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## (No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech

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(NO) STATE INTERESTS IN REGULATING GENDER:  
HOW SUPPRESSION OF GENDER NONCONFORMITY  
VIOLATES FREEDOM OF SPEECH

JEFFREY KOSBIE\*

ABSTRACT

Despite limited growth in legal protections for transgender people, dress and appearance are largely treated as unprotected matters of personal preference. In response, lawyers and scholars argue that dress and appearance are intimately connected to the expression of identity. Nonetheless, courts have generally deferred to the government's proffered justifications for these laws.

This article refocuses on the government's alleged interests in regulating gender nonconformity. Using a First Amendment analysis, the article reveals how seemingly neutral government interests are used to single out conduct *because* it expresses messages of gender nonconformity. This approach avoids impossible questions about the subjective intent of the individual to express their identity.

Drawing on social constructionist theories of gender, this article establishes that dress, appearance, and other behavior communicate the social meaning of gender and should be understood as communicative under the First Amendment. When the state singles out conduct *because* it expresses gender nonconformity, the state's interests are related to the suppression of a message. This violates freedom of speech under the governing *O'Brien* doctrine. Testing the theory against actual cases involving government employment, child custody, and restroom access, the article recognizes legitimate government interests in privacy, safety, and efficient workplace environments. The article, however, argues that under present doctrine on freedom

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of speech, the government may not suppress gender nonconformity as the means of achieving these ends.

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#### INTRODUCTION

What does my choice to wear a dress or a suit communicate? Should the government be able to regulate my choices about dress and appearance? When the government regulates conduct in order to suppress a message of gender nonconformity, it violates the freedom of speech. Consider the following example.

On February 2, 1974, police in a Cincinnati neighborhood approached Adams in a parking lot during an investigation of alleged prostitution.<sup>1</sup> Adams carried a purse and wore a blouse, brassiere, women's pants, wig, and earrings.<sup>2</sup> After some conversation with the officers, Adams prepared to leave the parking lot but was arrested for "dressing for illegal or immoral purposes."<sup>3</sup> The relevant city ordinance prohibited any person from "appear[ing] in a dress or costume not customarily worn by his or her sex."<sup>4</sup>

Adams was arrested because of how he dressed.<sup>5</sup> In particular, Adams was arrested because he dressed and presented himself as a woman.<sup>6</sup> Adams was not arrested merely because he disguised his identity.<sup>7</sup> The particular city ordinance did not prohibit all disguises.<sup>8</sup> Adams was arrested because he wore particular clothes. Adams wore clothes that communicated a gender. Adams wore clothes that both he and the arresting officer understood as women's clothes.

What makes these women's clothes? Nothing physically prevents men from wearing blouses, wigs, and earrings. These are not women's clothes because they fit only women's bodies. Blouses, purses, wigs, and earrings are women's clothes because they communicate a message of femininity.<sup>9</sup> Social gender norms allow us to interpret these as women's clothes.<sup>10</sup> Both Adams and the arresting officer understood his clothing as communicating a message of gender nonconformity.<sup>11</sup> Adams could only be arrested under this law for communicating gender nonconformity. Adams's arrest suppressed his communication of a message.<sup>12</sup>

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1. *City of Cincinnati v. Adams*, 330 N.E.2d 463, 464 (Ohio Mun. Ct. 1974) (holding Cincinnati's cross-dressing ordinance unconstitutional on vagueness grounds). I follow the court opinion in using male pronouns. For the purposes of this argument, it does not matter whether Adams self-identified as a male cross-dresser, a transgender woman, or other gender identity.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. The state does have an interest in regulating use of disguises in relation to crime. *See, e.g., Church of the Am. Knights of the Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583, 589 (W.D. Pa. 2000) (holding that an "anti-mask" ordinance is constitutional when limited based on the criminal intent of the mask-wearer).

8. *See Adams*, 330 N.E.2d at 464.

9. *See infra* Part I.B.1.

10. *See infra* Part I.A (presenting social constructionist theories of gender).

11. *See Adams*, 330 N.E.2d at 464.

12. The court dismissed the defendant's claim that his "costume represented a philosophy or ideal," only explaining that he failed to provide any evidence supporting this claim. *Id.* at 465. The court failed to consider how gender nonconformity is itself a philosophy or ideal. Arguments that gender nonconformity is speech continue to face this challenge

I use this example because cross-dressing laws vividly illustrate how the state targets conduct in order to suppress a message of gender nonconformity. Beginning in 1850, many states passed laws that prohibited “appear[ing] . . . in a dress not belonging [to one’s] sex,” “masquerading,” or appearing in “disguise.”<sup>13</sup> The state understood gender nonconformity as expressing a message of immorality and indecency:<sup>14</sup> the state was only concerned with cross-dressing because the conduct expressed a message.<sup>15</sup>

Most of these laws are no longer on the books, and the laws that remain are rarely enforced.<sup>16</sup> However, the state continues to penalize expressive conduct in order to suppress communication of gender nonconformity.<sup>17</sup> This article is not primarily about cross-dressers. This is about transgender people,<sup>18</sup> masculine women, effeminate men, and anyone else who does not conform to gender norms. I focus particularly on how state suppression of gender nonconformity impacts trans rights, but much of my argument would apply more broadly to all manners of gender expression.<sup>19</sup>

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today. *See infra* Part I.B (arguing that gender nonconformity meets the requirements for protecting conduct as speech).

13. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 27 (1999) (emphasis omitted). Eskridge notes that even when states did not have specific cross-dressing laws, police often used vagrancy laws to harass cross-dressers. *See id.* at 29–31; *see also, e.g.*, *People v. Archibald*, 296 N.Y.S.2d 834, 835, 837 (App. Div. 1968) (upholding conviction under vagrancy law).

14. *See infra* Part I.B.2 (arguing that the state regulates conduct that expresses a message of gender nonconformity); *see also* ESKRIDGE, *supra* note 13, at 27–29 (discussing use and enforcement of cross-dressing laws); I. Bennett Capers, *Cross Dressing and the Criminal*, 20 *YALE J.L. & HUMAN.* 1, 7–9 (2008) (a historical discussion of the states’ interest in cross-dressing). Capers recognizes that some legislators may have been concerned with women gaining some economic advantage, but he argues that concerns with morality were more dominant. *Id.* at 9. Capers argues that the law today continues to use dress to “police . . . boundaries of gender, class, and race.” *Id.* at 3. *See also* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 *SEATTLE U. L. REV.* 133, 151–53 (2010) (discussing history and rationales for cross-dressing laws).

15. Sumptuary laws were originally used to prevent people from adopting dress styles adopted by other social classes. Capers, *supra* note 14, at 7–8. Here, I am specifically referring to laws that targeted cross-dressing.

16. *See* SUSAN STRYKER, *TRANSGENDER HISTORY* 76, 83 (2008) (discussing decriminalization of cross-dressing); ESKRIDGE, *supra* note 13, at 111 (also discussing decriminalization of cross-dressing); Levi & Redman, *supra* note 14, at 150–53 (discussing continued enforcement patterns of cross-dressing laws). *But see* Galbreath v. City of Okla. City, No. CIV-11-1336-HE (W.D. Okla. Jan. 27, 2012) (order denying motion to dismiss), *available at* <http://law.justia.com/cases/federal/district-courts/oklahoma/okwdce/5:2011cv01336/82249/22> (giving an example of a recent disorderly conduct arrest for cross-dressing).

17. *See infra* Part I.B.2.

18. Throughout most of this paper, I use the term “transgender” to include cross-dressing and other forms of gender nonconformity. *See infra* Part I.A (defining transgender).

19. State enforcement of rigid gender norms also hurts intersexual people, but in ways distinct from trans people. *See* JULIE A. GREENBERG, *INTERSEXUALITY AND THE LAW: WHY*

How does the state suppress gender nonconformity? A Massachusetts school required a transgender girl to dress as a boy;<sup>20</sup> an Illinois police department disciplined two male officers for wearing earrings while off duty;<sup>21</sup> a Washington court awarded child custody to the mother because “[n]o one [knew]” how the child would understand the natural father’s gender transition;<sup>22</sup> and the Utah Transit Authority prevented a transgender woman from using public women’s restrooms while driving a bus.<sup>23</sup> Transgender youth face discrimination in foster care;<sup>24</sup> transgender prisoners are housed according to their anatomical sex and denied hormones or other care;<sup>25</sup> and many states refuse to change sex on birth certificates without proof of gender transition surgery.<sup>26</sup>

Courts and scholars typically address these issues of transgender discrimination through the prisms of equal protection, due process, and antidiscrimination law.<sup>27</sup> Indeed, the economic, emotional, physical, and other harms that transgender people suffer raise strong equal protection and antidiscrimination concerns.<sup>28</sup> Despite recognizing the vital advances made under these approaches, some scholars

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SEX MATTERS 97–106 (2012). Although intersexual advocates may benefit from my arguments against state enforcement of gender, I do not discuss the specific concerns of the intersexual movement here.

20. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*1 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff’d sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

21. See *Rathert v. Vill. of Peotone*, 903 F.2d 510, 513 (7th Cir. 1990).

22. See *Magnuson v. Magnuson*, 170 P.3d 65, 66 (Wash. Ct. App. 2007).

23. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007).

24. See, e.g., *Doe v. Bell*, 754 N.Y.S.2d 846, 847–48 (Sup. Ct. 2003) (challenging foster facility’s refusal to allow transgender woman to wear skirts).

25. See SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS (2007), available at <http://srp.org/files/warinhere.pdf> (discussing treatment of trans prisoners in New York).

26. See Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS 217, 238 n.35 (Paisley Currah et al. eds., 2006) (listing state laws requiring surgery to change gender designation on birth certificates).

27. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (protecting transgender women under Title VII); Jennifer L. Levi & Bennet H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in TRANSGENDER RIGHTS 74, 75 (Paisley Currah et al. eds., 2006) (suggesting disability antidiscrimination law as a venue to protect trans rights); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 295–97 (2005) (arguing that anti-discrimination law inadequately protects transgender persons).

28. See JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 10 (2011), available at [http://www.thetaskforce.org/reports\\_and\\_research/ntds](http://www.thetaskforce.org/reports_and_research/ntds) (detailing the many hardships faced by transgender individuals in all aspects of their lives).

have begun to question the limits of identity and equality-based legal theories to adequately protect performative elements of identity.<sup>29</sup> Existing theories fit all legal protections for gender nonconformity into a single model of transgender identity.<sup>30</sup> The post-surgery male-to-female transgender woman comes to represent all trans people.<sup>31</sup> But what happens when someone's identity does not neatly fit in this mold? What about non-operative transgender men, masculine transgender women, or slightly effeminate non-trans men? Their gender nonconformity might not be protected under an identity-based equal protection theory.

Building on this insight, I argue that freedom of speech should prevent the government from regulating gender nonconformity.<sup>32</sup> Although other models to protect transgender rights remain critical, my argument moves beyond some of the limits of an identity model by focusing on how the government regulates conduct to suppress the communication of gender nonconformity.<sup>33</sup> *City of Cincinnati v. Adams* illustrates how cross-dressing ordinances target communication.<sup>34</sup> Ultimately, I will argue that all cases where the government penalizes gender nonconformity<sup>35</sup> are similar to *Adams*: government regulations seek to suppress messages of gender nonconformity.

My argument builds on the work of other legal scholars who have argued that dress and appearance communicate core aspects of identity.<sup>36</sup> Gowri Ramachandran, for example, suggests an independent freedom of dress, based on concerns with dress and appearance as a site of connection between personal and public identities.<sup>37</sup> Similarly, Catherine Fisk argues that worker dress should be protected on the

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29. See, e.g., DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 79–93 (2011) (rejecting focus on “rights”); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 182 (2006) (arguing antidiscrimination law still requires people to “cover”); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 629 (2005) (suggesting antidiscrimination law enforces cultural biases).

30. See Vade, *supra* note 27, at 273–75 (suggesting the “Gender Galaxy,” a non-linear interpretation of gender, as a more accurate representation of gender diversity).

31. See *id.* at 255–56.

32. See *infra* Part I.

33. Cf. Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465, 468–75 (2009) (arguing for freedom of speech as an additional strategy).

34. 330 N.E.2d 463, 464 (Ohio Mun. Ct. 1974).

35. Much of my argument would also apply to conduct that communicates traditional gender norms, but I focus on how the state targets messages of gender nonconformity.

36. See, e.g., Flynn, *supra* note 33, at 491–94 (focusing on how individuals use conduct to communicate gender).

37. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 14–15 (2006) (criticizing the limits of equal protection challenges to dress codes).

basis of privacy and autonomy.<sup>38</sup> Although this scholarship establishes the critical role of appearance in building individual identity, it does not consider how the state targets appearance based on the message expressed. I move beyond the focus on the intentions of the individuals who are regulated to argue that the state's interest in gender nonconformity is based on the message expressed.<sup>39</sup>

I begin this article by considering the relationship between gender nonconformity and freedom of speech.<sup>40</sup> In Part I, I argue that state suppression of gender nonconformity violates core values underlying freedom of speech.<sup>41</sup> We protect speech partially out of a concern for autonomy and self-definition.<sup>42</sup> I use gender theory to sketch an understanding of gender as a social process of self-definition consistent with the value of autonomy.<sup>43</sup>

I then turn to doctrinal tests to argue that gender nonconformity should be protected.<sup>44</sup> Courts and scholars disagree over when conduct should be protected as "speech," but they agree that the state should not be able to regulate conduct solely to suppress a message expressed by that conduct.<sup>45</sup> Starting from this premise, I address two issues: first, how one's appearance, dress, and other forms of conduct communicate a message; and, second, when government regulation of this conduct violates freedom of speech.<sup>46</sup>

Past scholarship has used performative theories of gender to argue that individuals use dress, appearance, and other behavior to constitute their identities.<sup>47</sup> Conduct, however, does not become communicative merely because an individual intends to express something. Dress, appearance, and other conduct communicate gender within a social context that defines some behavior as "masculine" and other behavior as "feminine."<sup>48</sup> When the state regulates gender

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38. Her argument thus does not use freedom of speech but is similar to mine insofar as it protects individual expression instead of relying on equal protection. See Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1111 (2006).

39. See *infra* Part I.B.

40. See *infra* Part I.A.

41. See *infra* Part I.

42. See David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 72 (2012) (describing interest in self-definition as part of the broader autonomy value of free speech).

43. See *infra* Part I.A.

44. See *infra* Part I.B.

45. See *infra* Part I.B.1.

46. See *infra* Part I.B.2.

47. See *infra* note 114.

48. I make this point by connecting social constructionist theories of gender to the use of communication theory in free speech scholarship. See *infra* notes 148–59 and accompanying text.



nonconformity, it is not merely regulating conduct. By singling out dress and appearance that deviates from these gender norms, the state suppresses communication of gender nonconformity.<sup>49</sup> I argue that under the *O'Brien* test, courts should consider the means and not just the ends of government action in determining if the action suppresses communication.<sup>50</sup>

At the end of this theoretical discussion, I turn briefly to the strategic question of whether antidiscrimination law is more appropriate than freedom of speech for protecting transgender rights.<sup>51</sup> Even if state regulation of gender might violate freedom of speech, is it worth pursuing the argument in court? I start by arguing that present law inadequately protects transgender rights.<sup>52</sup> In the process, I illustrate how present law reinforces notions of the gender binary.<sup>53</sup> Cases built on a free speech theory can complement anti-discrimination law, emphasizing the relationship between identity and appearance.<sup>54</sup>

In Part II, I test and refine my argument by applying it to government employment, child custody, and restroom access.<sup>55</sup> I use actual cases to support my contention that the government regulates conduct in order to suppress communication of gender nonconformity.<sup>56</sup> Freedom of speech would not protect transgender rights in every case, but this Part illustrates that it is a viable theory in a wide range of cases.<sup>57</sup> This discussion also allows me to consider strategic challenges to using freedom of speech in different areas of law.

In this paper, I use “gender nonconformity” to refer to any conduct that does not follow expected gender-based social conventions.<sup>58</sup> I use transgender in a similarly broad fashion, to refer to anyone “whose gender identity or expression is different than the gender they were assigned at birth or different than the stereotypes that go with that gender. This includes people who identify as MTF (male-to-female), FTM (female-to-male), butch, genderqueer, tranny, transsexual, sissy boy, etc.”<sup>59</sup> Cisgender refers to people who identify with

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49. See *infra* notes 99–130 and accompanying text (arguing that the state suppresses conduct that expresses dissent from a gender binary).

50. See *infra* notes 203–15 and accompanying text.

51. See *infra* Part I.D.

52. See *infra* Part I.D.

53. See *infra* Part I.D.

54. See *infra* Part I.D.

55. See *infra* Parts II.A.2, II.B.2, II.C.2.

56. See *infra* Parts II.A, II.B, & II.C.

57. See *infra* Part II.A, II.B, & II.C.

58. See *infra* Part I.A (further discussing what it means for conduct to communicate gender).

59. See TRANSGENDER LAW CENTER, *PEEING IN PEACE: A RESOURCE GUIDE FOR TRANSGENDER ACTIVISTS AND ALLIES 2* (2005), available at <http://www.transgenderlawcenter>

the sex that they were assigned to at birth. Thus, most people would be cisgender men or women.<sup>60</sup> When describing case law, I follow the courts in using transsexual to refer to persons who desire or have undergone surgery to transition from one gender to the other. I also try to use pronouns preferred by individuals when describing cases. When it is not clear what pronouns a person used, I follow court opinions in pronoun use.<sup>61</sup>

### I. THE FREEDOM OF SPEECH ARGUMENT FOR PROTECTING GENDER NONCONFORMITY

The First Amendment generally only protects speech,<sup>62</sup> but courts have applied First Amendment scrutiny to some government regulations of conduct: burning an American flag,<sup>63</sup> wearing an obscene jacket,<sup>64</sup> protesting at military funerals,<sup>65</sup> nude dancing,<sup>66</sup> and posting computer source code to the internet.<sup>67</sup> These cases suggest that First Amendment scrutiny is appropriate when the government regulates conduct “because it has expressive elements.”<sup>68</sup>

Like burning a flag, gender nonconformity communicates ideas from one person to another. In particular, gender nonconformity communicates core elements of one’s identity and is related to the free speech values of autonomy and self-realization.<sup>69</sup> My key contribution is illustrating how the state singles out and suppresses conduct because it communicates gender nonconformity, interfering with this process of defining and expressing identity.<sup>70</sup>

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.org/issues/public-accomodations/peeing-in-peace [hereinafter PEEING IN PEACE]; see also STRYKER, *supra* note 16, at 1–30 (discussing history and politics behind some of these terms).

60. See STRYKER, *supra* note 16, at 22.

61. I do not like this option, as I recognize that courts may erase trans identities by deliberately using the wrong pronouns. See Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.–C.L. L. REV. 329, 348–52 (1999). Unfortunately, for some cases I have no other information on what pronouns an individual preferred.

62. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 7–10 (1982) (defining an independent free speech principle to mean that government regulations of speech are subject to greater scrutiny than similar regulations of conduct).

63. *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

64. *Cohen v. California*, 403 U.S. 15, 18 (1971).

65. *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011).

66. “[N]ude dancing . . . falls only within the outer ambit of the First Amendment’s protection.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (upholding restriction on nude dancing as content-neutral regulation).

67. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445, 449, 454–55 (2d Cir. 2001) (holding that software is speech, but still upholding injunction as content-neutral restriction).

68. *Johnson*, 491 U.S. at 406.

69. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (defining self-realization as a core value of free speech).

70. See Han, *supra* note 42, at 72 (arguing for self-definition as a key part of autonomy).

*A. Autonomy and Communication of Gender Nonconformity*

Before discussing how gender nonconformity is itself a message, I consider why we protect freedom of speech at all. I use this inquiry to support my argument that gender nonconformity is the kind of conduct that freedom of speech should protect. Scholars focus on three broad sets of values underlying free speech: democracy, truth, and autonomy.<sup>71</sup> Democracy is particularly privileged in much free speech theory<sup>72</sup> because free speech informs popular decision making and sovereignty.<sup>73</sup> Seemingly non-political speech plays a critical role in this process of democratic decision making.<sup>74</sup> For example, seeing a trans person using the restroom may convince someone to think about the importance of policies protecting restroom access. Free speech is also highly valued based on an instrumental concern with achieving truth.<sup>75</sup> As Holmes famously argued, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>76</sup> Countless books and articles have been written arguing that masculinity and femininity are not determined by biological sex.<sup>77</sup> However, seeing and interacting with a trans person may do more than any written argument to convince someone to change their assumptions about the relationship between sex and gender.<sup>78</sup> While democracy and truth support my argument, government suppression of gender nonconformity particularly infringes on the core free speech value of autonomy.

