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We celebrate the legal, social, and political advances made by women’s advocates and enhance the relationship between theoretical and practical perspectives by promoting discourse gender and the law issues. We seek to enrich the dialogue between the sexes by cultivating interdisciplinary discussions and encouraging the affirmation of differences. Finally, we are committed to the challenge of presenting an integrated perspective: one that will empower all women.

History and Purpose

The Texas Journal of Women and the Law was established in 1990, fulfilling the vision of our founding members who sought to create a journal that would inspire dialogue about legal, social, and political issues affecting women—their rights, their bodies, their careers, their families. Our founders recognized the need for a forum within the University of Texas School of Law in which to confront, discuss, and challenge legal issues facing women. The Texas Journal of Women and the Law created such a forum. Our focus has grown to include all areas of gender and law. As students of the law and participants in the evolution of the status of women in society, we recognize that feminist legal inquiry should incorporate a broad spectrum of social equality issues, including issues related to race, ethnicity, class, religion, sexual orientation, and basic human and civil rights.

Texas’ rich history and cultural diversity provide a fertile ground for producing innovative approaches to persistent questions of social equality. We identify with the tradition of progressive women in Texas as well as the generation of unheralded individuals who have fought for gender equality in their own time. Our generation has benefited from the efforts of other feminists, and we strive now to make our contribution to the next generation.

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SOCIAL FACTORING THE NUMBERS WITH ASSISTED REPRODUCTION

Bridget J. Crawford and Lolita Buckner Inniss*

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In early 2009 the airwaves came alive with sensational stories about Nadya Suleman, the California mother who gave birth to octuplets conceived via assisted reproductive technology. Nadya Suleman and her octuplets are vehicles through which Americans express their anxiety about race, class and gender. Expressions of concern for the health of children, the mother's well-being, the future of reproductive medicine or the financial drain on taxpayers barely conceal deep impulses towards racism, sexism and classism. It is true that the public has had a longstanding fascination with multiple births and with large families. This is evidenced by a long history of media attention and film depictions of such families, both fictitious and real. However, there is a point at which fascination turns to disdain, and that occurs all too often when the parents of the children are revealed to be Other—outside of racial and class norms. This essay describes eight socio-legal anxieties that coalesce in response to Suleman's story: (1) race and racial hierarchies; (2) the contingency of white privilege; (3) the nature of white motherhood; (4) the role of doctors as agents of the state; (5) reproductive technology and class; (6) bodily perfection and class markers; (7) the bounds of the traditional family; and (8) geographical differences.

The bounds of tolerance strain and break when individual autonomy collides with majoritarian notions of civic and moral virtue. Derision of Suleman reveals the limitations of tolerance for women who deviate from prescribed norms, including norms of “choice.” Suleman's story is not just about multiple births, then, but about society's multiple anxieties when a woman breaches the bounds of racial, class and gender expectations.

I. INTRODUCTION

In early 2009 the airwaves came alive with sensational stories about Nadya Suleman, the California woman who gave birth to octuplets conceived via assisted reproductive technology. In doing so, Suleman breached numerous mainstream social norms of motherhood. Perhaps first and foremost, she went well beyond the two-child home that has become the standard for middle class-dom. It is as if there were a Familial Least Common Denominator rule applicable to middle class parenting. You take

1. For some of the earliest news stories reporting the octuplets' births, see Jeff Gottlieb & Sam Quinones, It's Sibling Revelry as Bonus Baby Makes Eight, L.A. TIMES, Jan. 27, 2009; On the Record With Greta Van Susteren (Fox television broadcast Jan. 26, 2009) (“It looks like it's going to be a full house for one family in California. An unidentified mother has given birth to octuplets. Yes, that is eight babies—six boys, two girls. All of the babies are in stable condition. This is only the second time in recorded history a women has delivered octuplets.”).
the mother, put her in the numerator and put the number of kids in the denominator and you win points based on how close the resulting fraction is to 1/1. For the wealthy and socially well-placed, extra children may be subtracted out in direct proportion to the parents’ wealth. This is fuzzy math for sure, but in any case, Nadya Suleman got the math wrong. Her eight babies were, moreover, in addition to six that she already had at home.

It is true that the public has had a longstanding fascination with multiple births and with large families. This is evidenced by a long history of media attention and film depictions of such families, both fictitious and real. However, there is a point at which fascination turns to disdain, and that occurs all too often when the parents of the children are revealed to be Other—outside of racial and class norms. Nadya Suleman and her octuplets are the vehicles through which Americans express their anxiety about race, class and gender. The nation’s id\(^2\) may be sublimated by an ego\(^3\) of “concern” — for the health of eight helpless children, for the children’s rights to live productive, healthy lives,\(^4\) for the taxpayer-funded programs that may be “burdened” with expenses for the children with special needs,\(^5\) for the safety of reproductive medicine\(^6\) or for the mental


