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## Gender Identity Discrimination in the Workplace and Education: Title VII and the Title IX

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## **Gender Identity Discrimination in the Workplace and Education: Title VII and Title IX**

**Margaret (Meg) Butler\***

Though economists may argue whether the employer or the worker has more power in the employment relationship, in terms of the determination of hours, wages, and working conditions, Congress has enacted legislation to protect employees from abuse. One such law is the part of the 1964 Civil Rights Act which prohibits workplace discrimination, often referred to simply as Title VII, which includes protection against sex discrimination. The arc of Title VII law development reflects increased protection from gender identity discrimination, though that protection has come in fits and starts and remains tenuous.

Scholarship in this area often addresses leading cases, from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the United States Supreme Court began to use the word, and arguably the concept, of gender as distinct from sex and protected under Title VII from discrimination. Other leading cases addressed in scholarship include the *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), in which discrimination against a new hire who was transitioning genders between the date of hire and the start date, was found based on both a theory of sex stereotyping and as literally discrimination based on sex. In *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the court expressly extended the gender bias protections set forth in *Price Waterhouse* to include transgender employees. In analyzing these cases, scholars identify theories of discrimination claims that attorneys may pursue when representing clients. Another regularly addressed topic is enforcement of personal appearance standards, which arguably are based on or perpetuate sex stereotypes, and other specific Title VII concepts, such as bona fide occupational qualifications (BFOQ).

Scholarship in this area also addresses the Employment Non-Discrimination Act (ENDA), which has been proposed in Congress since the 1970s, but has yet to pass. ENDA, in its earliest iteration, prohibited discrimination on the basis of sexual orientation. The inclusion of protection

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from gender-identity discrimination in ENDA has been controversial.<sup>1</sup> The debate reflects tensions that arise when some view the ‘the LGBT community’ as monolithic, while others see it as more diverse than a single, homogenous community. Under the former view, what is good for ‘the community’ will ultimately benefit all, while the latter perspective questions even the priorities of the former. Some scholarship addresses this divide.

As of this printing, ENDA has not passed Congress—either with or without inclusive protection on the basis of gender identity. Though the law has not passed, scholars have spent a lot of time debating whether the limited protections of Title VII are better for transgender plaintiffs than the narrower protections in the proposed ENDA legislation. Also, the religious exemptions from ENDA that appear to be broader as it is introduced and re-introduced to Congress are the subject of scholarship. Perhaps because ENDA has not become law, some authors also turn to other alternatives to achieve non-discrimination protection. These alternatives include collective bargaining, policy-making by employers competing to be recognized for their workplace standards, and construing gender identity discrimination claims as are religious discrimination claims.

Given the tremendous reported rates of workplace discrimination by transgender and gender non-conforming people,<sup>2</sup> it seems likely that scholarship in this area will continue to grow. Further, as interest in transgender rights surges, and as gender identity becomes more central to legal discussion and change, more scholars may become interested in this area. Many of the articles included in this section are notes or comments written by students, rather than scholarship by academics. Topics likely to be addressed include innovative arguments for nondiscrimination policies or

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<sup>1</sup> In 2007 Representative Barney Frank introduced a version of ENDA that would protect both sexual orientation and gender identity. Three weeks after its first committee hearing, Franks introduced a second ENDA that contained no gender identity protections and a third containing only gender identity protections. “This strategic decision resulted in a seismic fracture between LGBT advocacy groups.” Suzanne B. Goldberg, Terra Hittson & Kevin Hu, *The Employment Non-Discrimination Act: Its Scope, History, and Prospects* 19–30 in *GENDER IDENTITY AND SEXUAL ORIENTATION IN THE WORKPLACE: A PRACTICAL GUIDE* (Christine Michelle Duffy, ed.-in-chief 2014) 19–30, available at: [http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/the\\_employment\\_non-discrimination\\_act\\_its\\_scope\\_history\\_and\\_prospects.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/the_employment_non-discrimination_act_its_scope_history_and_prospects.pdf).