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71. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970); Redish, *supra* note 69, at 591; see also Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–41, 143–54 (1989) (grouping a larger set of ten justifications into these three primary values).

72. See ERIC BARENDT, *FREEDOM OF SPEECH* 23 (1st ed. 1985) (“[T]he argument from democracy has been the most influential theory in the development of twentieth-century free speech law.”).

73. See SCHAUER, *supra* note 62, at 36 (“[F]reedom of speech is crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power.”).

74. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011) (holding that speech that “fall[s] short of refined social or political commentary” is still protected); see also Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 567, 591–94 (2011) (arguing against only protecting a narrow range of political speech).

75. See SCHAUER, *supra* note 62, at 16 (“[All formulations of the value of truth] share a belief that freedom of speech is not an end but a means . . . of identifying and accepting truth.”).

76. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

77. See, e.g., ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN* (2d ed. 1992).

78. Scanlon similarly argues that actual portrayals of sex may do more to change people’s attitudes towards sex than written arguments. See T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 547 (1979).

Autonomy includes a core concern with freedom to choose how we express our identity.<sup>79</sup> We prevent the government from interfering with speech not only to enhance democracy or the marketplace of truth, but also out of respect for autonomous self-expression. As David Han explains, “speech holds intrinsic value apart from aiding in the discovery of truth or promoting democratic self-governance: We also speak in order to define, develop, and express ourselves as individuals.”<sup>80</sup> When a trans woman says “I am a woman,” she engages this interest in self-definition. Similarly, when a trans man wears a suit instead of a dress, he engages this interest in self-definition. Our understanding of autonomy as a core free speech value should extend to the self-definition inherent in gender nonconformity.<sup>81</sup>

Even when the Supreme Court does not explicitly rely on autonomy and self-expression as reasons to protect speech, these values are implicit throughout the reasoning of its key free speech opinions.<sup>82</sup> Most recently, in *United States v. Alvarez*,<sup>83</sup> the Court protected Xavier Alvarez’s right to publicly lie about receiving the Congressional Medal of Honor. The Court focused on Alvarez’s individual interest in self-expression rather than any values of democracy or truth.<sup>84</sup> Justice Breyer noted that “[f]alse factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence.”<sup>85</sup> These objectives all relate to an underlying interest in self-definition.

*Alvarez* was about speech and not conduct, but the Court’s concern with protecting self-definition is also inherent in many decisions involving conduct.<sup>86</sup> In particular, the Court has noted the expressive function of clothing. In *Cohen v. California*, Justice Harlan emphasized “that the Constitution leaves matters of taste and style . . . to the individual.”<sup>87</sup> While Cohen’s jacket may have expressed political

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79. See Redish, *supra* note 69, at 607, 623 (developing full meaning of self-realization as related to autonomy).

80. Han, *supra* note 42, at 97–98 (defining interest in “self-definition”).

81. *Cf. id.* at 99 (arguing that self-definition is constitutionally based in autonomy).

82. See *id.* at 103–08 (discussing doctrinal basis of self-definition).

83. 132 S. Ct. 2537 (2012).

84. See *id.* at 2551 (“Though few might find respondent’s statements anything but contemptible, his right to make those statements is protected by the Constitution’s guarantee of freedom of speech and expression.”) (plurality opinion); *id.* at 2552 (noting that lies may not contribute to marketplace of ideas) (Breyer, J., concurring); see also Han, *supra* note 42, at 73, 97, 99, 103, 124–25, 128 (using *Alvarez* case as key example of why interest in self-definition serves crucial independent First Amendment function).

85. *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring).

86. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 573–74 (1974) (holding that wearing the flag on the seat of a pair of jeans is constitutional).

87. *Cohen v. California*, 403 U.S. 15, 25 (1971) (protecting jacket with words “Fuck the Draft”).

dissent, the jacket also defined and expressed Cohen's identity. Similarly, in *Tinker*, the Court protected students' black armbands.<sup>88</sup> While the Court emphasized the political nature of the armbands, it also noted the students' interest in autonomy and self-expression.<sup>89</sup> The Court also noticeably draws on the self-definition element of autonomy in cases dealing with compelled speech and freedom of association.<sup>90</sup>

These cases make it clear that free speech is not only about democracy or truth. In *Cohen*, the opinion began by noting that the case may seem trivial.<sup>91</sup> In *Alvarez*, the Court suggested that lies did not contribute much to democracy or truth.<sup>92</sup> Yet the Court recognized an autonomy value underlying speech in both cases.<sup>93</sup> As much as we recognize Paul Cohen's autonomy when we protect his jacket, we should recognize Pat Doe's autonomy when we protect her skirts.<sup>94</sup>

I now turn to gender theory to briefly sketch out an understanding of gender nonconformity as communicative. In doing so, I particularly emphasize the importance of autonomy and self-definition. By focusing on this interest in autonomy and self-definition, I avoid claiming that gender nonconformity is necessarily political.<sup>95</sup> We should protect gender nonconformity whether it is political or not.<sup>96</sup>

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88. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504–06, 511, 514 (1969) (protecting armbands worn in protest of the Vietnam War).

89. *Id.* at 511 (“[Students] may not be confined to the expression of those sentiments that are officially approved . . . students are entitled to freedom of expression of their views.”).

90. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573 (1995) (emphasizing “that a speaker has the autonomy to choose the content of his own message” as his or her freedom of association); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that state cannot compel an individual to be a “mobile billboard” for “an ideological point of view he finds unacceptable”); see also Han, *supra* note 42, at 106–07 (discussing these cases).

91. *Cohen*, 403 U.S. at 15.

92. *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring).

93. *Id.* at 2550; *Cohen*, 403 U.S. at 25–26.

94. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*4, \*8 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (protecting transgender girl's clothing).

95. Rather, my point in discussing political values above is that gender nonconformity contributes to democratic decision making whether or not it is political. See Andrew Koppelman, *Madisonian Pornography or, the Importance of Jeffrey Sherman*, 84 CHI.–KENT L. REV. 597, 607, 609–10, 612–13 (2009) (arguing that non-political speech plays a key role in furthering democracy).

96. See Steven J. Macias, *Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools*, SAN DIEGO L. REV. (forthcoming, 2012) (raising concern that expression of LGBT identity is politicized while expression of non-LGBT identity is not). My focus on self-definition avoids Macias's concern with equating identity and anti-identity speech as part of the same political discourse.

In our society, we use gender as a central way to identify people: male or female.<sup>97</sup> We assume that we can reliably identify someone as male or female based on his or her appearance.<sup>98</sup> Our pronouns depend on this, and we become uncomfortable when we cannot identify someone as male or female. Legal scholars describe this rigid system as a “gender binary.”<sup>99</sup> In this view, sex is determined at birth by some combination of biological factors and cannot be changed later.<sup>100</sup> All manner of dress and appearance is either “masculine” or “feminine.”<sup>101</sup> Men look and act certain ways *because* they are men. Women look and act certain ways *because* they are women. We expect that everyone will fall into these distinct categories.<sup>102</sup>

Gender theorists challenge the idea that there is any single category of “women” or “men.”<sup>103</sup> These scholars argue that gender is not a fixed category.<sup>104</sup> Women do not all think, look, or act alike. Instead, these scholars describe gender as mutable and performative.<sup>105</sup> Men do not wear suits because they are men.<sup>106</sup> Instead, when someone wears a suit, they constitute their masculinity.<sup>107</sup> We all constitute our identities as men and women by our behavior, including dress, hair, bodily movement, and speech.<sup>108</sup>

This means that masculinity does not only belong to male bodies.<sup>109</sup> One woman might speak softly, wear makeup and nail polish, and prefer pink shirts. But another woman might shave her head, lift weights, and tattoo her arms. These women are not merely expressing personal style preferences. They are constituting their

97. See David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1055 (2002).

98. See Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 123, 179 (2001).

99. See Cruz, *supra* note 97, at 1009–11 (arguing that gender is an ideology that can be compared to religious belief systems); Flynn, *supra* note 33, at 489 (suggesting trans people express opposition to gender binary); Keller, *supra* note 61, at 339 (arguing that a binary gender ideology shapes legal approaches to identifying transsexuals).

100. See FAUSTO-STERLING, *supra* note 77, at 77–85 (discussing binary division of sex and arguing that biologically it would be more accurate to consider at least five sexes).

101. See Weiss, *supra* note 98, at 179.

102. Jillian Weiss describes how this “normative principle” of gender completely erases the existence of trans people. See *id.* at 124.

103. See, e.g., FAUSTO-STERLING, *supra* note 77, at 88.

104. See, e.g., *id.*

105. Judith Butler’s work is considered the foundational text in this area. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 5–9 (1990).

106. See *id.*

107. See JUDITH HALBERSTAM, *FEMALE MASCULINITY* 100 (1998).

108. See BUTLER, *supra* note 105, at 25 (“[I]dentity is performatively constituted by the very ‘expressions’ that are said to be its results.”).

109. See HALBERSTAM, *supra* note 107, at 15 (studying how female-bodied people enact masculinity).

gender. They use their behavior to define themselves as more or less feminine or masculine.<sup>110</sup>

Describing gender as performative does not mean that it is a costume that we can take on and off at will.<sup>111</sup> Unlike when we change a costume, changing how we perform our gender involves redefining our identity. By describing gender as performative, scholars focus on this process of using conduct to define and express identity.<sup>112</sup> For example, when Pat Doe began wearing dresses to school, she was not merely trying out a new fashion style.<sup>113</sup> She was defining herself as a girl. Through her conduct, she constituted her female identity. Legal scholars use performative theories of gender to argue that gender expression forms a critical element of individual identity.<sup>114</sup> Gender nonconformity is an act of self-definition, directly implicating the free speech value of autonomy.

Even if we recognize how important gender nonconformity may be to trans people's self-definition, we also need to consider whether it is really speech. Gender nonconformity can only be protected under the First Amendment if it is understood as communicative by others.<sup>115</sup> When we see a jacket protesting the draft,<sup>116</sup> we understand the message being communicated. Many people, however, do not understand someone wearing a dress as communicating any message. Most of us fail to "see" any message here. Social constructionist theories of gender focus on how we internalize social norms that give meaning to gender nonconformity and other gender conduct.<sup>117</sup> These norms allow us to see a dress as a marker of femininity.

Despite some biological differences, men and women are more alike than different.<sup>118</sup> From birth, we learn how to be boys and girls,

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110. See, e.g., *id.* at 23.

111. See Weiss, *supra* note 98, at 159 (arguing that gender is not a costume).

112. See, e.g., *id.* at 160.

113. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

114. See, e.g., YOSHINO, *supra* note 29, at 70–71 (exploring relationship between performative theories and lesbian and gay identity); David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.—C.L. L. REV. 319, 326–27 (1994); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 945 (1989); Ramachandran, *supra* note 37, at 25 (exploring relationship between performative theories and appearance).

115. Gowri Ramachandran makes this point in defense of her decision to argue that freedom of dress should be independent of free speech. See Ramachandran, *supra* note 37, at 41.

116. See *Cohen v. California*, 403 U.S. 15, 16 (1971).

117. See LAURA KRAMER, *THE SOCIOLOGY OF GENDER: A BRIEF INTRODUCTION* 55–57, 77 (3d ed. 2011) (overview of relevant theories).

118. See FAUSTO-STERLING, *supra* note 77, at 7–8 (rejecting nature versus nurture framework for sex differences, "arguing instead for a more complex analysis in which an

men and women. Social norms tell us that men behave, dress, and appear in certain ways, and women behave, dress, and appear in different ways.<sup>119</sup> For example, in the United States, we learn that “boys don’t cry,” but girls are sensitive.<sup>120</sup> We learn how to express our gender consistent with social expectations of what we “should” do because we are women or men.<sup>121</sup> By the time we are old enough to understand ourselves as boys and girls, this process of learning is so ingrained that gender seems natural.<sup>122</sup> We automatically understand some conduct as expressing masculinity and other conduct as expressing femininity. This process of social learning masks how much of our behavior and appearance is geared towards constantly communicating our gender.<sup>123</sup>

Candace West and Don Zimmerman use social constructionist theories to describe gender as being accomplished in everyday interactions.<sup>124</sup> This situates gender performativity in a social context: individual gender performances are constantly evaluated against norms defining how men and women *should* behave.<sup>125</sup> Most of us constantly use our behavior, mannerisms, appearance, speech, and activities to prove that we are male or female.<sup>126</sup> When our gender performance “fails,” as when a man wears women’s jeans, we might be held accountable by others questioning our performance.<sup>127</sup> By wearing

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individual’s capacities emerge from a web of interactions between the biological being and the social environment.”); Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 AM. PSYCHOL. 581, 581 (2005) (“The gender similarities hypothesis holds that males and females are similar on most, but not all, psychological variables. That is, men and women, as well as boys and girls, are more alike than they are different.”).

119. See BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 1–2, 91–95 (2d ed. 1994) (describing process of learning to perform gender with particular attention to role of schools at a young age); see also ANN ARNETT FERGUSON, BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY 85–88 (2000) (arguing that black males learn how to perform a sort of deviant masculinity through their interactions with school officials who label them as violent and deviant); MICHAEL KIMMEL, GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN 24–43 (2008) (examining how American males between the ages of 16 and 26 learn how to be men).

120. See, e.g., JEFFREY A. KOTTLER, THE LANGUAGE OF TEARS 156–60 (1996) (discussing how males are conditioned not to cry, while females are encouraged to express their feelings).

121. See Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC’Y 125, 132 (1987).

122. See *id.* at 133 (discussing the categorization of individuals into genders).

123. Taylor Flynn refers to this masking as seeing “pink on pink.” Flynn, *supra* note 33, at 500–02. She argues that because gender norms are so ubiquitous, we fail to see how conduct is used to express gender: gender becomes invisible. *Id.*

124. West & Zimmerman, *supra* note 121, at 126 (“Doing gender involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine ‘natures.’”).

125. *Id.* While social construction theories of gender do not use the language of gender performativity, I use it here to make the connection between these theories.

126. See BUTLER, *supra* note 105, at 134–41.

127. See *id.* at 134–37.



a suit and tie, men avoid “failing” at their gender performance. Social norms tell us that wearing a suit and tie is masculine.<sup>128</sup> Because gender structures our whole society, most people are not aware of how they actively participate in communicating gender.<sup>129</sup>

I used this brief discussion of gender theory to challenge the idea of gender as a fixed, static category. Individuals use dress, appearance, and behavior in a social process of defining and communicating gender identity.<sup>130</sup> I turn now to building my doctrinal argument under freedom of speech. Key to this argument is the idea that the state cannot single out conduct because it expresses gender nonconformity.<sup>131</sup> When the state suppresses gender nonconformity, it infringes on the autonomy and self-definition values inherent in free speech.<sup>132</sup>

### *B. Gender Nonconformity Is Expressive Conduct Under Present Doctrine*

In *Doe v. Yunits*, the Superior Court of Massachusetts held that a transgender girl’s clothing was protected speech and that she must be allowed to present herself as a girl while at school.<sup>133</sup> This opinion supports my argument that gender nonconformity should be protected as speech. After Pat Doe began wearing “girls’ make-up, shirts, and fashion accessories to school,” school staff “informed [her] that she would not be allowed to attend [the school] if she were to wear any outfits disruptive to the educational process, specifically padded bras, skirts or dresses, or wigs.”<sup>134</sup> While the court recognized the school’s legitimate interest in maintaining an educational environment, it held that the school district “meant to suppress plaintiff’s speech.”<sup>135</sup>

As with *Yunits*, my argument hinges on how the government regulates conduct in order to suppress gender nonconformity. Individuals use a nearly limitless array of behavior to perform gender, but freedom of speech only prohibits regulating conduct because of the message expressed.<sup>136</sup> I begin with a lengthy discussion of why

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128. See West & Zimmerman, *supra* note 121, at 126–27.

129. See MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 93–99, 112–13 (2d ed. 2004) (explaining different sources of gender and how it constructs our whole society).

130. See BUTLER, *supra* note 105, at 136.

131. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff’d sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

132. See Han, *supra* note 42, at 106.

133. *Yunits*, 2000 WL 33162199, at \*3–5, \*8.

134. *Id.* at \*1–2.

135. *Id.* at \*4.

136. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

gender nonconformity is communicative.<sup>137</sup> This lays the groundwork for understanding how the state singles out and suppresses communication of gender nonconformity.

### 1. *Gender Nonconformity Is Communicative*

Following *Spence v. Washington*, the First Amendment protects conduct when it is “sufficiently imbued with elements of communication,”<sup>138</sup> but courts and legal scholars struggle to define when conduct should be considered sufficiently expressive to meet this threshold.<sup>139</sup> Courts do not even agree on how to describe the category of conduct that should be protected<sup>140</sup>: “expressive conduct,”<sup>141</sup> “symbolic expression,”<sup>142</sup> “symbolic conduct,”<sup>143</sup> “combined” speech and conduct,<sup>144</sup> or conduct that “convey[s] an unmistakable message.”<sup>145</sup> In defining expressive conduct, courts struggle between recognizing symbols as a “short cut from mind to mind”<sup>146</sup> and the idea that conduct cannot “be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>147</sup>

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137. See *infra* Part I.B.1.

138. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

139. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring) (“[W]here suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons [] we have allowed the regulation to stand”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (protecting symbols as “a short cut from mind to mind”); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–91 (1978) (defining communicative acts as those that further First Amendment values); John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1356–57 (2008) (arguing that conduct should be protected when it is communicative); David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515, 1524–26 (2003) (defining expressive conduct as conduct that conveys a mental state); Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 442 (1995) (“The distinction between mind and body, speech and conduct, expression and action, holds that speech is privileged above conduct; government may regulate the clash of bodies but not the stirring of hearts and minds.”). Recognizing the difficulty in defining expressive conduct, some scholars reject the test entirely and instead suggest alternate approaches to determining what conduct should be subject to the First Amendment. See, e.g., Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986) (presenting an economic model); Daniel F. Wachtell, Note, *No Harm, No Foul: Reconceptualizing Free Speech Via Tort Law*, 83 N.Y.U. L. REV. 949, 971–72 (2008) (presenting a harm principle).

140. See Greenman, *supra* note 139, at 1339–40 (emphasizing that “[t]he law nominally protects acts that are ‘expressive,’ but rarely defines that word”).

141. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000).

142. *Virginia v. Black*, 538 U.S. 343, 360 (2003).

143. *Id.* at 361.

144. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

145. *Spence v. Washington*, 418 U.S. 405, 410 (1974).

146. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

147. *O’Brien*, 391 U.S. at 376.

I follow free speech scholars who argue that the central concern of speech-conduct tests is protecting conduct when it is communicative.<sup>148</sup> Rather than focusing on the individual speaker's intent to express a message,<sup>149</sup> these scholars emphasize the role of social context in communication.<sup>150</sup> Conduct communicates a message when "speakers and listeners . . . understand the practices and conventions they employ as expressive."<sup>151</sup> In the case of gender, social norms provide the context that individuals use in performing gender.<sup>152</sup> Gender nonconformity should be protected as speech because speakers and listeners understand the conduct as communicative.

Linguistic theorists first explored the role of context in communication, arguing that language itself can only communicate a message when it is situated in an appropriate social context.<sup>153</sup> For example, saying "I do" in a wedding ceremony has a very different meaning from saying "I do" during a theatrical performance.<sup>154</sup> Drawing on this insight, free speech theorists have argued that we cannot evaluate conduct in a vacuum.<sup>155</sup> Instead, conduct functions as a speech act when it communicates meaning through the social conventions of a community or subcommunity.<sup>156</sup> First Amendment doctrine mentions social context,<sup>157</sup> but free speech scholars argue that the Court relies on social context more than the doctrine explicitly recognizes.<sup>158</sup>

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148. See Greenman, *supra* note 139, at 1340; McGowan, *supra* note 139, at 1524–25.