4. See, e.g., Hospital Says Octuplets Are Off Ventilators, Associated Press (Jan. 29, 2009). Some public discussion has centered on whether children born in situations of grave physical or mental illness have a right not to come into existence at all, or, having been born, whether they have a cause of action against doctors or even their parents. See e.g., Litigation and Trial: The Tales and Tribulations of a Philadelphia Lawyer, Can the Octuplets Sue for Medical Malpractice?, http://www.litigationandtrial.com/2009/02/articles/litigation/ideas/can-the-octuplets-sue-for-medical-malpractice-part-1-of-2/ (Feb. 4, 2009). Such claims, termed “wrongful life,” typically occur in cases of physician negligence which causes birth defects, though it is perhaps noteworthy that the first such cases to use the term referred to claims made by healthy children born under the stigma of illegitimacy. See, e.g., Zepeda v. Zepeda, 41 Ill. App. 2d 240 (1963). Few jurisdictions recognize wrongful life claims. See José Gabilondo, Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction, 28 B.C. Third World L.J. 1, 19 n.69 (2008), citing Deana A. Pollard, Wrongful Analysis in Wrongful Life Jurisprudence, 55 Ala. L. Rev. 327, 329 (2004). Nonetheless, the potential of such claims by the Suleman octuplets raises a host of moral and legal issues including the specter of eugenics (see infra Part III.A) and varying and rapidly changing standards of “normality.” See e.g., Lori B. Andrews & Michelle Hibbert, Can Disability Itself Be Viewed as a Legal Wrong?, in Americans With Disabilities: Exploring Implications of the Law for Individuals and Institutions 318, 318-323 (Anita Silver ed., Routledge 2000)

5. See, e.g., Kimi Yoshino & Jessica Garrison, Octuplets Care Could End Up Costing
and physical health of the children’s mother. But these expressions of concern barely conceal the collective id’s worst impulses towards racism, sexism and classism. Nadya Suleman’s treatment by the press and public reminds us that, despite proliferating notions of shared social and ethical values in the Obama era, the bounds of tolerance strain and break when individual autonomy collides with majoritarian notions of civic and moral virtue. In an ostensibly equality-oriented society, Nadya Suleman embodies the Other and serves as a focal point for multiple anxieties about several socio-legal factors: (1) race and racial hierarchies; (2) the contingency of white privilege; (3) the nature of white motherhood; (4) the role of doctors as agents of the state; (5) reproductive technology and class; (6) bodily perfection and class markers; (7) the bounds of the traditional family; and (8) geographical differences.

II. RACE-ING NADYA SULEMAN: BLACK, WHITE, AND/OR OTHER

As commentators and internet denizens reacted to the octuplets’ births (“How could this happen?”), the world imbued Nadya Suleman with...

Taxpayers Millions, L.A. TIMES (Feb. 11, 2009) at 1; NPR Day to Day: Doctors Should Do More to Avoid Octuplets (Nat’l Pub. Radio broadcast Jan. 29, 2009) (“You’re going to have millions of dollars spent keeping these babies in the neonatal ICU. It’s either going to show up in your insurance premium, or it’s going to show up in the Medicaid budget of the state. I don’t know too many families who can afford this.”) (statement of Arthur Caplan, Director of the Center for Bioethics at the University of Pennsylvania).

6. See, e.g., NPR Day to Day: Doctors Should Do More to Avoid Octuplets, supra note 5.

7. Good Morning America (ABC television broadcast Jan. 28, 2009) (“How many babies could one woman’s body hold?”).

8. President Barack H. Obama, Inaugural Address (Jan. 20, 2009), available at 2009 WL 135031 *1 (White House) (“On this day, we gather because we have chosen hope over fear, unity of purpose over conflict and discord. On this day, we come to proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas that for far too long have strangled our politics . . . . The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea, passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.”).


10. See, e.g., posting of Resident from MA to The Dish Rag (L.A. Times) blog, http://latimesblogs.latimes.com/thedishrag/2009/02/octo-mom-nadya.html (Feb. 10, 2009, 16:29 PST) (“How could this happen? How did she slip under the wire, avoid the money issues, use this money for implanting embryos when CA will have pay for years [sic]. Were there no social workers or investigations done? She has used state money for lip enhancement, etc.”); posting of sonja leppert to Lipstick Politix by PollyPartisan blog, http://pollypartisan.wordpress.com/2009/02/06/octuplets-mom-wanted-millions-of-babies-
racial characteristics.\textsuperscript{11} Reporters searched public records, claiming to uncover important information. Years prior, Suleman had petitioned a court for a name change;\textsuperscript{12} she had divorced a man named Gutierrez\textsuperscript{13} (as if these combined facts—a name change plus a prior marriage to a man with a Latino-sounding surname\textsuperscript{14}—might explain why a woman who already had six children could want or love eight more). Latinas have large families, right? She must be Latina. When Gutierrez distanced himself from his former wife,\textsuperscript{15} then she must be black, according to the internet whispers, as if blackness could explain how or why anyone would have fourteen children. As if to confirm her blackness, we then learned that even before the birth of the octuplets on January 26, 2009, Suleman had been receiving food stamps for three of her existing six children who suffer from developmental disorders or disabilities.\textsuperscript{16} Food stamps are proof, to some,
of blackness.17

A. Anxiety #1: The Specter of Blackness

Both popular and purportedly scholarly accounts vilify black people, and especially black women, for poor parenting.18 Indeed, ineffective motherhood is often portrayed as the principal province of black women,19 the source of myriad social ills,20 and a contagion that moves from black women to larger society as more women of other races “fall prey” to the ills afflicting black mothers.21 Nadya Suleman thus became the newest

