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SHARPLY DRAWN LINES: AN EXAMINATION OF TITLE IX, INTERSEX, AND TRANSGENDER

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INTRODUCTION

*“When lines are drawn sharply, they often cut. And sometimes people bleed.”*¹

Categorizations are inextricably woven into the framework of our society. Race, class, sex and gender are just a few examples of inextricable categorizations whose boundaries are viewed as immutable. These boundaries are artificial, however, and have been systematically solidified and reinforced throughout the last several centuries by medicine, science, history, societal norms, and the legal system. Siobhan Somerville noted that it was probably not a coincidence that “the classification of bodies as either ‘homosexual’ or ‘heterosexual’ emerged at the same time that the United States was aggressively policing the imaginary boundary between ‘black’ and ‘white’ bodies.”² Furthermore, the categorizations often intersect and inevitably produce compound categorizations, or more frequently, unique categories specific to compound titles, e.g., “black lesbians.”

This article focuses on the categories of sex and gender, the borders of which cannot be more rigidly defined, as evidenced by the extreme uneasiness that transsexuality and transgenerness often evoke in people. The dominant social discourse regards sex—and by extension, transsexuality—as a biological principle, whereas gender and gender identity act as the social counterparts to sex. This distinction in the discourse leads to different ideologies and analyses about the categorization of sex and gender—the former by biological constraints, the latter by

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¹ Elise Mattheson, *What’s So Funny About Bisexual Separatism?*, Keynote speech at the International Conference Celebrating Bisexuality (June 25, 1994), available at <http://www.lioness.net/speech.html>.

² SIOBHAN SOMERVILLE, *Scientific Racism and the Invention of the Homosexual Body*, in *QUEERING THE COLOR LINE: RACE AND THE INVENTION OF HOMOSEXUALITY IN AMERICAN CULTURE* 15, 38 (2000).

social construction.³ As one legal scholar noted, “[s]ex is regarded as a produc[t] of nature, while gender is understood as a function of culture.”⁴

In Part I, this article will demonstrate the oft-ignored fluidity surrounding the boundaries of sex and gender. Under social constructivist theories and feminist discourses, the overly-rigid definitions of sex and gender leave a great deal to be desired. Part II will explore the current jurisprudence of Title IX, focusing primarily on the prohibition of “sex” discrimination in educational settings. The boundaries of sex and gender are particularly pronounced in education, and the manner in which the legal system defines “the basis of sex” has enormous consequence for what, and who, Title IX protects. Finally, building upon the feminist and social constructivist discourses that conceptualize gender as a product of society, this article will advocate for the specific protection of the elusive “trans” folk in educational settings. Concentrating on the small but strong bit of guidance from existing case law, this paper will show that the inclusion of trans folk results in greater protection for all.

I. TRANSSEXUALISM

The terms “transgender” and “transsexual”—and any sexual variations of the norm—are often confused. An example of such confusion is the frequent misuse of the term “transgender” as one that refers exclusively to transsexuals in the oft-quoted phrase “gay, lesbian, bisexual, and transgender.” Transsexual men (female-to-male, or FTM) and transsexual women (male-to-female, or MTF) are actually a minority under the broader umbrella term of “transgender.” Transsexuals often feel “profoundly unhappy with their bodies and [the] gender norms associated with their birth sex.”⁵ They are often confused with intersexuals—people born with both male and female genitalia.

Although transsexualism has been generally ascribed to biological and consequently absolute factors, the biological and social divide is extremely limited. Where sex or other primarily biological constructs are attributed to immutable and genetic factors, society not only fixes the definition but also reinforces the category. For example, scientists for a long time attributed “deviant” characteristics to the “criminal body,” thereby distancing “normal” people from criminal behavior and the criminal race.⁶ By utilizing science to establish biological traits and characteristics, society reinforces absolute boundaries, yet in

³ Jody Lyneé Madeira, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests In Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 132 (2001).

⁴ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

⁵ GENDER EDUCATION & ADVOCACY INC., *GENDER VARIANCE: A PRIMER* (2001), available at <http://www.gender.org/resources/dge/gea01004.pdf>.

