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Sick and Tired of Hearing about the Damn Bathrooms

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SICK AND TIRED OF HEARING ABOUT THE DAMN BATHROOMS

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For the past several years, courts have struggled to reconcile discrimination against transgender employees and students with Title VII and Title IX sex-stereotyping jurisprudence.[1] But why? After all, sex divisions are commonplace throughout work and school life: in school, we undergo sex education in classrooms segregated by gender;[2] in the workplace, men are rarely required to wear makeup, while women are often encouraged to do so;[3] and in both settings, we use segregated restrooms designated for our gender.[4] In these instances, we abide by some intrinsic stereotype of what distinguishes one gender as patently different from another.[5] Yet we reject this separate-but-equal ideology in other instances—like when a woman is denied a promotion because she does not present femininely enough.[6] The

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1. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012)); *see also* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

2. *See* 34 C.F.R. § 106.34(a)(3) (2017) (permitting separation of human sexuality classes by gender).

3. *E.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) (in which a casino imposed a dress policy which required female bartenders to wear makeup but forbade male bartenders from doing so).

4. *See* Kate Wheeling, *Stalled Out: How Social Bias is Segregating America's Bathrooms*, PAC. STANDARD (Aug. 4, 2017), https://psmag.com/magazine/how-social-bias-is-segregating-americas-bathrooms?utm_content=bufferd3a46&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer [https://perma.cc/R9UF-BX9F] (tracing the history of segregated restrooms).

5. S*ee* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 146, 152–54 (2007) (listing gender stereotypes and describing them as "perceptions rather than realities about traits held by men and women"); *see also* JULIA T. WOOD, GENDERED LIVES: COMMUNICATION, GENDER, AND CULTURE 23–27 (9th ed. 2011) (discussing learned gender roles and stating that they are "neither innate nor necessarily stable" but rather "defined by society").

6. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989) (in which a woman was denied a promotion for not acting sufficiently effeminate); *see* Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 18 (2010) (describing opposition to same-sex marriage as supporting "separate but equal gender roles"). This Note uses the phrase "separate but equal" to refer to the phenomenon of

law of sex stereotyping is thus internally inconsistent: it allows certain stereotypes but proscribes others.[7]

When statutes like Title VII and Title IX forbid stereotyping, they adhere to a theory of equality. And while equality theory may protect from discrimination, it also eliminates difference as often as it celebrates it.[8] On the other hand, certain jurisprudential exceptions reify difference rather than mute it. For example, certain jobs are restricted to members of a certain race, gender, or religion—so long as the classification is a *bona fide* occupational qualification (BFOQ).[9] Dress and grooming standards may also be differentiated by gender under a burdens-balancing test.[10]

Transgender youth do not fit comfortably into the equality paradigm. Courts have wrestled with the concept of what it means to stereotype individuals who themselves rely on certain sets of stereotypes for self-affirmation and -identification.[11] This difficulty is exacerbated by the fact that transgender individuals do not necessarily adhere to a strict binary of stereotypes.[12] The current trend set by the Fourth Circuit's watershed opinion in *G.G. ex rel. Grimm v. Gloucester County School Board* and its Seventh Circuit successor *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education* is reliance on equality theory without reconciliation of stereotyping inconsistency.[13] For Gavin Grimm,[14] the

sex segregation—distinguishable from the Jim Crow practice—but recognizes the intersection of race and gender in the context of the phrase. *See* Wheeling, *supra* note 4.

7. *See* Baker, *supra* note 6, at 33; *see also* Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1188–89 (2016).

8. *See* YOSHINO, *supra* note 5, at 24 ("Courts have often interpreted these laws to protect statuses but not behaviors, *being* but not *doing* . . . courts will often not protect individuals against covering demands, which target the behavioral aspects of identity . . . .").

9. 42 U.S.C. § 2000e-2(e) (2012).

10. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109–10 (9th Cir. 2006) (discussing the equal burdens test).

11. *See* Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 226 (2016) (discussing the impulse to rely on binary and inherently sexed stereotypes of male and female when pursuing affirming care).

12. *See* YOSHINO, *supra* note 5, at 92 ("[A]uthenticity will look and feel different for each of us."); *see also* Strangio, *supra* note 11, at 224 ("We are . . . the men, women, and non-binary people who may need care that defies every expectation of how bodies look, perform, and have sex.").

13. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048–50 (7th Cir. 2017); G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 720–21 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017).

14. *Gloucester* began when Grimm was a minor, but he has since turned eighteen. Litigation following his eighteenth birthday was restyled as *Grimm v. Gloucester County School Board*. Lyle Denniston, *A Rite of Passage for "G.G." — Now Gavin Grimm*, NAT'L CONSTITUTION CTR.: CONST. DAILY (May 25, 2017), https://constitutioncenter.org/blog/a-rite-of-passage-for-g.g.-now-gavin-grimm [https://perma.cc/Q66D-9D6S]. For ease of reference, this Note only cites decisions prior to Grimm's eighteenth birthday.

student at the center of the *Gloucester* case, the struggle to access appropriate facilities culminated in "two public meetings, inviting the community to discuss [his] genitals and restroom usage in front of reporters and television cameras," from which he "continue[s] to suffer daily because of the school board's decision to make [his] bathroom use a matter of public debate."[15] For transgender students then, the unique burden of gender identity denial elevates stereotype-based school action from tolerable to onerous. To vindicate the rights of transgender students under the current Title IX regime, courts must reconcile the tension between sex-stereotyping theory and the statutory approval of communal biases by evaluating the psychological, dignitary, and physical harms borne by transgender students under a synthesized burdens-balancing test.[16]

A transgender person is typically understood to be someone whose gender identity—both parts social construct and internal perception of being a man, woman, or gender-nonconforming person—is different from the sex assigned to that person at birth.[17] This stands in contrast with a cisgender person, whose sex-at-birth and gender identity are congruent.[18] Often, a transgender individual's experience is marked by the condition "gender dysphoria," which the American Psychiatric Association defines as a continuous incongruence between a transgender person's "expressed/experienced gender and the gender others would assign" them.[19] In many cases, this results in a desire to "be treated as [another] gender or to be rid of one's sex characteristics," among other things.[20] While not necessitated in all instances, this tension may involve significant psychological distress.[21] This can be mitigated by positive socialization, which includes

15. Gavin Grimm, Opinion, *I'm Transgender and Can't Use the Student Bathroom. The Supreme Court Could Change That*, WASH. POST (Oct. 27, 2016), https://www.washingtonpost.com/opinions/im-transgender-and-cant-use-the-student-bathroom-the-supreme-court-could-change-that/2016/10/27/19d1a3ae-9bc1-11e6-a0ed-ab0774c1eaa5_story.html?utm_term=.4bc64562a3b4 [https://perma.cc/333U-5DWM]. *See generally Gloucester*, 822 F.3d 709.

16. Discussed *infra* in Part III.

17. *See Transgender FAQ*, GLAAD, https://www.glaad.org/transgender/transfaq [https://perma.cc/2Y2L-7ML2].

18. As defined by Oxford English Dictionary, the term "cisgender" refers to "a person whose sense of personal identity and gender corresponds with his or her sex at birth . . . ." *Cisgender*, OXFORD ENGLISH DICTIONARY (3d ed. 2015).

19. AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA 1 (2013).

20. *Id.*

21. *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOL. 832 (2015). *See generally* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 61 (7th ed. 2012), https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf [https://perma.cc/6J6J-BZMD].

acknowledgement of one's gender identity as well as participation in the common facets of that role.[22] Rejection of transgender individuals' identities often damages their mental health and self-perception.[23] In some cases, this can contribute to a transgender individual's self-harm or suicide.[24]

In recent years, heightened visibility of transgender people has incurred public scrutiny and aggravated rates of violence against transgender individuals.[25] A record twenty-one transgender people were murdered in 2015, and violent crimes motivated by gender identity nearly tripled from the previous year; that figure only grew in 2016.[26] In response to retailer Target's announcement of a transinclusive restroom policy, several cisgender people publicly threatened to bring weapons with them to the store's restrooms.[27] The Trump administration has already reversed progress on several LGBT-inclusive[28] policies.[29] Since rescinding its transin-

22. *See* Am. Psychological Ass'n, *supra* note 21; *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21.

23. *See* Am. Psychological Ass'n, *supra* note 21; *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21.

