

# FROM JACK TO JILL: GENDER EXPRESSION AS PROTECTED SPEECH IN THE MODERN SCHOOLHOUSE

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## ABSTRACT

*In recent years, transgender adults in the entertainment world have capitalized on their public platform to advocate for and increase awareness about issues affecting the transgender community. Yet even with the emerging cultural understanding of this community, there is a noticeable absence of a voice for transgender youth, a particularly vulnerable segment of this misunderstood population. Children—often as young as four or five—are more commonly proclaiming to be “born in the wrong body.” In addition to being subject to intolerable bullying and harassment by their peers, transgender youth face an uphill battle in public schools because educators are unprepared to handle the logistics of their transition process, which includes a prolonged period of living in all aspects as the opposite sex.*

*First, this article acknowledges the quagmire plaguing public schools that serve a transgender population. When and to what extent should schools intervene when children in their care are confronted with gender identity issues? What responsibilities do schools have to protect and educate both those children facing gender identity issues and those children who are impacted by their peers’ non-conforming gender expression? Finally, and most significantly, how should schools address the daily logistics affecting transgender students, including bathroom and locker room designation, which have historically been determined by a student’s biological sex?*

*Second, this article analyzes the current legal landscape governing issues affecting transgender youth in public K-12 schools. Although there is a burgeoning recognition in the law of rights for sexual choices and identities that are non-traditional, the current law is insufficient in dealing with the practical and logistical concerns that schools serving transgender students face on a daily basis.*

*Next, the article advances a novel argument that demands more robust protections for a transgender student’s gender expression. It submits that a transgender student’s expressive conduct (including her desire to use the restroom that corresponds with her gender identity) is speech that falls within the protective umbrella of the First Amendment. Since a transgender student’s outward expression of gender conveys an important message to others about that student’s identity, and because fitting in and being accepted are so vital to a transgender youth’s psychological well-being, a transgender student’s*

*expressive conduct is undoubtedly “speech” as defined by long-standing First Amendment jurisprudence.*

*Lastly, the article cautions that schools must not yield to the impermissible “heckler’s veto” by silencing a transgender student’s peaceful speech simply because that speech is unpopular. Instead, by modeling inclusiveness and awareness for students’ differences, school officials are in a unique position to affect a significant change in the negative attitudes held toward transgender youth.*

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## INTRODUCTION

Our love of lockstep is our greatest curse, the source of all that bedevils us. It is the source of homophobia, xenophobia, racism, sexism, terrorism, bigotry of every variety and hue, because it tells us there is one right way to do things, to look, to behave, to feel, when the only right way is to feel your heart hammering inside you and to listen to what its timpani is saying.<sup>1</sup>

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The 1999 hit science fiction movie *The Matrix* follows the double life of a gifted and inquisitive computer hacker named Neo as he explores the blurred lines between a computer-simulated fictitious world and a harsh, futuristic reality.<sup>2</sup> *The Matrix* won four Academy Awards, as well as several other accolades, including a Best Director Saturn Award for its famous writer and director, Lana Wachowski.<sup>3</sup>

In 2012, Lana spoke publicly about her own dual reality, when she confessed to the world her lifelong struggle with gender identity and her attempt at suicide as a teenager.<sup>4</sup> As a forty-seven-year-old transgender<sup>5</sup> woman, who had lived as a man named Larry until 2002, Lana recounted a life of inner turmoil, feeling as if she was stuck in a proverbial no-woman's land between socially accepted gender classifications—possessing a “powerful gravity of association” towards the female sex, yet feeling as if she “[did not] belong” in her body as a biological man with traditional male anatomy.<sup>6</sup>

Lana's account of her life stuck between two genders parallels the duality of *The Matrix*. Just as Neo was presented with the life-altering choice of whether to swallow the blue pill, which offered the security and comfort of the status quo,

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implementation of sound anti-discrimination and anti-bullying policies and the treatment of transgender and gender non-conforming students, experiences which have informed this article. My deepest gratitude to Mark Killenbeck for his feedback, wisdom, and invaluable comments on earlier drafts, to Steve Sheppard and Terri Day for their insight and guidance, to Josh Edwards and James Depper, my hard-working research assistants, for their contributions, and to Kertis Weatherby for his unwavering support.

1. ANNA QUINDLEN, *LOUD AND CLEAR* 224 (2d ed. 2005).

2. *THE MATRIX* (Warner Bros. 1999); see also *The Matrix* (1999), IMDB, <http://www.imdb.com/title/tt0133093> (last visited May 29, 2015).

3. See *The Matrix* (1999): Awards, IMDB, <http://www.imdb.com/title/tt0133093/awards> (last visited May 29, 2015).

4. See Jerry Portwood, *Lana Wachowski Explains Struggles With Being Trans, Suicide Plan*, *OUT MAGAZINE* (Oct. 24, 2012), <http://www.out.com/entertainment/popnography/2012/10/24/lana-wachowski-cloud-atlas-suicide-trans> (reporting that Lana admitted to contemplating suicide on a subway platform as a teenager); Cavan Sieczkowski, *Larry Wachowski Transgender: 'Matrix' Director Reveals Transition to Lana Wachowski*, *HUFFINGTON POST* (July 30, 2012), [http://www.huffingtonpost.com/2012/07/30/matrix-director-sex-change-larry-wachowski\\_n\\_1720944.html](http://www.huffingtonpost.com/2012/07/30/matrix-director-sex-change-larry-wachowski_n_1720944.html) (describing Lana's transition announcement).

5. Many of the cases, articles, and other sources cited herein erroneously refer to transgender individuals as “transgendered” individuals. The socially accepted modifier for individuals whose gender identity differs from the sex designation they were assigned at birth is “transgender,” not “transgendered.” See *Transgender 101*, *GAY & LESBIAN ALLIANCE AGAINST DEFAMATION*, <http://www.glaad.org/transgender/trans101> (last visited May 2, 2015). Although the distinction is subtle, transgender individuals and advocates make clear and firm arguments that “transgendered” is an inappropriate label. See, e.g., Joanne Herman, *Transgender or Transgendered?*, *HUFFINGTON POST* (Mar. 11, 2010), [http://www.huffingtonpost.com/joanne-herman/transgender-or-transgende\\_b\\_492922.html](http://www.huffingtonpost.com/joanne-herman/transgender-or-transgende_b_492922.html) (explaining that the term “transgendered” is morphologically incorrect and implies that “something happened” to people to make them “transgendered” and “denie[s] the person's dignity of being born that way.”). Throughout this article, I will refer to individuals whose gender identities differ from the sex they were assigned at birth as “transgender” individuals.

6. See THR Staff, *Lana Wachowski's HRC Visibility Award Acceptance Speech (Transcript)*, *THE HOLLYWOOD REPORTER* (Jan. 24, 2012, 5:00 AM), <http://edit.hollywoodreporter.com/news/lana-wachowskis-hrc-visibility-award-382177>.

or the red pill, which, although unknown, offered the potential for truth and clarity, so too Lana faced her own choice: to continue to live in the ill-fitting, yet socially-accepted, gender classification with which she was born, or to bravely break through societal norms to claim her own truth. Afflicted with a crisis of self-identity since she was a child, Lana embraced her inner voice and chose to live as a woman.<sup>7</sup>

In recent years, transgender children as young as five and six years old have grabbed the attention of the media.<sup>8</sup> Josie Romero was only six years old when she proclaimed herself to have been born in the wrong body.<sup>9</sup> At her young age, Josie, who was assigned the male sex designation on her birth certificate, changed her name from “Joe” to “Josie,” and lived as a girl from that point forward.<sup>10</sup>

Many children like Josie, who have gender dysphoria,<sup>11</sup> experience deep conflict over their gender assignments.<sup>12</sup> Despite the societal expectations resulting from their physiological and anatomical presentation, young children are bravely claiming their own gender identity and pushing social norms to their limits.

These narratives raise important and timely questions. Many of these questions are currently unanswerable. For example, how young is too young for a child to begin questioning his or her assigned sex?<sup>13</sup> At what age are children able to comprehend and accept differences in the gender identities and gender expression of their peers?

7. *Id.*

8. See, e.g., Petula Dvorak, *Transgender at Five*, WASH. POST, May 20, 2012, at A1; *Our America with Lisa Ling: Transgender Child: A Parent's Difficult Choice* (Oprah Winfrey Network television broadcast Feb. 22, 2011), available at <https://www.youtube.com/watch?v=S5P9kUz0yO0> (last visited May 29, 2015).

9. See *Transgender Children: How Young Is Too Young?*, PARENT SOC'Y, <http://www.parentssociety.com/news-2/transgender-children-how-young-is-too-young/> (last visited Jan. 2, 2015).

10. See *id.*

11. The *Diagnostic and Statistical Manual of Mental Disorders* (“the DSM”) was recently amended to diagnose transgender people with “gender dysphoria,” which reflects the emotional distress that can result from “the incongruence between one’s experienced/expressed gender and one’s assigned gender.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-V] (defining “gender dysphoria”).

12. See, e.g., Dvorak, *supra* note 8, at A1 (Kathryn began insisting she was a boy at age two); Alan B. Goldberg, *Born with the Wrong Body*, ABC NEWS (Apr. 25, 2007), <http://abcnews.go.com/2020/story?id=3072518&page=1> (Riley envied her twin sister’s female anatomy as early as age two.); Madison Park, *Transgender Kids: Painful Quest to Be Who They Are*, CNN.COM (Sept. 27, 2011), <http://www.cnn.com/2011/09/27/health/transgender-kids/index.html> (Tammy told her parents that she was a girl through sign language when she was three years old.).

13. See Barbara J. King, *Can Children Know, at Age 2, They Were Born the ‘Wrong Sex’?*, NPR.ORG (May 24, 2012), <http://www.npr.org/blogs/13.7/2012/05/24/153285061/can-children-know-at-age-2-they-were-born-the-wrong-sex>; cf. Clifford J. Rosky, *No Promo Hetero: Children’s Right to be Queer*, 35 *Cardozo L. Rev.* 425, 432 (2013) (arguing that “every child has a constitutional right to be queer”).

Still, many other critical questions, especially within the public school context, can and must be answered. When and to what extent should schools, standing *in loco parentis*,<sup>14</sup> intervene when children in their care are confronted with these issues? What responsibilities do schools have to protect and educate both those children facing gender identity issues and those children who are impacted by their peers' non-conforming gender expression? Finally, and most significantly, how should schools address the daily logistics affecting transgender students, including bathroom and locker room designation, sex designation on student records, and eligibility for interscholastic sports, all of which are currently determined exclusively by a student's biological sex?

Having come to the consciousness of society and the legal system, these logistical issues warrant judicial intervention, but high courts have declined to confront the difficult questions.<sup>15</sup> Consequently, schools struggling to balance the rights of individual students against the impact of a transitioning student's gender expression are left tackling the tough questions blindly.

In response to this predicament facing K-12 schools across the United States, this article advances a novel legal argument that demands more robust protections for a transgender student's gender expression. Because a transgender student's outward expression of gender (including her desire to use the restroom that corresponds with her gender identity) conveys an important message to others about that student's identity, her expressive conduct should be treated as speech that falls within the protective umbrella of the First Amendment. Accordingly, school officials must not improperly silence a transgender student's expressive conduct simply because the message conveyed (i.e., "I identify as a girl, even though I was born with male genitalia.") makes them uncomfortable.

This article proceeds in five parts. Part I will present a fictional paradigm, reflecting the struggles and fears of a modern transgender youth. In doing so, Part I will also consider the practical and logistical concerns that schools face on a daily basis with respect to the treatment of transgender students. Part II of this article will contemplate the linguistic background within which these issues arise

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14. *In loco parentis* (literally, "in place of the parent") is a legal concept that places the state in a quasi-parental or custodial relationship to its citizens. In the educational context, school officials have been deemed to stand *in loco parentis* to students in their care. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J., concurring) ("Through the legal doctrine of *in loco parentis*, courts upheld the right of schools to discipline students, to enforce rules, and to maintain order.").

15. *Cf., e.g., Smith v. Fields*, 132 S. Ct. 1810 (2012) (mem.) (refusing to review the Seventh Circuit's decision that Wisconsin's Inmate Sex-Change Prevention Act, a 2005 Wisconsin law prohibiting sex reassignment surgery for inmates, was unconstitutional under the Eighth and Fourteenth Amendments), *denying cert. to* 653 F.3d 550 (7th Cir. 2011); *Littleton v. Prange*, 531 U.S. 872 (2000) (mem.) (refusing to consider an appeal from a ruling that a transgender woman lacked standing to bring a claim as a surviving spouse under Texas wrongful death and survival statutes), *denying cert. to* 9 S.W.3d 223 (Tex. App. 1999).

and are discussed. Stigmatization can be conveyed through language.<sup>16</sup> Therefore, as schools, courts, and legislatures begin to adopt rules for addressing the concerns of transgender students, value-neutral terminology must be adopted. Part III will present an overview of the current federal legal landscape. Part IV will summarize the relevant legal response to the increasing threat of violence and harassment targeted at transgender youth at the state level. Invoking the First Amendment, Part V will propose an alternative argument that should be advanced to buttress a public school's responsibility to respect and protect a transgender student's gender expression. In conclusion, this article will offer a roadmap for resolving the issues facing transgender youth in the modern schoolhouse.

## I.

### FROM JACK TO JILL –

#### A TRANSFORMATIVE STORY OF A TRANSGENDER STUDENT'S PLIGHT

To illustrate the struggles and challenges facing both transgender children and public school administrators, I have created the fictional character "Jill." Jill's story is loosely based on the struggles and fears of real-life transgender students.

##### A. *Infancy and Early Childhood*

Let's imagine that "Jack," the first-born son of Linda and John Miller, was born in the summer of 1998 in the State of "Harmony." Based on his physical appearance and the normal development of traditional male sex organs, Jack was assigned the male sex designation on his official birth certificate and named "John Patrick Miller, Jr." by his parents. At the age of three, Jack began to proclaim his femininity, demonstrating strong preferences for traditional female-oriented toys and clothes. On Jack's fourth birthday, he asked for a pink tutu. After blowing out his birthday candles, Jack told his parents that his birthday wish was to be made into a girl, just like his younger sister. A year later, Jack demanded to be called "Jill" and would only answer to the corresponding female pronouns. Linda and John obliged and, from that point forward, referred to their first-born son as Jill, just as she wished.

When Jill turned seven, the Miller family consulted a psychiatrist. The psychiatrist diagnosed Jill with gender dysphoria<sup>17</sup> and recommended that she

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16. See Frédéric Mégret, *Practices of Stigmatization*, 76 LAW & CONTEMP. PROBS. 287, 300–02 (2013) (describing the use of stigmatizing language in criminal trials as a means of branding the accused through the connotations and implications of specific words and phrases); Susan U. Philips, *Language and Social Inequality*, in A COMPANION TO LINGUISTIC ANTHROPOLOGY 474, 480–81 (Alessandro Duranti ed., 2004) (describing feminist critiques of the use of language to derogate women).

