ARTICLE

TRANSGENDER STUDENTS AND THE FIRST AMENDMENT

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ABSTRACT

Suppose a transgender child experiences teasing and harassment from their classmates, whose hostile reactions interrupt the school day. School administrators tell the transgender child that, in order to allow educational activities to continue, they must dress in more gender-neutral clothing, ideally consistent with the sex they were assigned at birth. The student's parents protest, arguing that their child's clothing is speech that expresses their gender identity. The school points to Tinker v. Des Moines*, allowing suppression of student speech where it creates a material disruption, as well as recent legislation characterizing discussion of gender identity as lewd and obscene.*

This Article is the first analysis to map out and counter both obscenity and material disruption as justifications to limit gender-identity speech. Although not all clothing choices made by students are symbolic speech, gender presentation is the type of intentional and cognizable message that is protected under the First Amendment. Comprehensive examination of student speech cases demonstrates that current attempts to define gender identity as an inappropriately sexualized topic for children are inconsistent with existing law. Finally, the Article illustrates for the first time how schools can create a heckler's veto by teaching students that the speech of transgender students is abnormal. The Article proposes an analytical revision that takes the schools' role into account, reconciles the conflict between the heckler's veto doctrine and Tinker*'s material disruption test, and strengthens protection of all controversial student speech.*

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INTRODUCTION

Imagine a child attending school facing bullying and harassment from their classmates about their hair and other aspects of their appearance. Although the child was assigned male at birth, they choose to grow their hair long, socialize near-exclusively with girls, and refuse to use the boys' restroom unless no boys are inside.[1] Other students begin to remark upon the child's hair and clothing, both inside and outside of classrooms. Teachers begin to report to school administrators that their class has been derailed by students discussing and mocking the child. Other students report to an assistant principal that one group of boys who are particularly offended by the long hair are planning to use scissors to cut the child's hair to what they believe to be an appropriate length.[2] School administrators did not initially prohibit the child from growing their hair longer, but as complaints pile up, they conclude the child's outward appearance is becoming too much of a distraction during the school day. An assistant principal calls the child to her office and tells them that they have to cut their hair above their ears and collar and wear only masculine clothing or they will face detention and suspension. The student protests that their hair length and clothing express their gender and the school should not restrict their speech. The assistant principal responds that even if she agreed that the student is communicating something, they are causing a substantial disruption to the school's educational activities, and thus the school has the right to restrict their expression in service of the school's broader goals.

Although the facts above are taken from cases in the 1960s and 1970s, one can easily imagine a similar scenario facing transgender children in public schools today. The last two years have seen an incredible resurgence in legal restrictions affecting transgender children, be it employing state child protective systems against parents who support their children's gender identity,[3] enacting statutory exclusions of transgender girls playing competitive sports,[4] banning gender-affirming healthcare,[5] prohibiting children from using a school bathroom consistent with their gender identity,[6] or forbidding teachers from speaking

[1] *See* Ferrell v. Dall. Indep. Sch. Dist., 392 F.2d 697, 701 (5th Cir. 1968).

[2] *See* Gfell v. Rickelman, 441 F.2d 444, 447 (6th Cir. 1971); Meyers v. Arcata Union High Sch. Dist., 75 Cal. Rptr. 68, 71 (Cal. Ct. App. 1969); *Ferrell*, 392 F.2d at 700.

[3] Letter from Greg Abbott, Governor of Tex., to Jaime Masters, Comm'r, Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/CT5D-RPPU] (last visited Feb. 29, 2024).

[4] Michael J. Higdon, *LGBTQ Youth and the Promise of the Kennedy Quartet*, 43 CARDOZO L. REV. 2385, 2399-2400 (2022).

[5] Leo Sands, *Utah Banned Gender-Affirming Care for Trans Kids. What Does That Mean?*, WASH. POST (Feb. 1, 2023, 7:04 AM), https://www.washingtonpost.com/nation/2023/02/01/utah-gender-affirming-care-ban/.

[6] Public Facilities Privacy & Security Act, H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (codified at N.C. GEN. STAT. § 115C-521.2, 143-760 (2016)), *repealed by* 2017 N.C. Sess. Laws 1, ch.4.

about LGBTQ+ topics while at work.[7] Such legal action is spurred by inflammatory political rhetoric that characterizes any acknowledgment of gender identity in front of children as grooming, sexualizing, and predatory. As courtrooms and legislatures grapple with Florida's "Don't Say Gay" law and its imitators, protecting transgender children's gender expression under the First Amendment will likely become a central argument.

Currently, most litigation arising in the context of public schools cites Title IX of the Education Amendments Act, which forbids discrimination on the basis of sex in any educational program that receives federal funding.[8] Title IX, however, does not answer questions of equal treatment of transgender students with finality. Because the statute prohibits discrimination on the basis of sex and does not explicitly include sexual orientation and gender identity, the Department of Education's interpretation of Title IX and its applicability to gender identity has cycled according to the political leanings of the White House.[9] Although the Supreme Court has held that similar language in Title VII should be read to include discrimination on the basis of sexual orientation and gender identity,[10] it has yet to speak directly to Title IX. Moreover, both the Supreme Court and lower courts have shown willingness to exempt people and businesses from general antidiscrimination statutes if the challengers articulate a religious reason for disagreeing with the antidiscrimination principle.[11]

Alternative bases for protecting the rights of transgender students are thus prudent as a strategic matter and rigorous as a theoretical exploration of First Amendment law. Although a few scholars have proposed that the gender expression of transgender students is speech,[12] existing literature does not fully develop why the claim is viable. First, although commentators have briefly outlined how such speech might be treated under the landmark student speech case *Tinker v. Des Moines*,[13] none have addressed the alternative to *Tinker* presented by *Bethel School District v. Fraser*, in which the Supreme Court held

[7] *See, e.g.*, FLA. STAT. § 1001.42(8)(c)(3) (2022).

[8] 20 U.S.C. § 1681(a).

[9] Arthur S. Leonard, *The Biden Administration's First Hundred Days: An LGBTQ Perspective*, U. ILL. L. REV. ONLINE 127, 128-29 (2021); Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. RICH. L. REV. 927, 927-28 (2020) [hereinafter Purvis, *Gender Stereotypes*]; Jack B. Harrison, *"To Sit or Stand": Transgender Persons, Gendered Restrooms, and the Law*, 40 U. HAW. L. REV. 49, 90-91 (2017).

[10] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (holding Title VII prohibits discrimination on basis of gender identity).

[11] *See, e.g.*, 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2023) (granting certiorari to case in which artist argues antidiscrimination law violates First Amendment rights); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (holding university Title IX office's discipline of professor for misgendering transgender student violated professor's First Amendment rights).

[12] *See, e.g.*, Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 93 (2015).

[13] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

that lewd speech does not receive *Tinker* analysis.[14] Current statutes restricting discussion of gender identity in schools define discussion of gender identity as sexual obscenity,[15] clearly teeing up an analysis of *Fraser* that is currently missing from legal scholarship.

Second, even if the gender presentation of transgender students is understood as constitutionally protected speech, courts and current literature have not resolved the question of how the heckler's veto doctrine operates in schools. *Tinker* directs that schools must allow student speech unless it invades the rights of other students or causes a material disruption in the school's educational activities.[16] The disruptive reactions of other students may thus operate as a heckler's veto to silence a student's speech. Application of *Tinker* to the gender-presentation speech of transgender students demonstrates a wrinkle with the heckler's veto that has not previously been studied: the disruptive reactions of other students may, in some circumstances, be traced back to the school itself. If a school teaches that gender is a binary and immutable category, for example, the school has itself contributed to the material disruption it then points to as justification for limiting a transgender student's speech.

This Article presents the first robust analysis of transgender students' gender presentation as speech that fully addresses both of these questions. Part I discusses why gender presentation is properly understood to be speech, demonstrating that although student clothing is not universally communicative, the gender presentation of transgender students satisfies existing doctrine identifying symbolic speech. Part II turns to student speech rights, outlining *Tinker*'s holding and application in lower courts as well as a series of carveouts from *Tinker*'s protection developed over the last few decades. Part III then undertakes the first analysis of whether *Fraser*'s carveout for lewd, vulgar, and offensive student speech applies to expression about gender identity, both outlining current characterizations of gender identity as sexualized speech and providing a comprehensive reading of cases applying *Fraser* to demonstrate that issues relating to sexuality and gender identity are not lewd or offensive. Finally, Part IV returns to *Tinker* in order to discuss the problem of the heckler's veto. First, the heckler's veto doctrine is explained, including three appellate cases acknowledging the conflict between the heckler's veto doctrine and *Tinker* but coming to different results. Second, this Part outlines how public schools currently teach about gender: that it is binary, it is an appropriate and natural method of categorizing people, and that boys and girls fit into gender stereotypes. Lastly, the Part proposes a revision to *Tinker*'s analysis that reconciles the dilemma, giving students an opportunity to show that their school has helped to create a heckler's veto.

[14] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[15] FLA. STAT. § 1001.42(8)(c)(3) (2022).

[16] *Tinker*, 393 U.S. at 508.

I. GENDER PRESENTATION AS SPEECH

A threshold question is whether clothing, hairstyles, jewelry, and other aspects of personal appearance can and should be considered speech. Not all choices about appearance are intended to convey a message, but clothing obviously *can* be symbolic speech, as in the black armbands expressing opposition to the Vietnam War at issue in *Tinker*.[17] The issue is thus whether clothing, hairstyles, and other aesthetic choices that communicate gender identity should be considered symbolic speech. It is certainly easy to understand why a transgender student might view clothing and other aspects of personal appearance as expressing their gender identity.[18] Asserting choices around clothing and appearance is one of the first ways that a child can assert control over their body.[19] It is one of the only ways children can express their gender, particularly at younger ages.[20] It is also clear that this expression is personally significant, as transgender children who are able to freely express their gender identity are happier and healthier along a number of different metrics.[21] Data is similarly clear that trans children who are subjected to efforts to undo or reverse their transgender identity face serious mental and physical harm.[22]

That said, clothing obviously does not always convey a message. If one pictures a spectrum with a T-shirt reading "Biden 2020" or "Trump 2024" on one end and a toddler picking the red barrette instead of the green barrette on the other end, where is the line in the middle differentiating between aesthetic or otherwise constitutionally insignificant choices and constitutionally protected free speech? The Supreme Court answered by asking whether the person claiming that they are expressing a message had an "intent to convey a particularized message" and whether the "likelihood was great" that people observing the message would understand it.[23] Choices about clothing and other

[17] *Id.* at 504.

[18] Indeed, *every* student (whether transgender, cisgender, or nonbinary) likely views clothing and other aesthetic choices as expressing their gender identity.

[19] *Gender Stereotypes*, *supra* note 9, at 931; Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR 149, 155-56 (2010).

[20] Dara E. Purvis, *Transgender Children, Teaching Early Acceptance, and the Heckler's Veto*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY 219, 241 (Austin Sarat ed., 2017). In a guide for the families of transgender children, Stephanie Brill and Rachel Pepper write that, although there is no "right" way to come out as transgender, one common approach is to give children freedom with choices such as hair and clothing. STEPHANIE BRILL & RACHEL PEPPER, THE TRANSGENDER CHILD: A HANDBOOK FOR FAMILIES AND PROFESSIONALS 118 (2008).

[21] *Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1726 (2014).

[22] Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 30 (2009).

[23] Spence v. Washington, 418 U.S. 405, 410-11 (1974); *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989). The second part of the test, whether people observing the message would likely understand it, presents a significant challenge for nonbinary students. As discussed further below, several courts have had little trouble reasoning that people who

personal appearance, as the Fifth Circuit put it, "may be predicated solely on considerations of style and comfort," but may also communicate a message clearly enough to be protected as speech.[24]

Although there is not a robust history of caselaw, a few courts have specifically held that the clothing and grooming choices of transgender students are expression protected by the First Amendment. In a Massachusetts case, a junior high school student who began dressing in girls' clothing was repeatedly sent home by her school's principal for violating the school dress code, which prohibited "disruptive or distractive" clothing.[25] Later that year, she was formally diagnosed with gender identity disorder, and her therapist told the school that it was medically necessary for her to dress in girls' clothing and make other choices for a feminine appearance.[26] Despite this, when she returned to school in eighth grade, the principal required that she begin each school day by coming to his office, where he would review her appearance and either allow her to go to class or send her home to change.[27] She found this process unpleasant and missed enough class that she was required to repeat eighth grade.[28] In a meeting preparing for the start of her repeated eighth grade year, the principal and another school official told her that she would not be allowed to attend if she was wearing "outfits disruptive to the educational process," which they defined as "padded bras, skirts or dresses, or wigs."[29] Later that list was expanded to forbid any girls' clothing or accessories.[30]

She then filed a lawsuit arguing that the school was violating her free speech rights under the Massachusetts Declaration of Rights.[31] Although her claim was brought under state constitutional law, the court noted that the Massachusetts Article in question was analyzed using federal free speech law, and the decision cites First Amendment caselaw.[32] The court found, using the Supreme Court's analysis outlined above, the girl was "likely to establish that, by dressing in

observed someone presenting in feminine clothing would understand the clothing to indicate that their gender identity is female. The spectrum of gender identity encompassing people who do not identify as solely male or female, however, is arguably a less cognizable message, particularly at present when legal and social recognition of nonbinary identities is comparatively rare. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 896-97, 905-10 (2019).

[24] Canady v. Bossier Par. Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001).

[25] Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Sup. Ct. Oct. 11, 2000), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at *2.

[30] *Id.*

[31] *Id.*

[32] *Id.* at *3.

clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender."[33]

A decade later, a high school junior named Constance McMillen asked her school for permission to bring her girlfriend to the prom as her date and to wear a tuxedo instead of a dress.[34] She said that she wanted to attend with her girlfriend to express her sexual orientation and to wear a tuxedo to indicate her belief that students should not be required to wear gender-conforming clothing.[35] A district court similarly found that these messages fell "squarely within the purview of the First Amendment."[36]

Although specific caselaw is sparse,[37] several decades ago, several courts evaluated whether cisgender students with gender nonconforming appearances communicated a message.[38] One characteristic brought up time and time again was male students with hair longer than existing dress codes allowed—at the time, this meant hair that reached their shirt collar.[39] School employees complained that such hair was distracting and disruptive, both because the students with long hair combed and otherwise groomed themselves when they should have been paying attention in class and because other students were distracted by the other students' long hair.[40] The negative reactions from schools, classmates, and even courts often focused on the idea that by growing out their hair, the male students began to look like girls.[41] Some of the students in question may have been exploring and expressing their gender identity through their hair length.[42] But when asked directly, most of the students denied that their hair had any specific message, giving explanations such as "[I] just like[] it" or "I think it looks better."[43]

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[33] *Id.*

[34] McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 701 (N.D. Miss. 2010).

[35] *Id.* at 702.

[36] *Id.* at 705.

[37] In some cases, courts assume without deciding that clothing and other aspects of personal appearance are constitutionally protected speech because the student's claims fail on other grounds. *See* Canady v. Bossier Par. Sch. Bd., 240 F.3d 437, 439-41 (5th Cir. 2001); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 285 (5th Cir. 2001); Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 428-29 (9th Cir. 2008); Bar-Navon v. Brevard Cnty. Sch. Bd., 290 F. App'x 273, 277 (11th Cir. 2008). Another court refused to dismiss a lawsuit against a high school for refusing to let a transgender girl wear a dress to prom, but the motion was at such an early stage that no factfinding had actually taken place. Logan v. Gary Cmty. Sch. Corp., No. 207-CV-431, 2008 WL 4411518, at *5 (N.D. Ind. Sept. 25, 2008).

[38] Purvis, *Gender Stereotypes*, *supra* note 9, at 931.

[39] *Id.* at 932.

[40] Jackson v. Dorrier, 424 F.2d 213, 217 (6th Cir. 1970); Meyers v. Arcata Union High Sch. Dist., 75 Cal. Rptr. 68, 70 (Cal. Ct. App. 1969).

[41] Purvis, *Gender Stereotypes*, *supra* note 9, at 934-35.

[42] *Id.* (citing Ferrell v. Dall. Indep. Sch. Dist., 392 F.2d 697, 701 (5th Cir. 1968)).

[43] Purvis, *Gender Stereotypes*, *supra* note 9, at 935.

In such circumstances, courts will obviously not recognize the aesthetic choice as speech.[44] Courts will not supply a meaning for clothing that a teenager cannot themselves articulate.[45] A middle school student challenging her school's dress code who said there was no specific message she wished to convey through her clothes, but rather she wanted to wear things that looked nice and that she felt good in, did not have cognizable protected speech in the opinion of the Sixth Circuit.[46] Courts also will not credit expression that is unlikely to be understood by others. For example, a student who said that he wore his pants sagging below his waist to express his identity as a Black person was not successful in claiming his style was expression, as the court said that it was unlikely that other people would understand sagging pants to express cultural pride.[47]

But courts will not typically ignore a reasonably clear message conveyed through clothing.[48] One easy example is the use of black armbands to protest controversial actions taken by authority figures, be it the Vietnam War[49] or students protesting a school uniform policy.[50] Another court found that a Native American child wearing his hair in two long braids intended to communicate a message of pride in his heritage that school and community members were likely to understand.[51] A high school senior who wanted to wear traditional Lakota clothing instead of a cap and gown at his graduation ceremony[52] similarly succeeded in convincing a court that he intended to convey a message of pride in his heritage that would be understood by those viewing his clothing,[53] although he ultimately lost his case for other reasons.[54]

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[44] *Id.* (observing how easily courts "dismiss the First Amendment as inapplicable" in those cases).

[45] *Id.* at 937.

[46] Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 386, 389-90 (6th Cir. 2005).

[47] Bivens *ex rel* Green v. Albuquerque Pub. Schs., 899 F. Supp. 556 (D.N.M. 1995).

[48] Exceptions obviously exist. One such example occurred when a group of gifted and talented eighth grade students protested what they saw as a rigged election to select a class T-shirt by wearing their losing design of choice in protest. The Seventh Circuit found that the school did not violate the students' First Amendment rights by temporarily punishing students for wearing the protest shirts, although the court reasoned the students had no right to protest the school's lack of explanation about the T-shirt election process. *See* Brandt v. Bd. of Educ. of City of Chi., 480 F.3d 460, 466 (7th Cir. 2007).

[49] *See* discussion *infra* Section II.B.

[50] Lowry *ex rel.* Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 760 (8th Cir. 2008).

[51] A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 701 F. Supp. 2d 863, 882-83 (S.D. Tex. 2009), *aff'd* 611 F.3d 248 (5th Cir. 2010). The Fifth Circuit affirmed the decision but rooted the case in the Texas Religious Freedom Restoration Act instead of deciding it as a free exercise or free speech constitutional analysis. A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 258 (5th Cir. 2010).

[52] Bear v. Fleming, 714 F. Supp. 2d 972, 975 (D.S.D. 2010).

[53] *Id.* at 984.

[54] The court found that a public graduation ceremony was a school-sponsored activity, and thus the appropriate analysis followed *Hazelwood v. Kuhlmeier* rather than *Tinker*. *Id.* at 989.

A few transgender adults have successfully argued that their clothing expresses their gender identity.[55] One trans woman who worked at the DMV experienced harassment in the workplace after she began dressing in feminine clothing at work.[56] In the context of a lawsuit she filed alleging a First Amendment retaliation claim,[57] a federal court found that her clothing and other styling choices were constitutionally protected expression.[58] Similarly, a transgender woman who was civilly committed in a psychiatric facility successfully brought a retaliation claim, arguing that a supervisor retaliated against her expression of her gender identity through wearing feminine undergarments.[59] A third trial court found that a transgender woman had adequately argued that her gender expression through "wearing women's apparel, styling herself in a feminine manner, undergoing cosmetic surgeries to feminize her appearance, and maintaining feminine mannerisms"[60] was protected under the First Amendment, although her retaliation claim failed to show a sufficient link between that expression and the claimed retaliatory actions.[61]

Additionally, several courts assessing the speech value of aesthetic choices use the hypothetical example of a transgender person's clothing as an illustration of a clothing or hairstyle choice that would be understood as speech. In the case of the high school senior wishing to wear his traditional Lakota clothing to graduation, the court wrote that his message was specific and cognizable enough, as it was "akin to . . . the wearing of female clothing as an expression of a student's gender identity."[62] Another court facing an argument from a cisgender female bus driver that she should be allowed to wear a skirt instead of the uniform pants required of all bus drivers found "no particularized communication can be divined simply from a [cisgender] woman wearing a skirt."[63] By contrast, a transgender girl or woman wearing feminine clothing "sent a clear and particular message" that was "a sufficient proxy for speech to enjoy full constitutional protection."[64]

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[55] One case even found that a transgender woman's appearance and choice of bathroom at work was protected speech. Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. CIV.02-1531, 2004 WL 2008954, at *9 (D. Ariz. June 3, 2004).