24. *See* ANN P. HAAS ET AL., AM. FOUND. FOR SUICIDE PREVENTION & WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 2 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf [https://perma.cc/W3WF-ECXP]; *see also* Fallon Fox, *Leelah Alcorn's Suicide: Conversion Therapy is Child Abuse*, TIME (Jan. 8, 2015), http://time.com/3655718/leelah-alcorn-suicide-transgender-therapy/ [https://perma.cc/NLJ3-ACGD]; Lindsey Bever, *Transgender Boy's Mom Sues Hospital, Saying He 'Went into Spiral' After Staff Called Him a Girl*, WASH. POST (Oct. 3, 2016) https://www.washingtonpost.com/news/to-your-health/wp/2016/10/03/mother-sues-hospital-for-discrimination-after-staff-kept-calling-her-transgender-son-a-girl/?utm_term=.0f54c98e4901 [https://perma.cc/PY5F-BFUH].

25. *See* NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2016 (2017), http://avp.org/wp-content/uploads/2017/06/NCAVP_2016HateViolence_REPORT.pdf [https://perma.cc/M2E2-VM5P]; *see also* Katy Steinmetz, *Why Transgender People are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), http://time.com/3999348/transgender-murders-2015/ [https://perma.cc/6GTZ-525C].

26. *See* Zack Ford, *As 2015 Sees a Record Number of Documented Transgender Murders, a Glimmer of Hope*, THINKPROGRESS (Nov. 20, 2015, 1:00 PM), https://thinkprogress.org/as-2015-sees-a-record-number-of-documented-transgender-murders-a-glimmer-of-hope-bb39567fc672#.kxzqtw98c [https://perma.cc/J98Z-RRXB]; *see also* Trudy Ring, *Trans Woman Murdered in Alabama in Deadliest Year on Record*, ADVOCATE (Oct. 6, 2016, 9:40 PM), http://www.advocate.com/transgender/2016/10/06/trans-woman-murdered-alabama-deadliest-year-record [https://perma.cc/KV7U-PJTV].

27. Sunnivie Brydum, *Right-Wingers Pledge to Carry Guns to Bathroom to Fend Off Trans Folks*, ADVOCATE (Apr. 25, 2016, 5:32 PM), http://www.advocate.com/transgender/2016/4/25/right-wingers-pledge-carry-guns-bathroom-fend-trans-folks [https://perma.cc/S5YA-87BU].

28. The politics surrounding how the community's acronym is constructed and ordered are manifold, and far beyond the scope of this Note. *See* Joy D'Souza, *What is the Expanded LGBT Acronym? And What Does it Stand For?*, HUFFINGTON POST CAN. (June 27, 2016, 11:11 AM), http://www.huffingtonpost.ca/2016/06/27/entire-lgbt-acronym_n_10616392.html [https://perma.cc/W5U5-QALT]. For simplicity's sake, this Note uses the standard acronym "LGBT" used by the ACLU, recognizing that that choice is inherently political as well. *See generally LGBT Rights*, ACLU, https://www.aclu.org/issues/lgbt-rights [https://perma.cc/RTA5-QL25].

clusive guidance, the Department of Education (DOE) has scaled back its involvement in transgender discrimination cases.[30] President Trump's abrupt declaration of a ban on transgender military members also threw the employment and benefits status of thousands into question.[31]

Since the Supreme Court's decision in *Obergefell v. Hodges*, the rights of transgender people have been the focus of substantial public debate.[32] Twenty-four state legislatures have attempted to pass legislation that would prevent transgender people from using restrooms that align with their gender identity.[33] North Carolina in particular withstood significant criticism for the Public Facilities Privacy & Security Act, which attempted to predicate public restroom access on the sex listed on one's birth certificate.[34] Texas soon followed suit, ignoring public outcry and potential economic damage.[35] Several editorials published after the 2016 general election placed some blame for Hillary Clinton's loss on transgender people's struggle to participate in basic facets of public life, with one columnist declaring that "America is sick and tired of hearing about liberals' damn bathrooms."[36]

29. Michael D. Shear & Charlie Savage, *In One Day, Trump Administration Lands 3 Punches Against Gay Rights*, N.Y. TIMES (July 27, 2017), https://www.nytimes.com/2017/07/27/us/politics/white-house-lgbt-rights-military-civil-rights-act.html [https://perma.cc/3WG3-VJBA].

30. Emma Brown, *Education Dept. Closes Transgender Student Cases as it Pushes to Scale Back Civil Rights Investigations*, WASH. POST (June 17, 2017), https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html?utm_term=.8da1aacbcc68&tid=sm_tw [https://perma.cc/9KZZ-35JT].

31. Medardo Perez, *Banning Transgender Troops Could Cost U.S. $960 Million, Report Says*, NBC NEWS (Aug. 15, 2017), http://www.nbcnews.com/feature/nbc-out/banning-transgender-troops-could-cost-us-960-million-report-says-n792466 [https://perma.cc/JRP2-S6JY].

32. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see* Scott Skinner-Thompson, *How* Obergefell *Could Help Transgender Rights*, SLATE: OUTWARD (June 26, 2015, 2:26 PM), http://www.slate.com/blogs/outward/2015/06/26/obergefell_and_trans_rights_the_supreme_court_s_endorsement_of_identity.html [https://perma.cc/S43A-6HRM].

33. Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/PQC6-BAVD].

34. *See* Mark Abadi, *North Carolina Has Lost a Staggering Amount of Money Over Its Controversial "Bathroom Law,"* BUS. INSIDER (Sept. 21, 2016, 3:22 PM), http://www.businessinsider.com/north-carolina-hb2-economic-impact-2016-9 [https://perma.cc/96F5-KGYZ].

35. Jon Herskovitz, *Texas "Bathroom Bills" Stall in Special Legislative Session*, REUTERS (Aug. 14, 2017), https://www.reuters.com/article/us-texas-lgbt-idUSKCN1AU15U [https://perma.cc/5P7U-WY6L].

36. Mark Lilla, Opinion, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), http://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html [https://perma.cc/553E-KC4W].

Few institutions have borne the percolation of public anxiety over transgender individuals' existence more than the education system. Cases like *Gloucester* and *Whitaker* have pushed courts to harmonize the rights of transgender students with the equality theory—to mixed results.[37] *Gloucester* stemmed from a series of "Dear Colleague" letters issued by the DOE and the Department of Justice (DOJ).[38] Unsurprisingly, the DOE abandoned its transinclusive position after President Trump appointed Betsy DeVos as Education Secretary.[39] Shortly after, the Supreme Court remanded *Gloucester* for further proceedings—this time, without the support of DOE guidance.[40]

The plaintiffs in *Gloucester* relied on sex discrimination principles under Title IX.[41] At the time, the DOE's guidance supported this argument.[42] Without the benefit of the DOE's guidance, these arguments must contend with the issue of Title IX's codification of permissible gender divisions. These include, for example, schools' ability to segregate restrooms and athletic teams, as well as mandate dress codes according to community norms.[43] To secure facility equity for transgender students, courts must harmonize Title IX's prohibition of sex discrimination with the reality of permissible gender divisions. To this end, Part I of this Note will examine the equality principles that underpin Title IX and Title VII jurisprudence as well as the codification of permissible gender stereotyping present in both. Part II will explore the haphazard method by which courts have applied these principles in the cases of transgender employees and students. Part III will prove that Title IX can be narrowly interpreted to protect transgender students despite the statute's codification of communal biases.

37. *See generally* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017).

38. *See* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/UC2A-2BJB].

39. *See* Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.261034db0af6 [https://perma.cc/KL7B-UE2N].

40. Gloucester Cty. Sch. Bd. v. G. G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (mem.).

41. Brief for Plaintiff-Appellant at 23–25, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (No. 15-2056).

42. *See generally Gloucester*, 822 F.3d 709.

43. *See* 28 C.F.R. § 54.410 (2016) (concerning restrooms and locker rooms); *see also* Hayden *ex rel.* A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 581–82 (7th Cir. 2014) ("[S]ex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike.").

I. THE INTERNAL CONFLICT OF TITLE IX SEX DISCRIMINATION PROHIBITION

Title IX of the Education Amendments of 1972 mandates that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[44] In general, a person alleging a Title IX violation must show: that they were excluded from participation in an education program because of their sex; that the educational institution was receiving federal financial assistance at the time of the exclusion; and that the wrongful discrimination caused the complainant harm.[45]

Opponents of facility equity employ a textualist interpretation of Title IX to deny that the statute offers any protection for transgender students. They argue that the term "sex" in the statute and its enforcing regulations should be read according to its proposed plain text meaning: strictly "biological" or "anatomical" sex—essentially predicating identity on genitalia.[46] They also insist that Congress only ever intended for the statute to apply to cisgender students.[47] However, neither of these points are supported by dispositive evidence.

