

# IDENTITY BY COMMITTEE

Scott Skinner-Thompson

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## ABSTRACT

*Even in school districts with relatively permissive approaches to defining and embodying gender, the identities of transgender and gender variant students are often governed by complex regulatory protocols. Ensuring that a student is able to live their gender at school can involve input from a host of purported stakeholders including medical providers, mental health professionals, school administrators, the student's parents, and even the broader community. In essence, trans and gender variant students' identities are governed by committee, which reduces students' control over their lives, inhibits self-determination, constricts the scope of permissible gender identities, subjects them to incredible degrees of state surveillance, and amplifies the risk that sensitive information about the students will be disclosed more broadly.*

*Some of these barriers may have roots in the ways gender has been discursively framed in order to access harm-reducing legal benefits and carve out space for trans identity and survival. For example, persistent linking of transgender identity with medicalized diagnoses, potentially to harness medical care, may lend credence to a regulatory approach where medical providers and administrators, not the student, have predominant control over the child's identity. Similarly, attempts to essentialize gender identity as an innate mental state in order to assuage concerns about mutability legitimizes the role of mental health professionals in controlling the student's identity at school.*

*This Article intervenes in this regulatory landscape in three ways. First, it examines the prevailing discursive and sociolegal ways of framing gender and gender identity through an analysis of transgender history and activism, medical discourse regarding gender and gender identity, mental health discourse, and law reform efforts and advocacy.*

*Second, it unpacks the many bureaucratic barriers imposed on transgender and gender variant students in schools, tentatively linking those barriers to the discourses of gender identity. Through a detailed analysis of the education policies governing gender identity in each state and each state's largest school district, the Article documents the substantive requirements for living consistently with one's gender identity in school (for example, providing*

*medical documentation v. self-identification) and the different stakeholders enshrined in procedurally assessing students' gender.*

*Finally, the Article explores whether given extant doctrine endorsing comparatively expansive First Amendment speech rights—even for students—renewed discursive emphasis on “gender expression” could provide students with greater freedom relative to purported “committee” stakeholders. At the very least, an emphasis on the dialectical relationship between social context and gender expression could help schools, courts, and society better understand the non-essentialist (e.g., non-medical) but exploratory and performative components of our gender identities, building societal appreciation for the ways in which our identities—while our own and while material—are nevertheless dynamic—a simultaneously challenging but beautiful concept.*

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## INTRODUCTION

*Rumors of the demise of hegemonic sex/gender systems . . . have been greatly exaggerated.*

—Jack Halberstam<sup>1</sup>

Despite hard-fought and critically important victories for transgender people at the Supreme Court and locally,<sup>2</sup> bureaucratic regulation of gender identity is pervasive and, in some settings, growing rapidly. One such context is within public schools.<sup>3</sup> While ongoing efforts by some states to ban transgender and gender variant<sup>4</sup> students from living their gender identities have received important attention,<sup>5</sup> the effects of policies purporting to allow students to live their genders at school are less scrutinized but also important. As this Article unearths through a comprehensive evaluation of policies governing gender identity in each state and each state's largest school district (where available),<sup>6</sup> even in schools with comparatively permissive approaches

1. JACK HALBERSTAM, *TRANS\*: A QUICK AND QUIRKY ACCOUNT OF GENDER VARIABILITY* 10 (2018).

2. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (concluding that Title VII's prohibition on sex discrimination in employment included discrimination on the basis of someone's transgender status).

3. See *infra* Part II (cataloguing regulatory schemes for governing gender identity in every state and every state's largest school district).

4. Gender variant is a term often used to describe youth who do not conform with dominant gender norms and is sometimes used interchangeably with gender nonconforming. TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 615 (Laura Erickson-Schroth ed., 2014) [hereinafter *TRANS BODIES, TRANS SELVES*].

5. See *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2163 (2021); Scott Skinner-Thompson, *Resisting Regulatory Oppression of Transgender Children*, REGUL. REV. (July 1, 2021), <https://www.theregreview.org/2021/07/01/skinner-thompson-regulatory-oppression-of-trans-children/>, archived at <https://perma.cc/HMQ9-VXUG>.

6. See SCOTT SKINNER-THOMPSON, *POLICIES REGULATING GENDER IN SCHOOLS: COMPANION TO IDENTITY BY COMMITTEE: COMPANION TO IDENTITY BY COMMITTEE* (2022), <https://docs.google.com/spreadsheets/d/1K6iUkLnmDfaSVykyRaZ3Yqt7XNM9leGO-MQA6p2VbV4/edit?usp=Sharing> [hereinafter *Companion*] The chart attempts to code the key requirements of each law or policy in terms of its substantive and procedural requirements for students

to defining and embodying gender, the identities of transgender and gender variant students are governed by intricate and often inaccessible regulatory protocols.<sup>7</sup>

Ensuring that a student can live their gender at school can involve the submission of multiple forms of “evidence” of a student’s gender as well as input from a host of purported stakeholders including medical providers, mental health professionals, school administrators, the student’s parents, and even the broader community.<sup>8</sup> In essence, trans and gender variant students’ identities are governed by committee. Indeed, certain jurisdictions have literal “Gender Identity Eligibility Committees” or have required students to submit a “Transgender Application.”<sup>9</sup> These bureaucratic approaches have been endorsed by some LGBTQ rights organizations,<sup>10</sup> and represent a marked improvement over systems that outright deny the existence of trans and gender variant children.<sup>11</sup> In that way, the committee structure and the many professionals (medical, legal, educational) that contribute to it are often an important form of harm reduction that has improved, and undoubtedly saved, the lives of many trans children—lives that continue to face threats from many corners.<sup>12</sup> But, as explored in this Article, this committee structure is not without its own drawbacks. It provides students only limited control over their identities, inhibits self-determination, often constricts the scope of permissible gender

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attempting to access bathrooms or competitive athletics teams consistent with their gender identity. The specifics of each policy vary widely, and the “coding” may not capture all relevant nuance. For example, different policies governing intramurals and physical education classes v. interscholastic competition. Moreover, some of these laws are subject to ongoing lawsuits which may impact their enforceability. General policies of “nondiscrimination” on the basis of gender identity were not coded as indicating one way or another how students would be treated with respect to access to sex-segregated spaces and activities. For additional resources on state laws, see MOVEMENT ADVANCEMENT PROJECT, BANS ON TRANSGENDER YOUTH SPORTS PARTICIPATION (last updated October 11, 2022), <https://www.lgbtmap.org/equality-maps/sports-participation-bans>, archived at <https://perma.cc/C2XJ-UMW4>; MOVEMENT ADVANCEMENT PROJECT, SAFE SCHOOLS LAWS (last updated October 11, 2022), <https://www.lgbtmap.org/equality-maps/safe-school-laws/discrimination>, archived at <https://perma.cc/2XNM-ZH6T>.

7. See *infra* section II.A.

8. See *id.*

9. See, e.g., ARIZONA INTERSCHOLASTIC ASSOCIATION, 2022–2023 CONSTITUTION, BYLAWS, POLICIES AND PROCEDURES § 41.9 153 (outlining procedures for evaluation by a Gender Identity Eligibility Committee); S.D. HIGH SCHOOL ATHLETIC ASSOCIATION, SDHSAA TRANSGENDER PROCEDURE (2022), (requiring submission of Transgender Application for transgender male participation, with transgender female participation on female teams prohibited by state law, S.B. 46, 97 Leg. Sess. (S.D. 2022)).

10. See, e.g., LGBT SPORTS FOUNDATION, PROPOSED MODEL HIGH SCHOOL POLICY (2016).

11. See Elizabeth J. Meyer & Harper Keenan, *Can Policies Help Schools Affirm Gender Diversity? A Policy Archaeology of Transgender-Inclusive Policies in California Schools*, 30 GENDER & EDUC. 736, 749 (2018) (critiquing the at times exclusionary identity scripts perpetuated by school policies attempting to recognize and regulate some trans identities (but not others) while “recogniz[ing] the value and support that many transgender students have received from” such policies).

12. See *id.* at 750.

identities to the gender binary, subjects students to incredible degrees of state surveillance, amplifies the risk that sensitive information about the students will be disclosed too broadly, and is only accessible to those students with the support and resources necessary to navigate the often byzantine requirements.<sup>13</sup>

In addition to analyzing the harmful effects of this bureaucratized process, the Article also examines the degree to which these bureaucracies reflect certain ways of understanding gender,<sup>14</sup> and whether a shift in emphasis in the school context might lead to greater freedom for students.<sup>15</sup> Drawing from an array of sources, including personal accounts, legal advocacy, social science studies, and medical and psychological literature, the Article analyzes the principal discourses for thinking and talking about gender that have been deployed by transgender and gender variant people, their allies, legal advocates, and professional service providers.

In short, three different (but interrelated) frames have predominated—the Bio-Medical-Mental Understanding, the Social or Interactionist Understanding, and the Expressive-Performative Understanding. The first two frames (Bio-Medical-Mental and Social) have in some ways legitimized the committee structure for regulating gender identity in public schools, impeding students' ability to be the primary determiner of their identities. For example, persistent linking of transgender identity with medicalized diagnoses, including but not limited to “gender dysphoria,” potentially to harness medical care,<sup>16</sup> lends credence to a regulatory approach where medical providers and administrators, not the student, have control over the child's identity. Efforts to essentialize gender identity as an innate mental state in order to assuage overstated concerns about instrumental uses of gender freedom, for example, for competitive athletic advantage, likewise enshrine gatekeepers such as mental health professionals.<sup>17</sup> Similarly, pursuant to the law's recognition of parental control over raising and educating a child, an emphasis on the social/developmental aspects of transition, e.g., the purported role of coming out and socially transitioning in diagnostically confirming—as opposed to merely exploring or embodying—one's gender identity, may bolster a parent's ability to forbid the child's transition at school, even if the school and state or local policy is supportive of the student.<sup>18</sup>

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13. See *infra* section II.B.

14. See *infra* Part I

15. See *infra* Part III.

16. See, e.g., WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 2 (7th ed. 2011) [hereinafter WPATH SOC 7th ed.] (defining gender dysphoria “as discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth”).

17. See GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT'L CTR. FOR TRANSGENDER EQUAL., MODEL SCHOOL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS 2 (last revised Sept. 2018) [hereinafter GLSEN & NCTE, MODEL SCHOOL DISTRICT POLICY].

18. See Asaf Orr & Joel Baum, Schools in Transition: A Guide for Supporting

Consequently, the Article analyzes whether a renewed emphasis on the expressive or performative dimensions of gender may hold more emancipatory potential for students both in terms of legal doctrine and societal understanding of non-normative gender identities, ultimately cautiously concluding: yes.<sup>19</sup> The Expressive-Performative Understanding of gender underscores the degree to which gender identity, while perhaps influenced by biology and environmental forces, is nevertheless performed and expressed in myriad ways including physical embodiment, sartorial choices, and use or rejection of sex-segregated spaces.<sup>20</sup> As outlined in the Article's final Part, given extant doctrine endorsing comparatively expansive First Amendment student speech rights,<sup>21</sup> increased stress on the Expressive-Performative Understanding could provide students with the ability to dismantle the bureaucratic structures regulating their gender as infringements on their expressive rights, ultimately creating more space for gender self-determination.<sup>22</sup> Such an approach could yield particular benefits for students without the fiscal or familial resources needed to navigate the complex bureaucratic processes and for those that beautifully complicate binary identities. At the very least, an emphasis on the dialectical relationship between social context and gender expression could help schools, courts, and society better understand the non-essentialist, e.g., non-medical, but performative and exploratory components of our gender identities, creating awareness of the dynamic potential of our identities, which while our own and material, are nevertheless interconnected in challenging but exciting ways.<sup>23</sup>

These themes are explored in three parts, with Part I analyzing the prevailing frames for conceptualizing gender and gender identity, Part II discussing how those frames have influenced the bureaucratic construction of gender identity committees in public schools while detailing the committees' underappreciated harms to students' lives, and Part III analyzing whether the expressive dimensions of gender promise greater freedom for trans and gender variant students.

## I. DISCURSIVE CONSTRUCTION OF GENDER & GENDER IDENTITY

There are as many ways of conceptualizing the sources of "gender" and "gender identity" as there are different gender identities (e.g., male, female, non-binary, genderqueer).<sup>24</sup> But broadly speaking one's gender

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Transgender Students in K-12 Schools 9 (2015) (emphasizing social transition as a means of preventing or alleviating gender dysphoria in transgender youth).

19. See *infra* Part III.

20. See *infra* section I.C; JUDITH BUTLER, GENDER TROUBLE xxv (Routledge Classics 2006) (1990) [hereinafter BUTLER, GENDER TROUBLE].

21. See e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

22. See *infra* section III.A.

23. See *infra* section III.B.

24. See Jennifer Finney Boylan, *Throwing Our Voices: An Introduction*, in TRANS BODIES, TRANS SELVES, *supra* note 4, at xv, xvii (underscoring the rich multiplicity of views on gender identity among the trans community); Paisley Currah, Richard M. Juang, & Shannon

(culturally-created categories of expected behavior assigned to people frequently on the basis of certain sex-based characteristics) and gender identity (internal personal sense of belonging with a particular gender category, or no gender category) are discursively constructed as being influenced by some or all of the following elements: biological influences (nature), social influences and historical conditions (nurture/culture), and an individual's own self-constructing gender expression (the expressive or performative).<sup>25</sup>

There may be elements of "truth" to each of these.<sup>26</sup> Indeed, to the extent that everyone's gender identity is formed uniquely, some people may be more influenced or shaped by a certain factor, and less so by others.<sup>27</sup> As put by developmental psychologist Diane Ehrensaft, it is quite possible that "nature and nurture crisscross over time in a myriad of ways in the context of each particular culture to create gender as we know it."<sup>28</sup> As with others in the fields of queer theory and transgender studies,<sup>29</sup> the concern here is not with isolating the one "true" and universal source of gender identity.<sup>30</sup> As transgender

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Price Minter, *Introduction*, in *TRANSGENDER RIGHTS* xiii, xvi (Paisley Currah et al. eds. 2000) [hereinafter *TRANSGENDER RIGHTS*].

25. See SUSAN STRYKER, *TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION* 14–15 (2d. ed. 2017) [hereinafter *STRYKER, TRANSGENDER HISTORY*]; Laura Erickson-Schroth, Miqqi Alicia Gilbert, & T. Evan Smith, *Sex and Gender Development*, in *TRANS BODIES, TRANS SELVES*, *supra* note 4, at 80, 83, 99; GENNY BEEMYN & SUSAN RANKIN, *THE LIVES OF TRANSGENDER PEOPLE* 17 (2011).

26. See STRYKER, *TRANSGENDER HISTORY*, *supra* note 25, at 21 (emphasizing that how "gender identity develops in the first place and how gender identities can be so diverse are hotly debated topics that go straight into the controversies about nature versus nurture and biological determinism versus social construction"); DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* 61 (2007) (explaining that "no categorical system fully explains the ways in which those lived experiences we name through 'gender' and 'sexuality' are lived on a day-to-day basis by particular social actors in particular social contexts").

27. Cf. Stephen Whittle, *Forward* to *THE TRANSGENDER STUDIES READER* xiii (Susan Stryker & Stephen Whittle, eds. 2006) (explaining that the partial shift from the pathologization of trans identities has enabled trans people "to reclaim the reality of their bodies, to create with them what they would, and to leave the linguistic determination of those bodies open to exploration and invention").

28. DIANE EHRENSAFT, *THE GENDER CREATIVE CHILD: PATHWAYS FOR NURTURING AND SUPPORTING CHILDREN WHO LIVE OUTSIDE GENDER BOXES* 17 (2016) [hereinafter *STRYKER, TRANSGENDER HISTORY*].

29. See LESLIE FEINBERG, *TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO DENNIS RODMAN* xii (1996) [hereinafter *FEINBERG, TRANSGENDER WARRIORS*] (declining to "take a view that an individual's gender expression is exclusively a product of either biology or culture" and observing that "while biology is not destiny, there are some biological markers on the human anatomical spectrum," but at the same time "there must be a complex interaction between individuals and their societies").

30. Any attempt to establish a "true" source of gender identity is well beyond my purported expertise. I happen to believe that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992); see also *Obergefell v. Hodges*, 574 U.S. 644, 651–52 (2015) (emphasizing one's liberty "to define and express their identity"); FEINBERG, *TRANSGENDER WARRIORS*, *supra* note 29 at xi (defending as paramount

historian Susan Stryker underscored, “it’s more important to acknowledge that some people experience gender differently from how most do than to say why people experience gender differently from how most do.”<sup>31</sup> And such purported truth-telling is one of the principal strategies of disciplinary power critiqued by this Article.<sup>32</sup>

Instead, the goal of this Part is to analyze and map how gender and gender identity have been discursively constructed by diffuse societal elements—transgender and gender variant people themselves, but also their allies, legal advocates, and professional service providers—and in the next section, to show how certain discursive constructions may have lent credence to and legitimized the vast bureaucracies governing students’ lives. Rather than focus on a singular truth regarding the source(s) of gender and gender identity, I am interested in scrutinizing whether certain core features of the overlapping understandings of gender have greater liberating potential than others. To that extent, recognizing that all discursive frames have some measure of disciplining effect,<sup>33</sup> my objective with regard to analyzing these various discourses is simultaneously highly agnostic and decidedly instrumental. Beyond personal experiences with my own gender identity and sexuality, I have little to contribute to the important literature on the sources of gender and gender identity—as delightfully put by legal scholar and bioethicist Florence Ashley, “anyone who claims to have a clear [or complete] understanding of gender is a liar, liar pants on fire.”<sup>34</sup> Rather, I am interested in seeing which discursive understanding creates the most legal space—and lived reality—for individual freedom and exploration in the particular context of public education. Put differently, drawing from transgender activist Leslie Feinberg, this Article is “not aimed at *defining* but at [legally] *defending* the diverse communities that are coalescing.”<sup>35</sup>

But before going much further, some theoretical groundwork and definitional explanation of what I mean by “discourse.” In the context of intimate attraction, Michel Foucault explained that rather than simply repressing

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“the right of each individual to define themselves”).

31. STRYKER, *TRANSGENDER HISTORY*, *supra* note 25, at 22; *see also* STRYKER, *TRANSGENDER HISTORY*, *supra* note 28, at 31 (emphasizing the collective need for society “to be humble enough to admit to knowing much more about the ‘what’ of gender . . . than the ‘why’ of gender (the actual determinants that . . . cause only some people to be transgender)”).

32. *See* MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 68 (Vintage 1990) (Robert Hurley, trans., Pantheon 1978) (critiquing the “complex machinery for producing true discourses on sex”).

33. *Cf.* DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 106–07 (Duke Univ Press. 2015) (2011).

34. *See* Florence Ashley, *Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth*, 24 *CLINICAL CHILD PSYCHOLOGY & PSYCHIATRY* 223, 226 (2019) [hereinafter Ashley, *Against Delaying*]; *see also* Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 465, 478 (2009) (expressing skepticism that it’s possible to arrive “at a definitive understanding of sex”).