⁶ DAVID G. HORN, *This Norm Which Is Not One: Reading the Female Body in Lombroso's Anthropology*, in *DEVIANT BODIES: CRITICAL PERSPECTIVES ON DIFFERENCE IN SCIENCE AND POPULAR CULTURE* 109 (Jennifer Terry & Jacqueline Urla, eds., 1995).

the specific context of transsexualism, the “biological aspect of one’s body that determines one’s sex has not been legally or medically resolved.”⁷

Medical science has acknowledged at least eight recognized criteria of sex: chromosomal sex (XX for female, or XY for male), gonadal sex (evidently reproductive sex glands, consistent with chromosomal sex), sex hormone pattern (hormones secreted by testes or ovaries that produce gender characteristics), internal sex organs (ovaries or testes), genital sex (external sex organs), habitus (bodily form and appearance), assigned sex, and sex role (a psychological aspect of sexual identity).⁸ While these recognitions and developments are fascinating, medical science should be scrutinized with caution due to its long history of explaining and reinforcing current societal constructions.

It is ironic that the “one factor given the most weight by psychiatrists is the very one all too often disregarded by the legal system and by society at large: the person’s own gender identity.”⁹ Indeed, despite the eight criteria, when an intersexed baby is born, doctors generally only examine *one* of the aforementioned factors—the external genitalia. Anne Fausto-Sterling examined this “medical emergency,” noting that doctors essentially determine the sex of an intersexed baby by deciding which sex the child’s external genitalia most resemble—sometimes decided on a very narrow margin—and thereafter remove the “extraneous” parts.¹⁰ The doctors are then encouraged to convey to the parents that the decision was not arbitrarily made.¹¹

Further, doctors often recommend that intersexed children know little to nothing about their intersexed origins.¹² The objective is therefore to hide the child’s intersex history “just as it is hidden for ‘normal’ children, and the [intersexed] child [will be] construed as a naturally gendered subject.”¹³ Ultimately, “this approach to treating intersexed children gives primacy to genital appearance and reconstructs genitals to create the illusion of a seamlessly gendered history.”¹⁴ Criticism about the exclusive reliance on external genitalia to determine an individual’s sex has exposed the inadequacies of the binary sex structure, and has caused the “either/or” categorization to come under attack. Julie Greenberg asserted that the binary structure is unrealistic, as “sex and gender range across a

⁷ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999).

⁸ Madeira, *supra* note 3, at 135.

⁹ Janine M. Demanda, *Our Transgressions: The Legal System’s Struggle With Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507, 512 (2002).

¹⁰ ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000).

¹¹ *Id.*

¹² *Id.* at 64-65.

¹³ Rebecca Moskow, *On the Boundaries of Sex: A Feminist Interrogation of Judicial Determinations of the Legal Sex of Post-Operative Transsexuals* 12 (Fall 2003) (unpublished M.A. thesis, University of Cincinnati) (on file with author).

¹⁴ *Id.*

spectrum . . . [m]ale and female occupy the two ends of the poles, and a number of intersexed conditions exist between the poles.”¹⁵

The spectrum-like approach is not as surprising as it initially seems. For a long time, race was interpreted as an immutable category fixed by biological considerations. Similar to the boundaries of sex and gender, society placed people in racial categories—often along cursory white and non-white lines. Evelyn Nankano Glenn posited that both race and gender are products of social structure and cultural representation, as “race is a category without content; having no rooting in material reality, race is pure ideology, a lens through which people view and make sense of their experiences.”¹⁶ In fact, during the beginning of the nineteenth century, the census only provided two racial classifications: white and black.¹⁷ Similarly, the only sex classifications today are man and woman. The race-sex analogy, however, may only be taken so far as race is essentially less biologically-based than sex. As Judith Butler emphasized, the need to legally and socially define “sex” exists because “to participate in society, we must be sexed.”¹⁸

Transgender

*“We all came into this world naked; the rest of it is all drag.”*¹⁹

“Transgender” is an umbrella term that describes anyone who *transcends* conventional definitions of “man” or “woman.”²⁰ Under the social constructivist approach, gender is perceived as “internal” social construction whereas sex is perceived as an “external” biological trait.²¹ An individual’s gender is assigned through an “intricate system of cues, varying from culture to culture,” ranging from physical appearance and behavior to ‘context, and the use of power.’²² Gender does not necessarily follow from one’s biological, or self-identified, sex. Judith Butler, a well-known gender theorist, emphasized that gender is nothing but a performance—a system of meaning so pervasive and engrained that it completely shapes our identity.²³ Gays and lesbians fall under this broad concept of

¹⁵ Greenberg, *supra* note 7, at 273-74.

¹⁶ EVELYN NAKANO GLENN, *The Social Construction and Institutionalization of Gender and Race: An Integrative Framework*, in REVISIONING GENDER 11 (Myra Marx Ferree, Judith Lorber & Beth B. Hess, eds., New Ed ed. 1998).

