
RESPONSE

**SOLIDIFYING STUDENTS’ RIGHT TO GENDER
EXPRESSION[†]**

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[†] An invited response to Dara Purvis, *Transgender Kids and the First Amendment*, 104 B.U. L. REV. 435 (2024).

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INTRODUCTION

The genders and sexualities of students are regulated, shaped, and oppressed by formal school policies and informal educational norms.¹ Some of these policies are quite obvious, others subtler. Such regulation includes rigid binary-based dress codes, ad hoc policing of gender non-normative clothing, sex-segregated spaces and activities, regulation of student pronoun use, and literal gender identity committees for determining students' eligibility for athletic participation.² Against this backdrop of social control, students routinely seek freedom—the freedom to explore, understand, develop, and express their genders and sexualities.³ Indeed, *expression* of one's gender and sexuality—through clothing, nomenclature, pronouns, association, use of sex-segregated spaces, and more—is at the heart of *being and becoming* one's gender and sexuality.⁴ For those reasons, the First Amendment's protections of free speech—of free expression—have served as a cornerstone of queer liberation for over a half-century, protecting queer people's ability to gather together, develop their identities, and share their experiences.⁵ And to the extent the First

¹ Harper Benjamin Keenan, *Unscripting Curriculum: Toward a Critical Trans Pedagogy*, 87 HARV. EDUC. REV. 538, 541, 544, 548 (2017) (documenting how schools “script” and normatively shape or condition students' gender identities); Bethy Leonardi, Amy N. Farley, Emmett Harsin Drager & Jax Gonzalez, *Unpacking the T: Sharing the Diverse Experiences of Trans Students Navigating Schools*, BERKELEY REV. EDUC. (2021), <https://escholarship.org/uc/item/10v091bm> (“Ideas of what counts as ‘normal’ permeate school ecologies, privileging certain ideologies and marginalizing others.”).

² E.g., Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657, 684 (2022) [hereinafter Skinner-Thompson, *Identity by Committee*] (discussing role of gender identity committees in policing transgender students); Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 966 (2019) (suggesting potential revisions to deployment of pronouns in schools so as to better enfranchise nonbinary students).

³ Florence Ashley, *Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth*, 24 CLINICAL CHILD PSYCH. & PSYCHIATRY 223, 223 (2019) (powerfully explaining “[y]outh explore their genders” and that “[e]xploration is not only a vessel of discovery and understanding, but also of creation[,]” of not only “unearthing a pre-existing truth, but also making that truth for ourselves”); cf. Reina Gossett, Eric A. Stanley & Johanna Burton, *Known Unknowns: An Introduction to Trap Door*, in TRAP DOOR xv, xvi (Reina Gossett, Eric A. Stanley & Johanna Burton eds., 2017) (“[T]o violate the state-sponsored sanctions—to render oneself visible to the state—emphasizes that there is power in coming together in ways that don’t replicate the state’s moral imperatives. Fashion and imagery hold power, which is precisely why the state seeks to regulate and constrain such self-representations to this very day.”).

⁴ Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993) (arguing that queer self-identifying speech both communicates and constructs one’s identity); Leonardi et al., *supra* note 1 (underscoring ways in which identities are embodied, material, and lived, at same time that such embodiment communicates a person’s identity to others).

⁵ CARLOS BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 50-92 (2017); STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA’S PUBLIC SCHOOLS 8-9 (2010).

Amendment provides special solicitude to speech that runs against cultural grains,⁶ renewed emphasis on the expressive components of gender identity could provide significant protection for beautifully nonconforming gender identities.⁷ Notwithstanding the First Amendment's queer pedigree and emancipatory potential, the operationalization of free speech rights for transgender and gender-nonconforming students remains underdeveloped. That lack of precise development leaves queer students' right to expression (and right to their identities) vulnerable to erosion or, worse still, weaponization against them.

Thankfully, Dara Purvis's new article, *Transgender Students and the First Amendment*, provides a great service by refining the governing tests for determining whether schools are impermissibly infringing students' gender expression.⁸ Building on her tremendous prior scholarship in this area,⁹ Professor Purvis underscores how students' gender expression is potentially vulnerable to regulation pursuant to two principal doctrinal arguments that may help such regulation elide the First Amendment. The first riposte Purvis addresses is that students' non-normative expression is "disruptive" to the educational environment and therefore permissibly silenced pursuant to the governing test first articulated in *Tinker v. Des Moines*.¹⁰ The second is that students' gender expression might be characterized as lewd and therefore subject to constitutionally tolerable restriction pursuant to *Bethel v. Fraser*.¹¹ With regard to each, Purvis confronts these potential doctrinal vulnerabilities by taking account of the broader social ecosystem of both the school house and the state house. In other words, she flips the scripts and explains how the schools and legislatures themselves are disrupting transgender students' expression and sexualizing nonnormative gender identities.

