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BEING A TRANSGENDERED STUDENT: AN UPHILL FIGHT FOR EQUALITY

BY BRIAN EISNER¹

INTRODUCTION

Imagine you are a first grade boy.² Growing up, you were not like other boys.³ Instead of wearing shorts and a tee shirt, you preferred the feel of a dress; when you went to play, you were more likely to play with Barbie than with GI Joe; you even went so far as to tell your mother that you feel like a girl. In your mind and heart, you are a girl.

Your mother, confused at these feelings, brings you to a psychologist who administers tests. The conclusion is that you have gender identity disorder (GID),⁴ which means that you experience a significant discontent with the sex you were assigned at birth.⁵ Essentially, you have been given

¹ J.D. 2015, St. John's University School of Law. Member, *Journal of Civil Rights and Economic Development*.

² The hypothetical that follows is an adaptation of the Coy Mathis story. Sabrina Rubin Erdely, *About a Girl: Coy Mathis' Fight to Change Gender*, ROLLING STONE, Oct. 28, 2013, <http://www.rollingstone.com/culture/news/about-a-girl-coy-mathis-fight-to-change-change-gender-20131028?page=5>.

³ Beginning at 18 months, you began dressing as a girl and by the age of 2, you refused to leave the house dressed as a boy. *Id.*

⁴ Gender Identity Disorder is a DSM-IV recognized disorder. However, in 2013, the American Psychiatric Association released the DSM-V and renamed the disorder Gender Dysphoria. The reason for the change was a change in emphasis. The old disorder emphasized identity, while the new designation stresses the importance of distress. This is important because you can be transgender and not distressed about the incongruity between your identity and your sex. It shows a desire not to classify transgender as a disorder. Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift in Perspective On Gender Identity*, HUFFINGTONPOST.COM (Aug 4, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html. The reason that the newer term is not used in the text is two-fold: (1) when Coy Mathis (the real life counterpart to the hypothetical) went to the doctor, she was diagnosed with the newer disorder Gender Dysphoria, but at the time of her diagnosis the new DSM-5 had not yet been published; and (2) the newer disorder reflects distress in the decision whereas in the hypothetical the person does not feel distressed. Rubin Erdley, *supra* note 2. See also Jesse Green, *S/He*, NEW YORK MAGAZINE (May 27, 2012), <http://nymag.com/news/features/transgender-children-2012-6/> "For its upcoming revision, the *Diagnostic and Statistical Manual of Mental Disorders* is said to be reconfiguring its approach to the subject, focusing less on gender identity itself and more on the distress—or dysphoria—young people may feel as a result of it."

⁵ "Gender identity disorder . . . is defined by strong, persistent feelings of identification with the opposite gender and discomfort with one's own assigned sex . . ." *Gender Dysphoria*, PSYCHOLOGY

the psychological designation of a “girl trapped in a boy’s body.” Although your mother was initially shocked at the behavior and your diagnosis, she comes to accept your feelings as natural. In your home, your family fully accepts you as the unique individual you are.

Then you begin kindergarten.⁶ Luckily for you, your mother has spoken to the school district about your behavior and your desire to be a girl, including your desire to use the girl’s bathroom. The school decides to allow you to do what would be appropriate if you were a girl, even though you are biologically male. You flourish in school; you have an accepting group of friends, good grades, and a bright future.

But, suddenly things start to unravel. Between kindergarten and first grade, your classmates’ parents and the principal of your school hold a meeting to determine whether you can use the girl’s bathroom. The school decides to weigh your right to use the bathroom of your choice with the rights of the other students, their parents, and the impact of the decision as the children mature. After review, the school denies you access to the girl’s bathroom and to every other amenity that matches your gender identity.⁷ To accommodate your situation, the school provides you access to a staff bathroom, but you would be the only student using it. The entire school community has made you into the proverbial “other”⁸: an outcast.

The above experience is not unique to any single individual⁹. It is one of

TODAY, <http://www.psychologytoday.com/conditions/gender-identity-disorder> (last reviewed Oct. 20 2015).

⁶ You begin kindergarten as a boy, but you became unhappy that you had to stand in boy’s lines and everyone treated you as a boy. Rubin Erdley, *supra* note 2

⁷ Gender identity refers to “[o]ne’s innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.” Human Rights Campaign, *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions>.

⁸ The “other” is a psychological and philosophical term having its origins in the work of the German philosopher Hegel. The “other” is a way to define or constitute the self. See JACQUES LACAN, *ÉCRITS: THE FIRST COMPLETE EDITION IN ENGLISH* (Norton & Co. ed., 2007) (1966) (discussing the mirror stage and how an infant upon seeing itself gains a sense of self in contradistinction from the surrounding world: the “other.”); see also Lawrence Cahoon, *What Postmodernism Means*, in *TEXTS AND THEIR WORLDS II*, 115, 119 (K. Narayana Chandran ed., 2005) (“What appear to be cultural units—human beings, words, meanings, ideas, philosophical systems, social organizations—are maintained in their apparent unity only through an active process of exclusion, opposition, and hierarchization. Other phenomena or units must be represented as foreign or ‘other’....”). The idea has been used in fields such as social science and gender studies. See generally EDWARD SAID, *ORIENTALISM* (1978) (demonstrating how the Western World “othered” the people in the Orient in order to show that Orientals were inferior and needed to be controlled.); see also Michael Warner, *Homo-Narcissism; or Heterosexuality*, in *ENGENDERING MEN* 190 (Joseph A. Boone and Michael Cadden eds., 1990) (“...the modern system of sex and gender would not be possible without a disposition to interpret the difference between genders as the difference between self and Other.”).

⁹ But, this story is unique in one aspect: the school originally allowed her to use the bathroom of

the many shared experiences of people who identify as transgender.¹⁰ What's more, this will only become more prevalent. Studies have shown that the number of transgender individuals is steadily rising¹¹ because these individuals are more readily able to express themselves.¹² Not only are there more individuals identifying as transgender, but they are also "coming out"¹³ at earlier ages.¹⁴ This increase in the number of transgendered youth and the increase in the profile¹⁵ of the transgender

her gender identity. In most cases, the school will deny the person access immediately and the courts will uphold that ruling by the school. *See, e.g.*, Sarah Jane Kyle, *PSD Addresses Policy For Restroom Use By Transgender*, FORT COLLINS COLORADOAN (Dec. 15, 2011, 2:17 AM), <http://archive.coloradoan.com/article/20111215/NEWS01/12150331/PSD-addresses-policy-restroom-use-by-transgender-students>; <http://search.proquest.com/docview/910950678?accountid=134752> (the story of Dionne Malikowski, a 16 year old transgender student, who albeit registered as a girl, was suspended for using the girl's bathroom after being told to use a staff restroom); Christian Boone, *Georgia school denies use of boy's bathroom to transgender child*, THE ATLANTA JOURNAL-CONSTITUTION (Sept. 14, 2011, 6:19 PM), <http://www.ajc.com/news/news/local/georgia-school-denies-use-of-boys-bathroom-to-tran/nQLn7/> (detailing the story of D., a seven year old transgender student who was prohibited from using the boy's bathroom at school).

¹⁰ Transgender 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. Being transgender does not imply any specific sexual orientation. Therefore transgender people may identify as straight, gay, lesbian, bisexual, etc." Human Rights Campaign, *supra* note 7.

¹¹ It is difficult to get truly accurate numbers on the amount of transgendered individuals living in the U.S. because most demographic studies, such as the U.S. Census, do not ask about it. However, there have been attempts. One study estimated that the number of transgender is around .25% to 1% of the population. National Center for Transgender Equality, *Understanding Transgender People FAQ*, (May 1, 2009), http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf. Another study tried to estimate the number of transsexuals using the Lynn Conway measure. This looks at the amount of individuals who undergo sex reassignment surgery and uses it to estimate the amount of people who are transsexual. The study concluded that somewhere between 1 in 250 people and 1 in 500 people are transgender. Lynn Conway, *Basic TG/TS/IS Information* (2006), <http://ai.eecs.umich.edu/people/conway/TS/TS-II.html#anchor635615>. A final study stated that the total number in the U.S. is 700,000. Gary J. Gates, *UCLA Study Estimates Approximate 700,000 Transgender People in the U.S.*, <http://helenhill.wordpress.com/2011/06/04/ucla-study-estimates-approximate-700000-transgender-people-in-the-usa/>.

¹² *See e.g.*, Colleen O'Connor, *Pediatricians see growing number of cross-gender kids like Coy Mathis*, THE DENVER POST, (Mar. 3, 2013, 12:01 AM), http://www.denverpost.com/ci_22706559/pediatricians-see-growing-number-cross-gender-kids-like (stating that society now allows more gender-bending and thus transgender individuals can express themselves more openly).

¹³ "Identifying yourself as lesbian, gay, bisexual, or transgender (LGBT) and disclosing this to other people is often referred to as 'coming out'." AVERT, *available at* <http://www.avert.org/coming-out.htm>.

¹⁴ One of the major dilemmas in trying to gain legal protections for transgender individuals is the varied ages in which people can comfortably come out. Some individuals assert that they knew of their transgenderism before kindergarten, but others did not know until older. *See A Survey of LGBTQ Americans: Attitudes, Experiences, and Values in Changing Times*, PEW RESEARCH CENTER (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans>; *see also* Erdely, *supra* note 2 (stating that Coy Mathis began asserting she was a girl at the age of 2).

¹⁵ In this context, an increase in "profile" means that the transgender community, which has rarely been spoken by the public at large and the mainstream media is gaining more widespread recognition. This is evidenced by numerous shows surrounding transgendered people being produced (i.e. *Orange is the New Black* and *Transparent*), many celebrities "coming out" as transgender (i.e. Caitlyn Jenner,

community generally have increased the visibility surrounding the lack of legal protections¹⁶ for the transgender community. This lack of legal protection has led to some major developments in the law.¹⁷

The increase in the number of transgender youths and increase in the profile of the transgender community have also highlighted a significant problem affecting the transgender community: harassment at the K-12 level. The K-12 setting is one of the places where transgender individuals are harassed the most. A study done by the National Transgender Discrimination Survey found that “those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%); harassment was so severe that it led almost one-sixth (15%) to leave a school in K-12 settings or in higher education.”¹⁸

On August 12, 2013, California Governor Jerry Brown signed the School Success and Opportunity Act (Assembly Bill 1266) into law. This groundbreaking law,¹⁹ which modified the existing education law, states: “A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use

Laura Jane Grace, Chelsea Manning, etc.), and even more news articles written about the transgendered community. See e.g., Brandon Griggs, *America’s Transgender Moment*, CNN (June 1, 2015), <http://www.cnn.com/2015/04/23/living/transgender-moment-jenner-feat/>. In turn, this recognition has brought the problems of the transgendered community into the public eye. See e.g., Katy Steinmetz, *Why Transgender People are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), <http://time.com/3999348/transgender-murders-2015/>.

¹⁶ “The legal and political community has made great strides in the last decade toward assuring legal equality for lesbian, gay, and bisexual persons (The LG and B of LGBT). However, with regard to transgendered and other gender nonconforming people, there has been far less progress in addressing their legal rights. In fact, there has been a considerable lack of understanding in the courts with regard to issues of concern to this population.” *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 754-55 (Sup. Ct. 2013).

