATE

The New York State legislature should adopt a modified version of California and Illinois's RAD laws to better serve New York's transgender population. The modified law would address both the gender demarcation on a decedent's death certificate and increase the likelihood that a decedent's "informant" would be able to counter the assertions put forth by the decedent's next of kin in cases where the decedent has not submitted a funeral agent form. The law would also introduce a more detailed funeral agent form, which would allow for all individuals to more thoroughly present their wishes. Finally, the modified law would direct state agencies to conduct a TGNC-inclusive public education campaign to increase awareness of individual rights after death and to advocate that the decedent is the funeral "consumer" rather than their next of kin or agent.

at 755 ILL. COMP. STAT. 65/40 (2015)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

A. New York's Current Statutory Framework

New York has a Priority of Decision law regulating funeral proceedings rather than a Personal Preference law like California or Illinois, but the statutorily provided Appointment of Agent form in New York includes a section that allows for someone to give specific instructions about their wishes to their Agent.¹¹³ Neither the law nor the form makes any direct reference to gender presentation or pronouns as is done in Illinois.¹¹⁴ Any individual would be permitted to make such specific instructions about their gender pronouns and presentation on their form, but the form could be improved by directly asking for someone to declare what pronouns they use. This change would make it clear that those wishes will be adhered to.

The laws in New York regulating death certificates includes no protections for transgender individuals, noting only that funeral directors shall “obtain the personal and statistical particulars required for the certificate of death from a competent person acquainted with the facts and qualified to supply them and enter them on the certificate together with the name and address of his informant.”¹¹⁵ The “competent person qualified to supply” this information is not defined, and there is nothing in the statutes or accompanying regulations to indicate what would happen if the decedent’s partner or friend disagrees with the person with the authority to control the disposition of the remains about the decedent’s “personal and statistical particulars.”¹¹⁶ As previously discussed, one can assume that a funeral director would adhere to the instructions of the “customer” (the decedent’s funeral agent or next of kin) over anyone else, even if not required by law to do so. Although the designation of “M” or “F” on one’s death certificate theoretically has no bearing on how one is presented for their funeral proceedings, whether a funeral director considers the decedent to be male or female will certainly have an impact on how the body is prepared if no other instructions are given.

B. Proposed Changes

The full text of the proposed changes can be read below in

¹¹³ N.Y. PUB. HEALTH LAW § 4201 (2018).

¹¹⁴ *Id.*

¹¹⁵ N. Y. PUB. HEALTH LAW § 4142 (2013).

¹¹⁶ *Id.*

Appendix A. The most important aspects are summarized and explained in this section. First, New York should create explicit protections for TGNC individuals by ensuring that their gender is appropriately recorded at death, regardless of whether they have been able to take affirmative action to medically or legally transition in life. As discussed above, a majority of TGNC individuals surveyed in 2015 had not undergone any medical or legal transition due to the multiple socioeconomic barriers in their path. Instead, many individuals will “socially” transition by dressing or styling their hair in new ways and by asking friends, family, and colleagues to call them by a new name and address them with different pronouns. Often, TGNC individuals will express their wishes by “coming out” on social media or other forum long before undertaking legal or medical action to commemorate their transition.

The New York legislature can address this problem by amending the public health law to add a new section—4142-a; Death Certificate: Decedent’s Gender Identity. Section 4142-a would add to the duties of the funeral director as currently defined in Public Health Law S. 4142. The definition for “gender identity” in this new section would mirror the one used in the recently passed Gender Expression Non-Discrimination Act (“GENDA”).¹¹⁷ GENDA, which passed both legislative houses in New York on Jan. 15, 2019, and was signed by Governor Cuomo on Jan. 25, 2019, defines “gender identity and expression” as “a person’s actual or perceived gender identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.”¹¹⁸ This section would also allow for a “non-binary” gender expression, denoted by the letter “X,” as is current practice for birth certificates in New York City¹¹⁹ and as is proposed by the Gender Recognition Act.¹²⁰

Like California’s RAD law, this new section would mandate that the funeral director “shall record the decedent’s sex on the death certificate to reflect the decedent’s gender identity.”¹²¹ Unlike California, however, this proposal would add more protections to TGNC New Yorkers by describing the procedure the funeral director should follow to accurately determine the decedent’s gender. First, the funeral director should look to any instructions on their Funeral Agent

¹¹⁷ Gender Expression Non-Discrimination Act, 2019 N.Y. SESS. LAWS ch. 4 (McKinney) (codified in scattered sections of N.Y. laws).