17. Gender dysphoria is marked by a strong, verbalized desire to live as a gender different from the gender which an individual is assigned at birth, often manifesting in "strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one

attend both individual and family therapy on a weekly basis. Throughout the next four years, Jill's therapist came to know Jill and the Miller family well. He was struck by Jill's unwavering insistence that she was a girl and that her penis "did not fit" on her body.

### B. Adolescence

When Jill turned eleven and puberty set in, she became clinically depressed and suicidal. One Sunday afternoon, the Millers found Jill in the bathroom bleeding from her left wrist, with a kitchen knife, still wet with blood, in her right hand.<sup>18</sup> Out of concern for her safety, Jill's psychiatrist prescribed a strong anti-depressant, and Jill quickly stabilized.

At this point, as directed by her therapist, Jill began to live in all aspects as a girl.<sup>19</sup> She dressed as a girl, wore her hair long, and began hormone injection therapy. Jill began to feel an overwhelming sense of relief that she could outwardly express her true self to others.

While she had a few close friends, Jill struggled to maintain a social network. At times, she felt alone and misunderstood.

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has feelings and reactions typical of the other gender." AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA FACTSHEET 1 (2013), available at <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>; see also DSM-V, *supra* note 11, at 451–52.

18. A staggering forty-one percent of transgender persons attempt suicide. JAIME GRANT, LISA A. MOTTET & JUSTIN TANIS, NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT ON THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2, 82 (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf). For an example of transgender youth suicide, see *Vigil Held at UNC Charlotte for Transgender Student Who Committed Suicide*, TIME WARNER CABLE NEWS (May 9, 2013), [http://www.twcnews.com/archives/nc/triangle-sandhills/2013/05/9/vigil-held-at-unc-charlotte-for-transgender-student-who-committed-suicide-NC\\_693895.old.html](http://www.twcnews.com/archives/nc/triangle-sandhills/2013/05/9/vigil-held-at-unc-charlotte-for-transgender-student-who-committed-suicide-NC_693895.old.html). Kate, a University of North Carolina student who was born as a male but identified as female, committed suicide after suffering intolerable harassment at the Charlotte campus. See *id.* Similarly, in 2010, Chandler Barnwell, a ninth grade special education student at Parkview Arts & Sciences Magnet School, committed suicide after suffering extreme bullying and harassment based on his "failure to fit the regular gender stereotypes." Estate of Barnwell *ex rel.* Barnwell v. Watson, 44 F. Supp. 3d 859, 860 (E.D. Ark. 2014) (internal quotation marks omitted).

19. The typical stages of gender transformation commonly referred to as the Benjamin standards of care, involve a multi-step process. First, the individual contemplating a sex change usually undergoes hormonal therapy under the supervision of a psychiatrist or psychologist. Next, the individual is instructed to live for at least a year in all respects as the gender with which she identifies, in order to ensure she is comfortable with the new lifestyle. The gender transformation process culminates with sexual reassignment surgery. See, e.g., WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 59–61 (2012) [hereinafter STANDARDS OF CARE], available at [http://admin.associationonline.com/uploaded\\_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf](http://admin.associationonline.com/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf); O'Donnabhain v. Comm'r, 134 T.C. 34, 38 (2010) (describing the "triadic" treatment of the Benjamin standards of care); Louis J. Gooren, *Care of Transsexual Persons*, 364 NEW ENG. J. MED. 1251, 1252 (2011) (arguing that hormonal therapy should be preceded and accompanied by at least a year of living as the opposite sex). For transgender children and adolescents, irreversible surgery is also delayed until the patient reaches the age of majority. See STANDARDS OF CARE, *supra*, at 17–21.

The Millers retained an attorney from the American Civil Liberties Union (“ACLU”) to represent them in their discussions with the Harmony City School District, where Jill attended school. In the fall of 2012, the Millers and their attorney met with the principal at the Harmony City High School to discuss Jill’s transition. The Millers made multiple demands of the District in order to ease Jill’s transition.

Having never served a self-identified transgender student, the District had not confronted the issues raised by the Millers before. The District had no policy dictating its treatment of transgender and gender non-conforming students and no precedent for how to handle the Millers’ requests. The District’s attorney sought guidance from the State Education Department (“SED”), but SED was no help, refusing to issue policy because of the controversy surrounding the issues. Thus began the legal and practical conundrum in the Harmony City School District.

First, the Millers requested that the District maintain the confidentiality of Jill’s transgender status. Pursuant to the Family Educational Rights to Privacy Act (“FERPA”), in schools receiving federal funding, parents and students have the right to have personally identifiable information in their education records, except “directory information,” kept confidential.<sup>20</sup> On a state-by-state basis, there may be more emphatic privacy laws that protect against the disclosure of personal information, including medical and mental health information.<sup>21</sup> Notwithstanding the lofty privacy goals inherent in these laws, in reality, certain school officials must be advised of a transgender student’s status for the student’s own protection.<sup>22</sup>

With these dueling goals, the question became how the school district could maintain Jill’s privacy while simultaneously ensuring student safety and implementing school policy. With no guidance available, the Millers worked with the District to create a list of acceptable District staff members and teachers who would be informed of Jill’s status. The Millers also agreed to the disclosure of Jill’s transgender status to the extent such disclosure was necessary to protect Jill from imminent danger.

The Millers also insisted that school officials refrain from using the name “Jack” and refer to Jill by the appropriate female pronouns. Because it was not uncommon for Harmony students to request to be called a name other than the one that appeared on their official school records, the District treated the Millers’

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20. 20 U.S.C. § 1232g (2012).

21. See Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL’Y L. & ETHICS 327, 330–40 (2002) (describing the state constitutional, statutory, and common law protections against health information sharing among health care providers).

22. *Cf. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002) (considering the privacy interest at stake when schools condition student participation in after-school activities on drug tests and stating that “[a] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety”).



request as any other nickname request. As such, the District agreed to advise those personnel on the parties' "approved list" to adopt the name Jill as well as corresponding feminine pronouns. The District beseeched the Millers to be tolerant of inadvertent slips or honest mistakes while teachers and staff adjusted to the change. Both parties were cooperative and quickly complied with their responsibilities.

Next, the Millers demanded that the school retroactively amend Jill's school records to reflect her female gender. Under FERPA, parents may request an amendment of any school records that they consider "inaccurate, misleading, or otherwise in violation of the privacy rights of students."<sup>23</sup> The decision to amend ultimately rests with the school, and parents opposing the school's decision can request a hearing.<sup>24</sup> The District ultimately refused to change the sex designation on Jill's official records, fearing that such amendment would preempt the District's objection with respect to any subsequent sex or gender challenge.

While all of these practical and logistical considerations are important and necessitate immediate resolution, this article will focus on Jill's final and most sensitive request, that the District permit her to use the girls' restroom. The "great bathroom debate,"<sup>25</sup> one of the most divisive and controversial issues typically raised by transgender students,<sup>26</sup> quickly created a rift between the Millers and the District.

The District's student handbook dictated that students use the restroom that corresponds with the sex indicated on official school records (which matched the sex identified on the student's birth certificate). Reluctantly, as a compromise, the District offered Jill access to the single-stall, unisex bathrooms in the large and sprawling high school building. The Millers felt that it was impractical and physically impossible to restrict Jill's use to the single-stall unisex bathrooms in

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23. 20 U.S.C. § 1232g(a)(2) (2012).

24. *Id.*; U.S. DEP'T OF EDUC., FERPA GENERAL GUIDANCE FOR STUDENTS 2 (2011), available at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf> ("While a school is not required to amend education records in accordance with an eligible student's request, the school is required to consider the request. If the school decides not to amend a record in accordance with an eligible student's request, the school must inform the student of his or her right to a hearing on the matter. If, as a result of the hearing, the school still decides not to amend the record, the eligible student has the right to insert a statement in the record setting forth his or her views. That statement must remain with the contested part of the eligible student's record for as long as the record is maintained.").

25. The "great bathroom debate" is a term I use in characterizing the controversy over whether transgender individuals should be allowed to use the bathroom that corresponds with their gender identity.

26. See *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); Robert F. Bukaty, *Bathroom Ban Violated Transgender Student's Rights: Court*, NBC NEWS (Jan. 31, 2014, 4:52 AM), [http://usnews.nbcnews.com/\\_news/2014/01/31/22520422-bathroom-ban-violated-transgender-students-rights-court](http://usnews.nbcnews.com/_news/2014/01/31/22520422-bathroom-ban-violated-transgender-students-rights-court) (discussing *Doe*); David Stout, *Transgender Teen Awarded \$75,000 in School Restroom Lawsuit*, TIME ONLINE (Dec. 3, 2014), <http://time.com/3615599/transgender-student-restroom-lawsuit-maine> (same); see also Casey Hoke, *I'm a Transgender Teen and Which Restroom I Use Is None of Your Business*, HUFFINGTON POST (Jan. 29, 2015, 9:30 AM), [http://www.huffingtonpost.com/casey-hoke/transgender-bathrooms\\_b\\_6510862.html](http://www.huffingtonpost.com/casey-hoke/transgender-bathrooms_b_6510862.html).

the building, since there were only two, and neither was located near her classrooms. Instead, the Millers insisted that Jill be permitted to use the girls' restroom since she was, in all other aspects, living as any other high school girl. When it became evident that the parties would not amicably resolve the issue, the Millers filed a lawsuit in the Harmony State District Court, claiming that the District's refusal to allow Jill access to the girls' restroom violated the Harmony State Human Rights Law.<sup>27</sup>

### C. *A Culture of Violence Targeted at Transgender Youth*

On February 12, 2008, a cross-dressing, fifteen-year-old boy named Lawrence King was sitting peacefully in his school's computer lab when his fourteen-year-old classmate Brandon McNerney approached him and delivered two fatal shots into the back of his head.<sup>28</sup> During McNerney's criminal trial, at which he was tried as an adult, the defense lawyer advanced what has been called the "'gay panic defense,' where the defense argues that a gay person's sexual advances are so frightening that they lead the perpetrator to commit violence."<sup>29</sup> This strategy blames the victim and minimizes the bias-based motive driving most hate crime convictions.<sup>30</sup> McNerney ultimately pled guilty to second-degree murder and received a sentence of twenty-one years in prison.<sup>31</sup>

Threats of violence and harassment are highly prevalent realities for transgender youth in schools today.<sup>32</sup> In 2011, 705 transgender sixth- to twelfth-graders responded to the Gay, Lesbian & Straight Education Network (GLSEN)

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27. See, e.g., N.Y.C. ADMIN. CODE § 8-102(23) (2013).

28. See Hunter Stuart, *Gay Student's Flamboyant Behavior Blamed for his Murder*, HUFFINGTON POST (Nov. 23, 2011), [http://www.huffingtonpost.com/2011/11/23/lawrence-king-gay-murder\\_n\\_1109047.html](http://www.huffingtonpost.com/2011/11/23/lawrence-king-gay-murder_n_1109047.html). It is unknown whether King self-identified as transgender or whether he was just exploring with cross-dressing. Nonetheless, Lawrence's non-conforming gender expression was what made him the target of this heinous crime.

29. Erik Jens Gold, *The Lawrence King Case: In Court, Has the Bullied Become the Bully?*, TIME ONLINE (Aug. 25, 2011), <http://content.time.com/time/nation/article/0,8599,2090287,00.html>.

30. *Id.*

31. Catherine Saillant, *Gay Teen's Killer Takes 21-Year Deal*, L.A. TIMES, Nov. 22, 2011, at A4. For another example of tragic violence against a gender questioning teen, see Emery Cowan, *A Boy Remembered*, DURANGO HERALD (June 11, 2011, 8:44 PM), <http://durangoherald.com/article/20110612/NEWS01/706129875>. A sixteen-year-old from Cortez, Colorado, Fred Martinez told his family that he was "two-spirited," a "Native American term describing those who engender a male spirit and a female spirit." *Id.* On the night of June 16, 2001, Martinez disappeared after attending the Ute Mountain Roundtop Rodeo and an after-party. *Id.* Five days later, Martinez's body was found in a desert canyon on the edge of Cortez. *Id.* Investigators later charged eighteen-year-old Shaun Murphy with Martinez's death. *Id.* A friend was caught disposing of Murphy's bloody clothing, and Murphy bragged about "beat[ing] up a fag" that night. Electa Draper, *Tip Led to Arrest in Cortez*, DENVER POST, July 12, 2001, at B1. He pled guilty to second-degree murder and was sentenced to forty years in prison. See Cowan, *supra*.

32. See Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Surgery*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 368-72 (2007).

National School Climate Survey, one of the few annual studies of the experiences of LGBT students in America.<sup>33</sup> Eighty percent of transgender students reported feeling unsafe at school because of their gender expression<sup>34</sup> and sixty-four percent of LGBT students reported being verbally harassed in the past year because of their gender expression.<sup>35</sup> Of the 8,584 students surveyed, 56.9% of students heard teachers or other staff making negative comments about a student's gender expression at school,<sup>36</sup> and 20.1% of students reported being physically assaulted at school because of their gender or gender expression.<sup>37</sup> More than half of the students surveyed reported being a victim of cyberbullying in the past year.<sup>38</sup> Finally, of the students that did not report harassment or assault in the past year, 37.9% of them did not report the harassment because they doubted school staff intervention would be effective or worthwhile.<sup>39</sup>

Peer violence targeted at transgender youth is a real threat in schools today.<sup>40</sup> This is because a child's impressions begin to form in early development, as children take cues from parents and other adult authority figures in developing social attitudes.<sup>41</sup> Schools seeking to combat this problem should model tolerance for transgender students.<sup>42</sup> When stereotypes and prejudices are

33. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS (2011), available at <http://www.glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf>. The sample consisted of 8584 students between the ages of thirteen and twenty residing in all fifty states and the District of Columbia. *Id.* at 9. In order to participate in the study, students had to be at least thirteen years of age, have attended a K–12 school in the United States during the 2010–2011 school year, and identified as lesbian, gay, bisexual, transgender, or other non-conforming sexual orientation or gender identity. *Id.* Of the 8584 students surveyed, 15.3% (approximately 1299) of them identified as transgender or “other gender” (including, for example, androgynous or genderqueer). *Id.* at 10.

34. *Id.* at xix.

35. *Id.* at 24 fig.1.14.

36. *Id.* at xiv, 16.

37. *Id.* at 25 fig.1.16.

38. *Id.* at 26 fig.1.17.

39. *Id.* at 28. A quarter of the students believed that either “nothing or nothing effective” would be done to address the situation even if they reported it. *Id.* A ninth grade transgender student in Texas believed that school staff “wouldn’t do anything because it’s part of the school’s environment. People in my town actually think it’s funny when someone harasses and assaults people for being different. If you’re different it’s seen as your fault for whatever happens to you.” *Id.* A twelfth grade student who identified as having a gender identity of “other” explained that “[t]he staff doesn’t take harassment seriously. I come from a small town in Illinois where the mindset is to just suck it up and try to fit in.” *Id.* at 29.