<sup>2</sup> Transgender and gender-nonconforming survey respondents indicated that 90% had been harassed on the job, 47% had experienced adverse job outcomes due to their gender non-conforming or trans status. See Jaime M. Grant et al., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 51* (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf).

practices and the balancing of gender nonconforming employees' rights with the asserted religious rights of their co-workers. At least until gender identity becomes a statutorily or constitutionally protected category, there will be room for scholarship advocating for that treatment and further protecting gender identity in the face of asserted religious freedom claims. At a theoretical level, it is likely that advocates for transgender equality may produce scholarship challenging neoliberal notions of equality and advocating for better listening and responding to the needs asserted by trans people.

To research effectively in this area using free resources, it is wise to pair gender identity and/or its synonyms (*trans*, *transgender*, *gender nonconforming*, *Gender Identity Disorder (GID)*, *gender dysphoria*, *transsexual*, etc) with an employment discrimination concept. For the broadest search, using the gender identity synonyms and a basic add-on such as *workplace* or *employment discrimination* will suffice. To be more particular, it is helpful to use specific concepts of workplace discrimination, including *wrongful termination*, *constructive discharge*, *appearance standards*, *BFOQ*, *disparate impact*, and so forth.

Title IX offers protection from sex-based and gender discrimination in education, from sports<sup>3</sup> to student housing to sex-based harassment. To research in this area using free resources, pair gender identity and/or its synonyms with a concept related to education. Recent areas of interest include bathrooms, housing, harassment, bullying, uniforms, dress codes, and student groups or organizations.

To search a library catalog, the same terms used in searching free resources may be helpful for researching both Title VII and Title IX. To be more specific in the results retrieved, the following search terms may be helpful if the library consulted is organized using the Library of Congress system. Terms include:

Gender identity--Law and legislation--United States; Transphobia--  
Law and legislation--United States.

Transgender people--Employment--Law and Legislation--United States

If using premium databases, take advantage of the tools available for more precise searching. For example, in *Index to Legal Periodicals*, the subject *Transgender people--Employment* may be helpful when researching Title VII. The subjects *Transgender people--Education* and *Sex*

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<sup>3</sup> Consult Rebecca Mattson's chapter for information related specifically to Title IX and sports, including annotations of articles related to gender identity as well as sexuality.

*discrimination in education--Law & legislation* may be helpful when researching Title IX. Note that the language of subject headings changes from time to time and is not necessarily consistent across database providers.

### Title VII

Clements, Angela, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*. 24 BERKELEY J. GENDER L. & JUST. 166–207 (2009).

The 2007 ENDA initially offered protection from employment discrimination on the basis of gender identity and sexual orientation but subsequently was amended to omit protection on the basis of gender identity. With this background in mind, Clements reviews federal non-discrimination law and concludes that Title VII has historically worked best to protect either immutable traits or constitutionally recognized fundamental rights. Clements argues that without explicitly protecting gender identity, the risk is high that courts will fail to protect from employment discrimination those gay and lesbian plaintiffs who are also gender nonconforming.

Crawford, Emily K., *America's Finally Beginning to Talk about It—Transgender Individuals' Rights in the Workplace*, 18 DUQ. BUS. L.J. 45–80 (2016).

In this student comment, Crawford describes the limited legal protections from discrimination available to transgender employees under federal law, as well as the state law of Pennsylvania and the local law of Pittsburgh. After noting the failure of the law to protect transgender employees from workplace discrimination, Crawford describes the role that corporations may take to protect their employees. A number of Fortune 500 employers with offices or headquarters in Pennsylvania are lauded for their policies and practices that promote workplace equality. Underlying Crawford's analysis is the premise that corporations' enactment of inclusive policies will spill over and allow society to flourish.

Friedman, Joel Wm., *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205–28 (2007).