¹¹⁸ *Id.*

¹¹⁹ N.Y.C. LOCAL LAW 163 (2018).

¹²⁰ S. 56, 2019–2020 Legis. Sess. (N.Y. 2019); A.B. 3457B, 2019–2020 Legis. Sess. (N.Y. 2019).

¹²¹ *See* Respect After Death Act, ch. 631, 2014 Cal. Stat. 4231 (2014) (codified as CAL HEALTH & SAFETY CODE § 102875 (2018)); *infra*, app. A.

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Form pursuant to an amended Section 4201 of the public health law to see if the decedent has affirmatively declared their gender. If the form does not include the decedent's gender, the funeral director should defer to the informant or the person or persons with the right to control the disposition of remains. If a disagreement as to the decedent's gender arises, the funeral director may be presented with certain documents in order to ascertain the decedent's gender, just as is done in California. Unlike California, however, this proposal would emphasize that statements or declarations made by the decedent, such as voice recordings, journal entries, social media posts, or other documents that commemorate actions taken by the decedent to affirm their gender, should be given more weight than any un-updated identity documents. This change is intended to protect the TGNC decedents when their partner, roommate, or friend cannot gain access to any medical documentation commemorating a transition. It is more likely that someone will be able to find a social media post from "Coming Out Day" or a journal entry commemorating an intent to transition than that they will be able to find proof of healthcare.

Second, this proposal would turn New York from a Priority of Decision state to a Personal Preference state by amending Public Health Law section 4201. The amended section would state that a written form would "allow for any individual to provide written directions for their disposition or to designate an agent to direct the disposition" rather than simply permitting the designation of an agent.¹²² The amendment would also draw from the Illinois law and specify that "[t]he directions may include instructions regarding gender identity, including, but not limited to, instructions with respect to appearance, chosen name, and gender pronouns, regardless of whether the individual has obtained a court-ordered name change, changed the gender marker on any identification document, or undergone any gender affirming medical treatment."¹²³ Finally, this amended section would take the Illinois law one step further by adding language to the Disposition of Remains form to allow for the decedent to indicate the name and pronouns they would like to be used for them during their funeral proceedings.

Third, and perhaps most importantly, this proposal would add another new section to the Public Health Law—4201-a: Funeral Rights: Public Education—to bolster the new rights described in the amended section 4201. As discussed above, the major pitfalls in the RAD laws in California and Illinois, and the current funeral agent law in New York, are they only provide facial protection; the protections are largely inaccessible to the populations they purport to serve. As a practical

¹²² See *infra*, app. A.

¹²³ *Id.*

matter, one cannot take refuge in a law's protections if one does not know the law exists.

Public Health Law section 4201-a would draw inspiration from Local Law 190 of the City of New York for the year 2018.¹²⁴ That law was written to increase awareness about a requirement that all single-occupancy restrooms in the city to be made available for use by persons of any gender.¹²⁵ The original requirement had relied on public outreach to 311 to enforce the mandate, but the 311 received surprisingly few complaints about violations: the public could not reach out about a law they were not aware of.¹²⁶ To rectify that problem, local Law 190 of 2018 directs the city's Department of Buildings to coordinate with other city agencies to create a public education and outreach program. Similarly, the proposed Public Health Law section 4201-a would mandate the implementation of a statewide education and outreach program to increase awareness of individuals' rights to direct the disposition of their own remains, including their right to assert their gender during their funeral proceedings.