149. See Greenman, *supra* note 139, at 1343.

150. See McGowan, *supra* note 139, at 1525–26 (discussing role of social context in establishing communication).

151. *Id.* at 1524–25.

152. See West & Zimmerman, *supra* note 121, at 126–27.

153. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 15–16, 22 (1962) (developing concept of the speech act). Legal scholars often engage with linguistic theory to develop the relevance of context to understanding the relationship between conduct and speech. See, e.g., KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 339–40 (1989); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1326–27 (2005).

154. See AUSTIN, *supra* note 153, at 15–16, 22.

155. See Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH. L.J. 629, 634 (2000).

156. See *id.* at 635.

157. See, e.g., *Spence v. Washington*, 418 U.S. 405, 410 (1974) ("[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol.").

158. See Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995). Post notes that:

[T]he fundamental difficulty with the *Spence* test is that it locates the essence of constitutionally protected speech exclusively in an abstract triadic relationship among a speaker's intent, a specific message, and an audience's potential reception of that message . . . [But] the constitutional recognition

When the Court evaluates whether particular conduct is sufficiently expressive to merit protection under freedom of speech, it is implicitly asking whether the conduct occurs in a social context where it is understood as communicative.

What does it mean to consider the social context of gender nonconformity? I argue that social context renders gender nonconformity legible as speech.<sup>159</sup> To explore this, I first imagine how social context might make dress and appearance inexpressive. We might imagine a world where gender identity expression communicates no message at all. In this world, there would be no distinction between clothes, makeup, hairstyles, or appearance of men and women. Choosing between wearing a dress or tuxedo to a formal event would be as inconsequential as one's eye color. Choosing jeans or a skirt would be as inconsequential as one's height. Even if I wanted to communicate a female gender identity by wearing a blouse and skirt, no one would understand the message. Beauty and appearance bias might still be possible, but they would take on different forms.<sup>160</sup> How we think about beauty is wrapped up in gender: we describe men as handsome and women as pretty.<sup>161</sup> Some of our standards of beauty, however, are not dependent on gender.<sup>162</sup> We describe symmetrical faces and well-proportioned bodies as attractive.<sup>163</sup> In this hypothetical world, some beauty standards might survive, but a man could be handsome in a dress and a woman could be pretty in a tuxedo.

This world is only theoretical. We are not likely to see a world where appearance does not matter. Most of us would not want to live in such a world. I do not argue that this world is normatively desirable. It does, however, help illustrate how social context makes conduct into expression. More specifically, it illustrates how the lack

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of communication as possibly protected speech also depends heavily on the social context within which this triadic relationship is situated.

*Id.*

159. Cf. Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 969–79 (1993). Barbara Flagg discusses the transparency phenomenon, arguing that whites do not see whiteness. *Id.* This results in also failing to appreciate how blacks express racial messages through their conduct or appearance. *Id.* Flagg argues for developing consciousness of whiteness to help illuminate what it means to be black. *Id.* Similarly, I argue that cisgender blindness to gender results in failing to see how gender nonconformity expresses messages about gender. Taylor Flynn similarly makes this point about cisgender blindness to gender, labeling it "pink on pink." See Flynn, *supra* note 33, at 500–02.

160. See Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1034–35 (2009) (discussing appearance bias).

161. PENELOPE ECKERT & SUSAN MCCONNELL-GINET, LANGUAGE AND GENDER 60 (2003).

162. See Rhode, *supra* note 160, at 1035–36 (describing gender-neutral characteristics that people perceive as attractive).

163. *Id.*

of present social context would reduce the communicative quality of dress and appearance. Gender nonconformity expresses a message because it noticeably violates a set of gender expectations.

I use restroom choice as a helpful example to illustrate how gender nonconformity communicates a message.<sup>164</sup> Everyone communicates a message of gender identity by using a single-sex restroom.<sup>165</sup> To use the terms of social construction theories, we have learned that men use one set of restrooms and women use another set of restrooms.<sup>166</sup> Social norms ascribe gender meaning to restroom choice.<sup>167</sup> Even if a cisgender woman used the men's restroom because the line was shorter, others might think she was a man or be confused by her restroom choice. Similarly, if a transgender woman uses the women's restroom, others will likely either think she is a woman, or challenge her restroom choice because they think she appears too masculine. When a trans woman uses the women's restroom, she communicates her femininity even if she passes, and especially if she does<sup>168</sup>: if no one questions her, then she has successfully communicated that she is a woman. But even if she is challenged, her restroom choice communicates a message of gender identity.<sup>169</sup> As the *Yunits* court explained, "[t]he school's vehement response and some students' hostile reactions are proof of the fact that [Doe's] message clearly has been received."<sup>170</sup>

Gender nonconformity also communicates opposition to the gender binary.<sup>171</sup> When a trans woman uses the women's restroom, she challenges the assumption that femininity only belongs to cisgender women. The often visceral reaction to trans restroom use underscores how readily audiences understand the conduct to communicate a message of gender nonconformity.<sup>172</sup> Sex-segregated restrooms are so strongly ingrained in the ideology of the gender binary that

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164. See *infra* Part II.C (providing a complete discussion of sex segregated restrooms).

165. See Levi & Redman, *supra* note 14, at 135–36.

166. See *id.* at 164–65.

167. See *id.*

168. See YOSHINO, *supra* note 29 (presenting a detailed examination of the role of passing in relation to the law).

169. Cf. Greenman, *supra* note 139, at 1345–46. Greenman compares communicative conduct to speech in an argument: the conduct seeks to convince others to accept an idea. *Id.* While the transgender woman's gender identity message may be rejected, the conduct is communicative because others understand and reject the message that she expresses through her restroom choice.

170. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at \*4 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff'd sub nom.* Doe v. Brockton School Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

171. See *supra* notes 99–103 and accompanying text (defining gender binary).

172. See, e.g., Cruzan v. Special Sch. Dist., #1, 294 F.3d 981, 983 (8th Cir. 2002) (challenging trans restroom access based on this type of reaction).

opponents to state equal rights amendments did not have to explain why unisex restrooms were dangerous.<sup>173</sup> We simply assume that restrooms should be sex-segregated. By choosing the restroom associated with their gender identity, trans people communicate opposition to the gender binary.<sup>174</sup>

A counterexample emphasizes how social context makes restroom choice legible as a gender message. Many colleges now have some unisex multi-stall public restrooms.<sup>175</sup> If restrooms are unisex, then restroom choice cannot communicate a gender message. Choosing between two different unisex restrooms does not communicate a message. Restroom choice typically communicates a message of gender identity because of the underlying assumption that restrooms should always be sex-segregated.<sup>176</sup>

One objection to my argument so far is that gender nonconformity should only be protected as speech when the speaker intends to communicate a specific message.<sup>177</sup> According to this objection, any message communicated by restroom choice is too vague to be understood as speech.<sup>178</sup> This breaks down into challenges about the necessary intent of the speaker and the specificity of the message.<sup>179</sup> I argue that both of these challenges misunderstand what it means to protect conduct as communication, and that present free speech doctrine does not require intent or a specific message. Because gender nonconformity is always situated against social norms,<sup>180</sup> it is difficult to conceive of cases where people do not intend gender nonconformity to be communicative.<sup>181</sup> Gender nonconformity, however,

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173. See Levi & Redman, *supra* note 14, at 148–49.

174. Even though challenging a policy is not per se communicative, courts have recognized that conduct used to challenge social policies may be communicative in the proper social context. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 304–06 (1984) (assuming that sleeping in public parks to challenge policies about homelessness might be considered expressive conduct under the First Amendment).

175. See Levi & Redman, *supra* note 14, at 139 n.26.

176. See *id.* at 166.

177. See, e.g., *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (explaining that a conduct that attempts to communicate a “vague and unfocused” message is protected minimally under the First Amendment) (citing *E. Hartford Educ. Ass’n v. Bd. of Educ. of E. Hartford*, 562 F.2d 828, 858 (2d Cir. 1977)).

178. *Cf. id.* at 320 (explaining that a school teacher’s refusal to wear a tie in order to convey “a message of non-conformity and a rejection of older traditions” was not afforded any First Amendment protection because the message was not sufficiently focused to trigger protection).

179. See *id.* at 319.

180. See West & Zimmerman, *supra* note 121, at 132.

181. Even if courts required specific intent, they might presume this intent in most cases of gender nonconformity to avoid near impossible inquiries into subjective intent. See *infra* note 188 and accompanying text (arguing for imputed intent).

should be protected because it is communicative, even if someone does not have this specific intent.

*Spence* is often described as requiring (1) intent to communicate a specific message, and (2) likelihood that the message would be understood by the audience.<sup>182</sup> In *Troster v. Pennsylvania State Department of Corrections*, however, the court explained that if intent were required, “the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll” would not be protected.<sup>183</sup> The *Troster* court notes that the explicit test from *Spence* only required “activity [that] was sufficiently imbued with elements of communication,” while the two prongs of intent and likelihood of being understood were used to describe the particular case.<sup>184</sup> Moreover, later Supreme Court cases do not all cite *Spence* to determine when conduct should be treated as speech.<sup>185</sup>

Free speech scholars similarly argue that individual intent should not be a part of the test for when conduct is communicative. For example, Professor Greenman argues that the mental state of a nude dancer does not make the dancing more or less communicative.<sup>186</sup> Greenman explains that people communicate ideas that they do not think or feel.<sup>187</sup> The government should not have a greater ability to regulate communication based on the intent of the speaker. Joshua Waldman argues that, in practice, courts have collapsed the two prongs of *Spence* into one, imputing intent to the speaker based on whether conduct is understood as communicative.<sup>188</sup>

A hypothetical illustrates how gender nonconformity is communicative even if the speaker does not subjectively intend to express anything. Imagine a transgender man stranded on an island. He might consider his gender expression crucial to his sense of self, regardless of whether anyone else would ever see him. He might feel better about himself when he wears men’s clothes. A passenger on a passing cruise ship who happened to see the trans man on shore

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182. See *Troster v. Pa. State Dept. of Corr.*, 65 F.3d 1086, 1090 (1995) (citing *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (describing how other courts have interpreted *Spence*)).

183. *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569 (1995)).

184. *Id.* (citing *Spence*, 418 U.S. at 409–10).

185. See, e.g., *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 49 (2006) (deciding conduct is not “inherently expressive” but never citing *Spence*).

186. See Greenman, *supra* note 139, at 1343 (suggesting nude dancing is communicative even if the dancer is thinking about her trip home).

187. *Id.*

188. See Joshua Waldman, Note, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1851–58 (1997).

might take him to be a man but not realize he is expressing a message of gender nonconformity. In that case, the trans man's appearance communicated his gender identity: "I am a man." On the other hand, the passenger might understand the trans man to be transgender and communicating a message of gender nonconformity. In either case, gender nonconformity is communicative, even if the trans man was not aware of the ship. Whether or not individual transgender people subjectively intend to express a message, the audience easily understands the message.<sup>189</sup> Gender itself is a message. Even if a trans woman or man understands their gender entirely in non-expressive terms, their gender nonconformity is still communicative.

In some cases, the government has argued that gendered dress and appearance only communicate a diffuse message and should fail the second prong of *Spence*.<sup>190</sup> For example, in *Doe v. Yunits*, the school district argued that young school children could not understand the complex message of transgender identity potentially communicated by Pat Doe's conduct.<sup>191</sup> According to the school, Doe's dress was like other defiant behavior that did not express any particular message.<sup>192</sup> As the *Yunits* court recognized, however, Doe's conduct was easily understood as expressing gender nonconformity.<sup>193</sup> Other students did not need to understand what it meant to be transgender in order to understand the overall message.<sup>194</sup>

Professor Dean Spade explained similar challenges he faced because his behavior did not fit the expected model of transgender identity:

The fact that I don't want to change my first name, that I haven't sought out the use of the pronoun "he," that I don't think that "lesbian" is the wrong word for me, or, worse yet, that I recognize that the use of any word for myself—lesbian, transperson, transgender butch, boy, mister, FTM fag, butch—has always been/will always be strategic, is my undoing in their eyes.<sup>195</sup>

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189. See, e.g., *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*4 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff'd sub nom. Doe v. Brockton School Comm.*, No. 2000-J-638, 2000 WL33342399 (Mass. App. Ct. Nov. 30, 2000) (explaining that faculty and students understood Doe's female gender identity).

190. See, e.g., *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 319–20 (2d Cir. 2003) (holding that plaintiff's desire to wear a skirt only presented a diffuse message).

191. *Yunits*, 2000 WL 33162199 at \*4.

192. *Id.*

193. *Id.*

194. *Id.*

195. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 21 (2003). Spade's thinking on this issue has shifted, and he now uses male pronouns. See *id.* at 19 n.14.



Spade could be seen as only expressing a diffuse gender message. Because of the social construction of the gender binary, however, we always seek to understand behavior as communicating a male or female identity.<sup>196</sup> By consciously refusing to conform to norms of masculinity or femininity, Pat Doe and Dean Spade are both easily understood as communicating messages of gender nonconformity.<sup>197</sup> In *Hurley*, the Supreme Court explained that the overall theme of a parade can be clear, even if the precise meaning of different parts of the parade is not clear.<sup>198</sup> Spade's overall rejection of gender norms is clear, whether or not the exact meaning of particular conduct is clear.

I have intentionally argued for a broad range of gender nonconformity as communicative. Our present failure to understand gender nonconformity as speech is based on our failure to see "pink on pink."<sup>199</sup> I recognize the potentially radical breadth of this theory. However, this theory would not subject all regulation of dress and appearance choices to First Amendment scrutiny. The crucial test is whether state regulations target conduct based on nonconformity with norms of masculinity or femininity.<sup>200</sup> Preventing men from wearing dresses suppresses gender nonconformity, but regulating saggy pants does not similarly suppress gender nonconformity.<sup>201</sup> More importantly, the government may have legitimate reasons like safety and privacy to regulate dress and appearance. When government regulations of gender are not intended to suppress a message, the regulations do not implicate freedom of speech. My argument is similar to others who have argued that the test for expressive conduct is a low threshold.<sup>202</sup> A wide range of conduct may communicate gender nonconformity, but freedom of speech should only prevent the government from regulating this conduct specifically in order to suppress this message of gender nonconformity.

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196. See FAUSTO-STERLING, *supra* note 77, at 205–08.

197. *Yunits*, 2000 WL 33162199 at \*4; Spade, *supra* note 195, at 21–22.

198. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569–70 (1995).

199. See Flynn, *supra* note 33, at 500–02.

200. See Ramachandran, *supra* note 37, at 22–23 (discussing example of lesbian lawyer wearing high heels and makeup to make point about contextual specificity of communicating identity).

201. See Angelica M. Sinopole, Comment, "No Saggy Pants": A Review of the First Amendment Issues Presented by the State's Regulation of Fashion in Public Streets, 113 PENN. ST. L. REV. 329, 354–57 (2008) (suggesting that the audience is not likely to understand message expressed by saggy pants).

202. Cf. Cole & Eskridge, *supra* note 114, at 323–24 (arguing that same-sex intimacy should be expressive based on low threshold test); Ramachandran, *supra* note 37, at 21–24 (arguing that focus on whether conduct is sufficiently expressive ignores how communication is highly contextual).

## 2. Government Regulations of Gender Nonconformity Violate O'Brien

My central contention in this paper is that when the government singles out gender nonconformity from other conduct, it suppresses expression. Under *O'Brien*, government regulations of conduct are subject to the First Amendment when the government's interest is related to expression.<sup>203</sup> The "bedrock principle" is that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>204</sup> As the Court explained in *Texas v. Johnson*, the state's concerns with flag burning "blossom only when a person's treatment of the flag communicates some message . . . ."<sup>205</sup>

Similarly, the government's concerns with dress and appearance only arise when they communicate a message of gender nonconformity. In *Adams*, the state was not concerned with women wearing dresses.<sup>206</sup> The state's concerns arose only because Adams's dress communicated a message.<sup>207</sup> In contrast to *Adams*, laws based on government interests in workplace efficiency and professional appearance, education, privacy, and safety may not raise First Amendment concerns.<sup>208</sup> Whenever the state seeks to enforce gender norms by penalizing gender nonconformity, as in *Adams*, state action is related "to the suppression of free expression . . . ."<sup>209</sup>

I interpret *O'Brien* to prohibit singling out certain expressive conduct as a means of achieving an otherwise valid government interest.<sup>210</sup> This interpretation follows from the purpose of *O'Brien*:

203. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that government interest in efficient draft is unrelated to expressive use of burning draft card); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring).

204. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (internal quotation marks omitted).

205. *Johnson*, 491 U.S. at 410 (referencing the governing test announced in *O'Brien*).

206. See *City of Cincinnati v. Adams*, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974).

207. *Id.*

208. I do not think these ends are always independent of the communicative nature of gender nonconformity, but I think they may be in at least some cases. I discuss these further in relation to specific examples in Part II.

209. *O'Brien*, 391 U.S. at 377.

210. Other scholars similarly interpret *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984), as restricting the means of determining best interests of the child. According to these scholars, racial factors may sometimes be legitimate to the best interests of the child, but consideration of societal prejudice is an illegitimate means. Cf. Elizabeth Erin Bosquet, Commentary, *Contextualizing and Analyzing Alabama's Approach to Gay and Lesbian Custody Rights*, 51 ALA. L. REV. 1625, 1629, 1643 (2000) (applying *Palmore* to gay and lesbian adoption to argue that courts should only consider sexual orientation when there

government regulations of conduct should be subject to strict scrutiny under the First Amendment when they regulate conduct in order to suppress communication of a message. Moreover, this interpretation is consistent with how courts apply *O'Brien* in practice.<sup>211</sup> For example, in *Tinker*, the school may have had a valid interest in minimizing disruptions.<sup>212</sup> When the school singled out students wearing black armbands *because* those armbands expressed a message, however, the means were related to a state interest in the message expressed.<sup>213</sup>

When state action singles out conduct *because* it expresses gender nonconformity, the state action is related to expression. As in *Tinker*, Pat Doe's school had a valid interest in a proper school environment.<sup>214</sup> But when the school chose to penalize Doe's choice to wear the same clothes that other girls could wear, the school singled out Doe's gender nonconformity. Doe's conduct was singled out because it expressed a message of nonconformity. Whenever the state penalizes gender nonconformity but not other conduct, it necessarily acts to suppress communication.<sup>215</sup>

In some cases, courts suggest that the state may have an interest in the "status" of being transgender that is independent of the expression of gender nonconformity.<sup>216</sup> This alleged interest in the status of being transgender, however, cannot be separated from expression of gender nonconformity. The state is interested in status *because* it is constituted through conduct that expresses nonconformity with the gender binary. As others have argued in the context of sexuality, the First Amendment should protect conduct that expresses a status-based identity.<sup>217</sup> It is instructive to compare the government

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is a nexus between parental sexual orientation and child welfare); James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 521–22 (1987–1988) (arguing that *Palmore* allows race to remain part of custody decisions but not as a decisive factor); Eileen M. Blackwood, Note, *Race as a Factor in Custody and Adoption Disputes: Palmore v. Sidoti*, 71 CORNELL L. REV. 209, 222–24 (1985) (discussing the relationship between racial considerations as means and ends of best interest of the child); Robert B. Weinstock, Note, *Palmore v. Sidoti: Color-Blind Custody*, 34 AM. U. L. REV. 245, 268–69 (1984) (concluding that *Palmore* does not prohibit consideration of legitimate racial factors).

211. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that school could not prevent students from wearing black armbands).

212. *Id.*

213. *Id.* at 510.

214. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

215. See *id.* at \*4.

216. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (holding that Title VII does not apply to status of being transsexual).

