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Queer: Litigating Gender Non-Conformity

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QUEER: LITIGATING GENDER NON-CONFORMITY

ELIOT T. TRACZ, J.D.*

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INTRODUCTION

“Texas school district bans preferred pronouns, transgender sports participation.”¹ The headline does not mince words, and neither do the policies enacted by the Grapevine-Colleyville Independent School District. As enacted, the policies institute sex-based distinctions in sports² and erase

1. Emily Crane & MaryAnn Martinez, *Texas School District Bans Preferred Pronouns, Transgender Sports Participation*, N.Y. POST (Aug. 23, 2022), <https://nypost.com/2022/08/23/texas-school-district-bans-preferred-pronouns-trans-sports/>.

2. GRAPEVINE-COLLEYVILLE INDEP. SCH. DIST., TEX.. EDUC. CODE ANN. § 33.096 (West 2022), <https://pol.tasb.org/PolicyOnline/PolicyDetails?key=1102&code= FM# legalTabContent>.

An interscholastic athletic team sponsored or authorized by a district may not allow a student to compete in an interscholastic athletic competition sponsored or authorized by the district that is designated for the biological sex opposite to the student’s biological sex as correctly stated on the student’s official birth certificate, as described below, or if the student’s official birth certificate is unobtainable, another government record.

Exception

An interscholastic athletic team sponsored or authorized by a district may allow a female student to compete in an interscholastic athletic competition that is designated for male students if a corresponding interscholastic athletic competition designated for female students is not offered or available.

Birth Certificate Statement

For purposes of this provision, a statement of a student’s biological sex on the

transgender and non-binary students from the classroom. The text of the policy is not subtle:

District personnel and agents shall not teach, instruct, train, or otherwise require any other District personnel or agents to teach, instruct, train, or otherwise communicate to any individual or group topics regarding sexual orientation or gender identity unless and until those individual persons or the entire group has fully completed the fifth grade.

District personnel and agents, while acting as agents or representatives of the District, shall not teach, instruct, train, or otherwise promote gender fluidity, as defined herein. Nor shall District personnel and agents be required to adopt, support, or promote gender fluidity, as defined herein. This provision shall not be interpreted as requiring, and does not require, any District personnel or agent to violate any rules or regulations propagated by that individual's professional licensing authority.

....

The District shall not promote, require, or encourage the use of titles or pronoun identifiers for students, teachers, or any other persons in any manner that is inconsistent with the biological sex of such person as listed on:

1. The person's official birth certificate; or
2. If the person's official birth certificate is unobtainable, another government-issued record.

A statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex only if the statement was:

1. Entered at or near the time of the student's birth; or
2. Modified to correct any type of scrivener or clerical error in the student's biological sex.

However, to the extent that a student (with the written consent of such student's parent or legal guardian), parent, or legal guardian has specifically requested or directed the use of a specific title or pronoun for that particular student, District personnel interacting with the student may comply with such request at their discretion. District personnel shall not require a student, teacher, administrator, or any other person listed herein to use a title or pronoun in reference to another person that is inconsistent

student's official birth certificate is considered to have correctly stated the student's biological sex only if the statement was entered at or near the time of the student's birth or modified to correct any type of scrivener or clerical error in the student's biological sex.

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1. Entered at or near the time of the student's birth; or
2. Modified to correct any type of scrivener or clerical error in the student's biological sex.³

While students and their families may request to be addressed by their preferred pronouns, the policy is clear that honoring such a request is discretionary.⁴ The Grapevine-Colleyville policy is not an outlier—news media have reported on similar policies being enacted in other school districts throughout the country.⁵ Bills targeting the transgender community, and in particular, trans youth, are advancing throughout the nation.⁶

The group of individuals affected by these policies is substantial. Although the Grapevine-Colleyville policy specifically targets the erasure of non-binary individuals, it also impacts transgender individuals who frequently start their social transition before commencing hormone therapy or undergoing surgery⁷—procedures that many transgender people may never pursue.⁸ The policy targets other gender non-conforming individuals as well. A recent textbook on sexual orientation, gender identity, and the law identifies twelve different gender identities: cisgender, trans boy, trans

3. Grapevine-Colleyville Indep. Sch. Dist., Tex., *Miscellaneous Policies: Teaching About Controversial Issues* (Aug. 22, 2022), <https://pol.tasb.org/PolicyOnline/PolicyDetails?key=1102&code=EMB#localTabContent> [hereinafter *Teaching About Controversial Issues*].

4. *See id.*

5. *See, e.g.*, Lindsey Jensen, *Students walk out in protest of possible District 11 pronoun ban*, KOAA NEWS (Feb. 27, 2023), <https://www.koaa.com/news/covering-colorado/students-walked-out-and-proteted-a-possible-district-wide-pronoun-ban>; *see also* Trudy Ring, *Anti-LGBTQ+ Bills Allowing Outing, Pronoun Bans Advance Around Nation*, ADVOCATE (Feb. 21, 2023), <https://www.advocate.com/politics/transgender-outing-pronoun-ban>.

6. Jensen, *supra* note 5.

7. Crane & Martinez, *supra* note 1.

8. Walter Bockting, *The Psychology of Transgender*, AM. PSYCH. ASS'N (2015), <https://www.apa.org/news/press/releases/2015/11/psychology-transgender>.

girl, genderqueer, nonbinary, gender fluid, gender flux, agender, demigender, questioning gender, androgynous, and bigender.⁹ All but one of these identities (cisgender) would face stigmatization or erasure under the Grapevine-Colleyville policy.¹⁰

As policies targeting transgender individuals have been implemented, they have also become subject to constitutional challenges. Several of these challenges have resulted in findings that the policies were discriminatory.¹¹ This Article argues that extending the reasoning in *Grimm v. Gloucester County School Board*,¹² the highest-profile transgender rights case that was adjudicated in the Fourth Circuit, to policies targeting nonbinary and other gender non-conforming individuals takes the discussion outside of academia and repackages it into a more litigation-appropriate form.

Section I provides background information on the complexity of gender identity.¹³ This section addresses some of the different terminology used by members of the LGBTQ community to describe their gender identity, including the relatively well-known term “nonbinary” and continuing through to the less concrete term “queer.”¹⁴ Section II looks at the history of state action policing queer bodies and identities.¹⁵ It outlines statutes enacted to prevent individuals from hiding their identities and how such laws were used to target queer individuals.¹⁶ Section III discusses the case of *Grimm v. Gloucester County School Board* and the two approaches taken by the Fourth Circuit in analyzing the claims advanced in that case.¹⁷ First, it discusses the court’s finding that transgender individuals constitute a quasi-suspect class subject to heightened scrutiny.¹⁸ Second, it explores the court’s reasoning in finding that the policy in *Grimm* constituted sex-based

9. CARLOS A. BALL ET AL., *CASES & MATERIALS ON SEXUALITY, GENDER IDENTITY AND THE LAW* 7 (7th ed. 2022).

10. See Teaching About Controversial Issues, *supra* note 3.

11. See *Grimm v. Gloucester Cnty*, 972 F.3d 586, 619 (4th Cir. 2020) (finding that a school bathroom policy constituted sex based discrimination); see also *Hecox v. Little*, 479 F. Supp. 3d 930, 985 (D. Idaho 2020) (finding that a state statute requiring female athletes to be on teams corresponding to their biological sex constitute sex based discrimination).

12. *Grimm*, 972 F.3d at 619.