[56] Monegain v. Commonwealth of Va. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 128-29 (E.D. Va. 2020).

[57] *Id.* at 134.

[58] *Id.* at 135-37.

[59] Brown v. Kroll, No. 8:17CV294, 2017 WL 4535923, at *7 (D. Neb. Oct. 10, 2017).

[60] Vuz v. DCSS III, Inc., No. 3:20-CV-00246, 2020 WL 7240369, at *5 (S.D. Cal. Dec. 9, 2020).

[61] *Id.* at *7.

[62] Bear v. Fleming, 714 F. Supp. 2d 972, 984 (D.S.D. 2010).

[63] Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 320 (2d Cir. 2003).

[64] *Id.* (referencing Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Sup. Ct. Oct. 11, 2000)).

Finally, it is relevant to acknowledge the broader history of the movement for LGBTQ+ equality, which has long understood both the strength of free speech claims and the political and expressive value of identifying one's sexual orientation or gender. As Nan Hunter explained in 1993:

> To be openly gay, when the closet is an option, is to function as an advocate as well as a symbol. The centrality of viewpoint to gay identity explains the logic behind what has become the primary strategy of anti-gay forces: the attempted penalization of those who "profess" homosexuality, in a series of "no promo homo" campaigns.[65]

Just as LGB people were once pressured to remain in the closet, suppressing the gender expression of transgender people is a political act. For this reason, arguments about whether speech self-identifying a person as LGBTQ+ was constitutionally protected were some of the earliest and most successful court battles in the equality movement.[66] The idea that trans students' clothing choices could be protected as speech appeared in legal scholarship thirty years ago, before constitutional or statutory equality-based claims gained any meaningful ground.[67]

There is arguably a risk to over-applying First Amendment claims to contexts where the real harm could be more directly addressed. Frederick Schauer has famously criticized broad use of speech claims as "First Amendment opportunism."[68] Erica Goldberg extended this discussion, identifying the "First Amendment cynicism" that has developed as ideologically opposed groups accuse one another of using the Constitution disingenuously for purely political goals.[69] In this context, the argument against using speech claims would be that, at heart, treatment of transgender children is an equality issue, and if any constitutional argument is made it should rest in the Equal Protection Clause of the Fourteenth Amendment rather than cloaking an equality demand in the guise of the First Amendment.

Applying speech protections to expression of sexual orientation and gender identity, however, is thus not a novel or opportunistic technique—rather, it

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[65] Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993).

[66] *Id.*; *see also* CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 4-5 (2017); Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 79 (2006). This is also true specifically about student coming-out speech. STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS 23-36 (2010).

[67] Boaz I. Green, *Discussion and Expression of Gender and Sexuality in Schools*, 5 GEO. J. GENDER & L. 329, 331 (2004); *see also* Timothy Zick, *Restroom Use, Civil Rights, and Free Speech "Opportunism*,*"* 78 OHIO ST. L.J. 963, 981-84 (2017) (describing history of civil rights claims framed as free speech).

[68] Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1627 (2015).

[69] Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 961 (2020) (describing accusations of "disingenuous application or non-application of the First Amendment to further political ends unrelated to freedom of expression").

continues an existing line of doctrine begun in the earliest days of LGBTQ+ rights.[70] Transgender students may *also* have equality-based claims against a school that discriminates against them, but existing caselaw and the basic test for symbolic expression make it obvious that a message such as "I am presenting my gender as female to express the message that I am female" satisfies the expressive conduct test as both a specific intended message and a message that classmates, teachers, and other observers are likely to understand.[71] Clothing and other choices around personal appearance intended by transgender students to express their gender identity are thus likely to be recognized as speech protected by the First Amendment. This protection, however, is far from absolute. Student speech rights may be restricted for a variety of reasons particular to the context of minors speaking in the school context. The next Part turns to the multiple lines of doctrine laying out when student speech must be allowed versus when a school may constitutionally prohibit or punish student speech.

II. SPEECH RIGHTS IN SCHOOLS

The place and treatment of student speech within a school environment has long been contested—in his landmark book *The Schoolhouse Gate*, Justin Driver argues that "the public school has served as the single most significant site of constitutional interpretation within the nation's history."[72] A first key question goes to the purpose of public education itself: Is it to foster a freethinking citizenry, or is part of the school curriculum assimilation into a future populace that agrees about core values? If public schools are meant to help develop students into critical thinkers ready to joust in the marketplace of ideas, the value of student speech within the school environment should be weighted more heavily than if a school's primary purpose is to educate all students into at least some universal agreement.

[70] Scott Skinner-Thompson has written persuasively about the "emancipatory potential" of the expressive dimensions of gender identity. Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657, 694 (2022) [hereinafter Skinner-Thompson, *Identity by Committee*]; *see also* Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 885 (2018) (proposing "renewed attention on the First Amendment as a means of advancing LGBTQ rights").

[71] Holly V. Franson, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias To Enact and Enforce Nondiscriminatory Dress Code Policies*, 84 U. COLO. L. REV. 497, 520 (2013); *see also* Weatherby, *supra* note 12, at 93 (arguing such expression should also include student's choice of restroom). A more nuanced and accurate understanding of gender would also include expressions of masculinity and femininity in addition to expressing one's gender identity. *See* Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 199-200 (2013).

[72] JUSTIN DRIVER, THE SCHOOLHOUSE GATE 9 (2018).

A. *Early Student Speech: Assimilation Versus Diversity*

Both of these understandings of public education have held sway at different times.[73] In the mid-nineteenth century, Horace Mann advocated for public education as assimilationist, forging agreement on core values.[74] In the early twentieth century, John Dewey described schools as forging "community awareness,"[75] and education scholar Ellwood P. Cubberley extolled the value of public education for assimilating and Americanizing recent immigrants.[76] By contrast, others view the value of public education as teaching students how to engage with the marketplace of ideas.

Several early twentieth-century cases wrestled directly with the question of how strongly the state could direct an assimilationist bent in public school curricula. In *Meyer v. Nebraska*, the state of Nebraska outlawed teaching in foreign languages, which the Supreme Court found to be unconstitutional.[77] Nebraska justified this ban by saying it simply wished to "promote civic development" by preventing the education of children "in foreign tongues and ideals before they could learn English and acquire American ideals."[78] Failing to adequately acquire American ideals, in the state's view, would prevent them from becoming useful citizens as well as endanger public safety.[79] The Supreme Court rejected this argument, finding that it was "arbitrary and without reasonable relation to any end within the competency of the state."[80] In both *Meyer* and *Pierce v. Society of Sisters*, which evaluated a statute requiring public school attendance as a way to prevent education in Catholic schools,[81] the Court rejected the proposed state goal of inculcating American values as too deeply intruding on the fundamental rights of parents to decide how to raise their children.[82] Decades later, the Court similarly rejected Wisconsin's desire to educate children with a standardized set of values in *Wisconsin v. Yoder*, there assessing Wisconsin's compulsory school attendance law against the claims of Amish families who wished to withdraw their children after junior high school.[83] Although the Court recognized Wisconsin's "interest in universal education," it

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[73] *See* Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 666 (1987).

[74] Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 174 (1996).

[75] *Id.* at 178.

[76] DRIVER, *supra* note 72, at 44.

[77] 262 U.S. 390, 397 (1923).

[78] *Id.* at 401.

[79] *Id.*

[80] *Id.* at 403.

[81] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 530 (1925).

[82] *Id.* at 534-35.

[83] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

concluded that such an interest failed when balanced against fundamental rights such as free exercise and parental rights.[84]

Between *Meyer*/*Pierce* and *Yoder*, however, a pair of cases resolving the same question two ways demonstrated that the issue of whether public schools were meant to inculcate values or foster individual freedom was highly contested and unsettled law. The two cases, only three years apart, dealt with students who belonged to the Jehovah's Witness church. Because of their religious beliefs, the students refused to salute the flag in the classroom and were punished by their school. Both cases arose during World War II, a particularly patriotic (and xenophobic) time during which actions perceived as un-American were especially unpopular, which undoubtedly contributed to the treatment of the students in question. In the first case, *Minersville School District v. Gobitis*,[85] the Supreme Court held that the school district's disciplinary action was constitutional, citing the importance of universal values: "The ultimate foundation of a free society is the binding tie of cohesive sentiment."[86] The Court refused to, as it described the students' petition, "exercise censorship" over state legislatures and school officials who wanted to promote "an attachment to the institutions of their country."[87]

The decision was an unpopular one,[88] and only three years later the Court heard a case with almost identical facts. In the wake of *Gobitis*, West Virginia enacted a law requiring public schools to include various subjects "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism."[89] The state Board of Education also adopted a requirement that all teachers and students salute the flag daily.[90] If a student refused, that student would be expelled, and both the student and his or her parents could be prosecuted for truant delinquency.[91] As in *Gobitis*, several families belonging to the Jehovah's Witness faith sued.[92] This time, however, the Court took a different view of the requirement. In *West Virginia Board of Education v. Barnette*, the Court stressed that the requirement to salute the flag was not purely educational, as it crossed the line into requiring students to affirm a specific belief.[93] As Justice Jackson famously wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion

[84] *Id.* at 214.

[85] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[86] *Id.* at 596.

[87] *Id.* at 599.

[88] DRIVER, *supra* note 72, at 63.

[89] *Barnette*, 319 U.S. at 625.

[90] *Id.* at 626.

[91] *Id.* at 629.

[92] *Id.*

[93] *Id.* at 631, 633.

or force citizens to confess by word or act their faith therein."[94] Justin Driver argued that this recognized not only that students in public schools still held at least some constitutional rights, but that the broader societal consequences of violating those rights would be "disastrous."[95]

B. *Modern Student Speech:* Tinker

The modern foundation of student speech rights was laid in a series of cases in the middle of the twentieth century. The most famous student speech case is *Tinker v. Des Moines School District*.[96] The case arose because three students wore black armbands to school in protest of the Vietnam War.[97] All three were suspended and subsequently sought an injunction to prevent further school discipline.[98] Justice Abe Fortas, writing for the Court, began his opinion by acknowledging that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[99] That said, he also noted that the speech of students could "collide" with the legitimate authority of school officials.[100]

Given the circumstances of the protest in question, however, Fortas said that in the absence of any evidence that the students' protest actually disrupted the school's activities, the case simply did not involve such a collision.[101] A few other students "made hostile remarks" to the protesting students, but such remarks were made outside of the classroom, and no disruptions occurred in the school itself.[102]

The Court thus drew a line between "undifferentiated fear or apprehension of disturbance" and evidence of a material and substantial interference with the operation of the school.[103] If school officials could present actual evidence of such substantial interferences, such as widespread or violent reactions among other students, the school could constitutionally restrict the speech that triggered such interference.[104] If the school was merely *worried* about such a disturbance, however, that was not enough: the school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[105]

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[94] *Id.* at 642.
[95] DRIVER, *supra* note 72, at 67.
[96] 393 U.S. 503, 503 (1969).
[97] *Id.* at 504.
[98] *Id.*
[99] *Id.* at 506.
[100] *Id.* at 507.
[101] *Id.* at 508.
[102] *Id.*
[103] *Id.* at 508-09.
[104] *Id.* at 509.
[105] *Id.*

Notably, the Court explained this test with reference to the educational activities that take place at school outside of the classroom.[106] Justice Fortas discussed students expressing their personal opinions as "an important part of the educational process,"[107] and explicitly rejected the idea that students attend school only to receive messages that the state and school board have decided they should be given.[108] The Court thus pushed back against the idea that a goal of public school is to indoctrinate students with common values.

Justice Fortas's opinion may have oversimplified the broader societal context in which the students protested. Justin Driver has argued that the backlash to the armbands was significant enough that *Tinker* should have failed its own test.[109] Moreover, commentators both at the time and in later decades pointed out that by hinging the protection of speech on the reaction of listeners, one student's speech rights could be controlled by hostile listeners, or hecklers.[110]

Nonetheless, the *Tinker* disruption test has been used over and over in the decades since the case to evaluate speech-limiting actions by school officials, in the context of a variety of controversial issues. Multiple modern cases triggering such analysis involved the display of Confederate flags. A typical version of this case occurs in a school that has experienced recent tensions and even violence sparked by racist incidents. In the wake of such tension, the school administration places restrictions on displaying images that the school believes will reignite the debate, including the Confederate flag. A student who wishes to wear clothing emblazoned with the Confederate flag is told they cannot, and files a lawsuit arguing that the school is infringing on their speech rights. In such a context, courts have been likely to find that the speech had caused enough disruption of educational activities to support the school's actions. In one South Carolina case from 1997, the school pointed to multiple "incidents of racial tension" from the last several years sparked by students wearing clothing that displayed Confederate flags, including incidents that rose to the level of threatened violence.[111] After a student was suspended for wearing a jacket with a Confederate flag on it,[112] a court found that the school had a reasonable basis to believe that the jacket would cause similar incidents of tension and possibly violence.[113] Around the same time, a Kansas school district instituted a "Racial Harassment and Intimidation" policy prohibiting clothing and written materials "that [are] racially divisive or create[] ill will or hatred."[114] After a seventh-grade

[106] *Id.* at 512 ("The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom.").

[107] *Id.* at 512.

[108] *Id.* at 511.

[109] DRIVER, *supra* note 72, at 87.

[110] *Id.* at 88; *see also* Melissa Murray, *Sex and the Schoolhouse*, 132 HARV. L. REV. 1445, 1454 (2019) (reviewing JUSTIN DRIVER, THE SCHOOLHOUSE GATE (2018)).

[111] Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F. Supp. 488, 490 (D.S.C. 1997).

[112] *Id.* at 491.

[113] *Id.* at 493.

[114] West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1361 (10th Cir. 2000).

student was suspended for drawing a Confederate flag during math class and sued the school district,[115] the Tenth Circuit held that the multiple disruptive incidents that led to the creation of the policy justified the school's application of the policy.[116] A few years later, the Eleventh Circuit similarly held that school testimony about multiple fights that had arisen out of racial tension in the months before two students were suspended for displaying Confederate flags justified the school's actions.[117] The court added, "[O]ne only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke."[118]

Not all examples of a disruption satisfying *Tinker* occur in the context of racism, of course. For an example of a markedly different context, one Pennsylvania case arose out of an elementary school student's protest against animal cruelty at the circus.[119] The student in question wished to circulate a petition to her fellow students protesting a school field trip to a circus, but the school told her that she could not circulate the petition without submitting it for prior administrative approval.[120] The court pointed out that there was evidence that students spent time during class talking about her petition rather than working, constituting a disruption of the educational process, and that the school did not actually punish the student in any way and allowed her to hand out stickers and literature protesting the circus.[121]

Many applications of *Tinker* rule against the school and find that the school's prohibition or punishment of speech was not adequately justified by a disruption of the educational activities. For example, in Minnesota, a student's "Straight Pride" T-shirt sparked a number of incidents: one student approached the first to say she was offended, an argument broke out in a Christian student group about Christianity and sexual orientation, and a car belonging to a student who others believed was gay was keyed and urinated on.[122] The school's concern was magnified because only a couple of weeks before the Straight Pride shirt was worn, another item of clothing indirectly caused a serious injury.[123] A different

[115] *Id.*

[116] *Id.* at 1366; *see also* Barr v. Lafon, 538 F.3d 554, 566 (6th Cir. 2008) (finding that recent incidents including altercations and racist graffiti using racial slurs, Confederate flag, and violent threats against Black students supported school's conclusion that Confederate flag on clothing would lead to material disruptions).

[117] Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247, 1249 (11th Cir. 2003).

[118] *Id.* at 1249.

[119] Walker-Serrano *ex rel* Walker v. Leonard, 168 F. Supp. 2d 332, 335 (M.D. Pa. 2001), *aff'd*, 325 F.3d 412, 414 (3d Cir. 2003) (noting student prepared handwritten petition stating that she did not want to go on field trip to circus because "they hurt animals").

[120] *Id.* at 336 (explaining plaintiff was not allowed to circulate her petition without first submitting it to a school district representative for prior review).

[121] *Id.* at 344.

[122] Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1069-70 (D. Minn. 2001).

[123] *Id.* at 1070.

student had worn a Confederate flag bandana to school, which angered a Black student who spat on the student wearing the bandana.[124] The two students then got into a physical fight, during which the Black student fell, hit his head, had a severe epileptic seizure, and had to be hospitalized.[125] The court acknowledged that "[s]uch an incident undoubtedly impacts a school community dramatically, potentially making school staff and administration intensely sensitive to a seemingly volatile school environment," but ultimately concluded that there was not enough of a link between the fight instigated by the Confederate bandana and the Straight Pride T-shirt, and the other incidents were not disruptive enough to justify the school's actions.[126]

Assessing what level of disruption is enough to justify school action under *Tinker* has not been precisely calibrated by the Supreme Court, permitting courts motivated to protect particular student speech to minimize events that another court might find more significant. For example, a West Virginia case arose from a high school student who had a wardrobe consisting almost entirely of Confederate flag apparel—all but two of his shirts had the flag on them.[127] The court stated that he wore this clothing "in observance of his roots."[128] The court even said "[t]here is no basis in the record for concluding that plaintiff, who has African-American friends, is a racist."[129] That sentence is footnoted to acknowledge that the student admitted calling Black students on an opposing football team "the N word."[130] The court also discussed another incident that happened a couple of months before the school asked the student to stop wearing Confederate flag clothing, in which one of the school's fourteen Black students (out of just over 1,000 total students) left a notebook unattended.[131] When he returned, his notebook had been defaced by racist words and a drawing of a Confederate flag.[132] The court described the flag as "simply incidental to, and overshadowed by, the heinously offensive messages that accompanied it."[133] But earlier in the decision, a footnote describing the drawing notes that the flag was labeled with the word "rebel" above the flag and "n***** hater" below it, linking the flag with the racial slurs.[134]

The discretion inherent in *Tinker*'s standard is magnified by the wide variety of topics and student conduct to which it has been applied. One court found that

[124] *Id.* ("Upon seeing the [Confederate flag] bandana, an African-American student spat upon the white student, and a physical fight ensued.").

[125] *Id.*

[126] *Id.* at 1072.

[127] Bragg v. Swanson, 371 F. Supp. 2d 814, 819 (S.D.W. Va. 2005).

[128] *Id.* at 820.

[129] *Id.*

[130] *Id.* at 820 n.6 (internal quotation omitted).

[131] *Id.* at 816-17 (noting that only fourteen of the school's 1,004 students were Black and discussing how one Black student once left his spiral notebook in classroom).

[132] *Id.* at 817, 817 n.1.

[133] *Id.* at 827.

[134] *Id.* at 817 n.1.

although a long history of disruption sparked by the Confederate flag justified a school's racial harassment policy as applied to the Confederate flag,[135] a T-shirt with language about Jeff Foxworthy's "you might be a Redneck" joke was not sufficiently similar to the Confederate flag to support applying the racial harassment policy to ban it.[136] Student speech about abortion sparked at least two courts finding that schools had overreacted by trying to restrict student expression without sufficient evidence that a substantial disruption might take place. One found that a handful of student complaints in response to a student wearing a shirt that said "ABORTION IS HOMICIDE" once a week was insufficient to show the level of disruption called for under *Tinker*.[137] Another court found that a student taking part in a "Pro-Life Day of Silent Solidarity" protest generated only a "general fear of disruption."[138] Other cases present a grab bag of potentially controversial topics: a button expressing opposition to a proposed mandatory school uniform policy by comparing the proposed policy to Nazis in a depiction of Hitler Youth,[139] two different T-shirts depicting George W. Bush as a drunk driver and drug addict[140] or labeled as an "international terrorist,"[141] and even students wearing rosaries as necklaces,[142] which a gang liaison police officer classified as gang-related apparel.[143]

C. *Alternatives to* Tinker

Disruption, however, is not the only reason that a school might restrict student speech. In the decades since *Tinker*, the Supreme Court has created several carveouts that allow schools more flexibility in prohibiting or punishing student speech.