If we were restricted only to dictionary definitions, then it would be unclear what the ordinary meaning of the term "sex" was at the time of drafting. Definitions of the term "sex" at the time of Title IX's adoption seem to blend considerations of biology and gendered traits, which makes it difficult to determine whether it should be interpreted inclusively or exclusively.[48] Numerous dictionaries at the time did not predicate sex on genitalia, but rather a totality of physiology, communal norms, and gender

44. 20 U.S.C. § 1681(a) (2012).

45. *See id*. § 1687 (defining a "program or activity" as "a department, agency . . . or other instrumentality of a State or of a local government . . . [or] a college, university, or other postsecondary institution, or a public system of higher education . . . ."); *see also* Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir.1994) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 680 (1979)).

46. *See generally* Brief of Petitioner at 26–32, Gloucester County School Board v. G.G., 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 65477.

47. *See generally id.* at 32–34.

48. *See Sex*, AMERICAN COLLEGE DICTIONARY 1109 (1969) (defining "sex" as "the character of being either male or female" or "the sum of the anatomical and physiological differences with reference to which the male and female are distinguished . . . ."); *see also Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) (defining "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings . . . that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . ."); *Sex*, WEBSTER'S NEW COLLEGIATE DICTIONARY 1054 (1979) (defining "sex" as "the sum of the structural, functional, and behavioral characteristics of living beings . . . that distinguish males and females").

characteristics.[49] But even those which rely purely on external genitalia or reproductive function trade in unworkable stereotypes—it is a stretch to say that Congress would consider a sterile or castrated cisgender person to no longer embody their designated gender.[50] Many modern dictionaries also retain the trend of considering sex as a sum of various characteristics associated with gender identifiers and norms rather than a binary dependent on genitalia.[51]

Congressional purpose is hardly illuminating either. Numerous remarks by the sponsor of the statute, Senator Birch Bayh, reflect that at least one of the motivations behind the passage of Title IX was to provide protection to cisgender women in education as a remedy for past discrimination.[52] This goal, though significant, was a subset of a broader desire to eliminate all sex discrimination in education whatsoever. In Senator Bayh's words, "Central to my amendment are [provisions] which would prohibit discrimination on the basis of sex in federally funded education programs . . . This portion of the amendment covers discrimination in all areas where abuse has been mentioned [including] . . . access to programs within the institution . . . ."[53]

Without any explicit discussion of transgender status, these considerations are largely ambiguous as to how they should be applied to transgender students. Facially, they do not necessarily allow or disallow transgender students access to appropriate facilities. The broad language of the statute and the driving interest of eliminating sex discrimination in general may be read to permit a transinclusive reading. By the same token, the focus on educational parity for cisgender women in particular, and the lack of consideration of transgender students, may indicate otherwise.

49. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017). *But see* Josh Blackman, *Statutory Originalism*, JOSH BLACKMAN'S BLOG (Feb. 26, 2017), http://joshblackman.com/blog/2017/02/26/statutory-originalism/ [https://perma.cc/CN3Z-U7ML] (arguing that textual analysis does not produce any ambiguity in Title IX's definition of "sex").

50. *See, e.g.*, *Sex*, AMERICAN HERITAGE DICTIONARY 1187 (1976) (defining "sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions").

51. *See Sex*, BLACK'S LAW DICTIONARY 1583 (10th ed. 2014) (defining "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender."); *see also Sex*, AMERICAN HERITAGE DICTIONARY 1605 (5th ed. 2011) (defining "sex" as "[o]ne's identity as either female or male" or "the collection of characteristics that distinguish female and male").

52. "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . ." 118 CONG. REC. 5806–07 (1972); Senator Birch Bayh, Address at Secretary of Education's Commission on Opportunity in Athletics 24 (Aug. 27, 2002), https://web.archive.org/web/20081109052950/http://www.ed.gov/about/bdscomm/list/athletics/transcript-082702.pdf [https://perma.cc/2V7A-JXNF].

53. 118 CONG. REC. 5807 (1972).

This is not dispositive in itself, however: as the Supreme Court observed in *Oncale v. Sundowner Offshore Services, Inc.*, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[54] Thus, if the text itself is ambiguous, and the legislative purpose is not dispositive, one must look to relevant jurisprudential principles. These begin with Title VII.

A. The Price Waterhouse *Foundation*

In the past, courts have relied on Title VII jurisprudence to inform and control decisions pertaining to Title IX questions.[55] This has significant bearing on the question of whether Title IX protects transgender individuals, as several federal courts of appeals and numerous federal district courts have held that Title VII protections against sex discrimination also apply to transgender employees.[56] In relevant part, Title VII forbids employers from "limit[ing], segregat[ing], or classify[ing] [their] employees or applicants for employment in any way which would . . . adversely affect [the individual's] status as an employee, because of such individual's . . . sex."[57]

The Supreme Court expanded the concept of sex discrimination to include gender stereotypes in *Price Waterhouse v. Hopkins*.[58] In *Price Waterhouse*, Ann Hopkins, a senior manager of the accounting firm Price Waterhouse, sued the firm for rejection of her partnership proposal.[59] Hopkins alleged that the firm's decision was based on sex stereotyping in violation of Title VII.[60] Over the course of her evaluation for partnership, Hopkins had been criticized by partners for being "macho," and "overcompensate[ing] for being a woman."[61] Significantly, Hopkins was told to

54. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (rejecting argument that Title VII does not prohibit same-sex sexual harassment in the workplace because it was not the "principal evil" targeted by Congress).

55. *See* Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999) (citing *Oncale*, 523 U.S. at 82—a case involving a Title VII dispute—as controlling authority for a dispositive Title IX question); *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 74–75 (1992) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)—a case involving a Title VII dispute—as controlling authority for a Title IX question).

56. *See* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017) (collecting cases).

57. 42 U.S.C. § 2000e–2(a)(1) (2012).

58. 490 U.S. 228 (1989).

59. *Id.* at 231–32.

60. *Id.*

61. *Id.* at 235.

"walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[62]

The Court found for Hopkins, holding that a Title VII violation is established where sex stereotyping—personal biases as to which traits a particular gender must adhere to—influenced an adverse employment decision.[63] The Court explained that where "an employer . . . acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, [that employer] has acted on the basis of gender."[64] Also, the Court emphasized that "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[65]

The effect of the *Price Waterhouse* decision might not be as forceful as Justice Brennan's language suggested, however. Subsequent case law has dulled *Price Waterhouse*'s edge by establishing that reasonable community standards—or gender norms—may still be enforced by employers so long as they are not overly or unequally burdensome.[66] Commentators have observed that it is unlikely that the Court intended to wholly degender all workplaces as a result of its decision.[67] This reflects an inherent valuation of gender roles and divisions by Title VII.[68]

B. The Equal Burdens Test and Permissible Sex Stereotyping

Ensconced within Title VII and Title IX is approval of certain forms of sex stereotyping and segregation. For example, Title VII permits employers to make hiring decisions based on sex where that status "is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[69] A line of cases has also emerged which permits the segregation of workplace restrooms by gender as well as the enforcement of gendered employee grooming and dress codes.[70] These cases in turn vindicate Title VII's valuation of gender roles

62. *Id.*

63. *Id.* at 258.

64. *Id.* at 250.

65. *Id.* at 251 (alteration in original) (quoting L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978)).

66. *See* Baker, *supra* note 6, at 29–33.

67. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 20 (2000).

68. *Id.*

69. 42 U.S.C. § 2000e–2(e) (2012) (emphasis added).

70. *See* Baker, *supra* note 6, at 29–33; *see also* Ben-Asher, *supra* note 7, at 1210–15, 1225–28.

and the belief that separate *can* be equal for the sexes in certain cases.[71] This view can be traced back to "separate spheres" ideology: the belief that gender identity can only be preserved by separating members of different genders wherever possible.[72] Some commentators acknowledge that even today, segregation of facilities and enforcement of gendered dress codes facilitate the reinforcement of gender identity on a personal level.[73] Others observe that certain heteronormative presumptions of privacy and sexual assault risks underpin the segregation of prisons and restrooms.[74]

Despite *Price Waterhouse*, courts have not adopted the view that gender differentiation cannot exist in the workplace. For example, gendered employee dress codes have regularly withstood challenges under Title VII. To evaluate the discriminatory effect of a casino's dress and grooming policy, the Ninth Circuit in *Jespersen v. Harrah's Operating Co., Inc.* applied what is known as the "equal burdens" test. Under this test, a policy is valid if it burdens the sexes equally and does not impede opportunity.[75] Darlene Jespersen, a bartender at the sports bar in Harrah's Reno casino, sued under Title VII for sex discrimination after she was terminated for failure to comply with Harrah's uniform, appearance, and grooming standards.[76] The policy required that women wear a certain amount of makeup and prohibited men from wearing any.[77]

Although the casino bar's dress code was differentiated by gender, the court found for Harrah's and emphasized that the policy was not discriminatory because it did not place a greater burden on one gender compared to the other.[78] The court explicitly distinguished Harrah's policy from the circumstances in *Price Waterhouse*, stating that the stereotyping suffered by Hopkins interfered with her ability to work; in contrast, conformity with the "stereotypical image" of a woman under Harrah's policy did not "objectively inhibit a woman's ability to do [her] job."[79] Significantly, the court did not foreclose the possibility that an equally-applied policy could

71. *See* Baker, *supra* note 6, at 30.