35. FEINBERG, *TRANSGENDER WARRIORS*, *supra* note 29, at ix.



sexuality and discussions of it, modern society, in fact, facilitated discussions or “discourses” about sexuality and, by so doing, managed, controlled, and shaped what were deemed acceptable and unacceptable sexualities through diffuse, non-centralized exercises of social/disciplinary power.<sup>36</sup> The discourses justified and gave rise to professionals (doctors, psychotherapists, etc.) who could socially regulate sexuality through further disciplinary discourse, including via categorization (namely, the invention of the then-pathologized category of “homosexual”).<sup>37</sup> As transgender studies scholars have powerfully emphasized, and as will be expanded on in detail in the education context, similar disciplinary discourses have arisen with regard to the governance of gender.<sup>38</sup>

In fact, the construction of the category “transgender” is a good example of the power of discourse to create, enshrine, and control, notwithstanding its simultaneously liberating potential.<sup>39</sup> Of course, people *now* denominated as transgender have existed throughout human history,<sup>40</sup> but the term itself did not gain real purchase until the 1990s and has become institutionalized with astounding alacrity. At the same time, the term is contested and has varied meanings.<sup>41</sup> Today, the term “transgender” often operates to designate people “who identify with a binary gender other than the one they were assigned at birth” or, more broadly, as an umbrella term describing anyone who is, to varying degrees, gender variant.<sup>42</sup> As David Valentine notes in his ethnography of the term “transgender,” identities potentially falling under the transgender umbrella include, “transsexuals, transvestites, cross-dressers, men or women

36. See FOUCAULT, *supra* note 32, at 35.

37. See *id.* at 68.

38. See, e.g., Dean Spade, *Mutilating Gender*, in TRANSGENDER STUDIES READER, *supra* note 27, at 315, 318 [hereinafter Spade, *Mutilating Gender*].

39. See Meyer & Keenan, *supra* note 11, at 740 (explaining that reliance on fitting “neatly within a prescribed legal category in order to secure the protections of the law does not provide meaningful support for individuals whose identities transcend and blend discrete legal categories”); E. Patrick Johnson, “*Quare*” Studies, or (Almost) Everything I Know About Queer Studies I Learned from my Grandmother, 21 TEXT & PERFORMANCE QUARTERLY 1 (2001) [hereinafter E. Patrick Johnson, “*Quare*” Studies] (explaining that queer studies and the category queer have at times effaced issues confronted by people of color); cf. Judith Butler, *Imitation and Gender Insubordination*, in THE LESBIAN AND GAY STUDIES READER 307, 308–09 (Henry Abelove, Michele Aina Barale, & David M. Halperin eds. 1993) (acknowledging short-term liberating potential of identity categories notwithstanding their longer-term disciplinary risks).

40. See FEINBERG, TRANSGENDER WARRIORS, *supra* note 29, at 125; Nick Gorton & Hilary Maia Grubb, *General, Sexual, and Reproductive Health*, in TRANS BODIES, TRANS SELVES, *supra* note 4, at 215, 216; HALBERSTAM, *supra* note 1, at 25.

41. See Susan Stryker, (De)Subjugated Knowledges, in TRANSGENDER STUDIES READER, *supra* note 27, at 1–2 [hereinafter Stryker, (De)Subjugated Knowledges] (noting “the startlingly rapidity with which the term itself took root, and was applied to (if not always welcomed by) the sociocultural and critical-intellectual formations that were caught up in, or suddenly crystallized by, its wake”); STRYKER, TRANSGENDER WARRIORS, *supra* note 29, at 36–37; VALENTINE, *supra* note 26, at 4, 32.

42. STRYKER, TRANSGENDER WARRIORS, *supra* note 29, at 37; Paisley Currah, Richard M. Juang, & Shannon Price Minter, *Gender Pluralisms*, in TRANSGENDER RIGHTS, *supra* note 24, at 3, 4.

of transgender or transsexual experience, drag queens, drag kings, female or male impersonators, genderqueers, intersexuals, hermaphrodites, [and] fem queens”—just for starters.<sup>43</sup>

But notwithstanding its relatively recent vintage and broad scope, the term “transgender” and its social and legal definitions have served not just to classify identities, but to construct (and limit) them.<sup>44</sup> As described by sociologist Austin Johnson, there are hegemonic ideologies at work (ideologies Johnson labels “transnormativity”), which serve to “structure[ ] transgender experience, identification, and narratives into a hierarchy of legitimacy that is dependent upon a binary medical model and its accompanying standards.”<sup>45</sup> As one example, as legal scholar Dean Spade has underscored,<sup>46</sup> to the extent that access to certain kinds of gender confirming health care, such as genital surgery, have often been discursively constructed by transgender medical service providers as requiring that a “person lived continuously for at least 12 months in the gender role that is congruent with their gender identity” prior to surgery,<sup>47</sup> transgender identity has been constructed to reinforce the binary and, in effect, demand that transgender people pass as either a man or woman, and nothing else.<sup>48</sup>

These discursive demands from places of institutional authority both rhetorically shape and influence people’s identities in a conforming manner, but also reward those who are able to shape their narratives to access the service. Johnson suggests that these discursive demands are a form of accountability structure that “create[ ] a positive test for evaluating trans identity and experience within social, medical and legal settings.”<sup>49</sup> As put by Spade, the “self-determination of trans people in crafting our gender expression is compromised by the rigidity of the diagnostic and treatment criteria” while at the same time the criteria “produce and reify a fiction of normal, healthy gender that works as a regulatory measure for the gender expression of all people.”<sup>50</sup> This, notwithstanding that, of course, many gender variant people understand the hoops they are required to jump through and deploy the accepted,

43. VALENTINE, *supra* note 26, at 33.

44. MAGGIE NELSON, *THE ARGONAUTS* 52–53 (2015) (“[T]rans’ may work well enough as shorthand, but the quickly developing mainstream narrative it evokes (‘born into the wrong body,’ necessitating an orthopedic pilgrimage between two fixed destinations) is useless for some . . . [F]or some, ‘transitioning’ may mean leaving one gender entirely behind, while for others . . . it doesn’t?”).

45. Austin H. Johnson, *Transnormativity: A New Concept and Its Validation through Documentary Film About Transgender Men*, 86 SOCIO. INQUIRY 465, 466 (2016) [hereinafter Austin H. Johnson, *Transnormativity*]

46. Spade, *Mutilating Gender*, *supra* note 38, at 320–23.

47. WPATH SOC 7th ed., *supra* note 16, at 21.

48. See Spade, *Mutilating Gender*, *supra* note 38, at 326 (“diagnosis and treatment are linked to the performance of normative gender”).

49. Austin H. Johnson, *Transnormativity*, *supra* note 45, at 468.

50. Spade, *Mutilating Gender*, *supra* note 38, at 329.

medicalized and binary narrative as a form of resistance in order to strategically access services.<sup>51</sup>

With that theoretical preface complete, what are the overlapping and interrelated discourses shaping societal understanding of gender and gender identity, with a particular but nonexclusive focus on the student and youth context?

#### A. *The Bio-Medical-Mental Understanding*

To varying degrees and with different points of emphasis, gender and gender identity have often been understood and framed as having innate physical and/or mental components. Put glibly, gender has sometimes been understood as being located between the legs and/or between the ears.<sup>52</sup> These frames have legitimized and granted professional service providers such as physicians and mental health care specialists enormous influence and control over people's gender identities, including in the school and youth context.<sup>53</sup> And while the mental emphasis grants people more leeway and freedom than the emphasis on physical embodiments of gender, it still often essentializes gender as fixed and enshrines professionalized gatekeepers and bureaucratic surveillance, as will be discussed.

Historically, the prevailing hegemonic discourse regarding the source of one's gender emphasized biological elements and sex-related physical characteristics, most notably external genitalia, but also internal reproductive organs, chromosomes, genes, and hormones.<sup>54</sup> It is these physical characteristics (sometimes understood as one's "sex," even though these characteristics often do not neatly align with the particular binary sex society has grouped them under) that have been held up as the *sine qua non* of gender by those opposing any elasticity in the categories of gender and any daylight between the concept of sex and gender.<sup>55</sup>

51. See Austin H. Johnson, *Rejecting, Reframing, and Reintroducing: Trans People's Strategic Engagement with the Medicalisation of Gender Dysphoria*, 41 SOC. HEALTH & WELLNESS 517, 526–29 (2019) [hereinafter Austin H. Johnson, *Rejecting, Reframing, and Reintroducing*].

52. See EHRENSAFT, THE GENDER CREATIVE CHILD, *supra* note 28, at 31.

53. See JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 6 (2002) (explaining that beginning in the mid-twentieth century, trans people "ran into constant conflicts with doctors who insisted on their own authority to define sex and gender, diagnose the condition, and recommend the treatment"); HALBERSTAM, *supra* note 1, at 32 ("[A]ll too often medical frameworks produce rather than treat, diagnose rather than observe, and fix rather than care for transgender bodies . . .").

54. See Julia A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in TRANSGENDER RIGHTS, *supra* note 24, at 51, 52–54.

55. See, e.g., H.B. 663, 2016 Gen. Assemb. Reg. Sess. (Va. 2016) (proposing to require schools to force students to use bathrooms and locker rooms corresponding to their so-called "anatomical sex"); S.B. 6, 85 Reg. Leg. Sess. (Tex. 2017) (proposing to require students to use only the bathrooms and locker-rooms corresponding to their so-called biological sex); S.B. 46, 97 Leg. Sess. (S.D. 2022) (permitting student sports participation only "based on their biological sex").

But at times, the importance of these physical characteristics has also been underscored by transgender rights advocates.<sup>56</sup> Many trans individuals and organizations have fought valiantly to broaden access to different kinds of medical interventions that help empower transgender people to embody different aspects of their gender identity.<sup>57</sup> Such interventions include hormone therapy and different kinds of surgery to external genitalia, internal reproductive organs, and secondary sex characteristics such as breasts.<sup>58</sup>

To be clear, access to these interventions and the professionals that provide them is undoubtedly critical to helping many people embody their gender, and the interventions themselves form an important part of a broader emancipatory queer agenda.<sup>59</sup> And having a non-normative gender framed as a medical phenomenon or protected through disability law ought not to be inherently stigmatizing—just as any disability ought not be stigmatized.<sup>60</sup> But at times, the emphasis on bringing one’s body into so-called “alignment” with one’s gender identity through medical intervention has had unintended consequences, including both reifying the gender binary and enshrining the medical and mental health professional communities as gatekeepers over people’s gender—including transgender youth.<sup>61</sup> Put differently, even while rightly resisting attempts to pathologize trans and queer identities, for example, by successfully arguing for the removal of “gender identity disorder” from the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (the “DSM”),<sup>62</sup> the discursive emphasis on the physical embodiment of gender has nevertheless perpetuated medical gatekeeping over people’s gender identity,<sup>63</sup>

56. See Pau Crego Walters, *Trans Pathologization*, in TRANS BODIES, TRANS SELVES *supra* note 4, at 308 (noting that “organizing for trans rights has generally developed in parallel with trying to access trans-specific health care”).

57. See, e.g., NAT’L CTR. FOR TRANSGENDER EQUAL., *Getting Your Health Care Covered: A Guide for Transgender People* (last visited Oct. 7, 2022), <https://transequality.org/health-coverage-guide>, archived at <https://perma.cc/M5MG-HZNG> (advocating access to “transition-related care”).

58. See WPATH SOC 7th ed., *supra* note 16, at 18.

59. See Jules Chyten-Brennan, *Surgical Transition*, in TRANS BODIES, TRANS SELVES, *supra* note 4, at 265, 265.

60. See Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in TRANSGENDER RIGHTS, *supra* note 24, at 74, 74–75.

61. See Spade, *Mutilating Gender*, *supra* note 38, at 318–23; STRYKER, TRANSGENDER HISTORY, *supra* note 25, at 52.

62. See Tamar Carmel, Ruben Hopwood, & lore m. dickey, *Mental Health Concerns*, in TRANS BODIES, TRANS SELVES, *supra* note 4, at 305, 308–09 (outlining the history of the DSM’s treatment of transgender identities, and observing that while the removal of “gender identity disorder” from the DSM in 2013 helped de-pathologize trans identities, the inclusion of “gender dysphoria” is still stigmatizing to many).

63. Cf. Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in TRANSGENDER RIGHTS, *supra* note 24, at 171, 184 (“When resorting to the traditional medical model, it is virtually impossible to discuss gender-variant people or their issues without the use of terms that overtly state or at least imply pathology and reinforce the omnipotence of the medical professional.”).

and rendered those uninterested or unable to comply with the normative standards created by the medical model as illegible or inauthentic.<sup>64</sup>

Even more, as gender studies scholar Jules Gill-Peterson highlights with regard to trans children specifically, the narrative force behind medical intervention “grants immense authority to medicine in making the trans child an ontological possibility, as if trans children were unthinkable, nonexistent even, prior to puberty suppression therapy.”<sup>65</sup> And it helps prop-up related narrative tropes of parental “loss” that exist within some literatures on parenting transgender children, “exalt[ing] gender as an exceptional category [that] is treated as a pregiven fact,” locating the source of any loss or damage as stemming from existence of transgender children rather than with societal cisgenderism.<sup>66</sup>

Put differently by Judith Butler in her trenchant critique of the “gender identity disorder” diagnosis (and still largely applicable to a diagnosis of “gender dysphoria,” discussed below), the “diagnosis works as its own social pressure, causing distress, establishing wishes as pathological, intensifying the regulation and control of those who express them in institutional settings.”<sup>67</sup> As to transgender youth specifically, Butler suggests that the diagnosis acts “as peer pressure, as an elevated form of teasing, as a euphemized form of social violence.”<sup>68</sup>

Case and point is the widely referenced Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People (“SOC”) published by the World Professional Association for Transgender Health (“WPATH”). The prevailing version that influenced discourse and policies over the past decade and discussed herein was the Seventh edition, published in 2011.<sup>69</sup> While WPATH “recognizes and validates various expressions of gender that may not necessitate psychological, hormonal, or surgical treatments,” and rejects the pathologization of gender nonconformity,<sup>70</sup> the SOC

64. Austin H. Johnson, *Normative Accountability: How the Medical Model Influences Transgender Identities and Experiences*, 9 SOCIO. COMPASS 803, 803 (2015).

65. JULIAN GILL-PETERSON, HISTORIES OF THE TRANSGENDER CHILD 6 (2018); see also HALBERSTAM, *supra* note 1, at 8 (“The power of naming that has fallen to doctor and psychologists, social workers and academics, commands the authority of scientific inquiry and joins it to a system of knowledge that invests heavily in the idea that experts describe rather than invent.”).

66. Damien W. Riggs & Clare Bartholomaeus, *Cisgenderism and Certitude: Parents of Transgender Children Negotiating Educational Contexts*, 5 TSQ: TRANSGENDER STUD. Q. 67, 68 (2018).

67. Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS, *supra* note 24, at 274, 295.

68. *Id.*

69. As this Article was going to print in 2022, WPATH issued a revised, 8th edition of the Standards of Care, but there was not opportunity to completely revise this text. Nonetheless, as noted, the 7th edition is most relevant in terms of analyzing WPATH’s influence on discourses of gender over the past decade. For the 8th edition, see WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE (8th ed. 2022).

70. WPATH SOC 7th ed., *supra* note 16, at 2, 4.

sound with incredible inertia in favor of medical interventions to address the existence of transgender people, including through treatments for gender dysphoria.<sup>71</sup> Gender dysphoria is the socially created and deeply felt distress that can occur when someone's sex assigned at birth is inconsistent with a person's gender identity, and replaced "gender identity disorder" in the DSM in 2013. Treatment is held up as "available to assist people with such distress" and as a means "to explore their gender identity and find a gender role that is comfortable for them."<sup>72</sup> And while WPATH underscores that not all trans people have gender dysphoria and not all that do require a diagnosis, the heavy emphasis on "gender dysphoria," perhaps not much less than its predecessor "gender identity disorder," still pathologizes trans identities by suggesting that many trans people suffer from it before undergoing "treatment."<sup>73</sup> Indeed, as characterized by some scholars the shift in the DSM from "gender identity disorder" to "gender dysphoria" was "largely a symbolic gesture."<sup>74</sup> Perhaps paradoxically, the proffered solution to the social exclusion causing the distress is not to fix society, but to treat the individual.<sup>75</sup>

Yet, while WPATH rhetorically puts its thumb on the scale in favor of medical interventions as a critical part of transgender health, as to children and youth specifically, the WPATH suggests that certain interventions may not yet be appropriate for children and youth. Put differently, WPATH suggests that medical interventions including hormone therapy may be critical for certain individuals but interjects itself as a gatekeeper, particularly for children and youth. As explained by Gill-Peterson, the "ostensible concern is that the effects of these 'new' hormonal technologies are in some important way unknown or that children are too young to undergo hormonal therapy or even make the decision to alter their bodies—as if sex and gender were otherwise natural, unmodified forms in cisgender bodies."<sup>76</sup>

Indeed, at other turns, WPATH suggests that gender dysphoria during prepubescent childhood "does not inevitably continue into adulthood"

71. See Austin H. Johnson, *Transnormativity*, *supra* note 45, at 808 ("[I]n order to be legally recognized and affirmed as men and women, transgender people are held accountable to a medical model of identity that requires medical interventions."); see also MARTIN J. SMITH, GOING TO TRINIDAD: A DOCTOR, A COLORADO TOWN, AND STORIES FROM AN UNLIKELY GENDER CROSSROADS 1 (2021) [hereinafter SMITH, GOING TO TRINIDAD] (characterizing the transition of a transgender woman as "stalled short of the next *logical* step, surgery to transform her male genitalia into that of a female") (emphasis added).

72. WPATH SOC 7th ed., *supra* note 16, at 5.

73. Syrus Marcus Ware & Zack Marshall, *Disabilities and Deaf Culture*, in TRANS BODIES, TRANS SELVES, *supra* note 4, at 54.

74. Austin H. Johnson, *Rejecting, Reframing, and Reintroducing*, *supra* note 51, at 517; see also Harper Benjamin Keenan, *Unscripting Curriculum: Toward a Critical Trans Pedagogy*, 87 Harv. Educ. Rev. 538 (2017).

75. See HALBERSTAM, *supra* note 1, at 47 (noting that the DSM's framing of "gender dysphoria" does not account "for the fact that a person's distress over their gender identity may be the result of social exclusion, family violence or reduced employment opportunities rather than of a struggle with gender identification").