¹⁷ Both state and federal laws have begun to list transgendered individuals as a protected class. This reflects a willingness by the legislature to begin to correct the apparent wrongs that omission from the law’s protections has brought upon the transgender community. See *infra* Part V.

¹⁸ Jaime M. Grant, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 3, available at http://www.endtransdiscrimination.org/PDFs/NTDS_Report.pdf.

¹⁹ The law is groundbreaking in the sense that it is the first to specifically protect a transgender individual’s right to use the bathroom and locker room of his/her choice. In California, there was already a state law that prohibited public schools from discriminating against students based on gender identity. See CAL. EDUC. CODE §220 (2013). However, many schools interpreted the law to not apply to bathrooms, sports, or locker rooms. Thus, there was a need for the new law to be passed. Bob Egelko, *Transgender Student Rights Law Triggers Sharp Divide*, SAN FRANCISCO CHRONICLE (Jan. 23, 2014), available at <http://www.sfchronicle.com/lgbt/article/Transgender-student-rights-law-triggers-sharp-5170072.php>; see also Debra Cassens Weiss, *Transgender Students in California May Use Restrooms Based on Gender Identity Under New Law*, ABA JOURNAL (August 14, 2013), available at http://www.abajournal.com/news/article/transgender_students_in_california_may_use_restrooms_based_on_gender_identi (“State law already prohibits discrimination on the basis of gender identity, but supporters of the new law say it is designed to provide extra clarity.”).

facilities consistent with his or her gender identity, irrespective of the gender²⁰ listed on the pupil's records."²¹ This law was enacted to give transgender individuals the same freedom shared by other students: the ability to be comfortable when participating on a sports team, or while using the restroom or locker room.²²

But the bill turned law has been attacked from its very inception. The Pacific Justice Institute (PJI) tried to get the bill rejected during the legislative process by circulating a petition to constituents opposing the enactment into law.²³ When that failed, PJI encouraged parents to sign letters stating that their child's privacy rights would not be overridden simply because transgendered students wanted to use the bathroom of their choice.²⁴ It even began to solicit potential plaintiffs for a lawsuit challenging the law in court.²⁵ In addition to the efforts of the PJI, a group called Privacy for All Students is seeking to repeal the law through California's ballot initiative process.²⁶ This initiative has garnered the support of the California Republican Party.²⁷ The group has also proposed

²⁰ The actual law uses the term gender, but the drafters probably meant sex. *See* CAL. EDUC. CODE §221.5(f) (2013).

²¹ *Id.*

²² This Note is solely on the topic of bathroom use and transgender students. Although the California statute also includes locker rooms and sports teams, neither will be discussed herein.

²³ The PJI run website, www.genderinsanity.org, used to list various ways in which a person could help to stop AB 1266 from turning into law. However, the website was updated to reflect the passage of the bill into law and, thus, no longer lists them. *The School Bathroom Bill (AB1266)*, PACIFIC JUSTICE INSTITUTE, <http://www.pacificjustice.org/ab1266.html>.

²⁴ *Notice of Reasonable Expectation of Privacy*, PACIFIC JUSTICE INSTITUTE, <http://www.pacificjustice.org/notice-of-reasonable-expectation-of-privacy.html>.

²⁵ The President of PJI, Brad Dacus said, "We at Pacific Justice Institute stand ready and willing to defend anyone who will be victimized as a result of this new law. That includes someone whose privacy rights are violated in the bathroom, in the locker room, in the showers..." <http://www.pacificjustice.org/1/post/2013/08/breaking-gov-brown-signs-school-bathroom-bill-into-law.html>.

²⁶ Beau Yarbrough, *Conservatives Plan Ballot Initiative to Combat California's New Transgender Law*, HUFFINGTONPOST.COM (Sept. 14, 2013 1:37 PM) http://www.huffingtonpost.com/2013/09/14/california-transgender-ballot-initiative_n_3926247.html.

As of November 12, 2013, opponents of the law had gathered approximately 620,000 signatures. *See California Referendum on AB 1266, Transgender Student Participation Based on Gender Identity* (2014), [available at http://ballotpedia.org/California_Referendum_on_AB_1266,_Transgender_Student_Participation_Base_d_on_Gender_Identity_\(2014\)](http://ballotpedia.org/California_Referendum_on_AB_1266,_Transgender_Student_Participation_Base_d_on_Gender_Identity_(2014)). Only 487,484, however, were found to be valid. Thus, the measure missed the threshold mark by approximately 17,000 signatures. Melanie Mason, *Measure to Block Transgender Student Law Fails to Make Ballot*, LA TIMES (Feb. 24, 2014) <http://www.latimes.com/local/political/la-me-pc-transgender-student-initiative-20140224,0,68994.story#axzz2uYqjahqo>. This means for the time being, that the measure is safe.

²⁷ Zack Ford, *California Republican Party Endorses Anti-Transgender Discrimination*, THINKPROGRESS.ORG (Oct. 7, 2013) <http://thinkprogress.org/lgbt/2013/10/07/2740571/california-republican-party-endorses-anti-transgender-discrimination/>.

a second ballot initiative called the “Personal Privacy Protection Act.”²⁸ This Act, which would “require 365,880 signatures to make the ballot”²⁹ in 2016, would “mandate people in government buildings [to] use facilities in accordance with their biological sex.”³⁰ Furthermore, it would allow any affected person to sue for, and recover, “in no case less than \$4,000.”³¹ The main objection from the group, as their name implies, is that the California law sacrifices the privacy rights of the majority of students to allow a few transgendered students to feel more comfortable.³²

This Note argues that allowing transgender students the ability to use the bathroom of their gender identity is both necessary and crucial to allowing transgender students to flourish in school. However, this Note explains that in the current landscape, based on the current decisions, the California law infringes on the right to privacy of the other students. To combat this possible challenge to the newly enacted law, this Note recommends a two-part solution: first, society must begin to become more gender-neutral; and second, courts must modify the definition of sex to include gender identity³³ so that transgender students will have the right to choose the bathroom that makes them most comfortable.

Part I of this Note focuses on how sex, gender, and, more specifically, transgender are defined. These definitions demonstrate that a change³⁴ to the rule allowing sex-segregation based solely on biological sex is both necessary and inevitable because society’s understanding of gender and sex are expanding in a way that sex-segregation based on biological sex no longer makes sense. Part II recounts the history behind sex-segregated

²⁸ Zack Ford, *Bathroom Police Could Collect \$4,000 Bounty Under New California Ballot Initiative*, THINKPROGRESS.ORG (Apr. 20, 2015) <http://thinkprogress.org/lgbt/2015/04/20/3648783/california-transgender-bathroom/>.

²⁹ Christopher Cadelago, *California Transgender Bill Spurs Initiative for Bathroom Privacy*, THE SACRAMENTO BEE (Apr. 20, 2015) <http://www.sacbee.com/news/politics-government/capitol-alert/article19064163.html>.

³⁰ See *supra* note 29.

³¹ See *supra* note 28.

³² *Supra* note 26 “We just feel like it’s a privacy issue and a law that’s going to cause a lot of trouble.”

³³ Courts have continually held that transgendered individuals cannot use the bathroom of their choice because there is a right to be in a bathroom only with people of your own sex. Therefore, the only way to allow transgendered individuals to use the bathroom of their gender identity is to modify the court’s definition to include gender identity in the definition of sex. Another way to think about this is that the court should begin to hold that people have a right to be in bathrooms only with those of the same gender and gender identity.

³⁴ The reason that a change is necessary is because the definition of sex used by the courts is too narrow and limiting for what the term actually encompasses. In order to encompass all the people who should be allowed under the headings of “male” and “female”, the courts need to begin to use the term gender.

bathrooms and the public policy rationales used to keep them in place. Part III examines the current laws governing the right to privacy and concludes that the California law violates the right of privacy of other students. Part IV discusses that since a court could rule that there has been an infringement upon the right of privacy of other students the School Success and Opportunity Act is not narrowly tailored to further any compelling governmental interest. Finally, Part V proposes that to allow transgendered children the right to use the bathroom of their gender identity, society needs to become more gender neutral and, to begin the process, bathrooms need to be re-envisioned as a place encompassing all genders and not just one sex. As such, courts should move to a gender identity model and away from a biological sex or medical model.³⁵ This would mean that courts would have to adopt the emerging societal view that gender is more than just the genitals you are born with: it is how a person expresses themselves, regardless of whether it conforms to gender norms.

I. GENDER, SEX, AND TRANSGENDER: THE EVER-EVOLVING DEFINITIONS OF SOCIETY'S MOST DELICATE TERMS.

Generally, society seems to use the terms gender and sex interchangeably. It is not rare to see forms and articles and hear everyday conversation in which the terms are used in ways that indicate that they are essentially equivalent.³⁶ However, this is untrue and there are distinct differences between the two. As such, this Note will draw a distinction between biologically and medically defined sex and the social construct, gender.³⁷ Therefore, it is necessary to define the terms to differentiate their uses.

At first glance, it might seem that the mutability of the characteristics³⁸

³⁵ The medical model is one that the courts have used in conjunction with transgendered individuals. It attempts to define transgenderism solely by its psychological disorder, gender identity disorder (now called gender dysphoria). The various models will be explained in more detail later in the Note.

³⁶ See e.g., Milton Diamond, *Sex and Gender are Different: Sexual Identity and Gender Identity are Different*, *Clinical Child Psychology & Psychiatry* (July 2002).

³⁷ "For instance, Mary Anne C. Case defines sex as 'the anatomical and physiological distinctions between women and men' and gender as 'the cultural overlay on those anatomical and physiological distinctions.'" Dylan Wade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 261 (2005).

³⁸ Characteristics in this sense mean what society associates with sex or gender. For sex, this includes, but is not limited to, the sexual organs and the secondary sex characteristics that accompany them. For gender, it includes, but is not limited to, the cultural roles played by the different genders.

associated with the term is what distinguishes sex and gender. Generally, sex is seen as being largely immutable because it deals with a person's genitalia.³⁹ In this regard, a person can only be male (i.e. one with a penis) or female (i.e. one with a vagina). Using this definition, the only real way to change your sex is to have sex reassignment surgery (SRS).⁴⁰ On the other hand, gender is more malleable; it is a fluid social construct that can be more easily changed by the individual.⁴¹

However, this definition oversimplifies the two terms and confines them to narrow and rigid boxes. Both sex and gender can be, and should be, looked at on a continuum. Sex and gender both have the same extremes. However, differences emerge when it comes to what is in the gray area between the two endpoints. On the sex continuum, there are many factors that determine where one lies on the spectrum: genetics/chromosomes, gonads, internal reproductive morphology, external reproductive morphology, hormones, and secondary sex features.⁴² Here, the middle ground is populated by people who are intersex.⁴³ In the realm of gender, however, this middle ground is a bit murkier than its sex counterpart and, thus, a little bit more difficult to classify.

The gender spectrum⁴⁴ consists of everything from those who are transgender to those who are "masculine women"⁴⁵ or "effeminate men"⁴⁶ to those who consider themselves "gender neutral."⁴⁷ Adding to the

³⁹ Merriam Webster defines sex as "either of two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." *Sex Definition*, MIRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/sex>.