⁶ Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 563 (2011) ("[N]o system of democracy or free speech is worth its salt if it does not protect and promote dissent—that speech which criticizes existing customs, habits, institutions, and authorities.").

⁷ Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 904 (2018); see also Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 441 (2017) (explaining how performative or expressive understandings of gender amplifies individual agency and control over one's identity).

⁸ Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435 (2024).

⁹ See generally Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. RICH. L. REV. 927 (2020); Dara E. Purvis, *Transgender Children, Teaching Early Acceptance, and the Heckler's Veto*, 72 STUD. L., POL., & SOC'Y 219 (2017).

¹⁰ 393 U.S. 503 (1969).

¹¹ 478 U.S. 675 (1986).

I. SCHOOLS, NOT JUST OTHER STUDENTS, ARE SILENCING TRANSGENDER KIDS

Purvis first contends with the argument that transgender students' expressive identities may be regulated because they are allegedly "disruptive," by leaning into the notion that heckler's vetoes are impermissible under the First Amendment. While *Tinker* suggests that when a student's speech causes a material and substantial disruption to the functioning of a school then that speech may be permissibly regulated, Purvis explains, for starters, that under *Tinker* "undifferentiated fear or apprehension of disturbance" is insufficient to justify the suppression of student speech.¹² But more significantly, outside the school context, American jurisprudence recognizes "that a heckler's disruptive, protesting speech or reaction to another's speech cannot be used to justify government regulation or silencing directed toward Speaker A—the non-heckler."¹³ Otherwise the government is doing the work of effectuating a veto on behalf of the disruptive heckler.¹⁴ Although courts have been inconsistent in their attempts to reconcile heckler's veto doctrine with *Tinker*'s material disruption test, Purvis highlights how "[g]iving constitutional weight to reactions to speech under *Tinker* obviously operationalizes the heckler's veto."¹⁵ This move sets groundwork for skepticism regarding the argument that student reaction to transgender expression can justify regulation of transgender identity and lays the doctrinal foundation for her important sociocontextual move, discussed now.

As to the idea that nonnormative gender identities might induce negative reactions from other students, thereby causing a "disruption" potentially permitting the school to restrict a student's gender expression, Purvis details the incredible degree to which schools themselves are invested in inculcating the gender binary. Synthesizing and refining the observations of other important scholars, Purvis describes how schools entrench the hegemony of the essentialist gender binary in multiple ways. They segregate bathrooms along the gender binary,¹⁶ teaching students that segregating on the basis of the gender binary "is appropriate and easy to do," denying "the very existence of transgender, nonbinary, and intersex children."¹⁷ Abstinence-only sexual education programs "continue to deliver antigay messaging, emphasizing that sexual activity should only take place within a different-sex marriage [and] also teach reductive gender stereotypes that cast women as sexual gatekeepers, responsible for restraining

¹² *Tinker*, 393 U.S. at 508-09.

¹³ Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 165 (2019).

¹⁴ *Bible Believers v. Wayne County*, 805 F.3d 228, 261-62 (6th Cir. 2015) (en banc).

¹⁵ Purvis, *supra* note 8, at 480.

¹⁶ Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 484 (2018); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1224 (2017).

¹⁷ Purvis, *supra* note 8, at 485.

men and boys who are helpless against their biological urges.”¹⁸ Sex-segregated competitive sports “underscore[] the gender binary, believing that all children can and should be categorized accordingly,”¹⁹ notwithstanding that sex is a poor proxy for athletic ability.²⁰ Schools entrench the gender binary through dress codes, which “communicate gender and gender stereotypes.”²¹ As Purvis explains, “[m]ost 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.”²² Purportedly trans-friendly school policies that require students to submit a bevy of medical documentation to a cadre of school administrators before being able to live their gender similarly place their finger on the scale of the gender binary. As I have explained with regard to such policies:

Both the bureaucratic procedures and substantive requirements that have emerged for policing students’ gender identities and expression represent substantial barriers to students’ ability to live, express, and explore those identities. In many ways the regulatory frameworks serve as a normative signal reaffirming what society writ large communicates—that there is something abnormal about the child.