13. See *infra* Section I.

14. See *infra* Section I.

15. See *infra* Section II.

16. See *infra* Section II.

17. See *infra* Section III.

18. See *infra* Section III.

discrimination.¹⁹ Finally, it examines *Adams v. School Board of St. Johns County*,²⁰ an Eleventh Circuit case, which came to the opposite conclusion, before concluding that *Grimm*, in fact, got it right.²¹ Section IV argues gender non-conformity is a class that should be afforded heightened scrutiny.²² First, it discusses why laws and policies targeting gender non-conforming individuals constitute sex-based discrimination.²³ Then it applies the analysis from *Grimm* to argue that the same protection should be afforded to other gender non-conforming individuals.²⁴

I. GENDER NON-CONFORMITY

A. *Some Statistics and Definitions*

Due to the history of persecution and erasure experienced by the LGBTQ community, some of which will be detailed in the next section, and the many misunderstandings that exist about gender identity and sexual orientation, it is important to develop an understanding of what that community looks like. This section outlines key facets of the LGBTQ community through statistical data,²⁵ defines current terminology used by LGBTQ individuals to self-identify,²⁶ and includes excerpts from real gender non-conforming individuals to illustrate their lived experiences.²⁷

The LGBTQ community is a place of diverse orientations and identities. A recent casebook identifies fourteen sexual orientations²⁸ and twelve gender identities.²⁹ The Williams Institute estimates there are 13,042,000 LGBTQ people over the age of thirteen in the United States.³⁰ Of that number, an estimated 1.3 million of those people are transgender adults, with another

19. See *infra* Section III.

20. 57 F.4th 791 (11th Cir. 2022).

21. See *infra* Section III.

22. See *infra* Section IV.

23. See *infra* Section IV.

24. See *infra* Section IV.

25. See *infra* Section I(A).

26. See *infra* Section I(A).

27. See *infra* Section I(B) - (C).

28. BALL, *supra* note 9, at 7.

29. See *id.* at 7 (cisgender, trans boy, trans girl, gender queer, nonbinary, gender fluid, gender flux, agender, demigender, questioning gender, androgynous, bigender).

30. See *LGBTQ FAQs*, WILLIAMS INST. UCLA SCH. L., <https://williamsinstitute.law.ucla.edu/quick-facts/lgbt-faqs/> (last visited Oct. 23, 2023) [hereinafter LGBTQ FAQs].

300,000 aged thirteen to seventeen.³¹ A recent study from the Pew Research Center found close to five percent of young adults identify as something other than the gender they were assigned at birth.³²

In this article, I use several terms that may not be familiar to people outside of the LGBTQ community. Because identity is deeply personal, LGBTQ individuals may define some of these terms differently.³³ This Article acknowledges the validity of these differences but provides general definitions when necessary. Where terms may apply to both a person's gender identity and sexual orientation, I have limited my definition to identity.

First, for purposes of this Article, it is important to define "gender identity." A person's gender identity is that person's concept of themselves as male, female, both, or neither.³⁴ This identity may be identical to, or different from, the sex that the person was assigned at birth.³⁵

Another term used in this Article is "cisgender." A cisgender person is one whose gender identity is in alignment with the sex they were assigned at birth.³⁶ "Transgender," on the other hand, is "an umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth."³⁷ Some

31. *See id.*

32. *See* Anna Brown, *About 5% of Young Adults in the U.S. Say Their Gender is Different From Their Sex Assigned at Birth*, PEW RSCH. CTR. (June 7, 2022), <https://www.pewresearch.org/fact-tank/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth/>.

33. *Compare Genderqueer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/genderqueer> (Oct. 23, 2023) [hereinafter *Genderqueer*, MERRIAM-WEBSTER] (noting that some people who identify as genderqueer do so because they see their gender as androgynous), *with Glossary of Terms: Genderqueer*, HUM. RTS. CAMPAIGN (May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms> [hereinafter *Genderqueer*, HUM. RTS. CAMPAIGN] (highlighting that people who identify as genderqueer may consider their identity as both man and woman, neither man or woman or as somewhere in between).

34. *See Glossary of Terms: Gender Identity*, HUM. RTS. CAMPAIGN (May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms> [hereinafter *Gender Identity*, HUM. RTS. CAMPAIGN].

35. *See id.*

36. *See Glossary of Terms: Cisgender*, HUM. RTS. CAMPAIGN (May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms> [hereinafter *Cisgender*, HUM. RTS. CAMPAIGN].

37. *See Glossary of Terms: Transgender*, HUM. RTS. CAMPAIGN (May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms> [hereinafter *Transgender*, HUM. RTS. CAMPAIGN].

transgender individuals may further define themselves as a transman, a male-gendered person whose gender was not always male, or a transwoman, a female-gendered person who was not always female.³⁸

“Gender non-conforming” refers to individuals whose behavior does not conform to traditional or cultural expectations of their assigned sex.³⁹ This group includes, but is not limited to, transgender individuals.⁴⁰ A related term is “non-binary,” which refers to individuals who do not identify as either a man or a woman.⁴¹ Non-binary is a term that may include a number of gender identities, including transgender or genderqueer.⁴² “Genderqueer” individuals may view themselves as “being both male and female, neither male nor female, or entirely outside of these categories.”⁴³ This may involve a rejection of binary categories or some degree of fluidity of identity.⁴⁴

Finally, the word “queer” is used throughout this article. The Human Rights Campaign defines queer as “a term people often use to express a spectrum of identities and orientations that are counter to the mainstream. Queer is often used as a catch-all to include many people, including those who do not identify as exclusively straight and/or folks who have non-binary or gender-expansive identities.”⁴⁵

B. Binaries

Binaries have a way of simplifying matters that are otherwise nuanced and complex.⁴⁶ For example, categorizing an issue as black or white or an opinion as right or wrong. Similarly, activities may be dangerous or safe, and

38. See *Transwoman*, PENN STATE PRIDE CLUB, <https://sites.psu.edu/prideclub/lgbt-dictionary/> (last visited Oct. 23, 2023) [hereinafter *Transwoman*].

39. See *Glossary of Terms: Gender Non-conforming*, HUM. RTS. CAMPAIGN (May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms> [hereinafter *Gender Non-conforming*, HUM. RTS. CAMPAIGN].

40. See *id.*

41. See *Glossary of Terms: Non-binary*, HUM. RTS. CAMPAIGN (May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms> [hereinafter *Non-binary*, HUM. RTS. CAMPAIGN].

42. See *id.*

43. *Genderqueer*, HUM. RTS. CAMPAIGN, *supra* note 33.

44. See *id.*

45. *Glossary of Terms: Queer*, HUM. RTS. CAMPAIGN (May 31, 2023), <https://www.hrc.org/resources/glossary-of-terms> [hereinafter *Queer*, HUM. RTS. CAMPAIGN].

46. See Peter Elbow, *The Uses of Binary Thinking*, 13 J. ADVANCED COMPOSITION 51, 54 (1993).

the same applies to new ideas. Sexual orientation, sex, and gender identity are often subject to the same binary treatment. However, binaries are often inaccurate.⁴⁷ There are many ways to interpret or experience life, rendering binaries insufficient to capture a person's complexities.

This is particularly true in the case of biological sex. Society often operates under the assumption that human beings are either male or female.⁴⁸ Doctors typically examine newborns to determine and assign biological sex.⁴⁹ However, there are individuals—commonly referred to as intersex—who do not fit into this binary.⁵⁰ One such example is Cherly Chase, the founder of the Intersex Society of North America.⁵¹ When Chase was born, her mother was sedated for three days before doctors told her that she and her husband had a “deformed boy.”⁵² After being sent home, Chase’s parents consulted a professional and realized that their deformed baby boy was actually a baby girl.⁵³ Following surgical intervention, doctors told Chase’s parents to leave town, not tell anyone what had happened, and destroy any pictures of Chase as a boy.⁵⁴ Chase could live as a girl, marry a man, and have children.⁵⁵ Chase’s very existence speaks to the fact that biology does not operate on a binary.

Gender fluidity is another example of how binaries do not always align with lived experience. Avery Erickson has written about their experience with gender fluidity, from their initial awareness of their trans identity and desire to fit neatly into a box to their realization over time that they did not fit a singular identity. Erickson states:

Freedom and ease in my gender authenticity have not been a matter of figuring it out, but instead have been about stepping aside from thinking about letting go of my preconceived ideas about gender and its relationship to body and spirit. I have had to drop into my body, into my

47. *See id.*

48. *See id.*

49. *See* KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* 7 (2008).

50. *See id.*

51. *See id.* at 1.

52. *See id.* at 2. (Chase has since gone on the record about having been born with mixed male/female genitalia which were surgically altered to look female. *See* Hank Hyena, *The Micropenis and the Giant Clitoris*, *Salon* (Dec. 16, 1999) <https://www.salon.com/1999/12/16/surgery/>).

53. *See id.* at 7.