As part of a symposium on makeup, identity performance, and discrimination, Professor Friedman presents a review of the ways in which lesbian, gay, and transgender plaintiffs fare in asserting Title VII gender discrimination claims. Friedman notes the contradiction that plaintiffs often win on motions to dismiss for failure to state claims, yet lose on the basis that the hostility experienced by each plaintiff is based on either sexual orientation or transgender identity, rather than failure to comply with gender norms. Friedman further notes that courts often ignore what appear to be viable mixed motives claims.

Griffin, C.J., Note, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 RUTGERS L. REV. 409–36 (2009).

Griffin raises questions of bathroom access in the context of a New Jersey law that prohibits discrimination on the basis of gender identity or expression. Griffin addresses the concerns of both gender-variant employees, as well as those of an employer who wants to be protected from a sexual harassment or religious freedom claim asserted by another employee who shares a restroom with a transgender employee. Griffin describes the risks and difficulties for transgender people using public or work restrooms and predicts how a New Jersey court would decide a transgender bathroom access case. After evaluating the likely results of gender identity discrimination claims asserted under New Jersey law, Griffin offers suggestions for employers including diversity training, employee handbook language, and other policies and procedures.

Kim, Yeongsik, Comment, *Using Collective Bargaining to Combat LGBT Discrimination in the Private-Sector Workplace*, 30 WIS. J.L. GENDER & SOC'Y 73–98 (2015).

Advocating for protection from discrimination on the basis of both sexual orientation and gender identity, Kim suggests that private-sector employees seek such protection through collective bargaining agreements. According to Kim, existing laws provide limited anti-discrimination protections, but the National Labor Relations Board should treat anti-discrimination protections as a mandatory bargaining subject, which would provide additional employee protection. Further, Kim considers effects on employees, such as the possible displacement of the right to pursue a Title VII claim, as well as on employers and unions.

Koch, Katie & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243–68 (2008).

Koch and Bales present a very straightforward argument that “because of sex” should be expanded to include transgender within its scope of protection from employment discrimination under Title VII. Considering the purpose of employment anti-discrimination legislation, they argue that it would provide consistent protection across the country, employers would benefit from clear and consistent legislation on a national scale, and it would be more efficient than awaiting congressional action on ENDA or similar legislation.

Landsittel, Sue, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity under Title VII*, 104 NW. U. L. REV. 1147–78 (2010).

Transgender identity in the context of Title VII claims is often considered in terms of the gender binary of male and female norms, with courts considering GID diagnosis and treatment as well as whether the plaintiff is conforming or seeking to conform to the gender binary. Landsittel's comment notes that approach is under-inclusive in terms of protection offered to transgender plaintiffs and suggests instead that a more inclusive approach be used. Landsittel recommends considering transgender employment discrimination plaintiffs in a manner more similar to religious discrimination plaintiffs, where a consistency analysis is applied.

Lee, Jason, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination under Title VII*, 35 HARV. J.L. & GENDER 423–62 (2012).

After reviewing the approaches of transgender plaintiffs asserting Title VII claims, Lee characterizes three primary approaches and identifies the weaknesses of each approach. The approaches are based on (1) an assertion of gender nonconformity as a sex-discrimination claim, (2) an assertion that discrimination based on transgender status is per se protected under Title VII, or (3) the assertion that sex and gender are closely related social constructs and that Title VII should be interpreted to protect gender identity. Lee's evaluation of the weaknesses may be used to identify the best approach to use in representing clients, depending on the client circumstances.

McCarthy, Brian P., Note, *Trans Employees and Personal Appearance Standards under Title VII*, 50 ARIZ. L. REV. 939–66 (2008).

Employers' dress and grooming standards have generally been accepted as bona fide occupational qualifications (BFOQ) in the face of sex discrimination claims under Title VII. McCarthy advocates that BFOQ be narrowly construed to minimize anti-trans discrimination, citing *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981), in which the court applied a two-step test for the determination of whether an employer's practice or policy is a BFOQ. According to McCarthy, a trans plaintiff's sex discrimination claim based on an employer's personal appearance policies would be more likely to succeed.