40. See *id.* at 23.

41. Cf. J. Kenneth Morland, *The Development of Racial Bias in Young Children*, 3 THEORY INTO PRACTICE 120, 122–24 (1963) (explaining that children’s racial notions are not “natural,” but instead are learned through exposure to the attitudes of adults and cultural cues); *Precious Children: Teaching Young Children to Resist Bias*, PBS.ORG, [http://www.pbs.org/kcts/preciouschildren/diversity/read\\_teaching.html](http://www.pbs.org/kcts/preciouschildren/diversity/read_teaching.html) (last visited May 2, 2015).

42. See Douglas E. Abrams, *Bullying Victimization as a Disability in Public Elementary and Secondary Education*, 77 MO. L. REV. 781, 803 (2012) (“[S]chools are entrusted with a unique role

deeply embedded in social norms, stereotypes are passed from parent or teacher to child. This cycle of learned bigotry reinforces and perpetuates the deep-seated prejudices transgender youth face in schools.

Transgender youth are misunderstood simply because of who they are and how they outwardly express their gender identity. Since a transgender student's outward expression of her gender identity is expressive conduct—an extension of her self that deserves First Amendment protection—the time is ripe for government action to provide the imprimatur of law to protect this vulnerable group.

## II.

### SEMANTICS MATTER: GOVERNING LABELS AND CLASSIFICATIONS

As illustrated by Jill's story, the Harmony City School District, like most public school districts, was reluctant to modify its labeling of Jill as male. Nonetheless, all of the District's decisions, which impacted Jill as a transgender student, flowed from the District's use of language in classifying her as either male or female. Undoubtedly, a student's classification in one of two historically recognized sex categories is a controlling factor upon which schools rely in making decisions about gender-specific behavior.

In a legal system where gender classifications have historically been binary,<sup>43</sup> one of the most significant challenges in carving out rights for transgender individuals is how they are defined by governing law.<sup>44</sup> As such, sex

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in our society to mold children into responsible and wise adult citizens.” (quoting *In re Douglas D.*, 626 N.W.2d 725, 742 (Wis. 2001)).

43. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (“In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.”); see also Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 505 (2000) (“For inheritance, legitimacy, paternity, succession to title, and eligibility for certain professions to be determined, modern Anglo-Saxon legal systems require that newborns be registered as either male or female.” (quoting Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCI., Mar./Apr. 1993, at 20, 23)); Patricia Gagné, Richard Tewksbury & Deanna McGaughey, *Coming Out and Crossing Over: Identity Formation and Proclamation in a Transgender Community*, 11 GENDER & SOC'Y 478, 503 (1997) (“At the institutional level (in the military, economic, religious, legal, political, and medical realms) individuals' roles, rights, and responsibilities are determined by gender, under the assumption that gender is indicative of sex (or sexuality) and that labor must continue to be divided on that basis.”).

44. Courts struggle to fit transgender individuals' claims under laws that were made under the assumption that individuals fall into one of two camps (a binary system). See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (refusing to extend protections of Title VII to transgender individual claiming sex discrimination and holding that Title VII's prohibition against discrimination based on “sex, in its plain meaning, implies [only] that it is unlawful to discriminate against women because they are women and against men because they are men,” and not to discriminate “against a person who has a sexual identity disorder, i.e., . . . a person born with a female body who believes herself to be a male . . .”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (refusing to extend Title VII protections to transgender individuals);

and gender terminology is critical in determining the remedies and protections available for transgender youth.<sup>45</sup>

Society, and ultimately the law, must recognize that the terms “sex” and “gender” are not always interchangeable.<sup>46</sup> Sex traditionally refers to an individual’s “assigned” or “biological sex,” “[t]he physiological and anatomical characteristics of maleness and femaleness with which a person is born or that develop with maturity.”<sup>47</sup> Infants are usually assigned to a sex category at birth on the basis of physical characteristics, primarily the appearance of the external genitals, and that sex designation appears on birth certificates and other legal documents.<sup>48</sup> An individual’s biological sex and assigned sex almost always correspond; there are, however, instances in which a newborn appears to possess either both male and female genitalia or sexual anatomy that does not seem to fit within the traditional definitions of female or male.<sup>49</sup> In Jill’s case, her biological sex (and thus her assigned sex) is male.

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James v. Ranch Mart Hardware, Inc., 881 F. Supp. 478, 481 (D. Kan. 1995) (denying Title VII protection to transgender individuals).

45. See Robyn B. Gigl, *Transgender: Understanding Who the “T” in “LGBT” Are and Their Unique Legal Issues*, N.J. LAW., June 2013, at 10, 10 (“To understand the legal issues faced by the transgender community it is critical to understand the terminology.”).

46. Megan Bell, *Transsexuals and the Law*, 98 NW. U. L. REV. 1709, 1716–17 (2004).

47. Chase Catalano, Linda McCarthy & Davey Shlasko, *Transgender Oppression Curriculum Design*, in *TEACHING FOR DIVERSITY AND SOCIAL JUSTICE* 219 app. 10D (Maurianne Adams, Lee Anne Bell & Pat Griffin eds., 2d ed. 2007) (noting that markers of sex include internal and external reproductive organs, chromosomes, hormones, and body shape); cf. KATE BORNSTEIN, *MY GENDER WORKBOOK: HOW TO BECOME A REAL MAN, A REAL WOMAN, THE REAL YOU, OR SOMETHING ELSE ENTIRELY* 26–27 (1997) (“Anything that categorizes people is gender, whether it’s appearance or mannerisms, biology or psychology, hormones, roles, genitals, whatever: if we’re trying to categorize or separate people out, it’s gender.”).

48. See, e.g., N.J. STAT. ANN. § 26:8-40.12 (West Supp. 2014) (requiring the State to issue an amended birth certificate to an individual who undergoes sex reassignment surgery and requests an amended certificate); HAW. REV. STAT. § 338-17.7 (2010) (similar); NEB. REV. STAT. § 71-604.01 (2009) (similar). These statutes illustrate that sex categorization is determined by the physical characteristics of an individual’s genitalia, as issuance of the amended certificates is contingent on an individual having her genitalia physically altered from that with which she was born. See *Radtke v. Misc. Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (“The assigned sex of an individual at birth is based only on observation of anatomy at birth, which itself may change when the individual reaches puberty.” (citing *In re Lovo-Lara*, 23 I. & N. Dec. 746, 752 (BIA 2005))).

49. “‘Intersex’ is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside. Or a person may be born with genitals that seem to be in-between the usual male and female types—for example, a girl may be born with a noticeably large clitoris, or lacking a vaginal opening, or a boy may be born with a notably small penis, or with a scrotum that is divided so that it has formed more like labia.” *Frequently Asked Questions, What Is Intersex*, INTERSEX SOC’Y N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Jan. 4, 2014); see also Robert Myles, *Germany Becomes First European Country to Recognize Third ‘Indeterminate’ Gender*, ALLVOICES (Aug. 18, 2013), <http://www.allvoices.com/contributed-news/15227099-germany-becomes-first-european-country-to-recognise-third-indeterminate-gender> (“The change in German law will allow the parents of so-called intersex babies, those whose

“Gender,” on the other hand, is a socially prescribed term that parallels the concepts of masculinity or femininity society expects to accompany one’s biological or assigned sex.<sup>50</sup> The term “gender identity” refers to that gender classification with which an individual identifies—an individual’s own sense of being male or female or something in between “whether or not that gender-related identity . . . is different from that traditionally associated with the person’s physiology or assigned sex at birth.”<sup>51</sup> For example, despite the fact that her assigned sex is male, Jill’s gender identity is female.

“Gender expression” refers to an individual’s “external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions.”<sup>52</sup> The term “gender” can also encompass several different meanings within the context of a particular law. For example, under the New York City Human Rights Law, “gender” is an inclusive term that encompasses a person’s “actual or perceived sex and . . . gender identity, self-image, appearance, behavior or expression.”<sup>53</sup> Because Jill was known as Jack and presented as a boy until she began her transition, Jill’s gender was most likely perceived by her peers as male. Her gender expression, however, does not conform to society’s traditional notions of male behavior.

As illustrated by Jill’s gender dichotomy, “gender non-conforming” typically refers to a non-traditional mapping of gender expression and biological or assigned sex.<sup>54</sup> In other words, a gender non-conforming individual is an individual whose gender identity differs from his or her biological or legal sex, or who expresses gender in a way that does not conform to stereotypical binary expectations. Jill may be perceived as gender non-conforming because she is biologically a boy who wears dresses, enjoys applying her mother’s makeup, and expresses more traditional female behavior. Finally, the term “transgender” is an umbrella term encompassing the state of one’s gender identity or expression

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physical make-up constitutes a sexual ambiguity, to declare an infant’s sex as ‘unknown’ on their birth certificate.”).

50. See CTR. FOR SOCIAL JUST. EDUC. & LGBT COMMUNITIES, QUEERING OUR VOCABULARY: SEX, SEXUALITY, AND GENDER TERMINOLOGY, available at [http://socialjustice.rutgers.edu/files/documents/Queering\\_Our\\_Vocabulary.pdf](http://socialjustice.rutgers.edu/files/documents/Queering_Our_Vocabulary.pdf).

51. CONN. GEN. STAT. ANN. § 1-1n (West 2013). Federal statute defines “gender identity” as “actual or perceived gender-related characteristics.” Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249(c)(4) (2012). Many states provide protection against discrimination on the basis of “gender identity,” including Connecticut, CONN. GEN. STAT. § 4a-60(a)(1) (2014); Hawaii, HAW. REV. STAT. § 489-3 (2014); Iowa, IOWA CODE § 216.6(1)(a) (2013); New Jersey, N.J. STAT. ANN. § 2C:16-1 (West 2008); New Mexico, N.M. STAT. ANN. § 28-1-7 (2014); Rhode Island, R.I. GEN LAWS § 28-5-7 (2014); Vermont, VT. STAT. ANN. tit. 21, § 495 (2014); and the District of Columbia, D.C. CODE § 2-1402.11(a) (2015).

52. N.Y.C. COMM’N ON HUMAN RIGHTS, GUIDELINES REGARDING “GENDER IDENTITY” DISCRIMINATION, A FORM OF GENDER DISCRIMINATION PROHIBITED BY THE NEW YORK CITY HUMAN RIGHTS LAW 1-2 (2014), available at [http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis\\_English.pdf](http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis_English.pdf).

53. N.Y.C. ADMIN. CODE § 8-102(23) (2013).

54. Franklin H. Romeo, *Beyond A Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 713 n.1 (2005).

being inconsistent with that individual's assigned sex at birth.<sup>55</sup> For example, a male-bodied person, like Jill, who identifies consistently and persistently over time as a girl is a transgender girl.

Historically, certain rights and privileges (i.e., bathroom use) have been based on a binary construction of sex, as opposed to gender. Currently, the law reflects a strictly male or strictly female viewpoint of individual rights.<sup>56</sup> But assigning rights based solely on an individual's assignment in one of two sex categories is misguided since gender, the more accurate indicator of individuality and self-identity, can in fact span a spectrum.<sup>57</sup> In recognition of this fact, the use of gender-neutral pronouns like "ze" and "hir" is becoming increasingly popular.<sup>58</sup> Implicit in such linguistic changes is the recognition that, as discussed in Part VI below, an individual's gender identity, and his or her resulting gender expression, is inherently a speech act, entitled to full First Amendment protection. Because conduct expressing one's gender identity is worthy of First Amendment protection, the first overarching principle that should guide policymaking for the transgender community is that "[e]veryone has a gender identity."<sup>59</sup>

### III.

#### LEGAL PROTECTIONS FOR TRANSGENDER INDIVIDUALS

"There is a nascent jurisprudence of transsexualism" in American law.<sup>60</sup> For decades, courts and tribunals have failed to decide these difficult, and often

55. See Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37 n.1 (2000).

56. See Gagné, Tewksbury & McGaughey, *supra* note 43, at 503–04.

57. *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, at 6 (Colo. Div. Civil Rights June 17, 2013) (citing Melanie Blackless, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne & Ellen Lee, *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151 (2000)), available at [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf) (discussing Fausto-Sterling's finding that "1 in 100 children are born with 'subtle forms of sex anatomy variations' that deviate from the standard male and female anatomy, some of which will not appear until later in life."); THE PRIDE EDUC. NETWORK, GENDER SPECTRUM: WHAT EDUCATORS NEED TO KNOW 5 (2011), available at <http://pridenet.ca/wp-content/uploads/the-gender-spectrum.pdf> (explaining that there are a range of gender identities between and outside the categories of male and female).

58. See, e.g., *Ze and Hir*, GENDER NEUTRAL PRONOUN BLOG (Jan. 24, 2010), <http://genderneutralpronoun.wordpress.com/tag/ze-and-hir>. Many families and institutions in Sweden have adopted the use of "hen," a gender-neutral Swedish pronoun. See Elizabeth Braw, *The Three Letter Word Driving a Gender Revolution*, NEWSWEEK (Sept. 29, 2014, 8:56 AM), <http://www.newsweek.com/2014/10/03/three-letter-word-driving-gender-revolution-272654.html>.

59. *Transgender People*, TEENSHEALTH, [http://kidshealth.org/teen/your\\_mind/body\\_image/transgender.html](http://kidshealth.org/teen/your_mind/body_image/transgender.html) (last visited May 29, 2015).

60. *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) (citing to the Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (Supp. II 1990), and several cases as support for this proposition).

divisive, issues.<sup>61</sup> As Jill’s story illustrates, schools are blindly navigating an unplowed terrain. Now, however, with transgender issues at the forefront of popular culture,<sup>62</sup> and violence targeted at transgender individuals at a higher rate than the rest of the LGBTQ community,<sup>63</sup> courts and lawmakers should respond through legal reform.

#### A. Title VII and Federal Case Law

There is currently no federal statute that expressly prohibits discrimination in employment or places of public accommodation on the basis of gender identity. Although bills aiming to establish explicit protections on the basis of sexual orientation and gender identity have been introduced in Congress nearly every year since 1994, no bill has yet passed both Houses.<sup>64</sup> Nonetheless, transgender individuals seeking redress for claims of discrimination in the workplace have found protection in Title VII of the Civil Rights Act of 1964 (“Title VII”).

Indeed, Title VII—the oldest and most comprehensive anti-discrimination statute prohibiting discrimination by private parties—is the first federal law that has been interpreted by the judiciary to recognize rights and protections for transgender individuals.<sup>65</sup> Federal courts, from the 1970s through the 1990s,

61. See cases cited *supra* note 15.

62. One of the first films with a transgender central character, *Boys Don’t Cry*, explored issues of gender identity, heterosexism, and gender dysphoria. See *BOYS DON’T CRY* (Fox Searchlight Pictures 1996); see also *All My Children* (ABC television broadcast 1970–2011) (featuring the character “Zoe,” a transgender woman, from 2006–2007); *Glee* (Fox Broadcasting Company television broadcast 2009–2015) (featuring the character “Wade ‘Unique’ Adams,” a transgender woman, from the third season to the final season); *It’s Always Sunny in Philadelphia* (Fox Entertainment Group television broadcast 2005–present) (featuring the character “Carmen,” a transgender woman); *Orange Is the New Black* (Netflix, Inc. original series 2013–present) (featuring the character “Sophia Burset,” a transgender woman); *Transparent* (Amazon Studios original series 2014–present) (featuring a family that discovers their father is transgender).