⁴⁰ This is when a person goes through physical changes to match the sex with which they identify. It can include changing the actual organs on the body as well as hormone therapy to induce some of the changes naturally.

⁴¹ Merriam Webster defines gender as "the behavioral, cultural, or psychological traits typically associated with one sex." *Gender Definition*, MIRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/gender>; see also, James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 378 (2009).

⁴² Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, *supra* note 37, at 280.

⁴³ An intersex person is someone who has an anatomy that is not considered typically male or female. INTERSEX SOCIETY OF NORTH AMERICA, *What is Intersex?*, http://www.isna.org/faq/what_is_intersex.

⁴⁴ It is worth noting that gender has nothing to do with sexual orientation. Thus, classifications such as asexual, demisexual, heterosexual, gay, lesbian, or bisexual are not found on this continuum.

⁴⁵ A "masculine woman" is a female-bodied individual who exhibits qualities typically associated with a man. These qualities can include physical strength, conforming to male gender roles and dressing in clothing associated with men.

⁴⁶ An "effeminate man" is a male-bodied individual who exhibits qualities more often associated with feminine nature and female gender roles.

⁴⁷ Gender-neutral individuals should be distinguished from people who identify as "queer." A

complication that gender brings is that even within categories, people might be different. For instance, one of the terms that will be used frequently throughout this Note is transgender. According to the Human Rights Campaign, the term transgender encompasses a broad spectrum of individuals “who experience and/or express their gender differently from what most people expect—either in terms of expressing a gender that does not match the sex listed on their birth certificate or physically changing their sex.”⁴⁸ This basic definition shows how broad the category is because it encompasses both those who express themselves in a manner that defies gender norms and those who have undergone sex reassignment surgery. To distinguish the two, some theorists have described the former as a “part time” transgender⁴⁹ and the latter as a “full time” transgender.⁵⁰

To add to the confusion, there is also the term transsexual, which is different than transgender. A transsexual is a “person who does not identify with the sex they were assigned at birth and wishes, whether successful or not, to realign their gender and their sex through the use of medical intervention.”⁵¹ Thus, transsexual is a more specific term that deals solely with those who want to go through sex reassignment surgery.⁵² In contrast, transgender is an umbrella term encompassing a wider variety of individuals who do not conform to the gender binary, including those that are transsexual.

“queer individual” is someone who has a gender, but does not adhere to the gender binary system. Instead, they fall somewhere in between the two extremes. In contrast, a gender-neutral individual does not have a gender.

⁴⁸ HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions>.

⁴⁹ Courts have decided cases involving transgendered individuals based on whether or not the individual has had sex reassignment surgery. However, no court has explicitly explained that the term, “part time” transgendered person, has affected its decision. Even if the courts have not used the terminology “part time” and/or “full time,” the distinction is still unfortunate because it assumes that when someone does not seek to change their sex, they are less than someone who has changed their sex. These terms are rarely used within the transgender community.

⁵⁰ The reason for this type of labeling is that someone who has gone through sex reassignment surgery has taken a step to make it permanent. In effect, there is no way to turn back or to not be the gender that you profess. In contrast, the part time transgendered person could in fact go the other way. AMERICAN PSYCHOLOGICAL ASSOCIATION, *Answers to Your Questions About Transgender Individuals and Gender Identity*, <http://www.lgbt.ucla.edu/documents/APAGenderIdentity.pdf> (2006).

⁵¹ DIFFEN, *Transgender* vs. *Transsexual*, http://www.diffen.com/difference/Transgender_vs_Transsexual (last visited Oct. 30, 2015).

⁵² Also called Gender Reassignment Surgery, SRS is a group of surgeries that alters an individual’s sex. For male-to-female patients, this includes removal of the testicles and reconstructing the penis into a vagina. For female-to-male patients, this includes a mastectomy and a hysterectomy. The surgery is generally followed by hormone treatment. UNIVERSITY OF CALIFORNIA LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX ASSOCIATION, *Transgender Health Care at the University of California*, http://out.ucr.edu/docs/uclgbtia_historicaldocs.pdf (1991-2013).

With the confusion about where someone lies on the gender continuum and what terms⁵³ are proper, it should come as no surprise that courts have shied away from using them. Instead, courts tend to focus more on sex because there are only two major categories: male and female.⁵⁴ Thus, historically courts have based decisions on biological sex and medical definitions rather than gender identity.⁵⁵

A. Transgender Definition #1: The Biological Model

When courts adhere to a biological model, they look at both gender and sex in a strictly biological sense.⁵⁶ Within this model, the assumption is that someone who is male will identify as masculine and that someone who is female will identify as feminine.⁵⁷ This assumption allows courts to term those whose gender performance does not fall into this dichotomy as “diseased” or someone who is shunning nature.⁵⁸ Since people who fall outside the binary are classified as making a choice to shun nature, they are not extended the same rights as those people with immutable characteristics. For instance, many transgender people have tried to bring a sex discrimination claim under Title VII. Their argument is that they were fired due to their classification as transgender and that Title VII protects them. Although a claim can stand if brought because the person did not conform to sex stereotypes,⁵⁹ courts have used the biological model to deny the transgendered this avenue for protection. The courts have reasoned that Title VII protects only those characteristics that are immutable.⁶⁰ Since

⁵³ For instance, when it comes to pronouns, transgendered individuals normally use the pronoun that matches their gender identity rather than their biological sex. However, for many people, this is counterintuitive because when you see someone who was born biologically male, you automatically call that person “he.” Thus, even the simplest of terms can be more complicated when it comes to transgendered individuals.

⁵⁴ This was the traditional belief. As noted earlier, INTERSEX SOCIETY OF NORTH AMERICA, *supra* note 43, there are people who also do not fit neatly into the male/female dichotomy.

⁵⁵ The use of biological sex, as the basis for a decision, has been deemed the “biological model,” and the use of medical definitions has been coined, the “medical model.”

⁵⁶ This has been the model that has been most widely embraced by the courts. See Franklin H. Romeo, *Beyond a Medical Model: Advocating For a New Conception of Gender Identity in the Law*, 36 COLUM. HUMAN RTS. L. REV. 713, 719 (2005).

⁵⁷ *Id.*

⁵⁸ Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 899 (2006-2007).

⁵⁹ Price Waterhouse v. Hopkins, 490 U.S. 228, 302 (1989).

⁶⁰ ROMEO, *supra* note 56, at 721. Although religion, which is largely mutable, is also within the ambit of Title VII, this is a special case. When Congress amended Title VII in 1972, it explicitly stated that religion was included. Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453,

transgender individuals have chosen to go against nature and identify opposite to their birth sex, male or female, this choice cannot be protected.⁶¹

B. Transgender Definition #2: The Medical Model

The medical model is less strict because it allows courts to determine that gender is more of an immutable characteristic and thus claims might be actionable under Title VII.⁶² The model's main distinction from the biological model is that it defines any change in gender through gender dysphoria.⁶³ The problem with this definition is that it classifies those who do not conform to a set gender identity as diseased to deny them protection under the law. Thus, the medical model defines transgender individuals as inherently irregular. Even though they are gaining some rights (such as the potential to sue under Title VII), this definition fails to offset the feeling of inadequacy that comes from the courts describing them as irregular.

Interestingly, the U.S. Supreme Court has used a medical model approach when analyzing transsexual and transgender issues. In *Farmer v. Brennan*, the Court defined a transgender/transsexual individual as "one who has a rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex and who typically seeks medical treatment, including hormonal therapy, and surgery to bring about a permanent sex change."⁶⁴ Aside from the problem with classifying transgenderism as a disease, many transgendered individuals do not seek medical treatment and live with the same biological parts with which they were born. In essence, the Court seems to define "transgendered" as a desire to change your sex and gender.

C. The Transgender Models and Children

The two models described above are applicable not only to adult transgender individuals, but also to children in grades K-12. The purpose of the models is to provide a guide for the courts to rule on the legal status of transgendered people. The analysis does not turn on whether or not there are children involved, but rather whether the transgender person should be

455 (2010). The same cannot be said for transgenderism.

⁶¹ Romeo, *Beyond a Medical Model*, *supra* note 56.

⁶² *Id.* at 724.

⁶³ *Id.*; for a discussion on the term "gender dysphoria", see *supra* note 4.

⁶⁴ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

afforded rights based on his or her status as a transgendered individual.

The biological model applies to children in the same ways it applies to adults. Since the court is simply looking at what a person's biological sex is according to birth records, there is no reason why it would not be applicable to children.

Also, the medical model can be applied to children. Although the medical model is perhaps more applicable to people after they have reached the age of puberty, the model still applies to children. While SRS is generally not an option until the child turns eighteen, there are still other options available to younger transgender children. Most notably, children can undergo hormone therapy at the age of sixteen.⁶⁵ Since, presumably, a child will still be in school at the age of sixteen, the medical model is applicable. Furthermore, there are also medical options that begin even earlier in the child's development. Recently, doctors have begun to administer gonadotropin-releasing hormone analogs, more commonly referred to as puberty blockers,⁶⁶ in children as young as nine.⁶⁷ Thus, the medical model is applicable to children at this young an age.

However, no matter which model the Court decides to follow there will be problems. Chief among these problems is that a transgender child seeking to use the bathroom of his or her gender identity will have to overcome the right to privacy of the other potential occupant's of the restroom.

II. HISTORY AND PUBLIC POLICY

The history of sex-segregated bathrooms and facilities⁶⁸ is inextricably linked to public policy and the ideals of society as they change through the decades. Segregating bathrooms by sex is something that most people take

⁶⁵ Green, *supra* note 4, at 4.

⁶⁶ Puberty blockers (also known as puberty inhibitors) "suppress the production of sex hormones (testosterone and estrogen) thereby preventing the development of undesired secondary sexual characteristics." Johanna Olson, *Puberty Blockers*, TRANSFORMING FAMILY, available at <http://transformingfamily.org/pdfs/Puberty%20Blockers.pdf>.

⁶⁷ The puberty blockers are generally administered when a child reaches "Stage 2 of growth as indicated in the Tanner scale of physical development." The reason is that none of the physical developments have happened yet and it allows the child to make certain that they do not begin before the age in which the child can make a decision. Normally this stage is reached at eleven for girls and thirteen for boys, but can begin as early as nine. *Id.* at 5.

⁶⁸ Although, as stated earlier, this Note only concerns itself about bathrooms, the histories of other facilities might be useful as an analogy to how society is slowly changing when it comes to sex-segregated bathrooms. For instance, the YMCA used to have swimming pools that were sex-segregated because bathing suits were not required.

as normal, commonplace, and quite natural. However, bathrooms were not always sex-segregated in the United States.⁶⁹ It was not until 1887 that laws requiring sex-segregated bathrooms emerged.⁷⁰ The laws came as a direct response to the increase in female participation in the workforce as lawmakers were trying to protect the health and safety of women outside the home.⁷¹

But, the change was rapid. The first state to pass a sex-segregated bathroom law was Massachusetts. Within 35 years, restrooms were sex-segregated in 43 states.⁷² Since bathrooms were not the product of natural societal processes, but rather of laws mandating them, there have been attempts to rationalize the continuing existence of sex-segregated bathrooms. Throughout the years, there have been four major public policy arguments that have been furthered to justify keeping sex-segregated bathrooms: protection, cleanliness,⁷³ privacy⁷⁴ and morality.⁷⁵

In this section, only protection and morality will be discussed. The first historical public policy concern supporting sex-segregated bathrooms is protection, most notably of women. The argument is that by allowing men into women's bathrooms (and conceivably vice versa) there is a greater probability that there will be an increase in predation⁷⁶ by men against women.⁷⁷ Although this presumption might rest upon old stereotypes and

⁶⁹ In fact, in Britain, women did not have access to public bathrooms until the first women's lavatory was established in Victorian London in 1905. Olga Gershenson, *The Restroom Revolution: Unisex Toilets and Campus Politics*, SELECTED WORKS at 1, available at: http://works.bepress.com/olga_gershenson/3.