O'Keefe, James G., Note, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DEPAUL L. REV. 1101–30 (2007).

In this note, O'Keefe takes the position that *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the first case to extend the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibition against gender stereotyping to transgender employees. O'Keefe relies upon the argument that Smith's chromosomes were not changed through medical diagnosis and treatment and that sex is determined by chromosomes. Further, O'Keefe suggests that the Sixth Circuit misapplied *Price Waterhouse*, as it used the word "gender." Unlike other commentators, O'Keefe posits that *Smith* would not benefit Title VII plaintiffs generally, and instead suggests that the case would lead to the legislative loss of Title VII and similar state law employment protections for transgender or transsexual employees.

Reed, Alex, *A Pro-Trans Argument for A Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835–74 (2013).

Arguing a minority position, Reed advocates that a sexual orientation-only ENDA would be in the best interests of the LGBT community. Reed notes that there are stronger protections available under Title VII for sex discrimination and identifies a trend to include gender protection within that protection. The Title VII protections gained thus far for transgender people would be lost under an inclusive ENDA, according to Reed. Also, the ENDA prohibition of sexual orientation discrimination would protect LGB people from workplace discrimination, in Reed's analysis.



Sanders, Lauren, *Effects of EEOC Recognition of Title VII as Prohibiting Discrimination Based on Transgender Identity*, 23 DUKE J. GENDER L. & POL'Y 263–81 (2016).

During the Obama Administration, the Equal Employment Opportunity Commission (EEOC) made explicit through its Strategic Enforcement Plan for Fiscal Years 2013–2016 that discrimination based on “sex” under Title VII included discrimination based on gender identity. Sanders notes that this determination expanded the protections available for transgender and gender non-conforming employees who experience workplace discrimination. Although Sanders notes that EEOC interpretation of Title VII does not receive deference in the courts, the interpretation of Title VII has historically broadened following EEOC guidance and employment law may benefit from the inclusion of gender identity as part of the definition of “sex” under Title VII.

Sung, William C., Note, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487–39 (2011).

In this student note, Sung takes the position that Title VII should be amended specifically to amend the definition of “because of sex” to include gender discrimination and sexual orientation discrimination, among other suggested changes. Sung includes a history of congressional efforts to provide such protection, beginning in 1974 with Bella S. Abzug’s proposed Equality Act and ending with the failed Employment Non-Discrimination Acts (ENDA) of 2007 and 2009, noting that the serially introduced ENDAs have offered watered-down protections as compared with those of Title VII.

Tan, Shannon H., Note, *When Steve Is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579–614 (2008).

This note advocates for Congress to pass ENDA with language that explicitly protects people from discrimination on the basis of gender identity. Although Tan recognizes that the protections of ENDA (as introduced in 2007 and 2009) are not as comprehensive as those of Title VII, Tan argues the passage of a gender-identity inclusive ENDA would resolve a circuit split, assuring protection from discrimination against discrimination on the basis of gender identity, as well as increase the likelihood that people would be aware of the protection available. Tan’s

review of existing protections includes a brief survey of state and local laws, as well as a couple of case studies demonstrating the inequitable results of inconsistent state legislation.

Twing, Shawn D. & Timothy C. Williams, *Title VII's Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class under the Term "Sex" and Practical Implications of Inclusion*, 15 TEX. J. C.L. & C.R. 173–204 (2010).

Employment law practitioner authors provide thorough analysis starting from the initial questions whether transgender persons are protected by Title VII and state or local laws. The analysis of state law includes both restrictive and inclusive approaches to the federal question. The authors discuss rights of transgender employees, rights of co-workers, and offer guidance to employers. The guidance covers dress codes, overnight travel, the bona fide occupational qualification exemption (BFOQ) defense to claimed discrimination, customer preference, and a very brief discussion of law related to religious employers.