17. Then there was the unusualness of the children’s names: Maliyah, Noah, Jonah, Isaiah, Nariyah, Jeremiah, Makai, and Josiah. Jill Smolowe, The Challenge of Her Life, PEOPLE MAGAZINE, Feb. 23, 2009, at 70. Because of their “unique” names, the children were marked as racially ambiguous. Unique names are those which are not commonly used in European or any other regional or national tradition of naming, or names which have no clear or direct etymological link to any known word in any language (invented names), or highly unusual variations in spelling of common names. MICHAEL ERIC DYSON, IS BILL COSBY RIGHT? OR HAS THE BLACK MIDDLE CLASS LOST ITS MIND? 129-130 (Basic Civitas Books 2005); Stanley Lieberson & Kelly S. Mikelson, Distinctive African American Names: An Experimental, Historical, and Linguistic Analysis of Innovation, 60 AM. SOC. REV. 928, 930 (1995) (“There is a high correlation between unique first names and African ancestry in the United States. This is seen in a study of children’s names registered in Illinois in 1989. Twenty-eight percent of black girls and 16 percent of black boys were given unique names. By contrast, 5 percent of white girls and 3 percent of white boys were given unique names”); see also Roland G. Fryer, Jr. & Steven D. Levitt, The Causes and Consequences of Distinctively Black Names, 119 Q. J. ECON. 767 (2004) (“The incidence of unique naming among African Americans is even higher in recent years”).


20. Senator Daniel Patrick Moynihan infamously said, “[T]he Negro community has been forced into a matriarchal structure which, because it is to [sic] out of line with the rest of American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well.” Daniel Patrick Moynihan, The Negro Family: The Case for National Action, U.S. Dept. of Labor (Mar. 1965), available at http://www.dol.gov/asp/programs/history/webmeynihan.htm, in JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 128 (Oxford Univ. Press 1994). See also Juan Williams, A Question of Fairness, ATLANTIC MONTHLY, Feb. 1987, at 75 (reporting Supreme Court Justice Clarence Thomas’s statement during his Senate confirmation hearing that his sister receives government assistance and “gets mad when the mailman is late with the welfare check. That’s how dependent she is.”).

21. Black women are frequently portrayed as “bad mothers” all too often owing to their status as sole parents. See e.g. Laurel Parker West, Soccer Moms, Welfare Queens, Waitress Moms, and Super Moms: Myths of Motherhood in State Media Coverage of Child Care
evidence to which conservatives could point: “See, here’s another lazy (black) welfare queen having (too many) children.” The birth of the octuplets was not a media “miracle,” or a cause for celebration (would the reaction have been awe instead of horror if Suleman been white?). Rather Suleman and her octuplets might strain already-burdened (with too many of “those”) public resources.

When Suleman was revealed as not Latina and not African-American but “white” (read: white in America), the search was on to explain Suleman’s appearance. “Octuplets Mother Nadya Suleman Angelina Jolie Look-Alike,” bleated one entertainment website. Suddenly Suleman was a stalker, a mentally unbalanced, star-struck, fan-mail-sending weirdo. Her mental state, not her race, became an “explanation” for having fourteen children. Suleman (then read as white) was accused of having plastic surgeries to make herself resemble Jolie, a white celebrity known for full lips and dark hair, characteristics commonly associated with African-Americans. Suleman thus became the abnormal white woman (read as black) imitating a white woman famous for “black” aspects of her appearance. Suleman was engaged in a bizarre, reverse racial passing in


22. Scholars have discussed the way in which legislative and policy norms meant to control public spending have had as their stated and unstated objectives the reduction of family size among women of color. These objectives have been effectuated via various means, from forced sterilization and coerced birth control implants to “family caps” on welfare payments. See Melynda G. Broomfield, Controlling the Reproductive Rights of Impoverished Women: Is This the Way to “Reform” Welfare?, 16 B.C. THIRD WORLD L.J. 217, 227-35 (1996); Laurence C. Nolan, The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse, 3 AM. U. J. GENDER & L. 15, 21-24 (1994).


26. See, e.g. JAMES WELDON JOHNSON, AUTOBIOGRAPHY OF AN EX-COLOURED MAN (Hill and Wang 1960) (1927). See generally Valerie Smith, Reading the Intersection of
which an often-mocked black physical attribute - big lips - is re-appropriated (having been appropriated first by Jolie and other famous whites) to become a measure of white beauty.  

Dig further and we learned that Suleman’s father is a Middle Eastern immigrant, her mother is Western European. Suleman may have read culturally as white, then, but she is not all white, or not really white, again as if her ethnic heritage could explain her decision to have fourteen children. Suleman suddenly is rendered brown again, a backwards “Other” who should go back to “her” country where (veiled) women are not “liberated” enough to have control over their own bodies and (terrorist) men are the national enemies of any red-blooded American. Finally, we have an explanation that sticks: she’s really one of them, or at least, she’s

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27. YANICK ST. JEAN & JOE R. FEAGIN, DOUBLE BURDEN: BLACK WOMEN AND EVERYDAY RACISM 13 (M.E. Sharpe 1998) (1945) (writing that the systematic devaluation of black female beauty is often done in the midst of behavioral and attitudinal inconsistencies on the part of whites, allowing white women to seek dark skin via tanning and full lips via chemical injections, physical attributes for which black women are devalued).