63. See James Michael Nichols, *Transgender Murders 50 Percent Higher Than Gays, Lesbians in July*, HUFFINGTON POST (Aug. 27, 2013, 4:20 PM), [http://www.huffingtonpost.com/2013/08/27/trans-murder-rates\\_n\\_3824273.html](http://www.huffingtonpost.com/2013/08/27/trans-murder-rates_n_3824273.html); NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2013, at 58–60 (2014), available at, [http://avp.org/storage/documents/2013\\_ncavp\\_hvreport\\_final.pdf](http://avp.org/storage/documents/2013_ncavp_hvreport_final.pdf).

64. See, e.g., Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (passed by the Senate but not the House of Representatives).

65. Cf. Katherine Kraschel, *Trans-Cending Space in Women’s Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 HARV. J. L. & GENDER 463, 470 (2012) (“[S]everal cases that help define the scope of Title IX protection of transgender individuals were litigated under Title VII of the Civil Rights Act.”). Title IX, which prohibits discrimination based on sex in educational services and programs for any school that receives federal funding, has been interpreted to prohibit student-on-student harassment, but only where the funding recipient is deliberately indifferent to the harassment, the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); see also *Howell v. Austin Indep. Sch. Dist.*, 323 F. App’x 294, 295 (5th Cir.



generally denied sex-discrimination claims brought by transgender people.<sup>66</sup> In recent years this trend has changed; the First, Sixth, and Ninth Circuit Courts of Appeals,<sup>67</sup> as well as a number of federal district courts, have held that federal sex-discrimination laws such as Title VII offer limited protection to transgender or gender non-conforming individuals.<sup>68</sup> These transformative circuit cases follow the Supreme Court's landmark ruling in *Price Waterhouse v. Hopkins*,<sup>69</sup> which permitted a sex discrimination claim under Title VII to proceed on the grounds that a plaintiff's firm denied her partnership because of her failure to conform to traditional sex stereotypes.<sup>70</sup>

*Hopkins*, the plaintiff in *Price Waterhouse*, was a female senior manager at Price Waterhouse who was passed over for partnership at the prominent accounting firm.<sup>71</sup> The putative reason was her "aggressiveness" and lack of interpersonal skills, but the Supreme Court detected sexism in the comments of

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2009) (holding that the student did not establish that the school district had actual knowledge of the student's sexual abuse as required under Title IX).

66. *See, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, . . . a person born with a female body who believes herself to be male."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977) (rejecting claim by transgender plaintiff that her termination violated Title VII's prohibition on sex discrimination); *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 480–81 (D. Kan. 1995) (holding that there was no actionable claim of sex discrimination under Title VII or the Kansas Act Against Discrimination because the employee, an "anatomically male transsexual," failed to show membership in a protected class).

67. *See, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that a transsexual police officer "established that he was a member of a protected class" for purposes of Title VII sex-discrimination claim "by alleging discrimination . . . for his failure to conform to sex stereotypes"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572–75, 577 (6th Cir. 2004) (holding that transsexual city fire department employee stated a valid sex-discrimination claim under either Title VII or the Equal Protection Clause of the Fourteenth Amendment); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not "dresse[d] like a man"); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that transsexual prisoner could state a claim under Gender Motivated Violence Act, because "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.>").

68. *Compare Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008) ("Courts consistently find that transgender[] persons are not a protected class under title VII *per se*." (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007))), *Ulane*, 742 F.2d at 1084, and *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), with *Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) ("[I]t may be time to revisit . . . the [rejected] conclusion . . . that discrimination against transsexuals *because they are transsexual* is 'literally' discrimination 'because of . . . sex.'"). However, even in courts that have not found *per se* Title VII protections for transgender individuals, some have accepted the theory that Title VII does protect transgender individuals who can demonstrate that they were subject to discrimination, not because they are transgender, but because of sex stereotyping. *See, e.g.*, *Etsitty*, 502 F.3d at 1222 n.2; *Smith*, 378 F.3d at 571–75; *Lopez*, 542 F. Supp. 2d at 660; *Schroer*, 424 F. Supp. 2d at 211.

69. 490 U.S. 228 (1989).

70. *Id.* at 250–51.

71. *Id.* at 233.

her evaluators.<sup>72</sup> For example, partners described her as “macho” and stated that she “overcompensated for being a woman.”<sup>73</sup> One partner even advised Hopkins that she could improve her chances of making partner if she would only “walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry.”<sup>74</sup>

The Court held that Title VII reaches claims of discrimination based on “sex stereotyping.”<sup>75</sup> The Court emphasized that:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>76</sup>

This case carved out a new right under Title VII to be free from discrimination based on sex stereotyping. Sex stereotyping encompasses an employer’s discriminatory treatment of an employee based on that employee’s failure to conform to traditional gender roles and expectations.<sup>77</sup> Critically, Title VII and *Price Waterhouse* do not distinguish between transgender and non-transgender plaintiffs who fail to conform to traditional gender stereotypes.<sup>78</sup> In this fashion, *Price Waterhouse* opened the door to broader legal protections for transgender litigants.<sup>79</sup>

The Title VII gender line became even more blurred after transgender woman Diane Schroer interviewed while presenting as a man and was made an

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72. *Id.* at 234–35.

73. *Id.* at 235.

74. *Id.*

75. *See id.* at 251.

76. *Id.* at 251 (internal quotation marks omitted).

77. *See, e.g.,* *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004) (“discern[ing] stereotyping” in employer’s belief that a woman “cannot ‘be a good mother’ and have a job that requires long hours”); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that city firefighter, a biological male diagnosed with “Gender Identity Disorder,” was able to maintain sex stereotyping claim against the city, where he suffered discrimination based on the fact that he did not conform to notions of traditional male behavior).

78. *See Smith*, 378 F.3d at 574 (“[E]mployers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.” (internal citations omitted)).

79. *Cf. Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) (“[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.”); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (finding Title VII protections apply to harassment based on a belief that a person does “not conform with . . . ideas about what ‘real’ men should look or act like.”). *But see generally* Kimberly A. Yuracko, *Soul of a Woman: Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757 (2013) (rejecting the theory that the Court’s decision in *Price Waterhouse* provides ample protection for gender expression in the workplace).

offer of employment as a terrorism research analyst with the Library of Congress.<sup>80</sup> After informing the organization that she was in the process of transitioning from male to female and would be working as a woman, the Library rescinded Schroer's employment offer.<sup>81</sup> Schroer sued the Library of Congress for sex discrimination in violation of Title VII.

The District Court concluded that Schroer's "allegations of sex stereotyping d[id] not state a claim under Title VII."<sup>82</sup> Nonetheless, the court denied the Library of Congress's motion to dismiss "because discrimination against a transsexual may nevertheless violate Title VII's proscription of discrimination 'because of . . . sex.'"<sup>83</sup> The court noted that this holding was designed to "preserve[] the outcomes of the post-*Price Waterhouse* case law without colliding with the sexual orientation and grooming code lines of cases."<sup>84</sup>

Following *Price Waterhouse*, courts began to recognize Title VII discrimination claims "based on failure to conform to gender stereotypes."<sup>85</sup> The Sixth Circuit has clarified that, while earlier jurisprudence denied transgender individuals Title VII protection because they were considered victims of "gender" rather than "sex" discrimination, *Price Waterhouse* "established that Title VII's reference to 'sex' encompasses both the biological differences

80. Schroer v. Billington, 424 F. Supp. 2d 203, 205–06 (D.D.C. 2006).

81. *Id.* at 206.

82. *Id.* at 205.

83. *Id.* The *Schroer* court is one of only two federal courts to have explicitly stated that transgender people are protected because of their sex. The second is the lower court opinion in *Ulane v. Eastern Airlines, Inc.*, which stated that the judge "[f]ound by the greater weight of the evidence that sex is not a cut-and-dried matter of chromosomes, and that while there may be some argument about the matter in the medical community, the evidence in this record satisfies me that the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII." 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

84. *Schroer*, 424 F. Supp. 2d at 213.

85. *Id.* at 208; *see also, e.g.*, *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x. 492, 493 (9th Cir. 2009) ("[I]t is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women. Thus, [plaintiff] states a prima facie case of gender discrimination . . ." (internal citation omitted)); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior . . ."); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010) ("This Court concurs with the majority of courts that have addressed this issue, finding that discrimination against a transgendered individual because of their failure to conform to gender stereotypes constitutes discrimination on the basis of sex."), *aff'd*, 663 F.3d 1312 (11th Cir. 2011); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*7 (N.D. Ind. Jan. 5, 2009) (finding that transgender plaintiff "may succeed on her sex stereotyping claim if she can present sufficient evidence from which a rational jury could infer intentional discrimination"). *But see* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–24 (10th Cir. 2007) (explaining that discrimination on the basis of transgender status is not, in and of itself, discrimination "because of sex"); *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541, at \*5–6 (E.D. La. Sept. 16, 2002) (differentiating the plaintiff in *Price Waterhouse* from a transgender person because she "never pretended to be a man or adopted a masculine persona").

between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”<sup>86</sup>

*B. The ADA and the Rehabilitation Act – A Step Backward*

In 2008, federal anti-discrimination laws took a huge step backward when Congress passed large-scale amendments to the Americans with Disabilities Act (“ADA”).<sup>87</sup> Despite the wide-sweeping nature of the amendments, Congress preserved the exclusion from the ADA’s coverage of individuals suffering from “gender identity disorders.”<sup>88</sup> The 2008 amendments expanded the definition of the term disability in several important ways.<sup>89</sup> First, the rules of construction expressly state that the term disability “shall be construed in favor of broad coverage of individuals.”<sup>90</sup> Second, the amendments eased the definition of disability with the addition of a “regarded as” prong. Now, the Act requires only that an individual demonstrate that she was subject to a prohibited act because of an actual or perceived impairment, which removes the more onerous burden of proving that the perceived impairment limits or substantially limits a major life activity.<sup>91</sup> The amendments also broadened the definition of what constitutes a “major life activity” to include “major bodily functions,” such as “functions of the immune system, normal cell growth, digestive, bowel, [and] bladder.”<sup>92</sup> Finally, the 2008 amendments specified that the term “disability” includes “[a]n impairment that is episodic or in remission if it would substantially limit a major life activity when active,” and prohibited consideration of “ameliorative effects of mitigating measures” when assessing “whether an impairment substantially limits a major life activity.”<sup>93</sup>

Despite the fact that gender identity disorder is a condition that has long been recognized, diagnosed, and treated by the American Psychiatric Association,<sup>94</sup> the country’s most comprehensive disability discrimination

86. *Smith*, 378 F.3d at 573.

87. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

88. Compare 42 U.S.C. § 12211(b)(1) (2012) (excluding “transvestism, transsexualism, . . . [and] gender identity disorders” from the definition of disability), with ADA Amendments Act of 2008 (failing to amend this exclusion). See also Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 11 n.45 (2013) (citing 135 CONG. REC. S10753 (daily ed. Sep. 7, 1989)). For a detailed discussion about the 2008 exclusion of “gender identity disorder” from the ADA and the morally-charged sacrifice negotiated in Congress during the passage of the 2008 ADA amendments, see *id.* at 31–33.

89. Gordon Good, *The Americans With Disabilities Act: Short-Term Disabilities, Exceptions, and the Meaning of Minor*, 37 DAYTON L. REV. 99, 107–10 (2011) (explaining the purpose and effect of the expansion of the definition of “short-term disability”).

90. 42 U.S.C. § 12102 (2012).

91. *Id.*

92. *Id.*

93. *Id.*

94. Barry, *supra* note 88, at 9 n.34 (“The classification ‘Gender Identity Disorders,’ and the three diagnoses within that classification, ‘Transsexualism,’ ‘Gender Identity Disorder of Childhood,’ and ‘Atypical Gender Identity Disorder,’ first appeared in the DSM in 1980.”

statutes expressly exclude “transsexualism” and “gender identity disorders not resulting from physical impairments” from the list of protected disabilities.<sup>95</sup> Although the symptoms of gender dysphoria often become so severe that people can experience “clinically significant distress or impairment in social, occupational, and other important areas of functioning,”<sup>96</sup> federal laws prohibiting discrimination based on disability exclude conditions related to gender identity from their purview.<sup>97</sup>

This legal lacuna creates an interesting contradiction. Consider momentarily that Jill would not be defined as a “person with a disability” under the ADA based solely on her gender dysphoria,<sup>98</sup> even if the stress and anxiety resulting from her disorder caused her to become depressed. As long as the depression did not actually or impliedly inhibit a major life activity, as defined by the ADA, the underlying gender dysphoria would not itself qualify her as a person with a disability protected by the Act. Then assume, for the sake of argument, that Jill felt so uncomfortable using the boys’ bathroom, which the Harmony City School District designated for her use on the basis of her biological sex, that she ignored the urge to urinate and waited until the end of the school day to empty her bladder. Because she resisted the urge to urinate, Jill developed a painful bladder infection, for which she was hospitalized and treated by a urologist. If the severity of the bladder infection resulted in Jill developing a dangerous urological condition, and the condition interfered with a major life function, Jill would qualify as a person with a “disability” under the ADA.

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(citations omitted)). As defined in the DSM, gender identity disorder, now medically referred to as “gender dysphoria,” afflicts “people whose gender at birth is contrary to the one they identify with.” Am. Psychiatric Ass’n, *supra* note 17, at 1. “This diagnosis is a revision of DSM-IV’s criteria for gender identity disorder and is intended to better characterize the experiences of affected children, adolescents, and adults.” *Id.* In addition, the replacement of the word “disorder” with “dysphoria” in the diagnostic label is not only “consistent with familiar clinical sexology terminology, it also removes the connotation that the patient is ‘disordered.’” *Id.* at 2.

95. Federal Rehabilitation Act, 29 U.S.C. § 705(20)(F)(i) (2012); Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (2012); *see also* Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 182 (2005).

96. Am. Psychiatric Ass’n, *supra* note 17, at 1.

97. Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (2012); *see also* Jeannie J. Chung, *Identity or Condition?: The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, 21 COLUM. J. GENDER & L. 1, 14 (2011) (“At least eleven states have also excluded transgender individuals, either through common law or statute, from the protected class of ‘disability’: Indiana, Iowa, Louisiana, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Virginia. Conversely, eight states, either through state courts or administrative agencies, have granted standing to transgender individuals to claim protection under part or all of their disability anti-discrimination laws: Connecticut, Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington.” (internal citations omitted)).

98. Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (2012). *See* Johnson v. Fresh Mark, Inc., 98 F. App’x. 461, 462 (6th Cir. 2004) (holding that a pre-operative transgender woman diagnosed with “gender identity disorder” could not maintain a discrimination claim under the ADA against her employer, who refused to allow her to use the women’s restroom, because plaintiff was not “a person with a disability,” within the meaning of the Act).