76. GILL-PETERSON, *supra* note 65, at 6.

and—reinforcing the rigidity between gender and sexuality—notes that many prepubescent children who were assigned male were “more likely to identify as gay in adulthood than as transgender” according to some studies.<sup>77</sup> Conversely, WPATH suggests gender dysphoria among adolescents is more persistent and references a study where 70 adolescents given puberty suppressing hormones “all continued with the actual sex reassignment” (again, putting its thumb on the scale of surgery as the final word in legitimization).<sup>78</sup> The WPATH can fairly be read as suggesting that for many children, gender variance or fluidity is a phase— “[i]n most children, gender dysphoria will disappear before or early in puberty”<sup>79</sup>—with little discussion of why it might disappear, such as overwhelming influence of social forces toward conformity and against children’s efforts to perform different gender expressions. In short, the WPATH SOC seem to reify the importance of physical transition for gender fulfillment, and at the same time, question the relevance of such transition for children, the expressed gender identities of which WPATH seems to question.<sup>80</sup>

The WPATH then proceeds to outline the many roles it envisions for mental health professionals in working with children and adolescents with gender dysphoria, including (1) directly assessing the gender dysphoria, (2) providing psychotherapy to assist the children and adolescents with exploring their gender identity and alleviating distress related to gender dysphoria, (3) assessing and treating any co-existing mental health concerns, (4) referring “adolescents for additional physical interventions, such as puberty suppressing hormones, to alleviate gender dysphoria,” including documenting the existence of gender dysphoria and the adolescent’s “eligibility for physical interventions,” and (5) educating and advocating on behalf of gender dysphoric children and students, including in schools, among other responsibilities.<sup>81</sup>

With regard to the role for mental health professionals in the assessment of gender dysphoria, the WPATH in some way sets up mental health professionals as the determiners of the legitimacy of a young person’s gender identity and, at times, suggests that how an adolescent responds to certain physical treatments “can be diagnostically informative.”<sup>82</sup> For some people, this puts the cart before the horse and suggests that how a person responds to the idea of certain physical interventions such as genital surgery is in part determinative of their gender identity—that is, it puts physical embodiment at the forefront of gender determination.

Elsewhere, the mental and physical frames for gender identity are explicitly linked, with mental health professionals serving as gatekeepers for

77. WPATH SOC 7th ed., *supra* note 16, at 11.

78. *Id.*

79. *Id.* at 12.

80. *Cf.* EHRENSAFT, *THE GENDER CREATIVE CHILD*, *supra* note 28, at 51, 85 (critiquing, as a member of WPATH, their cautionary note that children should potentially wait to socially transition because children may convert back to the gender role correlating to their sex-assigned at birth).

81. WPATH SOC 7th ed., *supra* note 16, at 14.

82. *Id.* at 15.

physical/medical interventions, as emphasized by the role WPATH envisions for mental health professionals in referring adolescents for physical interventions (noted above).<sup>83</sup> As Dr. Marci Bowers, the President Elect of WPATH, has emphasized with regard to the recommended role of mental health professionals as gatekeepers for surgery generally (not specifically as to youth and children), “it’s pretty ridiculous that that is required.”<sup>84</sup> And as explained by scholar Florence Ashley, requiring psychological referral letters and a diagnosis of gender dysphoria for hormone replacement therapy privilege purported medical expertise over the “lived experiences” of trans people, while “misrepresent[ing] trans embodiment and devalue[ing] the experiences of those who wish to alter their bodies for reasons other than gender dysphoria,” including for purposes of gender euphoria—the joy that comes with aligning one’s body with one’s gender identity.<sup>85</sup>

In terms of criteria for adolescent eligibility for partially reversible physical interventions such as feminizing/masculinizing hormone therapy, WPATH emphasizes at several points that before such an intervention can begin a patient must present with “persistent, well-documented gender dysphoria,” simultaneously suggesting that gender identity/role is and ought to be fixed (“persistent”) and cementing professionals’ roles in surveilling and monitoring identity formation (“well-documented”).<sup>86</sup> Even as to fully reversible interventions such as puberty suppressing hormones, the adolescent must have “demonstrated a long-lasting and intense pattern of gender nonconformity or gender dysphoria.”<sup>87</sup> And as to irreversible interventions such as genital surgery, patients must reach the age of legal majority in their country and “have lived continuously for at least 12 months in the gender role that is congruent with their gender identity.”<sup>88</sup>

Of course, WPATH is not alone in contributing to the Bio-Medical-Mental frame of understanding gender and gender identity. For example, in the forward to the influential book, *The Transgender Child*, by Stephanie Brill and

83. See, e.g., Ruben Hopwood & lore m. dickey, *Mental Health Services and Support*, in *TRANS BODIES, TRANS SELVES*, *supra* note 4, at 298; Abram J. Lewis, *Trans History in a Moment of Danger: Organizing Within and Beyond “Visibility” in the 1970s*, in *TRAP DOOR* 57, 61 (Reina Gossett et al., eds., 2017) (quoting trans activist Angela Douglas as lamenting that “psychiatrists and psychologists . . . are some of the worst enemies of transsexuals and gay people and women”); Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in *TRANSGENER STUDIES READER*, *supra* note 27, at 221, 232 (critiquing clinicians who “act as gatekeepers for cultural norm” and operate as “the final authority for what counts as a culturally legible body”).

84. SMITH, *GOING TO TRINIDAD*, *supra* note 71, at 167.

85. Florence Ashley, *Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanizing*, 45 *J. MED. ETHICS* 480, 480–82 (2019); see also Florence Ashley, *Transgender Healthcare Does Not Stop at the Doorstep of the Clinic*, 134 *AM. J. MED.* 158, 158 (2021) (emphasizing “learning about trans health solely through traditional sources unwittingly perpetuates the disenfranchisement of trans communities”).

86. WPATH SOC 7th ed., *supra* note 16, at 34; see also *id.* at 20.

87. *Id.* at 19.

88. *Id.* at 21.



Rachel Pepper, Dr. Norman Spack, a pediatric endocrinologist who founded the America's first medical clinic specifically devoted to treating transgender children, laments how "[e]arly medical intervention is absent" for many transgender people.<sup>89</sup> In a forward to another prominent book, *The Gender Creative Child*, this one by Diane Ehrensaft, Spack hand wrings that in the 1980s when treating his first transgender patient, "[n]o psychological tests were performed," prior to initiating hormone treatment.<sup>90</sup> Spack's advocacy for the initiation of drug protocols designed to suppress the onset of puberty is premised on, in his words, the belief that such delay permits "patients to gain time to be further evaluated."<sup>91</sup> As emphasized by trans writer and performance artist Morgan M. Page, such narratives frame "trans people as new, as a modern, medicalized phenomenon," in turn "reifying the idea that trans people exist only as products of pharmacological-surgical processes, rather than as people who may or may not choose to access such processes."<sup>92</sup>

Indeed, gender identity itself (again, the internal sense of belonging to a particular gender category, or no gender category) has often been characterized as innate, fixed, essentialized, and/or biological. For example, as explained by Dr. Deanna Adkins, the founder and director of the Duke Gender Care Clinic in an affidavit submitted in support of the ACLU in litigation opposing North Carolina's so-called bathroom bill HB2, "evidence strongly suggests that gender identity is innate or fixed at a young age and that gender identity has a strong biological basis."<sup>93</sup> Put similarly by Brill and Pepper, "[i]t is most commonly understood that gender identity is formed in the brain . . . . From this perspective, the brain is a gendered organ, and gender identity is not a conscious decision . . . and all people whose gender identity does not align with their anatomical sex are simply born this way."<sup>94</sup> As described by GLSEN and the National Center for Transgender Equality (NCTE) in their "Model School District Policy on Transgender and Gender Nonconforming Students," "[g]ender identity is an innate and largely inflexible part of a person's

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89. Norman Spack, *Forward* to STEPHANIE BRILL & RACHEL PEPPER, *THE TRANSGENDER CHILD* ix (2008).

90. Norman Spack, *Forward* to EHRENSAFT, *THE GENDER CREATIVE CHILD*, *supra* note 28, at xiii.

91. *Id.* at xiv (emphasis added).

92. Morgan M. Page, *One From the Vaults: Gossip, Access, and Trans History-Telling*, in TRAP DOOR, *supra* note 83, at 135, 140; see also SA Smythe, *Black Life, Trans Study: On Black Nonbinary Method, European Trans Studies, and the Will to Institutionalization* 8 TSQ: TRANSGENDER STUD. Q. 158, 165 (2021) ("Trans people's unruly bodies have been scrutinized, coercively medicated, exploited, ahistorically relegated to the contemporary, and otherwise violated[.]").

93. Expert Declaration of Deanna Adkins, M.D. P 22, *Carcano v. McCrory*, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. May 13, 2016).

94. BRILL & PEPPER, *supra* note 89, at 14, 15 (being transgender "is understood to be biological and not 'caused' socially"); see also BEEMYN & RANKIN, *supra* note 25, at 5–6 ("[T]ransgender identities are no less 'natural' or 'legitimate' than the dominant gender categories of women and men.").

identity.”<sup>95</sup> Put differently, this discourse suggests that one’s gender is indeed inborn, fixed, and biological—but locates the biological source as one’s internal gender identity rather than one’s external genitalia.<sup>96</sup>

The discursive essentialization or fixing of gender identity is likely partially a tactical and self-preserving reaction to persistent historical questioning of the legitimacy of people whose existence beautifully undermines either the gender binary or essentialist views of certain physical sex characteristics as determining gender. As underscored by sociologist Tey Meadow, “proponents of biological explanations for gender and sexual difference imagined that the ‘argument for immutability’ provided a political justification for accommodation.”<sup>97</sup> Laws questioning non-normative gender identities and policing gender appearance are not new, and many ancient societies ranging from Roman to Hebrew forbade cross-dressing.<sup>98</sup> Often, the questions regarding the veracity of transgender and gender variant lives have taken overtly hateful turns, such as in the campaign to repeal Houston’s nondiscrimination law in 2015, with trans women portrayed as sick and violent men who only seek access to sex-segregated spaces that conform to their gender identity, such as restrooms, in order to harass cisgender women.<sup>99</sup> Of course, transgender women are women,<sup>100</sup> not men, and as Leslie Feinberg noted long ago, “defending the inclusion of transsexual [or transgender] sisters in women’s space does not threaten the safety of any woman . . . . Transsexual [and transgender] women are not a Trojan horse trying to infiltrate women’s space.”<sup>101</sup> Indeed, it is transgender people themselves who are disproportionately subjected to sexual violence and harassment.<sup>102</sup>

95. GLSEN & NCTE, MODEL SCHOOL DISTRICT POLICY, *supra* note 17, at 2.

96. *Cf.* TEY MEADOW, TRANS KIDS: BEING GENDERED IN THE TWENTY-FIRST CENTURY 3 (2018) (“Gender is no longer simply sutured to biology; many people now understand it to be a constitutive feature of the psyche that is fundamental, immutable, and not tied to the materiality of the body.”).

97. MEADOW, *supra* note 96, at 75 (internal citations omitted).

98. *See* FEINBERG, *supra* note 29, at 49–64.

99. *See* Chase Strangio, *Houston, We Have a Problem*, ACLU (Nov. 4, 2015), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/houston-we-have-problem>, archived at <https://perma.cc/6739-HPGT> (critiquing hateful campaign to repeal Houston’s Equal Rights Ordinance (HERO)); *see also* Erin Fitzgerald, *A Comprehensive Guide to the Debunked “Bathroom Predator” Myth*, MEDIA MATTERS FOR AMERICA (May 5, 2016), <https://www.mediamatters.org/sexual-harassment-sexual-assault/comprehensive-guide-debunked-bathroom-predator-myth>, archived at <https://perma.cc/A3LH-GRAE> (empirically documenting no evidence that people take advantage of LGBTQ non-discrimination laws to attack women in restrooms).

100. Julia Serano, *Debunking “Trans Women Are Not Women” Arguments*, MEDIUM (June 27, 2017), <https://juliaserano.medium.com/debunking-trans-women-are-not-women-arguments-85fd5ab0e19c>, archived at <https://perma.cc/SJ49-9N36>.

101. FEINBERG, *supra* note 29, at 117.

102. Julia Serano, *Transgender People, Bathrooms, and Sexual Predators: What the Data Say*, MEDIUM (July 7, 2021), <https://juliaserano.medium.com/transgender-people-bathrooms-and-sexual-predators-what-the-data-say-2f31ae2a7c06>, archived at <https://perma.cc/8AUP-SKWW>.

As with law reform efforts designed to gain protections for queer sexualities (namely, same-sex couples),<sup>103</sup> the emphasis on (homo)sexuality or, in this case, gender identity being innate may also be explained by its instrumental and short-term harm-reducing role in helping queer and trans people take advantage of constitutional equality protections rewarding identities that are not changeable, but rather immutable.<sup>104</sup> Consistent with this advocacy on behalf of same-sex couples, legal advocates for transgender rights have emphasized the immutability of gender identity in the context of equal protection challenges to schools' refusal to allow students to use restrooms consistent with their gender identity.<sup>105</sup>

But the medical essentialization of an individual's gender identity, including through emphasis on gender identities' purported immutability has costs. It constricts and limits exploration, provides others effective veto rights over the child's identity given the law's recognition of parental control over medical decision making,<sup>106</sup> and has served to facilitate the heavy policing and regulation of transgender and gender variant children, including within the educational context, as will be outlined in Part II.

### B. *The Social or Interactionist Understanding*

In addition to discursive emphasis on the biological, medical, and mental origins of gender and gender identity, gender identity has also at times been framed as being influenced by social factors. That is to say that while, as described above, gender identity has often been characterized as something physiologically fixed or innate, certain discursive space has at times been left open for the possibility that environmental and social influences may affect the development of gender or how one's gender manifests.<sup>107</sup> The emphasis on gender being shaped socially also buttresses the ability of professionalized gatekeepers and parents to control their children's gender identification with the support of school administration over the desires of the student,

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103. See generally Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 889 (2018) [hereinafter Skinner-Thompson, *The First Queer Right*] (critiquing primacy placed on homogeneity and conformity within gay rights litigation).

104. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 487 (1998) (noting that because strict scrutiny is unlikely to be applied under the Equal Protection Clause if an identity characteristic is mutable, equal protection doctrine encourages groups to emphasize that their identities are fixed).

105. See, e.g., Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 3, 18, *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 2:16-cv-00943-PP (E.D. Wis. Aug. 15, 2016).

106. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 623 (1979) (upholding constitutionality of law requiring minor to get consent of parents before obtaining an abortion).

107. See Whittle, *Forward to TRANSGENDER STUDIES READER*, *supra* note 27, at xi, xiii (noting "controversial" debates over whether gender identity is essential and biologically based or social constructed"); see also MEADOW, *supra* note 96, at 75–76 (tracking etiological studies of childhood gender nonconformity for their emphasis on social influences or biological determinism, with biology gaining increasing attention over time).

particularly given the constitutional rights parents possess over how to educate their children.<sup>108</sup>

For example, even while underscoring that people do not choose to be transgender and do not choose their gender,<sup>109</sup> Brill and Pepper admit that we, as a society, “don’t know what makes a person transgender,”<sup>110</sup> and elsewhere underscore that, “[g]ender identity emerges by age 2 or 3 and is influenced by biology and sociological factors.”<sup>111</sup> Similarly, licensed professional counselor and gender therapist Dara Hoffman-Fox seems to suggest that gender identity is, in many ways, “a blank slate” when people are born, and that social influences can constrict (or empower) people’s internal gender identity.<sup>112</sup> Or as put by Diane Ehrensaft, “[g]ender is born, yet gender is also made. Gender is an interweaving of nature and nurture.”<sup>113</sup>

Perhaps more importantly, tremendous discursive stress has been put on the so-called “social transition” as a means of (1) giving life to and effectuating or embodying one’s gender identity, but also as a means of (2) testing or verifying the veracity of their gender identity that does not correspond to their birth assigned sex, and (3) treating gender dysphoria (the medically-diagnosed distress “caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth.”)<sup>114</sup> Social transition refers the process by which a person comes out and navigates publicly living consistently with their gender identity, rather than their sex assigned at birth.<sup>115</sup> Interestingly, in some ways reflecting the two primary discursive frames for understanding gender and gender identity (the Bio-Medical-Mental Understanding and the Social Understanding), a person’s transition is often broken down into a “medical

108. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (involving law forbidding instruction of German in school infringing on parents’ fundamental right to control upbringing of their children).

109. BRILL & PEPPER, *supra* note 89, at 14; *see also* STEPHANIE BRILL & LISA KENNEY, *THE TRANSGENDER TEEN* 10 (2016).

110. BRILL & PEPPER, *supra* note 89, at 14–15.

111. *Id.* at 61; *see also* BRILL & KENNEY, *supra* note 109, at xiii, xiv (pushing back on idea that gender is fixed and immutable and suggesting that both biology and social influences play a role); STRYKER, *TRANSGENDER HISTORY*, *supra* note 25, at 22 (noting that “[s]ome people think that gender identity and transgender feelings . . . are caused by how children are raised or by the emotional dynamics in their families”); FEINBERG, *supra* note 29, at XII (declining to take a view as to whether gender identity “is exclusively the product of either biology or culture”).

112. DARA HOFFMAN-FOX, *YOU AND YOUR GENDER IDENTITY: A GUIDE TO DISCOVERY* 67 (2017).

113. DIANE EHRENSAFT, *GENDER BORN, GENDER MADE: RAISING HEALTHY GENDER-NONCONFORMING CHILDREN* 36 (2011); *see also* ASHLEY, *Against Delaying*, *supra* note 34, at 226 (“No one’s experience of gender is free from social influences; to think that they make gender less authentic would be to mistake gender for something that is not fundamentally dynamic and relational.”).

114. *See* WPATH SOC 7th ed., *supra* note 16, at 2;5; *see also* ORR & BAUM, *supra* note 18, at 9 (emphasizing social transition as a means of preventing or alleviating gender dysphoria in transgender youth).

115. ORR & BAUM, *supra* note 18, at 7; WPATH SOC 7th ed., *supra* note 16, at 97.

transition” and a “social transition.”<sup>116</sup> In other words, the role of the social transition as both diagnostic and therapeutic links the Social Understanding of gender identity with the Bio-Medical-Mental Understanding, in some ways reifying the same set of professionalized gatekeepers.

For instance, the WPATH SOC lists “living part time or full time in another gender role, consistent with one’s gender identity” as a treatment option for gender dysphoria.<sup>117</sup> Elsewhere, WPATH underscores the role of mental health professionals in managing students’ social transition and arguably reinforces the social stigma associated with gender expression that diverges from one’s birth assigned sex, emphasizing that children and adolescent “[c]lients and their families should be supported in making *difficult decisions* regarding the extent to which clients are *allowed* to express a gender role that is consistent with their gender identity.”<sup>118</sup> At times, WPATH makes social transition for children and adolescents sound downright scary and seems to discourage it. As to social transition in early childhood, WPATH provides:

Families vary in the extent to which they allow their young children to make a social transition to another gender role. Social transitions in early childhood do occur with some families with early success. This is a controversial issue, and divergent views are held by health professionals. The current evidence base is insufficient to predict the long-term outcomes of completing a gender role transition during early childhood. Outcomes research with children who completed early social transition would greatly inform future clinical recommendations.<sup>119</sup>

This emphasis on the social elements of gender—as either influencing the formation of gender identity, serving to help test or determine if someone is transgender, or as a palliative remedy for gender dysphoria—also enshrines and legitimizes professionalized gatekeepers such as medical and mental health professionals in evident ways. As put by critical studies professor Julian Carter:

While any individual element of this [formalized/institutionalized transition] sequence may be passionately desired, its trajectory through batteries of expert gatekeepers can be alienating even for those who most closely conform to those experts’ standards. The sequence itself materializes the discomfiting biopolitical requirement that trans-people must literally embody a particular set of psychiatric perspectives and medical practices.<sup>120</sup>

And as to gender variant children specifically, it often includes their parents as one of the principal gatekeepers, in effect placing the parents in the driver’s seat, rather than as navigator,<sup>121</sup> of the child’s gender identity, given

116. ORR & BAUM, *supra* note 18, at 7.

117. WPATH SOC 7th ed., *supra* note 16, at 9.

118. *Id.* at 16 (emphasis added).