28. Kimi Yoshino et al., Before the Octuplets: She wanted babies as a teenager. Then came the miscarriages, injury, wild mood swings and divorce, L.A. TIMES, Feb. 6, 2009, at 1 (describing herself as “half Arabic, half Lithuanian”); David Finnegan & Jeremy Olshan, Whoa, Momma!!! Octuplets Lady Has 6 Other Kids & All Live with Grandfolks, N.Y. POST, Jan. 31, 2009, at 5 (claiming that Suleman’s father, Ed Doud, is “a Palestinian immigrant who hails from Jerusalem”); Philip Sherwell & Caroline Hedley, Nadya Suleman Faces a Backlash over her Increasingly Peculiar Approach to Motherhood, SUNDAY TELEGRAPH (London), Feb. 8, 2009, at 17 (reporting that Suleman was “the daughter of an Iraqi linguist and a mother from Lithuanian stock who worked as a teacher”). See Posting by AnonymousJC to usmagazine.com (Feb. 18, 2009, 17:47 EST) (“For the record, Nadya Suleman is ½ Urkranian [sic] and ½ Iraqi, making her ethnically 100% Caucasion [sic]”).

29. Yoshino et al., supra note 28.

30. See, e.g., Posting of Bad Bill Bo Baggins to tmz.com, http://www.tmz.com/2009/02/18/octomom-nadya-suleman-foreclosure/ (Feb. 18, 2009, 14:19 EST) (“With all the cash from her interviews, I’m sure the mortgage will be paid real soon...There’s even talk of a reality show in the pipeline to boot...OctoMom will be doing great thanks to her adoring public wanting to know more about her Skank-azz....I say....ignore the b-otch....maybe she’ll take her litter and go back to IRAN!!!!!!!”); see also Post of Anonymous, Octomom Asks for Donations Via Web, to starmagazine.com, http://www.starmagazine.com/news/15223?comment_page=22#comments (Feb. 12, 2009) (“She's a dumb ass and need [sic] to go back to Iran and raise those bastards. The government has no money to pay for folks working hard and this one sucks the system dry with her trash. Tell her to go to hell! All of this for publicity and stupid folks to donate. Go back to your country. Your high school pictures show a different look from now with all of her plastic surgeries [sic] and fake nails!!! But no food for the children.”).
not one of us. Suleman is only contingently white.31

B. Anxiety #2: Of “Chicken Doo-Doo” Whites: Contingent Whiteness and Racial Hierarchy

In the film *Paper Moon*,32 the character Imogene (played by actress P.J. Johnson) is the fourteen-year old black maid of the sexually promiscuous exotic dancer Miss Trixie Delight (played by actress Madeline Kahn). Addie (played by actress Tatum O’Neal) is the nine-year old white daughter of a white man who is the object of Miss Trixie’s affections. Imogene explains to Addie that Miss Trixie, who appears Caucasian in all respects, is really not white— or at least not “white” beyond her appearance. “You know that little white speck on top chicken doo-doo?” Imogene asks Addie, “Well, that’s the kind of white I think Miss Trixie is. She’s just like that little white speck on top of old chicken shit.”33 Miss Trixie’s low morals and social transgressions make her whiteness, in Imogene’s cosmology, a preliminary stem of unsoiled whiteness leading to a dark and filthy (black) base.34 Public reaction to Nadya Suleman suggests that Suleman, like Miss Trixie, is being read as a “chicken doo-doo” white, a contingently white woman. Like Miss Trixie, Suleman becomes contingently white because her choices transgress the “rules” of whiteness. And in final confirmation that Suleman is just another “chicken doo-doo” white, an internet video went viral.35

In a widely distributed video, Suleman and her mother argued on camera for the world to see. Suleman angrily pleads with her mother, “You need to learn to understand... [and] learn to let go of what I chose to do. You didn’t accept it; move forward.”36 The octuplets’ grandmother counters that she “will never understand” her daughter’s choice to carry eight fetuses.37 Angela Suleman suggests her daughter should have given the embryos up for adoption. “How are you going to be able to provide for them?” the grandmother accusingly asks.38 In making the mother-daughter disagreement public, both Suleman and her mother transgress the bounds of

33. *Id.*
34. *Id.*; see Alvin Sargent, Script of *PAPER MOON* (1973).
36. *Id.*
37. *Id.*
38. *Id.*
white motherhood. They become the supposedly “low class” whites who air their family secrets on daytime talk-shows.  

The attempts to race Nadya Suleman reveal long-standing “rules” of American whiteness: notions of racial hierarchy in which whites with Northern European, Christian Protestant heritage are at the top and all others are placed downward along a rapidly plummeting slope leading to the ultimate in Otherness, blackness. Superficially, we may be well past the era of efforts to expose and shame racial “passing,” the assumption by mixed-race individuals of a white identity. But social scorn still will be brought on whites who, while having no black ancestry, fail to meet religious, familial, cultural or social norms for “counting” as white.