54. *See id.*

55. *See id.* (somewhat ironically, Chase identifies as lesbian.).

gut, the place where guidance and acceptance live. In the body there is no gender conditioning or training, there's no "yeah, but . . ." no masculine or feminine—just simply what *is* in a given moment.

. . . .

One thing at a certain time and place is "feminine," at another time, "masculine." It is all relative and therefore unreliable in providing an eternal, abiding, or unchanging label.⁵⁶

Erickson's lived experience shows that fluidity is tangible and deeply woven into the existence of members of our communities.⁵⁷ Erickson also shows that living on one side of a binary is not necessary to function within our society.⁵⁸

C. *The Indeterminacy of Queerness*

What about the "Q" in LGBTQ? "Q" may stand for "questioning," "queer," or both. "Questioning" is beyond the scope of this Article, but what do we do with a word like "queer?" Historically, queer was an adjective tending to describe something or someone unusual, quirky, odd, or strange.⁵⁹ This meaning has not changed since the early 1500s.⁶⁰ Yet, queer has also been employed—often pejoratively—as a noun to describe someone gay, lesbian, or bisexual.⁶¹ Merriam-Webster has adopted this description in its adjectival sense to describe the character of relating to an individual whose sexual or romantic attractions are not strictly heterosexual or whose sex or gender so matches those assigned at birth.⁶²

However, words, like identities, have histories of their own, and the adoption of "queer" or "genderqueer" by the LGBTQ community is no different. Part of the appeal of the term "queer" is that "there is nothing in particular to which it necessarily refers."⁶³ LGBTQ scholar Annamarie Jagose argued that because queer is "always ambiguous, always relational,"

56. AVERY ERICKSON, *Not-Two*, in NONBINARY: MEMOIRS OF GENDER AND IDENTITY 191, 197-98 (2019).

57. *See id.*

58. *See id.*

59. *See Queer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/queer> (last visited Jan. 29, 2024) [hereinafter *Queer*, MERRIAM-WEBSTER].

60. *See id.*

61. *See id.*

62. *See id.*

63. DAVID HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 65 (1995).

it is a difficult object to study.⁶⁴ For some, the attraction of queer is that it is a term “with some ambiguity, a term that would describe a wide range of impulses and cultural expressions, including space for describing and expressing bisexual, transsexual, and straight queerness.”⁶⁵

One such person is author Levi Govoni, whose short essay, *Deconstructing My Self*, acutely describes his identity journey as a transman:

As I grow older, I embrace my masculinity more fully, not as an abandonment of femininity, but as a complement to it.

....

I may have a uterus, but I was never a woman, and I have long forgone the need to pee standing up to feel like a man. I am comfortable with my masculine attributes, but no longer need to eradicate the feminine aspects of my character.

....

The contemporary umbrella term “genderqueer” (GQ) has become the catchall nonbinary label seeking to put a name to all of us nameless. Like the drawer in everyone’s kitchen that houses everything from a pair of pliers to birthday candles, GQ gives gender misfits a place to call home.⁶⁶

Govoni’s perspective, while highly personal, illustrates how labels may or may not always be appropriate.

Scholars of the philosophy of language may find “queer” validates Wittgenstein’s belief that words possess no intrinsic meaning and that no intrinsic meaning can be given to words.⁶⁷ It is, however, the very ambiguity of “queer” which complicates its status as an identity for legal purposes. Given its lack of distinct meaning, “queer” is necessarily auto-descriptive rather than empirical.⁶⁸ This presents a legal problem.

In an Equal Protection analysis, particular attention is paid to determining who is in the protected class.⁶⁹ A class could be overly inclusive (which means it includes both similarly situated and non-similarly situated individuals) or under-inclusive (which means that individuals who should be

64. ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 96 (1996).

65. *Id.* at 97.

66. LEVI GOVONI, *Deconstructing My Self*, in *NONBINARY: MEMOIRS OF GENDER THE IDENTITY* 12-13 (Micah Ratjunov & Scott Duane ed., 2018).

67. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 53-88 (G.E.M. Anscombe trans., 1953).

68. See JAGOSE, *supra* note 65, at 97.

69. See U.S. CONST. amend. XIV, §1.

included have been omitted).⁷⁰ “Queer,” based on our definition above, may be overly inclusive when viewed in its broadest sense. Instead, for reasons I will discuss below, queer—insofar as it relates to gender identity—should be subsumed within the broader class of gender non-conformity.

II. A HISTORY OF LAWS TARGETING GENDER NON-CONFORMING BEHAVIORS

A. *Historically*

Gender non-conforming behavior is not a new phenomenon in the United States. In his prominent work, *A Queer History of the United States*, Michael Bronski recounts various stories of individuals who chose to dress and live as a person of a different—or no—gender.⁷¹ One such person was Jemima Wilkinson, a colonial-era charismatic evangelist who “refused to use the pronouns ‘he’ or ‘she’ and dressed in gender-neutral clerical garments that made their sex unreadable.”⁷² Similarly, Deborah Sampson Gannett dressed as a man and, in 1782, enrolled in the Continental Army, fighting in several engagements before being discovered.⁷³

Just as gender non-conforming behavior is not new, legislative attempts to police queer bodies have also long existed. For example, throughout history, government entities have attempted to force gender conformity through prohibitions on attire.⁷⁴ The City of Columbus, Ohio, included in its municipal code a provision stating, “[n]o person shall appear upon any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress.”⁷⁵ Ordinances containing similar language also appeared in locations including St. Louis,⁷⁶ Chicago,⁷⁷ and Fargo.⁷⁸

On other occasions, laws have been repurposed to apply specifically to gender non-conforming behavior. Two examples arise from the State of

70. See *Over Inclusive*, USLEGAL, <https://definitions.uslegal.com/o/over-inclusive/> (last visited Oct. 23, 2023) [hereinafter *Over Inclusive*].

71. MICHAEL BRONSKI, *A QUEER HISTORY OF THE UNITED STATES* 22 (2011).

72. *Id.*

73. See *id.* at 36.

74. See, e.g., *Columbus v. Zanders*, 266 N.E.2d 602, 603 (Ohio 1970).

75. *Id.* (citing COLUMBUS, OHIO, MUN. CODE §2343.04 (2023)).

76. See *District of Columbia v. St. Louis*, 795 F.2d 652, 653 (8th Cir. 1986).

77. See *Chicago v. Wilson*, 357 N.E.2d 1337, 1339 (Ill. App. Ct. 1976).

78. See *Fargo v. Goss*, 302 N.W.2d 404, 404-05 (N.D. 1981).

New York. First is the case of *People v. Archibald*,⁷⁹ which involved the repurposing of a vagrancy statute. During an early morning patrol of a subway station, a police officer observed three individuals, including the defendant Mauricio Archibald, engaged in a loud conversation.⁸⁰ As the officer passed, Archibald allegedly turned, winked, and walked away.⁸¹ The officer spoke to Archibald, who, upon being asked his gender, responded, “I am a girl.”⁸² At the time of the incident, Archibald was wearing a “white evening dress, high heel shoes, blonde wig, female undergarments, and facial makeup.”⁸³

Archibald was convicted under a vagrancy statute that stipulated that “a person who has his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified ... is a vagrant.”⁸⁴ In a dissenting opinion, Justice Markowitz described the history of the vagrancy statute, §887(7) of the Code of Criminal Procedure,⁸⁵ as being enacted in 1845 to prevent individuals from appearing “disguised and armed.”⁸⁶ Justice Markowitz found that the statute had been enacted as part of an attempt to end the Anti-Rent Riots in the Hudson Valley.⁸⁷ Instead of targeting gender non-conforming behavior—which the legislature never even considered during debate over the law—the statute was aimed at farmers who would dress up as indigenous people (sometimes wearing calico dresses as part of their attire) and then murder law enforcement officials attempting to serve writs on the farmers.⁸⁸ Despite the fact that the statute was clearly not enacted to criminalize gender non-conforming attire, the conviction was sustained.⁸⁹

A second example involves a criminal case, *People v. Simmons*,⁹⁰ in which the court relied upon a statute that reads, “[a] person is guilty of criminal

79. 296 N.Y.S.2d 834, 835 (N.Y. App. Term 1968).