⁷⁰ Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 15 (2007).

⁷¹ "An examination of the statutes and related literature makes clear that the toilet laws were aimed at protecting women." *Id.* at 41.

⁷² C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 RUTGERS L. REV. 409, 414 (2009).

⁷³ Alex More, *Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 TEX. J. WOMEN & L. 297, 299-300 (2008) [hereinafter *Coming Out of the Water Closet*] (Over time, male-female biological dichotomy has led to the notion that there is a difference between hygienic practices between men and women. Females have been seen as clean and desirous of a clean bathroom, while men have been seen as dirtier and more willing to tolerate disorder. Because these are opposing ways of keeping a bathroom, this justified maintaining sex segregated bathrooms. Moreover, the creation of urinals and different apparatuses for male and female bathrooms, continued the trend of segregating bathrooms; however, this justification has tempered in recent years and therefore will not be addressed here).

⁷⁴ See *id.* at 300; See also discussion *infra* Part III (discussing privacy at length).

⁷⁵ See *id.* at 301.

⁷⁶ Although this argument stereotypes women as weaker than men, there is no denying the overwhelming majority of statistics that show rape is perpetrated by men against women. See *Sexual Assault Statistics*, ONEINFOURUSA.ORG, <http://www.oneinfourusa.org/statistics.php> (stating that 99% of rapist are men).

⁷⁷ "[S]eparate public restrooms for men and women foster subtle social understandings that women

paternalistic views that women are weaker than men and need to be protected, this does not mean that it is completely incorrect. Also, because all citizens need to be protected while using a public bathroom, the government has a legitimate interest in keeping all of its citizens safe.⁷⁸

Although this is still a legitimate concern, this justification does not hold as much weight when applied to children. In younger children, the threat of boys hurting girls is not nearly as great because puberty has not set in. The only concern would be the risk of bullying, but this concern would be alleviated because schools have security guards and other safeguards already in place. The concern increases when children hit puberty because the increased hormones might lead to some altercations. However, the same safeguards that are in place when children are younger (such as security guards and counselors to help children cope with the devious desires) would still be in place during this time and would once again help to alleviate this concern.

The other public policy concern is morality. Proponents of keeping sex-segregated bathrooms cite to longstanding principles that society's morals indicate that people desire to keep men and women separated in private situations, such as using the bathroom. Furthermore, historically, sex-segregated bathrooms were a response to women becoming more involved in the workplace. Since the laws could not relegate women back to the home and away from the "dangerous public realm", moral concerns dictated that women be given a "protective haven. . .[or, a] home away from home."⁷⁹

Like the other public policy concern, this is still a legitimate concern today. Laws are structured around the ideals and mores of society and are largely dictated by changing social mores.⁸⁰ Social mores surrounding transgender individuals have begun to change as society has become more

are inherently vulnerable and in need of protection when in public, while men are inherently predatory." David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 534 (2010).

⁷⁸ Similarly, this argument allows for the criminalization of murder or abortion in the final trimester of pregnancy.

⁷⁹ More, *supra* note 75, at 301.

⁸⁰ As society changes, so does the laws surrounding the protections and rights given to certain groups. For instance, a decade ago it was unimagined that homosexuals would be allowed to legally marry because society typically understood marriage to be a union between a man and a woman. However, many states now allow same-sex marriage. Similarly, the same can be said for the integration of African Americans into predominantly white schools. Before society's morality changed there was a belief that schools would always be segregated. Now, it is ludicrous to think that schools could ever be that way.

accepting of gender identities outside of the traditional man and woman.⁸¹ However, the morality surrounding sex-segregated bathrooms has changed only slightly.⁸² There is still the moralistic belief that women and men should be separated when it comes to the private practice of using the bathroom. But the historical and moralistic concern of giving a woman a place that is like a home outside the home is less of a concern because women have become more fully accepted into public life and there is less of a belief that women being in public life will lead to their harm

Thus, neither rationale should be a blockade for allowing transgendered children to use the bathroom of their gender identity. However, protection and morality are not the only justifications raised by those in favor of sex-segregated bathrooms. Today, the most difficult obstacle for the elimination of strict adherence to sex-segregated bathrooms is the privacy concerns of others using the bathroom.

III. WHY THE CALIFORNIA LAW AND THE TRANSGENDER COMMUNITY ARE SUSCEPTIBLE TO A RIGHT TO PRIVACY CHALLENGE

For over a century, the right to privacy has been among the most basic rights that a person can enjoy.⁸³ In fact, the right to privacy is so “deeply grounded” in society that Justice Brandeis once remarked that it was “the most comprehensive of rights.”⁸⁴ However, even though it is considered “the right most valued by civilized men,” it is not expressly written in the Constitution.⁸⁵ Instead, the right to privacy has been read into the Constitution in various places.⁸⁶ One place that courts have recognized the

⁸¹ The changes in acceptance of other gender identities are evidenced by children, parents and doctors addressing transgender related issues. As a result of open conversations about transgender issues early on, there has been a growing acceptance of transgender people in society today, where being transgender is not demonized. However, this does not mean that society has fully accepted transgender people or that the thought that identifying as transgender is immoral has completely dissipated. Rather, society has only begun to change, which is the first step to total acceptance and a renewed societal morality.

⁸² This is evidenced by the writing of numerous articles urging society to become more gender neutral. While there is a contingent who are trying to advocate for this position (more than ever before), this position has not become the norm.

⁸³ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ The first place that courts have found the right to privacy to exist is as a derivative of the Fifth and Fourteenth Amendments’ guarantee of substantive due process. *Whalen v. Roe*, 429 U.S. 589, 598 (1977). Substantive due process is a doctrine that allows the Court to protect certain unenumerated rights under the authority of the Fifth and Fourteenth Amendments. *See e.g.*, *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring). The other place that the right to privacy is found is in the

right to privacy is in the First Amendment.

The first major case in which the Supreme Court recognized the right to privacy in the First Amendment was in *Griswold v. Connecticut*.⁸⁷ In this case, the executive and medical directors of the Planned Parenthood League of Connecticut were convicted under a statute that made the use of contraceptives a criminal offense.⁸⁸ The Court concluded that “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”⁸⁹ As such, the Court reversed the defendants’ conviction on the grounds that the Connecticut statute was unconstitutional.⁹⁰ Ever since the creation of the right, courts have continued to extend it to include more disparate circumstances. The right to privacy has become so “comprehensive” that it has been found to exist in places where intuition might dictate otherwise, such as prisons and public places.⁹¹

The right to privacy is not one single right, but rather encompasses multiple, distinct rights. The right to privacy includes informational and decisional privacy.

“Informational privacy” is the fundamental right to control the dissemination of personal matters.⁹² As such, many courts have renamed it the right to confidentiality. Not all information has been classified as being protected by this privacy right. The standard is that “a particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity.”⁹³ Thus, the right

Fourth Amendment. *See* *Roe v. Wade*, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting) (stating that the Fourth Amendment embodies a right to privacy).

⁸⁷ *Griswold* and its progeny all included issues that were in the public eye and revolved around balancing societal morality with individual and family’s rights to control and make intimate decisions free from interference from the state. The same can be said for transgender rights today. The issue of what bathroom a transgender child is allowed to use has become a national issue ever since the Coy Mathis story. Furthermore, there is a need to balance society’s view that bathrooms should be sex-segregated with the transgender child’s right to make one of the most intimate of decisions, which bathroom to use, free from the interference of the law.

⁸⁸ Although the directors did not take contraceptives themselves, they were charged under another statute, which stated that “any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

⁸⁹ *Id.* at 483.

⁹⁰ *Id.* at 486.

⁹¹ The very nature of prisons is that they are restrictive of most rights. However, even in this setting, courts have held that a right to privacy exists. *See* Kelly Levy, *Equal, But Still Separate?: The Constitutional Debate of Sex Segregated Public Restrooms in the Twenty-First Century*, 32 *WOMEN’S RIGHTS L. REP.* 248, 277.

⁹² *Pettus v. Cole*, 49 Cal. App. 4th 402, 440 (1996).

⁹³ *Ortiz v. L.A. Police Relief Ass’n*, 98 Cal. App. 4th 1288, 1302 (2002).

includes⁹⁴ the ability to withhold medical information, including about transsexualism; the ability to withhold information about sexual preference; and the ability to withhold photographs of one's own nude body.⁹⁵ It is worth noting, the right to privacy with respect to transsexualism extends only to the medical information about transsexualism, such as the procedures that have been undertaken to become a transsexual. The simple fact of being transsexual is not private, but rather the medical information underlying the process is private.⁹⁶

“Decisional privacy” is the right to have autonomy and independence in decision-making for personal matters.⁹⁷ More specifically, individuals have a privacy interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.⁹⁸ The right to autonomy has never been recognized in a general sense, although there have been multiple attempts to persuade the courts to do so.⁹⁹ Instead, courts frequently hold the right is applicable only to protect the privacy of family, marriage, motherhood, procreation, child rearing, and sexual intimacy.¹⁰⁰

For instance, in *Roe v. Wade*, an unmarried pregnant woman wanted to terminate her pregnancy by abortion, but was denied the right via a Texas criminal statute.¹⁰¹ The Court held that the Texas statute was unconstitutional because it violated a woman's right to privacy in deciding whether to terminate her pregnancy.¹⁰² The Court upheld the right because “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”¹⁰³ However, the Court did conclude that the right to privacy was not absolute and could be limited by the State because the State has a

⁹⁴ This list is not all-inclusive, but rather is a sample of the sorts of information that courts have concluded fall under the ambit of informational privacy.

⁹⁵ *Kastl v. Maricopa County Cmty. College Dist.*, 2004 WL 2008954 (D. Ariz. 2004).

⁹⁶ *Doe v. USPS*, 1985 U.S. Dist. LEXIS 18959, *11 (D.D.C. 1985) (stating that “plaintiff has no special right of privacy as a transsexual”).

⁹⁷ *Whalen*, 429 U.S. at 599-600.

⁹⁸ *Pettus*, 49 Cal. App at 440.

⁹⁹ See *Personal Autonomy*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/personal_autonomy (last visited Mar. 11, 2016); see also *Katz v. United States*, 389 U.S. 347, 350 (1967).

¹⁰⁰ See *Personal Autonomy*, *supra* note 99; see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that criminal convictions for adult consensual sexual intimacy in the home violated the privacy protections of the Due Process Clause).