40. The large-scale 19th and early 20th century immigration of whites who were Catholic or Jewish greatly altered the public understanding of race. NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 1-5 (1995). One vivid illustration of this is the case of Leo Frank, the Jewish manager of a pencil factory in Atlanta, Georgia who was accused of raping and murdering an employee, thirteen year old Mary Phagan, the daughter of white tenant farmers. Frank v. Magnum, 27 U.S. 309 (1915). Initially, two black workers were arrested and interrogated about the crime, but according to prosecutors, all evidence pointed to Frank. Eric M. Freedman, Milestones, in Habeas Corpus Part II, Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions, 51 ALA. L. REV. 1467, 1474-501 (2000). Frank was tried and convicted. Id. Although the governor of Georgia ultimately commuted Frank’s death sentence to life imprisonment, Frank was taken from custody and lynched. Id. According to one scholar, the characterizations created in the Frank case, such as “perfectly innocent child” and “Northern [read foreign] Jew,” required the reconstruction, in some cases radical, of certain widely held beliefs about gender and race. MAROUF ARIF HASIAN, LEGAL MEMORIES AND AMNESIAS IN AMERICA’S RHETORICAL CULTURE 131-141 (Westview Press 2000). The case of Leo Frank, moreover, brought a new and complex element to understandings of race. This was true for two reasons. First and perhaps foremost, two blacks had been passed over for prosecution. Id. at 142 This in and of itself was seminal—both during the Jim Crow period and in more contemporary times, blacks were often constructed as criminals and the notion of choosing a white man in their stead to stand accused was well outside legal and social norms. Moreover, one of the principal witnesses in the case was a black man, and the Frank case is often cited as the first instance in which a black was allowed to testify in a Southern court against a white man. Id.


42. ADAM MCKIBLE, THE SPACE AND PLACE OF MODERNISM: THE LITTLE MAGAZINE IN NEW YORK 136-37, 147 (Routledge 2002); A.D. Powell, PASSING FOR WHO YOU REALLY ARE 5, 134 (Backintyme 2005); PAMELA L. CAUGHIE, PASSING AND PEDAGOGY: THE DYNAMICS OF RESPONSIBILITY 187-88 (The Bd. of Trustees of the Univ. of Ill. 1999).
They, too, are Other, and perhaps in the worst sense. They are biologically white, but they, like Miss Trixie, actively choose a path of social non-whiteness, bringing racial and cultural ambiguity to what remains a stubbornly binary racial discourse in the United States. These whites manqués also threaten to undermine long-established social and cultural understandings about race and gender. One site for this instability is the notion of white motherhood itself.

III. POLICING ROLES, POLICE ROLES

For much of American history, bad mothers frequently were seen as undermining ideals of American citizenship, while good mothers, responsible for raising physically and psychologically fit future citizens, were held up as the bedrocks for a strong, democratic future. Indeed, liberal conceptions of citizenship were implicitly (and sometimes explicitly) based on normative ideas about gender from earliest times in the United States, perhaps beginning with notions of "Republican Motherhood."  

A. Anxiety #3: Policing White Motherhood

Republican Motherhood was the virtuous motherhood that afforded women political status (though not necessarily political rights) in the early days of the new American nation. There were, however, distinct racial, class and even religious dimensions to the concept, as it encompassed only white, middle-class or wealthy Christian women. Black mothers, characterized as desexualized breeders of slaves, caretakers of white children, or hyper-sexualized, promiscuous hussies, remained outside the paradigm of virtue. In the post-slavery era, black women, Native American

46. Kerber, supra note 9, at 43.
47. Id.
48. Feldstein, supra note 45, at 5
49. Id. For an analysis of how persistent stereotypes hamper female law faculty members of color, see Regina Austin, Sapphire Bound! 1989 WIs. L. REV. 539, 540 (“Black bitch hunts are alive and well in the territory where minority female law faculty members labor. There are many things to get riled about that keeping quiet is impossible. We really cannot function effectively without coming to terms with Sapphire. Should we renounce her, rehabilitate her, or embrace her and proclaim her our own?”).
women, and poor, working-class white immigrants remained outside of the notions of Republican Motherhood, excluded by virtue of both their class and race.50

The racial and class dimensions of motherhood are, to a significant extent, still present in contemporary society. Feminists may resist rhetoric about “good mothers” as misogynistic efforts to regulate women,51 but even feminist value judgments about motherhood persist. Less inflammatory language of “concern” conceals these judgments and tempers them with distinctions between the institution of motherhood and the praxis of motherhood.52 But the public responses to Nadya Suleman remind us that the institution of motherhood still lies at the heart of entrenched racial and class hierarchies, all while we have come to recognize mothering to include a range of social, cultural and even political practices.53 Even among social progressives, a hidden transcript plays. Women (if educated, financially comfortable and adhering to mainstream values) may choose or not choose motherhood, as long as that choice is not publicly funded,54 doesn’t result in “too many” children,55 and doesn’t radically challenge the notion of the nuclear family.56 Middle-class white women most easily can follow this sub rosa transcript. Hence, critiques of Nadya Suleman operate to police and maintain the bounds of modern white, middle-class motherhood.

B. Anxiety #4: Doctors as Failed State Agents

One of the concerns frequently expressed in the media and on the internet was why any responsible physician would implant six or more embryos in a woman who already had multiple children.57 Moreover, once

50. Kerber, supra note 9, at 43.
51. Id. (commenting upon the image of the “bad mother” in the 1940’s and beyond and how certain texts of the period revealed overt misogyny and efforts to regulate women).
52. See, e.g., ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (Norton 1976). Rich situates motherhood as an oppressive institution, created by men to foster women’s dependence. At the same time, via her own anecdotal experiences of motherhood, she re-enshrines the notion of good mothering by arguing for an embrace of biological, woman-centered mothering that privileges the ideas and thoughts of women about parenting. Id.
55. Id.
56. Id. See also Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459 (1990); Laura T. Kessler, The Politics of Care, 23 WISC. J.L. GENDER & SOC’Y 169 (2008).
57. See e.g. Adam Pertman & Naomi Cahn, Limiting Reproduction, BALTIMORE SUN, Feb. 25, 2009, at 19A (discussing the case of Nadya Suleman and that of a 60 year old Canadian
the fetuses were viable, wouldn’t a responsible doctor have coordinated some sort of social-services intervention? This line of discussion highlights the ways in which pregnant women’s doctors are frequently viewed as having responsibilities beyond the role of health care provider. Hence, when they fail to act, as in the case of Nadya Suleman, they fail as representatives of the state.