One such carveout is for speech that is sponsored or broadcast by the school. The landmark case for school-sponsored speech, *Hazelwood School District v. Kuhlmeier*, arose in 1988 after students who wrote and edited a student

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[135] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254 (3d Cir. 2002) (noting substantial evidence of past disruption related to Confederate flag). It is worth noting that the racist incidents at the school were at a fever pitch: after a white student wore a Halloween costume consisting of blackface and a noose, a group of students began wearing clothing with the Confederate flag on what they called "White Power Wednesdays." Todd A. DeMitchell & Mark A. Paige, *School Uniforms in the Public Schools: Symbol or Substance? A Law & Policy Analysis*, 250 EDUC. L. REP. 847, 858 (2010).

[136] *Sypniewski*, 307 F.3d at 257.

[137] K.D. *ex rel.* Dibble v. Fillmore Cent. Sch. Dist., No. 05-CV-0336, 2005 WL 2175166, at *1, *6 (W.D.N.Y. Sept. 6, 2005).

[138] C.H. v. Bridgeton Bd. of Educ., No. CIV09-5815, 2010 WL 1644612, at *1, *8 (D.N.J. Apr. 22, 2010).

[139] DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 636, 646 (D.N.J. 2007).

[140] Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 322, 330 (2d Cir. 2006).

[141] Barber *ex rel*. Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 849, 856 (E.D. Mich. 2003).

[142] Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 663 (S.D. Tex. 1997).

[143] *Id.* at 664.

newspaper drafted stories about the impact of divorce and teen pregnancy on their classmates.[144] After the school principal instructed student editors to remove both stories, the students sued, arguing that the censorship violated their First Amendment rights.[145] Although the stories were student speech in the sense that they were written by students, the Supreme Court saw a clear distinction between the *Tinker* children's armbands and a student newspaper published under the auspices of the school, describing the difference as tolerating independent student speech versus affirmatively promoting specific student speech.[146]

A second carveout is by subject matter, reasoning that harmful speech presents a danger to students or is in direct conflict with the educational role of schools. The first example of such a subject-specific carveout arose in the mid-1980s, when a student named Matthew Fraser gave a speech at a high school assembly nominating another student for a position in student government.[147] There were about six hundred students in attendance ranging from ninth to twelfth grade, who were given the choice between attending the assembly or attending study hall.[148]

Fraser, who had been named the top high school debater in the state of Washington twice,[149] delivered a speech characterized by high school humor. The speech was basically entirely sexual innuendo—Chief Justice Warren Burger's opinion for the Court merely described it, but Justice William Brennan's concurrence reprinted the text of the speech in its entirety:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.[150]

Fraser acknowledged afterwards that his speech was "sophomoric," but insisted that it was a deliberate choice to appeal to his fellow students in line with popular media at the time such as the television show Three's Company.[151]

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[144] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988) ("One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.").

[145] *Id.* at 264.

[146] *Id.* at 270-71.

[147] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

[148] *Id.*

[149] DRIVER, *supra* note 72, at 91.

[150] *Bethel*, 478 U.S. at 687 (Brennan, J., concurring).

[151] DRIVER, *supra* note 72, at 92.

His judgment on this point appears to have been correct, as the student he nominated won with about 90% of the vote.[152]

The school officials watching his speech, however, were not impressed. He was suspended for three days and his name was stricken from the ballot to elect student speakers for graduation under a rule that prohibited obscene language, stating that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[153] He unsuccessfully challenged his suspension through the school district, then sued, alleging that his free speech rights had been violated.[154] The district court found in his favor, and in the meantime he had been elected graduation speaker by his classmates writing in his name, so he did speak at his graduation ceremony after all.[155] The Ninth Circuit agreed with the district court, finding that his speech was "indistinguishable" from the challenged antiwar expression in *Tinker*.[156]

The Supreme Court disagreed and focused on the content of the speech. Where everyone understood the *Tinker* armband to be political speech protesting the Vietnam War, Fraser's nominating speech was only sexual innuendo in the eyes of the Court, even though it took place in the context of student government activities.[157]

In the course of justifying why this distinction was relevant, Chief Justice Burger's opinion for the Court explained what he saw as the purpose of public education: to "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation"[158] and to ensure the "inculcation of fundamental values necessary to maintenance of a democratic political system."[159] Although he nodded to *Tinker*'s emphasis of the educational value of free speech, that value could not stand alone as an unmitigated good:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[160]

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[152] *Id.*

[153] *Id.* at 92-93.

[154] *Bethel*, 478 U.S. at 678-79.

[155] *Id.* at 679.

[156] *Id.*

[157] *Bethel*, 478 U.S. at 680.

[158] *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (William Beard rev. 1968)).

[159] *Id.* (brackets omitted) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[160] *Id.*

The value of any student's speech, as reflected in his opinion for the Court, can only be evaluated in the context of whether it promoted or undermined the shared values that the school was also teaching.[161] This was why, for example, a young adult's right to express himself using obscenities was very different than a teenager's right to express himself using innuendo.[162] While adults were presumably mature enough to hear innuendo or obscenities without being harmed, such innuendo "could well be seriously damaging" to the less mature audience Fraser addressed.[163] Burger stressed that the assembly included students as young as fourteen years old,[164] who were "bewildered" by both the speech itself and the actions of some of the older students, "graphically simulat[ing] the sexual activities pointedly alluded to."[165] By this point the Court had already approved other restrictions on sexual speech that could reach minors,[166] including a statute banning the sale of sexual material to minors, a school's authority to remove vulgar books from a school library,[167] and restrictions on vulgar language broadcast over public airwaves that children might inadvertently stumble upon.[168] Burger concluded that school officials could reasonably and constitutionally decide that allowing vulgar language, particularly in official contexts such as a school assembly, would undermine the educational activities and goals of the school.[169]

This judgment of sexual speech as inherently harmful created an alternative analysis to *Tinker*. This exception was quite explicit; Justice Brennan's concurrence[170] and Justice Thurgood Marshall's dissent[171] would both have performed the *Tinker* material disturbance analysis, with Justice Brennan finding that a sufficient disturbance took place and Justice Marshall disagreeing. The majority's approach, however, rejected that framework entirely and created a second track of analysis: that if speech were harmful or dangerous for the student audience, the school could constitutionally restrict or punish the speech without needing to show any actual interference with the educational work of the school.[172]

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[161] *Id.* at 683.

[162] *Id.* at 682 (citing Cohen v. California, 403 U.S. 15 (1971)).

[163] *Id.* at 683.

[164] *Id.*

[165] *Id.* at 678.

[166] *Id.* at 684 (citing Ginsberg v. New York, 390 U.S. 629 (1968) (upholding ban against material which would be appropriate for adults, but not when sold to minors)).

[167] *Id.* (citing Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion) (noting otherwise divided Court agreed that a "school board has the authority to remove books that are vulgar")).

[168] *Id.* at 684-85 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978)).

[169] *Id.* at 685-86.

[170] *Id.* at 687 (Brennan, J., concurring).

[171] *Id.* at 690 (Marshall, J., dissenting).

[172] *Id.* at 683.

This principle was extended to another subject—illegal drug use—in 2007. The most robust articulation of this principle was sparked by a controversy in Alaska, when a high school senior displayed a large banner reading "Bong Hits 4 Jesus" as the Olympic torch was carried by.[173] The student, Joseph Frederick, was suspended for ten days and later sued to challenge his suspension.[174] Although the banner received some attention, it did not result in widespread disruptions or other interference with educational activities.[175]

Chief Justice Roberts, writing for the Court, did not think this mattered. He summarized two important holdings from *Fraser*: first, the speech rights of students in public school are not the same as the speech rights of adults in public; and second, *Tinker* need not be applied in every case involving speech in a public school.[176] Instead, just as the danger of sexual innuendo removed *Fraser*'s speech from the *Tinker* framework, the danger of illegal drug use was sufficient that the *Tinker* test need not apply to Frederick's sign.[177] Although the message of "Bong Hits 4 Jesus" was not entirely clear, the school principal believed that it promoted drug use, and that interpretation was "plainly a reasonable one" in Roberts's eyes.[178] Once the banner was understood to promote drug use, the school could punish that speech as inherently dangerous.[179]

Most recently, the Court declined to expand these exceptions to the expression of vulgar off-campus speech. A high school student, upset that she was not selected for the varsity cheerleading team, posted images on Snapchat with the text, "Fuck school fuck softball fuck cheer fuck everything."[180] After other students showed the images to school administrators, the school suspended her from the junior varsity team for the rest of the school year.[181] The school justified its actions by arguing that using profanity in relation to a school extracurricular impeded the school's attempts to teach good manners, prevent disruption in school activities under *Tinker*, and maintain team morale.[182] The Court rejected these arguments, although not in a blanket rule. The Court acknowledged that student speech that takes place off of school grounds could in some circumstances be constitutionally punished by the school, because the concerns

[173] Morse v. Frederick, 551 U.S. 393, 397 (2007).

[174] *Id.* at 398.

[175] *Id.*

[176] *Id.* at 404-05.

[177] Emily Waldman has written about a worry from religious organizations that the case might result in simply broadening *Fraser* to support restricting any student speech that did not support a school's educational work. Emily Gold Waldman, *A Post*-Morse *Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 488 (2008).

[178] *Morse*, 551 U.S. at 401.

[179] *Id.* at 403, 409.

[180] Mahanoy Area Sch. Dist. v. B. L. *ex rel* Levy, 141 S. Ct. 2038, 2043 (2021).

[181] *Id.*

[182] *Id.* at 2047.

of the school do not disappear outside of the school gates.[183] The case at hand, however, was relatively easy in the eyes of the Court because the school had presented no evidence that the Snapchats actually led to a substantial disruption or harm to the rights of other students. The Court thus declined to give direction about where the line is between sanctionable and protected off-campus speech.[184] Instead, the Court simply said that in this context the school's interests were weak, whereas the student's speech rights were strong.[185]

One other line of cases is relevant to expression through students' choice of clothing: challenges to school dress codes and uniform requirements. A number of appellate courts have consistently held that generalized restrictions on student clothing do not impermissibly restrict student speech rights.[186] The Fifth Circuit's decision in *Canady v. Bossier Parish School Board*[187] provides a clear blueprint of such analysis: the court reasoned that although a student's choice of clothing can implicate the First Amendment,[188] the uniform policy in question was viewpoint neutral, in contrast to *Tinker*'s focus on school actions directed at specific student speech.[189] As a result, the court used traditional time, place, and manner analysis directing that the uniform policy passed constitutional review "if it furthers an important or substantial governmental interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."[190] The court then found that the goal of uniform policies was to improve education and that the policy did not target or unduly affect student expression.[191]

Transgender students wishing to wear clothing that expresses their gender identity, however, do not challenge dress codes or uniform policies in the abstract. They wish to wear clothing, hairstyles, and other markers of appearance that are compliant with the school's clothing requirements, but that the dress code or uniform policy identifies as associated with a gender other than the sex the student was assigned at birth. Any school action restricting such clothing is thus directed at specific student expression and would be analyzed under the *Tinker* line of cases.

A Seventh Circuit opinion provides a concise example of the above doctrines, as well as some of the policy concerns around student speech, in the context of disagreements about sexual orientation. After a number of high school students

[183] *Id.* at 2044-45.

[184] *Id.* at 2045.

[185] *Id.* at 2047-48.

[186] *See, e.g.*, Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 435 (9th Cir. 2008); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 391 (6th Cir. 2005); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 286 (5th Cir. 2001).

[187] 240 F.3d 437 (5th Cir. 2001).

[188] *Id.* at 440.

[189] *Id.* at 442.

[190] *Id.* at 443.

[191] *Id.* at 445.

participated in activities commemorating the National Day of Silence, protesting bullying and harassment of LGBTQ+ students, a few other students responded with various expressions of disagreement.[192] One student, who wore a T-shirt that said "Be Happy, Not Gay," was told that his shirt violated a school prohibition of derogatory comments insulting characteristics that included sexual orientation.[193]

After the student challenged the school's actions, arguing they violated his free speech rights, Judge Richard Posner wrote that where the school tried to balance the competing interests of free speech and "ordered learning," the student pointed to the relatively narrow exceptions of speech that would cause a disturbance under *Tinker*, were lewd under *Fraser*, or advocated illegal drug use under *Morse* as the only contexts in which the school's interests outweighed his own speech rights.[194] But Posner read the latter two cases in a more abstract way than some other courts, inferring that "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."[195]

Posner further pointed out another conflict in the school's role, that of promoting free speech versus protecting students from bullying:

> [H]igh-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students. Because of that relationship and responsibility, we are concerned that if the rule is invalidated the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment.[196]

Posner ultimately denied the student's request for a preliminary injunction against the school's derogatory comments policy generally, but granted it as to the specific "Be Happy, Not Gay" slogan, describing it as only "tepidly negative" and "highly speculative" that it either could cause substantial disruption or was patently offensive.[197]

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[192] Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 670 (7th Cir. 2008).

[193] *Id.*

[194] *Id.* at 672.

[195] *Id.* at 674.

[196] *Id.* at 674-75.

[197] *Id.* at 676.

The speech rights of students are thus protected in the abstract[198] but can be assessed along two paths. Should a court be presented with a student challenging school restrictions upon their speech, it will first ask whether the speech fits into one of the carveouts that give the school more authority: Was the speech sponsored by the school, did it promote illegal drug use, or was it patently offensive?[199] If the speech does not fit into one of those categories, then the court will apply *Tinker* to say the speech should be allowed unless it caused a substantial disruption that interfered with the educational work of the school. The next Part turns to the first inquiry, whether the speech of transgender students fits into a carveout.

III. GENDER IDENTITY AS LEWD SPEECH

Student speech expressing gender identity is obviously not sponsored by the school, nor does it promote illegal drug use. It has, however, been described as sexualized speech, particularly in recent years as part of attempts to forbid discussion of topics relating to LGBTQ+ people in public schools. The next Section outlines how legislators and other activists in the political sphere have attempted to characterize speech about LGBTQ+ issues, and transgender people in particular, as sexualized and even as sexually predatory.

A. *Characterizing Gender Identity as Lewd*

LGBTQ+ people, particularly gay men, have historically been characterized by homophobic prejudice as sexual predators who hope to turn children gay by molesting them. Clifford Rosky has traced the historical evolution of such fears and weaponized stereotypes, explaining that this "seduction fear" was one of the central reasons behind American anti-LGBTQ+ legislation.[200] Rosky's article *Fear of the Queer Child* follows the modern incarnation of such faux terrors from Anita Bryant's "Save Our Children" campaign of the late 1970s through modern anti-LGBTQ+ policies ranging from adoption statutes to Boy Scout membership policies.[201]

Rosky also discusses a slight twist on this boogeyman: the fear of gender variance in children. In the 1990s, this manifested as discussions in custody disputes, for instance when it was asked whether a boy raised by two lesbian

[198] Alexander Tsesis argues the Supreme Court's line of student speech cases has indicated student speech is "low-value" speech. Alexander Tsesis, *Categorizing Student Speech*, 102 MINN. L. REV. 1147, 1162-63 (2018).

[199] Many commentators object to the line of carveouts. For example, Deborah Ahrens and Andrew Siegel argue that the line of cases creating the carveouts "re-empowered schools to limit and punish student speech based on vague and conclusory concerns about decorum or paternalistic assumptions about students' ability to process complicated issues or handle crude language." Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 82 (2019).

[200] Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 620 (2013).

[201] *Id.* at 639-55.

women would have sufficient masculine role models, or be unable to appropriately form his gender identity.[202] Although Rosky's 2013 article describes such role modeling arguments as having waned in custody and visitation cases,[203] he also notes how opposition to the 2008 Employment Non-Discrimination Act, which would have prohibited discrimination based on sexual orientation and gender identity in federal employment, focused on the specter of transgender teachers who supposedly forced young children "to learn about bizarre sexual fetishes."[204]

This rhetoric has come roaring back into popular discourse in recent years. The pejorative term "groomer" has become "omnipresent in right-wing media" and is used to equate any LGBTQ+ person or LGBTQ+ topic as preparing children for sexual victimization.[205] The television commentator Tucker Carlson insinuated that teachers in California were grooming seven year old children by "talking . . . about their sex lives."[206] Drag queen story hours, public events often held at libraries in which a drag queen reads a book to children, have drawn particularly violent protests with members of the far-right neofascist Proud Boys interrupting the event while wearing T-shirts reading "Kill Your Local Pedophile."[207] After one such event, a Florida state representative tweeted, "I will be proposing Legislation to charge w/ a Felony & terminate the parental rights of any adult who brings a child to these perverted sex shows aimed at FL kids."[208]

Much of the current rhetoric has come out of Florida, which recently passed a statute known as the "Don't Say Gay" law. The law prohibits classroom instruction about sexual orientation and gender identity in kindergarten through third grade "in a manner that is not age-appropriate or developmentally appropriate," and makes a similar limitation for only age-appropriate or developmentally appropriate instruction past those grades.[209] Supporters of the law such as Florida Governor Ron DeSantis, however, use broad rhetoric that makes clear their position that any discussion of sexual orientation or gender identity is inappropriate at any age. When Governor DeSantis signed the bill into

[202] *Id.* at 659.

[203] *Id.* at 661.

[204] *Id.* at 663.

[205] Jessica Winter, *What Should a Children's Book Do?*, NEW YORKER (July 11, 2022), https://www.newyorker.com/news/annals-of-education/lgbt-books-kids-ban.

[206] Melissa Block, *Accusations of 'Grooming' Are the Latest Political Attack—with Homophobic Origins*, NPR (May 11, 2022, 5:27 AM), https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attack-homophobic-origins [https://perma.cc/J9UR-7KCL].

[207] Brandon Tensley, *Proud Boys Crashed a Drag Queen Story Hour at a Local Library. It Was Part of a Wider Movement*, CNN (July 21, 2022, 5:03 PM), https://www.cnn.com/2022/07/21/us/drag-lgbtq-rights-race-deconstructed-newsletter-reaj/index.html [https://perma.cc/D2FR-BS7F].

[208] *Id.*

[209] FLA. STAT. § 1001.42(8)(c)(3) (2022).

law, he said that opponents of the law "support sexualizing kids in kindergarten."[210] Governor DeSantis's press secretary, Christina Pushaw, tweeted of the statute, "The bill that liberals inaccurately call 'Don't Say Gay' would be more accurately described as an Anti-Grooming Bill" and "[i]f you're against the Anti-Grooming Bill, you are probably a groomer or at least you don't denounce the grooming of 4-8 year old children."[211] Republican National Committee Chair Ronna McDaniel wrote that children were "being indoctrinated with anti-American and sexually-explicit propaganda" in school.[212] After a number of groups and Florida parents filed a lawsuit arguing that the Don't Say Gay law was unconstitutional, a spokesperson for Governor DeSantis said that his administration would "defend the legality of parents to protect their young children from sexual content in Florida public schools."[213]

Florida is not the only state attempting to restrict any acknowledgment of LGBTQ+ people by describing them as sexualizing children, of course. The Attorney General of Texas, Ken Paxton, sent a letter to the Austin school district after learning of planned activities acknowledging Pride Week, which he criticized as "unmistakably. . . 'human sexuality instruction.'"[214] He posted the letter on Twitter, with a caption claiming that by attempting to prevent the activities, he was "hold[ing] deceptive sexual propagandists and predators accountable."[215] Representative, and now House Speaker, Mike Johnson of Louisiana introduced a federal bill cosponsored by thirty-two other Republicans in October 2022 called the Stop the Sexualization of Children Act.[216] The bill would prohibit the use of federal funds to "develop, implement, facilitate, or fund any sexually oriented program, event, or literature for children under the age of 10."[217] On his own website, Johnson wrote that "[t]he Democrat Party and their cultural allies are on a misguided crusade to immerse young children in sexual imagery and radical gender ideology."[218]

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[210] Winter, *supra* note 205.

[211] Brooke Midgon, *Gov. DesSantis Spokesperson Says 'Don't Say Gay' Opponents Are 'Groomers*,*'* HILL (Mar. 7, 2022), https://thehill.com/changing-america/respect/equality/597215-gov-desantis-spokesperson-says-dont-say-gay-opponents-are/ [https://perma.cc/E4JK-6J93].