217. David Cole and William Eskridge appear to have first proposed this idea, arguing that sex expresses intimacy. See Cole & Eskridge, *supra* note 114, at 328–29. Their

interests in gender nonconformity to the nude dancing cases and ethnic clothing cases. The Court's decisions upholding these regulations are distinguishable from cases involving gender nonconformity.<sup>218</sup>

In *Barnes v. Glen Theatre, Inc.*, the Court upheld the Indiana public indecency statute because it was based on order and morality.<sup>219</sup> The statute required female dancers to wear at least pasties and a G-string.<sup>220</sup> The plurality explained that “[t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity.”<sup>221</sup> Justice Souter concurred because the state's interest was the secondary effects of nude dancing establishments, and not the dancing itself.<sup>222</sup> Justice Scalia also concurred, describing the law as “a general law regulating conduct and not specifically directed at expression . . . .”<sup>223</sup> For different reasons, the Justices agreed that the Indiana law was not related to the expressive component of nude dancing.<sup>224</sup> Public nudity is understood as being immoral.<sup>225</sup> By finding reasons to regulate nude dancing that were supposedly not related to the message expressed, the Justices all implicitly agreed that if the public indecency statute only targeted the message of eroticism, the statute would be unconstitutional.<sup>226</sup>

In *Zalewska v. County of Sullivan*,<sup>227</sup> the state's interests are more plausibly unrelated to the message expressed by Zalewska's dress. In *Zalewska*, the Second Circuit held that an employee's wish to wear a skirt was not sufficiently expressive because the broad statement of cultural values was “vague and unfocused,” and viewers may not understand any message.<sup>228</sup> In this case, the government

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argument has been expanded by other scholars. See Megan Stuart, *Saying, Wearing, Watching, and Doing: Equal First Amendment Protection for Coming Out, Having Sex, and Possessing Child Pornography*, 11 FLA. COASTAL L. REV. 341, 346–49 (2010); Shannon Gilreath, *Sexually Speaking: “Don't Ask, Don't Tell” and the First Amendment After Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL'Y 953, 958–60 (2007); James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 L. & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 159, 164–66 (2003); Dale Carpenter, Review Essay, *The Limits of Gaylaw*, 17 CONST. COMMENT. 603, 633–41 (2000).

218. I would also argue that the nude dancing and ethnic clothing cases are wrongly decided, but my argument about gender nonconformity does not depend on this.

219. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568–72 (1991).

220. *Id.* at 563.

221. *Id.* at 571.

222. *Id.* at 582 (Souter, J., concurring).

223. *Id.* at 572 (Scalia, J., concurring).

224. *Id.* at 586.

225. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991).

226. See *id.* at 565.

227. *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314 (2d Cir. 2003).

228. *Id.* at 319 (internal quotation marks omitted).

asserted that pants were safer for van drivers because skirts might get caught in the van's moving parts.<sup>229</sup> It is suspicious that the government never previously complained about *Zalewska* wearing a skirt.<sup>230</sup> An employer, however, could have legitimate reasons to impose new safety requirements.<sup>231</sup> To the extent that the state's interest was based on safety, it meets *O'Brien's* requirement that a regulation not be based on the message expressed.

Regulations of gender nonconformity are distinct from both *Zalewska* and *Barnes*. Unlike *Zalewska*, the government's interests in regulating gender nonconformity focus directly on the social meaning of dress and appearance. In *Zalewska*, the government required all van drivers to wear the same uniform for safety reasons.<sup>232</sup> In *Barnes*, the Court agreed that the government could not regulate nude dancing if it did so to target eroticism.<sup>233</sup> In *Yunits*, the school district admitted that other girls could wear the same clothes prohibited for Pat Doe.<sup>234</sup> The school's concerns only arose because when Pat Doe wore the same clothes as other girls, her conduct communicated gender nonconformity. The court made this point when it chastised the school for "appear[ing] unable to distinguish between instances of conduct connected to plaintiff's expression of her female gender identity, such as the wearing of a wig or padded bra, and separate from it, such as grabbing a male student's buttocks or blowing kisses to a male student."<sup>235</sup> When the government singles out gender nonconformity, it does so because of the social meaning of dress and appearance.

### C. Other First Amendment Concerns

Now I want to return to *City of Cincinnati v. Adams*.<sup>236</sup> When I first discussed this case, I argued that by arresting Adams, the Cincinnati police suppressed communication of gender nonconformity.<sup>237</sup> But the regulation in *Adams* also raises concerns of viewpoint discrimination, vagueness, overbreadth, and compelled speech.

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229. *Id.* at 317.

230. *See id.* (noting that *Zalewska* "[had] never worn pants in her entire life") (internal quotation marks omitted).

231. *Id.*

232. *Id.*

233. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991).

234. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*4 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction), *aff'd sub nom. Doe v. Brockton School Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

235. *Id.* at \*5.

236. 330 N.E.2d 463 (Ohio Mun. Ct. 1974).

237. *See supra* Introduction.

These additional concerns similarly arise in contemporary regulations of gender nonconformity.

A prohibition on government viewpoint discrimination is central to all free speech values.<sup>238</sup> Viewpoint discrimination occurs when the state “regulate[s] speech in ways that favor some viewpoints or ideas at the expense of others.”<sup>239</sup> For example, the Supreme Court held that if a school district would allow use of school facilities by most social organizations to show films about family values, then the district has engaged in viewpoint discrimination by denying a church’s request to use school facilities to show films about family values from a religious perspective.<sup>240</sup> Viewpoint discrimination violates theories of democracy because it allows the government to undermine self-government by the people.<sup>241</sup> Speech should be protected to provide all information relevant to decision-making.

In *Adams*, someone could only be arrested under the cross-dressing ordinance if the police specifically found that they wore dress or a costume associated with the other gender.<sup>242</sup> The law did not regulate costumes generally.<sup>243</sup> Instead, it prohibited wearing costumes that expressed a message of gender nonconformity.<sup>244</sup> This viewpoint discrimination is offensive to free speech values.

Even when the government has a valid interest in restricting speech, any laws must specifically describe what speech is restricted.<sup>245</sup> The ordinance in *Adams* also fails this test, raising the related First Amendment concerns of vagueness and overbreadth. Vague laws do not sufficiently define what speech or conduct is prohibited, and overbroad laws regulate both protected and unprotected speech. Both raise a concern with excessive chilling of speech.<sup>246</sup> In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, the Supreme Court struck down a Los Angeles Airport regulation for overbreadth.<sup>247</sup> An airport might legitimately regulate solicitation that interfered with airport safety,<sup>248</sup>

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238. *See City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

239. *Id.*

240. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993).

241. *See SCHAUER*, *supra* note 62, at 39 (“[I]f the government is the servant, censorship by government is anomalous. It results in the servants pre-selecting the information available to the sovereign . . .”).

242. *City of Cincinnati v. Adams*, 330 N.E.2d 463, 464 (Ohio Mun. Ct. 1974).

243. *See id.*

244. *See id.*

245. *See id.* at 465.

246. *See id.* at 465–66 (holding that an ordinance that fails to give ascertainable standards of conduct is unconstitutionally vague); *see also Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576–77 (1987) (holding that an airport regulation that reaches protected speech in a nonpublic forum is unconstitutionally overbroad).

247. *Jews for Jesus*, 482 U.S. at 577 (1987).

248. *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992).

but Los Angeles's prohibition on all "First Amendment activit[ies]" potentially extended to "talking and reading, or the wearing of campaign buttons or symbolic clothing."<sup>249</sup> Even if the airport only intended to enforce the regulation narrowly, the Court explained that the overbreadth could have a chilling effect on protected speech.<sup>250</sup>

In *City of Chicago v. Morales*, the Court held that Chicago's Gang Congregation Ordinance was vague but not overbroad.<sup>251</sup> The ordinance prohibited "criminal street gang members" from "loitering" with one another in public.<sup>252</sup> The Court held that the ordinance did not violate overbreadth doctrine because "it [did] not prohibit any form of conduct that is apparently intended to convey a message."<sup>253</sup> The ordinance, however, violated vagueness doctrine for two reasons. The ordinance failed to give sufficient notice of what conduct was prohibited and gave arbitrary enforcement power to police.<sup>254</sup>

The ordinance in *Adams* suffers from both vagueness and overbreadth.<sup>255</sup> The ordinance was vague because it was not clear what might constitute a "costume not customarily worn by his or her sex . . ." <sup>256</sup> A man wearing a dress seems to fall clearly inside the ordinance, but the boundaries are unclear. The ordinance does not specify, for example, whether a man could wear a wig or a woman could wear jeans. The ordinance was also overbroad. It may have been constitutional to prohibit wearing costumes for criminal purposes, but the ordinance covered a much broader range of conduct, including Adams's own conduct.<sup>257</sup> It may have even covered wearing a costume at Halloween or for a theatrical performance.

Finally, cases like *Adams* raise compelled speech concerns. Just as the state cannot prevent someone from speaking, "[it] may [not] constitutionally require an individual to participate in the dissemination of an ideological message."<sup>258</sup> In *Wooley v. Maynard*, the Court overturned a law requiring the display of the slogan "Live Free or Die" on license plates.<sup>259</sup> The Court explained that "New Hampshire's

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249. *Jews for Jesus*, 482 U.S. at 571, 575.

250. *Id.* at 576.

251. *City of Chicago v. Morales*, 527 U.S. 41, 51–52 (1999).

252. *Id.* at 45–46.

253. *Id.* at 53.

254. *Id.* at 56.

255. *City of Cincinnati v. Adams*, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974). In contemporary cases, this vagueness concern might arise when there is a lack of consensus on what is considered "provocative" dressing in employment cases with trans persons. See Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1399–1400 (1992).

256. *Adams*, 330 N.E.2d at 464.

257. *Id.* at 466.

258. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

259. *Id.*

statute in effect requires that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message . . . .”<sup>260</sup> The Court contrasted the compelled expression in the slogan with the required use of the state seal on official documents.<sup>261</sup> Because a state seal is intended to verify authenticity, it does not compel expression of an ideological message.<sup>262</sup>

State regulations of conduct do not compel speech simply because someone finds the conduct distasteful.<sup>263</sup> As Professor Koppelman explains:

If . . . one is excused from obeying *any* law if obedience would send a message, and the objector gets to decide whether obedience sends a message, then all laws are invalid in all their applications because this defense will be available in a prosecution for any violation of the law, from double parking to homicide.<sup>264</sup>

In order for regulation of conduct to be compelled speech, the state must intend the regulation to compel expression of a message.<sup>265</sup>

Child custody orders raise clear issues of compelled speech. Courts have required parents to say or do certain things in order to maintain custody of their children.<sup>266</sup> In the gender nonconformity context, this could mean courts requiring parents to perform a “normal” gender identity.<sup>267</sup> In this case, the court compels conduct based on the message that the conduct will express.<sup>268</sup> Similarly, restroom restrictions also raise concerns of compelled speech. In *Etsitty v. Utah Transit Authority*, the government required a transgender female employee to use the men’s restrooms while at work.<sup>269</sup> To many transgender activists and advocates, this kind of enforced restroom segregation is a violent suppression of their identity.<sup>270</sup>

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260. *Id.* at 715.

261. *Id.* at 715 n.11.

262. *Id.*

263. ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, *A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION* 32 (2009).

264. *Id.*

265. *Id.* at 39.

266. *See, e.g., In re Marriage of D.F.D. and D.G.D.*, 862 P.2d 368, 371–77 (Mont. 1993) (reversing trial court decision awarding only supervised visitation to father with requirement that he not cross-dress or present himself as a woman in front of the child).

267. *See id.*

268. *See id.*

269. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1226 (10th Cir. 2007).

270. *See, e.g., LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE* 68 (1998); PEEING IN PEACE, *supra* note 59, at 3; Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN’S RTS. L. REP. 315, 326 (2009).



Enforced restroom segregation, nevertheless, is not compelled speech because the individual using the restroom subjectively claims that they are being forced to express a message.<sup>271</sup> Instead, the state compelled Krystal Etsitty to use the men's restroom specifically in order to communicate a message of gender conformity.<sup>272</sup>

#### *D. Why Not Antidiscrimination Law?*

Some activists may argue that I mischaracterize the core wrong inflicted by transgender discrimination.<sup>273</sup> According to this argument, by focusing on free speech, I might be seen to suggest that transgender discrimination primarily harms people by restricting their ability to express thoughts and ideas.<sup>274</sup> To many transgender people, the core wrong of trans discrimination is much deeper and more personal than an abstract free speech restriction. Not being able to use a restroom of their choice is experienced as a devaluation of their personal worth and integrity, not as an abstract restriction on their ability to express a gender message.<sup>275</sup>

This criticism misunderstands the goal of my argument. I do not attempt to replace status-based protection with free speech.<sup>276</sup> I do not argue that transgender discrimination primarily injures individuals by restricting their ability to freely express ideas. Instead, I argue that anti-trans laws harm individuals *and* violate free speech values on the limits of government action. Moreover, I suggest that arguments from freedom of speech illustrate how present antidiscrimination law reinforces the cultural gender binary.<sup>277</sup> Preventing a transgender girl from expressing her femininity at school may cause

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271. Cf. KOPPELMAN, *supra* note 263, at 32 (explaining why compelled speech requires more than subjective opposition to the meaning of the law).

272. I discuss potential state interests in restroom segregation below. See *infra* Part II.C.

273. Cf. Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 532–34 (2001) (defending against a similar argument that using sex discrimination mischaracterizes the core wrong of anti-lesbian and gay discrimination).

274. Cf. Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 498–505 (2001) (presenting a similar argument that a sex discrimination defense of lesbian and gay rights improperly characterizes lesbian and gay discrimination based on sexism instead of heterosexism).

275. See PEEING IN PEACE, *supra* note 59, at 3.

276. Cf. JACOB HALE, SUGGESTED RULES FOR NON-TRANSSEXUALS WRITING ABOUT TRANSSEXUALS, TRANSSEXUALITY, TRANSSEXUALISM, OR TRANS \_\_\_\_ (2009), available at <http://sandystone.com/hale.rules.html> (admonishing non-trans writers dealing with trans topics not to position their personal political commitments above those of trans people).

277. Cf. Flagg, *supra* note 159, at 958 (arguing that present law “blinds” us to cultural racial stereotypes).

direct psychological harm far graver than any abstract speech restriction, but the restriction on speech rights is also a real harm.<sup>278</sup>

I recognize the critical expansion of legal protection for trans people via antidiscrimination and equality legislation and case law.<sup>279</sup> An increasing number of states and cities include gender identity in their antidiscrimination laws.<sup>280</sup> Federal courts seem to be moving towards protecting trans people against discrimination in employment,<sup>281</sup> public accommodations,<sup>282</sup> and prisons<sup>283</sup> based on Title VII and similar laws.<sup>284</sup> Other federal agencies are also specifically adopting rules to protect trans people.<sup>285</sup> As these protections are increasingly available, many scholars and activists argue for the practical utility of these antidiscrimination laws.<sup>286</sup> These status-based protections of

278. *Cf. Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*4 (Mass. Super. Ct. Oct. 11, 2000) (order for preliminary injunction) (using free speech theory), *aff'd sub nom. Doe v. Brockton School Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

279. See PAISLEY CURRAH ET AL., *THE STATE OF TRANSGENDER RIGHTS IN THE UNITED STATES OF AMERICA* 6–9, 13 (National Sexuality Resource Center 2008) (defining “transgender rights” and discussing what strategies have worked so far); Flynn, *supra* note 33, at 468.

280. See NAT’L GAY & LESBIAN TASK FORCE, *JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE NONDISCRIMINATION LAWS* (2008), available at [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/all\\_jurisdictions\\_w\\_pop\\_8\\_08.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf) (listing thirteen states, the District of Columbia, and 108 city and county laws).

281. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008).

282. See, e.g., *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (using a sex stereotype theory under Equal Credit Opportunity Act to protect transgender access to bank).

283. See, e.g., *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (requiring prison to provide hormones as medical necessity); *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011) (same); *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000) (using Gender Motivated Violence Act to protect transgender prisoner).

284. See Iona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 561–62 (2007) (outlining increasing protections for trans people against employment discrimination).

285. See, e.g., *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012) (clarifying that EEOC will treat discrimination against transgender people as based on sex); Press Release, U.S. Dep’t of State, *New Policy on Gender Change in Passports Announced* (June 9, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm> (announcing new policies to facilitate changing gender marker on passports).

286. See, e.g., Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 54–55 (2000) (arguing for the use of sex discrimination law on both conceptual and strategic grounds); see also Anna Kirkland, *What’s at Stake in Transgender Discrimination as Sex Discrimination?*, 32 SIGNS 83, 106 (2006) (noting that the use of sex discrimination law is currently the most viable argument available to lawyers). Feminist scholars have made similar arguments. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995).

transgender people emphasize how gender identity is a core part of personal identity.<sup>287</sup>

Despite growing protections under antidiscrimination laws, scholars also identify many limits to this strategy.<sup>288</sup> In particular, dress and appearance are treated as matters of personal preference, unprotected by most antidiscrimination law. As Kenji Yoshino argues, people can be legally required to *cover* their differences.<sup>289</sup> Both public and private employers can generally enforce dress codes and appearance standards.<sup>290</sup> An extensive legal scholarship criticizes courts' willingness to defer to employers' proffered justifications for dress codes, illustrating how present antidiscrimination law reinforces the gender binary.<sup>291</sup> By focusing only on intentional discrimination, present antidiscrimination doctrine fails to recognize how regulations of dress and appearance are situated in broader structural inequalities.<sup>292</sup>

Because dress, appearance, and other conduct are used to express identity, expressive identity claims cannot be easily separated from broader issues of gender equality.<sup>293</sup> My argument from freedom of speech can help expand antidiscrimination doctrine by highlighting

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287. See Currah & Minter, *supra* note 286, at 50.

288. See *id.* at 48–57 (identifying four key potential limits to antidiscrimination laws); see also Kirkland, *supra* note 286, at 92 (arguing that Title VII protections are narrower than they seem); Vade, *supra* note 27, at 262 (arguing that antidiscrimination law treats sex as more real than gender); Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 724–30 (2005) (describing limits of medical model in protecting transgender people).

289. See YOSHINO, *supra* note 29, at 177–78.

290. See Klare, *supra* note 255, at 1412–30 (discussing constitutional and statutory limits on employer ability to regulate dress and appearance).

291. See, e.g., Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 303 (2007) (arguing that cognitive biases influence judicial decision making on gendered dress codes by obscuring the relationship between dress codes and gender inequality); Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2544–45 (1994) (criticizing overuse of community standards in justifying dress codes); Klare, *supra* note 255, at 1398 (arguing that dress codes police gender and empower employers to “enforce conformity to white, heterosexual, Christian images of beauty and proper grooming.”); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 383–85 (1991) (discussing social, political, and cultural meanings of hairstyles).

292. Cf. SPADE, *supra* note 29, at 84–85 (arguing that the perpetrator-victim dyad dominant in antidiscrimination law prevents understanding how broader social structures disadvantage transgender people).

293. Nan Hunter suggests the concept of “expressive identity claim[s]” as “an equality challenge in which the identity cannot easily be separated from a message.” Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1592 (2001); see also Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671, 1672 (2000) (arguing equality and expression cannot be easily separated).

the cultural gender norms behind dress and appearance discrimination, linking it with broader concerns about gender equality.<sup>294</sup> Even when they do not create “unequal burdens” under present doctrine, gendered dress codes create inequalities in people’s abilities to express their gender identity.<sup>295</sup> These inequalities particularly fall on transgender people, but my analysis is also more broadly applicable to the treatment of sex discrimination under Title VII.<sup>296</sup>

## II. TESTING THE THEORY WITH ACTUAL CASES

I now turn to apply this theory to actual cases involving government employment, child custody, and restroom access. The central goal of this Part is to demonstrate that my argument is not only theoretically sound, but also reflects actual government practices of singling out conduct in order to suppress messages of gender nonconformity.

I use actual cases to situate my argument in broader issues: dress codes and government employment, parental speech and child custody decisions, and sex-segregated restrooms. I examine both the potential and limits of freedom of speech in addressing these broader concerns. Finally, I consider arguments against protecting freedom of speech in each area. I have chosen these case areas both because they represent common challenges facing transgender people and because they illustrate the potential and limits of freedom of speech. Strategic decisions for protecting transgender rights depend on assessing the strength of various legal theories in these areas.

### A. Gender Nonconformity in Government Employment

In August 2004, Diane Schroer applied for a position as a specialist in terrorism and international crime at the Library of Congress.<sup>297</sup> Schroer used her legal name at the time, “David J. Schroer,” on the application.<sup>298</sup> Although Schroer had been diagnosed with gender

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294. Cf. Flagg, *supra* note 159, at 957 (discussing the “transparency phenomenon” in relation to race). Because my argument does not depend on subjective intent of transgender people to express gender nonconformity, it is also not inconsistent with antidiscrimination strategies that present transgender identity as non-volitional. See *supra* notes 180–99 and accompanying text (arguing subjective intent should not be relevant).

295. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1106, 1108 (9th Cir. 2006) (en banc) (holding dress code does not create “unequal burdens”). Some scholars also argue that First Amendment protections should directly reach into private workplaces by getting rid of the state action requirement of the Fourteenth Amendment. See Ramachandran, *supra* note 37, at 50 n.177.

296. Taylor Flynn similarly argues that free speech jurisprudence could expand anti-discrimination law. See Flynn, *supra* note 33, at 484.

297. *Schroer v. Billington*, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

298. *Id.*

identity disorder, she was still developing a plan for a medically supervised transition from male to female.<sup>299</sup> During the application process, Schroer maintained a traditionally male appearance.<sup>300</sup> Schroer held masters degrees in history and international relations.<sup>301</sup> She had twenty-five years' experience in the military, where she had reached the rank of Colonel, leading a military operation to track international terrorist organizations.<sup>302</sup> Schroer was interviewed in October 2004 and received the highest score of the eighteen interviewees.<sup>303</sup> The library offered the job to Schroer in December, because Schroer was "significantly better than the other candidates."<sup>304</sup>

While the library was completing the final paperwork for the hire, Schroer went to lunch with Charlotte Preece, the Assistant Director for Foreign Affairs, who was overseeing the hiring process.<sup>305</sup> During lunch, Schroer revealed that she was transsexual and planned to begin the new position as "Diane."<sup>306</sup> Preece reacted by asking, "Why in the world would you want to do that?"<sup>307</sup> She continued to ask Schroer various questions about the transition process, how it would impact her job performance, and how it would impact her security clearance.<sup>308</sup> During their conversation, Schroer showed Preece three photos of herself dressed in female attire.<sup>309</sup> Preece later admitted that she thought Schroer looked like "a man dressed in women's clothing."<sup>310</sup>

The next day, Preece called Schroer to rescind the job offer.<sup>311</sup> While Preece claimed to be concerned with Schroer's ability to maintain her security clearance after transitioning, Preece did not actually investigate how Schroer's security clearance would be impacted.<sup>312</sup>

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299. *Id.*

300. *Id.* at 295–96.

301. *Id.* at 295.

302. *Id.*

303. *Schroer v. Billington*, 577 F. Supp. 2d 293, 295–96 (D.D.C. 2008).

304. *Id.* at 296 (internal quotation marks omitted).

305. *Id.* at 295–96.

306. *Id.* at 296.

307. *Id.* (internal quotation marks omitted).

308. *Id.* at 297.

309. *Schroer v. Billington*, 577 F. Supp. 2d 293, 297 (D.D.C. 2008).

310. *Id.* (internal quotation marks omitted).

311. *Id.* at 299.

312. After lunch, Preece asked Cynthia Wilkins, the personnel security officer of the library, how transitioning would impact a security clearance. Preece did not provide Schroer's full name and social security number, so Wilkins could not have reviewed Schroer's history and present clearance status. The next day Wilkins told Preece that she was not sure how transitioning would impact Schroer's clearance status. While Wilkins suggested some concerns with Schroer's clearance, she never actually reviewed Schroer's file and could not actually determine how Schroer's personal clearance would or would not be impacted. *Id.* at 297–98.

Moreover, Preece admitted that she likely would have rescinded the offer to Schroer even if Schroer could maintain her security clearance.<sup>313</sup> Instead, Preece acted on her discomfort with the idea of Schroer transitioning from male to female.<sup>314</sup> Preece had been puzzled as to why a former Special Forces Colonel would decide to transition.<sup>315</sup> In particular, two of Preece's reasons for rejecting Schroer's job offer reveal how Preece's decision was based on the message expressed by Schroer's transition.<sup>316</sup> First, Preece was concerned that Schroer might lose some of her military contacts because her contacts "would no longer want to associate with her because she is transgender."<sup>317</sup> Second, Preece was concerned that Schroer would not seem credible when testifying before Congress because everyone would know that Schroer had been male.<sup>318</sup> Preece failed to follow up with Schroer's references to address any legitimate concerns about Schroer's future job performance.<sup>319</sup> Instead, Preece's reasoning focused on the message of gender nonconformity communicated by Schroer's conduct.<sup>320</sup>

Gender nonconformity is related to the broader issue of dress and appearance regulation in government employment, particularly as interpreted under Title VII.<sup>321</sup> I begin this section by examining challenges to government dress codes and appearance standards. I use these cases to explore the general free speech values implicated in government employer regulation of dress and appearance. I then review cases involving transgender employees to argue that when the government treats gender nonconformity differently from other gender expression, it suppresses communication of gender nonconformity. The government cannot act merely on the basis of transgender status of an employee without penalizing communication.<sup>322</sup>

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313. *Id.* at 299.

314. *See id.*

315. *See* *Schroer v. Billington*, 577 F. Supp. 2d 293, 296 (D.D.C. 2008).

316. In addition to the two reasons listed here, Preece also mentioned three other reasons to rescind the job offer: (1) Schroer seemed less trustworthy because she had not mentioned her transition initially; (2) Schroer's transition might impact her job performance; and (3) Schroer might not retain her security clearance. Preece did not discuss any of these concerns with Schroer, did not ask Schroer to speak with Schroer's friends who had transitioned and maintained security clearances, and did not speak with any of Schroer's references who were aware of Schroer's plans to transition. *Id.* at 297–98.

317. *Id.* at 297.

318. *Id.* at 298.

319. *Id.* at 297.

320. *See id.* at 305, 308.

321. In *Schroer*, the court held that the Library of Congress violated Title VII under two legal theories: discrimination based on sex stereotypes and discrimination because of sex. *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008).

322. *See supra* note 217 (arguing that regulation of transgender "status" necessarily suppresses communication).

Following my interpretation of *O'Brien*,<sup>323</sup> even if workplace efficiency and professional appearance are legitimate government ends, singling out gender nonconformity should be an impermissible means because it penalizes communication.

### 1. Broader Issue: Dress Codes and Government Employment

When the government acts as employer, courts must balance the government's interest as employer against employees' speech rights as citizens.<sup>324</sup> Thus, some speech that would be protected in other settings is not protected in a public employment setting. In particular, courts are hesitant to interfere with dress codes because "[i]n employee-employer relationships the constitutional area is, and should be, small. . . . The federal courts are not in the business of reviewing day-to-day administrative judgments."<sup>325</sup>

Under the governing balancing test announced in *Pickering v. Board of Education*, the Court protects free speech by balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees."<sup>326</sup> In particular, the Court stresses "having free and unhindered debate on matters of public importance" as "the core value of the Free Speech Clause."<sup>327</sup> *Connick v. Myers* narrowed this test by protecting employee speech only when it is "as a citizen upon matters of public concern . . . [not] as an employee upon matters only of personal interest . . . ."<sup>328</sup> *Garcetti v. Ceballos* further narrowed the balancing test by denying First Amendment protection to speech made in the course of an employee's official duties.<sup>329</sup>

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323. See *supra* notes 203–16.

324. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Various scholars have criticized this dominant balancing approach. See *infra* note 330.

325. *Tardif v. Quinn*, 545 F.2d 761, 763–64 (1st Cir. 1976) (assuming that female teacher's skirts were an appropriate length, public school can still dismiss the teacher based on concerns with school administration).

326. *Pickering*, 391 U.S. at 568 (protecting right of public school teacher to publish newspaper editorial criticizing school board). The Court refined this with a burden-shifting framework in *Doyle*, allowing the government to show that it would have reached the same employment decision even in the absence of the protected speech. *Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

327. *Pickering*, 391 U.S. at 573.

328. *Connick v. Myers*, 461 U.S. 138, 139, 147 (1983) (questionnaire about internal office policies and morale, circulated to other employees, was not a matter of public concern). The Court stressed "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143.

329. 547 U.S. 410, 410–11 (2006) (district attorney's memo recommending dismissal of a case was not protected speech because it was written as part of official duties).

Various scholars have criticized the balancing approach for excessively limiting employee speech, arguing that it is inconsistent with the First Amendment to allow courts and government employers to determine what matters are of concern to the public.<sup>330</sup> Reforming present doctrine based on these criticisms would strengthen my argument by preventing government employers or courts from deciding that gender norms are not a matter of public concern. Even under present doctrine, however, gender norms should be considered a matter of public concern. The state's interest in workplace efficiency is unrelated to employee communication of gender nonconformity.<sup>331</sup>

*Jespersen v. Harrah's* vividly illustrates how courts interpret Title VII to permit employer dress codes that target gender expression.<sup>332</sup> Darlene Jespersen had been a highly rated bartender at Harrah's Casino for nearly twenty years when the casino instituted a new dress code.<sup>333</sup> This new dress code required women to wear stockings, colored nail polish, and to wear their hair "teased, curled, or styled."<sup>334</sup> The dress code was shortly amended to require women to wear makeup.<sup>335</sup> Jespersen was fired after she refused to wear makeup, explaining that it made her feel "very degraded and very demeaned" and harmed her dignity.<sup>336</sup> The court found that Jespersen failed to present evidence that Harrah's dress code imposed an unequal burden on women and thereby violated Title VII.<sup>337</sup> Harrah's

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330. See, e.g., George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 129 (2008); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 996 (1997); Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 122 (1996); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 2 (2009).

331. Cf. Michèle Alexandre, *When Freedom Is Not Free: Investigating the First Amendment's Potential for Providing Protection Against Sexual Profiling in the Public Workplace*, 15 WM. & MARY J. WOMEN & L. 377, 377–78 (2009) (making a similar argument for protecting female employees' dress and appearance under freedom of speech).

332. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2004) (en banc). While *Jespersen* involved a private employer, it highlights how courts treat dress and appearance under Title VII. See Symposium, *Makeup, Identity Performance & Discrimination*, 14 DUKE J. GENDER L. & POL'Y 1 (2006) (including discussion and criticism of *Jespersen* by several prominent legal scholars). For a case where the government uses a dress code that feminizes women, see Bethanne Walz McNamara, Comment, *All Dressed Up With No Place to Go: Gender Bias in Oklahoma Federal Court Dress Codes*, 30 TULSA L.J. 395, 396–97 (1994) (finding that dress codes in federal district courts of Oklahoma feminized women by requiring them to wear dresses).

333. *Jespersen*, 444 F.3d at 1107.

334. *Id.*

335. *Id.*

336. *Id.* at 1108.

337. *Id.* at 1104–05.



dress code penalized Jespersen for refusing to express a particular, highly feminized, gender message.

Courts have treated government dress codes largely the same as private employers, marginalizing free speech concerns.<sup>338</sup> They assume that dress and appearance do not express any core element of identity.<sup>339</sup> Dress and appearance are treated as trivial, personal matters. Accordingly, my free speech argument is embedded in broader issues of employee autonomy and dignity as expressed through dress and appearance.

*Zalewska v. County of Sullivan* from the Second Circuit is typical of federal courts' deferral to the government in matters of employee dress and appearance.<sup>340</sup> Grazyna Zalewska worked as a van driver for the county.<sup>341</sup> After the county imposed a new dress code requiring van drivers to wear a uniform that included pants, Zalewska requested permission to wear a skirt because she "never wor[e] pants in her entire life" and "the wearing of a skirt constitutes . . . an expression of a deeply held cultural value."<sup>342</sup> The county refused this request, explaining that "pants are safer than skirts for the operators of vans."<sup>343</sup> When Zalewska continued to wear a skirt, she was suspended from her position as a van driver and eventually transferred to a different post.<sup>344</sup>

Zalewska challenged this suspension and transfer on free speech grounds. The court's analysis focused on whether Zalewska's "actions constitute[d] expressive conduct,"<sup>345</sup> recognizing that "clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, creativity or its lack . . . flamboyancy, gender identity, and social status."<sup>346</sup> In this case, however, the court held that "the

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338. See Mark R. Bandsuch, S.J., *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 321–24 (2009) (arguing that in dress code cases, Title VII protections are treated similar to other constitutional protections); Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353, 356 (2008) (documenting how courts uphold gender dress codes under Title VII); Ramachandran, *supra* note 37, at 16–17 (arguing that Courts do not adequately protect dress and appearance as a form of expression under freedom of speech and equal protection).

339. See Fisk, *supra* note 38, at 1112–13 (arguing that dress and appearance are core elements of personal autonomy and should be protected against arbitrary employer interference based on concerns with privacy).

340. *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (holding that an employee's choice to wear a skirt is not protected speech because the message is too diffuse).

341. *Id.* at 317.

342. *Id.* at 317–18 (internal quotation marks omitted).

343. *Id.* at 317 (internal quotation marks omitted).

344. *Id.* at 318.

345. *Id.* at 319 (internal quotation marks omitted).

346. *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003).

message that Zalewska intend[ed] to convey is not a specific, particularized message.”<sup>347</sup> The court’s analysis ignores the social construction of the gender binary underlying Zalewska’s conduct. Zalewska sought to reaffirm a traditional gender message rather than expressing nonconformity, but her conduct should still be understood as communicative when her individual behavior is situated against a structure of social norms defining gender.

Because the court decided that Zalewska’s conduct was not communicative, it upheld the dress code under rational basis review based on the government’s interest in safety.<sup>348</sup> While the government claims its safety concerns were independent of any message expressed, Zalewska never had problems wearing a skirt before the new dress code was imposed.<sup>349</sup> Moreover, she ordered a skirt from the private vendor supplying the uniforms and wore it without incident for three weeks after the new dress code was imposed.<sup>350</sup> The government might legitimately decide to institute new safety requirements in the workplace, but consistent with my interpretation of *O’Brien*, the court should consider whether the requirements single out specific conduct *because* it communicates a particular message.<sup>351</sup> Even if Zalewska’s dress was recognized as communicative, the court might still have upheld the dress code by balancing the government’s interest in safety against Zalewska’s expression. However, the court did not even reach this question because it treated Zalewska’s dress as non-communicative.

## 2. Government Penalizes Gender Nonconforming Employees

Even without reference to specific dress codes, government employers often penalize gender nonconformity by transgender employees.<sup>352</sup> As demonstrated in my discussion of *Schroer*,<sup>353</sup> alleged government interests in these cases ultimately center on gender nonconformity as communicative. *Schroer* is part of a broader pattern of penalizing gender nonconformity in order to suppress communication.

Jimmie Smith worked as a Lieutenant in the Salem Fire Department for seven years before being diagnosed with gender identity

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347. *Id.*

348. *Id.* at 322.

349. *Id.* at 317.

350. *Id.* at 318.

351. *See supra* notes 203–56 (arguing that the government should not be allowed to use means that suppress the communicative nature of conduct).

352. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008); *Smith v. City of Salem*, 378 F.3d 566, 573–74 (6th Cir. 2004).

353. *Schroer*, 577 F. Supp. 2d at 293.

disorder.<sup>354</sup> In preparation for transitioning from male to female, Jimmie Smith began “expressing a more feminine appearance on a full-time basis.”<sup>355</sup> Smith informed Thomas Eastek, his immediate supervisor, of his transition plans after Smith’s coworkers began commenting that Smith’s mannerisms and appearance were not “masculine enough.”<sup>356</sup> Instead of supporting Jimmie, Eastek informed city officials of Smith’s planned transition.<sup>357</sup> Intending to terminate Smith on the basis of his transgender status, city officials required Smith to undergo psychological evaluations by three physicians of the city’s choosing.<sup>358</sup> The city hoped that Smith would either resign or refuse to comply.<sup>359</sup> Smith threatened legal action in response to the city’s plan and alleged that a subsequent twenty-four-hour suspension was in retaliation for obtaining an EEOC “right to sue” letter.<sup>360</sup>

This case illustrates how any gender nonconformity can be penalized, even before an employee presents himself or herself as transgender. The other firefighters’ initial concerns were a reaction to Smith’s gender ambiguity.<sup>361</sup> Smith’s conduct communicated gender nonconformity, even if it did not neatly fit an identity rubric.<sup>362</sup> While Smith planned to transition genders, this reaction to gender ambiguity would raise similar concerns if Smith only intended to express nonconformity with masculine norms.<sup>363</sup> The fire department ultimately acted because Smith’s conduct violated the gender binary, requiring men to present themselves in a traditionally masculine fashion. While the fire department did not cite any dress code or appearance standards, they understood Smith’s appearance as communicating a message of gender nonconformity.<sup>364</sup> Using psychological tests underscores how the department considered this to be a deviant message.<sup>365</sup>

In a similar case, Phillip Barnes (now Philecia) began his career with the Cincinnati Police Department in 1981.<sup>366</sup> In 1998, Barnes

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354. *Smith*, 378 F.3d at 568. The Sixth Circuit held that Smith presented a prima facie case of sex discrimination under Title VII and remanded to the district court for further action. *Id.* at 578.

355. *Id.* at 568 (internal quotation marks omitted).

356. *Id.* (internal quotations omitted).

357. *Id.*

358. *Id.* at 569.

359. *Id.*

360. *Smith v. City of Salem*, 378 F.3d 566, 569 (6th Cir. 2004).

361. *See id.* at 568.

362. *See id.*

363. *See id.*

364. *Id.* at 566.

365. *See id.* at 569.

366. *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005).

passed a promotion exam to become a Sergeant.<sup>367</sup> As part of the promotion, he began a probation period.<sup>368</sup> Although the probation period was designed to allow supervision of new sergeants and decide if the promotion should stand, no other person had failed the probation period since 1993.<sup>369</sup> At the time of the promotion, Barnes had not yet transitioned in the workplace but lived as a woman outside of work.<sup>370</sup> Many people in the police department knew of Barnes's gender identity outside of work.<sup>371</sup> During the probation period, Barnes was marked down for lack of "command presence."<sup>372</sup> A month into the probation period, Barnes was placed in a "Sergeant Field Training Program," where he was under video surveillance and evaluated daily by different lieutenants.<sup>373</sup> Barnes was the only sergeant placed in this program, despite at least one other sergeant on probation who had lower evaluations than Barnes.<sup>374</sup> Some testimony suggested that Barnes was placed in this program specifically to ensure he failed probation.<sup>375</sup> Barnes was demoted at the end of his probation period, based on his poor performance.<sup>376</sup>

Command presence is a legitimate concern for a police department.<sup>377</sup> A police sergeant must command the respect of officers.<sup>378</sup> However, here the police department's assessment of Barnes's command presence at least partially relied on how Barnes's conduct violated social gender norms.<sup>379</sup> Barnes had similar evaluation marks to other sergeants.<sup>380</sup> What distinguished Barnes from other sergeants was his gender nonconformity.<sup>381</sup> Barnes's femininity came to be seen as a mark of deviance and weakness, and as a lack of command presence. Strength became a masculine trait. When the police department singled out Barnes, it did so because of the social meaning of his gender performance.

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367. *Id.*

368. *Id.*

369. *Id.* at 735.

370. *Id.* at 733.

371. *Id.* at 734 ("Barnes was living off-duty as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions.").

372. *Barnes v. City of Cincinnati*, 401 F.3d 729, 734 (6th Cir. 2004) (internal quotation marks omitted).

373. *Id.*

374. *Id.* at 737.

375. *Id.* at 734.

376. *Id.* at 735.

377. *Id.* at 734.

378. *Barnes v. City of Cincinnati*, 401 F.3d 729, 734 (6th Cir. 2004).

379. *See id.* at 738.

380. *Id.* at 735.

381. *See id.* at 733.

Transgender employees are also fired based on their refusal to use the restroom associated with their anatomical sex.<sup>382</sup> I discuss these cases in detail later in this paper, arguing that restroom choice expresses a message of gender identity. Here I only note that government regulations of gender nonconformity do not only arise in the context of appearance and dress.