Though not the case in the early history of medicine in the United States, for much of the twentieth century, doctors have been expected to act not only as health care providers but also as teachers, counselors, or parents to their patients. This is particularly true in the case of female patients, especially pregnant women. Even in the era of childbearing choice made possible by popular availability of contraceptives and legal access to abortion, the discursive construction of a woman’s decisions regarding childbirth is posited to be one wherein her doctor plays a significant if not a lead role. Where once women’s decisions to bear children were described as being between themselves and their God, those choices are now determined by women, their God and their doctors, or, more typically, thanks to the secularization of society (or the deification of doctors) women and their doctors. In this discussion of a woman’s

woman who gave birth to twins and arguing that federal and state governments should consider legal rules and boundaries for the fertility industry); Ashley Surdin, Octuplet Mother Also Gives Birth to Ethical Debate, WASH. POST, Feb. 4, 2009 (writing that guidelines call for in vitro fertilization of no more than two embryos and that the number implanted suggest a situation of law regulation).

58. See infra note 71 and accompanying text.

59. One scholar, in writing about the role of physicians in the abortion debate in the late modern era in the United States notes that in the early years of American history, during the colonial period and for decades thereafter, medicine was not practiced as part of a well-defined, guild system that maintained standards over the membership in and conduct of the profession. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 16 (Univ. of Cal. Press 1985). Rather, in much of the 19th century medicine was a domestic art, often relegated to women and slaves who practiced “healing arts” and folk medicine. Id. Even when medicine was practiced by medical school graduates, the quality of work of such persons was often widely variable, as many early schools were proprietary and were open to all who could pay their fees. Id. at 18.

60. LUCY M. CANDIB, MEDICINE AND THE FAMILY: A FEMINIST PERSPECTIVE 126-127 (BasicBooks 1995) (discussing the paternalistic, authoritarian model of the doctor-patient relationship and the way that such relationships have disserved women).

61. Id.

62. Id.

63. See e.g. MYRA MARX FERREE ET AL., SHAPING ABORTION DISCOURSE 160 (Cambridge Univ. Press 2002) (discussing how the choice of whether to terminate a pregnancy involves a woman’s relationship with God).

64. ROBYN ROWLAND, LIVING LABORATORIES: WOMEN AND REPRODUCTIVE TECHNOLOGIES 203-204 (Ind. Univ. Press 1992) (“Leaders of research in the reproductive area are deified as if they are ‘acting God’. The danger of this deification is that both the medical profession and the community may feel that medical teams are not accountable to the society in which they work.”).
“choice”, it becomes clear that choice, especially reproductive choice, is not the indivisible right that many have assumed. Rather, law and/or social policy dictate permissible and non-permissible behaviors, endorsed options and those options not endorsed.

Doctors enforce established mainstream cultural, social and legal norms of mothering. There are, for instance, a number of statutes that permit (and in some cases, mandate) physicians and other health care professionals to violate their pregnant patients’ confidentiality in order to report suspected drug or alcohol use to state authorities. There are also a number of laws requiring health care workers to report suspected incidences of abuse or neglect of a child. Although such rules ostensibly have the welfare of children in mind, they undermine parents’ confidentiality and privacy in ways that are permitted in almost no other area of the law.

Reporting rules deputize healthcare providers to act as agents of the state in what appears almost to be a third party policing scheme.

65. Id.
67. Spar, supra note 66, at 488-489.
71. Lolita Buckner Inniss, Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life? 11 U. PA. J. L. & SOC. CHANGE 75 (2007-2008), citing LORRAINE MASEROLLE & JANET RANSLEY, THIRD PARTY POLICING 52 (Cambridge Univ. Press 2006). Third party policing is a style of policing involving several entities, such as private individuals or community groups, who exercise regulatory control. Id. at 2. Those involved may be willing or unwilling partners. This is because included within the regulatory framework for such policing schemes are mechanisms for the police to coerce participation by the threat of civil or administrative sanctions for the failure to participate. Id. Harms occurring after the implementation of third party policing is often seen not only as a failure of governmental authorities but of the citizens who are made “partners” in third party policing. Id. Hence, when doctors act as Nadya Suleman’s doctors did, allowing her to undertake such an aberrational pregnancy, they fail not only in their individual capacities but also as state agents.

Besides the dictates of formal laws compelling physicians to participate in the regulation of mothers, there are stringent social or cultural norms that guide the behavior of doctors via-à-vis their patients. Though doctor-patient relationships are posited as purely
Discussion of doctors as failed state agents in its most basic sense refers to doctors’ failure to carry out formal state norms or even informal societal norms that replicate state norms. In this reading, doctors are failed state agents. However, it is perhaps more intriguing to center on the first two words of the phrase, reading it failed state agent. A failed state is a nation wherein there has been a collapse of sovereign capacity. There are arguably a number of ways to understand the notion of “failed state.”