72. YOSHINO, *supra* note 5, at 147–49 (discussing how the "separate spheres" ideology delineated gender roles by stereotypes); Terry Kogan, *Sex Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 4–5 (2007).

73. *See* Kogan, *supra* note 72.

74. Ben-Asher, *supra* note 7, at 1192–93.

75. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006).

76. *Id.* at 1105–06.

77. *Id.* at 1106.

78. *Id.* at 1109–10.

79. *Id.* at 1111–13.

impermissibly burden a person of either gender, thus giving rise to a *Price Waterhouse* sex-stereotyping claim.[80]

Thus, as commentators observe, *Jespersen* stands for the proposition that dress and grooming policies are equal and nondiscriminatory for cisgender individuals where they reflect and enforce community gender norms—the collective whole of personal biases.[81] So long as such stereotyping does not impose anything beyond an "insignificant effect on employment opportunities," that stereotyping does not violate Title VII.[82] To the extent courts have examined employers' policies under this test, the most common have involved requirements that only female employees wear revealing outfits.[83]

Title IX embraces the same enforcement of gender norms through several segregation provisions. Exchanges between Senator Bayh and other members of Congress during the statute's drafting indicate that Title IX was not meant to force the integration of facilities for men and women, and that segregation of restrooms, dormitories, and sports leagues between genders is still permissible.[84] Similar to the separation of restrooms and locker rooms, segregation of student housing by sex is permitted under Title IX so long as the facilities are comparable to one another.[85] Sex-specific study-abroad programs are also allowed so long as similar opportunities are also offered to the other sex.[86] Another provision permits segregation of sexual and physical education classes, as well as any nonvocational classes or extracurriculars.[87] In terms of athletics, Title IX demands sex-specific scholarships and teams so long as similar opportunities are available for the other sex.[88]

The same equal burdens rationale in *Jespersen* has been extended to school dress and grooming codes as applied to cisgender students. In *Hayden ex rel. A.H. v. Greensburg Community School Corp.*, the Seventh Circuit held that a hair-length policy that required male basketball players to

80. *Id.* at 1112.

81. Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039 (2016); *see also* Baker, *supra* note 6, at 29.

82. Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973).

83. *E.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032–33 (7th Cir. 1979) (requiring only female employees to wear uniforms is "disparate treatment," "demeaning to women," and "based on offensive stereotypes"); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (requiring only women to wear uniforms is facially discriminatory).

84. *See* 117 CONG. REC. 30407.

85. *See* 34 C.F.R. § 106.32(b) (2017).

86. *See id.* § 106.31(c)

87. *See id.* § 106.34(a)–(b).

88. *See id.* § 106.37; *see also id.* § 106.41.

keep their hair shortened to a certain length but which did not impose any hair-length requirements whatsoever on female players constituted a *prima facie* case of sex discrimination.[89] The court emphasized that "sex-differentiated standards consistent with community norms may be permissible to the extent they . . . impose[] comparable burdens" on the genders.[90] Also, the court acknowledged the shifting basis of a standard based on personal biases, noting that "community standards . . . do not remain fixed in perpetuity."[91]

The equal burdens test's ability to readapt itself and accommodate shifting cultural norms reflects why Ann Hopkins' loss of advancement in *Price Waterhouse* constituted sex stereotyping, but Darlene Jespersen's termination did not.[92] We view the stereotype that women cannot or should not be aggressive as outmoded, and consider it burdensome when enforced.[93] Meanwhile, the view that women commonly do or should wear makeup in the workplace is still commonly accepted, and may usually be enforced with minimal impact.[94] Depending on whether an employer or a school enforces the burden creates a degree of difference in whether the burden is permissible. Generally, it seems that employers often have valid business interests to enforce stereotypes, while the same cannot necessarily be said of schools.[95] The pertinent question, then, is how these views may apply to transgender individuals, as well as whether the equal burdens framework can accommodate transgender students.

II. SEX STEREOTYPING AND TRANSGENDER IDENTITY

In recent years, transgender plaintiffs have won several personal appearance challenges based on a Title VII theory of sex stereotyping. Since then, a veritable flood of Title IX challenges to transexclusive school poli-

89. Hayden *ex rel.* A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 580, 583 (7th Cir. 2014).

90. *Id.* at 581 (citing Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1118 (9th Cir. 2006))

91. *Id.*

92. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also Jespersen*, 444 F.3d at 1113.

93. *See* Baker, *supra* note 6, at 30.

94. Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) ("[H]air length policies are not within the statutory goal of equal employment . . . such employment policies have only a *de minimis* effect . . . .").

95. For example, before settling the case, the restaurant chain Hooters argued in *Latuga v. Hooters, Inc.* that its policy of hiring only women as waitstaff was permissible as a BFOQ. No. 93 C 7709, 1994 WL 113079 (N.D. Ill. Apr. 1, 1994). Commentators have observed that, if Hooters' primary business function is viewed as the provision of a sexualized environment, then this argument may have merit. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 204 (2004).

cies has emerged.[96] Courts have historically struggled to understand transgender individuals' identities, which has yielded a scattershot body of case law and no straightforward proposition for how statutes like Title VII and Title IX protect transgender people. If nothing else, the general trend in recent years has hewed towards transinclusivity. While the equal burdens test has only been explicitly applied to cisgender people, this trajectory suggests that there is a viable synthesis of transgender case law and the equal burdens test.

A. Title VII and Transgender Employees

The Sixth Circuit Court of Appeals' decision in *Smith v. City of Salem, Ohio*, is demonstrative of a transinclusive construction of sex stereotyping.[97] Smith, a transsexual[98] lieutenant of the Salem Fire Department undergoing the beginning stages of transition, received several admonishments from coworkers to the effect that Smith's "appearance and mannerisms were not 'masculine enough.'"[99] At the time, Smith had been diagnosed with Gender Identity Disorder, the precursor to the modern classification of gender dysphoria.[100] The City's executive body met and devised a plan to subject Smith to a battery of psychological evaluations, with the hope that Smith would not comply, thus justifying Smith's termination.[101] After Smith received a letter from the Equal Employment Opportunity Commission affirming Smith's right to sue for discrimination, Salem's Civil Service Commission suspended Smith.[102]

Smith filed suit in federal district court, asserting claims of sex discrimination under Title VII as well as retaliation.[103] The district court dis-

96. *See* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017) (collecting cases).

97. Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004).

98. Circuit Judge Cole uses the term "transsexual" to refer to the appellant throughout the case. *See generally id.* at 567. On one hand, given that Smith had not undergone reassignment surgery, the modern understanding of the differences between the terms "transgender" and "transsexual" might indicate that usage of the former here would be more appropriate. *Id.* at 568. However, this Note recognizes the peril in anachronistically applying terms which have only recently entered common parlance to situations and people which existed before the proliferation of such terms. Out of respect for private self-determination, this Note will adhere to the terms originally used in the cases cited where appropriate. *See* Stephen Whittle, *A Brief History of Transgender Issues*, GUARDIAN (June 2, 2010, 6:49 AM), https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues [https://perma.cc/EP2U-T6M5] (exploring the respective historical usages of the terms "transsexual" and "transgender").

99. *City of Salem*, 378 F.3d at 568.

100. *Id.*

101. *Id.* at 568–69.

102. *Id.* at 569.

