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On Transgender Students, Do the Right Thing in the Right Way

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A man stabs a woman to death in a crowded store. Dozens of people see him do it. For good measure, he then confesses on tape. Should he be tried for murder, or should society skip the trial and just lock him up?

Most people would agree he should be tried despite his overwhelmingly obvious guilt. A nation of laws ought to abide by them. Besides, skipping the trial in this case would set a dangerous precedent. People might want to skip the trial in the next murder—where guilt isn't quite so clear-cut.

Here's another scenario: A woman stabs herself to death in a crowded store. Dozens of people see her do it, but nobody tries to stop her. Someone then writes to a federal employee, asking if the failure to stop a suicide qualifies as murder. He says yes, even though the law is silent on the matter. Should the witnesses be charged with murder based merely on his say-so?

These are abstract hypotheticals, but they have a real-world parallel in the case of Gavin Grimm—a transgender student in Gloucester, Va. Last week the Supreme Court agreed to hear his case.

There's a long backstory, but the upshot is that the Gloucester school system doesn't want to let Grimm, who is anatomically female but who identifies as a male, use the boys' restroom. Grimm has sued, claiming the policy violates federal law prohibiting sex discrimination in public schools.

That question is hard enough to answer as it is, because Title IX does not spell out how to treat transgender students; when it was written, the concept had yet to appear. In Grimm's case, the question has been muddled further because the Department of Education has essentially rewritten the law by fiat. The department's view that transgender students must be treated according to their gender identity, rather than their biological sex, was first voiced in a letter.

Last January James Ferg-Cadima, an acting deputy assistant secretary for policy in the Office of Civil Rights, sent a three-page letter in reply to a query from Emily Prince, a regulatory lawyer and transgender activist. In his letter, Ferg-Cadima said schools "generally must treat transgender

students consistent with their gender identity." The department subsequently reiterated the position in a "Dear Colleague" letter issued jointly with the Justice Department.

So to get back to the hypotheticals: On matters of regulatory interpretation, the courts generally defer to the executive agencies, under doctrines known as Chevron and Auer. This can cause—and has caused—immense problems. As an amicus brief filed by the Cato Institute in the Grimm case points out, gratuitous judicial deference to agency interpretation undermines bedrock principles of the rule of law.

First, the law should give clear and fair warning—that is, people should be able to figure out in advance if they are breaking it or not. But if an agency can change regulations simply by writing a letter to a private individual, then the only people who know what the law actually says are the bureaucrats in charge of enforcing it. The law thus becomes subject to their arbitrary whim.

Second, letting agencies rewrite the law at whim undermines the separation of powers. Those who write the laws are not supposed to enforce them, too. That is why we have three branches: Legislators create laws, agencies apply them, and courts settle disputes about them. If an agency can rewrite the law at will simply by issuing a letter, then agencies can "both write the regulations they are charged with enforcing and later declare just what the ambiguous words of those regulations say, with little-to-no oversight by the courts."

In making these points, Cato stresses that it does not support Gloucester's policies on transgender students—or for that matter Grimm's request that the courts strike the policy down. Its concern has to do with the scope of executive power. There are supposed to be checks and balances. Procedures ought to be followed.

In this instance, the right way to craft rules about transgender students is to draft a proposal and submit it through the normal rule-making process—which includes public notice, comment, and so forth.

An even better way to go about it would be congressional legislation amending the 1972 law so that law-makers, rather than law-appliers, craft the new rules.

It's worth noting that the ACLU—which represents Grimm—takes a similar posture regarding the bedrock question of how to accommodate transgender students. The ACLU says "that question may ultimately warrant this Court's attention, but this is the wrong case at the wrong time. Consistent with its usual practices, the Court should allow the issue to continue percolating in the lower courts until a more appropriate vehicle arrives." For now, it just wants the court to defer to the Education Department and let Grimm use the boys' bathroom.

If and when Congress or the courts do get to the bedrock question, they should rule in favor of the Gavin Grimms of the world. Transgender individuals present no threat to anyone, and their accommodation can be managed with simple measures such as enclosed bathroom and changing stalls that protect both their privacy and the privacy of others. A few modest measures like those would hardly obliterate every distinction between the sexes.

Treating transgender people with respect and dignity is the obviously right thing to do. But even obviously right things need to be done the right way.