Much has been written on developing typologies of the forms of state failure, using state strength, the degree of failure or its cause as a criterion. Yet, while no one view of the failed state prevails, there is a central and private, they may have substantial public elements, and be intensely political in nature. Roberts, supra note 19, at 134. While the conceptual model of the doctor-patient relationship is seen as contractual or benignly paternalistic, these models, rather than inuring to the benefit of women, frequently work to their detriment. Id. See also Mark A. Rodwin, Patient Accountability and Quality of Care: Lessons From Medical Consumerism and the Patients' Rights, Women's Health and Disability Rights Movements, 20 AM. J. L. & MED. 147, 150-151 (1994) ("Until very recently, medical professionals interpreted the ethical injunction to work in the interest of patients to mean that they should make decisions for patients. Physicians generally assumed that medicine was primarily a science, that doctors who allow women to guide their own care are therefore failures in the sense that they participate in the assault upon socially and culturally accepted medical norms. See C. Warshaw, Limitations of the Medical Model in the Care of Battered Women, 3 GENDER & SOC’Y 506 (1989).


immutable fact about the concept: “state failure” is “an umbrella for various tendencies which are not always the same, but are united in demonstrating the inability to control.” When doctors act as Suleman’s doctors did (or did not) to control her reproductive actions, they not only failed in carrying out ethical, legal or even social obligations. Their failure to rein in her behavior potentially speaks to broader, more systemic state demise: an absence of broad, top-down sovereign power. This brings us to one of the unstated anxieties of modernity, a fear engendered by globalization, multiculturalism, feminism and other post-modern vehicles of political and social inclusion that encroach on the domain of state power and normative customary conceptions. While individual autonomy is arguably one of the hallmarks of life within a republican government, it is not clear that this was ever envisioned as popular autonomy that extended to women and other outsiders.

IV. CLASSIFYING BODIES

A. Anxiety #5: Reproductive Technology and Class

The narratives of wealth and poverty run strongly through the telling of Nadya Suleman’s story and the cultural reaction to the birth of her octuplets. The “welfare mom” who already had six children brought eight more children into this world. It turns out that the octuplets weren’t conceived “by accident.” Suleman had been a long-time patient at a California fertility clinic; she was implanted with six embryos fertilized in the lab. How could a woman who receives public assistance for her children afford in vitro fertilization? Reproductive technology is expensive, after all. One cycle of in vitro fertilization costs well into six

75. A VELEN TREASURY: FROM LEISURE CLASS TO WAR, PEACE, AND CAPITALISM 342-343 (Rick Tilman ed., M.E. Sharpe 1993) (describing how, even though state power appears to have diminished in the wake of modern institutional notions of popular autonomy, state power has become diffuse and may be found in customary usages that circumscribe autonomy).
76. Kimi Yoshino et al., supra note 5.
77. Posting of Sassy Smith, Photos: Octuplet Mom Can’t Afford Babies BUT Can Afford Plastic Surgery, to FameCrawler, http://www.babble.com/CS/blogs/famecrawler/archive/2009/02/11/photos-octuplet-mom-can-t-afford-babies-but-can-afford-plastic-surgery.aspx (Feb. 11, 2009, 10:03 EST) (“[H]ow does a woman who can’t afford her fourteen children (yes, and never mind how she was able to pay for fertility treatments in the first place!), afford to get her lips enlarged? Explain that to me!”).
Suleman’s pregnancy itself then became a source of anxiety. At 33, Suleman didn’t fit the traditional notion of the upper-class (white) woman who waits “too long” to have children and therefore needs infertility treatment. Here was a woman, who looked black or maybe brown (but definitely not white), who already had six children. Three of them were eligible for food stamps. How then could Suleman pay for her infertility treatments, newspapers wanted to know? It turns out that the cry of “food stamps” was only an opening salvo in the ensuing volley of comments about a poor, socially marginal woman’s use of reproductive technology.

An oft-repeated concern was whether Suleman’s children would be Darwinian sub-specimens as the children of a “hopelessly odd” mother, as one observer termed her. An interest in the potential imperfections of Suleman’s children is perhaps ironic, given longstanding concerns that reproductive technology could be harnessed by eugenicists seeking to people society with homogeneous, mentally and physically (if not morally) perfect “boys from Brazil.” Reproductive technology supposedly is available to people of all backgrounds. But discussions of reproductive technology often lead to discussions of control over genetics, as would-be parents hope for children who are tall, intelligent and good-looking.
Implicit in these efforts to counter a presumed recession toward the genetic mean is the notion that science provides people with the ability to produce superior children.

B. Anxiety #6: Bodily Perfection and Class

Given the obsession with perfection seen in the deployment of reproductive technology, can it ever be acceptable to knowingly bear children who may be physically or mentally flawed? Some argue (to great opposition) that it may be morally appropriate to abort fetuses with physical or mental defects and even to commit euthanasia once such an infant is born. But there is a countervailing ethic that mediates for greater acceptance of children with disabilities. For example, George Will, a politically conservative columnist, stated that "In America, more than 80 percent of the babies diagnosed prenatally with Down syndrome are aborted. This is dismaying to, among others, the American Association of People with Disabilities, whose premise is that disability is a natural part of the human experience. "Will described his own experience as the parent of a relatively high-functioning son with Down Syndrome. Will does not acknowledge the role that race or class privilege played in his experience and hence the shaping of his opinion. When culturally privileged members of society choose life for "defective" fetuses, they encounter substantially less opposition than less privileged people who do so. As the public

in FEMINISM & BIOETHICS: BEYOND REPRODUCTION 116, 138 (Susan M. Wolf ed., Oxford Univ. Press 1996) ("... research on infertility, pregnancy and childbirth has allowed men to insert more control over the production of more perfect children."); CHARLES P. KINDREGAN & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW & SCIENCE 263 (ABA Publishing 2006). Consider, for example, the proliferation of couples seeking to produce smart, attractive children by seeking egg donors among Ivy League educated women. See e.g., Bridgewater, supra note 83, at 1225 (discussing the market for reproductive services and the fact that donors having particular traits and characteristics may be paid a market "premium," and citing a case wherein one couple offered to pay $50,000 to an egg donor who was a tall, Ivy League student with an SAT score greater than 1400).