The development of Jill's urological condition undoubtedly resulted from her underlying gender dysphoria, yet only after receiving a secondary medical diagnosis for her urological complications would Jill qualify as a person with a disability under the ADA. This deliberate exclusion unfairly disadvantages individuals suffering from the often-serious complications resulting from gender dysphoria. A simple amendment repealing the explicit exclusion of gender dysphoria from the definition of "disability" would resolve this unjust legal loophole.<sup>99</sup>

Admittedly, transgender individuals and advocates may take issue with the labeling of gender dysphoria as a "disability" under federal law. The labeling of individuals with gender dysphoria as "disabled" may indeed have additional implications and consequences besides potential relief for trans-plaintiffs, including the perpetuation of continued social stigmas targeted at transgender individuals. "When we call someone disabled, we make a statement, not just about that person's 'well-ness,' but about his or her well-being, indicating something about our belief in his or her ability to fulfill a measure of human potential or to achieve a certain degree of self-respect."<sup>100</sup> Despite these concerns, the ADA can provide relief for a variety of conditions, including severe and unusual complications resulting from pregnancy.<sup>101</sup> Just as not every pregnant woman suffers from severe and unusual complications during her pregnancy, not every transgender individual suffers from gender dysphoria. Gender dysphoria, instead, is simply the diagnosis that attaches to individuals manifesting the "clinically significant distress" associated with the conflict over their gender identity.<sup>102</sup> The ADA is one way to achieve a quick legal fix so that transgender individuals with a genuine need for an accommodation can find solace in the law.

Once Jill qualifies as a person with a disability under the ADA, must Harmony City School District provide her access to the girls' restroom? Alternatively, could the school satisfy its reasonable accommodation burden under the ADA by providing Jill access to a gender-neutral bathroom, perhaps a single-stall staff restroom or the restroom in the nurses' room? With little judicial precedent and scant agency guidance, schools all over the country are

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99. See *infra* p. 129 for a discussion of the proposed amendment to the ADA.

100. Adriene L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1451 (1994) (citing Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30, 37 (Martha C. Nussbaum & Amartya Sen eds., 1993)).

101. *Darian v. Univ. of Mass.*, 980 F. Supp. 77, 85 (D. Mass. 1997) ("By its terms, though pregnancy per se is not covered by the ADA, the Act does not necessarily exclude all pregnancy-related conditions and complications."). *But see Gorman v. Wells*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002) (stating that "the majority of federal courts hold that pregnancy-related complications do not constitute a disability under the ADA" and explaining that the condition must make the individual qualify for ADA protection aside from the fact that she is pregnant).

102. DSM-V, *supra* note 11, at 452.

tackling these issues unarmed, and their ad hoc policy-making puts them in unnecessary danger for liability.<sup>103</sup>

### C. Recent Legal Developments

In 2012, the Equal Employment Opportunity Commission (“EEOC”) strengthened the groundwork laid by *Price Waterhouse* in its groundbreaking decision in *Macy v. Holder*.<sup>104</sup> In *Macy*, the EEOC removed the distinction between “sex” discrimination and “sex stereotyping” discrimination,<sup>105</sup> holding that discrimination against an employee or potential employee based on the employee’s transgender status (also known as gender identity discrimination) is discrimination “because of sex” and is prohibited by Title VII.<sup>106</sup> This ruling opens the door for transgender plaintiffs to bring lawsuits against employers that have discriminatorily fired or failed to hire them based on their gender identity. It also lays the groundwork for the theory that transgender discrimination is sex discrimination because gender identity is an integral part of one’s sex.

On July 21, 2014, President Barack Obama signed an amendment to Executive Order 11478, furthering protection for employees of federal contractors and federal employees from discrimination on the basis of sexual orientation and gender identity.<sup>107</sup> This is the first Executive Order expressly prohibiting sexual orientation and gender identity discrimination by federal employers.<sup>108</sup> On August 19, 2014, the Department of Labor Office of Federal Contract Compliance Programs issued Directive 2014-02, which clarified agency

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103. See sources cited *supra* note 26.

104. See *Macy v. Holder*, E.E.O.C. Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

105. *Id.* at \*5 (“We find that the Agency mistakenly separated Complainant’s complaint into separate claims: one described as discrimination based on ‘sex’ (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as ‘sex stereotyping,’ ‘gender transition/change of sex,’ and ‘gender identity’; by the Agency as ‘gender identity stereotyping’; and finally by Complainant as ‘gender identity, change of sex and/or transgender status.’ . . . Each of the formulations of Complainant’s claims are simply different ways of stating the same claim of discrimination ‘based on . . . sex,’ a claim cognizable under Title VII.” (internal citations omitted)).

106. *Id.* (“[T]he term ‘sex’ encompasses both sex—that is, the biological differences between men and women—and gender.” (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) and *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004)).

107. See Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014) (substituting “sexual orientation, gender identity” for “sexual orientation”).

108. See *FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good For Business*, WHITEHOUSE.GOV., <https://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0> (last updated July 21, 2014); Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985 (final rule Dec. 9, 2014) (to be codified at 41 C.F.R. §§ 60-1, 60-2, 60-4, & 60-50), available at <http://webapps.dol.gov/federalregister/HtmlDisplay.aspx?DocId=27976&AgencyId=11>.

guidance prohibiting discrimination on the basis of sex to “include[] discrimination on the bases of gender identity and transgender status.”<sup>109</sup>

In 2009, President Obama made great strides when he signed into law the historic Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (“HCPA”), enacted as a rider to the National Defense Authorization Act.<sup>110</sup> The much-needed and long overdue HCPA prohibits willful violence targeted against another individual on the basis of his or her sexual orientation or gender identity.<sup>111</sup> The Act defines gender identity as “actual or perceived gender-related characteristics,” protecting not only those individuals who self-identify as transgender but also those individuals who are perceived as gender non-conforming.<sup>112</sup> Since its enactment in 2009, the law has withstood constitutional challenges by defendants indicted under its provisions<sup>113</sup> and religious activists<sup>114</sup> who disagree with the policy objective of the statute—namely, to help protect individuals from violence based on who they are.<sup>115</sup>

#### IV.

##### SCHOOL-SPECIFIC PROTECTIONS INCLUDING ANTI-BULLYING LAWS

While no federal laws directly address bullying in schools, almost all states, as well as the District of Columbia, have some form of anti-bullying law. Currently, Montana is the only state that has no anti-bullying laws or regulations.<sup>116</sup> Of the forty-nine states that do have protections, many of them do not enumerate specific personal characteristics that are covered, such as race,

109. See U.S. DEP’T OF LABOR, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, DIRECTIVE 2014-02, GENDER IDENTITY AND SEX DISCRIMINATION (Aug. 19, 2014), available at [http://www.dol.gov/ofccp/regs/compliance/directives/dir2014\\_02.html](http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html).

110. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190.

111. 18 U.S.C. § 249(a)(2)(A) (2012).

112. *Id.* § 249(c)(4).

113. See, e.g., *United States v. Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012) (upholding the HCPA against various constitutional challenges).

114. See, e.g., *Glenn v. Holder*, 690 F.3d 417, 419 (6th Cir. 2012) (holding that pastors lacked standing to maintain a pre-enforcement challenge of the HCPA on First Amendment grounds).

115. See 155 CONG. REC. S10772, S10773 (daily ed. Oct. 27, 2009) (statement of Sen. Patrick Leahy). Commenting on the passage of the Matthew Shepard Hate Crimes Prevention Act, Senator Leahy remarked, “I am proud that Congress has come together to show that violence against members of any group because of who they are will not be tolerated in this country.” *Id.*

116. See Kathleen Conn, *Best Practices in Bullying Prevention: One Size Does Not Fit All*, 22 TEMP. POL. & CIV. RTS. L. REV. 393, 419 (2013); *Policies & Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/#listing> (last updated Mar. 31, 2014) (interactive map showing states that do and do not have anti-bullying laws). However, the Montana Office of Public Instruction has published a model anti-bullying policy for Montana school districts to adopt or amend at their discretion. MONT. OFFICE OF PUB. INSTRUCTION, MODEL SCHOOL DISTRICT POLICY BULLYING HARASSMENT, INTIMIDATION, AND HAZING OF STUDENT, available at [http://www.opi.mt.gov/pdf/Bullying/ModelBully\\_FreePolicy.pdf](http://www.opi.mt.gov/pdf/Bullying/ModelBully_FreePolicy.pdf).



sex, or sexual orientation.<sup>117</sup> At least fifteen states and the District of Columbia have laws specifically prohibiting gender identity discrimination in public schools.<sup>118</sup> Many of these states include protections against cyber or electronic bullying.<sup>119</sup> Generally, in these states, school officials may not harass or allow others to harass a student based on the student's gender identity. In addition, several of these states require that school districts have a policy against harassment and bullying based on a list of characteristics that includes gender identity.<sup>120</sup>

Increasingly, schools and school districts have also adopted policies protecting transgender students from discrimination, providing that transgender students be allowed to use restrooms and locker rooms and participate in sports in accordance with their gender identity.<sup>121</sup> The laws in New York,<sup>122</sup> California<sup>123</sup> and New Jersey<sup>124</sup> offer some of the most robust protections,

117. *See, e.g.*, ALA. CODE § 16-28B-4 (LexisNexis 2012); ALASKA STAT. ANN. § 14.33.200 (West 2014); GA. CODE ANN. § 20-2-751.4 (2011); KAN. STAT. ANN. § 72-8256 (2013); MO. ANN. STAT. § 160.775 (West 2010); OHIO REV. CODE ANN. § 3313.666 (LexisNexis 2012); TEX. EDUC. CODE ANN. § 37.001 (West 2013); W. VA. CODE ANN. § 18-2C-1 (LexisNexis 2012).

118. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 33, at xvii. *See, e.g.*, ARK. CODE ANN. § 6-18-514 (2011) (prohibiting bullying based on “actual or perceived personal characteristic including without limitation . . . gender, gender identity, physical appearance, . . . or sexual orientation”); CAL. EDUC. CODE §§ 220, 234 (West 2012) (requiring school districts to adopt policies prohibiting discrimination on the basis of gender, gender identity, gender expression, and sexual orientation); N.J. STAT. ANN. §§ 18A:37-14, -15(b)(2), -17(a) (West 2012) (requiring school districts to adopt harassment and bullying prevention policies, and incorporating a provision defining harassment to include actions or statements motivated by gender identity or expression); N.Y. EDUC. LAW §§ 12–13 (McKinney 2013) (prohibiting discrimination by employees or students based on a person's actual or perceived sexual orientation, gender identity, or sex, and requiring all school districts to develop a policy outlining its anti-discrimination and harassment guidelines).

119. *See* STOPBULLYING.GOV, *supra* note 116 (providing links to state laws or policies which include “gender identity” in an enumerated list and electronic or cyberbullying provisions); IOWA CODE § 280.28(2)(b) (2013); MINN. STAT. §§ 121A.031(a)(2)–(3) (2014); N.H. REV. STAT. ANN. § 193-F:4(I) (2014); N.J. STAT. ANN. § 18A:37-14 (West 2014); N.C. GEN. STAT. § 115C-407.15(a) (2014).

120. These states include California, CAL. EDUC. CODE § 233(a)(1) (West 2012); Colorado, COLO. REV. STAT. § 22-32-109.1(2) (2014); Minnesota, MINN. STAT. ANN. §§ 121A.031(g), 121A.0695 (West 2007); and New York, N.Y. EDUC. LAW §§ 11(6), 13(5) (McKinney 2013).

121. *See, e.g.*, *San Francisco Unified School District Policy*, TRANSGENDER LAW, <http://www.transgenderlaw.org/college/sfusdpolicy.htm> (last visited Jan. 6, 2015).

122. Dignity for All Students Act, N.Y. EDUC. LAW §§ 10–18 (McKinney 2013). New York's Dignity for All Students Act (“DASA”) requires school districts to develop and adopt policies to create a school environment free of “discrimination” and “harassment,” *id.* at § 13(1), and expressly includes harassment on the basis of gender identity or expression, *id.* at § 11(6)–(7); create school training programs to enable employees to prevent and respond to discrimination or harassment, *id.* at § 13(2); and identify at least one staff person to be thoroughly trained to handle issues of discrimination, *id.* at 13(3). Schools are also required to incorporate lessons on civility, tolerance and diversity, including anti-bullying lessons, into all core curricula. *See* N.Y. EDUC. LAW § 801-a (McKinney 2013).

123. CAL. EDUC. CODE § 32228(b) (West 2013) (“It is . . . the intent of the Legislature that public schools have access to supplemental resources to combat bias on the basis of . . . gender identity, gender expression, or sexual orientation, . . . and to prevent and respond to acts of hate

including mandates that school districts adopt and implement sound policies protecting students from harassment or bullying based on their actual or perceived gender identity.<sup>125</sup>

While state anti-discrimination and anti-bullying laws serve the important public policy goals of creating a school environment of safety and acceptance and raising awareness for students' differences, these laws, as they currently exist, are insufficient. Anti-bullying laws govern the boundaries of peer-to-peer interactions. But they lack guidance for schools struggling to figure out how to protect transgender students' rights more broadly. As a result, there has been an upsurge in the amount of litigation either threatened or filed by transgender students or their parents against schools.<sup>126</sup> In the past year, state-level courts and tribunals have considered and decided a small number of these conflicts, and their decisions suggest a growing recognition for transgender students' equality.<sup>127</sup>

One significant decision is a June 2013 Colorado Division of Civil Rights determination finding that probable cause existed for Coy Mathis, a six-year-old transgender girl, to sue her school district based on its decision to ban her from the girls' restroom.<sup>128</sup> Coy was born with male anatomy, but she self-identified as a girl from the time she was eighteen months old.<sup>129</sup> Coy initially enrolled in

violence and bias-related incidents."); CAL. EDUC. CODE § 200 (West 2012) ("It is the policy of the State of California to afford all persons in public schools, regardless of their . . . gender identity [or] gender expression . . . equal rights and opportunities in the educational institutions of the state.").

124. N.J. STAT. ANN. § 18A:37-15(a) (West 2012).

125. See N.Y. EDUC. LAW § 13(1) (McKinney 2013); *id.* § 11(6) (defining gender to "include a person's gender identity or expression"); N.J. STAT. ANN. § 18A:37-14 (West 2014); CAL. EDUC. CODE § 234.1(a) (West 2012).

126. See, e.g., *Transgender Student May Wear Boy's Graduation Gown*, CBS PHILLY (May 6, 2013, 7:20 PM), <http://philadelphia.cbslocal.com/2013/05/06/transgender-student-may-wear-boys-graduation-gown> (reporting that, after involvement from the local ACLU, a transgender student would be permitted to wear a boy's gown to a high school graduation ceremony, but would still be referred to by his birth name Sierra, not his preferred name, Isaak); *Transgender Student Files Complaint After Being Banned from All-Male Dorm*, CBS CLEVELAND (Mar. 21, 2012, 10:20 AM), <http://cleveland.cbslocal.com/2012/03/21/transgender-student-files-complaint-after-being-banned-from-all-male-dorm> (reporting that a transgender student filed a complaint against Miami University after being told he could not reside in an all-male dorm).

127. See, e.g., *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 606 (Me. 2014) (holding a school's refusal to allow a transgender girl access to girls' communal restroom was discrimination on the basis of sexual orientation in violation of the Maine Human Rights Act). *But see* *Goins v. W. Grp.*, 635 N.W.2d 717, 723 (Minn. 2001) (finding that defendant's enforcement of its restroom designation policy and gesture of offering plaintiff a single-occupancy restroom did not violate Minnesota's statutory prohibition against sexual orientation discrimination).