80. *See id.*

81. *See id.*

82. *See id.*

83. *Id.* at 836.

84. *Id.* at 835.

85. *See id.* at 837.

86. *Id.*

87. *See id.*; *see also* Eric Kades, *The End of the Hudson Valley’s Peculiar Institution: The Anti-Rent Movement’s Politics, Social Relations, and Economics*, 27 L. & SOC. INQUIRY 941 (2002) (reviewing two books on the Anti-Rent movement).

88. *See Archibald*, 296 N.Y.S.2d at 837.

89. *See id.*

90. *See generally* *People v. Simmons*, 79 Misc. 2d 249 (N.Y. Crim. Ct. 1974).

impersonation when he.... (1) (i) impersonates another and does an act in such assumed character with intent . . . to injure or defraud another.”⁹¹ The facts of this case were unusual. Gene Simmons was arrested for criminal impersonation while wearing a woman’s wig, a dress, women’s shoes, and makeup.⁹² Simmons faced three charges, two of which—larceny and prostitution—the court acknowledged were common in cases involving men dressed as women.⁹³ The third charge, criminal impersonation, resulted from a complaint by a man named Luberoff. He alleged that after agreeing to pay Simmons ten dollars to “take care of” Luberoff, Simmons drove with him to a secluded area.⁹⁴ Luberoff claimed to have felt something in his pocket, but upon searching it, he found only a couple of dollars and some facial tissue.⁹⁵ Luberoff flagged down a passing police car, and Simmons was arrested.⁹⁶ Although the court ultimately decided that the criminal impersonation statute did not proscribe “cross-dressing,”⁹⁷ *People v. Simmons* presents another example of a statute being repurposed to target gender non-conforming behavior.

B. Current Assault on Gender Identity

The United States is in the midst of an unprecedented wave of anti-LGBTQ sentiment. Transgender individuals have been a particular target, with numerous laws targeting medical care for transgender children,⁹⁸ including bans on accepted best practice treatment.⁹⁹ Another category of statutes involves bans on youth sports participation.¹⁰⁰ Finally, a number of

91. N.Y. PENAL LAW §190.25(1) (McKinney 2021).

92. *See Simmons*, 357 N.Y.S.2d at 250.

93. *See id.*

94. *See id.* at 251.

95. *See id.*

96. *See id.*

97. *See id.* at 256. (Here I use cross-dressing because the Court uses it, not because it is currently relevant).

98. For a state-by-state list of states and laws banning access to gender affirming care for trans youth, *see Healthcare Laws and Policies: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Mar. 14, 2023), <https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf> [hereinafter *Healthcare Laws and Policies*].

99. *See id.*

100. For a state-by-state list of states and laws banning transgender youth participation in sports *see LGBTQ Youth: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Feb. 23, 2023), <https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf> [hereinafter *Transgender Sports*].

laws address trans usage of bathroom facilities.¹⁰¹

Another set of widely publicized discriminatory laws are the so-called “Don’t Say Gay” laws. These laws, the most well-known of which was enacted in Florida, contribute to the erasure of LGBTQ youth from schools by limiting or prohibiting the discussion of LGBTQ topics.¹⁰² Despite recent press coverage, these laws have long existed; even the term “Don’t Say Gay” has been used to describe this category of legislation for at least a decade.¹⁰³

Pronouns and, by extension, respect for gender non-conforming individuals who may not identify as transgender have become another area in which gender identity has come under assault. Policies such as the one in Grapevine-Colleyville are gaining traction.¹⁰⁴ In order to prescribe a means of combating such policies, the remainder of this Article examines the ruling in the most important case involving transgender rights in schools—*Grimm v. Gloucester County*—and discusses why the same argument can be applied to strike down policies targeting non-binary and other gender non-conforming individuals.¹⁰⁵

III. SCHOOL BATHROOMS AND TITLE IX: A CIRCUIT SPLIT

The Equal Protection clause bars states from “deny[ing] to any person within [their] jurisdiction the equal protection of the laws.”¹⁰⁶ The United States Supreme Court has interpreted this to mean, “all persons similarly circumstanced shall be treated alike.”¹⁰⁷ Whether a government policy violates the Equal Protection clause is determined by applying one of several

Bans].

101. For a state-by-state list of states and laws affecting for trans youth and school safety, including facilities use, see *LGBTQ Youth: School Nondiscrimination Laws & Related Policies*, MOVEMENT ADVANCEMENT PROJECT (Mar. 6, 2023), <https://www.lgbtmap.org/img/maps/citations-schools-nondisc.pdf> [hereinafter *School Nondiscrimination Laws*].

102. For a current list of states that have enacted Don’t Say Gay Laws, see *LGBTQ Youth: LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT (Mar. 14, 2023), <https://www.lgbtmap.org/img/maps/citations-curricular-laws.pdf> [hereinafter *LGBTQ Curricular Laws*].

103. See Paige Hamby Barbeault, “*Don’t Say Gay*” Bills and the Movement to Keep Discussion of LGBT Issues Out of Schools, 43 J.L. & EDUC. 137, 138 (2014).

104. See Teaching About Controversial Issues, *supra* note 3.

105. See generally *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

106. U.S. CONST. amend. XIV, § 1.

107. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

levels of scrutiny: strict, intermediate, or rational basis.¹⁰⁸ The appropriate level of scrutiny is determined by the nature of the classification created by the government action.¹⁰⁹

Some classifications—race, national origin, religion, and alienage—have been identified as “suspect” and are subject to strict scrutiny.¹¹⁰ Under the strict scrutiny standard, the government policy violates the Equal Protection clause unless the government can show that the classification is “narrowly tailored to further a compelling governmental interest.”¹¹¹ Sex is considered a quasi-suspect class and is subject to intermediate scrutiny.¹¹² Therefore, a government policy does not violate the Equal Protection clause if the government can show the classification is “substantially related” to achieving an “important government purpose.”¹¹³ All other classifications are subject to rational basis review, which means that the individual challenging the governmental policy must show that the challenged classification is not “rationally related to a legitimate government purpose.”¹¹⁴

In order to determine whether a classification deserves a heightened level of scrutiny, the Supreme Court has considered several factors.¹¹⁵ These factors look at the characteristics upon which the classification is based, including (1) the lack of relevance of the characteristic upon which the classification is based,¹¹⁶ (2) a history of discrimination against those with the characteristic,¹¹⁷ (3) the immutability of the characteristic,¹¹⁸ and (4) the minority status or political powerlessness of those with the characteristic.¹¹⁹

108. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 551-54 (4th ed. 2011) (discussing tiers of scrutiny).

109. See *id.* at 553-54.

110. See *id.* at 554.

111. *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

112. See CHERMERINSKY, *supra* note 108, at 553.

113. *Id.* at 552-54.

114. *Id.* at 552.

115. See, e.g., Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138 (2011) (explaining there is no set test for this determination).

116. See, e.g., *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973).

117. See, e.g., *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985).

118. See, e.g., *Frontier v. Richardson*, 411 U.S. 677, 686 (1973).

119. See, e.g., *San Antonio Ind. Sch. Dist.*, 411 U.S. at 28.

A. Transgender as a Quasi-Suspect Class

i. Grimm v. Gloucester County and the Quasi-Suspect Framework

Gavin Grimm, a transgender high school student, was given permission to use the boys' restroom at his school.¹²⁰ Assigned female at birth, Gavin's gender identity is male.¹²¹ At the end of his freshman year, Gavin changed his name and visibly expressed his male identity.¹²² By the beginning of his sophomore year, Gavin was living fully as a male.¹²³

Initially, the school permitted Gavin to use the boys' restroom, but eventually, the school faced backlash from parents who demanded that Gavin be barred from using the restroom that corresponded with his gender.¹²⁴ After receiving complaints—and at the instigation of a Board member who was anti-trans—the school adopted a policy requiring students to use bathrooms matching their “biological gender” and constructed single-stall restrooms for students with “gender identity issues.”¹²⁵ Undeterred, Gavin continued his transition, underwent a chest reconstruction procedure, obtained a court order identifying him as male, and changed his birth certificate.¹²⁶ However, when Gavin presented the school with his medical documentation, the Board still mandated that he only be allowed access to the single-stall restrooms.¹²⁷