¹⁷ Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multi-Racial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 924 n.29 (2002) (citing U.S. Dep’t of Commerce, 200 Years of U.S. Census Taking: Population and Housing Questions, 1790-1990, at 36 (1989)).

¹⁸ Madeira, *supra* note 3, at 139 (quoting JUDITH BUTLER, BODIES THAT MATTER—ON THE DISCURSIVE LIMITS OF “SEX” 1 (1993)).

¹⁹ Although RuPaul, a well-known drag performer, is credited for these famous words, the quote can be traced back at least as far as to the gay liberation movement of the 1970s. *RuPaul*, in Wikipedia: The Free Encyclopedia, at <http://en.wikipedia.org/wiki/RuPaul> (last visited Sept. 10, 2005).

²⁰ GENDER EDUCATION & ADVOCACY INC., *supra* note 5.

²¹ Madeira, *supra* note 3, at 139.

²² *Id.* (quoting STEPHEN WHITTLE, THE TRANSGENDER DEBATE: THE CRISIS SURROUNDING GENDER IDENTITY 5 (2000)).

²³ See JUDITH BUTLER, BODIES THAT MATTER—ON THE DISCURSIVE LIMITS OF “SEX” (1993).

transgenderism because their attraction to members of their own sex defies the societal norms imposed upon them and their partners.²⁴

The gay/queer liberation movement has advanced and challenged the strict boundaries of gender. In the novel, *Stone Butch Blues*, Leslie Feinberg wrote about transgender experiences and the many nuances of gender performance.²⁵ The presence of drag queens, drag kings, soft butches, hard butches, high femmes, and soft femmes all challenge the binary gender identities that the either/or culture has produced. One scholar commented on this “self-aware twist” that has challenged binary gender identities, noting that:

[a]dditional evidence can be found in the subcategories of some of the above general identities and the cross-pollination that often happens between and among them. For example, a stone butch often presents a much more masculine gender performance than a soft butch. High femmes often learn their gender performance from drag queens. Some individuals identify as butchy femmes or faggy butches.²⁶

Some individuals, such as Jess, the main character of *Stone Butch Blues*, not only feel the need to interlace the performance of gender, but actually claim to feel more than one gender identity.

My face no longer revealed the contrasts of my gender. I could see my passing self, but even I could no longer see the more complicated me beneath my surface . . . Who was I now—woman or man? I fought long and hard to be included as a woman among women, but I always felt so excluded by my differences. I hadn't just believed that passing would hide me. I hoped that it would allow me to express the part of myself that didn't seem to be woman. I didn't get to explore being a he-she, though I simply became a he—a man without a past.²⁷

The term “transgender” can mean many things: it can signify the multiple performances of gender roles that one individual engages in; it can indicate the experience that some individuals have as they “transition” from one gender to another; it can represent several nuances or levels of gender in one person; and it can embody an individual that feels as if he or she embodies both sides of the binary structure. In the preface of *Transgender Warriors*, Feinberg elaborated on her conception of the term, explaining that:

[t]oday the word transgender has at least two colloquial meanings. It has been used as an umbrella term to include everyone who challenges the boundaries of sex and gender. It is also used to draw a distinction between

²⁴ GENDER EDUCATION & ADVOCACY INC., *supra* note 5.

²⁵ LESLIE FEINBERG, *STONE BUTCH BLUES* (1993).

²⁶ Demanda, *supra* note 9, at 514.

²⁷ FEINBERG, *supra* note 25.

those who reassign the sex they were labeled at birth, and those of us whose gender expression is considered inappropriate for our sex.²⁸

When one examines the full implications of gender, it is important to recognize that other social and cultural categories may also impact the development of one's gender. Although less obvious than the binary divide, gender shapes and is shaped by different intersections of categorical oppression. In other words, the definition and boundaries of gender are not influenced by sex alone, but may also be significantly affected by the race, class, generation, sexual orientation, religion, and/or culture of the individual. Kimberlé Crenshaw Williams noted in her work on intersectionality and identity politics that her "focus on the intersections of race and gender only highlights the need to account for the multiple grounds of identity when considering how the social world is constructed."²⁹

Multiple components of gender, even within the binary structure, are omnipresent, often embodied in the social and legal policies that gradually become self-imposed. In an account of the definitional implications of gender in the creation of domesticity, Joan Williams examined definitions that arise from different classes.³⁰ She noted that race and class identities directly influence how strictly the binary gender structure is interpreted, specifically that "[women's] family work is seen as important political work by African-Americans, because it helps sustain a family life that is seen as protection against racism in the outside world[.]"³¹ Further, she remarked, a "similar dynamic is at work in white working-class households."³² Despite the fact that the family places women in a position of subordination, it "is almost the only institution in capitalist society that bears both an ideology and a reality of love, of sharing, and of generosity."³³ Williams's work underscores the importance of social definitions of gender, and the need to acknowledge the many and varied categories that the concept implies, particularly in theoretical discussions.