[212] Ronna McDaniel, Opinion, *Parental Rights Bill: Teach Kindergartners the ABCs, Not S-E-X*, FOX NEWS (Apr. 4, 2022, 7:00 AM), https://www.foxnews.com/opinion/parental-rights-bill-teach-abcs-not-sex-ronna-mcdaniel [https://perma.cc/DJ98-K8KL].

[213] Brendan Pierson, *Fla. Parents Bring First Challenge to Bill Opponents Dub 'Don't Say Gay*,*'* REUTERS (Mar. 31, 2022, 3:28 PM), https://www.reuters.com/legal/litigation/florida-parents-sue-first-challenge-dont-say-gay-bill-2022-03-31.

[214] Ken Paxton (@KenPaxtonTX), X (Mar. 22, 2022, 8:18 PM), https://twitter.com/kenpaxtontx/status/1506425186219929608 [https://perma.cc/8J68-E32R].

[215] *Id.*

[216] H.R. 9197, 117th Cong. (2d Sess. 2022) (introducing bill).

[217] *Id.* at 1.

[218] Press Release, Rep. Mike Johnson, House Republicans Introduce Legislation To Ensure Taxpayer Dollars Cannot Fund Sexually Explicit Material for Children (Oct. 18,

Much of this rhetoric and legislative action focuses on transgender people specifically. Governor DeSantis has done so while speaking about the Don't Say Gay law, asking "[H]ow many parents want their kids to have transgenderism or something injected into classroom instruction? . . . I think clearly right now, we see a focus on transgenderism, telling kids they may be able to pick genders and all of that."[219] He has also falsely claimed that gender-affirming health care means "literally chopping off the private parts of young kids."[220] Governor DeSantis's news release marking enactment of the law quoted Florida Speaker Chris Sprowls as saying that "[o]nly fanatics think the classroom curriculum from kindergarten through 3rd grade should include teaching little children about gender identity."[221] A former Lieutenant Governor of New York writing in the *New York Post* directly argued that acknowledging or accepting transgender people is a form of sexual predation, stating that "instructing young kids that it's normal for boys to become girls and vice versa is going too far. Parents rightly fear their kids are being 'groomed.'"[222]

This focus on transgender people stretches into the federal government as well. Representative Lauren Boebert, discussing a proposed Equality Act that would have banned discrimination based on sexual orientation and gender identity in public accommodations,[223] again accused transgender women of being sexual predators, asking, "Where is the equity in this legislation for the young girls across America who will have to look behind their backs as they change in their school locker rooms, just to make sure there isn't a confused man trying to catch a peek?"[224] The proposed "Stop the Sexualization of Children Act" mentioned above would define prohibited sexually-oriented material as "any depiction, description, or simulation of sexual activity, any lewd or lascivious depiction or description of human genitals, or any topic involving

2022), https://mikejohnson.house.gov/news/documentsingle.aspx?DocumentID=1206 [https://perma.cc/RSM8-KPUN].

[219] *DeSantis Defends 'Don't Say Gay' Bill, Warns of Transgender Issues 'Injected' into Classroom Instruction*, CBS MIAMI (Mar. 4, 2022, 11:00 PM), https://www.cbsnews.com/miami/news/desantis-defends-dont-say-gay-bill-warns-of-transgender-issues-injected-into-classroom-instruction/ [https://perma.cc/XR8T-X5G3].

[220] Dawn Ennis, *DeSantis Wages War of Words To Oppose Abortion and Transgender Healthcare*, FORBES (Aug. 5, 2022, 7:39 PM), https://www.forbes.com/sites/dawnstaceyennis/2022/08/05/war-of-words-this-is-the-way-florida-fights-reproductive-and-transgender-healthcare/.

[221] News Release, Governor Ron DeSantis Signs Historic Bill To Protect Parental Rights in Education (Mar. 28, 2022), https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/ [https://perma.cc/B2V3-JD2L].

[222] Betsy McCaughey, Opinion, *Science Shows Transgender Education Doesn't Belong in Schools*, N.Y. POST (Apr. 20, 2022, 6:49 PM), https://nypost.com/2022/04/20/science-shows-transgender-education-doesnt-belong-in-schools/ [https://perma.cc/66DD-BCBB].

[223] H.R. 5, 117th Cong. (2021).

[224] Floor Remarks, Rep. Lauren Boebert, C-SPAN (Feb. 23, 2021), https://www.c-span.org/video/?c4948721/user-clip-bobert-floor-remarks02232021 [https://perma.cc/WJ6T-VNNG].

gender identity, gender dysphoria, transgenderism, sexual orientation, or related subjects."[225] In the eyes of over thirty Representatives, in other words, any acknowledgment of transgender people is as inappropriate for children as a depiction of sexual activity.

The rhetoric has also begun shifting toward a First Amendment framing. A spokesperson for Governor DeSantis argued, "There is no First Amendment right for anyone to incorporate gender theory or sexually explicit material into classroom instruction . . . . Sexual content does not belong in the K-3rd grade classroom."[226] It seems likely that the rhetoric characterizing transgender people as inherently sexualized is planting the seeds of a legal strategy which argues that statutes such as Florida's Don't Say Gay law do not violate the First Amendment because they simply prohibit speech that the Supreme Court has already held can be prohibited by schools. If that argument were to be successful in challenges to curriculum-based laws, it would similarly apply to the speech rights of individual students. The next Section thus turns to whether this legal framing of gender identity as lewd is correct, and what *Fraser* has meant in application by lower courts.

B. *A Doctrinal Definition of Lewd*

Although cases applying *Fraser* to specific speech vary, the opinion creates a stringent test under which only the worst speech is deemed harmful enough that schools may simply prohibit it without any *Tinker* analysis. The Supreme Court's opinion in *Fraser* uses the words "vulgar and offensive,"[227] "offensively lewd and indecent speech,"[228] and "vulgar and lewd"[229] to explain what speech may be prohibited by a school.[230] Lower courts applying the decision often simply repeat those words, but a few have attempted to expand the definition, such as the Second Circuit's focus on "sexual innuendo and profanity."[231] Five years later, called upon to again apply *Fraser*, the Second Circuit described the issue as one of form rather than content:

> *Fraser* and its progeny of cases all deal with speech that is offensive because of the manner in which it is conveyed. Examples are speech

[225] H.R. 9197, 117th Cong. (2022).

[226] Eli Yokley, *Parents Are Split on 'Don't Say Gay' Policy, but Americans Are Becoming More Comfortable with Queerness*, MORNING CONSULT PRO (May 23, 2022, 5:00 AM), https://morningconsult.com/2022/05/23/lgbtq-classroom-politics/.

[227] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[228] *Id.* at 685.

[229] *Id.*

[230] Scholars such as Mark Strasser have criticized the Court for not offering further guidance beyond *Fraser*'s text. *See* Mark Strasser, Tinker *Remorse: On Threats, Boobies, Bullying, and Parodies*, 15 FIRST AMEND. L. REV. 1, 41 (2016) ("[T]he Court has been utterly unhelpful with respect to how or when to differentiate among the kinds of speech that pose genuine dangers to students and school personnel versus sophomoric speech that, while inappropriate, poses no dangers to anyone.").

[231] Guiles *ex rel*. Guiles v. Marineau, 461 F.3d 320, 328 (2d Cir. 2006).

> containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder. Rather than being concerned with the actual content of what is being conveyed, the *Fraser* justification for regulating speech is more concerned with the plainly offensive manner in which it is conveyed.[232]

Reviewing cases in which *Fraser* is applied by lower courts reveals some clear patterns. Importantly, no cases treat discussion of sexual orientation or gender identity as inherently lewd, and some courts specifically reject the idea that LGBTQ+ topics are sexual.[233]

Explicitly sexualized jokes, images, and language are particularly likely to be found vulgar and lewd under *Fraser*. Some examples are obvious and extreme: a student cartoon of eight drawings of stick figures in sexual positions,[234] using "profane" terms to accuse one teacher of having sex with another teacher,[235] an unofficial student paper with the lead (fictional) story claiming that the school principal had been arrested for public masturbation,[236] and a video surreptitiously zooming in on a teacher's buttocks set to an explicit song called "Ms. New Booty."[237] As students and schools became more conversant with the internet, it opened new possibilities for lewd speech, such as a sixth-grade student who played a sexually explicit computer game called "Sexy Dress-Up" at school.[238] The Fourth Circuit applied *Fraser* to a MySpace page targeting another student by claiming that she had STDs.[239]

Social standards around sexualized speech have obviously changed over the past few decades, demonstrated by older cases reacting with shock to words that are seen as more anodyne today. For example, in 1992, a student T-shirt picturing the band New Kids on the Block with the message "Drugs Suck" was deemed vulgar.[240] The court's logic that the word "suck" had inescapable sexual connotations, however, may not hold true thirty years later, as the court asserted that "suck . . . in today's vernacular is more offensive than 'damn.'"[241]

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[232] Nixon v. N. Loc. Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005).

[233] *See infra* notes 293-295 and accompanying discussion.

[234] R.O. *ex rel.* Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 541 (2d Cir. 2011).

[235] J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Penn. 2002) (acknowledging complication that speech in question was on website rather than expressed on campus).

[236] Snell v. Prince George's Cnty. Bd. of Educ., No. CIV. AW-93-1184, 1995 WL 907869, at *2 (D. Md. Aug. 11, 1995), *aff'd sub nom.* Snell *ex rel.* Snell v. Buffington, 105 F.3d 648 (4th Cir. 1997).

[237] Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1279 (W.D. Wash. 2007).

[238] Smith v. Detroit Indep. Sch. Dist., No. 5:06-CV-262, 2009 WL 10708891, at *8 (E.D. Tex. Mar. 31, 2009).

[239] Kowalski v. Berkeley Cnty. Pub. Schs., No. 3:07-CV-147, 2009 WL 10675108, at *1, *7 (N.D.W. Va. Dec. 22, 2009), *aff'd*, 652 F.3d 565 (4th Cir. 2011).

[240] Broussard *ex rel.* Lord v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1528, 1537 (E.D. Va. 1992).

[241] *Id.* at 1536.

Similarly, the case involving a T-shirt about a "Coed Naked Band" viewed a T-shirt reading "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" as vulgar due to the word "dick."[242] A Michigan court also found the word "dick" vulgar a few years later, although it was used in the context of calling an assistant principal by that term.[243] In Texas, another T-shirt pun was also deemed vulgar, this time with the slogan "Somebody Went to HOOVER DAM And All I Got Was This 'DAM' Shirt."[244]

Perhaps surprisingly, relatively few cases involve the vulgar language of actual obscenities. Examples can be found—a student loudly repeating the phrase "white ass fucking bitch,"[245] another unofficial student newspaper described only as containing "sophomoric humor with a strong bent toward the vulgar and profane"[246]—but perhaps most lawyers advise that obscenities would more likely fall under *Fraser*'s ambit and thus such incidents are not litigated. Similarly, applying *Fraser* to threats is rare.[247] One example was quite straightforward; a student wrote an article for (yet another) unofficial student publication proposing various terrible things he hoped would happen to teachers and school administrators, including bomb threats, property damage, and that someone would sneak harmful substances into their food and prank them by publishing pornographic advertisements with teachers' phone numbers.[248] Another case was slightly more attenuated, as the speech in question was a T-shirt that read "Volunteer Homeland Security" next to a picture of a gun on the front, and on the back over a larger picture of a gun had the text "Special Issue—Resident—Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner—No Bag Limit."[249] The court's opinion spent two pages explaining why the shirt's language seemingly endorsed illegal vigilante violence rather than the student's explanation that it expressed support for the

[242] Pyle *ex rel.* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 170 (D. Mass. 1994) ("In sum, on the question of when the pungency of sexual foolery becomes unacceptable, the school board of South Hadley is in the best position to weigh the strengths and vulnerabilities of the town's 785 high school students.").

[243] Posthumus v. Bd. of Educ. of Mona Shores Pub. Sch., 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005).

[244] Mercer v. Harr, No. CIV.A. H-04-3454, 2005 WL 1828581, at *1, *5, *7 (S.D. Tex. Aug. 2, 2005).

[245] Heller v. Hodgin, 928 F. Supp. 789, 792 (S.D. Ind. 1996).

[246] Bystrom *ex rel.* Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1389-90 (D. Minn. 1987), *aff'd sub nom.* Bystrom v. Fridley High, 855 F.2d 855 (8th Cir. 1988).

[247] For example, the Third Circuit cited *Fraser*'s focus on the harm speech can cause a younger audience to find no First Amendment violation when a five-year-old was suspended for telling classmates "I'm going to shoot you" during a "game of cops and robbers." S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 419, 423 (3d Cir. 2003).

[248] Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 286-87 (Or. Ct. App. 2000).

[249] Miller *ex rel.* Miller v. Penn Manor Sch. Dist., 588 F. Supp. 2d 606, 611 (E.D. Pa. 2008).

U.S. military and fight against terrorism, and thus why it crossed the line into "a message of use of force, violence and violation of law."[250]

A few appellate courts have highlighted the overlap between *Fraser*'s concern for the wellbeing of other students and *Tinker*'s concern for disruption to the educational process. For example, in 2003 the Eleventh Circuit resolved a challenge involving the Confederate flag by finding that both cases justified the school's actions.[251] The court approvingly quoted the district judge's opinion, which did not focus on *Fraser*'s references to lewd or vulgar speech, but rather the job of schools to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government."[252] The court also referenced another of its own recent decisions, similarly holding that a school official was not personally liable for suspending a student over his refusal to put away a Confederate flag.[253] In its analysis of the assistant principal's liability, the court quoted a Seventh Circuit case's reading of *Fraser* that "[r]acist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could crush [a] child's sense of self-worth."[254]

Cases in which courts declined to apply *Fraser* illustrate a wide range of speech that is protected even if it is controversial, demonstrating that courts have been reluctant to identify broad categories of lewd or offensive speech that schools are free to restrict. Obscene language has been deemed to not fall under *Fraser* when it was used in the context of reciting a poem with swear words.[255] Students who criticize teachers with sexualized jokes or with untrue assertions that they have engaged in illegal or inappropriate behavior have been deemed to have engaged in offensive speech,[256] but straightforward criticism of teachers,

[250] *Id.* at 624-25.

[251] Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1249 (11th Cir. 2003).

[252] *Id.* at 1248.

[253] The court's description of the incident, while written in an anodyne descriptive manner, can be read to imply that more disciplinary issues were going on than merely refusing to put away a Confederate flag. The student in question, who regularly participated in Civil War reenactments and living histories, responded to the assistant principal's request by "tr[ying] to explain the historical significance of the flag" to the administrator, then when taken to the administrative office, "urged" another student wearing a T-shirt with a Confederate flag on it "to adhere to his principles and not submit to the alleged violation of his First Amendment rights." Denno v. Sch. Bd. of Volusia Cnty., 218 F.3d 1267, 1270-71 (11th Cir. 2000).

[254] *Id.* at 1272-73 (quoting Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996)) (holding that school's prohibition of elementary school student's distribution to entire class of invitations to religious meetings did not violate student's First Amendment rights).

[255] Behymer-Smith *ex rel.* Behymer v. Coral Acad. of Sci., 427 F. Supp. 2d 969, 971-73 (D. Nev. 2006) (holding student's recitation of poem by W.H. Auden with words "hell" and "damn" did not constitute "vulgar, lewd, obscene, or offensive" speech where it did not disrupt or divert from educational curriculum).

[256] Gano v. Sch. Dist. No. 411 of Twin Falls Cnty., 674 F. Supp. 796, 797-99 (D. Idaho 1987) (holding student's T-shirt printed with caricatures of three school administrators

such as creating a Facebook group calling one educator "the worst teacher I've ever met" has been found to not be offensive.[257] Statements that can be interpreted as violent threats may be problematic, but not all references to violence are. For example, the Ninth Circuit held that a school was wrong to have put negative information in a student's permanent record after the student wrote a poem from the perspective of a school shooter.[258]

Controversial political topics are also generally outside of *Fraser*'s ambit, further bolstering the proposition that discussion of sexual orientation and gender identity, even in current political debate, is not lewd or offensive. Multiple courts have ruled that displaying the Confederate flag is not patently offensive.[259] More than one court held that T-shirts with the statement "homosexuality is a sin" were not offensive.[260] In a case involving a seventh grade student wearing a T-shirt describing then-President George W. Bush as a "Cocaine Addict" and "Lying Drunk Driver" alongside images of drugs and alcohol, the district court found that the images were clearly offensive under *Fraser*.[261] On appeal, the Second Circuit reasoned that although the images were "insulting or in poor taste," they were not "as plainly offensive as the sexually charged speech considered in *Fraser* nor are they as offensive as profanity used to make a political point."[262] The court's focus upon the political value of the speech is characteristic, as controversial and arguably offensive messages that convey a political point have often been found not to fall under *Fraser*, including pro-gun messages,[263] kneeling during the national anthem,[264] a T-shirt with a

looking drunk and holding alcoholic drinks was not protected speech because T-shirt falsely accused administrators of committing misdemeanor of drinking on school property).

[257] Evans v. Bayer, 684 F. Supp. 2d 1365, 1367, 1374 (S.D. Fla. 2010).

[258] LaVine v. Blaine Sch. Dist., 257 F.3d 981, 983-84, 992 (9th Cir. 2001).

[259] Bragg v. Swanson, 371 F. Supp. 2d 814, 823 (S.D.W. Va. 2005) ("Regarding *Fraser*, and despite defendants' arguments to the contrary, the display of the flag is not *per se* and patently offensive."); *see also* Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 332 (6th Cir. 2010).

[260] B.A.P. v. Overton Cnty. Bd. of Educ., 600 F. Supp. 3d 839, 843, 845 n.1, 846 (M.D. Tenn. 2022) (analyzing t-shirt with "homosexuality is a sin - 1 Corinthians 6:9-10"); Nixon v. N. Loc. Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967, 974 (S.D. Ohio 2005) (holding plaintiff wearing T-shirt with "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" is protected speech).

[261] Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 322-23 (2d Cir. 2006).

[262] *Id.* at 329. Notably, the case was decided shortly before *Morse v. Frederick*, which would have provided a slightly different and clearer justification for restricting the speech if depictions of drugs were understood to potentially promote illegal drug use.

[263] N.J. *ex rel.* Jacob v. Sonnabend, 37 F.4th 412, 424 (7th Cir. 2022) (noting speech in question "isn't like the lewd sexual speech" in *Fraser*).

[264] V.A. v. San Pasqual Valley Unified Sch. Dist., No. 17-cv-02471, 2017 WL 6541447, at *1, *5 (S.D. Cal. Dec. 21, 2017).

photograph of then-President George W. Bush labeled "International Terrorist,"[265] and buttons referring to "Scabs" worn during a teacher's strike.[266]

Even student speech about sexual behavior or sexual attraction does not fall under *Fraser* if the speech itself is not sexualized. The First Circuit found that a post-it with the text "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS" stuck on a bathroom wall "contained no speech that could be viewed as 'offensively lewd' or 'indecent.'"[267] A student who created a bracket for his friends to rank sixty-four female classmates by attractiveness was also not held to have engaged in lewd or offensive speech.[268]

Sexualized speech is more likely to lead to application of *Fraser*. For example, although virtually everyone would be offended if they were compared to Nazis, such comparisons have only been found patently offensive under *Fraser* where the comparison was also accompanied by sexual remarks. In a New Jersey school district, two elementary school students wore buttons with a picture of Hitler Youth and a slogan against a mandatory uniform policy.[269] The photo did not have swastikas or other explicit depictions of Nazis, and perhaps elementary school students are some of the least likely people to recognize and understand a photo of Hitler Youth, but the students did not deny that the photo indeed showed Hitler Youth.[270] The New Jersey court described the image as offensive, but explained in some detail why it was not so offensive as to implicate *Fraser*:

> [T]he image here is not profane, nor does it contain sexual innuendo. It is, in fact, a rather innocuous photograph—rows and rows of young men, all facing the same direction and wearing the same outfit (with no identifying marks or patches). The photograph contains no visible swastikas, and the young men are not giving the infamous "sieg heil" salute. As noted by Plaintiffs' counsel at oral argument, the young men might easily be mistaken for a historical photograph of the Boy Scouts. The image may be interpreted as insulting or thought to be in poor taste, but it is not "lewd," "vulgar," "indecent," or "plainly offensive" as set forth in *Fraser*.[271]

An ambiguous image of Hitler Youth, in other words, was not so clearly a Nazi reference that the historical reference alone was patently offensive. Because it lacked sexual innuendo and was not lewd, vulgar, or indecent, the court reasoned that the school's actions were properly evaluated under *Tinker*'s

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[265] Barber *ex rel.* Barber v. Dearborn Pub. Sch., 286 F. Supp. 2d 847, 849, 856 (E.D. Mich. 2003) ("*Fraser* is inapplicable as Barber's shirt did not refer to alcohol, drugs, or sex. Furthermore, it was neither obscene, lewd, nor vulgar . . . .").