128. See *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, at 1, 5 (Colo. Div. Civ. Rights, June 17, 2013), available at [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf). The Division ordered Coy Mathis and the Fountain-Fort School District 8 to undergo compulsory conciliation. *Id.* at 14. Such conciliation is a precondition to filing an action in a Colorado state court for discrimination. COLO. REV. STAT. § 24-34-306(14) (2014).

129. *Mathis*, Charge No. P20130034X, at 3.

the Fountain-Fort School District 8 (the “District”) as a boy and was known by the school community as a boy.<sup>130</sup>

In November 2011, an incident occurred in Coy’s kindergarten class that prompted a dialogue between the school district and the Mathises.<sup>131</sup> When Coy’s teacher asked the children in Coy’s kindergarten class to form two lines, with the girls in one line and the boys in the other, Coy joined the girls’ line.<sup>132</sup> Her teacher immediately corrected her and directed her to join the boys’ line.<sup>133</sup> Coy complied, but when she came home at the end of the day, she seemed “distracted” and complained to her parents, “[n]ot even my teachers know I’m a girl!”<sup>134</sup>

Following this incident, in December 2011, the Mathises met with the school district to address the logistics of Coy’s transition.<sup>135</sup> Among other things, the parties discussed the use of feminine pronouns, attire, and how to “best address [Coy’s] transition with her classmates.”<sup>136</sup> While Coy was still in kindergarten, the topic of restroom use was not an issue because the classroom had one, unisex restroom.<sup>137</sup> At the beginning of first grade, Coy began using the girls’ restroom without incident.<sup>138</sup> In fact, Coy’s first grade teacher encouraged her students to go to the bathroom in pairs, and Coy always chose a female friend to accompany her.<sup>139</sup> Shortly after, however, the District prohibited her from using the girls’ restroom. Instead, they directed her to use either the boys’ restroom or one of the single-stall restrooms available to the school staff or in the health office.<sup>140</sup>

In its defense, the District argued that its restroom assignment policy was appropriately based on a student’s biological sex (as opposed to a student’s gender or gender identity), and that Coy was biologically a male.<sup>141</sup> The Colorado Division of Civil Rights (the “Division”) flatly rejected the District’s justification. Relying on guidance from the Colorado Civil Rights Commission, describing restrooms as “Gender-Segregated Facilities,” the Division held that the sex/gender rationale was unpersuasive since even Colorado law conflated the terms gender and sex.<sup>142</sup>

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130. *Id.* at 2–3.

131. *Id.* at 3.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* (“[Coy’s] transition was not specifically addressed or explained to the class. The students were simply told that [Coy] was now a girl.”).

137. *Id.* at 4.

138. *Id.* at 5.

139. *Id.* at 4–5.

140. *Id.* at 5.

141. *Id.* at 5–6.

142. *See id.* at 6–7 (citing COLO. CODE REGS. § 3-708-1:81.1–81.11 (2009)).

The Division also considered documentary evidence introduced by both parties. Although the District's school record reflected that Coy was male at the time of enrollment, the Division noted that the record produced asked for the student's gender, not the student's sex.<sup>143</sup> Accordingly, if the District's argument for banning Coy from the girls' restroom was based on the fact that her biological sex was male, the school record introduced by the District held little weight. More persuasive were Coy's Colorado and federal credentials, a state identification card and a U.S. passport, respectively, both indicating Coy's *sex*, not *gender*, as female.<sup>144</sup> Finally, the Division considered a Medical Information Authorization (Change of Sex Identification) form completed by a Colorado physician that identified Coy's *gender* as female.<sup>145</sup>

In light of the contradictory documentary evidence, the Division relied heavily on independent scientific research demonstrating that sexual anatomical anomalies occur in one out of one hundred children born,<sup>146</sup> and that an individual's assigned sex is based solely on the external reproductive organs, not the presence of internal female reproductive organs.<sup>147</sup> Based on this science, the Division concluded, "sex assignments given at birth do not accurately reflect the sex of a child, indicating that birth certificates may no longer constitute conclusive evidence of a child's sex."<sup>148</sup>

Ultimately, in finding that the Mathises had probable cause to pursue their discrimination claim, the Division referenced the Colorado Civil Rights' Commission rules interpreting and clarifying the Colorado anti-discrimination laws.<sup>149</sup> In considering the District's concerns about safety for Coy and other transgender students who could be subjected to harassment from other students, the Division cautioned schools charged with protecting their students from such behavior not to "penalize the student who was harassed [by] . . . hinder[ing] students' access to services or facilities" but rather to "respond to individual incidents of misconduct."<sup>150</sup> The Division even went so far as to remark that the

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143. *Id.* at 6.

144. *Id.*

145. *Id.*

146. *Id.* (citing Blackless, Charuvastra, Derryck, Fausto-Sterling, Lauzanne & Lee, *supra* note 57). The Fausto-Sterling study in fact states that the anatomical discrepancies may be as high as two percent. *See* Blackless, Charuvastra, Derryck, Fausto-Sterling, Lauzanne & Lee, *supra* note 57, at 162.

147. *Mathis*, Charge No. P20130034X, at 6 (citing INTERSEX SOC'Y N. AM., *supra* note 49).

148. *Id.*; *see also id.* at 10 ("Sex assignment at birth . . . is merely a category that a child is placed in based on observable anatomy, and does not take into consideration the psychological and biological variations associated with the composition of each person. Given the evolving research into the development of transgender persons, compartmentalizing a child as a boy or a girl solely based on their visible anatomy, is a simplistic approach to a difficult and complex issue.").

149. *Id.* at 7 (quoting COLO. CODE REGS. § 708-1:81.11(B) (2011)). In particular, the rule states that "all covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include . . . restrooms, locker rooms, dressing rooms, and dormitories." COLO. CODE REGS. § 708-1:81.11(B) (2011).

150. *Mathis*, Charge No. P20130034X, at 8.

District “would likely not consider having a separate classroom for African American students because it was concerned that they may be subjected to racial harassment, even though that harassment had not yet occurred.”<sup>151</sup> Similarly, in response to the District’s concern for the comfort level of non-transgender students and their parents the Division admonished the District, positing that it could not legitimize its position under the law based on hypothetical situations.<sup>152</sup> Coy thrived in school once she was fully accepted as a girl.<sup>153</sup>

In January 2014, the Maine Judicial Supreme Court considered the same question in *Doe v. Regional School Unit 26*<sup>154</sup>: whether a school district violated state human rights laws by banning a transgender girl from the girls’ restroom. It reached the same answer, but for different reasons.<sup>155</sup> Many of the circumstances mirrored the facts in the *Mathis* case, with the following factual differences: Plaintiff Susan, a transgender girl enrolled in the Asa Adams School (“the School”) in Orono, Maine, was in middle school when she filed suit.<sup>156</sup> Prior to entering fifth grade, Susan received a diagnosis of gender dysphoria and “[s]chool officials recognized that it was important to Susan’s psychological health that she live socially as a female.”<sup>157</sup> Susan’s parents and the School established a 504 plan,<sup>158</sup> pursuant to which the use of shared female facilities was recommended, unless it “became ‘an issue,’” in which case, the “unisex staff bathroom” was available.<sup>159</sup> Subsequently, the School announced that it would require Susan to use the staff restroom.<sup>160</sup> This decision followed a series of events during which a boy repeatedly followed Susan into the girls’ restroom.<sup>161</sup>

151. *Id.* at 12.

152. *See id.* As discussed in more depth in Part V *infra*, there is debate over whether it is the school’s role, or in fact the role of the parents, to be thinking in terms of hypotheticals and creating rules and policies in response to “what-if” scenarios. In fact, the application of most school policies is reactionary, not proactive; *cf.* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (referring to “the school’s need to be able to impose disciplinary sanctions for a wide range of *unanticipated* conduct” (emphasis added)).

153. *Mathis*, Charge No. P20130034X, at 13 (“[Coy] thrived in first grade once she was fully accepted as a girl, which included her ability to use the girls’ restroom.”).

154. 86 A.3d 600 (Me. 2014).

155. *See id.* at 606.

156. *Id.* at 602–03.

157. *Id.* at 602.

158. A “504 Plan” is a plan developed in compliance with the Rehabilitation Act, a federal law providing for accommodations for certain qualifying children in educational institutions that receive federal funding and are subject to the Act. *See id.* at 602 n.2; 29 U.S.C. § 794 (2012).

159. *Doe v. Reg’l Sch. Unit 26*, 86 A.3d at 602–603.

160. *Id.* at 603.

161. *Id.* “JM,” a male student, followed Susan into the girls’ restroom on two occasions. The first occasion occurred on September 28, 2007. *Doe v. Clenchy*, No. 09-CV-201, at 4 (Me. Super. Ct. Nov. 20, 2012), *available at* <http://www.glad.org/uploads/docs/cases/doe-v-clenchy/2012-11-20-doe-v-clenchy-dismissal-ruling.pdf>. He entered the girls’ restroom while Susan was washing her hands and told a teacher that his grandfather told him to do it. *Id.* at 4. A few weeks later, JM again followed Susan into the girls’ restroom on instruction from his grandfather. *Id.* at 5.

The court examined the relationship between the Maine Human Rights Law’s prohibition against discrimination based on “sexual orientation”<sup>162</sup> in areas of public accommodation and education and a provision of the Sanitary Facilities law, requiring that a school “provide clean toilets in all school buildings, which shall be . . . [s]eparated according to sex.”<sup>163</sup> In reconciling these provisions, the court noted that the Sanitary Facilities law “establish[es] [no] guidelines for the use of school bathrooms. Nor . . . how schools should monitor which students use which bathroom, and it certainly offers no guidance concerning how gender identity relates to the use of sex-separated facilities.”<sup>164</sup> Ultimately, the court held that the School’s conduct constituted unlawful discrimination on the basis of sexual orientation because she was treated differently from other students “solely because of her status as a transgender girl.”<sup>165</sup>

In recognizing that “where young children are involved, it can be challenging for a school to strike the appropriate balance between maintaining order and ensuring that a transgender student’s individual rights are respected and protected,”<sup>166</sup> the court cautioned that its holding should “not be read to require schools to permit students casual access to any bathroom of their choice.”<sup>167</sup> Rather, the decision stands for the narrow proposition that, where a child’s “psychological well-being and educational success depend upon [using the] bathroom consistent with her gender identity, denying access to [that] bathroom constitutes sexual orientation discrimination” under Maine law.<sup>168</sup>

Both the *Mathis* and *Doe* courts were at least partially persuaded by the fact that these trans-plaintiffs’ choice of restrooms was an act that constituted a natural expression of their gender identity.<sup>169</sup> Although neither court expressly invoked the First Amendment in support of their ultimate holdings, these decisions set the stage for the proposition that gender expression is conduct that falls within the ambit of the First Amendment.

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162. The term “sexual orientation” includes a person’s “gender identity or expression.” ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2012).

163. *Doe v. Reg’l Sch. Unit 26*, 86 A.3d at 605 (citing ME. REV. STAT. ANN. tit. 5, §§ 4592(1), 4602(4) and tit. 20, § 6501 (2013)).

164. *Id.*

165. *Id.* at 606.

166. *Id.* at 604.

167. *Id.* at 607.

168. *Id.*

169. *Id.* (“Where, as here, it has been clearly established that a student’s psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of [state law].”).

## V.

RESOLVING THE TRANSGENDER DIVIDE –  
GENDER EXPRESSION AS PROTECTED SPEECH

With the majority of states and municipalities having enacted anti-bullying and anti-discrimination laws and the judiciary on the cusp of deciding “the great bathroom debate,” the impetus toward carving out new protections for transgender students is finally underway. Nonetheless, litigants on both sides of the debate are left confused, with little practical guidance directing their conduct.

Some litigants have advanced the innovative gender-expression-as-protected-speech argument in limited circumstances, such as challenges to a school’s decree that a transgender girl student could not wear feminine apparel and accessories;<sup>170</sup> to an employer’s refusal to allow a female employee to wear a skirt instead of pants;<sup>171</sup> and even to an employer’s policy requiring a transgender woman to use the men’s restroom until she proved through documentation that she had undergone sexual reassignment surgery.<sup>172</sup> Yet, no transgender student has advanced the argument that her use of the girls’ restroom, like her feminine dress, feminine preferences, and feminine mannerisms, constitutes symbolic expression deserving protection under the First Amendment.

The Supreme Court has long recognized that the First Amendment’s protective umbrella “does not end at the spoken or written word.”<sup>173</sup> Indeed, it is well established that some forms of expressive conduct are “sufficiently imbued with elements of communication” as to constitute speech that falls within the aegis of the First Amendment.<sup>174</sup> The threshold burden is not an onerous one. “[A] narrow, succinctly articulable message” is not a condition precedent to receiving constitutional protection.<sup>175</sup> In the past, the Supreme Court has acknowledged the expressive nature of students’ donning black armbands in protest of the United States’ military involvement in Vietnam;<sup>176</sup> a sit-in by

170. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Ct. Oct. 11, 2000).

171. *Zalewska v. Cnty. of Sullivan*, N.Y., 316 F.3d 314, 319 (2d Cir. 2003).

172. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*9 (D. Ariz. June 3, 2004).

173. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

174. *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam); *see also, e.g., Johnson*, 491 U.S. at 406 (burning the American flag during a protest rally was expressive conduct within the protection of First Amendment); *Cohen v. California*, 403 U.S. 15, 16, 18 (1971) (walking through a courthouse wearing a jacket bearing the words “Fuck the Draft” communicated a message and was speech entitled to First Amendment protection). The Supreme Court has even held that nude dancing constitutes “expressive conduct” that is “within the outer ambit of the First Amendment’s protection.” *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 289 (2000).

175. *Holloman el rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569 (1995)).

176. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969); *see also Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139, 144 (N.D.N.Y. 2006)

African-Americans to protest segregation;<sup>177</sup> the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam;<sup>178</sup> and picketing on an array of issues.<sup>179</sup>

In arguing that particular conduct possesses sufficient communicative elements to invoke the First Amendment, a litigant must demonstrate “[a]n intent to convey a particularized message . . . and . . . [that] the likelihood [i]s great that the message would be understood by those who viewed it.”<sup>180</sup> There is no doubt that a transgender student’s gender expression has communicative qualities.<sup>181</sup> Courts have found that students express their masculinity or femininity, and other aspects of themselves, through the way in which they dress,<sup>182</sup> style their hair,<sup>183</sup> and accessorize their outfits.<sup>184</sup> Similarly, the manner in which a transgender student chooses a restroom designated for a particular sex expresses her unique gender identity.

Applying the conduct-as-speech<sup>185</sup> test to Jill’s decisions to dress and behave in conformance with her gender identity—including her desire to use the girls’ restroom—it is clear that Jill’s conduct satisfies both prongs of the analysis.

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(holding that a student’s wearing of a red, white, and blue necklace, in support of troops serving in Iraq, was expressive conduct which conveyed a message).