II. TITLE IX AND THE "BASIS OF SEX"

As evidenced by the discussion thus far, theoretical discourse has not yet managed a satisfactory account of all the nuances and distinctions that the terms "sex" and "gender" require. Sex is arguably classified with greater clarity, yet millions of people do not fit into traditional sex categories with clear boundaries.

²⁸ LESLIE FEINBERG, *TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RU'PAUL* (1996).

²⁹ KIMBERLÉ CRENSHAW WILLIAMS, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE*, 93-118 (Martha Albertson Fineman & Rixanne Mykitiuk, eds. 1994), available at <http://www.hsph.harvard.edu/Organizations/healthnet/WoC/feminisms/crenshaw.html>.

³⁰ JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

³¹ *Id.*

³² *Id.*

³³ *Id.*

Although the exact number of intersexuals and transsexuals is unknown, experts have estimated that the number is between 4% and 0.5% of the population.³⁴ The most commonly cited number hovers around 1%, which translates to 2.5 million people in the United States.³⁵ Legal definitions pertaining to sex and gender are even less helpful, and vary widely. Although a few state statutes provide some guidance, no uniform system or definition exists.

Anti-discrimination laws in the U.S. have attempted to eliminate rigid definitions of traditional gender norms and stereotypes as to what constitutes a “real man” or a “real woman.” Laws have been enacted to prevent discrimination “on the basis of sex” in employment contexts (e.g., Title VII and the Pregnancy Discrimination Act) as well as in educational contexts (e.g., Title IX).³⁶ However, difficult questions arise from the elimination of such differences, such as whether legal categories actually reinforce the stereotypes of appearance and behavior, and whether the law should aim to eliminate or accommodate and affirm differences. As one scholar observed, “[I]n order to eliminate such gender norms and stereotypes, the law must at first construct and reiterate them.”³⁷

In educational settings, the boundaries of sex and gender are rigidly identified and often self-identified. Title IX provides that “[n]o person in the United States 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[.]”³⁸ Although Title IX was enacted in 1972, a private right of action was not established until *Cannon v. University of Chicago*, in which the Supreme Court emphasized Title IX’s “unmistakable focus on the benefited class.”³⁹ *Cannon* involved a disparate impact case, but the extension of Title IX has reached considerably farther.

On its face, the plain meaning of Title IX protection seems to include transsexuals. In order to prove discrimination on the basis of sex, a person must show that he or she was a victim of discrimination *because of* his or her “maleness” or “femaleness,” that is, because he or she was being a “male” or “female.” It logically follows that such discrimination would include a MTF transsexual if the individual was discriminated against on the basis of hir⁴⁰ sex. While this reasoning works in theory, it has not produced results in practice. The lack of success so far may be due to several reasons, including the relative novelty of legal concern, the

³⁴ See Greenberg, *supra* note 17, at 927.

³⁵ *Id.*

³⁶ See generally Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2005); Pregnancy Discrimination Act, 42 U.S.C. § 2000e-1(k) (2005); Title IX, 20 U.S.C. § 1681(a).

³⁷ Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 53 (2003).

³⁸ 20 U.S.C. § 1681(a) (2005) (emphasis added). Limited exceptions follow 20 U.S.C. § 1681(a)(1)-(9).

³⁹ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691 (1979).

⁴⁰ “Hir” is used intentionally here to signify the blending of gender specific pronouns. The inadequacy of pronouns is a constant problem for transsexuals and transgender individuals. Words such as “hir” and XXX have often been used as compromises.

small number of affected population, and the age limit of eighteen years or older before gaining legal recognition of a sex transformation. Furthermore, the reasoning is not necessarily inclusive of all gender-bending behavior. For example, discrimination against a male effeminate will still be excluded from the purview of Title VII and Title IX jurisprudence as only transsexuals engaged in transgender performance will be included under the interpretation of such reasoning.