119. *Id.* at 17.

120. Julian Carter, *Transition 1* TSQ: TRANSGENDER STUD. Q. 235, 237 (2014).

121. Bethy Leonardi, Amy N. Farley, Emmett Harsin Drager, & Jax Gonzalez,

law recognizing parents' fundamental right to control the upbringing of their children, including within the educational context.<sup>122</sup>

### C. *The Expressive and/or Performative Understanding*

Finally, gender and gender identity have at times been discursively framed as being influenced by—and given meaning and life through—individual expression and performativity, which resist hegemonic norms of medicine and social construction.<sup>123</sup> What does it mean to say that someone's gender identity is expressive and/or performative?<sup>124</sup>

Judith Butler argued that social performances of gender, rather than necessarily expressing anything innate, ingrained, essential, or “true” about what it meant to be male or female, were often mere reflections of the dominant social constructions and conceptions of a particular gender. In Butler's words, the social expectation “conjures its object . . . the anticipation of a gendered essence produces that which it posits as outside itself.”<sup>125</sup> While Butler suggested that we were all, in essence, performing and reproducing socially inscribed notions of gender, she also explained that both subconscious and self-conscious performances that challenged prevailing norms could “expose the tenuousness of gender ‘reality.’”<sup>126</sup> Put differently by Butler, social construction is a “temporal process which operates through the reiteration of norms” but “sex is both produced and destabilized in the course of this reiteration.”<sup>127</sup> That is, as a result of imperfect reiteration (as opposed to duplication) of norms and identities, “gaps and fissures” open up that permit destabilization of the norms through gender expression.<sup>128</sup>

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*Unpacking the T: Sharing the Diverse Experiences of Trans Students Navigating Schools*, 10 BERKELEY REV. EDUC. 9 (2021) (observing that while students' voices should be centered, parents' perspectives can play an important role in foregrounding how school systems structure/control their children's identities).

122. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents can exempt teenage children from compulsory school attendance law); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (forbidding private schools infringes on parents' right to control upbringing and education of their children).

123. See HALBERSTAM, *supra* note 1, at 10 (observing that the use of “vernacular language for non-normative gender and sexual expression” represents a challenge to the “medical/psychiatric control of the discourse” in “which people collaborate to name their understandings of contrary embodiment”); Flynn, *supra* note 34, at 475 (“the understanding of gender as expressive is anything but new”).

124. The following three paragraphs discussing the concept of gender as performative or expressive draw from SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 58–59 (2020), which in turn builds on Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS. L. REV. 1673 (2017) [hereinafter Skinner-Thompson, *Performative Privacy*], and Skinner-Thompson, *The First Queer Right*, *supra* note 103.

125. BUTLER, *GENDER TROUBLE*, *supra* note 20, at xiv–xv.

126. *Id.* at xxiv.

127. JUDITH BUTLER, *BODIES THAT MATTER* xix (Routledge Classics 2011) (1993) [hereinafter BUTLER, *BODIES THAT MATTER*].

128. *Id.*

And while Butler is at times skeptical of individual volunteerism, she recognized space for subjective agency within the social grid/matrix.<sup>129</sup> She underscored the possibility that we can “work[ ] the weakness in the norm.”<sup>130</sup> Drawing from Michel Foucault, Butler explained that rather than remaining a passive medium reflecting dominant norms, identities could be an expressive site of resistance.<sup>131</sup> And the expressive value of non-normative gender performances is amplified precisely because of the dominant structures of heteronormativity, the gender binary, and cisgenderism—that is, gender performances that deviate from the norm are assertions of agency and are imbued with expressive meaning in part because of their resistant positioning to hegemonic social expectations. To conclude otherwise—that is, to conclude that that individuals completely lack agency or critical consciousness in the face of the forces of social construction (powerful as they may be)—is in some ways an insult to all people, including those from marginalized groups, who are acted upon by social forces. As stated by scholar of Black trans feminism Marquis Bey, because of “gender-nonconforming bodies’ situatedness in a gender-normative space, a hegemonic grammar that utterly disallows the very possibility of transgender,” the existence of “trans and nonnormative bodies is, by virtue of their inhabitation of public space, radical.”<sup>132</sup>

In short, identities—including sexual and gender identities—are dynamic.<sup>133</sup> And our “sexed” bodies are similarly dynamic—the product of biology and genetics, yes, but also social forces that shape and construct our bodies and identities.<sup>134</sup> In turn, our outward-facing identities help constitute our identi-

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129. Sonia K. Katyal, *The Numerus Clausus of Sex*, U. CHI. L. REV. 389, 441 (2017) (underscoring that the performative model of gender amplifies individual agency and control over one’s identity).

130. BUTLER, BODIES THAT MATTER, *supra* note 127, at 181; *see also* JUDITH BUTLER, UNDOING GENDER 3 (2004) (“If I have any agency, it is opened up by the fact that I am constituted by a social world I never chose. That my agency is riven with paradox does not mean it is impossible. It means only that paradox is the condition of its possibility”).

131. BUTLER, BODIES THAT MATTER, *supra* note 127, at 175–78.

132. Marquis Bey, *The Trans-ness of Blackness, the Blackness of Trans-ness*, 4 TSQ: TRANSGENDER STUD. Q. 275, 277 (2017); *see also* Reina Gossett, Eric A. Stanley, & Johanna Burton, *Known Unknowns: An Introduction to Trap Door*, in TRAP DOOR, *supra* note 83, at xv, xvi (“[T]o violate the state-sponsored sanctions—to render oneself visible to the state—emphasizes that there is power in coming together in ways that don’t replicate the state’s moral imperatives. Fashion and imagery hold power, which is precisely why the state seeks to regulate and constrain such self-representations to this very day.”).

133. BUTLER, BODIES THAT MATTER, *supra* note 127, at xi (“Sexual difference, however, is never simply a function of material differences which are not in some way both marked and formed by discursive practices. Further, to claim that sexual differences are indissociable from discursive demarcations is not the same as claiming that discourse causes sexual difference. The category of ‘sex’ is, from the start, normative; it is what Foucault has called a ‘regulatory ideal.’ In this sense, then, ‘sex’ not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs[ ]”).

134. The categories of “man” and “woman” are, at bottom, “political categories and not natural givens.” And “our bodies as well as our minds are the product of this [culturally imagined] manipulation.” Monique Wittig, *One Is Not Born a Woman*, in THE LESBIAN AND

ties and also contribute to the social tableau and shape others' identities. In the end, our identities say something.<sup>135</sup> They say something personal, and often political.<sup>136</sup> They are individually expressive and help performatively constitute gender—even if partially the product of social forces and/or biology. As summarized by Stryker, the notion of gender performativity or expression posits that “[r]ather than being an objective quality of the body (defined by sex), gender is constituted by all of the innumerable acts of performing it: how we dress, move, speak, touch, look. Gender is like a language we use to communicate ourselves to others and to understand ourselves.”<sup>137</sup>

As this discussion illustrates, the Expressive-Performative Understanding of gender is not totally divorced from the Social Understanding<sup>138</sup> (just as the Social Understanding is not totally divorced from the Bio-Medical-Mental Understanding), but instead of centering the role of society in influencing individual identity, the expressive or performative model can foreground individual agency and action in the face of those hegemonic influences, giving life to the admonition of Audre Lorde and other Black feminists that marginalized groups must claim the mantle of their individual subjectivity and agency.<sup>139</sup>

Notwithstanding that important interplay, as explained by Stryker, “the concept of ‘gender performativity’ . . . [has become] central to the self-understanding of many transgender people (along with many cisgender people, too).”<sup>140</sup> And there are many instances where the role of gender expression and/or performativity in manifesting gender identity has been underscored by trans activists and advocates. For example, influential transgender activist Leslie Feinberg defined gender as “self-expression, not anatomy.”<sup>141</sup> While noting that not all trans people choose medical interventions, Feinberg underscored

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GAY STUDIES READER 103, 103–05 (Aberlove et al. eds., 1993).

135. Leonardi et al., *supra* note 121, at 7 (emphasizing that identities are both embodied, material, and lived, at the same time that the embodiment communicates one’s identity to others).

136. Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 973 (1989) (“The mere disclosure of one’s gay, lesbian, or bisexual identity ineluctably accumulates political significance”).

137. STRYKER, *TRANSGENDER HISTORY*, *supra* note 25, at 163; *see also* SMITH, *GOING TO TRINIDAD*, *supra* note 71, at 143 (quoting transgender gender confirmation surgeon Dr. Marci Bowers, explaining that “[g]ender is a social construct. It’s not genitals, it’s not even hormones, it’s all these other little bells and whistles you do to announce your identity.”).

138. Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC’Y 125, 126 (1987) (arguing that people “do” gender, which “involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine ‘natures’”).

139. AUDRE LORDE, *SISTER OUTSIDER* 45 (rev. ed. 2007); *see also* BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 9 (Routledge 2015) (1989) (explaining that the “act of speech, of ‘talking back,’ [ ] is no mere gesture of empty words, [but] is the expression of our movement from object to subject—the liberated voice”).

140. STRYKER, *TRANSGENDER HISTORY*, *supra* note 25, at 162–63.

141. Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come*, in *TRANSGENDER STUDIES READER*, *supra* note 27, at 205.



that regardless of medical interventions, “[t]ransgender people traverse, bridge, or blur the boundary of the gender expression they were assigned at birth.”<sup>142</sup> Moreover, as Feinberg emphasizes when discussing police raids of queer bars and the enforcement of laws requiring three pieces of gender appropriated clothing, “[o]ur *gender expression* made us targets.”<sup>143</sup> In reading Feinberg’s *Transgender Warriors*, one easily gets the sense that it is her gender expression that is both at the center of her understanding of gender identity and the reason she has been subject to discrimination.<sup>144</sup> But for Feinberg, gender expression involved more than just sartorial choices, though it is also that. As Feinberg noted, even if she attempted to wear clothes considered consistent with her birth assigned sex (female), Feinberg “began to understand that [she] couldn’t conceal [her] gender expression.”<sup>145</sup> Indeed, even when discussing the right to change one’s sex, she frames it as an issue of expression: “Each person should have the right to determine and change their sex—and express their gender in any way they choose.”<sup>146</sup> Feinberg is not alone in this regard.<sup>147</sup>

Moreover, at times, state and local law reform efforts seeking to protect transgender people from discrimination often seem to deploy gender identity and gender expression as interchangeable synonyms, suggesting that one’s gender expression is a forbidden ground for discrimination under the state’s safeguards.<sup>148</sup> For example, in 2019 New York passed the Gender Expression Non-Discrimination Act (GENDA), which banned discrimination in housing, employment, and public accommodations on the basis of gender identity and gender expression, with “gender identity or expression” defined together as the same thing: “a person’s actual or perceived gender-related identity, appearance, behavior, expression or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.”<sup>149</sup> Similarly, in their “Model School District Policy on

142. FEINBERG, *TRANSGENER WARRIORS*, *supra* note 29, at X (emphasis removed).

143. *Id.* at 8 (emphasis in original); *see also* STRYKER, *TRANSGENER HISTORY*, *supra* note 25, at 101 (“visually perceiving someone to be transgender is one of the main triggers for antitransgender discrimination and violence”); Leonardi et al., *supra* note 121, at 7 (“What we know from trans students in schools is that much of the victimization they face with respect to gender is due to their gender expression, regardless of their gender identities.”).

144. *E.g.*, FEINBERG, *TRANSGENER WARRIORS*, *supra* note 29, at 27 (“I have faced so much persecution because of my gender expression [ . . . ]”); *id.* at 35 (noting that “it wasn’t just Joan of Arc cross- *dressing* that enraged her judges, but her cross-*gendered* expression as a whole) (emphasis in original).

145. *Id.* at 12.

146. *Id.* at 125.

147. *E.g.*, Jennifer Finney Boylan, *Throwing Our Voices: An Introduction*, in *TRANS BODIES, TRANS SELVES*, *supra* note 4, at xv, xvii (explaining that some trans people see themselves “as people who want to celebrate the fantasy aspects of gender, who want to enjoy the sense of escape and joy and eros that embracing an alter ego sometimes provides”).

148. STRYKER, *TRANSGENER HISTORY*, *supra* note 25, at 20. *But see id.* at 21 (observing that some trans people “draw a distinction between gender expression and gender identity to argue that identity is more serious, less chosen, and in greater need of protection than gender expression”).

149. N.Y. Exec. Law §§ 296, 296-a & 296-b.

Transgender and Gender Nonconforming Students,” GLSEN and the NCTE underscore that two of the three critical purposes of that the policy are to “foster an educational environment that is safe . . . regardless of gender identity or expression” and “to ensure that all students have the opportunity to express themselves in live authentically.”<sup>150</sup>

In addition to contemporary law reform efforts and “mainstream” transgender rights organization, freedom of gender expression formed a key part of early trans liberation agendas, as well. For example, an early article for trans liberation that appeared in a 1971 iteration of the *Trans Liberation Newsletter* listed as its first demand the “[a]bolition of all cross-dressing laws and restrictions on adornment,” while elsewhere also demanding access to hormone treatment and surgery “upon demand” and simultaneously calling for an “end the exploitation practices of doctors and physicians.”<sup>151</sup>

Make no mistake, it is not just sartorial choices that are expressive of gender, but physical embodiments as well. When discussing secondary sex characteristics—the outward-facing physical traits that tend to be associated with a particular sex (such as physical size, patterns of hair growth, etc.)—Stryker describes such characteristics as “perhaps the most socially significant part of morphology—taken together, they are the bodily ‘signs’ that others read to guess at our sex, [and] attribute gender to us.”<sup>152</sup>

All that said, it is crucial to underscore that suggesting that gender is, in part or for some people, “performative,” does not necessarily call into question the authenticity or legitimacy of anyone’s gender—including but not limited to transgender people.<sup>153</sup> Unfortunately, as many have importantly pointed out, an emphasis on gender as *exclusively* performance-based can read that way and, at times, the performative aspects of gender have been overemphasized.<sup>154</sup> Rather, at least as used here, the performative or expressive understanding of gender operates as a discursive recognition that an individual’s expressions of their gender can help do gender, rather than simply reveal gender, and that “‘being something’ [can] consist[ ] of ‘doing it.’”<sup>155</sup>

150. GLSEN & NCTE, MODEL SCHOOL DISTRICT POLICY, *supra* note 17, at 1.

151. STRYKER, TRANSGENDER HISTORY, *supra* note 25, 121–22.

152. *Id.* at 31.

153. *Cf.* Stryker, *(De)Subjugated Knowledges*, *supra* note 41, at 1, 11 (noting some transgender people resist the idea of gender as performative because they believe it suggests it is malleable or a form of play, rather than inalienable).

154. See Julia Serano, *Gender is More than Performance*, ADVOCATE (Oct. 7, 2013), <https://www.advocate.com/politics/transgender/2013/10/07/book-excerpt-gender-more-performance>, archived at <https://perma.cc/34B4-SUCE> (“Instead of saying that all gender is this or all gender is that, let’s recognize that the word gender has scores of meanings built into it. It’s an amalgamation of bodies, identities and life experiences, of subconscious urges, sensations and behaviors, some of which develop organically, and others which are shaped by language and culture. Instead of saying that gender is any one single thing, let’s start describing it as a holistic experience. Instead of saying that all gender is performance, let’s admit that sometimes gender is an act, and other times it isn’t.”).

155. STRYKER, TRANSGENDER HISTORY, *supra* note 25, at 163.

Moreover, the performative or expressive understanding of gender has at times also been critiqued as eliding the material or embodied experiences of gender, in particular for people of color whose embodied genders are often the sites of violence.<sup>156</sup> This is another critical insight and potential drawback to the expressive understanding of gender, but, in my view, an emphasis on performativity as an *aspect* of gender does not *ipso facto* detract from that materiality—in fact material embodiment can be an aspect or form of performative expression. Moreover, as noted at the outset, the principal concern of my analysis is to scrutinize which understanding of gender, if emphasized within the context of public schools, can create the most space for students lived, material freedom.

As underscored, not all trans people embrace the idea that gender is partially performed and expressed, and the medical discourse at times downplays expression, distinguishing “true” transgender children from those merely engaged in play or exploration.<sup>157</sup> And stressing the expressive dimensions of gender and gender identity is, of course, not going to eradicate all subordination of transgender people. Not at all. But, as Feinberg and others have underscored,<sup>158</sup> it is a critical part of a broader emancipatory agenda, which, as Part III explains, may be strategic to emphasize. But before diving into the doctrinal and discursive dividends of reemphasizing gender expression for transgender and gender variant children, it is necessary to explain in greater detail the ways in which the Bio-Medical-Mental and Social Understandings have contributed to the entrenchment of formalized gender regulation within public schools and the harms of that regulation.

## II. BUREAUCRATIC CONSTRUCTION OF GENDER IDENTITY COMMITTEES

Trans and gender variant children, like trans and gender variant adults, are nothing new.<sup>159</sup> But the growth of their formal institutional regulation within public schools is.<sup>160</sup> The discursive constructions of gender and gender identity as being, at turns, biological/mental and/or socially influenced have had a tremendous impact on the management of gender identity by institutions, including educational institutions.<sup>161</sup> As put by gender scholar Jack Halberstam, “[w]ith recognition comes acceptance, with acceptance comes power, and with

156. E. Patrick Johnson, “*Quare*” *Studies*, *supra* note 39, at 5.

157. *See, e.g.* MEADOW, *supra* note 96, at 20 (distinguishing children who “engage in atypical forms of play” from those whose “gendered statements and behaviors” suggest the child’s gender identity may be different than the child’s assigned gender).

158. FEINBERG, *TRANSGENER WARRIORS*, *supra* note 29, at 102–03.

159. GILL-PETERSON, *supra* note 65, at 5, 196; *see also* Syrus Marcus Ware, *All Power to All People? Black LGTTI2QQ Activism, Remembrance, and Archiving in Toronto*, 4 *TSQ: TRANSGENER STUD. Q.* 170, 173 (2017) (correcting narratives suggesting that there is something “new” about Black trans folk).

160. BEEMYN & RANKIN, *supra* note 25, at 159 (arguing that even as of 2011 transgender people were “still completely ignored and invisible in most institutional structures”).

161. MEADOW, *supra* note 96, at 3 (observing that the “sex/gender split has affected the administrative and institutional categorization of children” over “the last decade or so”).

power comes regulation.”<sup>162</sup> This Part outlines the degree to which gender identity, influenced by the dominate discursive models analyzed in Part I, has become subject to formal regulation and construction in public schools. The Part then underscores the costs and harms of these structures for transgender and gender variant students—costs that include barriers to identity freedom and self-determination, privacy harms through the committee surveillance regime, and distributional inequalities exacerbated by the committee structure.