103. *Id.*

missed Smith's federal claims and granted judgment on the pleadings.[104] On appeal, the Sixth Circuit Court of Appeals held that Smith's suspension had been impermissibly motivated by sex stereotypes.[105] The court analyzed *Price Waterhouse* and stated that it stands for the proposition that the term "sex" in Title VII "encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[106] The court concluded that, as a result, "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[107]

The *Smith* court ironically condemns stereotype-based action in the same breath with which it views Smith merely as a man wearing makeup.[108] While the opinion was likely meant to be restricted to transgender people, this rhetoric suggests that cisgender men who do not conform to certain gender norms would also be burdened if refused access to the women's restroom.[109] Without a societal shift towards integrating facilities, this view is untenable. The Tenth Circuit assumed the same view of transgender individuals and produced the opposite result.[110] In *Etsitty v. Utah Transit Authority*, the court found that the Utah Transit Authority's termination of a transsexual employee for using the restroom that aligned with their gender identity did not amount to sex discrimination under Title VII.[111] According to the court, "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."[112] The court thus held that a transsexual plaintiff's sex-stereotyping claim may not qualify as a sufficient burden.[113]

The Ninth Circuit arguably framed the test with proper acknowledgement of the plaintiff's gender identity.[114] The court held in *Kastl v. Maricopa County Community College District* that a college's denial of access

104. *Id.*
105. *Id.* at 572.
106. *Id.* at 573.
107. *Id.* at 574 (emphasis in original).
108. *Id.*
109. *Id.*
110. *See generally* Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).
111. *Id.* at 1224–25.
112. *Id.* (citing Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 875 n.7 (9th Cir. 2001)).
113. *Id.* at 1225 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).
114. *See generally* Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009).

to the women's restroom for an assigned-male-at-birth (AMAB)[115] transsexual instructor constituted a *prima facie* case of sex discrimination.[116] The court explained that "[a]fter [*Price Waterhouse*] . . . it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."[117] Per *Jespersen*, the Ninth Circuit views gender norms associated with one's sex-assigned-at-birth as being enforceable on cisgender employees without running afoul of Title VII.[118] Curiously, the court did not explicitly apply the equal burdens test to *Kastl*, although it is possible that the underlying logic of the test influenced the outcome.[119] The key aspect of this decision is that it suggests that where gender norms associated with one's sex-assigned-at-birth are enforced against a transgender employee, that enforcement rises to the level of discrimination.

Some commentators have recognized this as the willingness of some courts to move towards a transinclusive accommodation under the equal burdens test.[120] This may be linked to the fact that transgender individuals often suffer from the unique burden of gender dysphoria, which is substantially aggravated by exclusion from appropriate facilities and denial of gender identity.[121] The Seventh Circuit's opinion in *Hively v. Ivy Tech Community College of Indiana* also paves the way for this reading.[122] There, the court held that Title VII prohibits discrimination on the basis of sexual orientation.[123] In its discussion, the court also identified gender nonconformity as one of the bases for the discrimination.[124] Some courts have also indicated that the equal burdens doctrine remains intact so long as there is some showing of a burden such as gender dysphoria suffered by the plaintiff.[125] The key potential of a transinclusive equal burdens test is discussed *infra* in Part III.

115. "AFAB" and "AMAB" are among several commonly used acronyms for referring to a transgender individual's sex at birth. *See* Christine Salek, *9 Gender and Sexuality Acronyms You Should Learn*, MIC (June 29, 2013), https://mic.com/articles/52001/9-gender-and-sexuality-acronyms-you-should-learn#.Era6ee8h3 [https://perma.cc/7CZQ-APFR].

116. *Kastl*, 325 F. App'x at 493 (affirming the district court's grant of summary judgment for the College on the basis of insufficient evidence of gender-based discriminatory intent).

117. *Id.* (first citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); and then citing Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000)).

118. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006).

119. *See Kastl*, 325 F. App'x 492.

120. *See* Ben-Asher, *supra* note 7, at 1213–14.

121. *See* Am. Psychological Ass'n, *supra* note 21; *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21.

122. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).

123. *Id.* at 346–47.

124. *Id.*

125. *See* Schroer v. Billington, 424 F.Supp.2d 203, 213 (D.D.C. 2006).

B. Title IX and Transgender Students

School appearance cases have only recently begun the path towards a transgender identity exception under the equal burdens doctrine. The most recent and significant challenge to a transexclusive school restroom policy brought on equality grounds has been *Gloucester*.[126] In *Gloucester*, the Fourth Circuit held that a school board's transexclusive restroom policy constituted sex discrimination under Title IX.[127] The school granted boys' restroom access to Grimm, an AFAB transgender boy who was diagnosed with gender dysphoria and underwent hormone therapy.[128] Upon receiving complaints from upset members of the school district community, however, the Board voted to bar Grimm and any other transgender students from using restrooms that corresponded with their gender identity, and instead designated a separate unisex restroom to be made available for use.[129]

The Fourth Circuit acknowledged that Title IX permits certain types of sex segregation, including that of restrooms, but ultimately ruled that it would defer to the DOE's interpretation of Title IX.[130] Although much of its reasoning was couched in deference to the DOE, the court did observe that the validity of the agency's interpretation stemmed from the ambiguity of the term "sex" in Title IX.[131] The court also discounted privacy concerns as policy issues rather than dispositive legal questions.[132] Although Circuit Judge Floyd did not discuss the weight of *Price Waterhouse* on the issue, Senior Circuit Judge Davis cited the case as favorable controlling precedent in his concurring opinion.[133]

In his dissent, Circuit Judge Niemeyer acknowledged the codification of beneficial sex segregation in Title IX and argued that the ruling ran roughshod over "custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect."[134] Judge Niemeyer also insisted that the term "sex" was not ambiguous, but was rather only meant to refer to "biological" sex.

126. *See generally* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017). The significance of *Gloucester* is further shown by the sheer volume of transgender-student-rights cases brought in its wake. *See* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017) (collecting cases).

127. *Gloucester*, 822 F.3d 709.

128. *Id.* at 715–16.

129. *Id.* at 716–17.

130. *Id.* at 718, 723.

131. *Id.* at 721–22.

132. *Id.* at 723–24.

133. *Id.* at 727 (Davis, J., concurring).

134. *Id.* at 731 (Niemeyer, J., dissenting).

Throughout his dissent, Judge Niemeyer reasoned that communal norms and the benefits of sex segregation reinforced his reading of Title IX.[135] He also argued that if transgender students shared restrooms and locker rooms with cisgender students, the privacy and safety of cisgender students would be compromised.[136]

Less than a year after *Gloucester*, courts have already begun to extend the Fourth Circuit's reasoning to other facilities that Title IX protects, such as locker rooms. For example, *Whitaker* featured similar facts to *Gloucester*: a transgender boy sought a preliminary injunction so that he could use the boy's restroom at his school.[137] This time around, however, the Seventh Circuit analyzed the issue without deference to an administrative agency; rather, it granted the preliminary injunction after an equality theory analysis.[138] Similar to *Hively*, the court stated that discrimination on the basis of gender non-conformity likely violates Title IX.[139] Yet without reference to facility integration, the court's application of the equality theory allows for unintended consequences.

Courts can easily reach the opposite conclusion when analyzing cases with the *Gloucester* and *Whitaker* equality theory. The Northern District Court of Texas in *Texas v. United States* did exactly that.[140] In *Texas*, the court issued a nationwide injunction on enforcement of the DOE's interpretation of Title IX.[141] The court cited Judge Niemeyer's dissent favorably, emphasized that it was "illogical" to extend Title IX protection to transgender students, and argued that Title IX's codification of sex segregation was meant to protect cisgender students' privacy.[142]

As *Texas* shows, this line of cases rests on an uneven foundation. With the rescission of DOE support and the remand of *Gloucester*, lower courts must once again determine whether transgender students have a place in the modern Title IX regime. The trajectory of cases like *City of Salem*, *Kastl*, and *Whitaker* indicate that the soundest method is through the equal burdens test.[143]

135. *See generally id.* at 730–39.

136. *Id.* at 735–36.

137. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1038–39 (7th Cir. 2017).

138. *Id.* at 1049–50.

139. *Id.*

140. *See* Texas v. United States, 201 F. Supp. 3d 810, 827–28 (N.D. Tex. 2016).

141. *Id.* at 836.

142. *Id.* at 833–34.

143. *See generally Whitaker*, 858 F.3d at 1048–50; Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009); Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004)

III. TRANSGENDER STUDENT FACILITY EQUITY

The equality theory of transgender student facility equity, on its own, may not be sufficient in coming litigation without addressing the concept of permissible stereotyping. Under this theory, the denial of access to restrooms is based on stereotyped expectations of the requisite congruence between gender identity and physiology, and thus constitutes sex discrimination under Title IX. Some courts have signaled willingness to find that Title IX protects transgender students on the merits. These concessions, however, have been drawn in the ambit of favorable guidance by the DOE, which has since been rescinded.[144] The Fourth Circuit and other like-minded circuits may be willing to go along with the equality theory; but the argument will also inevitably fail with courts that share views with the Northern District Court of Texas. Instead, courts must reconcile the core inconsistencies of the equality theory.