In 1997, a district court in New York held that a MTF transsexual student, who was harassed by a professor, could proceed with her case under Title IX for discrimination on the basis of sex.⁴¹ Dismissing the university's motion for summary judgment, the court explained that "[t]here can be no doubt that Professor Eisen's conduct with respect to Jennifer Miles, assuming it can be proven, related to sex and sex alone. Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved."⁴²

In 1999, the Supreme Court applied Title IX to peer sexual harassment cases where the funding recipient acted with deliberate indifference by allowing the level of harassment to become so severe that it effectively deprived the victim's access to her rightful educational opportunity and benefit.⁴³ In *Davis v. Monroe County Board of Education*, a young female student was sexually harassed so relentlessly by a classmate that it became detrimental to her grades, self-esteem, and ability to learn.⁴⁴ *Davis* is of specific interest because the Court referred to the harassment of Davis as discrimination "on the basis of sex"⁴⁵ and "on the basis of gender."⁴⁶ Throughout its opinion, the Court liberally interchanged sex and gender as it analyzed "[w]hether gender-oriented conduct rises to the level of actionable 'harassment'."⁴⁷ Even the dissenting opinion contemplated "the state of gender discrimination law at the time Title IX was enacted in 1972."⁴⁸

The synonymous use of sex and gender is not new and has most frequently occurred in Title VII analysis. Title VII is the anti-discrimination statute that arguably has reached the furthest in its creation of many legal standards and processes that prohibit sex discrimination in employment. Some courts have moved towards a more expansive jurisprudential reading of the statute by focusing on the elimination of employment discrimination on the basis of gender stereotyping. In order to understand the interpretation of "sex" under Title IX, it is helpful to look to Title VII interpretations of the term for guidance as both statutes are often read similarly. Courts have generally mimicked Title VII interpretations

⁴¹ *Miles v. N.Y.U.*, 979 F.Supp. 248 (S.D.N.Y. 1997).

⁴² *Id.* at 249.

⁴³ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

⁴⁴ *Id.*

⁴⁵ *Id.* at 638.

⁴⁶ *Id.* at 631 (emphasis added).

⁴⁷ *Id.* at 650.

⁴⁸ *Davis*, 526 U.S. at 662 (dissenting opinion).

in the application of Title IX to combat sex discrimination in education.⁴⁹ However, the statutory interpretation of the phrase “because of sex” has varied widely.

Diverging definitions of “sex” under Title IX are most evident in Title VII and Title IX sexual harassment cases. Different legal theories have emerged from a conglomeration of case law involving sexual harassment under Title VII and Title IX. Professor Deborah Brake divided the jurisprudential interpretations of sex in sexual harassment discrimination cases into four groups:

- (1) that the harasser is attracted to the target, who would not have been selected but for her sex; (2) that overtly sexual harassment is necessarily based on the sex of the persons harmed; (3) that the sexual harassment more frequently, or more severely, harms girls and women, and thus has a disparate impact based on sex; and (4) that the harasser acted out of a sex-discriminatory motive.⁵⁰

In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court extended Title VII protection to same-sex harassment in employment.⁵¹ *Oncale*, a male worker on an oil platform, was sexually harassed by the jokes, innuendos, and physical threats of his coworkers.⁵² In holding that Title VII applies to men discriminated on the basis of sex, the Supreme Court explained that although “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . [Title VII] must extend to sexual harassment of any kind that meets the statutory requirements.”⁵³ This reading seems to comply with the theory that any harassment, overtly sexual in nature, is discrimination on the basis of sex, regardless of whether the victim is a man or a woman.

In another Title VII case, the Supreme Court located discrimination on the basis of gender under the purview of Title VII sexual discrimination. In *Price Waterhouse v. Hopkins*, a female candidate was denied partnership in a large accounting firm because she violated traditional gender norms by being aggressive and by failing to dress and act femininely.⁵⁴ The Supreme Court held that under Title VII, it is unlawful to discriminate against an individual who did not adequately conform to sexual stereotypes.⁵⁵ Read together, *Oncale* and *Price Waterhouse* may be used to hold employers and by analogy, schools, liable for

⁴⁹ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 91 (1986) (“[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.”).

⁵⁰ Deborah Brake, *The Cruellest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37, 43 (1999).

⁵¹ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

⁵² *Id.*

⁵³ *Id.* at 79-80.

⁵⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁵⁵ *Id.* *Price Waterhouse* was subsequently superseded by statute on a separate issue of law with respect to “mixed-motive” cases in employment law. See 42 U.S.C. § 2000e-2(m) (2005).

sexual harassment because employees or students fail to conform to expected gender stereotypes.