In addition to evaluating model policies created by LGBTQ advocacy groups and certain government agencies through their harm-reducing efforts to protect trans children, this Part contains the results of a comprehensive analysis conducted by the Author and several intrepid research assistants of the policies governing the regulation of transgender and gender variant students in public schools within each state and within each state’s largest school district (where available). More specifically, the Companion database documents the policies governing access to bathrooms and sex-segregated athletics, though some of the policies discussed govern much more than those two issues. The full database with results of this analysis are included in the Companion for Identity by Committee.<sup>163</sup>

What the Companion illustrates is that even in jurisdictions with comparatively permissive policies that do not restrict students to living with their birth-assigned sex,<sup>164</sup> the bureaucratic hurdles that are imposed to actually living one’s gender identity are significant. The Companion first catalogues the substantive requirements for being granted permission to live one’s gender identity at school (self-identification, hormones, sex assigned at birth, etc.), then documents the procedural processes students must navigate. For example, even in schools that purportedly permit self-identification of gender identity, in practice the freedom to do so is circumscribed by procedural hurdles and input from other purported stakeholders, with the ultimate decision often made by administrators. These procedural requirements represent a substantial restriction on students’ ability to actually live their gender and pose meaningful privacy violations. These barriers are particularly acute for those that lack parental support or the social capital to navigate these bureaucracies.

### A. *Constructing the Committee*

Of course, with renewed trans visibility, many jurisdictions have seen an uptick in legislation targeting the ability of transgender people to live their lives.<sup>165</sup> During 2021 state legislative sessions alone, more than 30 states

162. HALBERSTAM, *supra* note 1, at 18.

163. COMPANION, *supra* note 6.

164. Kylar W. Broadus & Shannon Price Minter, *Legal Issues*, in TRANS BODIES, TRANS SELVES, *supra* note 4, at 174, 205 (noting that “a growing number of states and local school districts have adopted laws or policies protecting trans students from discrimination”).

165. Page, *supra* note 92, at 143 (“As happened during previous periods of increased media visibility for trans people, we are currently experiencing a crackdown on the everyday lives of trans people by both the government and the general population . . . Visibility, this supposed cure-all, might actually be poison.”).

introduced laws seeking to curtail the existence of transgender lives in one context or another, including in public schools where trans participation in sports was excluded in several states.<sup>166</sup> The 2022 state legislative sessions were no different.<sup>167</sup> But as gender policy educator Aidan Key observes, “[e]ven the most progressive schools can have practices or policies that unintentionally marginalize or silence a transgender student.”<sup>168</sup>

Consistent with prevailing discursive emphasis on the Bio-Medical-Mental and the Social Understandings, several model policies developed by LGBTQ rights organizations have strategically embraced the bureaucratic regulation of students’ gender identity, often as a means of getting a foot in the door for recognition for trans students and to prevent schools from outright denying their lives. For example, the GLSEN and NCTE Model Policy, while cautioning that “[s]chools should avoid requiring medical, legal or other ‘proof’ in order to respect a student’s gender identity,” nevertheless suggests that schools do have a legitimate role in “verifying” a student’s gender identity, providing: “[s]chools have found that in practice it is not difficult to verify that a student is really transgender.”<sup>169</sup>

In a “best practices” guide called “Schools in Transition” developed by a consortium of LGBT organizations including Gender Spectrum, the National Center for Lesbian Rights, the Human Rights Campaign, and the ACLU, the guide emphasizes at several turns the role of educators, administrators, and parents in working as a team with the student to build the “right plan” for the students.<sup>170</sup> The guide is complete with appendices containing a model “Gender Transition Plan” that includes provisions for an “initial planning meeting” among the transgender or gender variant student, their parents, and potentially a host of school employees, while also outlining decisions that must be made about communicating with other families about the student’s transition, training with school staff about this student’s transition, and a potential meeting with the parents of other students in the child’s class.<sup>171</sup> Granted, these meetings/trainings are framed as optional, but the plans at minimum suggest that a student’s transition may involve communication with, in essence, the entire school community.<sup>172</sup>

Similarly, in the waning months of the Obama Administration, the U.S. Department of Education issued a report on “Examples of and Emerging Practices for Supporting Transgender Youth,” which collated some state and

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166. *Legislation Affecting LGBT Rights Across the Country*, ACLU (last updated Dec. 17, 2021), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2021>, archived at <https://perma.cc/3QUC-ZHAZ>.

167. *Legislation Affecting LGBT Rights Across the Country*, ACLU (last updated Oct. 7, 2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>, archived at <https://perma.cc/A7XF-NCCB>.

168. Aidan Key, *Children*, in *TRANS BODIES, TRANS SELVES*, *supra* note 4, at 409, 433.

169. GLSEN & NCTE, *MODEL SCHOOL DISTRICT POLICY*, *supra* note 17, at 2.

170. ORR & BAUM, *supra* note 18, at 13.

171. *Id.* at 56–59.

172. *Id.*

local policies designed to support trans youth.<sup>173</sup> On page 1 of the report, the Department of Education asks the question: “[h]ow do schools confirm a student’s gender identity?,” once again enshrining schools as a gatekeeping and verification regime.<sup>174</sup> Notwithstanding that the report notes that some schools “generally accept the student’s asserted gender identity,” the report also holds up as examples policies that require “more than a casual declaration of gender identity or expression.”<sup>175</sup> But more importantly, posing the question itself legitimizes school administrators’ regulatory role. The report also includes a section discussing how “school psychologists, school counselors, school nurses, and school social workers [can] support transgender students,” again rhetorically endorsing the committee approach to addressing a student’s gender identity.<sup>176</sup>

Beyond these model policies, this Article’s analysis of statewide policies and the policies in each state’s largest school district vividly underscore the degree to which schools and state athletic associations have instituted substantive and procedural regulations of children’s gender identity, often drawing from the Bio-Medical-Mental and Social Understandings.

In terms of substantive requirements, the many school districts and states which determine a student’s gender based on a student’s so-called “biological sex” or sex assigned at birth<sup>177</sup> or otherwise rely on some kind of medical intervention, be it surgery or hormone therapy, obviously depend on the narrowest formulations of the medical model. But even many of the school districts or states purporting to allow students to self-identify their gender require that the student “consistently” identify with a particular gender in every context or for every purpose, suggesting that gender identity needs to be fixed and constant in order to be legitimate and leaving no room for expression or play.<sup>178</sup> Other policies give credence to grossly overstated concerns that students may be attempting to gain some short term athletic advantage or may merely be mocking trans students, requiring that a student’s gender will be accepted if it is “sincerely held,” “bona fide,” or “genuine.”<sup>179</sup> Even policies that do not so explicitly start from a skeptical position regarding a student’s non-normative

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173. U.S. DEP’T OF EDUC., OFFICE OF ELEMENTARY & SECONDARY EDUC., EXAMPLES OF POLICIES AND EMERGING PRACTICES FOR SUPPORTING TRANSGENDER STUDENTS (May 2016).

174. *Id.* at 1.

175. *Id.* at 1, 2.

176. *Id.* at 11.

177. *See, e.g.,* COMPANION, *supra* note 6. (Alabama State Law; Arizona State Law; South Dakota State Law; Arkansas Activities Association; Florida State Law; Idaho State Law; Indiana High School Athletic Association; Louisiana High School Athletic Association; Mississippi State Law; Montana State Law; Oklahoma State Law; Tennessee State Law; West Virginia State Law; Iowa State Law.

178. *See, e.g., id.* (Anchorage School District; Denver Public Schools; Omaha Public Schools; New Hampshire Interscholastic Athletic Association; Newark Public School District; Rhode Island Interscholastic Athletic League; Seattle Public Schools).

179. *See, e.g., id.* (Connecticut Interscholastic Athletic Conference; Hawaii Department of Education; Kansas State High School Athletic Association; Minnesota State High School League; North Carolina High School Athletic Association).

gender identity nevertheless implicitly suggest that the identity may not be legitimate by describing it as, for example, the gender identity which the student “asserts” at school.<sup>180</sup>

Equally significant are the procedural hurdles imposed by many policies, often requiring and/or suggesting that many different stakeholders be included in governing the student’s gender identity at school or within competitive school sports. As the Companion documents, the procedural requirements take many different forms, with some policies requiring input from certain stakeholders (be it medical providers, administrators, or parents), and others making such input optional, in myriad combinations.<sup>181</sup> The input of stakeholders is more likely to be required in the athletic context. For example, while the South Dakota legislature recently banned transgender female participation,<sup>182</sup> for transgender males, the South Dakota High School Athletic Association requires schools to collect written support and/or verification documents from the student’s parents/guardians and health care professionals and then to submit this documentation as part of a “Transgender Application.”<sup>183</sup> The “Transgender Application” is then referred to an Independent Hearing Officer who issues a decision regarding the students gender identity which can be appealed to the Athletic Association’s Board of Directors.

Similarly, while the state legislature recently banned transgender female participation,<sup>184</sup> the Arizona Interscholastic Association requires students to submit evidence of “support” from their parents or guardians, school administrators, and health care providers with the ultimate determination of eligibility determined by a so-called “Gender Identity Eligibility Committee.”<sup>185</sup> Other states also have “Gender Identity Eligibility Committees” or the like for athletic participation, with the committee often being comprised of physicians, mental health care professionals, and school administrators, among others,<sup>186</sup> an approach advocated by the LGBT Sports Foundation in their Model Policy.<sup>187</sup>

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180. *See, e.g., id.* (Hawaii Department of Education; Minnesota State High School League; New York City Department of Education).

181. *See also Doe v. Boyertown Area Sch. Dist.* 897 F.3d 518, 524 (3d Cir. 2018) (discussing with approval school district that required the “student claiming to be transgender to meet with counselors who were trained and licensed to address these issues and the counselors often consulted with additional counselors, principals, and school administrators” before “a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity”).

182. S.B. 46, 97 Leg. Sess. (S.D. 2022).

183. COMPANION, *supra* note 6 (South Dakota High School Athletic Association).

184. S.B. 1165, 55 Leg. Sess. (Ariz. 2022).

185. COMPANION, *supra* note 6 (Arizona Interscholastic Association).

186. *See e.g.,* COMPANION, *supra* note 6 (California Interscholastic Federation, Illinois High School Association; Nebraska State Athletic Association; North Carolina High School Athletic Association; Wyoming High School Athletic Association; Maine Principals’ Association).

187. LGBT SPORTS FOUNDATION, PROPOSED MODEL HIGH SCHOOL POLICY (2016).

Other jurisdictions leave the ultimate decision regarding a student's gender to school or league administrators or an independent hearing officer.<sup>188</sup>

### B. *The Committee's Human Costs*

Given that “[t]rans political life was not born out of institutions; it rubbed up against and resisted them,” the alacrity with which trans and gender variant children's identities have been formally institutionalized should give pause.<sup>189</sup> This institutionalization of trans youth identities, aided by the Bio-Medical-Mental and Social Understandings of gender, has tremendous costs. Under the best of circumstances, transgender, gender variant, and queer youth generally face enormous social barriers and stigma, and often worse—bullying, erasure, harassment, and violence.<sup>190</sup> No doubt it was those same harms that prompted the initiation of the committee approach to try to protect and save trans children. So, while many of the procedures and requirements outlined above are often well-intentioned and may represent the best-case scenario in certain contexts, they may not represent the most emancipatory approach to gender and gender identity, and can inflict real costs to young lives that are already precarious.

#### 1. Barriers to Identity Freedom & Self-Determination

Both the bureaucratic procedures and substantive requirements that have emerged for policing students' gender identities and expression represent substantial barriers to students' ability to live, express, and explore those identities. In many ways the regulatory frameworks serve as a normative signal reaffirming what society writ large communicates—that there is something abnormal about the child.<sup>191</sup>

Procedurally, the regulatory protocols suggest that a student's gender and gender expression is something that needs to be questioned, suspected, controlled, contained, and managed. As explained by education scholars Elizabeth Meyer and Harper Keenan, many school gender policies “rest upon a model of inclusion that requires institutional legibility and recognition and are primarily focused on the management of individual people and cases rather than institutional change.”<sup>192</sup> While the ostensible goal is gender liberation, the

188. See e.g., COMPANION, *supra* note 6 (Minnesota State High School League).

189. Grace Dunham, *Out of Obscurity: Trans Resistance, 1969–2016*, in TRAP DOOR, *supra* note 83, at 91, 93.

190. STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS xvii (2010); GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 94 (2020); GLSEN, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 14 (2009); SANDY E. JAMES, ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 11 (Nat'l Ctr. for Transgender Equality 2016).

191. Keenan, *supra* note 74, at 541, 544, 548 (underscoring how schools “script” and condition students' gender); Leonardi et al., *supra* note 121, at 4 (explaining that notions “of what counts as ‘normal’ permeate school ecologies, privileges certain ideologies and marginalizing others”).

192. Meyer & Keenan, *supra* note 11, at 749.



bureaucracies can just as easily stifle.<sup>193</sup> Together, these procedures operate as what Jules Gill-Peterson describes as “radical skepticism and verification in the best instances.”<sup>194</sup> As powerfully put by Gill-Peterson, adults, including:

parents, so-called interested observers, or even allies and advocates, tarry within the dangerously limiting circumstances of a system that continues to assay the value of trans children’s being in terms not of their humanity and personhood but via questions absurd in their abstraction for how they ask us instead to wonder if trans children ‘prove something’ about the biological basis of sex and gender.<sup>195</sup>

By often rewarding those that are able to best comply with requirements for physical embodiment via medical documentation and “consistent” embodiment, the school policies also enshrine a particular kind of gender identity—often along immutable, binary lines.<sup>196</sup> As explained by Meyer and Keenan, a policy geared at enfranchising certain trans identities “can perpetuate the very harm it purportedly seeks to erase by reproducing systems of stratification.”<sup>197</sup> Indeed, many of the policies explicitly require or otherwise assume that the student identify with a particular binary gender.<sup>198</sup> But as Heron Greenesmith has powerfully underscored, “[a]s long as the primary legal and moral argument for queer and trans rights is based on immutable and either/or characteristics, it will exclude those who are fluid, bisexual and non-binary” and “[a]s long as the foundation of trans and queer rights is the belief that everyone’s sexual orientation and gender identity are inherent and fixed, there will be gatekeepers of our identities.”<sup>199</sup> That is, by embracing the binary the policies *ipso facto* embrace gatekeepers of who is in which category.

Moreover, parental support for transgender children is far from a given<sup>200</sup>—indeed, queer youth, and trans youth in particular, are disproportionately homeless

193. While some have noted that well-meaning educational bureaucrats may at times help trans students navigate the school environment, *e.g.*, Marie-Amelie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 *YALE L. & POL’Y. REV.* 83, 140–41 (2017), any so-called “accommodation” they are able to provide is still greatly circumscribed by the procedures outlined in this Part and the discourses dissected in Part I.

194. GILL-PETERSON, *supra* note 65, at vii.

195. *Id.*

196. Meyer & Keenan, *supra* note 11, at 737 (explaining that “[w]hen institutions develop policy in the name of trans inclusion, they run the risk of simultaneously codifying what it means to be trans and limiting whose gender expression may be protected by such policies”).

197. *Id.* at 739; *see also* Leonardi et al., *supra* note 121, at 18, 20.

198. A notable exception is the Denver Public Schools policy which makes specific reference to and provision for non-binary students and bathroom access. COMPANION, *supra* note 6 (Denver Public Schools).

199. Heron Greenesmith, *What if we weren’t born that way?*, XTRA\* (May 26, 2021), <https://xtramagazine.com/power/sexuality-fluidity-legal-rights-201664>, archived at <https://perma.cc/LP5H-QVY9>.

200. Leonardi et al., *supra* note 121, at 8 (noting that “some research has shown that nearly half of the LGBTQ+ students who were out to their parents reported that they were

compared to the general population, partially because of family rejection.<sup>201</sup> This makes ensuring that the school environment is supportive of trans youth even more critical. And while many of the policies purport not to require parental involvement, many at least suggest or encourage it.<sup>202</sup>

Thus even under the best of circumstances, the processes being constructed for regulating gender identity in the school context are only emancipatory for a small subset of trans and gender variant youth: those who fit the binary mold and that can then muster the incredible emotional, financial, and social resources needed to navigate the different hurdles. Perhaps underscoring the point: pursuant to the policy purporting to permit trans high school athletic participation in South Dakota from 2013 until 2022, only one transgender girl participated in sports.<sup>203</sup>

## 2. Invasions of Privacy

The administrative regulation of gender also imposes significant privacy risks for trans and gender variant children.<sup>204</sup> As the Supreme Court recognized as early as the 1970s, the “threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files” may be constitutionally significant.<sup>205</sup> This is even more true today as technology has amplified the privacy risks of government data collection and when the information at issue is as sensitive and intimate as information pertaining to one’s gender and sexuality.<sup>206</sup> The bureaucratization of gender identity in public schools creates privacy and surveillance harms made to feel badly about their identity”).

201. Berta Esperanza Hernandez-Truyol, *Embracing Our LGBTQ Youth: A Child Rights Paradigm*, in Oxford Handbook of Children’s Rights Law 543, 545 (Jonathan Todres & Shani M. King eds., 2020).

202. See e.g., COMPANION, *supra* note 6 (Anchorage School District; Hawaii Department of Education; Illinois State Board of Education; Des Moines Public Schools; Maine Principal’s Association; Maryland Public Secondary School Athletic Association).

203. Morgan Matzen, *Gov. Kristi Noem signs ‘fairness’ bill, limiting transgender athletes’ access to sports*, SIOUX FALLS ARGUS LEADER (Feb. 4, 2022), <https://www.argusleader.com/story/news/2022/02/03/south-dakota-anti-transgender-athlete-fairness-bill-passed-gov-kristi-noem/6654261001>, archived at <https://perma.cc/PFE9-JDUL>.

204. Of course, as discussed more fully in Part III, the privacy arguments often raised in opposition to the existence of transgender children are a canard. Transgender people and their bodies do not create privacy or security risks for anyone, and school facilities are designed in such a way to ensure that any student using a bathroom or locker room can avoid having their body exposed to others or viewing others’ bodies, should they wish. Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719 (2019); Scott Skinner-Thompson, *Bathroom Bills and the Battle Over Privacy*, SLATE (May 10, 2016, 7:30 AM), <https://slate.com/human-interest/2016/05/in-the-battle-over-bathroom-privacy-transgender-peoples-needs-matter-more.html>, archived at <https://perma.cc/7JXJ-8GUZ> [hereinafter Skinner-Thompson, *Battle Over Privacy*].

205. *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

206. Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015) [hereinafter, Skinner-Thompson, *Outing Privacy*] (arguing that information pertaining to one’s sexuality, gender identity, and medical information are of heightened constitutional importance under the Due Process Clause).

along at least two dimensions: (1) it represents a massive collection regime with (2) a concomitant risk of disclosure of that information.