[266] Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 526, 530 (9th Cir. 1992).

[267] Norris *ex rel.* A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 14, 24 (1st Cir. 2020).

[268] Wang v. Bethlehem Cent. Sch. Dist., No. 1:21-CV-1023, 2022 WL 3154142, at *1, *18 (N.D.N.Y. Aug. 8, 2022).

[269] DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 636 (D.N.J. 2007).

[270] *Id.*

[271] *Id.* at 645.

substantial disruption analysis. Last year, a court in California summarized existing precedents by stating "[n]one of the cases, even in the K-12 context, have allowed schools to broadly exclude all 'offensive' conduct. In *Fraser*, for example, the student speech was not merely offensive, but also 'sexually explicit, indecent, or lewd.'"[272]

This is not to say that no close questions exist. Some particularly provocative statements have been viewed as vulgar or patently offensive, even though they are not sexualized and have a cognizable political message.[273] For example, an Ohio student wore a T-shirt with Marilyn Manson's name, an image of a three-faced Jesus, and the text "See No Truth. Hear No Truth. Speak No Truth." on the front. The back of the shirt said "BELIEVE," with the letters "LIE" highlighted.[274] The Sixth Circuit found that the shirt fell under *Fraser*'s definition of vulgar and offensive speech.[275] The court linked the message of the shirt itself to broader messages in Marilyn Manson's music, arguing the symbols and words promoted values that were "patently contrary to the school's educational mission" and that the shirt and singer promoted drug use and suicide, although neither drugs nor suicide were referenced by the shirt.[276] This reaction to Manson may be explained by contemporaneous controversy over Manson in the wake of the Columbine school shooting of April 1999. After the tragedy, the media reported (incorrectly) that the two shooters wore Marilyn Manson T-shirts during the violence and were fans of the singer. As a result, Manson's concerts were cancelled, some schools banned all Marilyn Manson-branded clothing, and Manson himself was blamed for the deaths of the students.[277] Although the student in the Sixth Circuit case wore the shirt in 1997, two years before Columbine, the appellate court heard and decided the case in 2000, when characterization of Manson as a threat likely influenced the court's evaluation of what a Marilyn Manson T-shirt meant when worn to school.

Courts have also wrestled with sexualized expression in service of a laudable and nonsexual message. Multiple cases were sparked by students wearing bracelets created as a nation-wide awareness campaign about breast cancer that read "I ♥ boobies! (KEEP A BREAST)."[278] The motivation was almost identical to Matthew Fraser's: grab attention about a serious subject with "light-hearted"

[272] Flores v. Bennett, 635 F. Supp. 3d 1020, 1041 (E.D. Cal. 2022).

[273] Hardwick *ex rel.* Hardwick v. Heyward, No. 4:06-cv-1042, 2012 WL 761249, at *10 (D.S.C. Mar. 8, 2012), *aff'd*, 711 F.3d 426 (4th Cir. 2013) (finding shirt with American flag and text "Old Glory flew over legalized slavery for 90 years!" plainly offensive, potentially viewed as glorifying or endorsing slavery).

[274] Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 467 (6th Cir. 2000).

[275] *Id.* at 469.

[276] *Id.* at 470.

[277] *See, e.g.*, Christopher O'Connor, *Colorado Tragedy Continues to Spark Manson Bashing*, MTV (Apr. 26, 1999, 10:33 PM), https://www.mtv.com/news/2yvlra/colorado-tragedy-continues-to-spark-manson-bashing [https://perma.cc/B48U-G8TH].

[278] B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 297-98 (3d Cir. 2013).

and even provocative language.[279] One of the student plaintiffs who wore such a bracelet said that "no one really notices" more staid symbols for breast cancer awareness, such as the famous pink ribbon.[280] The problem, of course, is that the word "boobies" sounds more like Matthew Fraser than Susan G. Komen.[281] Some courts thus found that the bracelets were vulgar[282] and sexual innuendo, notwithstanding the motive.[283]

A school district in Pennsylvania took the same stance against the bracelets, banning them throughout schools in the district.[284] The Third Circuit, sitting en banc, held that to do so violated the First Amendment rights of students, and offered a specific reading of *Fraser* that is more speech-protective and clearer than most decisions applying the case. To begin with, the court read *Fraser* to apply only in limited circumstances, stating that the case "is not a blank check to categorically restrict any speech that touches on sex or any speech that has the potential to offend."[285] Instead, student speech could be limited under *Fraser* in only two circumstances. First, if speech were "plainly lewd," it could be prohibited by the school.[286] Second, if speech were more ambiguous, however—"speech that a reasonable observer could interpret as lewd, vulgar, profane, or offensive"—it could be restricted only if the speech could not be plausibly interpreted to comment on a political or social issue.[287] Given the recent political controversies over LGBTQ people and specifically transgender children, this reading of *Fraser* would very clearly protect even ambiguously lewd or vulgar speech that expressed a student's gender identity.

The court's application of this analysis to the bracelets gave even more guidance about what "plainly lewd" meant. Describing the bracelets as "an open-and-shut case," the court pointed to examples of plainly lewd speech: "Fraser's 'pervasive sexual innuendo' that was 'plainly offensive'"[288] and the "seven words that are considered obscene to minors on broadcast television."[289] By contrast, the fact that teachers and administrators did not ban the bracelets the moment they became aware of them, and their repetition of the word "boobies"

[279] *Id.* at 298.

[280] *Id.* at 299.

[281] *See* Sandy M. Fernandez, *Pretty in Pink*, BREAST CANCER ACTION, https://www.bcaction.org/about-think-before-you-pink/resources/history-of-the-pink-ribbon/ [https://perma.cc/UA23-N8KU] (last visited Feb. 29, 2024).

[282] J.A. v. Fort Wayne Cmty. Schs., No. 1:12-CV-155, 2013 WL 4479229, at *7 (N.D. Ind. Aug. 20, 2013) (finding bracelet's message was "ambiguously lewd," so school could ban it under *Fraser*).

[283] K.J. *ex rel.* Braun v. Sauk Prairie Sch. Dist., No. 11-cv-622, 2012 WL 13055058, at *7 (W.D. Wis. Feb. 6, 2012).

[284] B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 300 (3d Cir. 2013).

[285] *Id.* at 309.

[286] *Id.* at 298.

[287] *Id.* at 308.

[288] *Id.* at 320 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

[289] *Id.* (citing FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978)).

in announcements to students that the bracelets were prohibited, indicated that the word was not offensive enough to be viewed as vulgar and plainly lewd.[290]

Although not all courts have adopted the Third Circuit's specific reading, no court has held that reference to sexual orientation is itself sufficient to categorize the speech as lewd. The Third Circuit approvingly cited an essay by Eugene Volokh discussing a case in which a student wore a T-shirt saying "Jesus Is Not a Homophobe" in which he said "*Fraser* . . . hardly suggested that all speech on political and religious questions related to sexuality and sexual orientation could be banned from public high schools."[291] A Florida court held so explicitly, describing rainbows, pink triangles, and slogans including "Gay? Fine By Me," "Gay Pride," "I Support Gays," "God Loves Me Just the Way I Am," "Pro-Gay Marriage," and "Sexual Orientation is Not a Choice. Religion, However, Is" as "clearly not sexual in nature."[292]

An analogous issue arose in the context of student groups organized to support LGBTQ+ rights. For example, students sued their school in Texas after the school refused to allow them to post fliers and make announcements using the school P.A. system about a new club called the "Gay and Proud Youth Group."[293] Although the students' claim was analyzed as a question of whether the school appropriately restricted speech by content rather than viewpoint within the limited public forum of the school,[294] the school's explanation for its actions focused on the potential harm from sexualized topics.[295] The facts were complicated, however, by the student group's website. The site provided links to other online resources about sexuality, including www.gay.com.[296] That website had stories on sexually explicit topics, with headlines like "First Time with Anal Sex" and "How Safe are Rimming and Fingering?"[297] Although the students later removed this link from their website, the school principal reviewed their website when the link was active.[298] The court therefore described the case as "involving the issue of exposure of minors to material of a sexual subject matter."[299] Additionally, in between the events in the school and the court's

[290] *Id.*

[291] *Id.* at 309 (citing Eugene Volokh, *May "Jesus Is Not a Homophobe" T-Shirt Be Banned from Public High School as "Indecent" and "Sexual"?*, VOLOKH CONSPIRACY (Apr. 4, 2012, 3:36 PM), http://www.volokh.com/2012/04/04/may-jesus-was-not-a-homophobe-T-shirt-be-banned-from-public-high-school-as-indecent-and-sexual/ [https://perma.cc/5XU3-KEM9].

[292] Gillman *ex rel.* Gillman v. Sch. Bd. for Holmes Cnty., 567 F. Supp. 2d 1359, 1362, 1374 (N.D. Fla. 2008).

[293] Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 556 (N.D. Tex. 2004).

[294] *Id.* at 560.

[295] *Id.* at 563.

[296] *Id.* at 557.

[297] *Id.*

[298] *Id.* at 558.

[299] *Id.* at 562. Notably, in a more straightforward application of *Fraser*, another court rejected the idea that merely linking to another website made students responsible for that

decision, the Supreme Court had decided *Lawrence v. Texas*,[300] meaning that at the time of the school's censorship, same-sex sexual activity was illegal in Texas.[301] The court viewed the student group as promoting sexualized speech, but that conclusion was undoubtedly bolstered by the legal bias against LGBTQ+ people and the potential access to explicit sexual materials.[302]

Other courts, however, answered similar questions of recognition and access for student groups supporting LGBTQ+ students very differently. One court in Florida refused to apply *Fraser*[303] and stated explicitly that "this Court is unable to discern how a club whose stated purpose is to promote tolerance towards non-heterosexuals within the student body promotes the premature sexualization of students."[304] Although the history of schools and courts resisting recognition of LGBTQ+ student groups is rhetorically relevant to characterizations of LGBTQ+ topics as sexual, such cases generally do not raise *Fraser*[305] or find that a different test is more appropriate.[306] The applicability of such cases in determining whether an individual student's speech is lewd or vulgar is therefore not strong.

By contrast, the clearest implication from cases applying *Fraser* to individual student speech is that the case establishes a high bar. *Fraser* does not apply to speech that a school administrator disagrees with, nor to speech that is "inconsistent with [their] sensibilities"—as the Second Circuit put it, the case applies only "to 'plainly offensive speech' [and] must be understood in light of the vulgar, lewd, and sexually explicit language that was at issue in that case."[307] Matthew Fraser's language was viewed as plainly offensive "to any mature person," and should not be compared even to "speech that a reasonable observer

website's speech. It was likely significant that in applying *Fraser*, courts have typically treated speech uttered within the school and speech outside of the school differently. *See* Bowler v. Town of Hudson, 514 F. Supp. 2d 168, 171, 179 (D. Mass. 2007), *on reconsideration in part*, No. CV 05-11007, 2007 WL 9797643 (D. Mass. Dec. 18, 2007) (finding school's prohibition of posters advertising Conservative Club violated student speech rights, even though they listed website for national organization that linked to another site with "graphic video footage" of hostages in Iraq and Afghanistan being beheaded).

[300] 539 U.S. 558 (2003).

[301] *Caudillo*, 311 F. Supp. 2d at 558.

[302] *See id.* at 563 ("[T]his Court finds that the material on GAP Youth/LGSA's website and the group's goal of discussing sex both fall within the purview of speech of an indecent nature . . . .").

[303] Gonzalez *ex rel.* Gonzalez v. Sch. Bd. of Okeechobee Cnty., 571 F. Supp. 2d 1257, 1268-69 (S.D. Fla. 2008).

[304] *Id.* at 1266-67.

[305] *See, e.g.*, Gay-Straight All. of Yulee High Sch. v. Sch. Bd. of Nassau Cnty., 602 F. Supp. 2d 1233, 1235 (M.D. Fla. 2009).

[306] Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty., 2 F. Supp. 3d 1277, 1290 (M.D. Fla. 2014) (finding *Hazelwood v. Kuhlmeier*, and not *Fraser*, is appropriate standard for school's denial of official student group recognition).

[307] Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008).

could interpret as either lewd or non-lewd."[308] One district court found that *Fraser* cannot be applied to topics or subject matter of speech at all, but restricts only "the manner in which that view may be expressed."[309] Moreover, speech with a political or social message is particularly unlikely to be constitutionally restricted under *Fraser*.[310]

With this robust understanding of *Fraser*'s precedent established, it is difficult to imagine a viable argument that an individual student's expression of their gender identity could possibly be viewed as the type of lewd, vulgar, patently offensive expression that the case encompasses. There is nothing about the categories of gendered clothing, hairstyles, makeup, or other personal style choices that is inherently lewd. For all of the politicized rhetoric around LGBTQ+ people and topics as inappropriately sexualizing children, actually attempting to frame such an argument around the gender presentation of students demonstrates that the rhetoric falls apart as a legal matter. *Fraser* is simply inapplicable to the expression of transgender students, and therefore their expression should be analyzed under the broader frame of *Tinker*. The next Part turns to that analysis.

IV. *TINKER*, HECKLER'S VETO, AND DISTRACTIONS

Under *Tinker*, student speech should not be prohibited unless the speech causes a material disruption in the school's educational activities or school administrators have specific justification for believing that the speech would do so. This creates the possibility of a heckler's veto, meaning that the negative reactions of other students might justify silencing the transgender student.[311] If no other students react to a trans student's gender presentation, then the speech does not interfere materially and substantially with the school's operation. If, on the other hand, students object to the trans student, or even bully and harass that student, school authorities have a much stronger justification to argue that they must restrict the student's speech in order to prevent disruption of the school's educational activities. Such negative reactions are likely in many (if not most) schools, given data about bullying and harassment of transgender students. For example, one survey found that ninety percent of transgender students had heard

[308] B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 306 (3d Cir. 2013).

[309] E. High Gay/Straight All. v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1193 (D. Utah 1999).

[310] *See Hawk*, 725 F.3d at 306 ("By concluding that Fraser's speech met the obscenity-to-minors standard, the Court necessarily implied that his speech could not be interpreted as having 'serious' political value."); Mercer v. Harr, No. CIV.A. H-04-3454, 2005 WL 1828581, at *6 (S.D. Tex. Aug. 2, 2005) ("The cases in which courts did find First Amendment violations involved clothing expressing specific and clear political messages . . . .").

[311] R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 175 (2017).

derogatory statements about sexual orientation and gender.[312] In another survey of transgender adults, three quarters of the adults said that they had been harassed in school because of their gender identity.[313] This concept of the heckler's veto also exists as the heckler's veto doctrine in general First Amendment law, but *Tinker* arguably modifies that doctrine in the school setting.

A. *The Heckler's Veto Doctrine and Schools*

Under general First Amendment principles, almost all speech is constitutionally protected. Narrow exceptions exist, such as fighting words,[314] speech that attempts to incite imminent lawless action and is likely to do so,[315] obscenity,[316] child pornography,[317] and true threats.[318] Speech that sparks a negative response from listeners, however, does not fit into such an exception—there is no *Tinker*-esque material disruption test applied to adults. Moreover, the Supreme Court specifically rejected the idea of suppressing speech due to the reactions of people who hear it in what is now known as the heckler's veto doctrine. An early articulation of the concept occurred after Arthur Terminiello gave a controversial speech to a crowd of eight hundred in a Chicago auditorium, with another thousand people part of an "angry and turbulent" protest outside.[319] Terminiello was later convicted for disorderly conduct under a statute that defined a breach of the peace as speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[320] The Supreme Court held that the statute was unconstitutional, as "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[321]

The Court repeatedly reinforced this logic during cases that arose during the civil rights movement. In a series of cases, civil rights activists were convicted of breaching the peace because they held a peaceful demonstration that some members of the public may have disagreed with.[322] The Court held that it was

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[312] EMILY A. GREYTAK, JOSEPH G. KOSCIW & ELIZABETH M. DIAZ, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 10, (2009).

[313] JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, NATIONAL CENTER FOR TRANSGENDER EQUALITY 33 (2011).

[314] Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

[315] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[316] Miller v. California, 413 U.S. 15, 15 (1973).

[317] New York v. Ferber, 458 U.S. 747, 763 (1982).

[318] Watts v. United States, 394 U.S. 705, 706 (1969).

[319] Terminiello v. Chicago, 337 U.S. 1, 2-3 (1949).

[320] *Id.* at 4.

[321] *Id.*

[322] Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Fields v. South Carolina, 375 U.S. 44 (1963).

unconstitutional "to make criminal the peaceful expression of unpopular views."[323] Two years later it held that "[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."[324]

In 1966, betraying a certain frustration, Justice Fortas wrote that "[t]his is the fourth time in little more than four years that this Court has reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State's breach of the peace statute."[325] The case arose when five Black men engaged in a peaceful protest in a public library and were later charged with intent to provoke a breach of the peace.[326] Fortas first noted that the peaceful protest, which took place inside an almost empty library, did not actually cause any disturbance of any kind.[327] But it was not enough to quibble with the facts of the supposed offense—Fortas then wrote that "another and sharper answer . . . is called for" and held that the statute was unconstitutional, as it was applied deliberately to punish the right to protest.[328]

A footnote was even more direct, stating that "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."[329] The Court cited legal scholar Harry Kalven, who coined the term "heckler's veto" to describe the phenomenon of a hostile audience using the law to silence speakers they disagreed with.[330] As a general rule, therefore, the heckler's veto doctrine means that speech cannot be suppressed or punished solely because listeners react in negative or even violent ways.

Obviously, this principle seems to conflict with the material disruption analysis of *Tinker*.[331] Courts have disagreed with whether the heckler's veto doctrine can be applied in the school setting, creating what some commentators have described as a split between three circuits.[332] The earliest case arose in the Eleventh Circuit, when a high school student stood along with his classmates for the daily recitation of the Pledge of Allegiance over the school intercom, but put

[323] *Edwards*, 372 U.S. at 237.

[324] *Cox*, 379 U.S. at 552.

[325] Brown v. Louisiana, 383 U.S. 131, 133 (1966).

[326] *Id.* at 136-38.

[327] *Id.* at 138-40.

[328] *Id.* at 141.

[329] *Id.* at 133 n.1.

[330] *Id.* (citing Harry KALVEN, THE NEGRO AND THE FIRST AMENDMENT 140 (1965)).

[331] *See* Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980) (applying *Tinker* and finding that allowing school to justify prohibiting male student bringing another male student as his date to prom based on negative reactions of other students would be heckler's veto and create "mob rule by unruly school children"); *see also* DRIVER, *supra* note 72, at 125-27.

[332] Katherine M. Portner, Tinker*'s Timeless Teaching: Why the Heckler's Veto Should Not Be Allowed in Public High Schools*, 86 MISS. L.J. 409, 428 (2017); Julien M. Armstrong, Note, *Discarding* Dariano*: The Heckler's Veto and a New School Speech Doctrine*, 26 CORNELL J.L. & PUB. POL'Y 389, 409 (2016).

his hands in his pockets instead of over his heart and did not recite the pledge aloud.[333] After his teacher reported him to the school principal, the principal ordered the student to apologize. The principal later visited a second class and said anyone who refused to recite the pledge would be punished.[334] Angered by the principal's order, a second student named Michael Holloman stood with one fist raised in the air and refused to recite the pledge.[335] The teacher similarly reported Holloman to the principal, who offered him the choice between detention (which would prevent him from walking in his high school graduation ceremony) and being paddled.[336]

Hearing an appeal from a district court's grant of summary judgment to the teacher, principal, and school board, the Eleventh Circuit rejected the idea that any distraction of Holloman's fellow students during his protest meant that the school's actions were constitutional. As the court wrote, "student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption."[337] The teacher testified that several students approached her after class to complain about Holloman's protest, but the court held that such disagreement was irrelevant for purposes of constitutional analysis.[338] The court wrote at length about the harm of the heckler's veto:

> Allowing a school to curtail a student's freedom of expression based on such factors turns reason on its head. If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alter of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob. If bullies disrupted classes and beat up a student who refused to join the football team, the proper solution would not be to force the student to join the football team, but to protect the student and punish the bullies. If bullies disrupted classes and beat up a student because he wasn't wearing fancy enough clothes, the proper solution would not be to force the student to wear Abercrombie & Fitch or J. Crew attire, but to protect the student and punish the bullies. The same analysis applies to a student with long hair, who is doing nothing that the reasonable person would conclude is objectively wrong or directly offensive to anyone. The fact that other students might take such a hairstyle as an incitement to violence is an indictment of those other students, not long hair.[339]

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[333] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1260 (11th Cir. 2004).