Gavin sued, asserting that the school's policy violated the Fourteenth Amendment's Equal Protection clause and constituted sex-based discrimination in violation of Title IX.¹²⁸ After five years of litigation, a district court granted summary judgment in Gavin's favor.¹²⁹ The Fourth Circuit affirmed.¹³⁰

The Fourth Circuit found that heightened scrutiny applied to Gavin's case

120. See generally *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

121. See *id.* at 593.

122. See *id.*

123. See *id.*

124. See *id.*

125. See *id.* at 599.

126. See *id.* at 593.

127. See *id.* at 601. (No reason was provided for the refusal to accept Gavin's documentation).

128. See *id.*

129. See *id.*

130. See *id.* at 594.

because transgender individuals are a quasi-suspect class.¹³¹ The Fourth Circuit addressed the four factors laid out by the Supreme Court: (1) whether the class has experienced historical discrimination, (2) whether the class has a defining characteristic that “bears a relation to its ability to perform or contribute to society,” (3) “whether the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics,” and (4) “whether the class is a minority lacking political power.”¹³² The findings for each of these factors are discussed *infra*.

ii. Historical Discrimination

The Fourth Circuit found ample evidence of discrimination against transgender individuals.¹³³ The evidence indicates that, historically, being transgender was pathologized as a “gender identity disorder” and treated as a diagnosable form of mental illness.¹³⁴ Although “homosexuality” was removed as a mental health diagnosis in 1973, it was not until 2013 that “gender identity disorder” was removed from the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”).¹³⁵ Even though being transgender was considered a mental illness, the court found that coverage for transgender individuals was excluded from the Americans with Disabilities Act (“ADA”) and stripped transgendered individuals from coverage from the Rehabilitation Act.¹³⁶

Furthermore, relying on the National Transgender Discrimination Survey, the court found that the transgender community suffers from high rates of discrimination in employment, homelessness, and economic instability.¹³⁷ The court also found that the transgender community faces high levels of harassment in schools, retail settings, and medical offices.¹³⁸ Finally, transgender individuals are more likely to be victims of crimes.¹³⁹ Based on the weight of the evidence, the court found that there is a significant history of discrimination against transgender individuals that warrants heightened

131. *See id.* at 613.

132. *See id.* at 611-12.

133. *See id.* at 611.

134. *See id.*

135. *See id.*; *see also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 517 (2016) (discussing the genesis of gender identity disorder).

136. *See Grimm*, 972 F.3d at 611.

137. *See id.* at 611.

138. *See id.*

139. *Id.*

protection.¹⁴⁰

iii. Defining Characteristics that Bear a Relation to One's Ability to Perform or Contribute to Society

The Fourth Circuit found that being transgender bears no relation to an ability to perform or contribute to society.¹⁴¹ Although the court acknowledged that some transgender individuals suffer from gender dysphoria, which may cause an impairment, not all transgender individuals experience gender dysphoria, which is a treatable condition.¹⁴² Therefore, the court found there is no evidence that being transgender bears any relationship to a person's ability to perform or contribute to society.

iv. Whether the Class May be Defined as a Discrete Group by Obvious, Immutable, or Distinguishing Characteristics

In analyzing the third factor, the court found that transgender people constitute a discrete group with immutable characteristics.¹⁴³ Relying on the medical amicus brief, the court acknowledged that, far from being a choice, being transgender is "natural and immutable."¹⁴⁴ Being transgender is no different from being cisgender, except that being transgender marks the group as a target for differential treatment.¹⁴⁵

v. Whether the Class is a Minority Lacking Political Power

The court determined that transgender people are a minority class.¹⁴⁶ At the time *Grimm* was decided, the court noted that transgender individuals accounted for approximately 0.6 % of the adult population in the United States.¹⁴⁷ Unsurprisingly, the court found transgender individuals are underrepresented in every branch of government.¹⁴⁸ Pointing to the ADA

140. *See id.* at 611 (quoting the district court's examples of the types of discrimination transgender people commonly face).

141. *Id.* at 612.

142. *Id.*

143. *Id.*

144. *Id.* at 612-13.

145. *Id.*

146. *See id.* at 613 (stating that the school board in this case could not truly contend that transgender people do not constitute a quasi-suspect class).

147. *Id.*

148. *Id.* (At the time of writing, the organization Out for America has identified on 98 trans, gender queer, non-binary, two spirit, or gender-nonconforming elected officials in the United States, Out for America (Feb. 15, 2024) <https://outforamerica.org/?gender->

and the Rehabilitation Act, the court found that transgender people are not “able to meaningfully vindicate their rights through the political process.”¹⁴⁹

Based on consideration of the four factors, the court concluded transgender individuals constitute a quasi-suspect class.¹⁵⁰ As a result, the school’s policy restricting bathroom use was subject to heightened scrutiny.¹⁵¹ Under the application of heightened scrutiny, the court found the policy was not substantially related to an important government interest.¹⁵²

vi. Transgender Discrimination as Sex-Based Discrimination

The Fourth Circuit also held that the Gloucester County School bathroom policy constituted sex-based discrimination.¹⁵³ First, it found that the only logical reading of “corresponding biological genders” refers to males and females.¹⁵⁴ The policy did not define “biological gender,” but the school board made clear that it relied on the sex marker on a student’s birth certificate.¹⁵⁵ Finding that the policy could not be stated without referencing “sex,” the court found that heightened scrutiny should apply.¹⁵⁶

In addition, the court determined that Gavin was the victim of sex discrimination because he failed to conform to the sex stereotype promoted by the policy.¹⁵⁷ Citing a string of cases that addressed the issue, the court relied on substantial support for the proposition that discrimination against transgender people is sex-based discrimination under the Fourteenth Amendment because such policy punishes transgender individuals for being gender non-conforming.¹⁵⁸

identity=Gender%20Non-Conforming%2CGenderqueer%2CGenderqueer%2FNon-Binary%2CNon-Binary%2CTransgender%20Man%2CTransgender%20Woman%2CTwo%20Spirit.)

149. *Id.* at 611, 613.

150. *Id.* at 613.

151. *Id.*

152. *See id.*

153. *Id.* at 609.

154. *Id.* at 608.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See id.* at 608-09 (listing Sixth, Seventh, and Eleventh Circuit decisions that support the proposition that discrimination against transgender people is sex-based discrimination).

B. A Circuit Split

On December 30, 2022, the Eleventh Circuit created a circuit split when it released its decision in *Adams by and Through Kasper v. School Board of St. John's County* (“Kasper”), a case similar to *Grimm*.¹⁵⁹ Drew Adams, a transgender boy and student in the St. John’s County School District, began using the male bathrooms at his school as an eighth grader.¹⁶⁰ Adams moved on to Nease High School, which provided male, female, and sex-neutral bathrooms for its students.¹⁶¹ It was the unwritten policy of the school that male students must use male bathrooms, and female students must use female bathrooms.¹⁶² The School Board distinguished between male and female students based on various documents, including birth certificates, which may not be changed.¹⁶³

Prior to Adams’s case, the school district conducted a review of LGBTQ student issues, which led to the creation of a set of “Guidelines for LGBTQ students.”¹⁶⁴ The Guidelines recommended certain best practices, including addressing students in accordance with their gender identity pronouns and allowing transgender students to dress in accordance with their publicly expressed gender identity.¹⁶⁵ The Guidelines stated, “[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex.”¹⁶⁶

Nonetheless, Adams continued his transition socially, legally, and surgically.¹⁶⁷ In June 2017, after failing to convince the School Board to change its policy, Adams filed a suit against the School Board, alleging Equal Protection and Title IX violations.¹⁶⁸ Following a three-day trial, a District Court found in Adams’s favor on both counts.¹⁶⁹ On appeal, a

159. See *Adams v. Sch. Bd. of St. John’s Cnty.*, 57 F.4th 791, 791 (11th Cir. 2022).

160. See *id.* at 796-97.

161. *Id.* at 797.

162. *Id.*

163. *Id.*

164. See *id.* at 797-98 (describing the best practices in the Guidelines for LGBTQ students, which included addressing students consistent with their gender identity and allow students to dress in accordance with their gender identities).