### *3. Arguments Against Protecting Gender Nonconformity in Government Employment*

There are at least three objections that might be raised to protecting gender nonconformity in the workplace. First, the government's interest in professional appearance is allegedly not related to any messages that clothing and appearance might communicate. The implicit argument is that dress codes do not suppress communication because fashion is trivial and does not communicate anything.<sup>383</sup> In *Zalewska*, the court held that plaintiff's desire to wear a dress did not rise to the level of speech because it did not communicate any specific message.<sup>384</sup>

Even if professional appearance is a legitimate governmental interest, present law incorporates conventional gender norms into the definition of professional.<sup>385</sup> By singling out gender nonconformity as "unprofessional," dress codes suppress conduct because it expresses a message. Diane Schroer did not argue that the Library of Congress should not be allowed to implement a professional dress code.<sup>386</sup> She did not seek any exemptions from general professional appearance.<sup>387</sup> The photos that Schroer showed to Preece were of herself dressed in women's professional clothing.<sup>388</sup> Schroer argued that she should be allowed to dress as a woman while at work.<sup>389</sup> The Library of Congress did not penalize Schroer for a trivial fashion

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382. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007) (concerning a male to female transgender employee who was fired when she refused to use men's restrooms); *Glenn v. Brumby*, 724 F.2d 1284, 1304 (N.D. Ga. 2010) (same); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ. 02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. 2004) (same).

383. For a general discussion of appearance as trivial at work, see *supra* notes 332, 338.

384. *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 323 (2d Cir. 2003).

385. Cf. *Bartlett*, *supra* note 291, at 2543–45 (arguing courts generally use community norms incorrectly to legitimate employer dress codes); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 29–30 (2000) (illustrating how conventional gender norms are incorporated into Title VII analysis).

386. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

387. *Id.*

388. *Id.* at 297.

389. *Id.* at 305.

message (“I like to wear dresses”), but for a message of gender non-conformity (“I am a woman”). Following my interpretation of *O’Brien*, government employers should not be able to enforce dress codes in a way that specifically suppresses gender nonconformity.

Second, some parties argue that gender nonconformity interferes with workplace efficiency. Charlotte Preece claimed that Diane Schroer would be distracted by her gender transition and would not appear credible to Congress.<sup>390</sup> As an employer, the government has a legitimate interest in workplace efficiency.<sup>391</sup> Gender nonconformity, however, only raises “efficiency” concerns because the conduct communicates a message. If the government could always assert workplace efficiency as independent of the communicative nature of conduct, it could defeat any employee free speech claims. Instead, courts balance the employee’s interest in speech against the government’s interest in workplace efficiency.<sup>392</sup> Even if Zalewska’s dress had been recognized as communicative, the government could have still argued that it interfered with her duties as a van driver.<sup>393</sup> Courts should first recognize gender nonconformity as communicative, and only then engage in appropriate case-by-case balancing of interests.

Finally, the government might argue that it should be allowed to restrict gender nonconformity based on concern with client/customer interaction. In *Etsitty*, the Utah Transit Authority required a male-to-female transgender bus driver to use the men’s restrooms while on her bus route, based on concerns with passenger interactions.<sup>394</sup> According to this argument, third parties are uncomfortable with transgender employees.<sup>395</sup> Government as employer shares a concern with private employers that dress codes influence productivity and public image.<sup>396</sup> Courts generally defer to employer dress codes based on this concern with employer ability to control their public image.<sup>397</sup> However, under the *Pickering* balancing test, general concerns about public image and dress codes should not defeat free

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390. *Id.* at 297–98.

391. *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968).

392. *See supra* notes 326–32 (discussing balancing test and criticisms).

393. *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 317 (2d Cir. 2003).

394. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007).

395. For example, the police department of the Village of Peotone claimed that the public would not respect the whole police department if male police officers were allowed to wear earrings. *Rathert v. Vill. of Peotone*, 903 F.2d 510, 513 (7th Cir. 1990).

396. *See* Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369, 379, n.33 (2007) (discussing studies that show dress codes are related to productivity, professionalism, and company image).

397. *Id.* at 372.

speech claims for gender nonconformity.<sup>398</sup> As long as they do not interfere with the workplace, government employees retain their fundamental free speech interests in autonomy and self-definition.<sup>399</sup>

### *B. Gender Nonconformity and Child Custody*

When Carol Pulliam and Frederick Smith divorced in 1991, Smith had primary physical custody of their children.<sup>400</sup> After Smith's boyfriend moved in with him in 1994, Pulliam challenged the custody order.<sup>401</sup> In granting full custody to the mother, the court noted various concerns, including that the two men kissed in front of the children, the two men had oral sex (in a closed bedroom) while the children were home (in their bedroom), and the father's partner kept photos of drag queens at their house.<sup>402</sup> Regardless of other issues, the focus on the photos of drag queens is a problematic suppression of speech. The opinion never suggests that the children actually saw the photos of the drag queens.<sup>403</sup> Moreover, the court describes the photos as "improper sexual material."<sup>404</sup> The opinion does not suggest that the drag queens were unclothed or engaged in sex.<sup>405</sup> Instead, the concern with improper sexual material equates gender nonconformity with a message of deviance.

As illustrated in *Pulliam*, courts typically decide whether it is in a child's best interests to be exposed to a particular message with no consideration for parental speech rights.<sup>406</sup> Custody decisions penalizing gender nonconformity are one instance of this judicial willingness to decide child custody cases based on the message expressed by parental conduct. While the courts should be able to protect the best interests of the child, they should not be able to do so in a way that penalizes parents for expression of a specific message. Following my interpretation of *O'Brien*,<sup>407</sup> singling out gender nonconformity should be an impermissible means of determining the best interests of the child because it penalizes communication.

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398. *Pickering*, 391 U.S. at 568.

399. *See id.* at 572–73.

400. *Pulliam v. Smith*, 501 S.E.2d. 898, 900 (N.C. 1998).

401. *Id.* at 900–03.

402. *Id.* at 903. The discussion of same-sex intimacy is problematic because it does not appear to be any more than would be expected of straight parents. My concern is gender nonconformity, so I do not deal with this issue.

403. *Id.*

404. *Id.* at 904.

405. *Id.*

406. *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 643 (2006).

407. *See supra* notes 203–12 and accompanying text.

1. *Broader Issue: Best Interest Standard and Parental Speech*

Courts have imposed some narrow limits on judicial discretion in determining the best interest of the child. In *Palmore v. Sidoti*, the Supreme Court overturned a trial court decision to award custody to the father based on the mother's interracial marriage.<sup>408</sup> Although it noted "that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses," the Court held that under the Fourteenth Amendment, "the law cannot, directly or indirectly, give [private biases] effect."<sup>409</sup> Similarly, some state courts do not allow judges to restrict parental religious speech merely based on the best interests of the child.<sup>410</sup> Instead, in these states, judges can only restrict religious teachings if there is evidence that they are likely to cause substantial emotional harm to the child.<sup>411</sup>

Despite these narrow limits, the best interest standard grants substantial discretion to judges deciding child custody cases.<sup>412</sup> The judicial discretion under this standard has been upheld as necessary in a difficult area of family law,<sup>413</sup> and criticized as inviting judicial

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408. 466 U.S. 429, 431 (1984).

409. *Id.* at 433.

410. Volokh, *supra* note 406, at 635 n.8.

411. *Id.* at 648. For further discussion of religion and child custody decisions, see Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 *FORDHAM L. REV.* 383 (1989); Carl E. Schneider, Essay, *Religion and Child Custody*, 25 *U. MICH. J.L. REFORM* 879 (1992).

412. See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 *J.L. & FAM. STUD.* 337, 339 (2008) ("[U]nbridled judicial discretion became the pattern for best interests decision-making post-1960 when states passed broad welfare of the child statutes, providing judges simply with lists of factors, and otherwise vague allusions to judicial discretion for what is best for any given child under any given circumstances."). Forty-five states use some version of the best interest standard. *Id.* at 338 n.5 (noting that 38 states provide specific factors while seven leave best interest entirely to judicial discretion). The best interest standard is also used in other custody issues, including grandparent custody, third party custody, and changes in custody arrangements.

413. Scholars recognize family law as one of the most indeterminate areas of the law. This indeterminacy may allow courts to adapt the law to changing family structures and social demands, but also provides the possibility of judicial bias and improper decisions. Kimberly Richman suggests this indeterminacy should be considered a "double-edged sword," providing lesbian and gay parents room to argue for their inclusion under existing law, but allowing in judicial bias as well. See KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* 1–12 (2009). Similarly, Steven Peskind recognizes the criticisms of the best interest standard and argues for improving it, but ultimately concludes that the best interest standard is the best way to balance the competing interests involved in custody; see Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determining Child Custody*, 25 *N. ILL. U. L. REV.* 449 (2005). Various state supreme courts have held that the best interest of the child standard is not



bias and inappropriate use of irrelevant factors.<sup>414</sup> Because these decisions are only reviewed for abuse of discretion, trial courts' decisions typically stand.<sup>415</sup> Although statutes and case law do contain factors that judges should consider, in practice the best interest standard leaves considerable room for courts to consider parental ideology and speech in making custody decisions.<sup>416</sup> This is particularly true in states that include "moral fitness" as a factor in the best interest calculus.<sup>417</sup>

Even when courts explicitly consider parental speech in making custody decisions, it is rarely the only factor considered.<sup>418</sup> In any given case, courts might arrive at the same custody decision without parental speech. For example, while *Pulliam v. Smith* discussed the photos of drag queens, the opinion also noted that "on at least two (2) occasions [the father] struck the [child] on or about the head . . . ."<sup>419</sup> These non-speech factors may appear to provide non-speech-based reasoning.

Nonetheless, when parental speech is considered, it may be the deciding factor in a case. Despite evidence of the father striking the child on at least two occasions, the father might have retained custody of the children if the *Pulliam* court did not consider the message expressed by his homosexuality and photos of drag queens. Outside

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unconstitutionally vague. *See, e.g.,* Seymour v. Seymour, 433 A.2d 1005 (Conn. 1980) (finding that a statute giving the district court wide discretion to determine best interests of the child is not unconstitutionally vague); Herndon v. Tuhey, 857 S.W.2d 203 (Mo. 1993) (finding that a statute allowing trial court to grant visitation rights to grandparents based on best interests of the child is not unconstitutional); Harrold v. Collier, 836 N.E.2d 1165 (Ohio 2005) (finding that non-parental visitation statutes based on best interests of the child are constitutional). *See also* Doe v. Doe, 172 P.3d 1067 (Haw. 2007) (recognizing validity of best interest of child standard as related to determining constitutionality of grandparent visit statute).

414. *See, e.g.,* RICHMAN, *supra* note 413, at 8 (arguing that anti-gay bias has historically been used to discriminate against lesbian, gay, and transgender parents under the best interest standard); Stephen Parker, *The Best Interests of the Child: Principles and Problems*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS 26 (Philip Alston ed., 1994) (criticizing general vagueness of the best interest doctrine); Volokh, *supra* note 406, at 637–40 (arguing that best interest standard allows inappropriate consideration of parental ideology).

415. *See, e.g.,* Fletcher v. Fletcher, 526 N.W.2d 889, 893 (Mich. 1994) ("[A] custody award should be affirmed unless it represents an abuse of discretion. While the abuse of discretion standard is strict, it does not afford trial courts unfettered discretion in awarding custody. The court's exercise of that discretion is already limited by the statutory best interest factors . . . .").

416. *See* Volokh, *supra* note 406, at 646–49 (emphasizing how the best interest standard leaves room for courts to consider parental ideology).

417. *Id.* at 637 n.26.

418. *E.g., Ex parte D.W.W.*, 717 So.2d 793, 794–97 (Ala. 1998) (upholding limitations on maternal visitation that required the mother's lesbian partner not be present, also noting the mother's violent behavior and the mother's weak relationship with the child).

419. *Pulliam v. Smith*, 501 S.E.2d. 898, 901 (N.C. 1998).

the child custody context, free speech doctrine generally prevents courts from using constitutionally protected speech as any element in a decision because of the difficulty in determining what role speech played in a multifaceted decision.<sup>420</sup> When courts can consider speech as any element in a decision, it has a chilling effect on that speech. For example, if a parent knows that family courts will consider religion in deciding custody, the parent may avoid teaching his or her child about a non-traditional religion in which the parent believes. Thus, parents' speech is restricted even without the court ever formally considering religion in a custody decision.<sup>421</sup>

Custody decisions might act as restrictions on parental speech in several ways. Courts might order parents not to say certain things in order to retain full or partial custody. For example, courts have ordered parents not to use racist language, not to expose children to sexual content, not to discuss Communism or other political issues, and not to expose children to pro-LGBT literature.<sup>422</sup> Courts might order parents not to expose their children to certain speech by others.<sup>423</sup> For example, courts have ordered parents not to bring children to certain religious services,<sup>424</sup> and courts have ordered parents not to allow their partner to sleep in their bed when the child is home.<sup>425</sup> Courts might order parents to say certain things to their children, or courts might restrict custody based on parental failure to teach certain ideas to their children.<sup>426</sup> Finally, courts might restrict custody based on what a parent is likely to say to a child.<sup>427</sup>

Arguably, parental ideology is properly considered in determining the best interests of the child. In *McCorvey*,<sup>428</sup> the child may well have

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420. See, e.g., *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915–16 (1982) (overturning state court that improperly imposed liability based on combination of non-violent boycott—protected by the First Amendment—and violence); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977) (holding that school board decision to fire teacher based on protected speech is unconstitutional unless the school board could show that it would have reached same decision in the absence of the protected speech).

421. This draws on *Palmore* to develop the principle that societal disapproval of parental speech is an illegitimate means for custody decisions. This principle should apply at any level of review. *Cleburne* endorses this reasoning. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). *Garrett* insists that *Cleburne* was based on “the minimum rational-basis review.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001).

422. See Volokh, *supra* note 406, at 651–52.

423. See *id.*

424. *E.g.*, *Feldman v. Feldman*, 874 A.2d 606, 614 (N.J. Super. Ct. App. Div. 2005) (preventing mother from bringing child to Catholic Church).

425. *Ex parte J.M.F.*, 730 So.2d 1190, 1194, 1196 (Ala. 1998) (targeting conduct based on the court's understanding of the message that it sends to the child).

426. See Volokh, *supra* note 406, at 652–53.

427. See *id.* at 653.

428. *McCorvey v. McCorvey*, 916 So.2d 357, 366 (La. Ct. App. 2005).

been better off without hearing any racial slurs from her father.<sup>429</sup> Children may or may not benefit from learning their parents' ideas about religion<sup>430</sup> or drag queens.<sup>431</sup> Even if some true best interests of the child depend on parental ideology, that leaves open whether courts should be able to consider parental ideology in making these custody decisions. To put the point more starkly: even if it is in a child's best interest to not be exposed to racial slurs, should a court thus be able to use a custody decision to penalize parental use of racial slurs? I argue that courts should not be able to use custody decisions to penalize parental gender nonconformity. Even accepting my arguments, courts would still be able to consider other factors, like parental fitness, that properly relate to the best interests of the child.

## 2. Government Penalizes Gender Nonconformity in Child Custody

Like other forms of speech, courts have penalized gender nonconformity in child custody decisions.<sup>432</sup> By relying on gender nonconformity in determining the best interests of the child, courts single out particular conduct based on the message that it expresses.<sup>433</sup> Three examples illustrate how child custody decisions are used in practice to suppress communication of gender nonconformity.

In *Magnuson v. Magnuson*, the Washington Court of Appeals granted custody to the cisgender mother based on the supposed stability of her relationship with the child and the child's best interest.<sup>434</sup> The court held that custody decisions could not be based on a parent's transgender status but affirmed the trial court's decision based on the needs of the child and the potential instability of the parent-child relationship caused by the father's planned transition

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429. See Volokh, *supra* note 406, at 647 (discussing reasons it may be preferable for a child to be raised by a nonracist parent).

430. See, e.g., *Underhill v. Garcia*, No. 261651, 2005 WL 3304120, \*2 (Mich. Ct. App. 2005).

431. See Pulliam v. Smith, 501 S.E.2d 898, 901 (N.C. 1998).

432. See, e.g., *In re Marriage of D.F.D. and D.G.D.*, 862 P.2d 368 (Mont. 1993) (discussing trial court decision requiring father not to cross-dress during visitation with child).

433. In some cases, courts have also restricted custody based on a parent's decision to allow a child to undergo medically supervised gender transition. In these cases, the non-custodial parent has argued that gender transition is not in the child's best interest. See Shannon P. Minter & Mara Keisling, *The Role of Medical and Psychological Discourse in Legal and Policy Advocacy for Transgender Persons in the United States*, 14 J. GAY & LESBIAN MENTAL HEALTH 145, 152–53 (2010). While a parent's ability to provide proper medical care for a child is properly part of the best interest standard, these decisions improperly focus on the message expressed by certain medical procedures.

434. *Magnuson v. Magnuson*, 170 P.3d 65, 67–68 (Wash. Ct. App. 2007).

to a female gender identity.<sup>435</sup> The majority opinion explained that “[n]o one knows what is ahead[,] and [t]he impact of gender reassignment surgery on the children is unknown.”<sup>436</sup> A vigorous dissenting opinion argued that the majority considered the father’s transgender status, even while claiming to prohibit such consideration.<sup>437</sup> The dissent noted that the trial court found that the parents were equally fit in most respects, and, in fact, the father had previously been the primary caretaker.<sup>438</sup> The only basis for the trial court’s finding that the father’s relationship with the child might be unstable was based on the father’s planned transition to female.<sup>439</sup> While a legitimate concern with the parent-child relationship may have formed part of the rationale for this decision, the majority also penalized the unknown message conveyed by the father’s transition to a female gender identity. The court thus restricted the father’s parental rights based at least partially on the message conveyed by gender nonconformity.

In *Daly v. Daly*, the court terminated the natural father’s visitation rights and all other parental rights.<sup>440</sup> The court found that the child was at risk of serious physical, mental, or emotional injury from any visitation with Suzanne after she transitioned from male to female.<sup>441</sup> As with the last case, the trial evidence suggests that the decision was based at least partially on the court’s concern with the message sent by gender nonconformity.<sup>442</sup> The court explained, “that there are children who are not able to accept a parent as a transsexual[.]”<sup>443</sup> and further suggested “that Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly’s choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.”<sup>444</sup>

The opinion describes this as a choice about certain conduct: dressing as a woman, changing her name, undergoing sex reassignment surgery.<sup>445</sup> But this conduct only gains meaning *because* it

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435. *Id.* at 67 (extending previous Washington case law that prevented trial courts from considering a parent’s sexual preference in making custody decisions).

436. *Id.* at 66.

437. *See id.* at 68–69 (Kulik, J., dissenting); *see also supra* notes 216–58 and accompanying text (arguing that the state cannot target transgender status without targeting communication).

438. *Id.* at 68.

439. *Id.* at 68–69.

440. *Daly v. Daly*, 715 P.2d 56, 56 (Nev. 1986).

441. *Id.* at 59.

442. *See id.* at 57.

443. *Id.* at 58.

444. *Id.* at 59.

445. *Id.* at 57.

communicates a message of gender nonconformity. A cisgender woman choosing to get a breast augmentation or change her name would presumably not face the same judicial scrutiny. The court was concerned with Daly's choice to express a message of gender nonconformity. But the court did more than just terminate Suzanne Daly's visitation rights. The court terminated all of Suzanne's parental rights.<sup>446</sup> Not only would Suzanne lose the right to visitation in the present, she would lose all future rights to petition for visitation or other input into the child's life.<sup>447</sup> Even if the child would be harmed by visitation with Suzanne in the present, the decision to terminate all parental rights penalizes the message sent by Suzanne's gender nonconformity.<sup>448</sup>

Finally, in *M.B. v. D.W.*, the Court of Appeals of Kentucky affirmed a trial court decision to grant a stepfather adoption, terminating the parental rights of the child's biological father who had transitioned and was living as a woman.<sup>449</sup> The trial court's decision focused on emotional injury inflicted on the child by the father's female gender identity expression.<sup>450</sup> "[The child] stated that she felt 'abandoned,' and that the worst part was 'knowing that I did not have a father . . . he's a woman.'" <sup>451</sup> The trial court also considered the child's wishes to live with her stepfather and the failure of the natural father to pay child support.<sup>452</sup> The Court of Appeals held that sexual reassignment surgery was not a per se reason to terminate parental rights,<sup>453</sup> but the court suggested that in the case of sexual reassignment surgery, termination would be proper whenever a child was uncomfortable with the parent's new gender identity expression.<sup>454</sup> As with previous cases, legitimate concerns about parent-child relationship quality overlap with the courts' willingness to penalize parental conduct based on the message it expresses.<sup>455</sup>

These three cases share several features that illustrate the concerns raised by judicial treatment of gender nonconformity in

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446. *Daly v. Daly*, 715 P.2d 56, 56 (Nev. 1986).