Finally, I must re-emphasize that legislation impacting TGNC individuals after they die should be preceded by legislation that impacts us while we are still alive. This proposal for funeral procedures and death certificates should follow the passage of the already-pending Gender Recognition Act, S. 56.¹²⁷ As of this writing, this bill has been assigned to the State Senate's Committee on Codes. If passed, the law would make it easier to change one's name and gender demarcation on driver licenses and birth certificates, and it would also add a non-binary gender option for both identification documents.¹²⁸ This proposal would complement the Gender Recognition Act by also allowing a non-binary gender option for death certificates.

V. CONCLUSION

The RAD laws that have passed around the country are a step forward for the TGNC community—whenever gender transition is commemorated by a governmental institution, it signifies that the community is growing closer to societal acceptance. However, these

¹²⁴ N.Y.C. LOCAL LAW 190 (2018).

¹²⁵ *Id.*

¹²⁶ *Transcript of the Minutes of the Committee on Housing and Buildings*, N.Y.C. Council, 2018–2021 Sess. (N.Y. 2018) (statement of Patrick Wehle, Assistant Comm'r for External Affairs at N.Y.C. Dep't of Bldgs.) (explaining that “the department has received very few complaints concerning” improper signage).

¹²⁷ S. 56, 2019–2020 Legis. Sess. (N.Y. 2019).

¹²⁸ *Id.*

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laws do not take into account the lived experiences of transgender and gender non-conforming individuals. The day-to-day lives of TGNC individuals are impacted by discriminatory barriers to gender recognition and medical treatment, along with threats of physical violence. These laws must be modified to account for the systemic challenges if they are to be effective.

In the first month of the 2019–2020 session, the New York state legislature passed two pieces of legislation intended to protect LGBTQ individuals: GENDA, described briefly above, and statewide protections against conversion therapy.¹²⁹ If the newly Democratic New York state legislature wants to continue working towards equality for TGNC individuals, it should next adopt the Gender Recognition Act, and then consider this modified RAD as complement to it.

¹²⁹ Nick Morrow, *New York Passes Gender Expression Non-Discrimination Act & Protections Against Conversion Therapy*, THE HUMAN RIGHTS CAMPAIGN: BLOG (Dec. 15, 2019) <https://www.hrc.org/blog/historic-ny-legislature-passes-gender-expression-non-discrimination-act-ban>; S. 1047, 2019–2020 Legis. Sess. (N.Y. 2019); S. 1046, 2019–2020 Legis. Sess. (N.Y. 2019).

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DYING WHILE TRANS

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APPENDIX A

Changes to the NYS Public Health Law are noted with an underline; portions of the Public Health Law that should be redacted are enclosed in [brackets]. Unimpacted paragraphs are denoted with ellipses.

AN ACT to amend the public health law in relation to enacting the “Respect After Death Act.”

Section 1: Short title. This act shall be known and may be cited as the “Respect After Death Act”.

S 2. The public health law is amended by adding a new section 4142-a to read as follows:

S 4142-a. Death Certificate; Decedent’s Gender Identity. 1. As used in this section, the following terms shall have the following meanings, unless the context otherwise requires:

(a) “Gender identity” means a person’s actual gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.

(b) “Informant” means the person reporting the death to the funeral director, undertaker, or person having charge of the body of a deceased person.

(c) “Non-binary” means any gender identity that is not strictly male or female, and shall be denoted as “X”.

(d) “Person” means a natural person eighteen years of age or older.

(e) “Individual” means a natural person, regardless of age.

2. In each case the funeral director, undertaker or person having charge of the body of a deceased individual shall record the decedent’s sex on the death certificate to reflect the decedent’s gender identity.

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3. If the decedent has not left directions for the disposition of their remains including a declaration of gender identity pursuant to Section 4201, the following persons may be consulted to determine the decedent's gender identity:

- (a) The informant; or
- (b) the person or persons with the right to control the disposition of remains pursuant to Section 4201.

4. If the consulted individuals are in disagreement as to the gender identity of the decedent, the funeral director, undertaker or person having charge of the body may be presented with the following documents in order to ascertain the gender identity of the decedent:

- (a) Statements or declarations by the decedent, including but not limited to (i) voice recordings, (ii) journal or diary entries, (iii) posts on social media, or (iv) electronic communications;
- (b) proof of clinical treatment for gender transition or gender-affirming therapy;
- (c) an advanced directive;
- (d) a court order approving a name or gender change;
- (e) proof of clinical treatment for gender transition; or
- (f) a birth certificate, driver's license, social security record, or

5. The goal of consulting the documents listed in subsection four is to ascertain the wishes of the decedent. As such, documents communicating statements or declarations by the decedent, or documents commemorating actions taken by the decedent to affirm their gender, shall be given the most weight.