165. *Id.* at 798.

166. *Id.*

167. *Id.* (noting, with no explanation, that at all relevant times Adams, who was a minor, retained his female genitalia).

168. *Id.*

169. *Id.*

divided Eleventh Circuit affirmed the District Court ruling.¹⁷⁰ After a rehearing *en banc*, however, the outcome changed.¹⁷¹ In its Equal Protection analysis, the majority applied an intermediate scrutiny analysis, finding that the School Board's bathroom policy advanced the important governmental objective of "protecting student's privacy in school bathrooms" and did so in a manner substantially related to achieving that objective.¹⁷²

The least convincing aspect of the majority's argument was that "the School Board sought to accommodate students by providing them with an alternative [...] and not requiring them to use the bathrooms that match their biological sex."¹⁷³ The School Board relied upon vestiges of "separate but equal" logic, arguing that it did a favor to transgender students like Adams by providing gender-neutral bathrooms.¹⁷⁴ In addressing a similar policy, the Third Circuit ruled:

This argument is not only unpersuasive, it fails to comprehend the depths of the problems the School District's policy was trying to remedy or the steps taken to address them. The School District already provides single-user accommodations for all students. Any student who is uncomfortable changing around their peers in private spaces, whether transgender or cisgender, may change in a bathroom stall, single-user bathroom, or the private team rooms. The appellants seemingly admit that these accommodations "resolve all privacy concerns." Yet they insist that the policy should be changed to require that transgender students use individual bathrooms if they do not wish to use the communal facilities that align with their birth-determined sex. Not only would forcing transgender students to use single-user facilities or those that correspond to their birth sex not serve the compelling interest that the School District has identified here, it would significantly undermine it. As the Court of Appeals for the Seventh Circuit has recognized, a school district's policy that required a transgender student to use single-user facilities "actually invited more scrutiny and attention from his peers." Adopting the appellants' position would very publicly brand all transgender students with a scarlet "T," and they should not have to endure that as the price of attending their public school.¹⁷⁵

170. *Id.*

171. *Id.* at 799.

172. *See id.* at 803.

173. *Id.* at 810.

174. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3rd Cir. 2018) (stating that transgender individuals experience negative health outcomes when denied access to privacy facilities consistent with their gender identities).

175. *See id.* at 530.

Furthermore, the majority's opinion considered only the bathroom privacy interests of cisgender students—none of whom were parties in the case—and not the bathroom privacy concerns of transgender students.¹⁷⁶

The majority's opinion raises further concerns about the limits of such a policy. What if a heterosexual student were to complain that his right to privacy in the bathroom was violated by the presence of a gay student? Would gay and lesbian students be afforded separate restrooms? Would bisexuals in straight-passing relationships be allowed to use male or female restrooms, while others in same-sex relationships were required to use gay or lesbian restrooms? Could they switch upon a change in relationship status?

The majority also rejected Adams's Title IX claim and the extension of *Bostock v. Clayton County*,¹⁷⁷ in which the Supreme Court found that discrimination against transgender individuals is sex-based discrimination.¹⁷⁸ This rejection was based on the argument that Title IX, unlike Title VII under which *Bostock* was decided, contains carve-outs for separate living facilities (despite the fact that living facilities were not at issue in Adams' case)¹⁷⁹ and bathroom facilities.¹⁸⁰ Instead, the majority argued that they had to interpret the meaning of "sex" solely within the context of Title IX.¹⁸¹

Unsurprisingly, the majority reached the decision that "sex" in Title IX is unambiguous in referring to "biological sex."¹⁸² It reasoned that Title IX allows schools to provide separate bathrooms on the basis of biological sex, and therefore, the School Board acted in accordance with Title IX.¹⁸³ The majority ruled that because Adams was born female, the School Board only had to allow Adams to use the female restrooms.¹⁸⁴

There are several problems underlying the opinion. In his dissent, Judge

176. *See id.*

177. *See Adams*, 57 F.4th at 811; *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1731 (2020).

178. *See Adams*, 57 F.4th at 811; *Bostock*, 140 S. Ct. at 1731.

179. *See Adams*, 57 F.4th at 811. Only three pages earlier the Court sought to distinguish *Bostock* by pointing out that a school is not a workplace. *Id.* at 808. Apparently, such logic does not extend to distinguishing between non-residential public high schools and residential schools such as colleges.

180. *Id.* at 811.

181. *Id.*

182. *Id.* at 815.

183. *See id.*

184. *Id.*

Wilson noted that under the majority's view, the School Board's policy, which relies on the same indicia for determining the sex of all students, assumes that biological sex is accurately determinable at birth.¹⁸⁵ This effectively erases intersex children from the bathroom conversation entirely.¹⁸⁶ As a result, the School Board's policy discriminates against intersex children on biological grounds.¹⁸⁷

Additionally, as the dissent by Judge Jordan observed, the School Board policy treats different transgender students disparately.¹⁸⁸ Under the School Board's policy, a student like Adams, who registered in the School District as female, will always be treated as female regardless of legal changes to their driver's license or birth certificate.¹⁸⁹ A transgender student whose legal documentation matched their gender identity at the time of enrollment would be allowed to use the restroom that aligned with their gender identity.¹⁹⁰ As a result, the policy itself creates two classes of transgender students and treats them differently, a reality that neither the School Board nor the majority addressed.¹⁹¹

In determining how to address bathroom policies regarding transgender students, *Grimm* offers a better path forward. It addresses the facts of the case, the realities experienced by the student, and the law with a candor lacking in *Kasper*. On the other hand, *Kasper* dodges the question of discrimination against transgender students, favoring textualism over a challenging legal analysis, as well as being overly deferential to government-backed discrimination.¹⁹² More importantly, the analysis of *Grimm* is directly applicable to the challenges facing other gender non-conforming individuals.

185. *Id.* at 821-22 (Wilson, J., dissenting).

186. *See id.* at 823 (pointing out that certain conditions can cause delayed genital development, which presents a problem for the school's policy of requiring children to use either a male or female bathroom based on their biological sex).

187. *See id.*

188. *See id.* at 828 (Jordan, J., dissenting).

189. *See id.* at 827.

190. *See id.* at 828.

191. *See id.*

192. *See id.* at 823.

IV. ANALYZING POLICIES TARGETING GENDER NON-CONFORMING STUDENTS

A. *Gender Non-Conformity and Sex Discrimination*i. *The Textualist Approach*

The clearest way to determine whether a law or policy relies on “sex” to justify treating individuals differently is to review its plain language. In cases like the Grapevine-Colleyville policy, the reference is explicit, thus warranting heightened scrutiny.¹⁹³ In other instances, a policy may not reference “sex,” but rather “biological gender,”¹⁹⁴ as did the policy in *Grimm*.¹⁹⁵ The court treated “gender” as synonymous with “sex.”¹⁹⁶ Again, such classification warrants heightened scrutiny under the Supreme Court’s binding framework.

Despite the *Kasper* court’s attempt to present its argument based on the text of Title VII, a textualist reading founded on the principle that the “text of [the] law is the law”¹⁹⁷ leads to the ineluctable conclusion that where the word “sex” appears in law or policy, a sex-based classification exists. This conclusion follows regardless of whether the law or policy refers to bathrooms, locker rooms, or pronouns. The law is clear: sex-based classifications are subject to heightened scrutiny.¹⁹⁸

ii. *Gender Stereotyping*

Gender stereotyping—the “overgeneralization of characteristics, differences, and attributes of a certain group based on their gender”¹⁹⁹—is generally proscribed by law. In *Price Waterhouse v. Hopkins*,²⁰⁰ a landmark Title VII case, the Supreme Court confirmed that sexual stereotyping could not be the basis for employment actions.²⁰¹

Ann Hopkins was a senior manager at Price Waterhouse and was up for

193. See EDUC. § 33.096.

194. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020).

195. *Id.* at 599.

196. See *id.*

197. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

198. See *United States v. Virginia*, 518 U.S. 515, 516 (1996).

199. See *Gender Stereotyping*, GENDER EQUAL. L. CTR., <https://www.genderequalitylaw.org/gender-stereotyping> (last visited Oct. 23, 2023).