Procedurally, the regulatory protocols suggest that a student’s gender and gender expression is something that needs to be questioned, suspected, controlled, contained, and managed.²³

Purvis’s detailed work explaining how schools themselves communicate and regulate gender is doctrinally significant because it demonstrates that any social disruption to the expressive existence of transgender students is not merely instigated by other students (that is, third-party hecklers), *but is instead the very product of the school’s own policies/messaging*. In other words, where “the school’s restriction of [transgender students’] speech” comes on the heels of the

¹⁸ *Id.* at 485-86; 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, 598 (2011) (“[Y]oung women are taught to be sexual gatekeepers and are told that young men their age are unable to control their sexual urges”); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1472 (2017) (explaining that several “states require teachers to emphasize the benefits of abstinence from sexual activity outside of marriage, while defining the term ‘marriage’ to exclude same-sex couples” (footnote omitted)).

¹⁹ Purvis, *supra* note 8, at 487.

²⁰ Nancy Leong, *Against Women’s Sports*, 95 WASH U. L. REV. 1249, 1262-63 (2018); Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 287 (2013).

²¹ Purvis, *supra* note 8, at 489.

²² *Id.* at 492.

²³ Skinner-Thompson, *Identity by Committee*, *supra* note 2, at 688 (internal citations omitted).

school's "consistent and clear messaging that is in clear opposition to the student's speech,"²⁴ there is powerful evidence that the school is being impermissibly motivated by its disagreement with the student's gender expression—a classic example of impermissible viewpoint discrimination.²⁵ Put differently, Purvis's approach has the potential to significantly decrease the degree to which *Tinker*'s "disruption" defense can be used as a pretextual cover for the school's own normative disagreement with the student's expressive identity.²⁶ Schools cannot point to other students' reaction to the existence and expression of transgender students when the schools themselves are directly expressing opposition to transgender student.

II. SCHOOLS, NOT THE EXISTENCE OF TRANSGENDER STUDENTS, ARE SEXUALIZING NONNORMATIVE GENDER IDENTITIES

Another line of First Amendment cases, most prominently *Bethel v. Fraser*, suggests that student speech can be silenced by schools if it is lewd.²⁷ Given the historical playbook of characterizing queer people as sexual predators or so-called "groomers,"²⁸ Purvis is rightly concerned that schools will attempt to justify their oppression of transgender identity by deeming their gender expression lewd. Purvis dispenses with this potentiality by mustering a body of cases suggesting that student invocation of their sexual orientation (and, logically, one's gender identity) cannot, by itself, be characterized as lewd and therefore permissibly restricted consistent with the First Amendment. As Purvis summarizes,

[I]t 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 [*Fraser*] encompasses. . . . For all the politicized rhetoric around LGBTQ+ people and topics as inappropriately sexualizing children, actually attempting to frame

²⁴ Purvis, *supra* note 8, at 494.

²⁵ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (citations omitted)).

²⁶ While government institutions have the ability to engage in their own speech, that speech is not protected by the First Amendment, and can be subject to constitutional challenge when it infringes on the constitutional rights of individuals. *See generally* HELEN NORTON, *THE GOVERNMENT'S SPEECH AND THE CONSTITUTION* (2019).

²⁷ *Bethel v. Fraser*, 478 U.S. 675, 689-90 (1986) (permitting regulation of student's associated student body nominating speech that contained ample sexual innuendo about the candidate).

²⁸ Clifford J. Rosky, *Fear of the Queer Child*, 61 *BUFF. L. REV.* 607, 631 (2013).

such an argument around the gender presentation of students demonstrates that the rhetoric falls apart as a legal matter.²⁹

But Purvis does more than simply explain why gender expressive speech itself is not lewd or offensive under prevailing doctrine. Purvis also articulates how, perhaps counterintuitively, it is the rigid policing of gender that performs the sexualization of youth. Drawing from the work of Shawn E. Fields,³⁰ Ruthann Robson,³¹ and others, Purvis underscores how the school policies in place to perpetuate the gender binary and sexual hierarchies facilitate sexualization. For example, as Fields has underscored, dress code policies have led to a five-year-old kindergartner being sent home because the dress she wore had spaghetti straps, which could, according to the school, potentially distract her classmates.³² Put differently, the school saw in the dress something sexual and objectified the child, leading to the child's discipline.³³ In another example highlighted by Purvis, female students were disciplined because what they wore underneath their zip-up jackets (which remained zipped) was not dress code compliant, and according to reports the girls were effectively disrobed in order to police their clothing which the school deemed sexualized.³⁴

The same thing is happening with regard to the existence of transgender children. Those policymakers attacking transgender students through laws such as Florida's "Don't Say Gay" law³⁵ or the proposed "Stop the Sexualization of Children Act"³⁶ seem to believe that acknowledging the existence of transgender people is, inherently, lewd.³⁷ As I have explained elsewhere, "[o]ften lumping together mere acknowledgement of the existence of gay and trans people, on the one hand, with pornography and sexually explicit content, on the other, proponents of Don't Say Gay bills, like Florida Governor Ron DeSantis, argue that these laws are needed to prevent the 'sexualizing' of kids.³⁸ But as Purvis explains, thinking about, talking about, and expressing gender is not inherently prurient, obscene, or lewd.³⁹ And, as in the dress code examples above, the regulatory obsession with the bodies of transgender youth says a lot more about

²⁹ Purvis, *supra* note 8, at 474.