177. *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

178. *Schacht v. United States*, 398 U.S. 58, 62–63 (1970).

179. *See, e.g., United States v. Grace*, 461 U.S. 171, 176 (1983); *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313–14 (1968).

180. *See Spence v. Washington*, 418 U.S. 405, 410–11 (1974); *see also Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410–11); *Church of the Am. Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2014); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013).

181. *See Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Ct. Oct. 11, 2000).

182. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001) (“[A]n individual’s choice of attire also may be endowed with sufficient levels of intentional expression to elicit First Amendment shelter. . . . Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views.”); *Yunits*, 2000 WL 33162199, at \*3 (holding that a transgender girl’s female-oriented dress constituted symbolic expression worthy of First Amendment protection).

183. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 882–83 (S.D. Tex. 2009) (holding that a male student’s long braids reflected his Native American heritage and thus were sufficiently communicative to constitute “speech” that fell within the scope of the First Amendment).

184. *See Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139, 144 (N.D.N.Y. 2006); *Yunits*, 2000 WL 33162199, at \*3.

185. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).



A. *Bathroom Choice as Symbolic Conduct Communicating a Particularized Message About Gender Identity*

The first prong of the conduct-as-speech inquiry asks whether a transgender student intends to convey a particularized message through her conduct.<sup>186</sup> Because school-age children feel strong pressure to fit in, and students suffering from gender dysphoria desire to be accepted as a member of the gender with which they identify, communicating a message to their peers through dress, mannerisms, and other symbolic conduct is exceptionally important.<sup>187</sup> “Strong[ly] felt pressure for gender conformity . . . is normative for young children, who tend to regard gender stereotypes as moral imperatives.”<sup>188</sup>

Where the stakes are so high, and the desire to be understood and accepted so critical to their well-being, transgender students’ need to communicate a strong message through their behavior and self-expression is undeniable.

At least one court has found that a transgender student’s ability to express her gender identity was important to her health and well-being.<sup>189</sup> This transgender student’s “dressing in clothing and accessories associated with the female gender” was “not merely a personal preference but a necessary symbol of her very identity” that “express[ed] her identification with that gender.”<sup>190</sup> Unlike a “generalized and vague desire to express [one’s] middle-school individuality,”<sup>191</sup> a transgender student’s efforts to convey her gender identity,

186. *Spence*, 418 U.S. at 410–11; *Johnson*, 491 U.S. at 404; see also *Kerik*, 356 F.3d at 205; *Steen*, 732 F.3d at 388.

187. See Priscilla R. Carver, Jennifer L. Yunger & David G. Perry, *Gender Identity and Adjustment in Middle Childhood*, 49 *SEX ROLES* 95, 96 (2003); Gagné, Tewksbury & McGaughey, *supra* note 43, at 486 (“Appearance is a central component in the establishment and maintenance of self and identity. An alternative gender may be achieved only through interaction, in which the recognition of others has the potential to legitimate and reinforce the emergent alternative identity. Therefore, in order to ‘be’ themselves, whether on a temporary or permanent basis, transgenderists have a compelling need to present alternative expressions of gender.” (citation omitted)); cf. Jennifer L. Kreiss & Diana L. Patterson, *Psychosocial Issues in Primary Care of Lesbian, Gay, Bisexual, and Transgender Youth*, 11 *J. PEDIATRIC HEALTH CARE* 266, 268 (1997) (“Peer rejection and loss of friends is a devastating event for the adolescent, whose normal developmental tasks involve a movement away from parents and family and toward the peer group as a growing source of support. Peer group rejection has a powerfully negative effect on the self-esteem and coping of the adolescent.”).

188. Carver, Yunger & Perry, *supra* note 187, at 96.

189. *Yunits*, 2000 WL 33162199, at \*3 (issuing a preliminary injunction against a school district that had disciplined a transgender student for her style of dress).

190. *Id.* (contrasting its findings with the finding in *Oleson v. Board of Education of School District No. 228*, 676 F. Supp. 820, 822 (N.D. Ill. 1987), which held that a male student wearing an earring as an “expression of his individuality and attractiveness to girls” was not within scope of the First Amendment). *But cf.* *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 390 (6th Cir. 2005) (holding that a twelve-year-old’s desire to wear “any and all clothing” was a “vague and attenuated notion[] of expression” undeserving of First Amendment protection).

191. *Blau*, 401 F.3d at 389 (explaining that the plaintiff testified that she “d[id] not wish to convey any particular message, but wishe[d] only to wear clothes that she th[ought would] ‘look[] nice on [her]’ and that ‘she fe[lt] good in’”).

and ultimately her personhood, through expressive conduct inherently convey a particularized and important message.

Likewise, an individual's conduct in using a restroom designated as either "male" or "female" expresses that individual's belief that she belongs in that designated category of persons. By choosing to enter a facility labeled for a specific gender group, that individual is effectively stating her association with that gender. Although no words may ever be uttered, there is a strong mental association between the designation affixed to a restroom door and the fact that only those individuals identifying with that designation would enter and use that facility. Therefore, since a transgender student's selection of a particular restroom is "sufficiently imbued with elements of communication," the conduct is expressive and sends a particularized message about the student's gender identity.<sup>192</sup>

The second prong of the expressive-conduct-as-speech inquiry considers whether the expressive conduct constitutes a message that has a great likelihood of being "understood by those who observe the conduct."<sup>193</sup> In the case of a transgender student, the appropriate audience at the core of the inquiry is the school faculty and student body.<sup>194</sup> A transgender girl, like Jill, who was once known by her peers as a boy, can easily establish through testimony that her peers understood "that she is a biological male more comfortable wearing traditionally 'female'-type clothing because of her identification with that gender."<sup>195</sup>

At a very early age, children begin to understand that certain articles of clothing (e.g., dresses, high heels, tutus) are feminine and certain gender-specific behaviors express a message to others about an individual's self-identification with one of two gender classifications.<sup>196</sup> "A child's awareness of being a boy or a girl starts in the first year," and soon thereafter, children become aware of traditional "gender role behavior—that is, doing things 'that boys do' or 'that girls do.'"<sup>197</sup> Gender expression constitutes speech because it conveys a symbolic message, a proverbial "short cut from mind to mind."<sup>198</sup>

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192. *Johnson*, 491 U.S. at 404.

193. *Bivens el rel. Green v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 560–61 (D.N.M. 1995) (stating that student failed to demonstrate whether his wearing saggy pants to express his identity as an African American youth was understood by others); accord *Johnson*, 491 U.S. at 404; *Church of the Am. Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2014); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013).

194. *Yunits*, 2000 WL 33162199, at \*4.

195. *Id.*

196. See Jodi Putnam, Judith A. Myers-Walls & Dee Love, *Ages and Stages*, PURDUE UNIV. EXTENSION SVC., <https://www.extension.purdue.edu/providerparent/child%20growth-development/AgesStages.htm> (last visited Feb. 8, 2015); 2 MAGILL'S ENCYCLOPEDIA OF SOCIAL SCIENCE: PSYCHOLOGY 668 (Nancy A. Piotrowski ed., 2003) ("Children are able to apply correct gender labels to themselves by about age three. At this stage, young children base gender labeling on differences in easily observable characteristics such as hairstyle and clothing . . .").

197. *Gender Identity and Gender Confusion in Children*, HEALTHYCHILDREN.ORG, <http://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and->

A transgender individual's choice of which bathroom to use is as natural and effortless as the ability of others observing that choice to understand its message. Consider observing an androgynous or gender-ambiguous person in public. The only overt expression of gender identity you may recognize is her choice of restroom. Because it is socially understood that a person uses the restroom that corresponds with her gender, restroom choice conveys significant information about an individual's gender identity. Accordingly, demonstrating that a transgender student's peers understood that the student's behavior, including restroom use, intended to convey his or her gender identity should not be a significant hurdle to overcome.<sup>199</sup>

### B. *Scrutinizing School Suppression of Gender-Expressive Speech*

Once a court determines that a transgender student's conduct, such as using the restroom that corresponds with her gender identity, constitutes symbolic speech that was understood by those perceiving it, the school's restriction of such speech will be subject to judicial scrutiny. If the school's conduct is aimed at suppressing the content of the speech, this will be an almost impossible hurdle for the school to overcome since "the most exacting scrutiny" will be applied.<sup>200</sup> Only restrictions enacted for a legitimate and important state purpose, rather than those aimed at suppressing controversial speech, can justify the restriction on free speech.<sup>201</sup> Thus, while the "government generally has a freer hand in restricting symbolic conduct than it does in restricting the written or spoken word," the government may not censor conduct *because* of its expressive impact.<sup>202</sup>

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Gender-Confusion-In-Children.aspx (last updated May 11, 2013) (citing AM. ACAD. PEDIATRICS, CARING FOR YOUR SCHOOL-AGE CHILD: AGES 5 TO 12 (2004)).

198. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (holding that a "flag salute is a form of utterance" because "[t]he use of an emblem or flag [can] symbolize some system, idea, institution, or personality . . .").

199. See Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 207 (2013) (arguing that "[r]estroom choice typically communicates a message of gender identity because of the underlying assumption that restrooms should always be sex-segregated"); *id.* at 243 ("Restroom choice is deliberate and intended to communicate a central aspect of identity: 'I am a woman,' or 'I am a man.' . . . When a transgender man begins using the men's restroom, not only does his conduct communicate his gender, but he consciously chooses to do so in order to communicate his gender identity.").

200. See *Texas v. Johnson*, 491 U.S. 397, 412 (1988) (quoting *Boos v. Barry*, 485 U.S. 312 (1988)).

201. See *id.* at 413–14 (finding that the State's asserted interest in protecting the symbolic status of the flag was an impermissible viewpoint restriction). The Court in *Johnson* did not consider specifically whether maintaining order was a legitimate state interest because it found the interest did not apply to the facts of the case, but the Court did make clear that it "[d]id not suggest that the First Amendment forbids a State to prevent 'imminent lawless action.'" *Id.* at 410.

202. *Id.* at 406. See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (describing that when the government seeks to regulate conduct that combines speech and nonspeech elements, a sufficiently important interest in regulating the nonspeech elements can justify First Amendment

It is well-established that “students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>203</sup> Indeed, “[p]ublic school students enjoy a degree of freedom of speech . . . that is balanced against the added concern of the need to foster an educational atmosphere free from undue disruptions to appropriate discipline.”<sup>204</sup> In its landmark decision in *Tinker*, the Supreme Court held that symbolic student conduct was protected unless the “facts . . . might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”<sup>205</sup> Thus, so long as a transgender student’s behavior in using his or her preferred restroom does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” it should be entitled to First Amendment protection.<sup>206</sup>

Coy Mathis used the girls’ restroom in her Colorado elementary school without incident.<sup>207</sup> In fact, the record reflected that Coy’s peers were socially accepting of her gender expression.<sup>208</sup> Where a transgender student’s restroom use occurs without incident, there is no cause for school administrators to anticipate disruption to the classroom to justify a school’s suppression of the transgender student’s symbolic conduct.<sup>209</sup> The Supreme Court has cautioned, “[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.”<sup>210</sup> Courts have been unwilling to “simply defer to the specter of disruption or the

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limitations); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“We have often noted that restrictions of . . . [expression] are valid provided they are justified without reference to the content of the regulated speech . . .”).

203. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

204. *Bivens ex rel. Green v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 559 (D.N.M. 1995) (citing *Tinker*, 393 U.S. at 509); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67, 272–73 (1988) (carving out an additional standard for school-sponsored speech and holding that a school may excise pages from school newspaper that contained private information about pregnant students because it was “reasonably related to legitimate pedagogical concerns”).

205. *Tinker*, 393 U.S. at 514.

206. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966)).

207. *Mathis v. Fountain-Fort Carson Sch. Dist.*, 8, Charge No. P20130034X, at 4–5 (Colo. Div. Civil Rights June 17, 2013), available at [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf).

208. *Id.* at 13.

209. See *id.* But see *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 111, 115 (2d Cir. 2012) (holding that a ten-year-old fifth grader’s drawing expressing a desire to “[b]low up the school with the teachers in it” could reasonably be anticipated to substantially disrupt school environment, so the student’s suspension did not violate right of free expression).

210. *Cohen v. California*, 403 U.S. 15, 21 (1971).

mere theoretical possibility of discord.”<sup>211</sup> Certainly, a school cannot restrict speech based upon “undifferentiated fear or apprehension of disturbance.”<sup>212</sup>

Schools must also proceed cautiously when an isolated incident actually occurs on campus resulting from disapproval of a transgender student’s gender expression. Much like the “gay panic defense” advanced by counsel during the Lawrence King murder trial,<sup>213</sup> school officials can mistakenly place blame upon the “speaker” when incidents of violence or harassment are targeted at transgender students. For example, in *Doe v. Clenchy*, instead of disciplining J.M. for harassing Susan on multiple occasions, the school penalized Susan by rescinding her right to use the girls’ restroom.<sup>214</sup> This type of punitive response to Susan’s and other transgender students’ protected speech violates long-standing First Amendment principles by granting the listener an intolerable, majoritarian heckler’s veto.<sup>215</sup>

The heckler’s veto doctrine cautions the government from punishing the speaker, who is otherwise engaging in peaceful speech, merely because her speech “stir[s] people to anger, invite[s] public dispute, or br[ings] about a condition of unrest.”<sup>216</sup> The United States Supreme Court has been a robust protector of free speech, even when such speech has been considered extremely offensive.<sup>217</sup> The Court has observed that:

211. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1271 (11th Cir. 2004); *accord* Reineke v. Cobb Cnty. Sch. Dist., 484 F. Supp. 1252, 1261 (N.D. Ga. 1980) (finding that because the potential for disruption could have been resolved through conversations within the journalism department, a school acted unreasonably in prohibiting certain elements in the school newspaper).

212. Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)) (holding that a male student’s desire to bring another male to the high school prom constituted protected speech that could not be restricted out of fear that his conduct had the potential to result in an unwarranted violent reaction by other students).

213. *See supra* notes 27–31 and accompanying text.

214. *Doe v. Clenchy*, No. 09-CV-201, at 4–5 (Me. Super. Ct. Nov. 20, 2012), *available at* <http://www.glad.org/uploads/docs/cases/doe-v-clenchy/2012-11-20-doe-v-clenchy-dismissal-ruling.pdf>. *See supra* notes 166–67 and accompanying text.

215. *See Tinker*, 393 U.S. at 508–09 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

216. *Terminiello*, 337 U.S. at 5; *accord Tinker*, 393 U.S. at 509 (refusing to allow suppression of student speech where it was the individuals objecting to the speech, not those speaking, causing the disruption); *see also* *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 765, 769 (9th Cir. 2014); *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011).

217. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1215, 1217 (2011) (holding that defendants’ picketing at the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty, was protected speech “at the heart of the First Amendment’s protection” because the nature of the speech—“political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy— [we]re matters of public import” (internal quotations omitted)); *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (reversing the Illinois Supreme Court’s denial of a stay of an injunction which prohibited the petitioners from marching in Skokie, Illinois while donning a swastika and distributing pamphlets which promoted hatred against persons of Jewish faith); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (holding that a state may not criminalize advocacy of the use of violence, apart from when it is inciting imminent lawless conduct).