Take, for example, the model “Gender Transition Plan” created by Gender Spectrum. Questions are asked about “the nature of the student’s transition (male-to-female, female-to-male, a shift in gender expression, etc.),” “[h]ow urgent is the student’s need to transition?,” the list of school staff members who will be present during the “initial planning meeting,” the “specific information that will be conveyed to other students (be specific),” which students will be provided this information, whether “any sort of information [will] be shared with other families about the student’s transition,” and whether there will “be specific training about this student’s transition with school staff?”<sup>207</sup> The Arizona Interscholastic Association goes so far as to require that transgender students seeking to participate in interscholastic athletics submit “[a] description of the student’s gender story, including age at emerging awareness of incongruence between sex assigned at birth and gender identity and where the student is in the gender transition process.”<sup>208</sup> In short, the bureaucratization of gender leads to many invasive substantive questions regarding a child’s identity, with the answers either intentionally or unintentionally provided to a host of others.

And while the model transition plans and school policies often seek to protect privacy as best they can, including by asking whether particular information should be limited to certain confines,<sup>209</sup> the creation of the plan and committee themselves represents an incredible data grab, even when it is far from clear that a student needs to disclose such information in order to simply come to school consistent with their gender identity. While every student should be called their accurate name and referred to with appropriate pronouns, ensuring that each student receives such humane treatment in class and from peers does not necessarily need to involve such formal data collection by school administration. An alternative might merely involve each teacher asking at the beginning of a course every student’s names and pronouns.<sup>210</sup> The same holds true for access to sex segregated spaces, like bathrooms. While the bathroom has long been a site where gender and sexuality were policed by both social norms and carceral authorities, up until recently one has rarely needed to formally prove one’s gender to the state or comply with codified institutional rules to access a particular bathroom.<sup>211</sup> But with the rising visibility of trans people, some jurisdictions now are actively regulating

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207. ORR & BAUM, *supra* note 18, at 56–57.

208. COMPANION, *supra* note 6 (Arizona Interscholastic Association).

209. ORR & BAUM, *supra* note 18, at 52.

210. Gabriel Arkles, *Improving Law School for Trans and Gender Nonconforming Students: Suggestions for Faculty*, 17 CUNY L. REV. F. 84, 87 (2014).

211. SHEILA L. CAVANAGH, *QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION* 70 (2011).

bathroom access.<sup>212</sup> And the formal collection itself serves as a barrier to freedom that further underscores the stigma attached to gender variant identities.

In addition to the privacy invasions that occur when information is collected by school officials and other members of the “committee,” to the extent a school’s policing of students’ gender incorporates the views of others in the community, the student’s identity, far from being private, has the potential to become a public spectacle, another powerful deterrent to the student’s gender freedom. Take, for example, the Washington Interscholastic Athletic Association policy governing “gender identity participation” for interscholastic sports, which was in place until it was amended in 2021. While the policy provided that “[a]ll students should have the opportunity to participate in WIAA [activities] in a manner that is consistent with their gender identity,” the policy created an appeals process whereby people could challenge whether the student’s “gender identity is bona fide,” before a “Gender Identity Eligibility Committee” that was required to include at least one physician or mental health professional.<sup>213</sup> If the student was denied eligibility by the Committee, they could appeal to the Executive Director of the WIAA who would conduct a hearing. And while this entire process was purportedly confidential and sealed, it represented a massive inquiry into the validity of the student’s gender. Similarly, while the National Education Association guidance on transgender student rights advises that schools “should accept a student’s assertion of the student’s gender identity and not require any particular substantiating evidence,” the NEA nevertheless suggests that there be a process for evaluating credible challenges to what the NEA labels the student’s “asserted” gender identity.<sup>214</sup>

Beyond the privacy invasions created by the committee/gender verification process itself, to the extent the bureaucratization of students’ gender creates practical barriers to obtaining permission to access sex-segregated spaces and activities, students whose expressed identities are different than those recognized by the school will incur privacy violations when they are forced to use sex-segregated spaces that are inconsistent with their gender expression—in effect being outed every time they use the restroom.<sup>215</sup>

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212. Cf. Amber Phillips, *The tumultuous history of North Carolina’s bathroom bill, which is on its way to repeal*, WASH. POST (March 30, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/19/the-tumultuous-recent-history-of-north-carolinabathroom-bill-which-could-be-repealed>, archived at <https://perma.cc/Z85B-65ZR> (discussing North Carolina’s first of its kind bathroom bill).

213. WASHINGTON INTERSCHOLASTIC ATHLETIC ASSOCIATION, 2020–2021 OFFICIAL HANDBOOK § 18.15.

214. NATIONAL EDUCATION ASSOCIATION, LEGAL GUIDANCE ON TRANSGENDER STUDENTS’ RIGHTS 6 (June 2016).

215. Skinner-Thompson, *Outing Privacy*, *supra* note 206, at 192 (explaining that “transgender people are also outed when governments, schools, or employers refuse to let them use a bathroom consistent with their gender expression, and force them to use bathrooms that align with the sex assigned at birth or segregate them in unisex restrooms”).

### 3. Distributional Impacts

In addition to privileging those students whose identities can comply with a medicalized, binary mold of gender, the regulatory processes are also unequal along other dimensions. Namely, structural barriers of poverty and racism likely prevent many Black and Brown trans children from taking advantage of what regulatory freedom does exist. This is perhaps not surprising given the degree to which white, middle-class children have been centered in discussions about transgender children.<sup>216</sup> As documented above, navigating the byzantine processes required to be treated consistently with one's gender identity in schools is no small feat.<sup>217</sup> Even if parental support is not formally required by a school policy, navigating the transition process would be made more efficient and accessible if a student has a parent or guardian that not just normatively support the student's identity, but has the free time and institutional know-how to do so. But having a parent with those resources is far from a given. In the same way that bureaucratic processes for supporting students living with disabilities have been critiqued as being only accessible to a small subset of families,<sup>218</sup> there is good reason to believe that many of the plans will not be accessible to all students equally.

As documented by the National Center for Transgender Equality's 2015 U.S. Transgender Survey, while a growing number of trans people do receive support from their families, 10 percent of transgender people reported that an immediate family member was violent to them because they were transgender and 8 percent were kicked out of the house because they were transgender.<sup>219</sup> As sociologist Austin Johnson has underscored more generally with regard to a transnormative ideology grounded in the medical model, there are significant distributive racial and class consequences of such a model, which excludes those without the financial resources or social capital necessary to access trans affirming medical care.<sup>220</sup>

More significantly, there is also reason to believe that schools and school officials will be less likely to accept the identities of queer students of color. Generally speaking, students who are minoritized because of their race are

216. GILL-PETERSON, *supra* note 65, at 2; HALBERSTAM, *supra* note 1, at 34, 47–49; Meyer & Keenan, *supra* note 11, at 738.

217. *Supra* Part II.A.

218. LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381 (2018); *see also* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 915 (2016) (suggesting that bureaucratic procedures that have been developed for regulating sexual assault on college campuses could be disproportionately used to punish male students of color).

219. NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 70–72 (2016).

220. Austin H. Johnson, *Transnormativity*, *supra* note 45, at 486; *see also* Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 630 (2011) (explaining that “many trans people are unable to access comprehensive medical care because they are uninsured and lack the means to pay out-of-pocket”); BARRY REAY, *TRANS AMERICA: A COUNTER-HISTORY* 7 (2020) (same).

already subject to greater amount of discipline in schools—they are viewed as suspect.<sup>221</sup> But that suspicion and discipline is particularly acute for trans students of color,<sup>222</sup> whose queer identities are often not read as legible or treated as legitimate.<sup>223</sup> Again, this is perhaps not surprising given the degree to which structural barriers to freedom are often ignored in discussions of transgender children,<sup>224</sup> and the degree to which white children have dominated the narrative regarding trans youth.<sup>225</sup> Put differently, the bureaucratized committee process operates as an iteration of what Black trans poetics and cultural studies scholar SA Smythe describes as “incremental legal rights victories for those closest to the usual heteronorms at the expense of the usual disposable subjects, who continue to feel the weight and unmitigated violence of that same legal enterprise.”<sup>226</sup>

### III. EMANCIPATORY DECONSTRUCTION THROUGH GENDER EXPRESSION

Given the costs of the institutionalization of student gender identity via the Bio-Medical-Mental and Social Understandings, would a greater emphasis on the expressive and performative dimensions of gender hold emancipatory potential? A strong, albeit uncertain, argument can be made that the answer is yes. A renewed focus on the expressive role of gender identity may yield dividends both in terms of doctrinal/legal arguments in favor of student gender freedom as well as discursive/rhetorical freedom.

This Part discusses the potential discursive and doctrinal dividends of a renewed emphasis on the expressive and performative dimensions of gender, before addressing possible drawbacks to the expressive/performative model. As to rhetoric or discourse, an emphasis on the dynamic between gender expression and social context could help schools, courts, and society better understand the non-essentialist (e.g., non-medical) and performative components of our gender identities, and combat the predominant essentialized conceptions of gender that also often reinforce the gender binary. As to doctrine, understanding gender identity as expressive could enable legal recognition that gender

221. DEREK BLACK, *ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE* (2016).

222. See, e.g., GLSEN & NATIONAL BLACK JUSTICE COALITION, *ERASURE AND RESILIENCE: THE EXPERIENCES OF LGBTQ STUDENTS OF COLOR, BLACK LGBTQ YOUTH IN U.S. SCHOOLS* (2020).

223. Cf. C. RILEY SNORTON, *BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY* 141 (2017) (explaining how mainstream depictions of certain trans folk as acceptable was aided by the subjugation of nonwhite gender variant bodies); E. Patrick Johnson, “*Quare*” *Studies*, *supra* note 39, at 12 (foregrounding how certain discussions of queerness work to erase racial identity and the material realities of people of color).

224. GILL-PETERSON, *supra* note 65, at 2; HALBERSTAM, *supra* note 1, at 34, 47–49; see also Che Gossett, *Blackness and the Trouble of Trans Visibility*, in TRAP DOOR, *supra* note 83, at 183–84 (underscoring the degree to which respectability politics of much transgender rights discourse prevents a more liberatory trans politics).

225. Examples include Gavin Grimm, Ash Whitaker, and Coy Mathis, among others, all represented by LGBT movement organizations.

226. Smythe, *supra* note 92, at 159.

expression is a covered form of symbolic speech or expressive conduct. Such speech is protected in public schools under well-established law recognizing a wide range of conduct as speech, even within the schoolhouse gates.

A. *Discursive Dividends—Exploration & Play*

There are significant discursive benefits to underscoring gender identity's expressive and/or performative components in terms of creating the most social space for students to explore their identities as they develop. As Jules Gill-Peterson has powerfully noted, "trans-inclusive and trans-affirmative voices struggle to find a way to protect trans children that does not imagine them as deserving of protection because they are, finally, the property of adults, not people with the right to gender self-determination."<sup>227</sup> Put differently, "[w]e have not even yet begun to ask what it would mean to let trans children name their own desires and be recognized as entitled to direct their own affairs."<sup>228</sup> Underscoring the expressive and performative dimensions of gender could help free youth to chart their own course and not feel the need to identify their gender with a particular "innate" category as quickly as possible. It could serve as a bedrock for gender self-determination,<sup>229</sup> help combat the subjugation of gender multitudes, and help foster what Florence Ashley has described as an "ethics of gender exploration."<sup>230</sup>

As explained by Ashley, "[y]outh explore their genders" and that "[e]xploration is not only a vessel of discovery and understanding, but also of creation[.]" of not only "unearthing a pre-existing truth, but also making that truth for ourselves."<sup>231</sup> In other words, while many "people experience gender, in whole or in part, as something that is discovered and affirmed, many of us also see it as constituted by exploration."<sup>232</sup> As such, it is critical that students be permitted the space for such exploration and play without having to seek multiple layers of permission before doing so. They should feel emboldened to understand gender as not necessarily something innate or fixed, as the dominant discourses emphasize, but as "tentative . . . provisional and improvisational."<sup>233</sup> Instead of understanding "transition" as the bookend of the journey and the end of exploration, as it often is under the Bio-Medical-Mental and

227. GILL-PETERSON, *supra* note 65, at vii-viii.

228. *Id.* at vii; *see also* Austin H. Johnson, *Transnormativity*, *supra* note 45, at 469 (underscoring how prevailing narratives leave "very little room for trans people's faculty or power to use their own agency in making decisions about their identification with and actualization of their individual gender identities").

229. Eric. A. Stanley, *Gender Self-Determination*, 1 TSQ: TRANSGENDER STUD. Q. 89, 90–91 (2014) (explaining that a trans politics built on collective self-determination "opens up space for multiple embodiments and their expressions by collectivizing the struggle against both interpersonal and state violence [and by pushing] us away from building a trans politics on the fulcrum of realness (gender normative, trans, or otherwise) while also responding to the different degrees of harm people are forced to inhabit").

230. Ashley, *Against Delaying*, *supra* note 34, at 223.

231. *Id.*

232. *Id.* at 224.

233. *Id.*

Social Understandings, we might, as Ashley suggests, understand exploration as coming “before, during and after it.”<sup>234</sup>

As described in detail above, the current emphasis on the Bio-Medical-Mental and Social Understandings, buttressed by the committee structure, encourages and rewards those able to demonstrate that their gender identity is fixed, persistent, and consistent, while actively discouraging exploration of gender lest the exploratory identity be rendered illegible and illegitimate. An emphasis on the expressive or performative dimensions of gender could combat subjugation and create more breathing room for students, helping them appreciate that it is okay to try things out and on, both literally and figuratively. For policymakers, educators, and society more broadly, an emphasis on the expressive and dynamic nature of gender could build appreciation for the conclusion “that a more extensive policy is not inherently a better policy.”<sup>235</sup> And to the extent that gender performances gain greater expressive purchase when the identities go against social norms, emphasizing the expressive dimensions of gender may bolster calls for trans studies to “eschew[ ] the will to institutionality in favor of radical emergence.”<sup>236</sup>

## B. *Doctrinal Dividends*

In addition to discursive benefits of framing gender identity as expression/performative, there may also be important doctrinal benefits which, in turn, will influence how courts and society understand gender.<sup>237</sup>

### 1. Symbolic Speech; Expressive Identities

A long line of First Amendment jurisprudence establishes strong protections for so-called expressive conduct or symbolic speech, including expressive identities. The Supreme Court has reasoned that “[s]ymbolism is a primitive but effective way of communicating ideas.”<sup>238</sup> As put long ago by First Amendment scholar Melville Nimmer, “[a]ny attempt to disentangle ‘speech’ from conduct which is itself communicative will not withstand analysis. The speech element in symbolic speech is entitled to no lesser, and also no greater, degree of protection than that accorded to so-called pure speech. Indeed, in one sense all speech is symbolic.”<sup>239</sup>

234. *Id.* at 227.

235. Meyer & Keenan, *supra* note 11, at 744.

236. Smythe, *supra* note 92, at 162.

237. Flynn, *supra* note 34, at 485 (explaining that “a First Amendment approach may provide a greater opportunity for success for cases in which a medical model is not used and provides the flexibility of reliance on a diagnosis if that approach is preferred [and that] [b]ecause First Amendment claims are predicated on the expression of views rather than directly based in identity, there is at least less of a doctrinal (as opposed to pragmatic) drive to prove the underlying ‘truth’ or reality of one’s views”).

238. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

239. Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 33 (1973).



While there is not a rigid test for determining whether conduct is expressive and therefore entitled to First Amendment coverage, the Court has emphasized that social context plays an important role and that conduct is more likely to be deemed covered First Amendment speech if it is understood as expressive and sends a particularized message.<sup>240</sup> That said, the Court has suggested that a particularized message is not a hard and fast requirement for conduct to be covered expression.<sup>241</sup> Based on these guidelines, the Court has characterized many instances of conduct as expressive and entitled to First Amendment coverage. Examples include flag burning,<sup>242</sup> cross burning,<sup>243</sup> the wearing of black arm bands,<sup>244</sup> and sit-ins,<sup>245</sup> among many others.

Moreover, the Supreme Court has on multiple occasions recognized that identities themselves—particularly queer sexual identities—may be expressive. For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the Court held that Massachusetts’s antidiscrimination statute violated the First Amendment by requiring a private group organizing Boston’s annual St. Patrick’s Day-Evacuation Day parade to include members of another group, the Irish-American Gay, Lesbian and Bisexual Group of Boston (“GLIB”).<sup>246</sup> The Court reasoned that just as the parade organizers were engaged in expression, GLIB’s “participation as a unit in the parade was equally expressive.”<sup>247</sup> In addition to their formal organization around a message of queer inclusivity, the Court noted that “*the presence of the organized [GLIB] marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.*”<sup>248</sup> As such, the Court concluded that the forced presence of the gay, lesbian, and bisexual marchers would infringe on the private message of the parade organizers and was prohibited.

Even more explicitly, in *Boy Scouts of America v. Dale*, the Court held that application of a New Jersey anti-discrimination statute to the private Boy Scouts organization so as to force inclusion of a gay man, James Dale, as a scout leader, violated the First Amendment rights of the Scouts.<sup>249</sup> According to the Court, Dale’s presence alone as an out gay man would “force the

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240. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

241. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) (“a narrow, succinctly articulable message is not a condition of constitutional protection”); see also Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1464 (2013) (observing that the Court in *Hurley* disclaimed any purported “particularized message” requirement).

242. *Texas v. Johnson*, 491 U.S. 397, 405–06 (1989).

243. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

244. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

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

246. *Hurley*, 515 U.S. at 580–81.

247. *Id.* at 570.

248. *Id.* at 574.

249. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>250</sup> Relying in part on *Hurley*, the Court reasoned that just “[a]s the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout’s [sic] choice not to propound a point of view contrary to its beliefs.”<sup>251</sup>

As these examples illustrate, often the government-compelled presence of sexual minorities pursuant to non-discrimination laws has been deemed as infringing on a private group’s expressive rights. If the presence of a sexual minority in that context is deemed expressive, then the same should hold true with even greater force when state entities are directly regulating and repressing the identity of gender or sexual minorities—excluding their expressive presence in a public space.

Separate and apart from cases holding that the compelled presence of sexual minorities is expressive and therefore implicates the First Amendment rights of private expressive organizations, stand early gay rights cases where the First Amendment was used to protect the rights of gay people to associate together and, separately, to be “out” within government-controlled environments. As methodically detailed by law professors Carlos Ball and Stuart Biegel,<sup>252</sup> long before the Supreme Court recognized the importance of equality, dignity, and privacy for same-sex intimacy, courts often protected the ability of queer people to espouse explanations of their identities (for example, through gay-themed magazines)<sup>253</sup> and permitted them leeway under the First Amendment to formally gather together to just be/exist, and to further explore and elaborate those identities (for instance, via gay student organizations at public schools).<sup>254</sup> In the gay student organization cases, courts often recog-

250. *Id.* at 653.

251. *Id.* at 654.

252. See CARLOS BALL, *THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY* 50–92 (2017); BIEGEL, *supra* note 190, at 8–9, 28.