³⁰ See generally Shawn E. Fields, *Institutionalizing Consent Myths in Grade School*, 73 OKLA. L. REV. 173 (2020).

³¹ See generally RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 73 (2013).

³² Fields, *supra* note 30, at 186.

³³ *Id.* at 176.

³⁴ Purvis, *supra* note 8, at 490-91.

³⁵ H.B. 1069, 2023 Leg. (Fla. 2023).

³⁶ H.R. 9197, 117th Cong. 2 (2022).

³⁷ Purvis, *supra* note 8, at 463-64.

³⁸ Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. (forthcoming 2024) (manuscript at 42), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563643 [hereinafter Skinner-Thompson, *Trans Animus*].

³⁹ Purvis, *supra* note 8, at 474.

the regulators than it does about the students themselves. In other words, if “sexualization” includes simply presenting examples of human sexuality, human gender, and people in relationships, then attempts to suppress non-normative student gender expression are actually counterproductive to their purported goal of sexual/gender neutrality because they are not hiding gender expression, but instead enforcing hegemonic hetero- and cis-normativity.⁴⁰ That is, the regulatory efforts are actively sexualizing and gendering students in a normative way. So if, according to anti-trans legislators and educators, “sexualization” simply means acknowledgement of gender, then schools are engaged in that activity all the time—as Purvis documents. And to the extent the government objects to expression on the same subject/content but from a different vantage point, that is, as discussed above, quintessential (and impermissible) viewpoint discrimination.

III. PROTECTING TRANSGENDER STUDENTS FROM HARASSING SPEECH

In her effort to bolster the doctrinal protections for gender expression, Purvis is attentive to the fact that sometimes minoritized children, including transgender students, racially minoritized students, immigrants, females, and others, may be subject to hateful, harassing speech from other students. To that end, Purvis carefully explains that schools do, at times, have legitimate reasons consistent with the First Amendment, educational goals, and antidiscrimination law, for regulating speech that hatefully harasses other students, including transgender students.⁴¹ As she underscores, it is permissible under *Tinker* to restrict student speech that infringes on the rights of other students.⁴² As such, verbal assaults directed at transgender students by others can, consistent with the First Amendment, be regulated by school officials.⁴³ But to ensure that this exception does not swallow the rule, Purvis seems to suggest (at least to my reading) that sometimes disagreeable, difficult, and even hurtful speech on issues of political and social salience, including generalized statements that may appear homophobic or transphobic, may have to be tolerated under the First Amendment, consistent with educational goals of fostering dialogue on issues of social and political importance.⁴⁴ That can be a difficult pill to swallow, but it is a necessary one if the speech of minoritized communities is going to be

⁴⁰ Skinner-Thompson, *Trans Animus*, *supra* note 38 (manuscript at 42-43).

⁴¹ Purvis, *supra* note 8, at 497-99.

⁴² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁴³ Purvis, *supra* note 8, at 500.

⁴⁴ *Id.* at 458-59; 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) (delineating personal invective directed at specific students as unprotected student expression and generalized political commentary as protected student expression).

robustly protected from censorship—a key first order right that has been central to the advancement of rights for many minoritized communities.⁴⁵

CONCLUSION

At a time when the existence of transgender people is being attacked from virtually every angle, developing nuanced conceptual and doctrinal frames for protecting transgender people has never been more important. But as with any legal or rhetorical frame, it is critical to attend to how one's arguments may be used, or abused, in other contexts. Luckily, scholars such as Dara Purvis are standing on the shoulders of, and standing shoulder-to-shoulder with, transgender rights activists and stepping into the breach.⁴⁶ In *Transgender Students and the First Amendment*, Purvis powerfully advances arguments in favor of the free speech rights of transgender students. She efficiently explains how their identities are expressive and covered by the First Amendment in the first instance. And most significantly, Purvis then goes on to explain how schools' own ideologies are facilitating disruption and/or condemnation of students' gender expression, eroding any plausible defense for the schools' regulation of students' gender identity expression.

⁴⁵ E.g., HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 96-97 (Jamie Kalven ed., 1988) (documenting First Amendment rights instituted by racial justice activists).

⁴⁶ Katie Eyer has persuasively documented the degree to which transgender individuals have succeeded in protecting their rights through constitutional law. *See generally* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405 (2023).