447. *See id.* at 59. Termination of parental rights in the state of Nevada is defined in NEV. REV. STAT. ANN. § 128.110 (West 2011).

448. Critically, Suzanne offered to forego visitation rights in order to maintain parental rights. A dissenting opinion stressed this inconsistency in the majority opinion. *Daly*, 715 P.2d at 60–63 (Gunderson & Springer, dissenting).

449. *M.B. v. D.W.*, 236 S.W.3d 31, 33 (Ky. Ct. App. 2007).

450. *Id.* at 36.

451. *Id.* at 35.

452. *Id.* at 36–37.

453. *Id.* at 38 ("Neither do we hold that a parent's undergoing gender reassignment is, in itself, grounds for such termination.").

454. *Id.* at 37.

455. *See M.B. v. D.W.*, 236 S.W.3d 31, 37 (Ky. Ct. App. 2007).

child custody cases. Most importantly, in all three cases, custody restrictions were at least partially used to suppress conduct that communicated gender nonconformity. Parent-child relationship quality remains a valid concern, but courts should not use parental speech as evidence of relationship quality. Courts should not impute evidence based on their concerns with the parent's expression of gender nonconformity. These cases are related to the broader challenge of protecting parental speech rights while preserving the best interest of the child standard.<sup>456</sup> I turn now to some challenges in protecting gender nonconformity in child custody cases.

### *3. Arguments Against Protecting Gender Nonconformity in Child Custody*

Parental rights are generally a strong bar against state interference with how children are raised.<sup>457</sup> In particular, outside of divorce cases, the courts rarely regulate parental speech.<sup>458</sup> Professor Volokh examines several potential reasons why courts generally do not regulate parental speech in intact families.<sup>459</sup> He argues that protecting parental speech rights is consistent both with preventing the government from interfering with broader parents' rights and with preventing the government from restricting public discourse and debate.<sup>460</sup> As with any other speech, the government should not be able to restrict child custody to suppress parental speech. While the state might legitimately take custody away from parents based on child abuse, it should not take custody away based on a parent's gender nonconformity.

Freedom of speech should similarly protect gender nonconformity in the case of divorced parents.<sup>461</sup> Parental speech rights are protected in intact families even when they might undermine the best interests of the child.<sup>462</sup> In divorce cases, the best interests standard should not be able to trump freedom of speech. Parents do not

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456. See Volokh, *supra* note 406, at 631–32 (arguing that in almost all cases parental speech rights can be protected without damaging the best interests of the child); see also RICHMAN, *supra* note 413, at 1–12 (discussing related challenge of balancing parents' claims to "rights" against best interests of the child).

457. See *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000) (holding that statute permitting court to grant custody to grandmother based on best interest violated substantive due process rights of mother).

458. See Volokh, *supra* note 406, at 673–74, nn.180–84 (arguing that the rare exception is cases where courts consider abusive parental speech as one element of child abuse).

459. *Id.* at 673–84 (describing this as an incompletely theorized agreement).

460. *Id.* at 631–32.

461. Volokh develops the comparison between speech in intact and separated families in great detail. See *id.* at 683–99.

462. See *id.* at 686–87.

give up their speech rights by divorcing.<sup>463</sup> While courts have to determine the best interests of the child, they should also continue to protect the ability of parents, as opposed to the government, to determine how to raise children.<sup>464</sup>

Mere conflict between parents over religious and ideological teachings does not justify state intervention.<sup>465</sup> For example, in *Magnuson*, the biological father transitioned to a female gender identity.<sup>466</sup> By rejecting the gender binary, the father's conduct may have challenged the mother's gender ideology. However, each parent should maintain a right to free speech. While conflicting messages may be challenging for children, this is no different from intact families. Married parents may similarly teach conflicting ideas to their children. Even when parents teach fundamentally conflicting ideas to children, courts avoid restricting speech in intact families.<sup>467</sup> Similarly, in split families, conflict over gender identity expression should not be a basis for a court to restrict either parent's custody.

Several child custody cases mention potential psychological harm to the child. In *Daly*, the court explained that the child might be harmed by the father's planned gender transition.<sup>468</sup> Superficially, this seems consistent with the best interest standard. However, this is problematic because it allows courts to impute emotional injury based on the court's assumptions about the gender messages expressed by a parent. While the *Magnuson* court purported to decide based on potential harm to the child, there was minimal evidence of how the father's transition would impact the child.<sup>469</sup> Instead, as the dissent vigorously pointed out, the court acted on its assumptions about the father's status as transgender.<sup>470</sup> The court decision treated gender nonconformity as deviant, simply assuming that it would harm the child.<sup>471</sup> Legal scholars argue that this is a problematic pattern in custody cases: courts simply assume that any sort of sexual deviance will harm children without a showing of actual harm.<sup>472</sup> In

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463. *See id.* at 685–86 (noting, however, that divorced parents do not have exclusive control over raising children because they must split that with the other parent).

464. *See Volokh, supra note 406*, at 687–89.

465. *See id.* at 689–94.

466. *Magnuson v. Magnuson*, 170 P.3d 65, 66 (Wash. Ct. App. 2007).

467. *See Volokh, supra note 406*, at 673–75.

468. *Daly v. Daly*, 715 P.2d 56, 58 (Nev. 1986).

469. *See Magnuson*, 170 P.3d at 66.

470. *Id.* at 68–69 (Kulik, J., dissenting).

471. *See id.*

472. *See, e.g.*, Suzanne A. Kim, *The Neutered Parent*, 24 YALE J. L. & FEMINISM 1, 1–2 (2012) (showing how focus on “normal” sexuality stands in for actual harm to children); Nancy G. Maxwell & Richard Donner, *The Psychological Consequences of Judicially Imposed Closets in Child Custody and Visitation Disputes Involving Gay or Lesbian*

reality, psychological studies find that children fare worse when parents are forced to hide part of their identity,<sup>473</sup> and that children of sexual minorities do not have worse psychological outcomes.<sup>474</sup>

In *Palmore v. Sidoti*, the Supreme Court held that child custody decisions could not be based on societal prejudice against interracial relationships.<sup>475</sup> While the Court acknowledged the potential difficulty the child would face, the Court stressed that under the Equal Protection Clause, private biases could not be a basis for the law.<sup>476</sup> Children of interracial parents could learn to deal with social prejudices.<sup>477</sup> Eventually this could be better for the individual child, as well as for society as a whole.<sup>478</sup> Similarly, children with transgender parents may or may not face social discrimination. But by basing child custody decisions on anti-transgender prejudice, courts would enforce private biases and potentially deny children the opportunity to better understand gender.<sup>479</sup>

### C. Gender Nonconformity and Restroom Access

On June 24, 2007, Khadijah Farmer wore jeans and a polo shirt, and had her hair shaved very short.<sup>480</sup> While Farmer is a cisgender woman, her dress and hair were not traditionally feminine.<sup>481</sup> Following the Gay Pride Parade in New York City, Farmer and a female companion went to Caliente Cab Company, a Mexican Restaurant.<sup>482</sup> After they began eating, Farmer excused herself to use the women's restroom.<sup>483</sup> As Farmer entered the women's restroom, another patron

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*Parents*, 13 WM. & MARY J. WOMEN & L. 305, 305–06 (2006) (arguing that courts incorrectly rely on stereotypes to assume a parent's sexuality will harm children).

473. See Maxwell & Donner, *supra* note 472, at 318–27 (summarizing research on the damaging impact of parental secrets).

474. See *id.* at 327–30.

475. *Palmore v. Sidoti*, 466 U.S. 429, 434–35 (1984).

476. *Id.* at 433.

477. See Liana Nazaryan, Note, *Interracial Adoption: Is a Colorblind Adoption a Good Idea in a Color Conscious Society?*, 23 J. JUV. L. 100, 106–08 (2002–2003).

478. See *id.* at 106.

479. See *supra* note 421 (arguing that *Palmore* should apply to all rational basis review). As in *Palmore*, children may be exposed to dissenting views of parents when a cisgender parent challenges a transgender parent. As much as possible, courts should respect both parents' continued rights to free speech. Narrow restrictions may be appropriate only to protect against direct attacks on the other parent. See Volokh, *supra* note 406, at 697–99 (discussing these sorts of restrictions in detail).

480. Rich Schapiro, *Lesbian Riled by Boot from Ladies Room*, N.Y. DAILY NEWS, June 30, 2007, <http://www.nydailynews.com/news/lesbian-riled-boot-ladies-room-article-1.224762>.

481. Jennifer Lee, *Woman Wins a Settlement Over Her Bathroom Ouster*, N.Y. TIMES, May 14, 2008, at B3.

482. *Id.*

483. *Id.*



glared at Farmer, telling her “[t]his is the women’s bathroom.”<sup>484</sup> Farmer replied that she belonged in the women’s restroom.<sup>485</sup> Farmer was then removed from the restroom and the restaurant by a bouncer who refused to believe that Farmer is a woman, despite her repeated offers to present her identification.<sup>486</sup> The bouncer acted on the basis of Farmer’s short hair and masculine dress.<sup>487</sup>

Because this happened in a restaurant, it is not clear whether a First Amendment challenge could be staged.<sup>488</sup> I use this case because it illustrates how gender nonconformity is regularly penalized in the restroom. In particular, this example emphasizes how gender ambiguous women and men might be more severely penalized than transgender people who pass.<sup>489</sup>

Restrooms seem like an odd place to make a free speech argument. Most people use the restroom several times a day and never think about any message that might be sent by their restroom use. When we see other people enter the restroom, we typically do not understand their restroom use to communicate a message. Similarly, we do not think of preventing (cisgender) men from using the women’s restroom as being based on any gendered message. Instead, most people think about sex-segregated restrooms in terms of privacy.<sup>490</sup> While I think our cultural definition of privacy in some sense depends

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484. Schapiro, *supra* note 480.

485. *Id.*

486. Lee, *supra* note 481.

487. See Schapiro, *supra* note 480.

488. The First Amendment does not directly apply to private restaurants, but might be used in a challenge to any relevant state laws. Many state laws and local ordinances require restaurants to segregate restrooms by sex. See, e.g., New York City Plumbing Code, § 403.1, [http://www.nyc.gov/html/dob/downloads/pdf/plumbing\\_code.pdf](http://www.nyc.gov/html/dob/downloads/pdf/plumbing_code.pdf) (specifying number of restrooms required for each sex); 10 N.Y. COMP. CODES R. & REGS. tit. 10, § 14-1.142 (assuming restrooms will be sex segregated). After being denied access to a restaurant’s restrooms, a transgender plaintiff could sue the restaurant for a violation of sex antidiscrimination law or a violation of state or local public accommodations laws. See, e.g., *Freeman v. Realty Resources Hospitality*, No. CV-09-199 (Me. Sup. Ct. May 27, 2010), available at <http://www.glad.org/uploads/docs/cases/freeman-v-dennys/2010-05-27-freeman-superior-court-decision.pdf> (order denying motion to dismiss) (allowing lawsuit under Maine public accommodations law against Denny’s restaurant for violating Maine’s Human Rights Act by discriminating on the basis of gender identity in restroom access). Freedom of speech could be used to challenge the restaurant’s reliance on state law to justify restroom segregation. This would not prevent a restaurant from privately deciding to restrict restroom access based on gender nonconformity, but would at least challenge the state law.

489. See, e.g., *Cruzan v. Special Sch. Dist.*, #1, 294 F.3d 981, 982–83 (8th Cir. 2002) (plaintiff claimed male-to-female coworker in the women’s restroom created hostile work environment, but plaintiff admitted that she had not even noticed coworker’s restroom use for several months).

490. Tobias Wolff argues that much opposition to trans restroom access is based on anxiety over exposure of the body. See Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL’Y REV. 201, 207 (2012).

on gender norms, I am willing to accept that privacy might function as a government interest independent of expression.<sup>491</sup>

Nonetheless, when the government penalizes transgender restroom access, it means suppress communication.<sup>492</sup> As a matter of free speech, the government should not be allowed to restrict access to restrooms in order to suppress communication of gender nonconformity.<sup>493</sup> Restroom choice is deliberate and intended to communicate a central aspect of identity: “I am a woman,” or “I am a man.” Even if most cisgender women never subjectively intend to communicate a message by using the women’s restroom, their conduct is legible as communicating a nearly universal social norm. This becomes even clearer in the case of transgender restroom access. When a transgender man begins using the men’s restroom, not only does his conduct communicate his gender, but he consciously chooses to do so in order to communicate his gender identity.<sup>494</sup> When the government restricts transgender restroom access, it uses an illegitimate means to suppress gender nonconformity. This potentially radical argument could reach any sex-segregated facilities. In practice, this argument would not necessarily require dramatic changes. I do not try to define the exact scope of the government’s interest in privacy here, but insofar as privacy is culturally defined as distinct from gender, the government might have a continued interest in sex-segregated facilities for certain purposes.

### 1. *Broader Issue: Sex-Segregated Restrooms*

Laws first required sex-segregation of restrooms in the late 1880s.<sup>495</sup> In response to growing concerns over women’s safety in the workplace, these laws were attached to a wave of protective legislation.<sup>496</sup> Some restroom provisions were part of broader protections for all laborers, while others were attached to bills specifically

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491. See *infra* Part II.C.3 (discussing privacy and safety rationales); see also Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1112 (2005) (suggesting that culture constrains the First Amendment).

492. See *supra* notes 203–56 and accompanying text (interpreting *O’Brien*).

493. This would protect any gender nonconformity. In Farmer’s case, Farmer may or may not have thought about her restroom choice as speech. Nonetheless, the restaurant targeted her restroom choice based on the message communicated. See *supra* notes 480–87 and accompanying text.

494. However, subjective intent to communicate a message is not required to protect conduct as speech. See Waldman, *supra* note 188, at 1894.

495. Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 39 (2007) (Massachusetts adopted the first law requiring sex-segregated restrooms in workplaces in 1887). Kogan discusses the history of adoption of these laws and their original justifications. *Id.* at 39–50.

496. *Id.* at 39.

designed to protect women and children.<sup>497</sup> Terry Kogan identifies four rationales underlying the legislative discussion of these laws: (1) protecting women's weaker bodies by giving them a place of respite; (2) providing better sanitation by having adequate restrooms for women; (3) protecting privacy, as understood by Victorian norms of modesty; and (4) preserving a separate sphere for women on the basis of morality.<sup>498</sup> As suggested by these rationales, restrooms were sex-segregated to benefit and protect women.

Sex-segregation of restrooms is now ingrained in our culture to a point that questioning it seems radical. In the debates over a federal Equal Rights Amendment (ERA) in the 1970s, Phyllis Schlafly and other ERA opponents used the specter of desegregating restrooms to prevent passage of the ERA.<sup>499</sup> ERA opponents did not need to explain or justify their reference to restrooms; they relied on a shared social understanding that restrooms are supposed to be sex-segregated.<sup>500</sup> Opponents of antidiscrimination bills have continued to use this specter of restrooms, illustrating the continued assumption that restrooms should be sex-segregated.<sup>501</sup>

With this seeming universal acceptance of the logic behind sex-segregated restrooms, why challenge them? Does "bathroom discrimination"<sup>502</sup> only matter to a small group of transgender individuals? While my paper addresses bathroom discrimination in the transgender context, the issue is much larger. Brief consideration of the larger problems with sex-segregated restrooms will illustrate why gendered laws are not as natural as assumed.

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497. *Id.* at 39–40.

498. *Id.* at 41.

499. Levi & Redman, *supra* note 14, at 139.

500. *Id.* at 140.

501. In recent years, as state legislatures have added trans protections to antidiscrimination laws, this specter of the restroom has again come up. Anti-transgender activists in Massachusetts labeled the state's antidiscrimination law as "the bathroom bill." *Id.* at 141. This tactic has been repeated in many states across the country. *See, e.g., Where We Stand Today, NO BATHROOM BILL*, <http://www.nobathroombill.com/where-we-stand-today/> (last updated Jan. 25, 2012). Based on this tactic, many states have explicitly excluded restrooms from their sex antidiscrimination laws. *See, e.g.,* R.I. GEN. LAWS § 11-24-3.1 (1956) ("Nothing contained in this chapter that refers to 'sex' shall be construed to mandate joint use of restrooms, bath houses, and dressing rooms by males and females."). Courts have also held that transgender antidiscrimination laws do not cover restroom access. Levi & Redman, *supra* note 14, at 143–44. *But see id.* at 150 (Maine courts rejected this logic). Despite this hysteria over restroom access, there are no reported cases of activists using an antidiscrimination bill to gain access to restrooms. *See* Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 445–46 (2008) ("An extensive search has revealed no case brought under any state ERA challenging the norm of public single-sex bathrooms.").

502. Levi & Redman suggest this term. Levi & Redman, *supra* note 14, at 133.

Under sex-segregated bathroom laws, a father technically cannot assist his young daughter in a public restroom.<sup>503</sup> A wife cannot help her wheelchair-dependent husband in the restroom.<sup>504</sup> A son cannot aid his elderly mother.<sup>505</sup> Sex-segregated restrooms are less efficient than unisex restrooms and create longer lines.<sup>506</sup> This is particularly true when each restroom has a limited number of larger handicapped stalls: handicapped stalls in one restroom go unused while a line forms for the stalls in the other restroom. Sex-segregated restroom laws can also lead to sanctions against gender ambiguity, as illustrated by Farmer's case.<sup>507</sup> Finally, most transgender individuals report frequent violence and intimidation when they use the restroom.<sup>508</sup> Some transgender individuals may not safely be able to use either restroom.<sup>509</sup>

Mary Anne Case convincingly argues for unisex restrooms as the ideal policy outcome.<sup>510</sup> Unisex restrooms could be one-person restrooms with locked exterior doors, or could be larger restrooms with individual stalls. Because men and women would all use stalls, there would be no loss of privacy. My free speech argument cannot reach this broader policy argument for unisex restrooms.<sup>511</sup> Nonetheless,

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503. Kogan, *supra* note 495, at 4. In practice, parents frequently bring opposite-sex infants and very young children into the restroom with them.

504. *Id.*

505. *See id.* at 3.

506. *See* Mary Anne Case, *Why Not Abolish the Laws of Urinary Segregation?, in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 213 (Harvey Molotch & Laura Norén eds., 2010).

507. Schapiro, *supra* note 480.

508. Levi & Redman, *supra* note 14, at 136–37.

509. *Id.* at 137.

510. *See* Case, *supra* note 506. Alex More alternately suggests restrooms marked “other” to accommodate transgender people. Alex More, Note, *Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 *TEX. J. WOMEN & L.* 297, 311 (2008). More's suggestion would require three sets of restrooms and seems less practical and less normatively desirable. Restricting people to a unisex restroom (whether marked “unisex,” “male and female,” “other,” or “decline to state”) would force them to “out” themselves by preventing them from using the men's and women's restrooms. *See* PEEING IN PEACE, *supra* note 59, at 12.

511. Freedom of speech prevents government from interfering with speech. Thus freedom of speech could prevent government from penalizing transgender restroom choices. Freedom of speech would not compel all restrooms be designated as unisex. It also would not reach many of the problems with sex-segregated restrooms discussed above. For example, a husband might wish to accompany his wheelchair dependent wife into the restroom solely as a caregiver. Freedom of speech would also not reach cases dealing with unequal provision of restrooms by sex. *See, e.g.,* *Wedow v. City of Kan. City*, 442 F.3d 661, 671–72 (8th Cir. 2006) (holding that failure to provide adequate restroom and locker facilities to female fire fighters can constitute sex discrimination). Therefore, while freedom of speech might seem like a weak tool for the problem of sex-segregated restrooms, it would provide greater freedom of restroom choice to transgender individuals.

this policy debate illuminates the relationship between gender expression and broader systems of social inequality.