253. *E.g.*, *One, Inc. v. Olesen*, 355 U.S. 371, 371 (1958) (summarily reversing post office’s refusal to ship magazine devoted to discussing the scientific, historical and political aspects of homosexuality as running afoul of the First amendment); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 489–91 (1962) (concluding that it violated the First Amendment to censor publication of gay erotic magazine); see also *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Mass.*, 383 U.S. 413, 413 (1966) (overturning lower court conclusion that erotic novel depictions of same-sex sexual activity was obscene); *Gay Men’s Health Crisis v. Sullivan*, 792 F. Supp. 278, 292 (S.D.N.Y. 1992) (striking down the CDC’s restrictions on grant funds toward “offensive” AIDS-related educational materials as unconstitutionally vague).

254. *E.g.*, *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 850 (8th Cir. 1977); *Gay All. of Students v. Matthews*, 544 F.2d 162, 163 (4th Cir. 1976); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 660–61 (1st Cir. 1974); see also BIEGEL, *supra* note 190, at 9–10 (discussing student organization cases).

nized that mere coming together socially as a gay community, while conduct, was nevertheless communicative.<sup>255</sup>

But perhaps most critically, while not always embraced,<sup>256</sup> courts often recognized that gay people were protected from sanction in their government jobs because their identities were expressive. In several cases dealing with gay teachers or professors who were publicly out about their sexual orientation, courts concluded that adverse actions against such employees on account of their identity expressions ran afoul of the First Amendment.<sup>257</sup> Relatedly, courts have, at times, protected queer students' rights to bring same-sex dates to school events or display modest affection for people of the same-sex while at school as protected expression, concluding that such embodiments of their sexualities were communicative.<sup>258</sup>

All told, as legal scholar William Eskridge has explained, the "insight implicit in [the First Amendment gay rights] rulings was that, for gays and lesbians, identity speech ('I am gay') was both personal and political."<sup>259</sup> Put powerfully by law professor Nancy Knauer, there seems to be judicial recognition that in a heteronormative social context beset by fierce culture wars over sexuality, openly gay individuals' identities are both expressive and highly politicized.<sup>260</sup> But even without a verbal self-proclamation or "coming out," within largely conformist social settings identities that deviate from and challenge the norms have an almost inherent expressive dimension.<sup>261</sup> As explained by law professor and movement attorney Nan Hunter, "identity politics is

255. *Bonner*, 509 F.2d at 659–60.

256. *E.g.*, *Rowland v. Mad River Loc. Sch. Dist.*, 730 F.2d 444, 449 (6th Cir. 1984) (concluding that disclosure of public school counselor's bisexuality was not protected by First Amendment).

257. *Acanfora v. Bd. of Educ.*, 491 F.2d 498, 499–500 (4th Cir. 1974); *Aumiller v. Univ. of Del.*, 434 F. Supp. 1273, 1301 (D. Del. 1977).

258. *Fricke v. Lynch*, 491 F. Supp. 381, 384 (D. R.I. 1980) (bringing same-sex date to prom is expressive); *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 704–05 (N.D. Miss. 2010) (same); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1188 (C.D. Cal. 2007) (on-campus displays of affection are expressive of gay sexual orientation); see also David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 321–22 (1994) (arguing that same-sex intimate conduct is expressive and that the expression often serves as the government's justification for regulation).

259. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 905 (1997); see also Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993) (explaining that self-identifying speech both communicates and constructs one's identity).

260. Nancy J. Knauer, "Simply So Different": *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1001 (2001).

261. Skinner-Thompson, *Performative Privacy*, *supra* note 124, at 1692.

interwoven with dissent—is understood *as* dissent,” such that “an identity characteristic itself is understood to convey a message.”<sup>262</sup> So understood, in many ways the First Amendment’s protection of free expression and association operated as what I have labeled as “the first queer right” by protecting non-normative sexualities as expression.<sup>263</sup>

To the extent the gender expression of transgender and gender variant people can involve sartorial choices that reflect or confirm one’s gender identity, or challenge gender stereotypes and binaries,<sup>264</sup> it is also significant that courts have sometimes, albeit inconsistently, deemed clothing choices as covered First Amendment expression. Rightly so given that clothing can “be both a form of self-constitution and a medium of communication.”<sup>265</sup> Of course, *Tinker v. Des Moines*, wherein the Court established that student expression is covered under the First Amendment, itself involved a clothing choice that was intended as and understood as politically expressive.<sup>266</sup> So did the case of *Cohen v. California*, where the Supreme Court struck down the conviction of a person who wore a jacket that said “Fuck the Draft” into a courthouse.<sup>267</sup> As law professor Ruthann Robson has explained, while “[a]ttire bearing words or symbols is much more likely to meet the expressive threshold necessary to invoke First Amendment protections . . . even unadorned apparel can speak volumes.”<sup>268</sup>

Courts have applied these principles to deem clothing choices pertaining to LGBTQ identity and/or LGBTQ political rights as covered First Amendment expression. For example, in *McMillen v. Itawamba County School District*, the court held a lesbian student’s desire to wear a tuxedo to prom in contravention of the policy that female students wear dresses fell “squarely within the purview of the First Amendment” as covered expression.<sup>269</sup> Similarly, in a suit brought by a straight student, *Gillman v. School Board of Holmes County*, the court held that a school’s ban on wearing clothing containing rainbows, pink triangles, and or one of several pro-gay rights slogans was impermissible under the First Amendment.<sup>270</sup>

Consistent with the expressive/performative discursive model for understanding gender and gender identity, under these veins of First Amendment

262. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 1–2 (2000).

263. Skinner-Thompson, *The First Queer Right*, *supra* note 103, at 882.

264. RICHARD THOMPSON FORD, DRESS CODES: HOW THE LAWS OF FASHION MADE HISTORY 263, 6, 11 (2021) (while noting that “there is no specific type of clothing that inherently ‘belongs’ to” a particular gender, “[g]ender difference is [nevertheless often] marked by clothing, hairstyles, and cosmetics” and, in that way, “clothes actually do make the man (or woman)”).

265. *Id.* at 7.

266. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

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

268. RUTHANN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCH, SEXUALITY AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES 110 (2013).

269. *McMillen*, 702 F. Supp. 2d at 705.

270. *Gillman v. Sch. Bd. of Holmes Cnty.*, 567 F.Supp.2d 1359, 1362 (N.D. Fla. 2008).

authority, trans and gender variant identities can easily be understood as covered First Amendment speech as well.<sup>271</sup> Nascent case law on this issue has at times been receptive to the idea that trans and gender variant people's expressions of their gender identity are covered expression.<sup>272</sup> For example, in a case involving the arrest and jailing of a transgender female in a jail denominated for males, a court concluded that the plaintiff had pled sufficient facts to support her claim that she was engaged in expressive conduct that was understood by the defendants because "changing one's appearance to align with traditionally male or female traits is a means by which some transgender people not only begin to live according to their gender identity, but also convey their gender identity to others."<sup>273</sup> In this case, the plaintiff not only dressed in a manner to convey her gender identity, but had also undergone hormone therapy and "several surgeries to feminize her appearance."<sup>274</sup> Similarly, in *Doe v. Yunits*, the court held that a transgender female student's efforts to wear clothes typically worn by females to school was covered expressive conduct likely to be understood by others because "by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender" and that the "plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity."<sup>275</sup> Importantly, the court noted that "the school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received."<sup>276</sup>

As legal scholar Dara Purvis has argued, such cases centering on the expressive function of gendered clothing, "open[ ] the door to a promising legal argument framing the clothing and other aesthetic choices of transgender students today as protected First Amendment expression."<sup>277</sup> And while Purvis is less sanguine about the prospect of bathroom use being considered

271. Cf. Paisley Currah, Richard M. Juang, & Shannon Price Minter, *Gender Pluralisms*, in, TRANSGENDER RIGHTS, *supra* note 24, at 3, 20 (suggesting that "[p]erhaps gender nonconforming practices will be recognized as expressive activity worthy of constitutional protection at some moment in the future").

272. Older and dated cases dealing with the constitutionality of, for example, gendered school rules regarding hair length present a more mixed picture, and the Supreme Court never intervened to resolve circuit differences. ROBSON, *supra* note 268, at 69.

273. *Vuz v. DCSS III, Inc.*, No. 3:20-cv-00246-GPC-AGS, 2020 WL 7240369, at 5 (S.D. Cal. Dec. 9, 2020).

274. *Id.* at 1.

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

276. *Id.* at 4. *But see* *Youngblood v. Sch. Bd. of Hillsborough Cnty.*, No. 8:02-cv-1089-T-24MAP (Fl. Dist. Ct. Sept. 24, 2002) (rejecting First Amendment claim by female who did not want to dress in school required outfit consisting of "a revealing, scooped neck drape" for yearbook photo and instead wanted to wear a jacket, shirt, and tie).

277. Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. RICH. L. REV. 927, 940 (2020); *see also* Carlos A. Ball, *Gender-Stereotyping Theory, Freedom of Expression, and Identity*, 28 WM. & MARY BILL RTS. J. 229, 236 (2019) (arguing that the expressive components of the gender-stereotyping theory of sex discrimination could help equality claims become less stringently tied to narrow identity categories, creating a more pluralistic equality framework).

expressive,<sup>278</sup> to the extent using a sex-segregated restroom is the principal (if only) sex-segregated space many people use on a routine basis, a strong argument can be made that accessing a restroom consistent with one's gender identity is one of the most definitive expressions of gender that one undertakes.<sup>279</sup> As law professor Danielle Weatherby has powerfully explained, "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."<sup>280</sup> Or, as explained by legal scholar Jeffrey Kosbie, "[w]hen 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."<sup>281</sup>

## 2. Identities that Challenge, not Disrupt

Assuming trans and gender variant identities are expressive within the public-school context and therefore entitled to First Amendment coverage, the next step is to determine whether school regulation of those expressive identities runs afoul of the governing rubrics for evaluating the regulation of student speech in public schools. Compared to the Bio-Medical-Mental and Social Understandings and the formalized equality approaches they buttress (analyzed below), First Amendment doctrine provides comparatively robust protection for students' expressive freedom, including their expressive conduct.<sup>282</sup>

The prevailing test for determining whether a regulation impermissibly restricts students' speech rights was most famously articulated in *Tinker v. Des Moines*,<sup>283</sup> and recently reaffirmed in *Mahanoy Area School District v. B.L.*<sup>284</sup> In *Tinker*, a case involving suspension of students wearing black armbands to protest the Vietnam War, the Court confirmed that "First Amendment rights,

278. Purvis, *supra* note 277, at 941.

279. Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 122 (2015); see also Kyle C. Velte, *Mitigating the "LGBT Disconnect": Title IX's Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U. J. GENDER SOC. POL'Y & L. 29, 71 (2019) (explaining that "[a] transgender person's decisions about how their body looks [including through surgery or no surgery] is intrinsically tied to the message they want to express about their gender").

280. *Id.* at 122.

281. Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 243 (2013).

282. JESULON S.R. GIBBS, *STUDENT SPEECH ON THE INTERNET: THE ROLE OF FIRST AMENDMENT PROTECTIONS* 30 (2010) (noting that the "overwhelming majority of scholarship examining student free speech rights begins by acknowledging that in 1969 the U.S. Supreme Court attributed a great degree of First Amendment protection to public school students in *Tinker*").

283. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

284. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2048 (2021) (confirming the *Tinker* standard in a case involving the impermissible regulation of off-campus speech).

applied in the light of the special circumstances of the school environment, are available to teachers and students” and that neither “students or teachers shed their constitutional rights to freedom of speech or expression at the school house gates.”<sup>285</sup> In so concluding, the Court confirmed that expressive conduct—such as wearing an armband—was tantamount to “pure speech” and therefore “entitled to comprehensive protection under the First Amendment.”<sup>286</sup> Such speech, the Court suggested, could only be regulated if the students’ speech was accompanied by disorder or disturbance by the student speakers or intruded “upon the work of the schools or the rights of other students.”<sup>287</sup> But “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>288</sup> Given the lack of evidence of disruption, the Court easily concluded that the suspensions violated the students’ expressive freedoms.

That said, the Court has underscored that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>289</sup> Nor has the Court reliably applied the *Tinker* disruption test in school speech cases.<sup>290</sup> But those two caveats aside, in deciding school speech cases, the Court nevertheless consistently puts a premium on whether the student speech at issue negatively impacts the educational environment. For example, in *Bethel v. Fraser*, the Court upheld against a First Amendment challenge the discipline of a student who made use “elaborate, graphic, and explicit sexual metaphor” in a speech nominating another student for student government because of its negative, insulting, and bewildering impact on many students.<sup>291</sup> Similarly, in *Morse v. Frederick*, the Court concluded that speech which could reasonably be interpreted as promoting illegal drug use (displaying a “BONG HiTS 4 JESUS” sign at a school-supervised event) could be regulated consistent with the First Amendment.<sup>292</sup> However, in the same breath, the Court cabined the holding of *Bethel*, emphasizing that speech that is merely “offensive” cannot be forbidden under the First Amendment even in the school context.<sup>293</sup> As law professor Justin Driver has underscored, *Tinker*’s extensive protection for student expression remains robust and, in fact, “today’s students enjoy far greater First Amendment protections than did their counterparts in the pre-*Tinker*-era.”<sup>294</sup>

More to the point, bearing in mind the importance of student speech and the need to ensure the efficient operation of the educational environment, lower

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285. *Tinker*, 393 U.S. at 506.

286. *Id.* at 506–07.

287. *Id.* at 508.

288. *Id.*

289. *Bethel v. Fraser*, 478 U.S. 675, 682 (1986).

290. *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

291. *Fraser*, 478 U.S. at 678, 683–84.

292. *Morse*, 551 U.S. at 408–09.

293. *Id.* at 409.

294. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 125 (2018).

courts have applied these standards to protect gay and lesbian expressive identities in schools. For example, in *Fricke v. Lynch*, after concluding that a male student bringing a male date to prom was covered expression, the court held that prohibiting the student's speech of attending prom with their same-sex date failed the *Tinker* test, in part, because "undifferentiated fear or apprehension of disturbance" based on other students' negative reaction to the speech could not justify the regulation.<sup>295</sup> To conclude otherwise would, in effect, grant the other students a heckler's veto.<sup>296</sup> The same conclusion has been reached in cases dealing with sartorial choices reflecting LGBTQ identity.<sup>297</sup> As put by the Supreme Court in *Palmore v. Sidoti*, "[p]rivate biases may be outside the reach of [constitutional] law, but the law cannot, directly or indirectly, give them effect."<sup>298</sup> While, of course, the case law regarding school regulation of non-normative sexual orientations is still evolving, as summarized by Cliff Rosky, "courts have consistently held that the First Amendment prohibits the state from discouraging the expression of pro-gay opinions and homosexual desires—even among children—because such a policy is tantamount to the suppression of a particular viewpoint."<sup>299</sup>

### 3. Gender Regulation as Infringement on Expression

Assuming that gender is expressive but not disruptive, the next doctrinal question is whether the regulations outlined in Part II constitute an impermissible infringement or burden of that speech. A law may be deemed an infringement on expression in a variety of ways, including outright prohibitions on certain types of speech, prior restraints such as permitting requirements or licensing regimes, and compelled speech.<sup>300</sup> If a law does infringe on protected

295. *Fricke v. Lynch*, 491 F. Supp. 381, 387 (D. R.I. 1980).

296. *Id.*; see also *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1075 (D. Nev. 2001) (denying school defendants' motion to dismiss gay student's First Amendment claim because the court could not conclude as a matter of law that the student's speech coming out about his sexuality caused a substantial disruption, or that defendants could have reasonably believed such a disruption would occur); *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) (applying the *Tinker* disruption test in evaluating whether high school's denial of equal access to Gay Straight Alliance was permissible, and concluding that student and community opposition to the GSA could not justify denial of rights); DRIVER, *supra* note 294, at 125 (noting that "some lower courts have even held that student hecklers must not be permitted to silence student speech"); cf. Dara E. Purvis, *Transgender Children, the Heckler's Veto, and Teaching Early Acceptance*, 72 *STUD. IN LAW, POL., & SOC'Y* 219, 246 (2017) (suggesting that as children and society become more accepting of trans children, the argument that the existence of transgender children causes "disruption" will weaken even further).

297. *E.g.*, *Gillman v. Sch. Bd. of Holmes Cnty.*, 567 F.Supp.2d 1359, 1375 (N.D. Fla. 2008) (holding that speculative disruptions caused by other students' reactions to pro-gay expression do not justify suppression of the speech).

298. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

299. Clifford J. Rosky, *No Promo Hetero: Children's Right to Be Queer*, 35 *CARDOZO L. REV.* 425, 444 (2013).

300. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1015, 1018 (5th ed. 2015).



expression, the law must then satisfy strict scrutiny if it is content-based and intermediate scrutiny if it is content-neutral.<sup>301</sup>

Laws, such as many of those introduced and/or passed in 2021 and 2022, that provide students no freedom regarding their gender expression in that they do not allow a student to access sex-segregated spaces or activities at school unless the space/activity corresponds to the student's sex assigned at birth are clearly prohibitions amounting to an infringement.<sup>302</sup> Common examples of unconstitutional prohibitions include laws that criminalize or impose fines for certain kinds of speech.<sup>303</sup>

But the bureaucratic "committee" process also amounts to an infringement on students' expressive liberty. In addition to outright prohibitions on speech, if a law imposes a prior restraint on speech it is an infringement. In fact, the Supreme Court has at times emphasized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,"<sup>304</sup> in part because they amount to *ex ante* regulation and determinations that speech is problematic. And while, as legal scholar Erwin Chemerinsky has explained, a clear distinction between prior restraints and outright prohibitions is not always crystal clear, since both forms of regulation are on the books *before* the speech exists and, if violated, both forms of regulation are enforced via punishment *after* the speech occurs, a prior restraint is generally defined to exist when there is some sort of administrative system for evaluating whether expression can or cannot occur, such as a licensing or permitting regime.<sup>305</sup> As in many contexts, examples are sometimes the best teachers,<sup>306</sup> and regulations deemed prior restraints subject to First Amendment analysis by the Supreme Court include laws requiring written permission before engaging in a parade on city streets<sup>307</sup> and laws that required registering with the city and receiving a permit before engaging in door-to-door advocacy.<sup>308</sup>

As outlined in Part II, many of the procedures developed by school districts to regulate students' gender expression require that students seek

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301. *Compare* *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."), *with* *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny to regulation with incidental impact on expressive conduct).

302. Scott Skinner-Thompson, *Resisting Regulatory Oppression of Transgender Children*, *THE REGULATORY REVIEW* (July 1, 2021), <https://www.theregreview.org/2021/07/01/skinner-thompson-regulatory-oppression-of-trans-children>, archived at <https://perma.cc/VQC2-RTPY>.

303. *R.A.V.*, 505 U.S. at 382 (concluding that criminalization of certain speech is an infringement).

304. *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976).

305. CHEMERINSKY, *supra* note 300, at 996.

306. *Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n.*, 531 U.S. 288, 296 (2001) (in the context of discussing what does and does not amount to state action, observing that "examples may be the best teachers").