¹⁰¹ *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

¹⁰² *Id.* at 154.

¹⁰³ *Id.* at 169 (Stewart, J., concurring)

legitimate interest in protecting potential life.¹⁰⁴

Furthermore, the right to privacy was extended to include sexual intimacy within the home by the Court's decision in *Lawrence v. Texas*.¹⁰⁵ In this case, police, responding to a weapons disturbance, entered into a man's apartment and found him engaged in anal sexual intercourse with another man.¹⁰⁶ This ran afoul of a Texas statute that made it a crime to engage in homosexual sodomy.¹⁰⁷ The Court determined that "these matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."¹⁰⁸ Thus, the Court held that this law was unconstitutional because it violated an individual's right of privacy in making decisions regarding his or her private sexual life.¹⁰⁹

Finally, in *U.S. v. Windsor*, the Court held that the Defense of Marriage Act¹¹⁰ was unconstitutional because it deprived homosexual persons of equal liberty under the Fifth Amendment's Due Process Clause.¹¹¹ Although the Court did not specifically speak about the right to privacy, the right is implied within its final ruling. The Court's conclusion states that "the Fifth Amendment . . . withdraws from Government the power to degrade or demean in the way this law does."¹¹² Inherent in this statement is that governments cannot pass laws that interfere with a person's right to make intimate choices, such as whom to marry.

All of these cases stand for the principle that the right to autonomy is applicable in situations involving either personal choices that are either (1) personal choices of such an intimate nature (such as having a child) that they should be free from government intervention or (2) personal choices that the Court deems to be central to a person's personal dignity. In the case of transgender children seeking to use the bathroom of their gender identity, this choice might be covered under the rule set forth in *Lawrence*. While it is obvious that the right to choose which bathroom you use is not

¹⁰⁴ *Id.* at 156.

¹⁰⁵ *Lawrence*, 539 U.S. 558.

¹⁰⁶ *Id.* at 563.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 574.

¹⁰⁹ *Id.* at 578 ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.")

¹¹⁰ This Act defined marriage as "only a legal union between one man and one woman as husband and wife." 1 U.S.C.S. §7.

¹¹¹ *U.S. v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

¹¹² *Id.* at 2695.

on the same level as choosing whether to have a child, it should be considered so enmeshed with a person's dignity that it falls within the ambit of *Lawrence*. A person decides which bathroom to use based on where he or she firmly believes he or she belongs. It is a choice that implicates a person's "own concept of existence" and as such should be covered under the auspices set by the Court.¹¹³

However, there is another step before a court determines that a right to autonomy cannot be limited through government intervention. *Roe v. Wade* and its progeny indicate that there is also a balancing test that must accompany any right to privacy inquiry.¹¹⁴ The right to privacy affords individuals an allowance in determining certain intimate decisions free from state interference. This right is constrained only when it would interfere with some other legitimate interest, such as the potential life of an unborn, viable child.¹¹⁵

As such, the right to privacy is not absolute.¹¹⁶ Rather, it can be restricted if the Court finds that the government has a compelling interest in the restriction and that the law is narrowly tailored to meet that goal.¹¹⁷ Thus, it is insufficient for an opponent of a law to merely say that the law infringes upon the right to privacy, but rather the opponent needs to show that the law is restrictive for no compelling reason.

A. Right to Privacy: Bathrooms and Transgender Children

The protections afforded by the right to privacy change depending upon the circumstances. Most notably, protection is at its strongest when the right to privacy concerns conduct that takes place within a person's private residence.¹¹⁸ However, this does not mean that the right is simply found in private places; rather quite the opposite is true. Courts have almost

¹¹³ *Lawrence*, 539 U.S. at 574. Unfortunately, as discussed in more detail below, *infra* Part III.A, courts are probably not going to extend coverage to a transgender individual's bathroom choice.

¹¹⁴ See *e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring)(stating that "limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest).

¹¹⁵ See *Lawrence*, 539 U.S. at 583 (holding that moral disapproval is not a legitimate state interest to justify criminalizing homosexual sodomy as opposed to heterosexual sodomy).

¹¹⁶ *Hill v. National Collegiate Athletic Assn*, 7 Cal. 4th 1, 37 (1994) ("Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part").

¹¹⁷ *Casey*, 505 U.S. at 871.

¹¹⁸ See *e.g.*, *Lawrence*, 539 U.S. 558 (2003) (concluding that a law making it a crime to have gay sex in your own house is unconstitutional).

unanimously held that the right to privacy extends beyond the four walls of the house and into certain public forums.¹¹⁹ Chief among these is a public restroom.¹²⁰ The main privacy interest in a public bathroom is to be free from intrusion by the opposite sex.¹²¹ The reason for this privacy interest is that a reasonable belief exists that a member of the opposite sex will not be present in a sex-segregated bathroom.

The belief that a member of the opposite sex will not be present in a public bathroom is so fundamental it could be a viable reason to deny someone a job.¹²² In *Hernandez v. University of St. Thomas*, a public school denied a male custodian worker a job because it would have required him to work in the woman's dormitory.¹²³ The main issue before the court was whether sex is a bona fide occupational qualification because of privacy concerns.¹²⁴ The court held that there was a genuine issue of material fact as to whether custodial work allowed for a sex-based hiring policy.¹²⁵

Since the right to be free from the opposite sex in a public bathroom is so entrenched in society, it has been a battleground for transgender rights.¹²⁶ Opponents of laws allowing transgender rights normally deride the purported legislation as merely being a "bathroom bill".¹²⁷ In one particular case, a bill in Massachusetts sought to add the transgendered as a protected class under a nondiscrimination law.¹²⁸ However, opponents fought the

¹¹⁹ Levy, *Equal, But Still Separate?: The Constitutional Debate of Sex Segregated Public Restrooms in the Twenty-First Century*, *supra* note 97 at 278 (discussing various cases in which courts have held that a right to privacy exists outside the home).

¹²⁰ *Rosario v. United States*, 538 F. Supp. 2D 480, 497 (D.P.R. 2008).

¹²¹ Courts have held that this right exists regardless of whether it is a male walking into a female bathroom or vice versa. *Compare* *Norwood v. Dale Maintenance Systems*, 590 F. Supp. 1410, 1417 (N.D. Ill. 1984) *with* *Brooks v. ACF Indus.*, 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982).

¹²² *See also* *Norwood* 590 F. Supp. at 1416 (N.D. Ill. 1984) (reasoning that "[i]n certain situations the privacy rights of individuals justify sex-based hiring by an employer").

¹²³ 793 F. Supp. 214, 215 (D. Minn. 1992).

¹²⁴ A bona fide occupational qualification (BFOQ) is a job qualification that relates to the "essence, . . . or to the central mission of the employer's business." A BFOQ analysis is undertaken during a Title VII claim, but also includes privacy consideration. *Id.*

¹²⁵ *Id.* at 218.

¹²⁶ One reason that this is particularly true is that in most cases where bathroom usage is an issue, the opponent generally attacks not only bathroom usage, but other rights as well. For instance, in *Etsitty v. Utah Transit Authority*, the defendant argued that by giving the transgendered worker access to the bathroom of her choice, it would be like giving, "a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditch diggers to strip to the waist in hot weather." Brief of Appellees at 32.

¹²⁷ *See Fox News Gins Up "Bathroom Bill" Fears To Dismiss Protections For Transgender Students*, <http://www.glaad.org/news/video-fox-news-gins-%E2%80%9Cbathroom-bill%E2%80%9D-fears-dismiss-protections-transgender-students>.

¹²⁸ Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE

inclusion of a protected transgender class by alleging that the law would allow “any man [to] legally gain access to facilities reserved for women and girls by indicating, verbally or non-verbally, that he inwardly feels female at the moment.”¹²⁹ Afraid that this scenario could come true, the public stopped the law from being signed.¹³⁰

Based on the logic that the public does not want to endure possible misuses of the bathroom, there has been a tendency among courts to force transgender people to adhere to their biological sex and to disregard their gender identity when going to public restrooms. However, the problem with this is that many transgendered people have changed their whole lives and present completely as the gender with which they identify.¹³¹ In quotidian fashion, many will dress like the other gender and conform to every other marker of gender conformity. The only marker that would make them different is their genitals, which are not visible from the outside. It would be very uncomfortable for them to have to walk into a bathroom of people of the opposite gender; in essence, it would be the equivalent of sending a woman into the men’s room and vice versa. It might even be uncomfortable for other people in the bathroom because they would have all the indicia of the opposite sex. But, even with this consideration, courts have generally held one of two ways: (1) the transgendered person can use the bathroom only of their biological sex or (2) they can use a single person bathroom.

The closest a court has come to ruling in favor of the transgendered person is in *Cruzan v. Special School District #1*. In that case, Cruzan, a school teacher, brought a claim under the Minnesota Human Rights Act alleging that the school district discriminated against her on the basis of sex by allowing a transgendered coworker to use the women’s restroom.¹³² The court held that Cruzan did not establish a claim for either hostile work environment or employment disadvantage because there were other bathroom options available for her to use.¹³³ Furthermore, she even stated

UNIV. L.R. 133, 141 (2010).

¹²⁹ They also argue that “there is no way to distinguish between someone suffering from Gender Identity Disorder and a sexual predator looking to exploit this law. This is the dangerous reality of this bill.” The opponents even created a website with a video of some man following a young girl into the bathroom to prove their point. *Id.* at 142.

¹³⁰ Compare these tactics with those of the Pacific Justice Institute. *See supra* notes 22-32 and accompanying text.

¹³¹ While most transgender individuals do not seek to change their sex through surgery, many of them do present themselves in ways that are often associated with the opposite sex.

¹³² 294 F. 3d 981, 982 (8th Cir. 2002).

¹³³ *See id.* at 984.

that she did not routinely use the bathroom that she saw the transgendered coworker exit.¹³⁴ In essence, the transgendered coworker's presence in the bathroom did not affect her in anyway except possibly as a "mere inconvenience."¹³⁵

However, the *Cruzan* ruling does not explicitly state that a transgendered individual has a right to use the bathroom of his or her choice. Instead, it concludes that the actions alleged by Cruzan did not constitute a hostile work environment.¹³⁶ This distinction is pertinent because the court could have simply declared that a person using the bathroom of their gender identity is legal and is never discriminatory. But instead the court left open the possibility that under a different set of facts having a transgendered person using the bathroom could constitute a hostile work environment.¹³⁷

With the current laws in place, it is very possible that the California law would be found unconstitutional. The law allows transgender students to use the bathroom of their gender identity and not their biological sex. However, many courts have previously held that transgendered people do not have a right to use the bathroom of their choice. For instance, in *Goins v. West Group*, the Minnesota Supreme Court held that designating bathroom use based on "biological gender" rather than "biological self-image" was not discrimination because of "cultural preference".¹³⁸ Even though *Goins* dealt with a Human Rights Law (which is a Minnesota antidiscrimination statute), the reasoning of the court can also apply to the right of privacy. Since it was considered acceptable to require transgender individuals to use sex-segregated bathrooms based on their biological sex due to "cultural preference"¹³⁹, the defense of "cultural preference" could also protect another student's right to privacy. With *Goins* and similar cases as precedent, there would be very little that could help a transgender student defend his or her use of the bathroom of choice against a right of

¹³⁴ *See id.*

¹³⁵ *Id.*

¹³⁶ "To make this showing, Cruzan had to establish the school was 'permeated with discriminatory intimidation, ridicule, and insult.'... We agree with the district court that Cruzan failed to show the school district's policy allowing Davis [the transgendered coworker] to use the women's faculty restroom created a working environment that rose to this level." *Id.*

¹³⁷ Most notably, the court leaves open the possibility that if there were not other bathrooms Cruzan could have used then there might have been a claim that could survive summary judgment.