Turner, Ilona M., Note, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561–96 (2007).

In this heavily cited comment, Turner posits that discrimination against transgender employees constitutes a violation of the sex-discrimination prohibitions of Title VII as interpreted and applied in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). After developing the line of cases leading to *Price Waterhouse* and reviewing subsequent application of the case, Turner presents differing perspectives regarding the reliance on a gender-stereotyping theory as the basis of a discrimination claim. Further, Turner interrogates the value of relying upon a disability-based theory as the basis of a discrimination claim.

Weinberg, Jill D., *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1–32 (2009).

Weinberg notes that the historical conflation by courts of sexual orientation and gender identity has been used to terminate gender nonconforming plaintiffs' Title VII claims. Recognizing the difficulties faced by gender nonconforming plaintiffs under Title VII, Weinberg reviews the historical efforts to pass ENDA. Subsequently, Weinberg describes, based on the 2009 version, ways in which including gender identity in

ENDA would benefit those who experience gender-based discrimination. Gender identity should be added to ENDA to best protect transgender and gender nonconforming plaintiffs from workplace discrimination, according to Weinberg.

Weiss, Jillian Todd, *Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & C.R. L. REV. 573–650 (2009).

The changing understanding of *transgender* and *sex* over time are Weiss’s preliminary focus. After describing the claims of transgender plaintiffs in a historical review of Title VII cases, Weiss makes predictions of how the justices on the Supreme Court would treat claimants based on a textualist approach. In particular, the more textualist justices were deemed less likely to consider changing definitions of words over time. Justices considered are: Scalia, Kennedy, and Thomas; Roberts and Alito; and Stevens, Breyer, Ginsburg. Souter’s likely approach is not addressed, as he had announced his resignation prior to the publication of the article.

### Title IX

Archibald, Catherine Jean, *Transgender Student in Maine May Use Bathroom That Matches Gender Identity—Are Co-Ed Bathrooms Next?*, 83 UMKC L. Rev. 57–72 (2014).

In the context of increasing protections for transgender students, allowing them to use bathrooms matching their gender identity, Archibald asserts that the Equal Protection Clause requires co-educational or desegregated bathrooms. In Archibald’s analysis, the decision to sex-segregate bathrooms would be evaluated under the intermediate scrutiny review, and the historic separation of bathroom facilities is insufficient to meet the standard. Archibald lists social benefits of desegregating bathrooms, particularly focusing on the effects on gender nonconforming or transgender and intersex people.

Bryk, Amanda, *Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students under Title IX*, 37 CARDOZO L. REV. 751–92 (2015).

The Department of Education's Office for Civil Rights (OCR) released guidelines declaring that Title IX protection from discrimination in education includes transgender students in the scope of the law's prohibition of sex discrimination. Bryk notes, however, that religious colleges or universities that are required to comply with the statutory protections (due to their receipt of federal funds) are readily granted exemptions that functionally preempt transgender students' discrimination claims. The religious exemption made available to employers who seek to engage in religion-based discrimination otherwise prohibited by Title VII is narrow and still requires employers to follow the mandates of Title VII that protect against race, sex, and national origin discrimination. Bryk argues that the religious exemption should be applied more narrowly to assure that transgender students are able to fully participate in education without experiencing discrimination.

Harris, Zenobia V., *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 149–200 (2010).

Students whose schools require a dress code present a challenge to transgender students, particularly youth who require parental permission for medical treatment such as hormone therapy. These youth may only be able to express themselves and their gender through their external appearance, and school dress codes marginalize or silence that expression. Harris provides two case studies of students challenging dress codes, one based on disability and the other on freedom of expression, as well as analysis of the advantages and disadvantages of pursuing each type of claim. Harris also suggests ways in which school districts may avoid litigation, such as through policies, training, and protocols for handling reported harassment.