200. See 490 U.S. 228, 258 (1989).

201. *Id.*

partner in 1982.²⁰² She had worked at the firm for five years and was praised for her accomplishments by both her peers and her clients.²⁰³ Among her chief accomplishments was a two-year campaign that successfully secured a \$25 million contract with the State Department.²⁰⁴ Instead of making an offer or denying partnership, the partners at Price Waterhouse decided to hold her candidacy for a year.²⁰⁵ On more than one occasion, Hopkins's aggressive personality rankled staff members, a fact that she was aware of and had been counseled to improve.²⁰⁶ Regardless, commentary on her interpersonal skills constituted the majority of the negative feedback on her candidacy.²⁰⁷

At the same time, another strain of negative comments—one based on her status as a woman—permeated Hopkins's reviews.²⁰⁸ The performance reviews included statements that she was “macho,” that she “overcompensated for being a woman,” that she should attend “a course at charm school,” and that partners objected to her use of profanity “because it’s a lady using foul language.”²⁰⁹ Even her supporters described her in gendered terms, with one stating that she had grown “from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appeal lady [*sic*] ptr candidate.”²¹⁰ When Hopkins was told that her candidacy was on hold, she was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²¹¹ Unsurprisingly, the court found that other female candidates for partnership had been evaluated in sex-based terms.²¹²

At the United States Supreme Court, the majority found that stereotyping on the basis of sex was present in Price Waterhouse's treatment of

202. *Id.* at 233.

203. *Id.* at 234.

204. *Id.* at 233 (citing a quote that Hopkins' performance was “virtually at the partner level”).

205. *Id.*

206. *See id.* at 234.

207. *Id.* at 234-35.

208. *Id.* at 235.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See id.* at 236. (discussing that previous female candidates for partnership were viewed more favorable if partners believed the candidates “maintained their femininity while becoming professional managers”).

Hopkins.²¹³ Specifically, the Court held that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”²¹⁴ Under this reasoning, sex stereotyping is a form of sex-based discrimination.²¹⁵

Since *Price Waterhouse*, some courts have held that sex stereotyping extends to sexual orientation.²¹⁶ For example, in *Nichols v. Azteca Restaurants Enterprises*,²¹⁷ a gay male employee was found to have been the victim of adverse employment action due to sex stereotyping after being referred to as “she” and “her,” as well as anti-LGBTQ slurs.²¹⁸ Similarly, in *Oncale v. Sundowner Offshore Services, Inc.*,²¹⁹ the Supreme Court held that Title VII protected men from adverse employment actions based on same-sex harassment. In the process, the majority put to rest the notion that men cannot be victims of sexual harassment.²²⁰ The question then, is how do *Price Waterhouse*, *Nichols*, and *Oncale* apply to situations such as the Grapevine-Colleyville policy?

Ruth Bader Ginsburg famously argued that laws creating sex-based classifications often rely on stereotypes and should be subject a higher level of scrutiny.²²¹ That the Grapevine-Colleyville policy creates a sex-based classification is clear from the plain language of its text.²²² But is this policy, as well as others like it, based on stereotypes?

Arguably, it is because the policy assumes that the correct pronouns for an individual are those pronouns that conform to the gender assigned at birth.²²³ Students should use the appropriate gendered pronouns (he/him/his, she/her/hers) as determined by the school. Furthermore, the policy dictates student behavior based on normative expectations of the students’ assigned gender.²²⁴ Policies based on such expectations necessarily implicate “sex,” thus rendering them subject to heightened scrutiny.

213. *Id.* at 256.

214. *Id.* at 250.

215. *See id.*

216. *Nichols v. Azteca*, 256 F.3d 864, 874 (9th Cir. 2001).

217. *Id.*

218. *See id.* at 870-71.

219. *See* 523 U.S. 75, 82 (1998).

220. *See id.* at 79.

221. Brief for Appellant at 5-7, *Reed v. Reed*, 404 U.S. 71 (1971).

222. *See* Teaching About Controversial Issues, *supra* note 3.

223. *Id.*

224. *See id.*

B. *Gender Non-Conformity as a Quasi-Suspect Class*

i. *Gender Non-Conforming Individuals as a Class Have Experienced Historical Discrimination*

Discriminatory action against gender non-conforming individuals is most common in the form of microaggressions.²²⁵ However, the discrimination does not end there. Studies have found that discrimination against gender non-conforming individuals can be found in higher rates of harassment and sexual violence in the education setting,²²⁶ verbal harassment and denial of promotions at work,²²⁷ disparate medical care,²²⁸ and police harassment.²²⁹

Non-binary individuals are often victims of general violence.²³⁰ Activist Jeffrey Marsh has put the experience of being threatened with violence because of their identity into words, saying:

He told me where he'd shoot me. Not where in the world, but where on me—where on my body. He told me much more than that, but his message started with where the bullet would go in and where it would come out. He was thorough and detailed. He weaved the story of my murder, and it was the first time anyone had threatened me with death. It wasn't the last.²³¹

Marsh is not alone in this experience.

Professor Jessica Clark identified numerous reasons for the bias against non-binary people.²³² These reasons include different forms of erasure, such as the conviction that religion and science prove that all people are male or female, rejection of their identity as merely a phase or symptom of confusion, and the belief that being non-binary is merely attention-seeking behavior.²³³ These beliefs dehumanize non-binary and other gender non-conforming

225. See Kevin Nadal et al., *Microaggressions Toward Lesbian, Gay, Bisexual, Transgender, Queer, and Genderqueer People: A Review of the Literature*, 53 J. SEX RSCH. 488, 488 (2016).

226. See Jack Harrison et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels and Otherwise in the National Transgender Discrimination Survey*, 2 LGBTQ POL'Y J. 13, 21 (2011).

227. *Id.* at 22.

228. *Id.*

229. *Id.* at 22-23.

230. *Id.* at 23.

231. See Jeffrey Marsh, *Life Threats*, in *NONBINARY: MEMOIRS OF GENDER AND IDENTITY*, 72, 72 (Micah Rajunov & Scott Duane eds., 2019).

232. Jessica A. Clarke, *They, Them, Theirs*, 132 HARV. L. REV. 894, 910-11 (2019).

233. *Id.*

individuals without serving any socially beneficial purpose.²³⁴

Another basis for discrimination identified by Professor Clarke relates to the investment of people and society in a gender binary.²³⁵ In particular, people privileged by being born on the masculine side of the binary stand to lose the benefits conferred by that privilege.²³⁶ At the same time, individuals on the feminine side of the binary enjoy their own set of privileges, like female-only scholarships, social groups, and gyms.²³⁷ The loss of a binary may threaten their ability to claim these privileges.

Existing as a gender non-conforming person is closely analogous to being transgender—and thus within the protection of *Grimm*. Identifying as queer is less analogous; however, “queer” individuals have their own history of discrimination.²³⁸ Queer is a reclaimed word with nuanced meanings.²³⁹ At the same time, many middle-aged and older LGBTQ individuals remember enduring “queer” as a slur, and some have resisted its reclamation due to the trauma associated with its use.²⁴⁰ In addition, the association of “queer” with homosexual activity and identity associates the identity of queerness with a long history of discrimination.²⁴¹ It is reasonable to acknowledge that “queer”—as both rhetoric and identity—warrants heightened consideration given the history of discrimination against queer individuals.

ii. Gender Non-Conformity is a Defining Class Characteristic that Bears No Relation to the Class’s Ability to Perform or Contribute to Society

Whether gender non-conformity is a defining characteristic that bears no relation to a class’s ability to perform or contribute to society is the easiest factor to address in relation to people who identify as gender non-conforming

234. *See id.*

235. *Id.* at 913 (positing that those who “cherish” gender difference may worry that nonbinary identities would render their views “politically incorrect”).

236. *Id.*

237. *Id.*

238. *See generally* ERIN RAND, RECLAIMING QUEER: ACTIVIST AND ACADEMIC RHETORICS OF RESISTANCE (2014).