¹³⁸ *Goins v. West Group*, 635 N.W. 2D 717, 723 (Minn. 2001).

¹³⁹ Cultural preference is a term used to describe how the majority of society views a particular issue. For instance, if the majority of society did not want marriage to include gay marriage, then the cultural preference would be to legally exclude gay marriage.

privacy challenge.¹⁴⁰

B. Right to Privacy: The Problem with the Rulings

Courts that rule that bathroom usage is controlled by biological sex are adhering to precedent. However, this precedent is both outdated as well as inaccurate based on developments in the fields of science and psychology.¹⁴¹ As described before, sex and gender are no longer the clear-cut dichotomy of either male or female.¹⁴² Bodies are not always exclusively male or female because some people fall into the middle of the continuum. For instance, intersex people do not fit neatly into the male or female box. Therefore, past precedent is inapplicable to what bathroom intersex people should use. The same can be said for those who are transgender. There is no set type of transgender. As physical bodies, they range from people who have retained their biological genitalia, but adhere to the norms of the opposite gender, to people who have undergone complete sex reassignment surgery. Transgender individuals are exactly like the gender that they express. Having a rule that varies based on whether a person remains biologically his birth sex or has undergone a surgery or has utilized hormone therapy to develop some of the secondary sex characteristics of the opposite sex may cause confusion in drawing lines. For example, courts would need to continually rule about hormone therapy and how many treatments are necessary to be considered the opposite sex. The possibility for various circuit splits and invasion of privacy of the transgendered person¹⁴³ make this law not only unclear, but also unfair. A law based on the stage of a transgendered person's transition would be a veritable guessing game and, thus, would be antithetical to the court's mission of making the law both transparent and consistent. Therefore, ruling that bathroom choice should be relegated to your biological sex rather than your gender identity is problematic when it is applied to transgender people.

Relegating bathroom usage to biological sex is equally, if not more,

¹⁴⁰ While the cases mentioned do not specifically deal with a right to privacy claim, they can be used as persuasive authority. Furthermore, they show the tendency of the courts to hold in favor of plaintiffs seeking to uphold sex-segregated bathrooms.

¹⁴¹ One way that psychology has come to show that the precedent is inaccurate is in its reclassification of replacing gender identity disorder with gender dysphoria. See Parry *supra*, note 4.

¹⁴² See *infra* Part III.C.

¹⁴³ Transgender individuals would have to potentially divulge the state of their bodies to the courts so that the court could rule on where the individual could use the bathroom. This would be a clear violation of the right to informational privacy. See *generally supra* Part III.

problematic when dealing with children. Although children will probably not be at the age where they have gone through SRS, many will transition in different ways.¹⁴⁴ For instance, there will be transgendered children who begin to mimic the mannerisms of the opposite sex, will dress like the opposite sex, and might even begin to undergo hormone therapy. Thus, much like older transgender individuals, children will also fall into different sections of the gender continuum.

This is problematic because the court would have to arbitrarily draw a line. The biggest issue in allowing the court to do so is that children need to express themselves and feel comfortable, especially in a school environment. An arbitrary ruling would be adverse to this mission.

C. *Right to Privacy: The Problem With Single-Person Bathrooms*

Equally as problematic is requiring transgender students to use single-person bathrooms or staff bathrooms.¹⁴⁵ Although the bathrooms are the same as the sex-segregated ones in the sense that they contain a toilet and a sink,¹⁴⁶ transgendered students may feel like they are being punished and may start to do poorly in school.¹⁴⁷ Also, requiring transgender students to use single-person bathrooms is problematic in that it only “perpetuate[s] gender stereotypes and discriminatory behavior” by singling them out as an “other group”.¹⁴⁸

¹⁴⁴ See generally *supra* Part I.C. for a discussion on the various medical therapies available to children of various ages; Furthermore, although it might be difficult for some children to get consent for the medical therapies described (hormone therapies and puberty blockers) in many cases a parent will acquiesce to the child’s desires for three reasons: (1) when they realize that the transgender child is not going through a phase and is persistent in desiring the change, (2) when they realize that gender transition is not “frivolous or elective”, but rather necessary, and (3) in some instances when the transgender children begins to exhibit self-destructive tendencies when not allowed to get the hormone therapies. Although several different parents were initially apprehensive, they all allowed their children to get the hormones or puberty blockers. See Green, *supra* note 4.

¹⁴⁵ Single-person bathrooms are different than gender-neutral bathrooms. A single-person bathroom is one that can only be occupied by one person at a time and is generally unisex. However, a gender-neutral bathroom only has stalls and no urinals. It is communal and allows anyone of any gender to enter.

¹⁴⁶ There might even be a claim that forcing transgendered people to use single person bathrooms in lieu of the bathroom of his choice might be akin to the issues set forth in *Plessy v. Ferguson*. See 163 U.S. 537 (1896). This claim would be especially pertinent if the bathrooms differed in some qualitative way, such as one being cleaner or larger than another.

¹⁴⁷ An example of some of the adverse effects of forcing transgendered youths to be their biological sex is seen in the experiences of Eli Erlick. Eli was born male, but at the age of eight decided to become a girl. Originally, she loved her school gym class, but when forced to join the boy’s team she dropped out. This led to a loss of friends and a decrease in her grades. *Playing for the Other Team*, THE ECONOMIST, Aug. 17, 2013, available at <http://www.economist.com/news/united-states/21583714-life-slowly-getting-better-transgendered-playing-other-team>.

¹⁴⁸ Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity*:

Furthermore, if courts rule that transgender students should be given access to unisex bathrooms, this poses another potential problem. Many of the opponents of giving transgender students the right to use single-person bathrooms have stated that “gender-neutral single-person restrooms. . . [are] a very expensive add-on.”¹⁴⁹ This would mean that even if transgender students are given the right to use unisex bathrooms, there is a very good chance that the school would not be able to afford to build them. Instead, they might be relegated to using the bathroom of their biological sex, which as discussed, is a problem.

Also, along the same lines as single-person bathrooms, many transgender students have been allowed to use staff bathrooms instead of using sex-segregated bathrooms. The reasoning behind this is similar to allowing them to use unisex bathrooms; it should make the transgender students feel safer and more comfortable than using the bathroom of their biological sex while still allowing the non-transgender students their privacy. However, this also has its problems. In *Doe v. Clenchy*, Maine’s highest court held that “forcing” a student to use a staff bathroom when she attended school might be unlawful discrimination against that student.¹⁵⁰ The reason that this is discriminatory is that it singles out the transgender student as being different; it forces the student to be recognized by other students as not within the gender binary and, in essence, outside of society. It effectively makes the transgender student an outcast.

Thus, at the moment, no court has granted transgender students the right to use the bathroom of their choice.

IV. IS THE CALIFORNIA LAW, WHICH ALLOWS TRANSGENDER STUDENTS TO USE SEX-SEGREGATED BATHROOMS BASED ON THEIR GENDER IDENTITY NARROWLY TAILORED TO A COMPELLING GOVERNMENTAL INTEREST?

Even if the court decides that there is a protected privacy interest for children to use bathrooms free from people of the opposite sex, the inquiry

An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection, 9 U. Pa. J. Const. L. 895, 896-97 (2007); see *supra* note 8.

¹⁴⁹ Levi & Redman, *supra* note 128, at 142.

¹⁵⁰ No. CV-09-201, 2011 Me. Super. LEXIS 70, at *13 (Me. Super. Ct. Apr. 1, 2011). The motion to dismiss Doe’s claim of unlawful denial of public accommodations was granted in part and dismissed in part. *Id.* The part that was dismissed was the question of whether forcing Doe to use a staff bathroom constituted unlawful discrimination. *Id.* The part that was granted was that there was no affirmative duty for the school to allow her to use the girls’ bathroom. *Id.*

does not end. Rather, this “invasion of an interest fundamental to personal autonomy” merely informs the court that the law is suspect and needs to be analyzed with the strictest scrutiny.¹⁵¹ The strict scrutiny test is the most arduous test that any court can use to analyze a law. Historically, it has been so difficult to meet the requirements that legal scholars have called it: “strict in theory, but fatal in fact.”¹⁵² To overcome the burden, the government has to prove that there is a compelling governmental interest that supersedes the infringed upon right.¹⁵³ Then, if there is a compelling governmental interest, the law would need to be narrowly tailored to further that interest. In this case, the California statute might be premised on a compelling governmental interest, but is not narrowly tailored and, thus, will be unconstitutional.¹⁵⁴

The government has a compelling interest in protecting the safety and welfare of its minors.¹⁵⁵ The California law raises concerns about the safety of minors who attend California schools. This argument is promulgated by those trying to keep bathrooms sex-segregated.¹⁵⁶ However, transgender students can make the same argument. These students identify with characteristics that are outside the gender norms that society generally associates with people of their sex. They have various behaviors that would be more associated with the opposite gender than those that match their biological sex. Therefore, it would make sense that they would feel more comfortable in a place where their gender identity matched the people around them. Furthermore, attacks on transgendered people are much more likely to take place in bathrooms with people who match their biological sex rather than their gender identity.¹⁵⁷ There have been numerous

¹⁵¹ *Hill v. National Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 34 (Cal. Sup. Ct. 1994).

¹⁵² See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006); see also Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

¹⁵³ The court must look at the “specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests.” *Hill*, 7 Cal. at 34. The countervailing interests need to be compelling for the law to succeed. *Id.*

¹⁵⁴ The nature of strict scrutiny is that the law is deemed to be unconstitutional because it infringes upon a fundamental constitutional right. It has been said that strict scrutiny functions as a “judicial trump card” that invalidates any attempt at state regulation because the interest is rarely sufficient to overcome this burden. *Id.* at 30.

¹⁵⁵ *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997).

¹⁵⁶ For instance, the argument would be that a girl’s would feel unsafe having a man in the same bathroom because it could lead to predatory behavior by the boy. This is especially true as children hit puberty because the rise of hormones might make the boy’s more predatory. In fact, safety concerns are one of the tenets for sustaining the use of sex-segregated bathrooms.

¹⁵⁷ See e.g., Andrea Swalec, *Transgender New Yorkers Face Scorn and Violence Using Public Restrooms*, HUFFINGTONPOST.COM (Oct. 1, 2012) <http://www.huffingtonpost.com/2012/10/01/transgender-new-yorkers-face-scorn-violence-public->

occurrences of men violently assaulting transgender women because they look different and do not conform to the stereotypes of manhood and masculinity.¹⁵⁸ This is particularly true with teenage boys. Transgender students, especially transgender girls, are very susceptible to bullying. This bullying is normally perpetrated by those of the same sex lashing out at someone they perceive as different or “girly”. Thus, it would be unsafe to force a transgender girl into a boy’s bathroom. Therefore, the government has a compelling interest to ensure that these assaults do not occur, especially when it has to do with minors who go to school.