A. Equality Theory

As an initial matter, textual analysis of Title IX poses little threat to the weight or validity of the equality theory. Undoubtedly, courts like those in *Etsitty* and *Texas* may interpret the text of Title VII and Title IX as being completely unambiguous because, in their view, the term "sex" was only ever intended to mean "biological" sex.[145] As discussed *ante*, however, dictionary definitions at the time of Title IX's passing were largely conflicting, with sex defined at times only in reference to genitalia or anatomy and at others with consideration of behavioral and chromosomal traits.[146] As to plain meaning, it can hardly be said that a consensus existed which confined the term to a simple genital-derived dichotomy. A straightforward and practical application of such a standard is not readily apparent either. The court in *Gloucester* acknowledged the difficulty and posed the question of "which restroom would a transgender individual who had undergone sex reassignment surgery use? What about an intersex individual? What about an individual born with X–X–Y sex chromosomes?"[147]

144. Somashekhar et al., *supra* note 39.

145. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007); *Texas*, 201 F. Supp. 3d at 832–33.

146. *See supra* text accompanying note 48; *see also supra* text accompanying note 51.

147. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 720–21 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017). "Intersex" is a term which refers to various manifestations of an individual's sex characteristic not falling squarely into a traditional male/female dichotomy. *See* WORLD HEALTH ORG., GENDER AND GENETICS 1, 2, http://www.who.int/genomics/gender/en/index1.html [https://perma.cc/3N3D-X6LN].

Legislative purpose is not dispositive either. The sponsors of the statute appear to have envisioned a liberal application of its substance.[148] Even if the sponsors did not consider transgender students in drafting the statute, there's little to indicate that it is meant to be exclusive. Besides, the Supreme Court has expanded the application of Title VII (and, by extension, Title IX) to issues not originally contemplated by its drafters, such as same-sex sexual harassment.[149]

On first impression, then, the equality theory is properly drawn from Title VII jurisprudence, which informs analysis of issues under Title IX.[150] As the Court held in *Price Waterhouse*, sex stereotyping may constitute impermissible sex discrimination.[151] In other words, an adverse action taken against someone because they transgress certain gender norms associated with sex may constitute sex discrimination.[152] How this applies to transgender people may seem straightforward, although courts have struggled to apply the concept evenly or with proper consideration for gender identity. For example, in *City of Salem* the court observed that "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[153] On its face, this reasoning would suggest that, for example, a cisgender man who wears a dress should be allowed to use the women's restroom, even if that was not the court's intent.

Putting aside the courts' historical struggle to understand the concept of gender identity, cases like *City of Salem* suggest a shift towards understanding that discrimination against transgender people arises from the perception that an individual's gender identity is incongruous with their assigned sex.[154] Under the equality theory, the school acts upon a stereotyped view of how masculine men must be and how effeminate women must be when it denies appropriate facility access to transgender students. To deny a transgender person access to a restroom because of their assigned sex is therefore an act of stereotyping based on a belief of what norms and characteristics to which a particular sex must adhere. Both Sen-

148. *See supra* text accompanying note 52.

149. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (rejecting argument that Title VII does not prohibit same-sex sexual harassment in the workplace because it was not the "principal evil" targeted by Congress).

150. *See supra* text accompanying note 55.

151. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–52 (1989).

152. *Id.*

153. Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) (emphasis in original).

154. *Id.*

ior Circuit Judge Davis in his concurrence in *Gloucester* and Circuit Judge Williams in *Whitaker* indicated that such a construction of *Price Waterhouse* also extends to Title IX. This would mean that in the school context, denial of appropriate facility access to transgender students would constitute impermissible sex discrimination.[155]

The problem with this argument is that Title IX enforces gender norms through the equal burdens test. Under the test, gender-differentiated policies are permitted so long as they vindicate communal biases and do not unduly burden or impede opportunity.[156] Thus, requiring a female casino bartender to wear makeup does not constitute sex discrimination because it conforms to certain gender norms and does not impede her ability to obtain employment or perform her job.[157] In contrast, denying partner status to a woman because she is aggressive or authoritative constitutes a burden: it is an impediment to opportunity leveraged on the basis of outmoded views of how women can and cannot act.[158] The court in *Etsitty* took this implicit view and held that such values barred transgender employees from accessing restrooms that corresponded with their gender identities.[159] There, the court reasoned that it is not an impediment to a man's employment to be barred from the women's restroom, thus failing to rise to a discriminatory degree of sex stereotyping.[160]

Rather than formulate a transinclusive construction of the equal burdens test, some would argue that the more equitable path is to dispose of gendered facilities entirely and integrate.[161] They argue that sex segregation produces a hierarchy of opportunity that inherently disadvantages women.[162] Under this view, the modern construction of equality theory cannot abide sex stereotyping or strict adherence to gender norms.[163] Any divisions based upon such communal biases are inherently discriminatory.[164]

155. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049–50 (7th Cir. 2017).

156. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006).

157. *See id.* at 1110.

158. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); *see also* Baker, *supra* note 6, at 30.

159. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007).

160. *Id.* at 1225.

161. *See, e.g.*, Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 177–79 (2017).

162. *See id.* at 167–69 (citing Mary Anne Case, *Why Not Abolish the Laws of Urinary Segregation?*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 215–16 (Harvey Molotch & Laura Noren eds., 2010)).

163. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995).

164. *Id.* at 95.

There is some token movement towards this solution; a not insignificant number of schools, businesses, and government locations now offer unisex facilities.[165] As the Seventh Circuit in *Hayden* noted, cultural norms can shift over time; the favorable perception of beneficial sex segregation adjusts accordingly.[166] In turn, law must adapt to these changes—after all, "doctrinal formulations are less important to the law's development than the cultural experience in which those laws are embedded."[167] Cases like *Gloucester* and *Whitaker* indicate a growing willingness on the part of courts to favor transgender students and scrutinize schools' efforts to exclude them.[168]

Regardless of the merits of integration, advocates for transgender student facility equity have not adopted this view. Whether out of strategic formulation or genuine disinterest, advocates in cases like *Gloucester* have explicitly denied seeking integration.[169] It also seems distinctly unlikely that most courts would adopt this approach. As some commentators have argued, there is an understanding that statutes like Title VII and Title IX do not mandate "a world of sexless individuals."[170] Many derive value from gendered institutions like sex-segregated restrooms as well: the separation reifies gender by rendering it as identifiably discrete from another gender.[171] Separation also fosters a safe haven from the gaze of another gender, where certain performative aspects of gender may fall away, if only for a brief time.[172] While in no way categorical, many transgender individuals also benefit from this separation, as accessing a restroom which corresponds with one's gender identity reinforces self-perception of that identity.[173] In a certain capacity, integration frustrates these benefits in a

165. *See, e.g.*, Sharon Bernstein, *California Requires Single-Stall Public Bathrooms to Be Open to All*, REUTERS (Sept. 29, 2016, 6:25 PM), http://www.reuters.com/article/us-california-lgbt-bathrooms-idUSKCN11Z34H [https://perma.cc/7QNN-RYBC].

166. Hayden *ex rel.* A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 581 (7th Cir. 2014).

167. YOSHINO, *supra* note 5, at 176 (explaining Oliver Wendell Holmes's statement "[t]he life of the law has not been logic: it has been experience").

168. *See generally* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049–50 (7th Cir. 2017); G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017).

169. *See generally* Brief for Plaintiff-Appellant, *Gloucester*, 822 F.3d 709 (No. 15-2056).

170. *See* Post, *supra* note 67, at 20.

171. *See* Kogan, *supra* note 72 at 8–9 (discussing how "architectural dichotomies" inherently reinforce masculine and feminine norms).

172. *See id.* at 49 (discussing how "Victorian values of modesty" influenced the use of restrooms as "private space[s] . . . hidden from public gaze").

173. *See* Am. Psychological Ass'n, *supra* note 21; *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21; *see also* Nico Lang, *What It's Like to Use a Public Bathroom While Trans*, ROLLING STONE (Mar. 31, 2016), http://www.rollingstone.com/politics/news/what-its-

trajectory towards what some commentators describe as an androgynous—and notably masculine—mean.[174] While we may eventually move towards integration, the present requires some stopgap measure that accommodates gendered spaces, communal norms, and transgender individuals all at once.

B. Equal Burdens Test Synthesis

Courts must reconcile the tension between the equality theory and Title IX's valuation of societally-approved sex stereotyping by showing that the multifaceted harm borne by transgender students constitutes unduly burdensome stereotyping. This synthesis combines a similar construction of the equality theory's sex-stereotyping standard with the equal burdens test and a harm standard tailored to transgender individuals' unique experience. Under this construction, denying transgender students access to appropriate facilities because they do not fully conform to the norms of their gender identity constitutes sex stereotyping, similar to that in *Price Waterhouse*.[175] Unlike the court's approach in *City of Salem*, this does not give credence to the viewpoint of the discriminating individual who considers a transgender woman as a man presenting as a woman and vice versa.[176] Instead, similar to the court's view in *Kastl*, it vindicates the victim's identity by measuring stereotyping relative to how the victim is perceived to conform to the norms associated with their gender.