[334] *Id.*

[335] *Id.* at 1261.

[336] *Id.*

[337] *Id.* at 1271.

[338] *Id.* at 1274-75 (noting that restriction of expression requires more than "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969))).

[339] *Id.* at 1275.

The court did not, however, see this principle as conflicting with *Tinker*. Rather, the court focused on the level of disruption caused by Holloman's protest and found that the school had punished him because it disagreed with his protest, not because any material or substantial disruption had actually taken place.[340]

The second case in the trio, *Zamecnik v. Indian Prairie School District #204*, arose when a few high school students in Illinois wished to wear T-shirts reading "Be Happy, Not Gay" in response to the Day of Silence in support of LGBTQ+ students.[341] Appealing from a permanent injunction that allowed students to wear the slogan on their clothing, the school argued (among other things) that one of the student plaintiffs wearing the slogan on their clothing had sparked disturbances in the form of harassment and other negative reactions from other students.[342]

In applying *Tinker* to assess whether the school reasonably anticipated a material disruption, the Seventh Circuit described the evidence as falling within three categories: harassment of gay students, harassment of the T-shirt-wearing plaintiff, and an expert report talking about the impact of the message.[343] The court described the second category of evidence as "barred by the doctrine . . . of the 'heckler's veto.'"[344] Any harassment of the plaintiff because other students disagreed with her shirt's message could not be relied upon to suppress her speech. The court reads *Tinker* as endorsing the heckler's veto doctrine, presumably because it requires a *substantial* disruption before a school may limit a student's speech.[345] But the opinion also somewhat sidesteps the potential conflict between the heckler's veto doctrine and *Tinker* by finding that the potentially disruptive reactions were to the student filing a lawsuit rather than wearing the T-shirt.[346]

The final case arose at a high school in northern California with a history of violent incidents sparked by gangs and racial tension.[347] One specific trigger for a near-altercation occurred on Cinco de Mayo in 2009, when a group of mostly white students hung up an American flag and began chanting "USA." The next year, a group of white students wore clothing with American flags on Cinco de Mayo. Several of the students were confronted by other students early in the school day, and during a break between classes, two students sought out an assistant principal to alert him that there might be physical violence in response to the flag clothing.[348] The assistant principal asked the students to turn their

[340] *Id.* at 1272-73, 1281.

[341] Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 875 (7th Cir. 2011).

[342] *Id.* at 879 (noting school's presentation of evidence of harassment of gay students, as well as plaintiff and expert report concluding slogan was "particularly insidious").

[343] *Id.*

[344] *Id.* (quoting Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966)).

[345] *Id.*

[346] *Id.* at 880.

[347] Dariano v. Morgan Hill Unified Sch. Dist., 745 F.3d 354, 356 (9th Cir. 2014).

[348] *Id.* at 357.

clothing with the American flag inside out so that the flags were not visible, but the students refused.[349] He then told them that he was worried that other students might react with violence, and the flag-wearing students apparently agreed that they might be physically attacked.[350] The assistant principal ultimately decided that two students whose clothing had less "prominent" flags could return to their classes without changing, and offered the rest the choice between turning their clothing inside out or going home with excused absences.[351] The school did not impose any other punishment on the students.[352] Although this prevented any violence at school, the students who wore the flag clothing were threatened in the days following the incident.[353]

The students later sued the school district and school administrators, arguing that their free speech rights had been violated.[354] The Ninth Circuit's decision applied *Tinker*'s material disruption test and found that the school employees had "evidence of nascent and escalating violence" to justify their actions.[355] The court noted as well that the school had limited student expression as little as possible, focusing solely on preventing violence and keeping the students in question safe.[356] Those students were not punished for engaging in their speech, nor was the speech they engaged in prohibited across the board, as the assistant principal treated individual students wearing flags differently according to how likely he thought it was that their clothing would spark potentially violent confrontations. [357]

The Ninth Circuit's panel decision did not mention the heckler's veto doctrine in this analysis. A judge not on the panel, however, wrote a dissent from a denial of rehearing en banc stressing what he saw as a stark conflict between the "bedrock principle" of the heckler's veto and the panel decision "condoning the suppression of free speech by some students because *other students* might have reacted violently."[358] His dissent argued that the court's decision turned the "rule of the mob" and "demands of bullies" into school policy.[359]

It is certainly accurate to say that different courts view the interaction of the heckler's veto doctrine and *Tinker*'s material disruption test differently: the *Zamecnik* and *Holloman* courts were concerned with the prospect of students effectively silencing one another by reacting to speech in an unruly manner,

[349] *Id.*

[350] *Id.*

[351] *Id.* at 357-58.

[352] *Id.* at 358.

[353] *Id.*

[354] *Id.* at 356.

[355] *Id.* at 359.

[356] *Id.* at 359-60.

[357] *Id.* at 360.

[358] Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 766 (9th Cir. 2014) (O'Scannlain, J., dissenting) (asserting importance of protecting unpopular speech).

[359] *Id.* at 771.

whereas the *Dariano* panel did not mention the potential conflict. But all three cases at least claimed to apply *Tinker*, with the first two courts finding no material disruption and the last finding it. While the cases do not create a true circuit split, therefore, they demonstrate the clear dilemma presented by the practical effect that *Tinker*'s material disruption test can give to a heckler's veto. Obviously, the context of the school and the school's educational activities justifies different treatment of students' free speech rights, but *Tinker* may not fully account for how the school's educational activities affect how students react to unpopular speech. The next Section turns to this question.

B. *Teaching the Gender Binary*

Giving constitutional weight to reactions to speech under *Tinker* obviously operationalizes the heckler's veto, at least where those reactions are significant enough to materially disrupt the educational work of a school. The educational work of a school, however, trains students in how they react to unpopular speech, including substantive normative judgments about what kinds of opinions and speech are valuable or normal and what kinds of speech are offensive.

Some of this teaching is in the relatively abstract realm of shared values and community norms. Justice Hugo Black, dissenting from *Tinker*, wrote "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[360] Even Justice Brennan, writing to vindicate the right of students to challenge their school's removal of "objectionable" books from the school library, acknowledged that one purpose of a school curriculum is to transmit community values.[361]

Instruction in these community values is sometimes explicit. For example, in the Eleventh Circuit's case involving a student's refusal to recite the Pledge of Allegiance, the Alabama state legislature had passed a law requiring schools to spend at least ten minutes of instruction per day developing "the following character traits: courage, patriotism, citizenship, honesty, fairness, respect for others, kindness, cooperation, self-respect, self-control, courtesy, compassion, tolerance, diligence, generosity, punctuality, cleanliness, cheerfulness, school pride, respect for the environment, patience, creativity, sportsmanship, loyalty, and perseverance."[362] The law also required schools to hold a recitation of the Pledge of Allegiance to the flag every day.[363] At the time of Holloman's protest, Alabama schools thus explicitly taught patriotism as expressed in reciting the Pledge of Allegiance to the American flag every morning. This education contributed to the objections that some students expressed in response to

[360] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

[361] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982).

[362] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1261-62 (11th Cir. 2004).

[363] *Id.* at 1262.

Holloman's protest: he was engaged in speech that they had been taught to consider unpatriotic.

Such instruction can take place implicitly as well, and be described as communicating what kinds of speech, behavior, or appearance might distract classmates by falling outside the bounds of socially acceptable behavior. Dress codes and restrictions on student behavior and expression are routinely justified as reducing distractions that would divert classmates' attention from their studies. One judge explained the perceived danger of distraction in plain terms, in the context of a male elementary school student who had been told by his school to remove an earring:

> The evidence presented in this matter clearly shows that a male student wearing an earring can disrupt an elementary classroom. It is not a common occurrence for boys in elementary school grades to wear earrings, and the presence of one will surely cause a distraction in the classroom. As such, we find it reasonable for a school, or principal, to ensure the avoidance of distractions in the classroom through the implementation of a consistent dress code.[364]

School officials and the judge thus agreed that a particular expression—here, a boy with an earring—was so unusual that other students simply could not be expected not to be fascinated or disturbed by it.

But where is the line between an aesthetic choice that is so unusual that other students will be distracted and one that is different but unremarkable? That line is a moving target that changes from year to year. In the 1970s, female students wearing pants were deemed so likely to cause a disturbance that dress codes needed to forbid it.[365] In the 1980s, football and basketball players were told that they needed to have sideburns no longer than their earlobes in order to present the school in the best light.[366] In 2001, one school specified that blue jeans would distract other students, but black or wheat-colored jeans would not.[367]

As the preceding paragraphs make obvious, "distracting" clothing and style choices are often tied to gendered expectations. Indeed, public schools have taught students about sexual orientation and gender identity—and that heterosexuality and cisgender identities are "normal" and better—for decades.[368] Clifford Rosky has comprehensively chronicled such messaging, focusing on

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[364] Jones *ex rel.* Cooper v. W.T. Henning Elementary Sch. Principal, 721 So. 2d 530, 532 (La. Ct. App. 1998).

[365] Johnson v. Joint Sch. Dist. No. 60, 508 P.2d 547, 547 (1973). The Missouri State House of Representatives recently drew headlines after it revised its dress code to specify that female representatives had to wear jackets, eventually amended to specify that "jacket" included blazers and cardigans. Eduardo Medina, *Missouri State Lawmakers Revise Their Dress Code for Women*, N.Y. TIMES (Jan. 15, 2023), https://www.nytimes.com/2023/01/15/us/missouri-dress-code-women.html.

[366] Davenport v. Randolph Cnty. Bd. of Educ., 730 F.2d 1395, 1396-97 (11th Cir. 1984).

[367] Byars v. City of Waterbury, 795 A.2d 630, 639 (Conn. Sup. Ct. 2001).

[368] *See* BRILL & PEPPER, *supra* note 20, at 179 (arguing that schools could choose not to "reinforc[e] the accepted cultural training of gender").

the lesson that heterosexuality is superior.[369] Rosky traced an evolution in how public schools addressed sexual orientation: initially characterizing homosexuality as offensive, then restricting any speech about sexual orientation on the logic that to do otherwise would be to promote the crime of sodomy, then justifying prohibition of speech advocating for LGB equality as triggering bullying from other students that would disrupt the school's educational activities.[370] The communications from schools have also included the belief or assertion that gender is binary.[371] The messaging is not always explicit, but is nonetheless powerful—Melissa Murray described the phenomenon as schools "inculcat[ing] values of sexual citizenship."[372] Writing about the power of socialization in general, Holning Lau noted that while socialization of students can be innocuous and even positive—such as requiring students to raise their hands to speak in class—it can also demand that children who are members of historically excluded groups assimilate to prevailing norms and silence their own identities.[373]

Schools thus communicate a variety of messages to students that range from fact-based instructions of academic subjects to normative, value-laden expressions of what is societally acceptable. The latter category of messaging implicitly teaches students what expression is so abnormal that it is shocking, even worth objecting to in a disruptive manner. Most relevantly for transgender students, schools regularly and consistently teach that gender is binary, that someone's gender is a stable (likely permanent) characteristic, and that it is appropriate to organize students by their gender. All of this messaging lays a foundation against which transgender students are seen as shocking or even disturbing, creating the perfect context for the heckler's veto to develop.

One of the clearest examples of schools modeling the gender binary is through the use of sex-segregated bathrooms. Bathroom access for trans people has become, in the words of Tobias Barrington Wolff, the "alpha and omega of opposition to gender-identity protections."[374] States have legislated access to bathrooms for public school children explicitly to prevent trans students from accessing bathrooms consistent with their gender identity,[375] and other state statutes mandate sex-segregated bathrooms at a variety of locations including

[369] Clifford J. Rosky, *No Promo Hetero: Children's Right To Be Queer*, 35 CARDOZO L. REV. 425, 479-80 (2013).

[370] *Id.*

[371] *Id.* at 487-97.

[372] Murray, *supra* note 110, at 1446.

[373] Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 319, 324 (2007).

[374] Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 205 (2012).

[375] Elise Holtzman, *"I Am Cait," but It's None of Your Business: The Problem of Invasive Transgender Policies and a Fourth Amendment Solution*, 68 FLA. L. REV. 1943, 1971 (2016).

schools.[376] Even schools that are not legally required to provide sex-segregated bathrooms often choose to do so.[377]

The effects of sex-segregated bathrooms upon trans students are direct and significant. In one national survey, over half of transgender students said that their school required them to use the bathroom or locker room of their sex assigned at birth.[378] Students in such a position often try to avoid using the bathroom at school, resulting in significant discomfort, distraction, and even medical issues.[379] School policies singling out transgender students turn their normal bodily needs into a disruptive and isolating experience and can deprive them of educational opportunities. As one example, a young transgender girl did not face issues with bathroom access in her kindergarten classroom because each class had a single-user bathroom.[380] On a class field trip to the zoo, however, she was told that if the zoo did not have a single-user bathroom she would have to use the men's room.[381] Perhaps acknowledging the clear issues with sending a kindergarten girl into a men's bathroom, the school specified that she could only use the bathroom once school chaperones emptied it and then stood watch at the entrance to prevent anyone else from entering, making an already troubling experience immensely disruptive to the entire field trip.[382] When initially pressed on the question of bathrooms before a field trip the next year, the school told the girl's mother that she would be allowed to use the women's bathroom, but only if the mother attended as a chaperone, placing a demand on the mother to perform childcare during her workday.[383]

Sex-segregated bathrooms do not only affect trans and nonbinary people who aren't sure which to go into, however. Having bathrooms available in a space signifies what kind of people are expected and welcome in that space.[384] Sometimes this means whether a women's bathroom is available at all—notoriously, the Supreme Court did not have a women's bathroom until 1981, and the U.S. Capitol did not have a women's bathroom off of the Senate floor

[376] David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 82 (2011) [hereinafter Cohen, *Stubborn*].

[377] *Id.* at 86.

[378] Suzanne E. Eckes & Colleen E. Chesnut, *Transgender Students and Access to Facilities*, 321 EDUC. L. REP. 1, 2 (2015).

[379] *Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 21, at 1729.

[380] A.H. *ex rel.* Handling v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 544 (M.D. Pa. 2019).

[381] *Id.*

[382] *Id.*

[383] *Id.* at 546.

[384] It also signifies who was on the team that designed a space. Kathryn H. Anthony & Meghan Dufresne, *Potty Privileging in Perspective: Gender and Family Issues in Toilet Design*, *in* LADIES AND GENTS: PUBLIC TOILETS AND GENDER 48, 48 (Olga Gershenson & Barbara Penner eds., 2009).

until 1992.[385] Such landmarks were the product of the history of public bathrooms, which only became common in the nineteenth century and were initially only for men.[386] Terry Kogan's historical research has shown that public bathrooms were extended to women when legislators "began to regulate public architectural spaces as a means of fostering social values" and started segregating women-only spaces away from men, including bathrooms.[387] This segregation was imposed even when the bathroom only accommodated one person at a time.[388] Factories in the nineteenth century installed single-user bathrooms a considerable distance from each other and limited their usage to one sex based on the belief that women were physically and emotionally vulnerable and needed a secluded space in which to retreat from the workplace when it became too much for them.[389] Sex-segregated bathrooms developed as an extension of the nineteenth-century idea of separate spheres for men and women that "protected" women from the workforce and civil life.[390]

As Laura Portuondo has written, this means that although sex-segregated bathrooms are widely accepted as normal, it does not make them innocuous or neutral.[391] For example, caregiving parents out in public with a child of a different gender than their own regularly face difficulties supervising a child seen as too old to go into the "wrong" bathroom, but too young to manage going to the bathroom alone.[392]

Modern sex-segregated bathrooms continue to communicate normative messages about sex and gender. Most obviously, the existence of bathrooms

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[385] Wickliffe Shreve, *Stall Wars: Sex and Civil Rights in the Public Bathroom*, 85 L. & CONTEMP. PROBS. 127, 136 (2022).

[386] Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 472-73 (2018).

[387] Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 6 (2007) [hereinafter Kogan, *Sex-Separation*]. Notably, the segregation in public spaces simultaneously incorporated racism, xenophobia, and other biases in choosing only some (white) women to segregate away. *Id.* at 18.

[388] Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1217 (2017) (noting single-user sex-segregated bathrooms were norm until at least mid-1900s).

[389] *Id.* at 1219.

[390] *See* Kogan, *Sex-Separation*, *supra* note 387, at 41-51.

[391] Portuondo, *supra* note 386, at 471.

[392] Holning Lau, *Shaping Expectations About Dads as Caregivers: Toward an Ecological Approach*, 45 HOFSTRA L. REV. 183, 189 (2016); *see also* Susan Etta Keller, *Gender-Inclusive Bathrooms: How Pandemic-Inspired Design Imperatives and the Reasoning of Recent Federal Court Decisions Make Rejecting Sex-Separated Facilities More Possible*, 23 GEO. J. GENDER & L. 35, 44 (2021); Timothy J. Graves, *Breaking the Binary: Desegregation of Bathrooms*, 36 GA. ST. U. L. REV. 381, 394, 405 (2020); Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 175 (2017). The author's family faced a similar problem when her husband, a stay-at-home father, took their oldest daughter to swimming lessons at the local YMCA and discovered that the only entrances to the pool were through the sex-segregated locker rooms.

labeled men/women or boys/girls teaches children that categorizing people by sex is appropriate and easy to do.[393] It denies the very existence of transgender, nonbinary, and intersex children.[394] Defenses of sex-segregated bathrooms as necessary to protect girls or women also perpetuate rape culture by implying that boys or men in a "private" space will be unable to resist inflicting sexual harm. This myth is particularly harmful when deployed against transgender women, characterizing trans women as male sexual predators who are using gender identity to demand access to potential victims.[395]

Where sex-segregated bathrooms merely imply a gender binary and rape culture, abstinence-only sexual education programs yell it out loud. Thirty-one states require sexual education to stress abstinence, teaching that the only way to prevent pregnancy and STIs is to refrain from premarital sexual activity.[396] The federal government has specifically funded abstinence-only sexual education since 1981.[397] There was an attempt to eliminate federal funding under President Barack Obama, but states that wished to teach abstinence-only simply declined federal money while their representatives lobbied to renew the support, which was ultimately successful, and included five years of funding for abstinence-only sex ed in the Affordable Care Act.[398] In recent years the grants in question have been rebranded, from "Abstinence Only Until Marriage" to "Sexual Risk Avoidance Education,"[399] and using terms like "poverty prevention" and "youth empowerment," but the messaging remains the same.[400]

Such sexual education has explicitly moral dimensions that send very clear messages about gender. Abstinence-only curriculums continue to deliver antigay messaging, emphasizing that sexual activity should only take place within a different-sex marriage.[401] They also teach reductive gender stereotypes that cast

[393] David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 511 (2010) [hereinafter Cohen, *Keeping*].

[394] *Id.* at 538.

[395] Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719, 1774 (2019).

[396] Samantha Y. Sneen, *The Current State of Sex Education and Its Perpetuation of Rape Culture*, 49 CAL. W. INT'L L.J. 463, 472 (2019).

[397] *Id.* at 469; Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 510-11 (2008).

[398] *See* Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587, 595 (2011). Federal funding for abstinence-only education even increased significantly in the late 2010s. *Fact Sheet: Federally Funded Abstinence-Only Programs: Harmful and Ineffective*, GUTTMACHER INST. (May 2021), https://www.guttmacher.org/fact-sheet/abstinence-only-programs [https://perma.cc/ZRB5-38QR%5D].

[399] Olivia S. Lanctot, *Title IX & Disparate Impact: The Harmful Effects of Abstinence-Centric Education*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 765, 769-71 (2022).