Montgomery v. Independent School District No. 709, a Title IX harassment action, reached the same result with a similar reading.⁵⁶ During his eleven years of education, Montgomery was subjected to continuous torment at the hands of other students.⁵⁷ The court ruled that Montgomery stated a cognizable claim under Title IX on the basis of sex.⁵⁸ While the court noted that sexual harassment based solely on sexual orientation or perceived sexual orientation did not meet the requirements of “basis of sex” under Title IX, the court was persuaded that the harassment largely attributable to the perception that Montgomery did not meet traditional gender stereotypes of masculinity.⁵⁹ This interpretation, combined with the prohibition against discrimination on the basis of gender stereotypes, seems to indicate that overt sex or gender harassment is *always* considered sex discrimination under the statute.

The Ninth Circuit applied a similar interpretation of the law to a different set of facts in a case involving a pre-operative male-to-female transsexual prisoner who sued the state prison guard and other prison officials under § 1983 and the Gender Motivated Violence Act (GMVA).⁶⁰ The Ninth Circuit contributed to deconstructing “traditional gender norms,” by holding that “for purposes of [Title VII and the GMVA], the terms ‘sex’ and ‘gender’ have become interchangeable.”⁶¹ This interchangeability of terms, the court stated, is attributable to the fact that “in the mind of the perpetrator the discrimination is related to the sex of the victim.”⁶² The perpetrator’s actions stemmed from his belief that the victim was a man who failed to act like one. Thus, similar to the holding in *Price Waterhouse*, the court argued that “sex” under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.⁶³

Brake advocated a comparable analysis of gender stereotypes. She suggested that the inquiry for sexual harassment should be based on whether the behavior “punishes gender ‘outliers,’ including students perceived as gay or lesbian, and . . . reinforce[s] stereotyped roles of females as sexual objects and males as sexual aggressors.”⁶⁴ Katherine M. Franke, a legal scholar, asserted that the “disaggregation of sex from gender represents a central mistake of equality jurisprudence.”⁶⁵ The broader reading of discrimination “on the basis of sex” as one that includes gender is better tailored to protect individuals who do not identify

⁵⁶ *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000).

⁵⁷ *Id.* at 1084.

⁵⁸ *Id.* at 1093.

⁵⁹ *Id.* at 1092-93.

⁶⁰ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

⁶¹ *Id.* at 1202.

⁶² *Id.*

⁶³ *See id.* at 1201.

⁶⁴ Brake, *supra* note 50, at 43.

⁶⁵ Franke, *supra* note 4, at 1-2.

with the binary structure of sex and the gender performance traditionally related to their assigned sex. For example, the more expansive approach will protect transsexuals who do not identify with their biological birth genders and engage in dress or behavior that is generally associated with the opposite sex. The broader interpretation will also protect gay and lesbian students, whose performance of homosexuality is outside of the traditional gender norms. Finally, the incorporation of gender under the purview of Title VII and Title IX will protect heterosexual men and women who challenge the gender boundaries through less dramatic gender performances in dress, mannerisms, grooming, reproductive choices, etc.

Some scholars, however, are dissatisfied with this approach, noting that it will not eliminate and denaturalize “gender norms that project femininity as the ‘real’ and ‘natural’ expression of femaleness (female agency) and masculinity as the ‘real’ and ‘natural’ expression of maleness.”⁶⁶ Furthermore, some argue, the semantic debate about the use of “sex” versus the use of “gender” is of little value, as few legislatures have actually considered that distinction during the enactment of the legislation. One such scholar, Laura Grenfell, emphasized that a more holistic approach is ultimately necessary—an approach that incorporates the historical, social, political, and cultural norms that pervade our construction and conceptualizations of gender and sex.⁶⁷ Grenfell explored the treatment of the transgender individuals in other countries, particularly Canada, observing that greater acceptance of the transgender came with legislative, judicial, and cultural change.⁶⁸

Nevertheless, the fact that there has not been a large amount of legislative discussion about sex and gender semantics under Title IX may potentially be helpful. First, a long history of clearly defined boundaries and distinctions of sex and gender does not exist to the same extent that it does in other legislation. Combined with the clear intent of Title IX to facilitate equal opportunities for all sexes, there is arguably room for flexibility in the choice of gender versus sex. Further, it may be better to work to broaden the current definition of sex in Title IX than to attempt to incorporate entirely new protections into existing legislation.