307. *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (upholding permit regime for holding parade on city streets).

308. *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002) (striking down the registration requirement).

permission from the school before expressing their gender identity by taking advantage of sex-segregated spaces and activities.<sup>309</sup> And, at turns, school districts are empowered to “verify” the students’ gender before allowing them to participate—this is a classic example of a prior restraint.<sup>310</sup>

In addition to restraining students’ gender expression, laws which limits students’ ability to live consistently with their gender identity by forcing them to use names, gender markers, and facilities inconsistent with their gender identity constitute an infringement of speech in a third way: they compel students to express a gender identity that is not their own, implicating prohibitions on government-compelled speech.<sup>311</sup> The Supreme Court has recognized that compelling people to speak a particular message is no less pernicious than prohibiting them from speaking their own message.<sup>312</sup> Of particular relevance to the school setting, the Court has ruled that students could not be compelled to salute the flag or say the Pledge of Allegiance because to do so would infringe on students ability to think and enforce conformity.<sup>313</sup> Similarly, and also particularly relevant given that regulation of gender identity often occurs via government-issued documentation, the Supreme Court has declared that forcing people to include a particular message on their government-issued license plate, e.g., New Hampshire’s “Live Free or Die” slogan, constituted impermissible compelled speech.<sup>314</sup> Forcing students to adopt gender markers and use sex-segregated spaces that are inconsistent with their gender identity forces the students to profess and express speech that is not their own, in contravention of the compelled speech doctrine.<sup>315</sup>

Briefly, related to the compelled speech analysis, it is worth addressing whether any message being conveyed as a result of the regulations’ application to students is the government’s speech or the student’s speech. While the government’s own speech is not subject to First Amendment restraints that apply when the government is regulating private speech,<sup>316</sup> here the regulations at issue implicate students’ speech, not that of the government. The Court has identified at least three factors for determining whether speech is the government’s or an individual’s: whether the government has historically used the speech for its own expressive purposes, whether speech is closely identified

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309. *See infra* Part II.

310. *Id.*

311. Flynn, *supra* note 34, at 497–500.

312. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

313. *Id.* at 640–42.

314. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

315. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *Corbitt v. Taylor*, No. 2:18-cv-91-MHT-GMB, 2019 WL 690375 (M.D.Ala.) (arguing that Alabama’s refusal to allow gender-marker changes on state identification documents constitutes a violation of compelled speech doctrine).

316. HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 31 (2019).

by the public with the government, and whether the government maintained control over the message.<sup>317</sup> Here, these factors militate toward concluding that the regulation of student speech is at issue, not government speech. While all laws express *something*,<sup>318</sup> the government has not historically used gender regulations and sex-segregation to express a particular message of its own *about a specific individual* (as opposed to the law expressing that gender-segregation is appropriate and relevant). And, in fact, the existence of gender-segregated restrooms is actually relatively new, dating to the late 19th century in the United States.<sup>319</sup> More significantly, the public would not attribute a person's presence in a restroom or on a sports team as the government's message since (until the advent of the regulations under consideration) the individual decides what restroom to enter, declaring their gender.<sup>320</sup> Finally, the formal regulation and definition of gender as it relates to sex-segregated spaces—that is, policing who is male, female, or otherwise—is actually quite new with the government taking a relatively hands off approach until recent attempts to enact so-called bathrooms bills aimed at defining who is and is not a particular gender.<sup>321</sup> Until recently, it had largely been left to individuals to make the choice (amidst social pressure) about what sex-segregated space to use.

#### 4. Gender Regulations Fail Application of Scrutiny

Once it is established that there is an infringement via an outright prohibition, prior restraint, or compelled speech, the next question is to determine whether the infringement is content-based, in which case strict scrutiny will apply, or content-neutral, in which the less rigorous but still searching intermediate-scrutiny will apply.<sup>322</sup> Together as a group, these two forms of scrutiny are sometimes referred to as “heightened scrutiny.”<sup>323</sup>

A law will be deemed a content-based regulation of speech if it facially distinguishes between “speech because of the topic discussed or the idea or message expressed,” or, even if facially neutral, “cannot be justified without reference to the content of the regulated speech” or was “adopted by the government because of disagreement with the message.”<sup>324</sup> The Court has continued to take a capacious approach when evaluating what constitutes a content-based

317. *Id.* at 39; see *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–10 (2015) (collating factors).

318. *E.g.*, DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 68 (1990) (explaining that the penal process is “a means of evoking, expressing, and modifying passions, as well as an instrumental procedure for administering offenders”); Kirstie Ball et al., *Big Data Surveillance and the Body-subject*, 22 *BODY & SOC’Y* 58, 70–71 (2016) (explaining that “[S]urveillance communicates value systems to the surveilled.”).

319. CAVANAGH, *supra* note 211, at 7.

320. See *infra* Part I.C., Part II.A.1.

321. Phillips, *supra* note 212.

322. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny to regulation which had incidental impact on expressive conduct).

323. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

324. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (quotations and citations omitted).

regulation.<sup>325</sup> Here, there can be little doubt that the school regulations of student's gender are content-based in that they are focused on regulating speech about the student's gender, cannot be justified without referencing the student's gender, and are often meant to directly stop the student's gender expression.

As such the regulations would be subject to strict scrutiny requiring that the law be the least restrictive means of achieving a compelling government interest.<sup>326</sup> But even if the law were deemed content-neutral and to have only an incidental impact on speech, it would still be subject to intermediate scrutiny requiring that the law be narrowly tailored to serve a significant or important government interest and leave open ample opportunities for communication. The school regulations cannot survive either form of heightened scrutiny.

Regulation of student's gender identity is often defended in the name of preserving cisgender students' privacy,<sup>327</sup> and, in the sports context, preserving opportunities for cisgender females to "fairly" participate in gender-segregated sports.<sup>328</sup> Assuming that these are, in the abstract at least, important concerns, the existence of trans and gender variant students does not jeopardize those interests, suggesting that laws are not tailored to achieve those government interests.

As to the privacy concerns, bathrooms are increasingly designed to provide personal privacy to anyone who desires it—stalls are available for those that do not want their external genitalia exposed and who do not want to be exposed to other people's genitalia.<sup>329</sup> Locker rooms too are increasingly designed to allow anyone desiring not to be observed to have access to private spaces through practical and cheap interventions such as privacy curtains.<sup>330</sup> In other words, the vast committees that have been created to regulate student gender identity are not narrowly tailored to achieve the goals of privacy and far less restrictive alternatives exist, such as privacy curtains and the like. That is, the laws are overinclusive and regulate more than necessary to achieve their goal of privacy and therefore fail both intermediate and strict scrutiny.<sup>331</sup>

Moreover, to the extent the laws are motivated by purported concern over people's prurient interests in gender-segregated spaces, there is scant evidence

325. *Id.*

326. *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992).

327. *E.g.*, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527 (3d Cir. 2018) (analyzing privacy arguments made against letting trans students use facilities consistent with their gender identity).

328. *E.g.*, WASHINGTON INTERSCHOLASTIC ATHLETIC ASSOCIATION, 2020–2021 OFFICIAL HANDBOOK § 18.15 app. A.

329. Skinner-Thompson, *Battle Over Privacy*, *supra* note 204.

330. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 288 (2013).

331. *Cf.* *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (holding that even under rational basis review, where a law is completely divorced from advancing its stated goal, it will be deemed unconstitutional); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (same).

people will take advantage of trans affirming policies to masquerade into a bathroom and assault someone—myths that have been repeatedly debunked.<sup>332</sup>

Trans and gender variant youth's gender identities do not pose a threat to anyone else.<sup>333</sup> Such arguments regarding trans people also completely overlooks issues of sexuality. Trans youth—like cisgender youth—can be straight, gay, bi, or pan. While one's own gender may play a role in one's sexuality to the extent part of sexuality involves how our bodies interact with each other, one's gender does not *dictate* one's sexuality, and schools rightly permit people of all sexualities to use school restrooms and locker rooms.<sup>334</sup> Thus, to the extent laws regulating gender ignore issues of sexuality, the laws are also underinclusive such that they would fail intermediate or strict scrutiny.<sup>335</sup>

Concerns regarding trans female youth taking athletic opportunities from cisgender youth are also overstated.<sup>336</sup> To begin, such arguments ignore that the paramount purposes of youth sports is not winning, but developing physical ability, social interaction, mental health, self-esteem, and teamwork among all participants.<sup>337</sup> The developmental benefits of athletic participation are acutely important for vulnerable groups, such as transgender students, who already face tremendous barriers in terms of social recognition and feelings of isolation.<sup>338</sup> And while Title IX's endorsement of sex-segregated athletics undoubtedly serves an important feminist objective in advancing women's rights by creating space for women's athletic competition, that promise extends to all women.<sup>339</sup> Regardless of who participates, only a handful of students “win a championship” in any given year. Being assigned an accurate sex at birth does not mean

332. Erin Fitzgerald, *A Comprehensive Guide to the Debunked “Bathroom Predator” Myth*, MEDIA MATTERS (May 5, 2016, 1:51 PM), <https://www.mediamatters.org/sexual-harassment-sexual-assault/comprehensive-guide-debunked-bathroom-predator-myth>, archived at <https://perma.cc/TXM7-MVZ7>.

333. Chase Strangio, *Transgender People Aren't a Threat to You*, ACLU (May 6, 2016), <https://www.aclu.org/blog/lgbtq-rights/transgender-rights/transgender-people-arent-threat-you>, archived at <https://perma.cc/7MZ9-GFN4>.

334. Skinner-Thompson, *Battle Over Privacy*, *supra* note 204.

335. *Moreno*, 413 U.S. 529.

336. The following two paragraphs draw from a short popular press piece I authored, Scott Skinner-Thompson, *Trump Administration Tells Schools: Discriminate Against Trans Athletes or We'll Defund You*, SLATE (June 4, 2020, 4:33 PM), <https://slate.com/news-and-politics/2020/06/betsy-devos-transgender-athletes-connecticut.html>, archived at <https://perma.cc/2RW6-VXN4>.

337. See PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES (2010); Lindsay A. Taliaferro et al., *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, 78 J. SCH. HEALTH 545, 552 (2008); Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, 14 J. OF ADOLESCENT RES. 10, 18 (1999).

338. See GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND QUEER YOUTH IN OUR NATION'S SCHOOLS (2020).

339. Erin Buzuvis, “*On the Basis of Sex*”: *Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC'Y 219, 243 (2013).

victory is a birthright. Nor should being assigned an inaccurate sex at birth render you perpetually excluded.

Moreover, it is important to bear in mind that sex is a poor proxy for physical ability or size (much less a coherent category itself).<sup>340</sup> Put differently, the range of physical differences within a particular sex category is far greater than the average differences between cisgender males and females.<sup>341</sup> Even at the college and adult level, the National Collegiate Athletic Association (NCAA) recognizes that trans female athletes do not inherently have an advantage compared to cisgender females.<sup>342</sup> The NCAA notes that “many people may have a stereotype that all transgender women are unusually tall and have large bones and muscles. But that is not true.”<sup>343</sup> The NCAA has emphasized the importance of not overgeneralizing and not assuming that all transgender females “are taller, stronger, and more highly skilled in a sport than” cisgender females.<sup>344</sup>

In short, the committee structure fails either form of heightened scrutiny because the inclusion of transgender children does not implicate the purported interests justifying the bureaucratic regulations, making the regulations unnecessary and overly restrictive. And, as documented above, the committee structure actually undermines many of its goals, harming the privacy and well-being of trans and gender variant children, rendering it counterproductive.<sup>345</sup>

## 5. Comparison to Equality Arguments

Any fair evaluation of the strength of framing gender identity as an issue of First Amendment gender expression must involve a comparison to other viable options, the most prominent of which is equality arguments under either the Equal Protection Clause or federal statutory prohibitions on sex discrimination. And in fact, equality arguments regarding transgender equality have been met with meaningful success, with the Supreme Court’s recent decisions protecting transgender people from employment discrimination under Title VII as the most prominent example.<sup>346</sup> There are also important examples of transgender students being protected through an equality lens from discrimination in public schools, including the high-profile example of Gavin Grimm, a victory which the Supreme Court refused to reconsider.<sup>347</sup>

340. *See supra* Part I.

341. *See* Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977).

342. NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 7 (Aug. 2011).

343. *Id.*

344. *Id.*

345. *Cf.* U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534–38 (1973) (striking down law under rational basis review where it actually impeded its stated objective of helping meet people’s nutritional needs).

346. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

347. *E.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *cert. denied* 141 S. Ct. 2878 (June 28, 2021).

But an examination of those victories underscores two principal shortcomings of equality arguments thus far. First, as demonstrated by the way equality arguments have been litigated, the equality lens has been most useful for those most well-equipped to comply with the Bio-Medical-Mental and Social Understandings of gender identity, leaving the many that cannot, including non-binary folk, less protected.<sup>348</sup> Second, the equality lens has proven most effective when dealing with bans on gender transition by public schools, such as those at issue in the Grimm case, which required the student to use the bathroom according to their sex assigned at birth, but at times has been deployed in a way to prop up and reify the committee structure. That is, the equality litigation often relies on and presupposes people who are able to comply with the restrictive models of gender outlined in Part I and the procedures outlined in Part II.

In case after case, plaintiffs pursuing litigation under an equality lens against bans on transgender students emphasize their adherence to the both the Bio-Medical-Mental and Social Understandings and presume that trans students can comply with those models. Students' complaints often mention that the gender identity of transgender adolescents is "stable and fixed."<sup>349</sup> Students' complaints emphasize the role of "'social transition,' in which the individual lives in accordance with his gender identity in all aspects of life" as a means of treating gender dysphoria.<sup>350</sup> They also underscore the students' conforming gender appearance, sometimes including a photograph,<sup>351</sup> and that the student is indeed accepted by their community as a boy or girl.<sup>352</sup> They emphasize that "living full-time in accordance with one's gender identity in all aspects of life for at least one year is a prerequisite for any medical interventions."<sup>353</sup> And often the students note that they themselves are engaged in medical care for gender dysphoria, including potentially medical interventions such as hormone treatment, and are supported by their medical professionals.<sup>354</sup> They also

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348. Marie-Amelie George, *Framing Trans Rights* 114 NW. U. L. REV. 555, 610 (2019) (observing that sex equality frames for transgender rights may have reinforced the gender binary to the detriment of non-binary people).

349. Second Amended Complaint P 24, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 4:15-cv-00054) [hereinafter *Grimm* Amended Complaint].

350. *Grimm* Amended Complaint P 17, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017) (No. 2:16-cv-00943) [hereinafter *Whitaker* Amended Complaint]; see also Complaint P 26, Hecox v. Little, 479 F.Supp.3d 930 (D. Idaho Aug. 17, 2020) (No. 1:20-cv-00184) [hereinafter *Hecox* Complaint].

351. *Grimm* Amended Complaint P 2 (emphasizing student's appearance as "typical" of other boys); *Hecox* Complaint P 23 (including photo of plaintiff).

352. *Whitaker* Amended Complaint P 26; see also *Grimm* Amended Complaint P 2.

353. *Whitaker* Amended Complaint P 18; see also *Grimm* Amended Complaint P 1 (underscoring that the student "with the help of his medical providers, transitioned to living in accordance with his male identity as part of medically necessary treatment for gender dysphoria").

354. *Whitaker* Amended Complaint P 25; see also *Grimm* Amended Complaint PP 1, 40; *Hecox* Complaint P 29.

carefully note that they adhered to all the requirements including meeting with school officials to, in effect, clear the acceptability of the student's transition.<sup>355</sup>

Now, it's possible these cases could have been litigated differently. One can imagine equality arguments being made on behalf of those who resist categorization at all, but to date the pull of the hegemonic models of gender has not engendered such framing. And, as outlined above, the expressive model provides a surer path of creating the most discursive space for all people—regardless of their gender identity.

There may also be concern that framing the identities of minoritized gender identities as expressive and underscoring the role of social context in understanding conduct as expressive will just as easily lead to protection for anti-queer speech by students in the schoolhouse or bolster expressive arguments made by those seeking to exclude queer folk from, for example, public accommodations. This concern is overstated for a couple of reasons. First, as outlined above, understanding gender identity as expressive is very consistent with existing First Amendment jurisprudence and does not greatly expand the kind of conduct already deemed as expressive, as evidence by the Court's decisions in *Hurley*<sup>356</sup> and *Dale*.<sup>357</sup> Second, on the back end of the analysis, the compelling government interest of protecting queer people will continue to justify anti-discrimination laws, even should, for example, the cake baker's activity be deemed his expression.<sup>358</sup> Similarly with respect to anti-queer speech in school, such speech by students would be disruptive under *Tinker* because it infringes with the rights of others and can be regulated consistent with the First Amendment, as courts have already concluded.<sup>359</sup>

There may also be concern that an expressive, First Amendment frame does not solve the distributional problems because in order to enforce a First Amendment right, it would still require resources to bring a lawsuit. That may be true in the first instances, but if such First Amendment challenges are successful, the bureaucratic structures outline in Part II would need dismantling or at the very least reworking. In other words, the currently prevailing approach holds up the (inaccessible) bureaucracies as the solution, whereas a First Amendment approach—while of course requiring resources—could yield a more emancipatory result after litigation.

Finally, there may be concern that an emphasis on expressive identity exploration will create more opposition and backlash to the reality of trans existence precisely because of the comparative freedom it provides through its

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355. *Whitaker* Amended Complaint P 27; see also *Grimm* Amended Complaint P 3.

356. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

357. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

358. Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 596 (2001) (arguing LGBT non-discrimination laws survive First Amendment scrutiny because of the compelling interest in achieving equality).

359. *E.g.*, *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1170–71 (9th Cir. 2006) (upholding denial of preliminary injunction in case involving school's regulation of homophobic expression).



more fluid approach to gender. That's quite possible and an important consideration. But given the current vehemence with which trans lives are already being attacked,<sup>360</sup> a compelling argument can be made in favor of embracing the most emancipatory model. For example, as noted, South Dakota just outlawed trans female participation in high school sports notwithstanding that under the committee approach that governed over the last decade or so only one trans female athlete successfully availed themselves of the process in order to participate.<sup>361</sup> In other words, the backlash is happening one way or another.

#### CONCLUSION

The degree to which the identities of trans and gender variant students are subject to administrative surveillance and control by public schools is breathtaking. Even students attending relatively open-minded institutions, with supportive families, and the resources needed to navigate the bureaucratization of student gender face tremendous hurdles in terms of simply living their gender. More so for the many students without those assets. But a more emancipatory model may be available that would let students live and explore their identities without proving their identity and without seeking permission from doctors, mental health counselors, administrators, and others. Appreciating the expressive and performative components of students' gender could not only provide them First Amendment protection, more fully opening the schoolhouse gate to trans and gender variant students, but it could also help open the minds of our society more broadly to the ways in which gender exploration need not be feared. Instead, it can be embraced for the courageous and beautiful act of defiance and creation it is.

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360. Page, *supra* note 92, at 143.

361. Matzen, *supra* note 203.