239. *Id.*

240. *See* Juliette Rocheleau, *A Former Slur Is Reclaimed, and Listeners Have Mixed Feelings*, NPR (Aug. 21, 2019, 10:33 AM), <https://www.npr.org/sections/publiceditor/2019/08/21/752330316/a-former-slur-is-reclaimed-and-listeners-have-mixed-feelings>.

241. *See* I’Jaz Ja’Ciel, *The Q Word: A Crash Course on ‘Queer’*, SPECTRUM NEWS (June 25, 2021, 5:00 PM), <https://spectrumlocalnews.com/nys/buffalo/news/2021/06/24/the-q-word--a-crash-course-on--queer->.

or queer. Indeed, being gender non-conforming or queer does not hinder a person's ability to live, to work, to pay taxes, to get an education, to have a family, or to perform or contribute in any other way that society values. At the same time, there is no evidence that gender non-conforming people inflict a burden on society.

Some gender non-conforming individuals suffer from gender dysphoria.²⁴² As a result, they may experience impairment at school, at work, and in their daily routine.²⁴³ These challenges may, in turn, lead to unemployment or dropping out of school.²⁴⁴ But it is also true that not all gender non-conforming individuals will experience gender dysphoria.²⁴⁵

iii. Gender Non-Conformity is an Immutable Characteristic

Immutability is much broader than its literal meaning of “not able to be changed.”²⁴⁶ Instead, it refers to those characteristics “determined solely by the accident of birth” rather than by “individual responsibility.”²⁴⁷ Placing a burden on people because of a characteristic over which they have no control violates “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”²⁴⁸ In addition, immutability considers the “relative ease or difficulty with which a trait can be changed,” because this helps determine “whether someone, rather than being victimized, has voluntarily joined a persecuted group and thereby invited the discrimination.”²⁴⁹

Children tend to begin “expressing gendered behaviors and interests” between two and four years of age.²⁵⁰ Formation of an individual's gender identity may begin even earlier than that.²⁵¹ It goes without saying that such

242. See *Gender Dysphoria*, MAYO CLINIC (Feb. 26, 2022), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255> [hereinafter *Gender Dysphoria*].

243. *Id.*

244. *Id.*

245. *Id.*

246. See Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 4, 4 (2015).

247. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

248. *Id.*

249. See *Dean v. District of Columbia*, 653 A.2d 307, 346 (D.C. Cir. 1995).

250. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 455 (5th ed. 2013).

251. See *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006) (stating that, according to some, one's “internal sexual identity... is produced in significant part by hormonal influences on the developing brain *in utero*”).

formations are outside of an individual's control.

iv. The Minority Status or Political Powerlessness of Those with the Characteristic

A classification warrants heightened scrutiny if the classified group is “a minority or politically powerless.”²⁵² The Connecticut Supreme Court has interpreted this to mean that a class may either be a minority *or* lack political power.²⁵³ With this understanding, a group that is not a “true minority” may warrant heightened scrutiny if it “nonetheless is lacking in political power.”²⁵⁴

Whether or not one interprets this factor as disjunctive, or conjunctive is immaterial. That gender non-conforming individuals are a minority is beyond dispute, because roughly 1% of U.S. adults are non-binary, a number that jumps to approximately 1.6% when transgender people are included.²⁵⁵ At the same time, gender non-conforming individuals are largely politically powerless, satisfying the second prong of the analysis. The first non-binary state legislator in U.S. history was elected in 2020.²⁵⁶ Yet, there are no transgender or gender non-conforming representatives in either chamber of Congress.²⁵⁷ Similarly, there is no transgender or gender non-conforming presence in the federal judiciary.²⁵⁸

In the current political climate, politicians seeking a cultural scapegoat often target non-binary people. Sometimes such attempts fail spectacularly.²⁵⁹ At other times, anti-gender non-conforming laws or

252. See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

253. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 439 (Conn. 2008).

254. *Id.*

255. See *Brown*, *supra* note 30.

256. See Kelsie Smith, *Mauree Turner is the First Nonbinary State Legislator and First Muslim Oklahoma Lawmaker*, CNN (Nov. 5, 2020), <https://www.cnn.com/2020/11/05/politics/first-nonbinary-and-muslim-oklahoma-lawmaker/index.html>.

257. See Leigh Ann Caldwell & Theodor Meyer, *Delaware Could Elect First Transgender Member of Congress*, WASH. POST (July 5, 2023, 6:03 AM), <https://www.washingtonpost.com/politics/2023/07/05/delaware-could-elect-first-transgender-member-congress/>.

258. See Kylee Reynolds & Ethan Rice, *It’s 2023. Where is Our Country’s First Openly Transgender or Nonbinary Federal Judge?*, LEADERSHIP CONF. ON C.R. & HUM. RTS. (Mar. 31, 2023), <https://civilrights.org/blog/its-2023-where-is-our-countrys-first-openly-transgender-or-nonbinary-federal-judge/>.

259. See, e.g., *GOP Candidate Says Jesus Didn’t Use Pronouns and Everyone Is Dunking on Her*, GOD (July 27, 2022), <https://god.dailydot.com/lavern-spicer-pronouns-bible/> [hereinafter *GOD*] (quoting Lavern Spicer (@lavern_spicer), “Jesus

policies are defeated.²⁶⁰ Occasionally, they are successful.²⁶¹ At all times, there is a lack of political power for gender non-conforming people.²⁶²

C. Policies Discriminating Against Non-Transgender Gender Non-Conforming Individuals Should be Subject to Intermediate Scrutiny

So, should laws and policies affecting gender non-conforming people be subjected to heightened scrutiny? The answer is certainly yes. Such policies generally implicate sex in the plain language of their text. But even if they did not, the reliance on gender stereotyping would necessarily constitute sex-based discrimination. Finally, the content of the policies notwithstanding, gender non-conforming individuals constitute a quasi-suspect class. Courts reviewing such policies should have little difficulty finding such a classification.²⁶³

CONCLUSION

This Article has stopped short of analyzing whether policies targeting gender non-conforming students further an important government interest by means that are substantially related to that interest.²⁶⁴ While some proponents may claim that they are protecting children, the fact is that members of the LGBTQ community, and especially younger members, are already subject to higher levels of violence than the general public.²⁶⁵ At the same time, misgendering has been shown to be harmful to LGBTQ individuals, who suffer an increased risk of depression and other mental health disorders.²⁶⁶ It is difficult to understand how intentional outing,

Christ never introduced himself using pronouns,” TWITTER (July 26, 2022, 3:24 PM), (deleted tweet)).

260. See, e.g., *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020).

261. See, e.g., *North Dakota Governor Outlaws Pronoun Policies in Schools*, CBS (May 8, 2023), <https://www.cbsnews.com/380innesota/news/north-dakota-governor-oks-law-to-ignore-transgender-pronouns/> [hereinafter *CBS*]; Trisha Ahmed, *North Dakota Governor Outlaws Pronoun Policies in Schools*, ASSOCIATED PRESS (May 8, 2023, 6:06 PM), <https://apnews.com/article/north-dakota-transgender-pronouns-bathrooms-53b0b3863c4728175657d9b055f89ac5>.

262. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020).

263. See, e.g., *Teaching About Controversial Issues*, *supra* note 3.

264. See *Craig v. Boren*, 429 U.S. 190, 197 (1977).

265. See *Transgender People Over Four Times More Likely than Cisgender People to be Victims of Violent Crime*, WILLIAMS INST. (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/> [hereinafter WILLIAMS INST.].

266. See R.A. Lisner, *Misgendering: Why it’s Harmful and How to Apologize if You Do It*, HEALTH (Nov. 19, 2022), <https://www.health.com/mind-body/lgbtq-health/what->

forced misgendering, and general erasure serve the purpose of protecting children. Policies that discriminate on the basis of sex merit a wholesale prohibition similar to the precedent of *Lawrence v. Texas*²⁶⁷ that prohibited sodomy laws thereafter.

Laws targeting gender non-conforming individuals create a class-based legislative scheme. Whether because of overt sex-based classification, gender stereotyping, or status as a quasi-suspect class, courts must apply heightened scrutiny when legislatures, county commissions, or local boards target gender non-conforming individuals. Title VII, Title XI, and the Fourteenth Amendment require no less.

is-misgendering.

267. 539 U.S. 558 (2003).