## *2. Government Penalizes Gender Nonconformity in Restroom Access*

When bathroom discrimination occurs, the state is very often involved in some capacity.<sup>512</sup> Trans people regularly report police abuse and harassment at public restrooms.<sup>513</sup> Several transgender activists have reported being harassed, whether they use the men's or women's restroom.<sup>514</sup> When arrests are made, police might charge trans people with disorderly conduct, public indecency, or resisting arrest.<sup>515</sup> When police harass or arrest trans people for using the restroom, the state quite violently suppresses gender nonconformity.

In addition to direct police enforcement, many states have laws or regulations requiring public accommodations to have sex-segregated restrooms.<sup>516</sup> These laws might be part of liquor licensing laws,<sup>517</sup> health and safety codes,<sup>518</sup> or building<sup>519</sup> and plumbing codes.<sup>520</sup> Thus the decision to sex-segregate restrooms is done in compliance with state laws. Insofar as these laws can be read to prohibit restroom choice by trans people, the government restricts speech.<sup>521</sup>

Finally, government employees have been fired based on concerns about their restroom use. The Utah Transit Authority (UTA) fired a transgender bus driver, claiming to be concerned with potential

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512. Even if the state has a legitimate interest in the ends of safety and privacy, freedom of speech should be implicated if it uses means that suppress gender nonconformity over other conduct. *See supra* notes 203–56 and accompanying text (interpreting *O'Brien*).

513. *See PEEING IN PEACE, supra* note 59, at 1–11 (discussing extent of bathroom discrimination faced by transgender people).

514. *See, e.g., FEINBERG, supra* note 270, at 68 (telling story of an MTF activist).

515. *See Gehi, supra* note 270, at 326.

516. *See Kogan, supra* note 495, at 39–40 (providing a history of sex-segregated restroom law).

517. *See, e.g., TEX. ALCO. BEV. CODE. ANN.* § 61.43 (West 2003) (requiring “separate free toilets for males and females, properly identified, on the premises”).

518. *See, e.g., FLA. STAT.* § 381.0091 (repealed 2011) (Florida public health law) (“If more than one restroom is provided in any building or facility owned or operated by the state or any political subdivision of the state, the restrooms for males shall be separate from the restrooms for females.”).

519. *See, e.g., MINN. STAT.* § 326B.109 (West 2012) (“In a place of public accommodation subject to this section, the ratio of water closets for women to the total of water closets and urinals provided for men must be at least three to two, unless there are two or fewer fixtures for men.”).

520. *See, e.g., N.Y. CITY CHARTER & ADMIN. CODE ANN.*, § 403.1 (2008) (New York City plumbing code) (specifying number of restrooms required for each sex).

521. Bringing a free speech claim against these laws would depend on how the laws are enforced and interpreted. *See supra* note 488.

liability for the employee's use of women's public restrooms while on the job.<sup>522</sup> Krystal Etsitty was anatomically male, but was diagnosed with gender identity disorder and had transitioned to female.<sup>523</sup> When she refused to comply with UTA requests that she use men's restrooms while on the job, she was fired.<sup>524</sup> If Etsitty's dress communicated her gender nonconformity, then her restroom choice certainly communicated gender nonconformity. By using women's restrooms, Etsitty challenged the gender binary. She communicated the message that trans women should use the same restrooms as cisgender women. It is precisely this message that the state penalized. Moreover, had Etsitty complied with the request to use the men's restroom, the government would have compelled her to send an alternate gender message.<sup>525</sup> Just as the state cannot penalize Etsitty's gender expression by firing her based on her dress, it cannot compel her to send a different gendered message in order to be allowed to use the restroom. Use of the restroom cannot be conditioned on particular speech. The UTA may have allowed Etsitty to dress as a woman and otherwise present herself as a woman, but when it came to the restroom, UTA demanded that Etsitty express a male identity.<sup>526</sup>

How do we know that the state reacts to gender nonconformity instead of anatomical sex? While UTA might argue that it merely required Etsitty to use the restroom consistent with her anatomical sex, actual enforcement of restroom sex-segregation is not based on anatomical sex.<sup>527</sup> Even when trans people are questioned in their restroom use, nobody demands to see their genitals to determine which restroom they should use.<sup>528</sup> Instead trans people are questioned because their gender expression is non-normative.

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522. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007).

523. *Id.* at 1218.

524. *Id.* at 1226 (dismissing sex-stereotyping claim by explaining "Etsitty was terminated not because she failed to conform to stereotypes about how a man should act and appear, but because she was a biological male who intended to use women's public restrooms").

525. See *supra* notes 258–65 and accompanying text (discussing compelled speech problems).

526. See also *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1307 (N.D. Ga. 2010) *aff'd*, 663 F.3d 1312 (11th Cir. 2011) (holding that Georgia General Assembly Legislative Counsel had valid interest in dismissing transgender employee based on concerns with potential harassment claims brought by women over employee's use of women's restrooms); *Michaels v. Akal Sec., Inc.*, No. 09-CV-01300-ZLW-CBS, 2010 WL 2573988, \*1 (D. Colo. June 24, 2010) (transgender federal courthouse employee placed on involuntary leave after another employee complained about her restroom use).

527. Moreover, even if UTA were to base its actions solely on Etsitty's anatomical sex, this still suppresses her communication of gender nonconformity.

528. See West & Zimmerman, *supra* note 121, at 132 ("Neither initial sex assignment (pronouncement at birth as a female or male) nor the actual existence of essential criteria for that assignment (possession of a clitoris and vagina or penis and testicles) has much—if anything—to do with the identification of sex category in everyday life.").

When a trans person enters a restroom, if they are even recognized as trans, others understand the gender message expressed by their restroom choice. Carla Cruzan, a teacher at Southwest High School in Minnesota, challenged the school's decision to allow a transgender teacher to use the women's restroom.<sup>529</sup> Cruzan encountered Davis (the transgender teacher) exiting a stall in the women's restroom.<sup>530</sup> Cruzan immediately exited the women's restroom to complain to the principal and later sued the school district for allowing Davis to use the women's restrooms.<sup>531</sup>

Cruzan's reaction was based on the message communicated by restroom choice. Cruzan did not argue that Davis must meet certain medical criteria in order to use the women's restroom. As far as Cruzan was concerned, Davis could never use the women's restroom. Cruzan's discrimination claims particularly reveal how she understands Davis's restroom use as offensive speech.

Cruzan claimed that the school district discriminated against her religious beliefs by allowing Davis to use the women's restroom.<sup>532</sup> In order for this theory to make sense, Cruzan must recognize Davis's use of the restroom as speech: "Cruzan asserts that her religious beliefs do not permit her to share a private facility, such as a restroom, with members of the opposite sex."<sup>533</sup> Cruzan's complaint is about more than privacy or discomfort. It is more than anti-trans discrimination. Cruzan's complaint alleges that Davis's conduct directly challenges her beliefs. Cruzan's religious beliefs incorporate the gender binary, the ideology that men and women are fundamentally different and sex is fixed at birth.<sup>534</sup> Davis's use of the women's restroom was an act of self-definition. It defined and expressed her identity as a woman, and it challenged the gender binary. Cruzan necessarily understood Davis's restroom use in these ideological terms, as a challenge to her understanding of the gender binary.

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529. *Cruzan v. Special Sch. Dist., # 1*, 294 F.3d 981, 982–83 (8th Cir. 2002). David Nielsen began working for the school district in 1969. *Id.* at 983. In 1998, he informed the district that he was transgender and would begin presenting himself as Debra Davis. *Id.* The district worked with Davis to accommodate her gender transition. *Id.* During discussions to prepare for Davis's transition, Cruzan objected to the possibility of Davis using the women's restroom. *Id.* The school district initially decided that Davis would use alternate restrooms, but the school district's legal counsel later informed the district that Minnesota antidiscrimination law might require them to allow Davis to use the women's restroom. *Id.* Cruzan was not informed of this change and did not learn of Davis's use of the women's restroom until she encountered Davis in the women's restroom. *Cruzan v. Minn. Pub. Sch. Dist. No. 1*, 165 F. Supp. 2d 964, 968 (D. Minn. 2001).

530. *Cruzan v. Special Sch. Dist., #1*, 294 F.3d 981, 983 (8th Cir. 2002).

531. *Id.* (claiming religious discrimination and hostile work environment sex discrimination).

532. *Id.* at 982–83.

533. *Cruzan*, 165 F. Supp. 2d at 967.

534. *See supra* notes 105–08 and accompanying text (describing gender binary).

This ideological construction of Davis's restroom use becomes even clearer when considering Cruzan's typical use of a different restroom from Davis.

Cruzan claimed that the school district created a hostile work environment by allowing Davis to use the women's restroom.<sup>535</sup> Cruzan never claimed to be physically threatened by Davis; in fact, Cruzan acknowledged that she was not even aware of Davis's use of the women's faculty restroom for several months.<sup>536</sup> Cruzan used the girl's restroom at another end of the campus, a restroom not used by Davis.<sup>537</sup> Thus, Cruzan claimed she was threatened if Davis was allowed to use any women's restroom.<sup>538</sup> Because Cruzan primarily used a different restroom and rarely directly interacted with Davis, Cruzan was not threatened in any way by Davis's actual restroom practices.<sup>539</sup> Cruzan did not claim to be harassed or endangered.<sup>540</sup> Instead, Cruzan essentially alleged that the school district supported an ideology inconsistent with her beliefs about the gender binary. Cruzan felt threatened by the idea of a transgender woman using the women's restroom. Cruzan's meritless hostile work environment claim is thus based on Cruzan's reaction to the message expressed by Davis's restroom use.

I now turn to the privacy and safety concerns underlying sex-segregated restrooms (and other public facilities). While these concerns should not allow the government to suppress gender nonconformity, I do not argue that the government should never be able to enforce sex-segregated restrooms.

### *3. Arguments Against Protecting Gender Nonconformity in Restroom Access*

While I believe unisex restrooms are the ideal policy solution, I am not prepared to argue that freedom of speech requires them. What is different about a cisgender man and a trans woman using the women's restroom? Even if the cisgender man does not intend to express a gender message by using the women's restroom, subjective intent should not be required to protect conduct as speech. Sex-segregated restrooms are such a universal norm in our society that

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535. *Cruzan*, 165 F. Supp. 2d at 966.

536. *Id.* at 969.

537. *Id.* at 968.

538. *See Cruzan v. Special Sch. Dist., #1*, 294 F.3d 981, 984 (8th Cir. 2002).

539. This is consistent with both the district and appellate courts, which rejected Cruzan's claim noting that she did not see Davis using the restroom. *Id.* at 984; *Cruzan*, 165 F. Supp. 2d at 968.

540. *See Cruzan*, 294 F.3d at 984.



both of their conduct would be understood as communicative. The difference must lie in the state's interests. Sex-segregated restrooms are most firmly based on privacy and safety. I turn to each of these justifications to argue that when the state targets transgender restroom use, it uses illegitimate means of targeting gender nonconformity.

Safety is probably the most common argument in favor of sex-segregated restrooms. Assuming for the sake of argument that sex-segregation of restrooms is rationally related to safety, preventing trans people from using sex-segregated restrooms is not related to safety. Typically, this argument is presented thus: allowing trans women in the women's restroom is a threat to women and children.<sup>541</sup> Opponents of trans restroom access suggest that trans women are really male sexual predators.<sup>542</sup> There is no evidence, however, that trans restroom access poses any real threat to safety.<sup>543</sup> Moreover, sex-segregated restrooms do not prevent cisgender male sexual predators from entering women's restrooms. Even if there were potential safety concerns, free speech theory would not support restricting restroom access for all trans persons based on these concerns. While speech can be restricted based on "true threats," the hypothetical possibility of harm is not a sufficient reason to restrict speech.<sup>544</sup> In the restroom example, it is worth remembering that various other sources of law address the concerns of safety. If a male sexual predator were to actually pose as a trans woman, any violence committed would not be "speech." Even actual spoken words are not protected speech when they are equivalent to an act of violence.<sup>545</sup> Thus, this safety argument for strict sex-segregation of restrooms fails on two grounds. First, as a practical matter, there is no evidence that preventing trans people from using their restroom of choice actually enhances safety.<sup>546</sup> Second, as a matter of freedom of speech, the possibility of harm is insufficient to restrict speech.

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541. See, e.g., *Case*, *supra* note 506, at 9 (discussing this claim).

542. See *Levi & Redman*, *supra* note 14, at 137.

543. *Id.* at 160 (noting that even in San Francisco there are no reported cases of trans women harassing cis women).

544. For example, Virginia could constitutionally prohibit cross-burning when the statute targets conduct that is specifically intended to communicate a threat. *Virginia v. Black*, 538 U.S. 343, 359 (2003) ("True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). Similarly, a federal statute criminalizing true threats against the President is constitutional, but a man's comment that "[i]f [the Army] ever [made] me carry a rifle the first man I want to get in my sights is L.B.J." was political hyperbole and not a true threat. *Watts v. United States*, 394 U.S. 705, 706 (1969). Trans persons do not intend to threaten others by using the restroom and their conduct cannot be classified as a "true threat."

545. See *Black*, 538 U.S. at 359 (noting that words that incite violence or incite a breach of the peace are punishable by the states).

546. *Levi & Redman*, *supra* note 14, at 161.

Privacy arguments similarly fail on both practical and theoretical grounds. There is a well-established reasonable expectation of privacy in public restrooms.<sup>547</sup> Many courts use this as the basis for a same-sex privacy bona fide occupational qualification (BFOQ) under Title VII.<sup>548</sup> Privacy in a public restroom is meant to protect others from viewing someone in a state of partial undress.<sup>549</sup> This privacy expectation is not absolute; multiple people can use a public restroom at the same time. Our notions of privacy are culturally constructed: we assume that being seen by members of the opposite sex is a greater violation of privacy than being seen by members of the same sex.<sup>550</sup> Underlying this notion of privacy is a general discomfort with the idea of sharing restrooms with members of the opposite sex.

Surely our understanding of privacy is culturally constructed and can change over time. For example, anxieties over the body and privacy partially drove opposition to both racially integrated swimming pools and shared barracks and showers in the repeal of Don't Ask, Don't Tell.<sup>551</sup> Anxiety over loss of privacy from trans people using restrooms may dissipate over time. Nonetheless, the state may at least have a rational interest in sex-segregated restrooms to accommodate cultural understandings of privacy. Sex-segregated restrooms do not perfectly serve this goal of privacy, but in many applications they seem at least related.

Whatever rational interest in privacy may exist, it does not justify singling out and suppressing gender nonconformity. Restroom choice is a powerful act of self-definition. Trans people often very consciously choose to use a particular restroom in order to define and express their identity. Their masculinity or femininity is

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547. See Michael R. Flaherty, Annotation, *Search and Seizure: Reasonable Expectation of Privacy in Public Restroom*, 74 A.L.R. 4th 508 (1989) (discussing extent of reasonable expectation of privacy against police surveillance in a public restroom).

548. See, e.g., *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1410 (N.D. Ill. 1984) (upholding the employer's right to deny a female employee a position cleaning men's bathrooms in a client's building because fundamental privacy rights were implicated); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982) (finding that "while using any of the bathhouses, the male employees had legitimate privacy rights that would have been violated by a female's entering and performing janitorial duties therein during their use thereof, and to protect those rights, those male employees were entitled to insist that defendant not assign plaintiff to do so."). But see Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1260 (2003) (arguing that the same-sex privacy BFOQ almost always violates the meaning of Title VII).

549. Thus, for example, Kapczynski suggests that it would be appropriate to require an opposite sex janitor to knock on a bathroom door before cleaning the bathroom, to ensure that the janitor did not accidentally see someone using the bathroom in a state of partial undress. See Kapczynski, *supra* note 548, at 1271–72.

550. *Id.* at 1277.

551. See Wolff, *supra* note 490, at 203, 217–20, 227–30.

constituted through the very act of using the restroom.<sup>552</sup> The anxiety many cisgender people feel in response is a clear signal that they understand the communication of gender nonconformity. Our concern with the autonomy value of free speech should force us to think carefully about this. Moreover, most trans people try to avoid drawing attention to themselves in public restrooms.<sup>553</sup> Like most other people, trans people simply want to use the restroom.<sup>554</sup> The only invasion of privacy is the idea of being uncomfortable about sharing a restroom with a transgender person.<sup>555</sup> Even if some cisgender women might feel uncomfortable with the message expressed, free speech prohibits the government from regulating expressive conduct based on the discomfort of the audience.<sup>556</sup>

While proponents of sex-segregated restrooms claim to protect safety and privacy, they ignore the safety and privacy of transgender people.<sup>557</sup> For example, in *Johnson v. Fresh Mark, Inc.*, the court explained, “the company made a good faith effort to determine which facilities were appropriate for Plaintiff, but left with her counsel’s ambiguous response, was forced to rely on the unequivocal information provided on her drivers’ license.”<sup>558</sup> The court held that “the company only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms,”<sup>559</sup> despite earlier noting that Plaintiff “fear [ed] for her own safety and well-being” if she was forced to use the men’s restroom.<sup>560</sup> By enforcing restroom segregation based on genitalia, cases like *Johnson* violate the privacy and safety of transgender persons, while also failing to add to the privacy or safety interests of gender conforming persons.

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552. See BUTLER, *supra* note 105, at 25 (theorizing how gender identity is constituted through conduct).

553. See PEEING IN PEACE, *supra* note 59, at 3, 6–9.

554. See *id.* at 3 (“Safe bathroom access is not a luxury or a special right.”).

555. See Levi & Redman, *supra* note 14, at 163 (“The privacy objection to transgender-inclusive laws is rooted in the idea that restricting restroom use to persons of the same sex guarantees privacy from the sexual (or otherwise ‘improper’) gaze of others”).

556. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). Similarly, today we would never argue that public swimming pools should remain racially segregated over a perceived loss of privacy. See Wolff, *supra* note 490, at 217–20 (discussing anxiety over this loss of privacy).

557. See PEEING IN PEACE, *supra* note 59, at 12–13 (noting that requiring transgender persons to use “gender neutral” restrooms or restrooms of their birth sex would require them to “out” themselves every time they use the restroom).

558. *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (rejecting sex stereotyping claim under Title VII).

559. *Id.*

560. *Id.* at 998.

Sex-segregated restrooms admittedly raise difficult questions for my free speech theory. When trans people use sex-segregated restrooms, the government (and private individuals) reacts to the message of gender nonconformity. By excluding trans people from the restrooms, the government suppresses their communication of gender nonconformity. Nonetheless, the government may still have legitimate interests in privacy and safety. These real interests should be balanced against each other under a First Amendment analysis. Here, I argue that courts should recognize how restricting transgender restroom access singles out conduct *because* it expresses a message of gender nonconformity. Only then can these interests be properly balanced.

### CONCLUSION

When the state regulates employee dress codes, determines child custody, or enforces sex segregation in restrooms, it claims to have neutral interests. But my analysis reveals how these allegedly neutral interests are achieved through singling out particular conduct because it expresses gender nonconformity. Even if a government employer's interest in professional appearance is independent of the message of gender nonconformity, it cannot define professional appearance by singling out gender nonconformity. I interpret *O'Brien* to prohibit singling out expressive conduct as a means of achieving otherwise valid government interests.

Gender nonconformity is more than a mere personal style. We use dress, appearance, and other gendered behavior to define and express our identity. We protect free speech partially out of respect for this key value of autonomy. When the state acts to suppress gender nonconformity, it infringes on this process of self-definition.

By using specific cases, I illustrate how my theory is viable in practice. The government does single out gender nonconformity. Right now, courts largely fail to interrogate state interests in regulating gender. Thus, my primary goal in this article was to establish how the state targets specific conduct that expresses gender nonconformity.

But my discussion of specific cases also raises theoretical and practical limits to my argument. What interests does the government as employer have in professional appearance? How can courts balance parental speech rights against best interests of the child? How far do legitimate interests in privacy reach in the restroom context? Because my central goal in this article is to reveal how state action is based on messages of gender nonconformity, I cannot fully address these limits. Once we recognize how the state

suppresses communication of gender nonconformity, we can better consider the limits of other state interests.

A free speech basis for transgender rights should be used to complement, not replace, antidiscrimination law. I do not argue for any single understanding of gender or the proper legal protection. Instead, I argue that conceptualizing gender nonconformity as free speech offers an additional legal avenue to protect gender identity, and may be more consistent with how some people understand their gender. This argument also speaks to broader concerns about the relationship between appearance, identity, and autonomy.