This alone might permit nonconforming cisgender students improper facility access, but the distinguishing difference lies in the burden element of the equal burdens test. The test functions to vindicate communal norms so long as enforcement of such norms do not impede a student's educational opportunities.[177] For cisgender students, there is no burden in being denied access to a facility or program that does not correspond with their gender identity. These students still have access to appropriate restrooms, locker rooms, and sports leagues without shame or psychological harm.

The same cannot be said of transgender students. Denial of access to appropriate facilities is a complex harm that constitutes an impermissible impediment on the enjoyment of the educational institution. Because of the

like-to-use-a-public-bathroom-while-trans-20160331 [https://perma.cc/DL4D-QF55] ("Now I have a different relationship to bathrooms. I actually feel like it gives me power.").

174. *See* Baker, *supra* note 6, at 31–32 n.171 (citing Kimberly Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 172 (2004); also discussing the case of Shannon Faulkner, who withdrew from The Citadel after being forced to get a buzz cut and receiving substantial harassment thereafter).

175. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

176. *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004).

177. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006).

unique nature of the harm experienced by transgender people, the burden's severity should be evaluated on a scale drawn from sexual harassment jurisprudence, which acknowledges the student's perception.[178] In short: "the objective severity of the [burden] should be judged from the perspective of a reasonable [transgender person] in the plaintiff's position."[179] To meet this standard, it is crucial to define the harm that transgender students suffer from denial of access and identify why it rises to the level of an impermissible burden. It is in equal parts a dignitary harm, a psychological harm, and, in certain cases, a physical harm.

First, denial of access deprives transgender people of the autonomy of self-expression and self-identification.[180] Justice Kennedy observed in *Obergefell* that a liberty interest exists in "certain personal choices central to individual dignity and autonomy, including . . . choices that define personal identity . . . ."[181] By virtue of public (or at least communal) access, school restrooms and locker rooms are not truly "private" spaces—not in the way that one's home restroom and bedroom are private. Rather, there is an expectation of moderate personal privacy: stalls, privacy strips, curtains, and the like partially conceal, but do not fully shield from awareness and perception.[182] The very act of entering a restroom or locker room is a viewable public act that announces the gender of the entrant. Through sex segregation, restrooms "create a system of surveillance and policing of public spaces based on subjective assessments of a person's gender and gender expression."[183]

A Rolling Stone interview of several transgender people examined this phenomenon; Brynn Tannehill, a transgender woman, noted that "[i]f you

178. *See e.g.*, Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1296 (N.D. Cal. 1993).

179. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1997)).

180. As defined by Professor Yoshino, autonomy being "the freedom to elaborate [one's] authentic sel[f,] rather than . . . a rigid notion of what constitutes an authentic . . . identity." YOSHINO, *supra* note 5, at 93.

181. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015); *see also* YOSHINO, *supra* note 5, at 71 ("[I]f there is a 'right to be,' there is a 'right to say what one is.'"). Analysis of a potential Due Process claim for transgender student facility equity is beyond the scope of this Note. For a discussion of transgender rights in light of *Obergefell*, see generally David B. Cruz, *Transgender Rights After Obergefell*, 84 UMKC L. REV. 693 (2016).

182. Julie Beck, *The Private Lives of Public Bathrooms*, ATLANTIC (Apr. 16, 2014), https://www.theatlantic.com/health/archive/2014/04/the-private-lives-of-public-bathrooms/360497/ [https://perma.cc/62T4-8UB8] (discussing public-restroom-related anxiety and various "social rituals" practiced to mitigate such discomfort).

183. Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 77 (2013) (citing SHEILA L. CAVANAGH, QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION (2010)).

walk in [to a restroom] and you're presenting as female . . . you walk into the men's room and you've immediately identified yourself as a lost cisgender woman . . . or you walk in and you stay and that immediately marks you as transgender . . . ."[184] Similarly, Gavin Grimm's banishment to a single-stall unisex restroom separate from the student body functionally "outed" him to other students.[185] Grimm describes this aspect in that he "did not choose to announce to the news media that [he is] transgender. [His] school board made that decision for [him]."[186] In this way, a school that forces a transgender student to use a restroom that does not align with their gender identity also eradicates that student's right to self-determine. Thus, in denial of access to proper facilities, there also resides a hostility to transgender students' "right . . . to define and express their identity."[187]

The burden of denial is also commonly identified as a psychological harm. Gender dysphoria in particular often manifests as "a marked difference between [an] individual's expressed/experienced gender and the gender others would assign [them]."[188] Typically, gender-affirming socialization is key to assuaging the harmful effects of dysphoria.[189] Denial of access to proper facilities denies beneficial socialization and aggravates the substantial distress inherent to dysphoria.[190] This is precisely the burden imposed when Grimm is denied access to the boys' restroom.[191] Grimm has since described this experience as struck through with humiliation and pain from having to "hold it" to avoid using the improper restroom.[192] In his words, "[e]very day brings that little bit of extra planning and that nagging feeling that someone is going to find a new way to single me out."[193] This distress colors a student's entire educational experience and denies enjoyment of the benefits of the institution. A student can hardly be expected to go through the school day without using the restroom—but by forcing

184. Lang, *supra* note 173.

185. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 732–33 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017).

186. Grimm, *supra* note 15.

187. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

188. AM. PSYCHIATRIC ASS'N, *supra* note 19.

189. *See* O'Donnabhain v. Comm'r, 134 T.C. 34, 38 (2010); *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21 ("During this time, patients should present consistently, on a day-to-day basis and across all settings of life, in their desired gender role.").

190. *See* Am. Psychological Ass'n, *supra* note 21; *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21.

191. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716–17 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017).

192. Grimm, *supra* note 15.

193. *Id.*

transgender students to use restrooms which invoke harmful psychological distress, this is the precise result.

The culmination of these harms can lead to the threat and actualization of physical injury. Studies have found that in the school setting, facility denial bears a statistically significant relationship to suicidality among transgender students.[194] Beyond common ailments related to distress and anxiety, many transgender people like Grimm develop urinary tract infections from being unable to use the restroom.[195] Alain Kupec, a transgender woman, described in an interview her experience as "wondering if people are looking at [her], if [she's] going to be forced to use the wrong restroom, and if it's going to jeopardize [her] personal safety."[196] In her interview, Erica Lachowitz stated that, after being assaulted and molested she was told by police that she would not have been attacked "if [she wasn't] wearing a dress and trying to fool men."[197] By forcing transgender students to use restrooms not associated with their gender identity, schools place those students at substantial risk of physical harm.

These individual harms interact and amass into a cumulative burden that constitutes impermissible discrimination under the equal burdens test. As Mitch Kellaway stated in his *Rolling Stone* interview, "[i]t's not just bathrooms. It is locker rooms. It is getting misgendered by your professor. It's all sorts of little worries you have throughout the day that have this cumulative effect . . . ."[198] The extreme psychological distress and damage to socialization experienced by transgender students—determined from the perspective of the reasonable transgender person—under such a regime functionally deprives them of an essential facet of their education. The temporal nature of transition relative to dysphoria would require that, in such cases, the school administration receive actual or constructive notice of the burden imposed upon the student. Drawing again from Title VII jurisprudence, this would require either that the burden on transgender students be "so pervasive as to warrant an inference" that the school knew of it, or that someone informed the administration of the burden on a par-

194. Herman, *supra* note 183, at 66; Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY 1378, 1396 (2016) ("Findings indicate relationships between denial of access to bathrooms . . . and increased risk of suicidality . . . .").

195. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 717 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017); *see also* Herman, *supra* note 183, at 75–76.

196. Lang, *supra* note 184.

197. *Id.*

198. *Id.*

ticular student.[199] The latter case is common: for example, Grimm in *Gloucester* directly informed the school administration of his transition and the accommodations which would be necessary.[200]

This construction of the equal burdens test thus harmonizes the direction of cases like *City of Salem*, *Kastl*, and *Whitaker* with the principles of gender norm enforcement within Title IX. Similar to how Ann Hopkins bore a sex-stereotyping burden in *Price Waterhouse* by being denied advancement for perceived masculine traits, Grimm was subject to a burden in *Gloucester* when he was denied access to the only restroom which would not compromise his mental health and physical safety.[201] It triumphs over middling equality demands, and instead focuses on "the legitimacy of the social demands made on" transgender students and "impel[s] courts to look at difference in life as it is lived."[202] It also proves that the dispute over bathrooms is not a dispute over bathrooms at all. Rather, it is a concerted effort to deny transgender students the right to self-identify and exist in a public setting. Thus, schools must provide transgender students access to facilities that correspond with their gender identity.