However, the law is not narrowly tailored to further this interest. A law is narrowly tailored if it is not overly broad to achieve the stated purpose.¹⁵⁹ To be overly broad, the law would need to encompass too much in its application so as to render the stated purpose academic.¹⁶⁰ In other words, the law cannot cover more people than it intends to fulfill the goal. Thus, the law cannot be over inclusive, which means that it protects only those who fall within the purported interest. Here, the law is over inclusive because the law goes beyond the scope of the interest that it is trying to further. Although the law purports to target only transgender individuals, it also encompasses all of the individuals who are affected by their bathroom use. As such, the law exceeds the limits that it tries to impose (i.e. that it only affects transgendered children).

Furthermore, under the second prong of narrow tailoring, the law needs to be the least restrictive means available for serving that purpose.¹⁶¹ This does not mean that it has to be the only method available to effectively further the interest. Even if an equally restrictive method preferable to the opposing party exists, it does not mean the law is not narrowly tailored.¹⁶² The relevant inquiry is whether the “regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.”¹⁶³ This is also problematic for the California law. The students who believe their right to privacy is being invaded (or ignored) will say that another way exists to help these students that does not infringe on their right to privacy: the use of single person bathrooms. Single person

restrooms_n_1928748.html.

¹⁵⁸ Swalec, *supra* note 157.

¹⁵⁹ Ward v. Rock Against Racism, 491 U.S. 781, 783 (1989).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 798.

¹⁶² *Id.*

¹⁶³ *Id.* at 799.

bathrooms would eliminate the risk of potential altercations between students who are biologically of one sex and those who are transgender because the students would not share the same bathroom. Also, single-sex bathrooms would have the added benefit of not requiring children to lose their right to privacy so that a transgendered child can use the bathroom of his or her gender. Proponents of this solution will have painted it as the best of both worlds.

Even though there have been no rulings on this issue, courts might be persuaded that use of single person bathrooms would be the most effective and least restrictive means available. This would mean the California law is not necessarily narrowly tailored. In the past, courts have barred transgendered individuals from using the bathroom of their choice and told them to use the single person bathrooms.¹⁶⁴ In the court's eyes, this would solve both the transgendered child's problem and the other students: one does not have to use the bathroom he or she does not want, and the other does not have to have someone of the opposite sex in his or her bathroom.¹⁶⁵

V. EXPANDING THE LAW TO INCLUDE GENDER IDENTITY WOULD ALLOW THE TRANSGENDER COMMUNITY THE ABILITY TO COMBAT A RIGHT TO PRIVACY CLAIM AND WOULD FURTHER THE GOAL OF OBTAINING GENDER NEUTRALITY.

The current state of the law makes it very difficult for transgendered students to defeat a right to privacy claim brought by another student who has to use the same bathroom. As soon as this particular right is invoked, it is an uphill and nearly impossible battle that the transgender students face. Even though there may be a compelling interest, it would be difficult for a court to uphold laws that infringe on this privacy right of other students because making the law narrowly tailored using the least restrictive means is not suitable to protect the interests of the transgender students.

However, there is something inherently wrong with forcing an entire group of children to be uncomfortable and risk being outcasts because courts refuse to look at gender identity when assessing bathroom usage. Therefore, it is necessary for courts to expand the definition of sex to

¹⁶⁴ See *Goins*, 635 N.W 2d at 724.

¹⁶⁵ Later on there will be a discussion about the reasons that a single person bathroom does not solve the problem.

include gender identity and mandate the building of gender-neutral bathrooms in public schools. This would help to move society¹⁶⁶ in the direction of gender neutrality and would allow the transgender students the ability to exercise the freedom to choose which bathroom makes them the most comfortable.¹⁶⁷ Furthermore, this option would be the least invasive on the right of privacy of other students. Not only would this make sense from a public policy standpoint, but it would also be more in line with the burgeoning societal viewpoint that gender is more than just male and female and that all bodies along the continuum need protection, as evidenced by the policies and laws put in place on the federal, local, and private levels.

In *Goins v. West Group*, the Minnesota Supreme Court upheld the use of “biological gender” (used to connote what has been referred to throughout this paper as sex) in creating sex-segregated bathrooms over “biological self-image.”¹⁶⁸ The court reasoned that the company was allowed to segregate its bathrooms in this way because it was the “cultural preference” (*i.e.* it was in line with society’s viewpoint) to have bathrooms separated between males and females.¹⁶⁹ The court hinged its decision on the views of society and a desire to be in step with the majority. It would stand to reason that, using this logic, if the public viewpoint indicated a preference to desegregate bathrooms then the courts would rule in that manner.¹⁷⁰

Recently, at both the federal and local levels of government, legislatures have shown that the majority now also believes sex to include gender identity. Federally, one of the biggest steps has been the inclusion of transgender women as a protected group under the Violence Against Women Act.¹⁷¹ When the law was originally written and signed into law in

¹⁶⁶ This would not be the first time in history that the courts have decided to try and help society move in the proper direction. For instance, in *Brown v. Bd. Of Education*, the court desegregated schools even though it was unpopular in the South at the time. 347 U.S. 483 (1954).

¹⁶⁷ There have been some opponents to gender neutral options for transgender individuals. They tend to say that by having a third bathroom it creates the feeling of being outside society or at least the norms of society. See Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity*, 9 U. PA. J. CONST. L. at 928. But, it seems that these theorists are conflating unisex and gender neutral. A gender neutral option would allow anyone to use it. Thus, people who were walking in could be male, female, or transgender. A unisex bathroom is a single occupancy bathroom that would make the transgender person feel out of place because it would single them out.

¹⁶⁸ *Goins* 635 N.W. 2D at 722.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Democracy Now, *New Violence Against Women Act Includes Historic Protections for Native American and LGBT Survivors*, http://www.democracynow.org/2013/3/8/new_violence_against_women_act_includes .

1994, it only covered biological women.¹⁷² However, a few years ago the law lapsed because Congress could not agree on whether to add transgender women as a protected class.¹⁷³ Opponents fought furiously against the inclusion, stating that the inclusion would subvert the intended purpose of the law if it would cover men who decided to wear dresses.¹⁷⁴ Thus, for two years the law lapsed while the two opposing sides fought. During this time, the attitude towards transgender women changed enough so that the law passed by a vote of 286 to 138 in the House and by a 78-22 vote in the Senate.¹⁷⁵ This shows that the law not only passed by more than a narrow margin, but also garnered support from both Democrats and Republicans, thus showing that the majority accepted the notion that gender identity is different than sex. The fact that it was bi-partisan makes this argument even more compelling because it cannot be written off merely as a Democratic agenda.

The support for expanding sex to include gender identity has also occurred at the local levels of government and certain private institutions. One of the biggest trends on college campuses is the installment of gender-neutral bathrooms, locker rooms, and housing. In fact, currently, more than 150 campuses have gender-neutral bathrooms.¹⁷⁶ Grinnell College in Iowa recently built all gender neutral amenities,¹⁷⁷ which have garnered support from the majority of students. This change and student support shows that society's understanding of gender is expanding and that desire for strict adherence to sex-segregated bathrooms based on the gender binary is lessening.

Even within public K-12 settings, schools have recently taken into consideration gender identity when it comes to bathroom designs.¹⁷⁸ For

¹⁷² *The Violence Against Women Act*, WHITEHOUSE.GOV, http://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf (last visited Mar. 11, 2016).

¹⁷³ Jennifer Bendery, *Violence Against Women Act Shouldn't Cover Same-Sex Couples*, *GOP Congresswoman Says*, (May 15, 2012) http://www.huffingtonpost.com/2012/05/14/violence-against-women-act-same-sex-couples_n_1516281.html.

¹⁷⁴ Bendery, *supra* note 173.

¹⁷⁵ Tom Cohen, *House Passes Violence Against Women Act After GOP Version Defeated*, CNN (February 28, 2013), <http://www.cnn.com/2013/02/28/politics/violence-against-women/>; Sahil Kapur, *Senate Passes Expanded Violence Against Women Act*, <http://talkingpointsmemo.com/dc/senate-passes-expanded-violence-against-women-act> (Feb. 12, 2013).

¹⁷⁶ Kim Bellware, *Gender-Neutral Bathrooms are Quietly Becoming the New Thing at Colleges*, HuffPost (July 18, 2014) available at http://www.huffingtonpost.com/2014/07/18/gender-neutral-bathrooms-colleges_n_5597362.htm.

¹⁷⁷ Mike Klein and Adam Belz, *College Adds Locker Rooms to Gender-Neutral Policy*, USA Today (November 10, 2011) <http://usatoday30.usatoday.com/news/nation/story/2011-11-09/gender-neutral-college/51134546/1>

¹⁷⁸ See Grant, *supra* note 18.

example, the Massachusetts Department of Education established guidelines that schools should ensure students can access bathrooms and locker rooms that match their gender identity.¹⁷⁹ Connecticut has also passed similar guidelines.¹⁸⁰

Perhaps the most telling new law that shows less adherence to strict notions of biological sex and shows that society is ready for gender-neutral bathrooms comes from Philadelphia. On October 24, 2013, the mayor of Philadelphia signed legislation requiring that new or renovated city-owned buildings must include gender neutral bathrooms along with the traditional men's and women's restrooms.¹⁸¹ This shows that legislatures are willing to define the term "sex" more broadly in a way that allows for gender neutral bathrooms.¹⁸² Although the law still permits sex-segregated bathrooms, it shows that society wants to be more accommodating to transgender individuals and those outside the gender binary.¹⁸³

Another major indication of the trend towards more liberal laws has been the outcry against laws that have restricted the definition.¹⁸⁴ For instance, in North Carolina, the legislature passed, and the governor signed, a law that "requires public schools and agencies to segregate bathrooms by the biological sex on someone's birth certificate" and prohibits "any city or

¹⁷⁹ Massachusetts Department of Elementary and Secondary Education, *Nondiscrimination on the Basis of Gender Identity*, <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>.

¹⁸⁰ Connecticut Safe School Coalition, *Guidelines for Connecticut Schools to Comply With gender Identity and Expression Non-Discrimination Laws* (Oct. 4, 2012), http://www.sde.ct.gov/sde/lib/sde/pdf/equity/title_ix/guidelines_for_schools_on_gender_identity_and_expression2012oct4.pdf

¹⁸¹ NBC10.com, *Gender-Neutral Restrooms Become the Law*, (Oct. 28, 2013), <http://www.nbcphiladelphia.com/news/local/LGBT-Gender-Neutral-Restrooms-206932591.html>.

¹⁸² However, it is worth noting that while this law shows a willingness to have gender-neutral bathrooms, there are, of course, measures that have been taken by other legislators in other states that indicate a desire to keep the status quo. For instance, Florida State Representative Frank Artiles recently introduced a bill to restrict bathroom use to biological sex under threat of up to one year in jail. See Dominic Holden, *Florida Lawmaker Says Using Restroom is a Choice for Transgender People*, BUZZFEED (Feb. 9, 2015) <http://www.buzzfeed.com/dominicholden/florida-lawmaker-says-using-restroom-is-a-choice-for-transge>.