[400] Jesseca Boyer, *New Name, Same Harm: Rebranding of Federal Abstinence-Only Programs*, 21 GUTTMACHER POL'Y REV. 11, 12 (2018).

[401] Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1466 (2017).

women as sexual gatekeepers, responsible for restraining men and boys who are helpless against their biological urges.[402] One curriculum describes young men as having strong sexual desires due to testosterone, while any women or girls who have sexual fantasies do so because they were "culturally conditioned."[403] Girls are asked to "put the brakes on first to help the boy[s]," who cannot control (and do not hold responsibility for) their sexual desires.[404]

Children are thus explicitly taught some of the central principles of rape culture: that sexual assault is the product of uncontrollable sexual desires and that it is the responsibility of girls and women to prevent sexual assault.[405] Jennifer S. Hendricks and Dawn Marie Howerton chronicled a particularly appalling example of such a lesson, in which sixth-grade students learning about date rape were asked, "How do some people say NO with their words, but YES with their actions or clothing?"[406]

Abstinence-only sexual education curriculums also teach broader gender stereotypes about differences between men and women. Representative Henry Waxman issued a report about how abstinence-only programs often described women as needing financial support and successful relationships, whereas men need admiration and accomplishments.[407] A leading curriculum describes young women as caring "less about achievement and their futures" than young men do.[408] A colorful example uses a fairy tale to teach a normative lesson about how girls should interact with boys:

> Deep inside every man is a knight in shining armor, ready to rescue a maiden and slay a dragon. When a man feels trusted, he is free to be the strong, protecting man he longs to be.
>
> Imagine a knight traveling through the countryside. He hears a princess in distress and rushes gallantly to slay the dragon. The princess calls out, "I think this noose will work better!" and throws him a rope. As she tells him how to use the noose, the knight obliges her and kills the dragon. Everyone is happy, except the knight, who doesn't feel like a hero. He is depressed and feels unsure of himself. He would have preferred to use his own sword.
>
> The knight goes on another trip. The princess reminds him to take the noose. The knight hears another maiden in distress. He remembers how he

[402] Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 953 (2007) ("Abstinence-only curricula implicitly and explicitly perpetuate the stereotyped double standards of virility versus chastity, homemaker versus breadwinner, subject versus object of desire.").

[403] *Id.*

[404] *Id.* at 953-54.

[405] Sneen, *supra* note 396, at 472-73.

[406] Hendricks & Howerton, *supra* note 398, at 599.

[407] Henry A. Waxman, *Politics and Science: Reproductive Health*, 16 HEALTH MATRIX 5, 6-8 (2006).

[408] Pillard, *supra* note 402, at 954.

> used to feel before he met the princess; with a surge of confidence, he slays the dragon with his sword. All the townspeople rejoice, and the knight is a hero. He never returned to the princess. Instead, he lived happily ever after in the village, and eventually married the maiden—but only after making sure she knew nothing about nooses.
>
> Moral of the story: occasional assistance may be all right, but too much will lessen a man's confidence or even turn him away from his princess.[409]

Federally funded programs teach young students a rigid and outdated version of the gender binary: girls and boys are fundamentally different, not merely in their anatomy but also in their desires. Boys want to achieve, want to become breadwinners, and should always desire sex with girls or women. By contrast, girls should grow up to be mothers, they should not care about achievements, and they should not feel sexual desire. They are responsible for boys' sexuality and protecting themselves from it, but they should also not be assertive or give good advice to boys, and if they do not shrink themselves into damsels in distress they will be abandoned by the people they care about.

Other aspects of school activities rigidly impose categorization into a gender binary. One example of this is in sports: although most physical education classes are co-educational, competitive sports are almost exclusively segregated by sex. This is despite the fact that Title IX, the famous statutory directive for equality in education, should be read to address inequality in sports.[410] The law does so in order to begin to break the stereotype that women and girls are not athletic and cannot (or should not) be physically active and competitive, and Title IX has been very successful in increasing girls' participation in sports.[411] Title IX still allows for sex-segregated competitive sports teams, however.[412] It even allows schools to completely exclude one sex in some circumstances: if a school only has one competitive team, members of the opposite sex can try out for that team, unless the sport is a contact sport, in which case one sex simply does not have that sport available to them at all.[413]

One obvious consequence of the acceptance of sex-segregated teams in competitive sports is to deny opportunities to transgender and nonbinary athletes.[414] Dividing sports into girls' and boys' teams also underscores the gender binary, believing that all children can and should be categorized accordingly.[415] In her excellent article, *Against Women's Sports*, Nancy Leong

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[409] Hendricks & Howerton, *supra* note 398, at 589.

[410] *See* 20 U.S.C. § 1681 (prohibiting discrimination in education on basis of sex); *see also* 34 C.F.R. § 106.41 (2020) (regulating antidiscrimination of sex in athletics in education).

[411] Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 129 (2019).

[412] Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 274 (2013).

[413] Cohen, *Stubborn*, *supra* note 376, at 90.

[414] Kimberly A. Yuracko, *The Culture War over Girls' Sports: Understanding the Argument for Transgender Girls' Inclusion*, 67 VILL. L. REV. 717, 719 (2022).

[415] Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1262-63 (2018).

persuasively argues that the assumption underlying sex segregation—that doing so is necessary to "enforce a level playing field"—is incorrect, and that "[a]s a result, the same system that supposedly guarantees a space for women to compete simultaneously communicates women's 'competitive inferiority.'"[416] For example, when children have not reached puberty, there is little difference in size, weight, or athletic ability to justify not letting girls and boys play on the same teams and against each other. Rigidly sex-segregating sports even at young ages thus communicates that categorizing people by sex is more important or more natural than more substantive and relevant divisions.[417] Erin Buzuvis similarly argues that sex-segregated sports imply that women need to be separated into a less competitive division, because presumably they would never be competitive playing the same sport against men or boys.[418] Leong argues that the default should be sex integration, and that rather than using sex as a "crude proxy" for more specific characteristics, sports should, where possible, use characteristics such as height, weight, or hormone levels to create divisions.[419] The status quo simply underscores perceptions that girls are incapable of being as strong or as fast as boys and that sex is an unobjectionable organizing principle that both encompasses everyone and provides a meaningful distinction. Additionally, spaces coded as only for boys or men, such as sex-segregated sports teams, have been shown to increase negative attitudes about girls and women, even among children young enough to play on Little League baseball teams.[420] A sadly ironic example of such attitudes took place after a thirteen-year-old girl named Mo'Ne Davis became the first girl to ever pitch a shutout game in the Little League World Series.[421] The next year, after Disney announced plans to film a movie based on her life, a college baseball player was kicked off of his school team after he tweeted calling her a "slut."[422]

Another gendered aspect of schooling is dress codes. Most schools have significant restrictions on what students can wear: about 25% of public schools require school uniforms, and 60% have strict dress code policies.[423] Although

[416] *Id.* at 1264.

[417] Cohen, *Keeping*, *supra* note 393, at 539.

[418] Erin E. Buzuvis, Attorney General v. MIAA *at Forty Years: A Critical Examination of Gender Segregation in High School Athletics in Massachusetts*, 25 TEX. J. ON C.L. & C.R. 1, 16 (2019).

[419] Leong, *supra* note 415, at 1284.

[420] Cohen, *Keeping*, *supra* note 393, at 548.

[421] Alex Hampl, *Mo'Ne Davis Becomes First Girl To Throw a Shutout in LLWS*, SI (Aug. 15, 2014), https://www.si.com/more-sports/2014/08/15/mone-davis-shutout-little-league-world-series.

[422] Cindy Boren, *How Mo'Ne Davis Silenced the Bloomsburg Baseball Player Who Called Her a Slut*, WASH. POST (Mar. 24, 2015, 9:29 AM), https://www.washingtonpost.com/news/early-lead/wp/2015/03/24/how-mone-davis-silenced-the-twitter-troll-who-called-her-a-slut/.

[423] Shawn E. Fields, *Institutionalizing Consent Myths in Grade School*, 73 OKLA. L. REV. 173, 183 (2020).

many students challenged the imposition of dress codes and uniform policies as they were implemented,[424] modern challenges and news coverage have centered on gendered requirements that have different restrictions for boys and girls.[425] For example, a high school in Kentucky drew criticism in 2015 after a female student was sent home because her collarbone was visible.[426]

Dress codes communicate gender and gender stereotypes in multiple ways. Most straightforwardly, a majority of dress codes give specific restrictions by category, giving different directions to male and female students. For example, in a study of twenty-five dress codes taken from New Hampshire schools, sixteen of the twenty-five contained explicitly gendered restrictions.[427] There were significantly more rules directed to girls than to boys.[428] Dress code provisions applying only to girls often focus upon covering specific body parts such as collarbones or shoulders, forbidding types of clothing typically worn by girls that do not give sufficient coverage, such as tank tops with spaghetti straps, or are too formfitting, such as leggings.[429] Facially neutral rules may also be enforced in a gendered manner, such as one school that performed a spot check on the length of girls' shorts, announcing that if ten girls failed to pass the check (by wearing shorts that were shorter than the dress code allowed), all girls would not be allowed to wear shorts for one day as punishment.[430]

One key reason for dress codes is to minimize distractions during the school day, but the implementation of gendered restrictions in service of minimizing distraction operationalizes the gender stereotype that girls are responsible for boys' sexual interest in them.[431] Meredith Johnson Harbach found that schools often enact gendered dress codes on the theory that girls in inappropriate clothing would not only distract male students, but also male teachers.[432] One high school student told a reporter that her principal "constantly says that the main reason for [the dress code] is to create a 'distraction-free learning zone' for our male counterparts."[433] The idea that girls must protect boys from themselves

[424] School dress codes are a relatively recent phenomenon, as most schools did not have dress codes at all until the 1960s. *See* Ahrens & Siegel, *supra* note 199, at 55.

[425] Jillian R. Friedmann, *A Girl's Right to Bare Arms: An Equal Protection Analysis of Public-School Dress Codes*, 60 B.C. L. REV. 2547, 2563-64 (2019).

[426] Fields, *supra* note 423, at 174.

[427] Todd A. DeMitchell, Christine Rienstra Kiracofe, Richard Fossey & Nathan E. Fellman, *Genderdized Dress Codes in K-12 Schools: A Mixed Methods Analysis of Law & Policy*, 376 EDUC. L. REP. 421, 442-45 (2020).

[428] *Id.* at 444.

[429] *Id.* at 445-46; Fields, *supra* note 423, at 176-77.

[430] Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039, 1039 (2016).

[431] As Ruthann Robson points out, this justification also rests on the assumption that male students are heterosexual. *See* RUTHANN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES 73 (2013).

[432] Harbach, *supra* note 430, at 1044.

[433] Fields, *supra* note 423, at 188.

and their own inability to focus on their studies sparked the hashtag "IAmMoreThanADistraction" in protest.[434]

Shawn E. Fields has powerfully demonstrated how such dress code policies sexualize students. He uses an example from 2015 when a five-year-old kindergarten student was sent home for violating the dress code because her dress had spaghetti straps.[435] As Fields wrote, "it defies common sense" to describe the shoulders of a five-year-old child as distracting her fellow five-year-old classmates from their work.[436] He continues to point out that enforcement of the dress code "required an adult administrator . . . to sexualize a five-year-old girl," then forced the girls' parents to decide whether to explain to their daughter that she was sent home from school in an "honest yet premature conversation about sex and objectification of womens' bodies."[437]

Dress code enforcement can also lead school employees to sexualize students in more explicit ways. At one Florida high school, students reported that multiple girls were found to be in violation of the dress code even though their top layer—zip-up jackets zipped all the way up—was compliant. Instead, at least one girl reported that a male school employee forced her to unzip her jacket, then reported her for a dress code violation because she was only wearing a sports bra under the jacket.[438] There is no indication in news coverage of the incident that she ever took her jacket off at school or even unzipped the jacket, so it appears that she was effectively forced to disrobe in a hallway.[439] As another student described, "[g]irls were being told to unzip their jackets to see what was underneath to see if it was appropriate. But the thing is, if it's zipped up, it should be fine."[440]

The irony is magnified when school dress codes are set against another context in which schools and students have disagreed about clothing: yearbook photos. In recent years, several students have challenged requirements for senior photos that specify that male students wear suits, but female students wear a velvet drape placed across their shoulders that Ruthann Robson describes as "if not sexually revealing, . . . certainly sexually suggestive."[441] A few teenage girls have expressed discomfort with the velvet drape and asked to wear a suit,

[434] DeMitchell et al., *supra* note 427, at 433.

[435] Fields, *supra* note 423, at 186.

[436] *Id.*

[437] *Id.* at 186-87.

[438] Zachery Lashway & Brie Isom, *Bartram Trail High Students Felt Uncomfortable While Being Accused of Dress Code Violations*, NEWS4JAX (Mar. 29, 2021, 11:24 PM), https://www.news4jax.com/news/local/2021/03/29/bartram-trail-high-students-felt-uncomfortable-while-being-accused-of-dress-code-violations/ [https://perma.cc/8BZX-F3DQ].

[439] *See id.*

[440] *Id.*

[441] ROBSON, *supra* note 431, at 73.

following the requirement for male students.[442] The school's dress code for such photos thus *imposes* sexualization upon girls who ask to wear more modest clothing. As Robson writes, "whether the regulation of girls' dress is intended to prevent girls from appearing too sexual or insufficiently sexual, it attempts to place girls in sexualized and gendered hierarchies."[443]

Such hierarchies are occasionally revealed outright by uncommonly direct school administrators. Last year, the Fourth Circuit sat en banc to hear a case challenging the dress code of a public charter school that required all female students to wear skirts. The founder of the school described the dress code as expressing a determination on the part of the school "to preserve chivalry . . . . For example, young men were to hold the door open for the young ladies."[444] He defined chivalry as "a code of conduct where women are treated, they're regarded as a fragile vessel that men are supposed to take care of and honor," and that the goal was to treat girls "courteously and more gently than boys."[445] The Fourth Circuit was direct in its reaction: "It is difficult to imagine a clearer example of a rationale based on impermissible gender stereotypes."[446] These gender stereotypes, the court went on to say, have "potentially devastating consequences for young girls."[447]

Dress codes are typically not as strict as prohibiting female students from wearing pants, but the gendered nature and enforcement of dress codes have similarly negative consequences. Most directly, dress codes are often enforced by sending the student in the "offending" clothing home to change. The concern for the potential distraction of male students, even to the point of physically removing a female student from the class, makes clear that the education of the male student is more important than the education of the female student.[448] As such, enforcements happen repeatedly—one study found a single high school imposing over one hundred dress code-based disciplinary actions per month, with over ninety percent against female students[449]—students repeatedly see girls removed from class so that boys can better learn. Female students are distracted from their own studies by the attention they have to expend toward "policing their own appearance."[450] Female students may also be distracted by physical discomfort due to the dress code—one junior high school student wrote a public letter to her school requesting that the dress code requirement that shorts

[442] *See, e.g.*, Sturgis v. Copiah Cnty. Sch. Dist., No. 3:10-CV-455, 2011 WL 4351355, at *1 (S.D. Miss. Sept. 15, 2011).

[443] ROBSON, *supra* note 431, at 73.

[444] Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 113 (4th Cir. 2022).

[445] *Id.*

[446] *Id.* at 125-26.

[447] *Id.* at 126.

[448] Stephan Wah, *"Boys Will Be Boys, and Girls Will Get Raped": How Public School Dress Codes Foster Modern Day Rape Culture*, 23 CARDOZO J.L. & GENDER 245, 247 (2016).

[449] Fields, *supra* note 423, at 192.

[450] *Id.*

be longer than a student's fingertips be altered to permit shorter hemlines.[451] Although virtually all boys' shorts meet that requirement due to prevailing styles in boys' clothing, few girls' shorts do, meaning that girls had to go to multiple stores to find sufficiently long shorts, which the student reported cost more than other girls' shorts.[452] Some students were unable to find shorts that were long enough, meaning that in order to avoid a dress code violation, they wore leggings or pants even on uncomfortably hot days.[453]

Dress codes thus send students several clear messages. Most obviously, most dress codes explicitly draw a distinction between regulations for boys' and girls' clothing, reinforcing a binary definition of gender as well as the belief that suitable clothing is different depending on the gender of the child wearing it.[454] Even facially neutral dress codes are enforced in gendered ways, as demonstrated by a male high school student who wore a shirt that clearly violated the dress code—it was both off the shoulder and cropped to show his midriff—yet was not disciplined, despite wearing it for an entire school day.[455] This shows students that the motivation behind dress codes is not professional dress in the abstract, but making girls responsible for the actions of their male classmates. Girls told that their clothing will distract their classmates by being sexually attractive are taught rape culture, the idea that victims of sexual assault did something to cause (or at least failed to prevent) the bad actions of others.[456] School officials sometimes say this outright, such as the Chicago high school principal who was recorded in a school council meeting explaining the dress code by saying "there have been sexual abuse cases throughout the city of Chicago . . . . These things are put in place to, why, why should we allow students to dress provocatively?"[457] As Shawn Fields writes, "[s]chool dress codes tell girls that their permission to enter public school is conditioned on an adult's determination that those around her can control themselves. And this entire narrative reinforces scripts and assumptions about gender and sexuality that misplace responsibility for sexual violence on its victims."[458]

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[451] DeMitchell et al., *supra* note 427, at 432.

[452] *Id.*

[453] *Id.*

[454] Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Entry Point for the Trans* School to Prison Pipeline*, 24 AM. U. J. GENDER SOC. POL'Y & L. 263, 273 (2015).

[455] Maggie Parker, *Teen Boy Wears Crop Top To Make a Point About Sexist School Dress Codes*, YAHOO!LIFE (Nov. 7, 2017), https://www.yahoo.com/lifestyle/teen-boy-wears-crop-top-make-point-sexist-school-dress-codes-173544910.html [https://perma.cc/AM2A-JTLS].

[456] Wah, *supra* note 448, at 262.

[457] Elise Solé, *High School Principal Under Fire for Suggesting That Dress Codes Prevent Sexual Abuse: 'Why Should We Allow Students To Dress Provocatively?,'* YAHOO!LIFE (Aug. 24, 2018), https://www.yahoo.com/lifestyle/high-school-principal-fire-suggesting-dress-codes-prevent-sexual-abuse-allow-students-dress-provocatively-201804744.html [https://perma.cc/GVA5-69D6].

[458] Fields, *supra* note 423, at 190.

This discussion has only scratched the surface of some of the most common ways that schools teach gender. Other examples abound, from the gender essentialism of publicly funded sex-segregated schools[459] to language addressing students as "boys and girls" both verbally[460] and in physical labels inside the classroom.[461] One essay by a former teacher's aide described a teacher directing a young boy to put down a doll in order to play with a truck instead, explaining to the aide that she was teaching "appropriate" play with toys.[462] Alongside the formal curriculum of their day, students are immersed in messages both explicit and implicit that gender is a binary and the categories of boy/girl or male/female are distinct in innumerable ways. It is no wonder, given this messaging, that some students react to transgender students with surprise, attention, and even protest. The next Section turns to how (and whether) a school can restrict the speech of one student based upon the reactions of others consistent with the First Amendment.

C. *Accounting for Teaching the Heckler's Veto*

Current application of *Tinker* allows for the implementation of a heckler's veto, as the Seventh and Eleventh Circuits have acknowledged. Scholars have also criticized *Tinker*, in some cases calling to modify[463] or replace the ruling altogether.[464] This criticism has not fully acknowledged one of the unique aspects of student speech: the fact that it takes place in an environment where all of the student audience for speech receive the same instruction that

[459] *See* David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation's Experiment with State-Sponsored Sex Segregation in Education*, 44 SETON HALL L. REV. 339, 341 (2014) ("We argue that sex-segregated education promotes an essentialized view of what it means to be a boy or girl, something the Court has consistently cautioned against in its warnings about 'outmoded stereotypes.'"); Cohen, *Stubborn*, *supra* note 376, at 64-65; David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 138 (2009); Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, U. ILL. L. REV. 455, 473 (2005).

[460] BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 34 (1993).

[461] Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 451 (1999) (noting sex-segregated coat racks for several classes in school attended by author's child).

[462] Jesse Holzman, Opinion, *Moving Beyond the Gender Binary in Education*, TEACH FOR AM. (June 24, 2021), https://www.teachforamerica.org/one-day/opinion/moving-beyond-the-gender-binary-in-education [https://perma.cc/3GYT-AKS4%5D].