In the push for protection under the Employment Non-Discrimination Act (ENDA),⁶⁹ the transgender community faced a similar problem. Lobbyists realized that amending the legislation to specifically include transgender protection was equivalent to acknowledging that the protection did not exist in the previously existing framework.⁷⁰ In the case of Title IX, the framework already exists. Title IX was enacted to eliminate both stereotypical and real differences on the basis of

⁶⁶ Grenfell, *supra* note 37, at 68.

⁶⁷ *See generally id.*

⁶⁸ *See id.*, at 77-84.

⁶⁹ ENDA is a proposed bill for federal legislation to protect against workplace discrimination on the basis of sexual orientation. The bill has failed to pass since its introduction in 1994. *See generally* Chai R. Feldblum and Lisa Mottet, *Gay People, Trans People, Women: Is it All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623 (2000).

⁷⁰ *Id.* at 629.

sex in education.⁷¹ This combined approach is necessary to effectively achieve the objectives of the statute, ensuring protection to the “gender outliers” who challenge our very concept of sex and gender.

III. THE REALITY OF TRANSGENDER STUDENTS

*“The bane of a transsexual’s existence is public restrooms.”*⁷²

In a recent Massachusetts case, *Doe v. Yunits*,⁷³ a fifteen-year-old transgender student who was diagnosed with Gender Identity Disorder obtained a preliminary injunction⁷⁴ against her school. Threatening suspension, the school prohibited her from wearing any clothes or “fashion accouterments” that were inconsistent with her gender identity, namely wigs, padded bras, skirts and dresses.⁷⁵ She was suspended three times for using the women’s bathroom.⁷⁶ In the eighth grade, the principal required the plaintiff to report to his office every day so that he could approve the plaintiff’s appearance.⁷⁷ If the principal thought that she was dressed too femininely, she would be sent home to change.⁷⁸ Ultimately, citing that the school’s dress code prohibited “disruptive” clothing, the school prohibited Doe from enrolling altogether and provided her a home tutor instead.⁷⁹ Doe brought suit under a number of Massachusetts statutes and constitutional provisions.⁸⁰ In issuing a preliminary injunction against the school, the court emphasized that the school may not prohibit Doe “from expressing her gender identity, and thus, her quintessence, at school.”⁸¹ The court further stated that it cannot “allow the stifling of [Doe’s] selfhood merely because it cause[d] some members of the community discomfort.”⁸²

This case is an anomaly among cases that involve transgender and transsexual students. In most cases, transgender students face severe discrimination and harassment in schools; 89.5% of them report that they feel unsafe in schools.⁸³ Identification of the issue and subsequent changes to improve the situation have been made on a small scale by individual colleges and school boards. California law prohibits gender-based discrimination in public schools,

⁷¹ See 20 U.S.C. § 1681(a).

⁷² Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 46 (1995).

⁷³ *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

⁷⁴ Doe was a biologically born male but preferred to live and to be referred to as a female. *Id.* at *1.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Yunits*, 2000 WL 33162199.

⁷⁹ *Id.* at *2.

⁸⁰ *Id.*

⁸¹ *Id.* at *7.

⁸² *Id.*

⁸³ GAY LESBIAN STRAIGHT EDUCATION NETWORK, THE GLSEN 2001 NATIONAL SCHOOL CLIMATE SURVEY: THE SCHOOL-RELATED EXPERIENCES OF OUR NATION’S LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH 21 (2001), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/221-1.pdf.

defining gender as “a person’s actual or perceived sex and includes a person’s perceived identity, appearance or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person’s sex at birth.”⁸⁴ Minnesota and New Jersey have similar protections.⁸⁵

Specific problems identified by transgender advocacy groups include:

1. The incorrect and/or disrespectful use of names and pronouns, a problem that leads to lack of self-worth, invalidation, depression and suicide.
2. Lack of appropriate restroom accessibility.
3. Lack of gender-neutral bathrooms—a problem that directly reflects on the student’s safety, as many transgendered students are not perceived to be sufficiently stereotypically masculine or feminine enough to use a gendered restroom without question.
4. Lack of locker room accessibility.
5. Lack of access to sports and gym class.
6. Gender segregation in other areas (classroom discussions, field trips, etc.).
7. Inappropriate dress codes that force students to conform to a particular gender identity.
8. Unsupportive family situations.
9. Lack of role models and access to accurate information.⁸⁶