C. Balancing Burdens

Courts will also need to address potential burdens this may place on cisgender students and prove their illusory nature. In particular, courts like in *Etsitty* and *Texas* have indicated that they view transgender people as inherently threatening to the privacy and safety of cisgender people.[203] Judge Niemeyer's dissent in *Gloucester*, for example, relies on the proposition that there is a particular and unique right to privacy "such that [one's] nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex."[204] However, as the majority in *Gloucester* observed, this view rests in part on an antiquated presumption that sexual attraction inheres a propensity to surveil and violate the privacy of the objects of sexual attraction.[205] Schools that seek to protect students' privacy likely already have amenities like toilet stalls, urinal privacy strips, and shower privacy curtains. Those that do not al-

199. Kalich v. AT & T Mobility, LLC, 679 F.3d 464, 474 (6th Cir. 2012).

200. *Gloucester*, 822 F.3d at 715.

201. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); *see also Gloucester*, 822 F.3d at 716–17.

202. YOSHINO, *supra* note 5, at 182.

203. *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1226–27 (10th Cir. 2007); *see also* Texas v. United States, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016).

204. *Gloucester*, 822 F.3d at 734 (Niemeyer, J., dissenting).

205. *See id.* at 723–24 n.11.

ready protect the privacy of cisgender students are able to pursue such upgrades similar to the *Gloucester* school.[206] When transgender students use the restroom, they do not do so to surveil others; they do so to use the restroom. They also do not undermine the way in which restrooms reify gender for cisgender students: boys emerging from the boys' restroom are secure in their gender identity, regardless of the presence of a transgender student.

The safety and privacy of women, in particular, qualifies as a theme among opponents of appropriate transgender student facility access. These objectors often frame the issue as the need to protect women from the lecherous machinations of men.[207] Typically, this is coupled with the assertion that appropriate facility access enables cisgender men to arbitrarily declare themselves to be women (or disguise themselves as such) to surveil and assault women in restrooms and locker rooms.[208] Protection of women from assault is an undeniably valid interest.[209] Considering that 20% of women are raped at some point in their lifetimes and 91% of total sexual assault victims are women, there is a genuine need to ensure women's safety.[210]

But this argument disingenuously presumes that transgender women are "actually" men pretending to be women, however, and that transgender identity is rooted in sexual perversion and deviancy.[211] This reflects the view of gender identity as a "sexual preference" akin to sexual orientation.[212] History disposes with this fear: transgender people are not suddenly using restrooms which correspond with their gender identity for the first time, but have instead been doing so for decades without a single recorded case of an assault perpetrated by a transgender individual.[213] Access to

206. *Id.* at 716.

207. *See* Colker, *supra* note 161, at 171.

208. *See* Alexandra Brodsky, Opinion, *Don't Use Girls as Props to Fight Trans Rights*, N.Y. TIMES (Oct. 27, 2016), http://www.nytimes.com/2016/10/27/opinion/dont-use-girls-as-props-to-fight-trans-rights.html?_r=0 [https://perma.cc/NE7R-SWYE] (accusing the North Carolina legislature of "rel[ying] on a dangerous myth that prohibiting discrimination against transgender people would allow predatory men to enter women's restrooms" in drafting House Bill 2).

209. *See generally* SHEILA L. CAVANAGH, QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION 73 (2010).

210. NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [https://perma.cc/Q463-TCK7].

211. *See* 162 CONG. REC. E1288 (2016) (statement of Rep. John Duncan opposing facility equity for transgender individuals) [hereinafter Duncan Statement].

212. *Id.*

213. *See* Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth*,*'* ABC NEWS (Apr. 22, 2016, 7:15 PM), http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019

appropriate restrooms by transgender people has been permitted in several states with the same results.[214] There is no mutual exclusivity in protecting privacy and allowing transgender individuals appropriate facility access; statutory prohibitions of assault, harassment, and violations of privacy still exist, after all.

This does not preclude the possibility of any transgender individual ever assaulting or surveilling someone in a restroom, but it does reflect that such an incident would be wholly unprecedented. The fact that transgender people are commonly subject to harassment and violence in restrooms instead indicates that the privacy violations predicted by opponents of transgender facility equity have been, thus far, solely directed towards transgender individuals.[215] In certain cases, forcing assigned-male-at-birth transgender students in particular to use restrooms which correspond with their sex-assigned-at-birth may put them at a higher risk of assault and harassment.[216] Claims of privacy violations in large part seem to be premature, if not wholly manufactured.[217]

The common response has been to advocate for separate unisex facilities, but this approach is burdened with its own set of issues as well. In *Gloucester*, for example, Grimm viewed such separation from the student body as a wellspring of stigma, reinforcing the "otherness" of his identity and functionally "outing" him to other students, where they might not have

[https://perma.cc/XFS4-VURD] ("[T]he 'reality is that most everyone has shared a bathroom with a trans person and nothing has happened.'").

214. *See id.* ("Over 200 municipalities and 18 states have nondiscrimination laws protecting transgender people's access to facilities consistent with the gender they live every day . . . .").

215. *See* Duncan Statement, *supra* note 211; *see also* DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 50 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [https://perma.cc/Y8WW-7SN5] ("Rates of sexual assault and misconduct are highest among undergraduate . . . [students] identifying as transgender, genderqueer, non-conforming, questioning, and as something not listed on the survey . . . .").

216. *See National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, NAT'L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN (Apr. 21, 2016), http://endsexualviolence.org/files/NTFNationalConsensusStmtTransAccessWithSignatoriesUpdated4-29-16.pdf [https://perma.cc/M2B9-RH83] ("[W]e oppose any law that would jeopardize the safety of transgender people by forcing them into restrooms that do not align with the gender they live every day.").

217. *See* Curtis M. Wong, *Teen Says She'll Fail High School if Trans Students Use Her Locker Room*, HUFFINGTON POST (Aug. 31, 2016, 9:14 AM), http://www.huffingtonpost.com/entry/pennsylvania-teen-trans-students_us_57c5afa1e4b0cdfc5ac96a81? [https://perma.cc/4RSC-PHKB] (high school student claiming that she will be constructively barred from completing high school if transgender students are allowed appropriate restroom and locker room access. When asked about the lack of evidence of any transgender students actually attending her school, the student responded: "How would you know?").

otherwise viewed him as such.[218] While schools may argue that a single-stall unisex restroom is meant for all students, cisgender and transgender alike, it is likely that such an installation will become a target for transphobia-rooted vandalism.

Transgender students are subjected daily to a unique mixture of anxiety, dignitary and privacy violation, and threat of physical harm. The immense burden this places on transgender students wholly impedes access to educational benefits and the attendant qualities of healthy student life. The healthy development of children requires preservation of bodily autonomy and freedom from surveillance; this is no less true for transgender students.[219] The fact that positive socialization and acceptance of one's gender identity are often crucial to the mental health and security of transgender children evinces the importance of facilitating their privacy in these settings.[220] Regardless of whether integration may assuage these harms, it is unlikely to come any time soon. The equal burdens test already intrinsic to Title VII and Title IX jurisprudence provides the tool to reconcile permissible sex stereotyping with transgender students' autonomy and right to self-identification.

CONCLUSION

By itself, the equality theory is not capable of vindicating the rights of transgender students. Equality theory does not explain why it matters whether facility denial is rooted in a stereotype. It also ignores the fact that certain stereotypes are not only protected, but are indeed encouraged under Title VII and Title IX. The equal burdens doctrine, in contrast, contemplates these countervailing considerations and shows that transgender students' autonomy can be protected without dispensing of law reliant upon collective communal biases.

The equal burdens doctrine also proves that the dispute over transgender students' access to appropriate facilities is largely pretextual. Courts like those in *Texas* and *Etsitty* have naturally focused on the specifics of restrooms and locker rooms, as well as how those facilities reify gender. But the relative burdens placed on transgender students due to facility

218. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 732 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017); *see also* YOSHINO, *supra* note 5, at 68 ("[O]uting seemed uncomfortably close to the forced acknowledgement exacted by homophobes . . . .").

219. *See* Am. Psychological Ass'n, *supra* note 21; *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21.

220. *See* Am. Psychological Ass'n, *supra* note 21; *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 21.

denial go far beyond "holding it;" denial of proper facility access is, in itself, a denial of autonomy. It is crucial that courts employ the equal burdens test and recognize that this is not simply a "transgender bathroom dispute": it is a struggle to defend transgender students' right to exist.