6. If a document specified in subsection four is not presented and a majority of persons who have equal rights to control the disposition of the remains pursuant to Section 4201 do not agree with the gender identity of the decedent as reported by the informant or the individuals with whom the decedent had shared a home immediately prior to death, any one of those individuals may file a petition, in the supreme court in the county in which the decedent resided at the time of their death, or in which the remains are located, seeking an order of the court determining, as appropriate, who among those parties shall determine the gender identity of the decedent.

7. The person completing the death certificate in compliance with subsection two is not liable for any changes or costs arising from claims related to the sex of the decedent as entered on the certificate of death.

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S 3. Section 4201 of the public health law is amended to read as follows:

1. As used in this section, the following terms shall have the following meanings, unless the context otherwise requires:

...

(E) “Individual” means a natural person, regardless of age.

2. . . .

(c) The person in control of disposition, pursuant to this section, shall faithfully carry out the [directions] wishes of the decedent to the extent lawful and practicable, including consideration of the financial capacity of the decedent’s estate and other resources made available for disposition of the remains. The person in control of disposition shall also dispose of the decedent in a manner appropriate to the moral and individual beliefs and wishes of the decedent provided that such beliefs and wishes do not conflict with the directions of the decedent. The person in control of disposition may seek to recover any costs related to the disposition from the fiduciary of the decedent’s estate in accordance with section eighteen hundred eleven of the surrogate’s court procedure act.

...

3. The written instrument referred to in paragraph (a) of subdivision two of this section is intended to allow for any individual to provide written directions for their disposition or to designate an agent to direct the disposition, including cremation, of the person’s remains. The directions may include instructions regarding gender identity, including, but not limited to, instructions with respect to appearance, chosen name, and gender pronouns, regardless of whether the individual has obtained a court-ordered name change, changed the gender marker on any identification document, or undergone any gender affirming medical treatment. The directions may be modified or revoked only by a subsequent writing signed by the individual. The person otherwise entitled otherwise to control the disposition of a decedent’s remains under this act shall faithfully carry out the directions of the decedent to the extent that the decedent’s estate or the person controlling the disposition are financially able to do so. The written instrument may be in substantially the following form, and must be signed and dated by the decedent and the agent, if one is so named, and properly witnessed:

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DIRECTIONS FOR DISPOSITION OF REMAINS
[APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF
REMAINS]

I, (Your LEGAL name and address) being of sound mind, willfully and voluntarily make known my desire that, upon my death, the disposition of my remains shall be as follows. [controlled by. (name of agent)

With respect to that subject only, I hereby appoint such person as my agent with respect to the disposition of my remains.

The name I will be referred to in all funeral proceedings shall be:

The pronouns that shall be used to refer to me in all funeral proceedings shall be:_____

My body is to be cremated: [] YES [] NO

I hereby appoint (name of agent) to ensure that my wishes are carried out upon my death.

AGENT:

Name:

Address:

Telephone Number:

Statement by witness (must be 18 or older)

...

S. 4. S 2. The public health law is amended by adding a new section 4201-a to read as follows:

S 4201-a. Funeral Rights; Public Education. 1. As used in this section, the following terms shall have the following meanings, unless the context otherwise requires:

(a) "Gender identity" means a person's actual gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.

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(b) “Non-binary” means any gender identity that is not strictly male or female.

2. The commissioner shall establish and implement an education and outreach program to increase awareness of individuals’ rights to direct the disposition of their own remains, including their right to assert their gender identity during their funeral proceedings, as set forth in section 4201 of the Public Health Law.

3. In establishing and implementing the education and outreach program required by subsection two of this section, the commissioner shall seek the cooperation of the Department of Education, the Division of Consumer Protection, and the Office of the Aging.