All of these identified methods of sex-segregation yield an overarching theme—the problems that transgender students constantly face are not taken seriously. Further, involuntary categorization of one’s choice of identity as abnormal and invalid is “extremely psychologically harmful.”⁸⁷ The lack of gender-neutral bathrooms is most readily identified as the greatest of the listed problems, as transgender students often “get harassed, beaten, and arrested in *both* women’s and men’s rooms. Many avoid public bathrooms altogether and develop health problems.”⁸⁸ One advocate noted that “[f]or transgender and gender non-conforming people, the lack of safe bathroom access is the most frequent form of discrimination faced but the least acknowledged by policy makers.”⁸⁹

Some recommended solutions include: using correct names and pronouns according to self-identification; increasing availability of gender-neutral bathrooms; assigning appropriate locker room accommodations; encouraging participation in sports and gym class with competitive issues resolved on a case-by-

⁸⁴ CAL. CODE REGS. tit. 5, § 4910(k) (Barclays 2005).

⁸⁵ See TRANSGENDER LAW AND POLICY INSTITUTE, *Non-Discrimination Laws and Policies in K-12 Schools*, <http://www.transgenderlaw.org/college/index.htm#schools> (last visited Aug. 27, 2005).

⁸⁶ TRANSGENDER LAW CENTER, *Transgender and Gender Non-Conforming Youth Recommendations for Schools*, <http://www.transgenderlaw.org/resources/tlcschools.htm> (last visited Sept. 11, 2005).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (quoting Shawna Virago, Community United Against Violence (CUAV), Remarks at San Francisco Human Rights Commission LGBT Advisory Committee Meeting (Sept. 24, 2002), available at http://www.ci.sf.ca.us/site/sfhumanrights_page.asp?id=12619).

case basis; permitting dress codes according to student's gender identity; emphasizing confidentiality; introducing more role models for gender non-conforming students; and opening access to accurate information about gender diversity.⁹⁰

Recently, four small liberal arts colleges have addressed gender non-conformance issues by establishing special accommodations for students who do not identify as only "male" or "female."⁹¹ Wesleyan, Sarah Lawrence, Smith, and Brown have all made accommodations, including private bathrooms and showers, specialized housing, and sports teams on which students who do not identify themselves as either male or female may participate.⁹² Wesleyan no longer requires students who use campus health services to check off "M" or "F" on their data forms but provides a box to "describe your gender identity history."⁹³ Furthermore, some of these schools are offering gender-neutral housing for all students.⁹⁴ Overall, transgender students are gradually receiving acknowledgment and acceptance, especially as educators become more comfortable with the spectrum of sexual definitions and gender performance.

CONCLUSION

While these changes sound innovative and even radical to the average reader, particularly readers who are not quite comfortable with varying levels of gender non-conformance, the question still remains: Does Title IX compliance require the accommodations discussed in Part III? If oppressive categorical gender norms are applied to the legal definition of "sex," then perhaps Title IX does require such accommodations. Title IX was nevertheless intended to remedy sex discrimination in education as it was perceived in 1972—when women and girls were at the height of confronting a long and strong history of systematic gender stereotyping in education. Moreover, Title IX has been consistently interpreted to protect against sexual harassment. As such, for the person who does not have a sex, who is medically dependent on breaking with society's traditional gender roles, it is discrimination "on the basis of sex" when that person is forced to choose an undesired gender performance. Likewise, the refusal to protect the transgender student from known harassment *is* sexual harassment under Title IX.

The difficulties inherent in the construction of sex and gender are not new. Questions of essentialism, social constructions, science, and history all arise to confront and confound our society—a society that is entrenched and invested in a binary division of sex and gender. With respect to the examination of sex and gender, the "trans" individual creates upheaval and discomfort. Yet similar to the

⁹⁰ TRANSGENDER LAW CENTER, *supra* note 86.

⁹¹ Fred A. Bernstein, *On Campus: Rethinking Biology 101*, N.Y. TIMES, Mar. 7, 2004, § 9, Col. 1, at 1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

lessons learned from previous experiences dealing with the intersections of race, class, religion, and sexuality, little progress is made without the slow and painful examination of the multiple levels of perversions that have brought about the present situation.

The more the boundaries blur, the more fluid and the more inclusive the society will become, which will ultimately extinguish the need for society to create categorizations—between female and male, as well as other rigid categorizations of oppression. Science, society, and history all point to the fact that there is a class of underrepresented and oppressed people—the trans folk. Consistent with the lessons of history, the society will be one day be reprimanded for its transgressions.