¹⁸³ The local level has been where transgender individuals have gained more rights, but it is also where some bills have been brought to hurt them. In Arizona, a bill was introduced by a state legislator to "protect businesses from civil or criminal liability if they ban transgender people from restrooms if their identification doesn't match their gender appearance." Although this "Show Me Your Papers Before You Go Potty" bill has not been passed, the fact that it has been brought up is telling. Michaelangelo Signorite, *John Kavanagh, Arizona State Representative, Defends Transgender Bathroom Bill*, HuffingtonPost.Com (April 3, 2013) http://www.huffingtonpost.com/2013/04/03/john-kavanagh-arizona-transgender-bathroom-bill_n_3006516.html.

¹⁸⁴ This paper will take a quick look at the law in North Carolina because it is the one that received the most outcry. However, it is worth noting that the South Dakota governor also recently vetoed a transgender bathroom bill. One of the reasons for the veto was the push from the public. Greg Botelho and Wayne Drash, *South Dakota Governor Vetoes Transgender Bathroom Bill*, CNN (March 2, 2016).

county from creating new anti-discrimination laws.”¹⁸⁵ This law has been largely ridiculed as being too restrictive. In fact, more than 80 CEOs from major companies signed a letter demanding that the governor repeal the law.¹⁸⁶

Courts normally lag behind the legislature on decisions that would change a fundamental part of society because they typically want the legislature to first decide. For instance, in *Doe v. Clenchy*, a transgender teen girl was told that she could not use the girl’s restroom because she was transgender and instead she had to use a staff-only, non-communal restroom that isolated her from everyone.¹⁸⁷ The Maine Supreme Court held that the school had a right to do this because there was no “affirmative obligation to accommodate . . . transgender status.”¹⁸⁸ Although this decision shows how courts lag behind the legislature, a recent court decision has allowed transgender individuals access to gender neutral bathrooms or to the bathroom of their choice. Recently, a case in Colorado involving a six year old transgender girl named Coy Mathis has garnered national attention.¹⁸⁹ After her school district denied her use of the girl’s restroom, the Colorado Civil Rights Division held that she had the right to use the bathroom of her choice.¹⁹⁰ The court reasoned that keeping the ban in place “creates an environment that is objectively and subjectively hostile, intimidating, or offensive.”¹⁹¹ Thus, this court was willing to recognize a proper solution to the dilemma faced by the transgender student when forced into sex conforming bathrooms.

With this background in mind, when right-of-privacy claims are brought by potential plaintiffs seeking to exclude transgender children from the bathroom matching their gender identity, courts should begin to rule that

¹⁸⁵ Jeff Guo, *The Cunning Trick in North Carolina’s Radical New Anti-LGBT Law*, THE WASHINGTON POST (April 1, 2016) <https://www.washingtonpost.com/news/wonk/wp/2016/04/01/the-cunning-trick-in-north-carolinas-radical-new-anti-lgbt-law/>.

¹⁸⁶ *More than 80 Major CEOs and Business Leaders Demand North Carolina Repeal Discriminatory Radical New Anti-LGBT Law*, Reuters (March 29, 2016). It is worth noting that they also wrote a similar letter to the governor of Georgia about a similarly discriminatory law. The governor of Georgia wound up not signing the law due to the outcry. *Id.*

¹⁸⁷ *Doe v. USPS*, 1985 U.S. Dist. LEXIS 18959, *13 (D.D.C. 1985).

¹⁸⁸ *Id.* It is worth noting that the lawsuit was brought under the Maine Human Rights Act and stated that forcing her to use the non-communal bathroom discriminated against her.

¹⁸⁹ See e.g., Elizabeth Flock, *Coy Mathis Case May Set Precedent on Transgender Kids and Bathrooms*, U.S. News (June 24, 2013) <http://www.usnews.com/news/articles/2013/06/24/coy-mathis-case-may-set-precedent-on-transgender-kids-and-bathrooms>.

¹⁹⁰ Flock, *supra* note 189.

¹⁹¹ Ed Payne, *Transgender First-grade Wins the Right to Use Girls’ Restroom*, CNN (June 24, 2013) <http://www.cnn.com/2013/06/24/us/colorado-transgender-girl-school/>. Like the *Doe v. Clenchy* case, this was also brought under a Human Rights Act and the claim was for discrimination.

gender identity should dictate how society segregates bathrooms. The effect of segregating bathrooms according to gender identity would be that the transgender students would be able to keep the right to choose which bathroom to use, while also allowing them an avenue to combat potential claims of right to privacy. Since courts have read that there is a right to privacy in being segregated from the opposite sex, if the term sex included everyone who identified as the same gender, then it would end the potential right- to-privacy claims of the other students. A ruling redefining sex to include gender identity would also be preferable when it comes to public policy. One of the many reasons for sex-segregated bathrooms is that they are more comfortable for people to use. However, a boy walking into the boy's bathroom wearing a dress and having all the mannerisms of a girl (and for all intents and purposes, looking exactly like a girl) would probably make the other boy in the bathroom as uncomfortable as if a biological girl was there.¹⁹² Thus, redefining sex to include gender identity would alleviate this problem because it gets rid of the potential problem of having a transgender girl using a boy's bathroom, and vice versa.

Also, a ruling holding that boys and girls can choose the bathroom they use based on their gender identity would reduce the potential for attacks on the transgendered children, especially in their teenage years, because it would allow them to go into bathrooms that match their appearance and mannerisms in all ways except genitalia. Furthermore, schools have security guards and other security measures in place that would help to alleviate any safety concerns that might arise from transgendered children using the same bathroom as those who biologically match their gender identity. Lastly, the government has an interest in protecting their citizens from harm (hence why we have laws such as VAWA). Ruling that transgender children could use the bathroom of their gender identity would allow the government the best opportunity to protect transgendered children because it would keep the transgender community away from those that do them the most harm:¹⁹³ often those of the same biological sex.

¹⁹² This might explain why the rates of being harassed, physically assaulted, and sexually assaulted in public accommodations by those that are transgendered is so high. In one study of 6,000 transgender individuals, one-half stated that they had experienced harassment in public accommodations, and 10% had been physically assaulted. Grant, *supra* note 18 at 5.

¹⁹³ This holds true even for transgender men who are biologically female and using the male restroom. The reason is that a transgender man appears to be a man in all respects: from manner of dress to speech to appearance. The only difference would be in genitals and that is something that the other men could not see or know. Thus, walking into a men's bathroom they would be no different than any other man or boy who walks into the bathroom. On the other hand, walking into the women's bathroom a transgender man would be instantly recognizable and would be in danger of severe

From a sheer safety perspective, this ruling would make everyone involved better off.

Finally, along with changing the definition of sex when considering right-to-privacy claims, the courts should also begin to mandate the installation of gender neutral bathrooms. The gender-neutral bathrooms envisioned in this Note would consist of multiple single-person stalls within a communal bathroom (i.e. it would look much like the traditional woman's bathrooms). A challenge will probably be brought to separate children of different sexes because of the difference in genitalia. However, the single stalls would make it very rare for one child to see another child. The only way it would happen is if one of the students came out into the open and exposed his or her genitalia to another student. Not only could this happen in traditional bathrooms, but it would be handled in the same manner, through disciplining (and counseling) the student who took his genitals out in public. Furthermore, although allowing children to use a bathroom with a child of the opposite sex might be confusing and hard to explain, establishing these bathrooms when the children are young will eliminate the novelty of being in a bathroom with the opposite sex by the time they are older. Also, any behavior that would be considered indecent would be dealt with in the same way that it is today (i.e. punishment and/or counseling).

The only potential pitfall to using the bathrooms as children get older is that it might cause some students to feel uncomfortable when they begin to go through some of the changes associated with manhood and womanhood. Most notably, opponents will cite that girls who are beginning to menstruate might feel embarrassment with having a boy in the bathroom and that the boys in the bathroom might feel uncomfortable finding feminine care products in the bathroom with them. While this is a potential problem, the privacy of the stall would alleviate these concerns. Right now, when a girl begins to menstruate, she goes into the girl's bathroom and into a private stall. In this stall she can do what needs to be done away from the prying eyes of her peers. The same would happen if transgendered children were allowed into the bathroom. The girl having her period would go into the bathroom and into a stall away from her peers. The girl would neither be more or less comfortable than she is in sex-segregated bathrooms. Also, this event is normally very confusing for girls of that age. Therefore, no

emotional and verbal harassment.

matter who is in the bathroom there will be some discomfort. But, since the bathrooms would give the same amount of privacy whether or not transgendered children are allowed in, there is no reason to force transgendered children to use bathrooms of their biological sex. Thus, there is no reason to believe that this should be any more of a problem than it is now. And as for the boys who feel uncomfortable with the feminine care products, this can be combated through education and helping the boys in the bathroom to understand what is happening with their female counterparts.

Another possible challenge to the creation of gender neutral bathrooms in public schools is that younger children will not be old enough to fully understand what is happening because they do not have a grasp of the differences between sex and gender and would simply see a boy dressed in girl's clothes in their bathroom (and vice versa). Opponents using this defense will point to the fact that younger children are still in the "cooties" phase and might find it discomfoting being around the opposite sex. However, this is not the case. Younger children will already be used to going into bathrooms with the opposite sex because many parents bring their toddlers into bathrooms with them when the parent of the same sex is not available.

Lastly, the school districts might have a claim that requiring them to install gender neutral bathrooms would be cost prohibitive. Therefore, the courts (and the legislature) should allow for a defrayal of the costs of construction. This could be done through a simple tax deduction. When a company can show that it has installed bathrooms that are gender neutral, it can write off the expense. This would incentivize the building of gender neutral bathrooms and would make it less likely that schools would fight the potential ruling on economic grounds. Incentivizing the building of gender neutral bathrooms through tax breaks would also help to make certain that schools would install the bathrooms and, thus, allow transgender students access to a bathroom that makes them comfortable.

CONCLUSION

The California law, which allows children in public schools in grades K-12 to use the bathroom and locker room and participate on athletic teams of their gender identity, irrespective of sex, is necessary to protect transgender students from harassment and to allow them to feel comfortable in a school setting. Unfortunately, there is potential that it will be overturned on right-

to-privacy grounds. Proponents of overturning the law on right-to-privacy grounds will argue that the privacy rights of the children who use the bathroom with the transgendered children are being invaded simply by a person of the opposite sex being in the bathroom. Based on the right to privacy case law, there is a substantial likelihood that the California law would be overturned because most courts have ruled that it is a fundamental right to be free from individuals of the opposite sex in the bathroom. To combat the inability of the current laws to protect transgender students and their right to choose the bathroom they desire, courts must be proactive and take the initiative to allow transgender students the right to choose which bathroom they would want to use. The most effective means of accomplishing this would be to rule that sex-segregated bathrooms are based on gender identity rather than biological sex and also to mandate gender-neutral bathrooms. This would bring us closer to a gender neutral world and one in which transgender individuals, not only students, have “won” the war in deciding what bathroom they want to use.¹⁹⁴

¹⁹⁴ Donaldson v. State, 2012 MT 288 (Mont. 2012) (Nelson, J., dissenting).