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>218</sup>

Peaceful expressive conduct satisfying the *Tinker*<sup>219</sup> standard that is otherwise met by violence, threats or other retaliatory conduct by persons offended by the speech cannot lawfully be suppressed under the heckler’s veto doctrine.<sup>220</sup>

A school’s response to a transgender student’s gender expression, including the use of the restroom that corresponds to his or her gender identity, must be motivated “by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>221</sup> In fact, the underpinnings of the First Amendment invite public dispute and shield “the sphere of intellect and spirit” from government intrusion.<sup>222</sup> Scholars have discussed the values sought by free speech protection as a guide to deciding whether a particular government speech restriction is consistent with the First Amendment.<sup>223</sup> While scholars and judges define these values differently, the majority agree that the First Amendment protects a person’s right to express her identity, even when the government or, in this instance, other children are uncomfortable with that identity.<sup>224</sup>

218. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969) (citing *Terminiello*, 337 U.S. 1).

219. *Id.* at 509 (“In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”).

220. *See, e.g., Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879–80 (7th Cir. 2011) (holding school district’s act of forbidding high school students from wearing “Be Happy, Not Gay” t-shirts violated the First Amendment).

221. *Tinker*, 393 U.S. at 509.

222. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

223. *See, e.g., Terri Day & Danielle Weatherby, Bleeeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469, 470 n.1 (2012) (citing Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963)) (identifying the following four “values” served by the First Amendment’s guarantee of free expression: (1) promoting individual identity and self-fulfillment; (2) encouraging a marketplace of ideas based on the notion that truth will win out if all ideas are considered; (3) supporting the democratic process; and (4) protecting the balance between stability and change in our democratic government without the threat of a violent uprising).

224. *See Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 688–91 (E.D. Ky. 2003) (rejecting argument that gay-straight alliance could be banned as disruptive, where students protesting a gay-straight alliance organized walkouts and protested outside of school); *cf. Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (finding that “[t]he right

At the essence of a transgender student's behavior is her attempt to be recognized for her own, unique identity. Although some schools, and some students, may feel uncomfortable with a gender non-conforming student's gender expression, discomfort with the content of a speaker's message is not a valid reason to restrict the otherwise peaceful speech. A school's action in banning a transgender student from using the restroom that corresponds with her gender identity impermissibly validates the legally reprehensible heckler's veto.

Finally, safeguarding the right of transgender individuals to freely express their gender identity is a value that implicates First Amendment jurisprudence.<sup>225</sup> This value is particularly imperative in public schools, where teachers and administrators are capable of influencing children during their most formative years, which can help shape the character of this nation's future generations. As early as 1837, courts applied the *in loco parentis* principle to schools.<sup>226</sup> According to this doctrine, public schools are charged with parent-like responsibilities during the hours that children are in their custody.<sup>227</sup> In service of those responsibilities, public schools should foster an environment that enables growth in their students, focusing particularly on the development of a positive self-image and a healthy tolerance for individual differences.

Invoking this quasi-parental relationship, it is a public school's right, or perhaps even obligation, to encourage students to embrace the non-threatening differences of their peers. By respecting transgender students' non-threatening, symbolic gender expression, schools not only satisfy the First Amendment, but also model tolerance for individual differences.

At this exceptional moment in history, with issues affecting transgender individuals at the vortex of national debate, public schools, standing *in loco parentis*, have a unique opportunity to transform social attitudes by modeling inclusiveness and acceptance for their students. Public schools cannot violate the First Amendment based solely on "an urgent wish to avoid the controversy

to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution"); *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621, 626–627 (W.D. Ky. 2000) (upholding dress code in part because it "[d]id not prohibit alternative . . . student expression through badges, buttons, or other means"). See generally Day & Weatherby, *supra* note 223 (explaining that most speech of low social value is still entitled to First Amendment protection).

225. See Laurel Grbach, *Transgender Student Dress: Free Speech and Protected Expression in Public Schools*, 22 TEMP. POL. & CIV. RTS. L. REV. 526, 536–43 (2013).

226. *Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J., concurring); see, e.g., *State v. Pendergrass*, 19 N.C. (2 Dev. & Bat.) 365, 365–366 (1837) ("The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.").

227. *Drum v. Miller*, 47 S.E. 421, 425 (N.C. 1904). Historically, the *in loco parentis* doctrine bestowed upon school officials a nearly limitless power to maintain order in public schools and to impose discipline, including the sanction of speech. More recently, however, the Supreme Court, in light of *Tinker*, has narrowed the doctrine, such that the modern *in loco parentis* doctrine no longer provides unrestrained power to school officials. See *Morse*, 551 U.S. at 413–19 (2007) (Thomas, J., concurring) (discussing the historical adaptation of the *in loco parentis* doctrine).

which might result from the expression.”<sup>228</sup> Instead, “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance,”<sup>229</sup> like the symbolic conduct expressed by a transgender student simply striving to fit in, falls within the protective umbrella of the First Amendment.

#### CONCLUSION AND RECOMMENDATIONS

While transgender individuals are becoming more prevalent in pop culture,<sup>230</sup> transgender youth remain at-risk, still plagued by high rates of violence.<sup>231</sup> As studies reveal new frontiers of bias, the LGBT community may meet significant hurdles as groups and individuals push through deeply embedded social norms to affect legal change.<sup>232</sup> This is especially clear when taking into account the historical legal struggles of minority and marginalized groups.<sup>233</sup>

A recent academic study revealed that the majority of heterosexual adults hold negative opinions about transgender individuals.<sup>234</sup> The negative attitudes were associated with several factors, including political conservatism,

228. *Morse*, 551 U.S. at 404 (majority opinion) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969)).

229. *Id.* (quoting *Tinker*, 393 U.S. at 508).

230. See, e.g., Lauren Effron & Kevin Dolak, ‘*Dancing with the Stars*’ Premiere: Chaz Bono Cha-Chas into Millions of Homes, ABC NEWS (Sept. 19, 2011), <http://abcnews.go.com/Entertainment/dancing-stars-premiere-chaz-bono-nancy-grace-dwts/story?id=14555326>. Chaz Bono, the only child of legendary American entertainers Sonny and Cher, used his spotlight as a competitor on the television show *Dancing with the Stars* to educate the public about his gender identity and his transgender status. See *id.*; Susan Donaldson James, *Trans Chaz Bono Eyes Risky Surgery to Construct Penis*, ABC NEWS (Jan. 6, 2012), <http://abcnews.go.com/Health/transgender-chaz-bono-seeks-penis-genital-surgery-risky/story?id=15299871>; *Chaz Bono Gives Degrassi Storyline a Boost*, WINNIPEG FREE PRESS (Nov. 22, 2012), <http://www.winnipegfreepress.com/arts-and-life/entertainment/TV/chaz-bono-gives-degrassi-storyline-a-boost-180566271.html> (describing an episode of a Canadian teen drama during which Chaz appeared to give advice to a transgender teen, and the struggle Chaz faced without public depictions of transgender life when he was young); *Late Show with David Letterman* (CBS television broadcast May 11, 2011), available at <http://gawker.com/5801120/chaz-bono-explains-what-transgender-means-to-david-letterman>; see also Adam Gabbatt, ‘*Call Me Chelsea Manning*’: Jailed Private Announces Intention to Live as a Woman: US Soldier States Plans to Undergo Hormone Therapy Military Prison Insists It Will Not Provide Treatment, GUARDIAN (Aug. 22, 2013), <http://www.theguardian.com/world/2013/aug/22/bradley-manning-woman-chelsea-gender-reassignment>. Manning previously leaked hundreds of thousands of government documents and received a thirty-five year sentence; she announced following the trial that she intended to live as a woman. *Id.*

231. See *supra* notes 32–34 and accompanying text.

232. See Aaron T. Norton & Gregory M. Herek, *Heterosexuals’ Attitude Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 SEX ROLES 738, 745 tbl.1 (2013) (showing a 32.01 “thermometer score” of attitudes toward transgender people, where scores range from 0 to 100 and higher scores correlate with more positive attitudes).

233. See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating Section 3 of the Defense of Marriage Act, which defined marriage as between one man and one woman); *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring miscegenation law that prohibited interracial marriage unconstitutional).

234. Norton & Herek, *supra* note 232, at 745 tbl.1.



endorsement of a binary conception of sex, and lack of personal contact with sexual minorities.<sup>235</sup> Transgender rights remain murky because the American public is struggling to fit transgender individuals into an archaic, rigidly fixed legal system.

Due to this uncertainty in the law, trans-plaintiffs, and LGBT plaintiffs generally, have more recently been invoking the courts in search of judicial remedies. Indeed, in late 2012, a Massachusetts District Court held that a prisoner's gender identity disorder constituted a serious medical need that triggered Eighth Amendment protection, and the Department of Correction's refusal to provide him with male-to-female sex reassignment surgery constituted deliberate indifference of his serious medical need.<sup>236</sup> Moreover, in 2013, the Supreme Court held that the Defense of Marriage Act violated the Fifth Amendment by defining marriage as solely between a man and a woman.<sup>237</sup> In making this finding, the Court recognized that spouses in same-sex marriages were entitled to the same rights and privileges as spouses in heterosexual marriages.<sup>238</sup> With these cases and others, there is an emerging recognition in the law of the rights of persons with non-traditional sexual choices, orientations, and identities.

While the law takes baby steps to catch up with science, medicine, and society's acceptance of non-majoritarian ideas, transgender individuals, and especially transgender youth, need immediate proactive reform. Schools, sitting *in loco parentis*, are left blindly navigating these difficult issues as they struggle to balance the interests of students struggling with gender identity alongside the safety and protection of the other students in their custody.

To remedy this legal abyss, the following steps should be adopted. First, Congress should amend the ADA and the Rehabilitation Act so that the definition of disability no longer excludes conditions related to gender dysphoria and gender identity disorders. Second, while the law has traditionally recognized only two, rigidly fixed sex classifications, developing a trans-affirmative vocabulary is essential to fashioning new categories of protections for gender non-conforming individuals<sup>239</sup> and to informing discussions with children about transgender issues.<sup>240</sup>

235. *Id.* at 749–50.

236. *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 197–98 (D. Mass. 2012).

237. *Windsor*, 133 S. Ct. at 2696 (2013) (“DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.”).

238. *See id.* at 2695.

239. *See* ASS'N OF LESBIAN, GAY, BISEXUAL & TRANSGENDER ISSUES IN COUNSELING, COMPETENCIES FOR COUNSELING WITH TRANSGENDER CLIENTS 4 (2009), available at [http://www.counseling.org/docs/competencies/algbtic\\_competencies.pdf?sfvrsn=3](http://www.counseling.org/docs/competencies/algbtic_competencies.pdf?sfvrsn=3) (noting that “transgender people have been historically marginalized and pathologized by diagnostic and assessment systems”). In November 2013, German law began recognizing a third sex category for infants whose sex cannot be determined with certainty at birth. This third legal category, identified as “indeterminate,” will allow parents of intersex babies the ability to declare an infant's

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.<sup>241</sup>

Because “[i]nescapably, like parents, [teachers] are role models,”<sup>242</sup> the first step toward creating a safe school environment for transgender youth begins with modeling and adopting a trans-affirmative vocabulary. Once students incorporate trans-affirmative language into their everyday vernacular, they may begin to think, and eventually act, with sensitivity towards and awareness of their gender non-conforming peers.<sup>243</sup>

Similarly, schools must adopt sound policies protecting transgender students from bullying and harassment, as consistent with state and local law, and provide a counseling mechanism for both gender non-conforming students and students who are impacted by the gender expression or gender identity of their schoolmates.

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sex as “unknown” on the infant’s birth certificate. Myles, *supra* note 49. Notably, this new German law also complements the country’s existing body of law, as it provides a legal mechanism for transgender individuals who have undergone gender reassignment surgery to seek amendment of their birth certificates. *See id.*

240. *See* LAMBDA LEGAL & NAT’L YOUTH ADVOCACY COALITION, BENDING THE MOLD: AN ACTION KIT FOR TRANSGENDER STUDENTS 30–32 (2008), [http://www.lambdalegal.org/sites/default/files/publications/downloads/btm\\_bending-the-mold\\_0.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/btm_bending-the-mold_0.pdf).

241. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (carving out an exception to the *Tinker* rule for clearly lewd speech). To the extent opponents of the gender-expression-as-speech theory maintain that a transgender student’s use of the bathroom corresponding with her gender identity is lewd and vulgar speech, such argument is misguided. First, this article suggests only that all individuals, regardless of biological sex, should be able to live their day-to-day lives as the gender with which they identify, without the fear of governmental intrusion. To the extent any individuals, regardless of gender identity, inappropriately expose themselves in a public space, such acts would be subject to punishment under state public indecency laws. In the school environment, the government may have a disciplinary interest in ensuring that all students maintain order in the classroom, bathroom, or any other on-campus space. Therefore, should a disruption arise because of the *inappropriate* conduct of any student, transgender or not, in the bathroom or elsewhere, then the question turns to whether discipline is appropriate. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). This article merely posits that transgender students, like all students, should be granted access to the restroom corresponding with their gender identity. Once they enter the restroom, their conduct, like all other students’, is subject to certain parameters. To the extent transgender students wish to enter and use the bathroom without incident, and their expressive conduct is peaceful and not otherwise inappropriate, such expressive conduct is no more lewd or vulgar than any other individual’s bathroom use.

242. *Fraser*, 478 U.S. at 683.

243. *See* Caroline T. Clark & Mollie V. Blackburn, *Reading LGBT-Themed Literature with Young People: What’s Possible?*, *ENG. J.*, Mar. 2009, at 25, 27–29 (suggesting that if LGBT-themed literature was incorporated into the core classroom curriculum, students would be more understanding and accepting of that community).

Finally, trans-litigants challenging schools' determinations regarding bathroom/locker room designation, or other designations based primarily on assigned sex, should advance the theory that a transgender student's gender expression is speech that falls within the protective umbrella of the First Amendment. First, a transgender student's outward expression of gender, as conveyed through dress, hairstyle, and even restroom use, is undoubtedly intended to convey a message to outsiders about a gender non-conforming student's gender identity. Second, because fitting in and being accepted are so vital to a youth's well-being, there can be no doubt that a transgender student's expressive conduct is intended to, and actually does, convey a particularized message.

Moreover, when well-established First Amendment jurisprudence protects student speech that is not lewd and does not pose a "material disrupt[ion] [to] classwork," schools should not yield to the heckler's veto by silencing transgender students' otherwise peaceful symbolic expression.<sup>244</sup> Schools should instead impose discipline upon those students who express disapproval of a transgender student's gender expression in a violent or disruptive manner.

As the recent legal victories for Coy Mathis and Susan Doe signify, the time is ripe for archaic social norms regarding sexuality and gender identity to be reformed. Meanwhile, public school officials are in a unique position to create a sea of change in the deep-seated negative attitudes toward transgender individuals by fostering open and safe environments for transgender students to express their gender identity, the essence of who they are.

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244. See *Tinker*, 393 U.S. at 513; cf. *Fraser*, 478 U.S. at 683.