Higdon, Michael J., *To Lynch A Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 IND. L.J. 827–78 (2011).

Fear and community involvement were critical psychological factors behind lynching of African-Americans during the civil rights era, and Higdon notes that the segregation of African-American students has been described as spiritual, emotional, and mental lynching. With that background, Higdon focuses analysis on the ways in which gender stereotypes contribute to bullying and the long-term psychological harm arising from bullying. Higdon considers the complicit behavior of teachers and school administrators, including allegations from students'

actual claims. Recognizing the extreme change necessary, Higdon suggests strategies that may promote change: (1) victim litigation; (2) anti-bullying policies and legislation; and (3) training school personnel and others to combat bullying and teaching children about bullying and its motivations.

McGovern, Ashley E., *When Schools Refuse to “Say Gay”: The Constitutionality of Anti-LGBTQ “No-Promo-Homo” Public School Policies in the United States*, 22 CORNELL J.L. & PUB. POL’Y 465–90 (2012).

At least seven states and additional localities have adopted policies which prohibit teachers from speaking on topics of sexual orientation or gender identity, even in response to bullying or related violence. McGovern contextualizes the need for tolerance in schools and describes the “right to be out” (468), analyzing the students’ First Amendment free speech rights in terms of *Tinker v. Des Moines*, 393 U.S. 503 (1969), and the Fourteenth Amendment Equal Protection clause. To address the issues raised in the article, McGovern suggests the implementation of state and federal policy changes such as the development of initiatives to prevent and address bullying.

Rao, Devi M., *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J.L. GENDER & SOC’Y 245–70 (2013).

Bullying and harassment based on gender identity, often experienced by transgender students, should be treated as per se sex discrimination in violation of Title IX, according to Rao’s analysis. The framework of analysis that bases Title IX protection from harassment and discrimination on gender stereotypes, Rao claims, is bad for individuals and public policy for a number of reasons: (1) it calls for the transgender student to minimize or hide zir<sup>4</sup> transgender status as irrelevant to the claim; (2) it pushes the transgender student to identify by biological sex, rather than by gender identity; and (3) it encourages use of the defense that the underlying animus was anti-transgender discrimination and therefore not in violation of the law.

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<sup>4</sup> *Zir* is a pronoun used as in the following example, “Zee is a writer and wrote that book zirself. Those ideas are zirs. I like both zir and zir ideas.” “Ze” Pronouns. MyPronouns.org, <https://www.mypronouns.org/ze-hir/> (last visited May 8, 2018).

Tobin, Harper Jean & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC'Y 301–30 (2013).

Transgender students should be able to live life fully as their chosen genders. Tobin and Levi posit that Title IX's guarantee that no person shall be excluded from educational programs or activities on the basis of sex is violated by schools that deny equal access to sex-segregated bathroom facilities, for example, on the basis of the stigmatization arising from the denial. The authors describe state and local laws that support their interpretation. Further, the authors suggest that schools evaluate whether there is a clear pedagogical purpose to any gender-based policies, rules, and practices (315). Anticipating counter-arguments, the authors note that third-party privacy rights are not infringed by providing transgender students equal access to a gender-specific facility.

Womack, Katherine A., *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365–98 (2010).

Writing in anticipation of transgender housing discrimination claims arising on college campuses, Womack considers the history of the American legal system's treatment of transgender people, beginning with a case from 1629 in Colonial Virginia and continuing through modern equal protection, Title VII and Title IX, state and local laws, and the federal Hate Crimes Prevention Act (HCPA). In sex-segregated residential facilities, such as shelters, prisons, and school dorms, Womack notes, transgender youth are routinely assigned to accommodation based on their biological sex, rather than their asserted gender identity. Womack's analysis concludes with recommendations that academic institutions be flexible and consider both whether transgender students would be isolated by housing options and whether the application process includes adequate privacy for students.

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