[463] Tryphena Liu's student note flags these cases in discussing the heckler's veto, although Liu's solution is quite different. Liu proposes courts should only permit schools to apply *Tinker*'s substantial disruption test if the court finds that the student reaction is genuine rather than manufactured outrage. Tryphena Liu, Note, *Untangling* Tinker *and Defining the Scope of the Heckler's Veto Doctrine's Protection of Students' Free Speech Rights*, 9 U.C. IRVINE L. REV. 829, 845 (2019); *see also* Sara Nau, *"Small Town Values" and "The Gay Problem:" How Do We Apply* Tinker *and Its Progeny to LGBTQA Speech in Schools?*, 22 TEX. J. WOMEN & L. 131, 152 (2013) (proposing balancing test weighing long-term effects of suppressing speech against short-term effects of disruption).

[464] Noah C. Chauvin, *Replacing* Tinker, 56 U. RICH. L. REV. 1135, 1150 (2022).

contributes to their understanding of that speech. When assessing what kind of speech is distracting enough to materially disturb the educational work of the school, current analysis fails to ask whether the school itself contributes to the distraction by telling students what is strange enough to be distracted by.

A fuller accounting of how to reconcile *Tinker* and the heckler's veto doctrine must take the school's role into account. This should not be a superficial inquiry that allows any school instruction or implied messaging to excuse away material disruptions—only consistent and reasonably clear messaging by the school should potentially shift the *Tinker* analysis. The burden of proof should lie with a student challenging the school's restriction of their speech to show that the school has engaged in consistent and clear messaging that is in clear opposition to the student's speech before the student engaged in that speech or expressive conduct. Moreover, not all of a school's messaging should shift the balance in favor of allowing disruptive student speech, if the school's messaging is fact-based instruction that is part of the curriculum. For example, a student who wishes to insist that the Earth is actually flat or deny that the Holocaust happened cannot point to instruction in science and history classes to demand greater protection for their speech.

If, however, the student can show that the disruption caused by their speech is effectively a heckler's veto stoked by the school, then the school should only restrict the student speech where school officials had reasonable justification to forecast physically violent confrontations between students, or where such violent incidents actually took place in reaction to the speech. The school should have to show either that school administrators reasonably believed there was an imminent threat of violent reaction or that they took action to prevent potentially violent student reactions, and such efforts were not successful, before silencing the student speech in question. Schools still have an obligation to protect students, and that interest in their safety outweighs speech rights where there is not time to take more speech-protective measures. This reasonable justification should not be understood as requiring that a student speaker engage in fighting words—rather, the concern is for what student listeners are likely to do, either because of clear indications and warnings that the situation is threatening violence or recent examples of other physical confrontations. If the only disruption, however, is disruption of the educational activities of the school, then the school must discipline the reactions to the speech, and not the speaker. This is consistent with the educational setting: where a school reasonably fears for the physical safety of students, some limits on speech are justified. Where the school fosters student reaction to unpopular speech, however, the responsibility remains with the school to allow that speech and focus its actions on teaching students to tolerate differences of strong opinions without becoming disruptive.

A concise outline of the proposed modification is that if a student's speech is restricted because the school claims the speech is likely to or actually did cause a material disruption under *Tinker*, the student can respond by showing that the school clearly and consistently delivers a message to students in direct conflict with the student speech. If the school can show that its message is fact-based

instruction that is part of the school curriculum, the *Tinker* analysis remains unchanged. If the school can show that the material disruption consisted of imminent or actual physical violence, the *Tinker* analysis also proceeds unchanged. But if the school's counter-messaging is not a fact-based portion of the curriculum and the material disruption was merely to the school's educational activities, then the school cannot restrict the student speech.

An example of how this changed analysis might play out can be provided with a slight adjustment to the facts of *Holloman v. Harland*, the Eleventh Circuit case discussed above. Michael Holloman stood silently with a fist raised in the air rather than recite the Pledge of Allegiance alongside his classmates.[465] Although Holloman's teacher said that students privately complained to her after class about Holloman's actions, the court found that the isolated and calm complaints did not create a material disruption.[466] Imagine, however, that Holloman's classmates reacted more dramatically to his protest, interrupting the planned class by demanding to know why he refused to say the pledge alongside them, and refusing to end the argument and resume their studies. Under current *Tinker* analysis, such a disruption would likely have justified the school telling Holloman that he could not engage in ongoing protest during the pledge.

Holloman would have been able to prove that his school was engaged in consistent and clear messaging that patriotism, as expressed by reciting the Pledge of Allegiance, was the morally correct stance and refusing to say the pledge was not. He could have pointed to an Alabama statute requiring school districts to develop a "character education program" that spent at least ten minutes per day developing traits including patriotism. The character education program was required to include daily recitation of the Pledge of Allegiance.[467] This instruction is not a fact-based portion of the curriculum, but rather an explicit effort to teach students specific normative beliefs. The analysis would thus shift from allowing the school to restrict Holloman's speech to requiring the school to address the disruption by disciplining disorderly students and incorporating more instruction on the traits of respect for others, kindness, self-control, and tolerance—all traits also promoted by the statute requiring the pledge.[468]

Many cases applying *Tinker* would remain unchanged by this adjustment. For example, a Tenth Circuit case involved a number of high school students who were members of a religious group that wished to hand out 2,500 small rubber dolls with cards stating that they were the same size as twelve-week fetuses.[469] When they attempted the distribution, however, it swiftly went awry:

> Both schools experienced doll-related disruptions that day. Many students pulled the dolls apart, tearing the heads off and using them as rubber balls

[465] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1261 (11th Cir. 2004).

[466] *Id.* at 1274-75.

[467] *Id.* at 1261-62.

[468] *Id.* at 1261.

[469] Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 30 (10th Cir. 2013).

> or sticking them on pencil tops. Others threw dolls and doll parts at the "popcorn" ceilings so they became stuck. Dolls were used to plug toilets. Several students covered the dolls in hand sanitizer and lit them on fire. One or more male students removed the dolls' heads, inverted the bodies to make them resemble penises, and hung them on the outside of their pants' zippers.
>
> Teachers at both schools complained that students' preoccupation with the dolls disrupted classroom instruction. While teachers were trying to instruct, students threw dolls and doll heads across classrooms, at one another, and into wastebaskets. Some teachers said the disruptions took eight to 10 minutes each class period, and others said their teaching plans were derailed entirely. An honors freshman English class canceled a scheduled test because students had become engaged in name calling and insults over the topic of abortion. A Roswell security officer described the day as "a disaster" because of the dolls.[470]

The Tenth Circuit acknowledged that the distribution was obviously speech by the distributing students,[471] but school administrators were justified in stopping attempts to continue distributing the dolls, as the distribution clearly caused a substantial disruption.[472] The proposed modification to prevent some heckler's vetoes would not change this conclusion: there is no indication that the school clearly and consistently promoted prochoice positions or any other message that contributed to the mostly juvenile pranks sparked by the dolls.

Similarly, the threatened physical violence in response to a few students wearing clothing featuring American flags on Cinco de Mayo discussed by the Ninth Circuit in *Dariano* means that the Ninth Circuit's analysis would not change.[473] Even if one altered the facts to imagine the school clearly and consistently messaged that American patriotism was inappropriate,[474] the threat of imminent violence would allow school administrators to restrain student speech.

There are also examples that could push against the distinction between fact-based instruction and other messaging by the school. A student who sparks a disruption in biology because she repeatedly objects and says the teacher's lesson goes against the Bible, for example, would likely argue that the school's instruction is not fact-based and is a normative expression denying her religious beliefs, but it seems unlikely that courts would have much difficulty concluding that the lesson is fact based. A harder question could arise where a student objects to a framing or inclusion of elements of lessons—for example, if a school

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[470] *Id.* at 31.

[471] *Id.* at 35.

[472] *Id.* at 36-37.

[473] *See* Dariono *ex rel* M.D. v. Morgan Hill Unified Sch. Dist., 745 F.3d 354, 362 (9th Cir. 2014).

[474] To be clear, there is no indication or implication that celebrating the holidays of a variety of countries, religions, cultures, and so on conveys such a message.

in Florida were to show a PragerU video describing feminism as a "mean-spirited, small minded and oppressive philosophy," does that become plausibly a fact-based portion of the curriculum?[475] It seems unlikely, but courts could be called upon to distinguish fact-based instruction from value-laden messaging.

Another obvious question about this changed analysis is whether it would apply to any unpopular student speech: Could students wearing Confederate flags,[476] for example, point to Title IX and a school's antiracist efforts to say that the school had to allow their speech, even though students reacted in disruptive ways to their shirts?

First, not all unpopular student speech would receive increased protection. Again, the student speakers must be able to point to consistent and clear messaging from the school that directly conflicts with the student's speech—this would likely be impossible for a wide variety of politically controversial speech. For example, several of the cases involving antigay speech were sparked by *student* speech, such as students organizing around the National Day of Silence, rather than the school's programming.[477]

It is at least a viable question, however, whether some schools clearly and consistently communicate a message that racism, sexism, homophobia, transphobia, and other types of prejudice are wrong. In theory, therefore, this analysis could result in more protection for speech expressing such bias under *Tinker*'s material disruption analysis. That does not mean, however, that such speech must constitutionally be allowed. *Tinker* also held that schools may restrict student speech that collides with or invades the rights of others.[478] In 2006, the Ninth Circuit applied this prong of *Tinker* to hold that a school could constitutionally require a student to remove shirts upon which he had written antigay slogans in response to the National Day of Silence.[479] The court wrote that the shirts collided "with the rights of other students in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation,

[475] *See* Ayana Archie, *A Lot is Happening in Florida Education. These Are Some of the Changes Kids Will See*, NPR (Aug. 14, 2023, 5:07 AM), https://www.npr.org/2023/08/14/1193557432/florida-education-private-schools-prageru-desantis [https://perma.cc/9Y6A-XCDJ].

[476] Given the number of *Tinker*-based cases involving students wearing or otherwise displaying Confederate flags, it is the obvious example of controversial student speech. Use of the flag as an example of *Tinker* analysis sidesteps the strong argument that the Confederate flag should be considered patently offensive under *Fraser*.

[477] *See* Steven J. Macias, *Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools*, 49 SAN DIEGO L. REV. 791, 817 (2012) ("The increasing activism of gay students and their allies on school campuses has led to a backlash from antigay students claiming for themselves the right to espouse messages expressing their dissatisfaction with their fellow students' outspokenness.").

[478] 393 U.S. 503, 513 (1969).

[479] Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006), *cert. granted, judgment vacated sub nom.* Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).

have a right to be free from such attacks while on school campuses."[480] The court drew a distinction between political debate, even heated debate, and "demeaning statements" that "assault[ed]" other students.[481]

The Ninth Circuit's decision was the first to apply the "invasion of rights" language from *Tinker*,[482] and has drawn criticism from some scholars.[483] Its reasoning has been applied, however, in several other Ninth Circuit and California decisions. One such example arose when a high school sophomore made a series of posts on his MySpace page threatening to shoot and assault fellow students, targeting both groups of students, such as Black and gay students, as well as some individual students by name.[484] Several of his friends, increasingly worried by his posts, went to a trusted football coach who alerted the school principal, who began proceedings that expelled the student for ninety days.[485] The court found that speech that raised "the specter of a school shooting" justified the school's actions under either prong of *Tinker*,[486] noting specifically that threatening and targeting students "represent[ed] the quintessential harm to the rights of other students to be secure."[487] Similarly, in another case the court held that sexual harassment "implicates the rights of students to be secure," justifying school discipline for a seventh-grade student who harassed two younger students.[488]

Two cases from the past year further develop the analysis. One arose in Clovis, California, when a graduating high school senior posted a photo of a Black classmate on his personal Twitter, captioning the picture with a racial slur.[489] He posted the photo from the school campus, during school hours, on the very day of his graduation, so after the principal was alerted to the photo, she called the student and his parents to her office, gave him his diploma, and told him that he was not allowed to walk at the graduation ceremony.[490] After the

[480] *Id.* at 1178 (quotation marks and citation omitted).

[481] *Id.* at 1181.

[482] Waldman, *supra* note 177, at 467; *see also* Kellam Conover, Note, *Protecting the Children: When Can Schools Restrict Harmful Student Speech?*, 26 STAN. L. & POL'Y REV. 349, 377-84 (2015) (drawing distinction between speech that creates hostile environment or is personally directed at individual students and speech that is political commentary or voluntary civil discussion among students).

[483] *See, e.g.*, John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 577 (2009) ("[O]n my view, [] *Tinker* allows schools to enact facially viewpoint-based speech rules or to enforce facially viewpoint-neutral rules with viewpoint-discriminatory effects . . . ." (citation omitted)); Abby Marie Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1517 (2008) (stating *Tinker* ruling is opaque).

[484] Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1065-66 (9th Cir. 2013).

[485] *Id.* at 1066 (describing how student claimed his violent statements were jokes).

[486] *Id.* at 1070.

[487] *Id.* at 1072.

[488] C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1146-47, 1152 (9th Cir. 2016).

[489] Castro v. Clovis Unified Sch. Dist., 604 F. Supp. 3d 944, 946 (E.D. Cal. 2022).

[490] *Id.*

student sued, arguing that the punishment violated his free speech rights, the court concluded that his post did not easily fit into any of the doctrinal exceptions to *Tinker*'s analysis,[491] and, due in part to how quickly the facts developed, there was no evidence of a threat of disruption.[492] The court found, however, that his post denigrated the student in the picture and invaded the rights of the other students who saw the post.[493]

Finally, in yet another case sparked by problematic social media posts, a high school student created a private Instagram account targeting fellow students and school employees with racist and other derogatory language.[494] Although the account was kept private with a limited number of followers, one student with access to it showed the account to other students, and news quickly spread around school and caused what the court found was a serious disruption under *Tinker*.[495] The trial court went on to state that the posts "clearly interfered with 'the rights of other students to be secure and to be let alone.'"[496] The demeaning language crossed a line from merely offensive language, in the judgment of the court, to impermissible interference with other students' rights. The court explained that just as sexual harassment threatens a person's sense of security, "the racist and derogatory comments plaintiffs made here about their peers . . . 'positions the target as a[n] . . . object rather than a person' and thereby violates the targeted student's right to be secure."[497] The Ninth Circuit affirmed the decision in December 2022, holding that even without any disturbance, "[h]ad these posts been printed on flyers that were distributed furtively by students on school grounds but then discovered by school authorities, the 'collision with the rights of [the targeted] students to be secure and to be let alone' would be obvious."[498]

The precise bounds of this prong of *Tinker*'s analysis have yet to be delineated. A Third Circuit decision by then-Judge Samuel Alito provides an example of what is not far enough to invade the rights of other students. Two students who wanted to express their religious beliefs that being gay was wrong sued over their school district's antiharassment policy, which defined harassment as "verbal or physical conduct" based on personal characteristics "which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive

[491] *Id.* at 949.

[492] *Id.* at 950.

[493] *Id.*

[494] Shen v. Albany Unified Sch. Dist., No. 3:17-CV-02478, 2017 WL 5890089, at *2 (N.D. Cal. Nov. 29, 2017), *aff'd sub nom*. Chen *ex rel* Chen v. Albany Unified Sch. Dist., 56 F.4th 708 (9th Cir. 2022).

[495] *Id.* at *2-3, *8 ("[T]he record firmly establishes that C.E. caused a substantial disruption at AHS. That is enough under *Tinker* to support defendants' disciplinary measures, and consideration of whether C.E. also invaded the rights of others is not necessary.").

[496] *Id.* at *9.

[497] *Id.*

[498] *Chen*, 56 F.4th at 718.

environment."[499] The court held that speech that was "merely offensive to some listener" did not invade the rights of other students, and thus the policy prohibited speech that was constitutionally protected expression.[500]

Even with an alternative line of analysis to restrict some particularly harmful student speech, the proposed modification to *Tinker*'s material disruption prong will undoubtedly protect and allow more student speech. The result of interrogating the role of schools in creating a heckler's veto is to treat students as people learning to engage in a marketplace of ideas. This is consistent with the goals of public education—as Richard Posner wrote, "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[501] It also begins to address the current discussion around the concept of cancel culture on college campuses. Amanda Harmon Cooley has offered the provocative thesis that college students protesting controversial speakers with the goal of preventing their speech are the natural and predictable consequence of "speech-suppressive pedagogy" in public schools.[502] Professor Cooley argues that:

> The transformation of students from suppressed to suppressors is a direct consequence of the state's distorted speech-inculcative model that students have been exposed to for the lion's share of their educational experience; that model, introduced by the *Fraser* Court, equates suppression of student speech with notions of "democratic" values of civility.[503]

The intervention proposed in this Section directly addresses the problem that Professor Cooley identifies, that "young people are being taught . . . that student speech that is inappropriate or objectionable should be suppressed and that such suppression is a social good."[504] The expectation is that schools cannot teach orthodoxy and then use a resulting heckler's veto to suppress student speech: rather, schools should be expected to teach students how to disagree respectfully.

Returning to the ultimate topic of transgender students, as outlined above, few trans students would have difficulty pointing to clear and consistent messaging provided by their schools about the gender binary and what the categories "boys" and "girls" mean. In the absence of imminent violence, even heated student

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[499] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 202-04 (3rd Cir. 2001).

[500] *Id.* at 217.

[501] Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

[502] Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 369 (2019) ("This Article posits that the increase in student suppression of speech at colleges and universities is a product of the distorted democratic-values inculcation to which students have been exposed via state disciplinary censorship and student speech-suppressive pedagogy in primary and secondary schools, resulting from the devolution of the Supreme Court's student speech jurisprudence. Although the Court has consistently identified democratic-values inculcation as a core mission of public schools, its current student speech jurisprudence twists the true meaning of this inculcation by identifying student speech suppression as a democratic value.").

[503] *Id.* at 400.

[504] *Id.* at 395.

reactions to trans students' expression of their gender identity through clothing and other choices about their appearance could not justify their schools prohibiting their gender presentation.

CONCLUSION

The current political climate is such that protecting the speech rights of transgender students will not address every threat to their legal equality. Making clear that their gender presentation is protected by the First Amendment, however, would be a significant change that would be durable and impactful in their daily lives. Strengthening the speech rights of transgender students as analyzed above provides an additional avenue for litigation alongside Title IX and equality-based arguments, which are particularly important when both statutory and constitutional rights have been in flux.

Although "Don't Say Gay" laws are styled as curriculum restrictions, they obviously implicate the speech rights of everyone in a school, including students. The infamy of Florida's statute is currently inspiring other conservative legislators to propose similar bills restricting classroom instruction and to expand attempts to equate gender identity as sexualized speech. A clear rebuttal grounded in existing precedent responds to such legislation directly, making clear that both societal opinions and courts have rejected and moved past the idea that awareness of transgender people harms children.

Additionally, this Article strengthens broader application of speech rights that frames other aspects of school and public life as related to expression. For example, some scholars have argued that the choice of bathroom is expressive, as a person literally chooses between the labels "Men" and "Women." Scott Skinner-Thompson recently argued that restricting bathroom access could therefore be understood as compelled speech.[505] Acknowledging the expressive work of gender presentation starts down a path that could have application far beyond the context of student speech.

This Article focuses on transgender students, but the concepts apply with equal force to nonbinary[506] and gender nonconforming students. A fuller understanding of gender presentation as speech expands acceptance of all genders and offers a more universal framework than an equality-based argument that depends on identifying discrimination by sex, discrimination because of sex stereotyping, and discrimination on the basis of sexual orientation or gender identity as related but potentially distinct actions.

Finally, the implications for student speech generally are significant. Recognizing gender presentation as speech invigorates analysis of dress codes and uniform requirements, not by arguing that clothing restrictions are impermissible, but by highlighting that the restrictions should not be gendered. The proposed revisions to *Tinker* protect more student speech than current understandings and invite a more public and direct assessment of what implicit

[505] Scott Skinner-Thompson, *Identity by Committee*, *supra* note 70, at 706-07.

[506] *See* Clarke, *supra* note 23, at 963.

messages schools teach students. This assessment also nudges schools to more explicitly teach tolerance of ideas with which people disagree, treating students as participants in the marketplace of ideas instead of vulnerable people who must be sheltered from it.