85. Scientists have argued that there is an observable regression towards a mean intelligence quotient (I.Q.) in all persons within large groupings, notwithstanding the intelligence of any one person in the group, and that blacks have a higher regression toward the mean than whites. Nathan Brody, Jensen's Genetic Interpretation of Racial Differences in Intelligence, in THE SCIENTIFIC STUDY OF GENERAL INTELLIGENCE: TRIBUTE TO ARTHUR JENSEN 397, 405 (Helmuth Nyborg ed., Pergamon 2003). Others argue that regression is a statistical and not a genetic phenomenon and as such provides no evidence for either genetic or environmental determination of I.Q. See Brian Mackenzie, Fallacious Use Of Regression Effects In The I.Q. Controversy, 15 AUSTR. PSY. 369 (1980).

86. See Peter Singer, PRACTICAL ETHICS 175-177 (2nd ed., Cambridge 1993).

reaction to Nadya Suleman highlights, toleration turns to outright scorn when that unprivileged individual has conceived using artificial means.

V. EXCEEDING BOUNDARIES

The traditional nuclear family, consisting of a man and a woman who are married to each other and who have a limited number (somewhere between two and three) of shared offspring, is becoming less common as other types of families proliferate in our society. However, the notion of the traditional nuclear family still holds tremendous ideological sway. Variations from this norm are met with unease and resistance.

A. Cherchez L'Homme (Absent) and Other Assaults on Family Values

The female-headed household is often cited as the bane of society and

88. While the production of large families among white, middle class women was encouraged not so long ago, there was a radical change in the discourse at the turn of the century. Crusaders such as Margaret Sanger assailed large families, calling them "wicked" and "immoral" because of their "injury" to members of those families and to society itself. MARGARET SANGER, WOMAN AND THE NEW RACE (1920). While some laud Sanger as having the health and welfare of women at heart, others accuse her of having eugenicist views and for wanting to limit the growth of immigrant families. See, e.g., LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA 186-196 (Viking 1976); CAROLE R. MCCANN, BIRTH CONTROL POLITICS IN THE UNITED STATES, 1916-1945 100 (Cornell Univ. Press 1999); JAMES REED, FROM PRIVATE VICE TO PUBLIC VIRTUE: THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY SINCE 1830 (Basic Books 1978).

89. See, e.g., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000 CENSUS BRIEF, Table 1: Households by Type: 2000 (Sept. 2001), http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf. Family households constitute 68.1% of American households, where a "family household" consists of a "householder" (the owner or renter of the residence) and "one or more people living together, who are related to the householder by birth, marriage or adoption," whether or not other people unrelated to the householder also live in the residence. Id. at 2. 51.7% of families include married couples. Id. Female householders with no husband present are 12.2% of families. Id. Male householders with no wife present are 4.2% of families. Id. Two or more unrelated persons living together are 6.1% of all households. Id. Single persons living alone comprise approximately one-quarter of all households (25.8%). Id. For a discussion of the law's treatment of diverse families in the wealth transfer context, see Bridget J. Crawford, The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law, 3 PITT. TAX REV. (2005). See also Browne C. Lewis, One Size Does Not Fit All: A Proposal to Create a Flexible Intestacy System that Equitably Balances the Interests of the State, Marital Children and Non-Marital Children 1-2 (Feb. 18, 2007), available at http://ssrn.com/abstract=963919.

90. Laura T. Kessler, Transgressive Caregiving, 33 FLA. ST. L. REV. 1 (2005) (examining a less well-explored conception of family caregiving within the feminist and queer legal theory literature, revealing the way that family caregiving can be a liberating practice for caregivers whose practices challenge mainstream norms).
the source of numerous social problems. The absence of fathers in households is often seen as a principal reason for juvenile delinquency, poverty, illiteracy and plummeting graduation rates, as well as the prime reason for multigenerational illegitimacy. Rallying their followers with a demand for a return to "family values," conservative leaders frequently point to and assail the numerous other ways in which contemporary family configurations undermine established familial norms: living in families in which the parents are gay or lesbian partners, living in families where there are multiple generations or collateral relatives, living in families involving transnational or transracial adoption, or, finally, in families that are larger than average. Nadya Suleman, the unmarried mother of fourteen, ten of whom were born in multiple births, clearly breaches the heterodoxy.


93. Multiple births, especially in the era before fertility drugs and other assisted reproductive technologies, were often met with fascination. That fascination, however, sometimes turned to scorn when the parents belonged to a disfavored social group. Consider, for example, the treatment of the Oliva and Elzire Dionne, who in 1934 gave birth to what are believed to be the first quintuplets to survive their infancy and the first known set of female identical quintuplets. Their parents, poor, French-speaking and Catholic, existed as members of a minority subclass in Canada, and their Outsider status likely hastened the government's findings that they were unfit parents. The Dionne Quintuplets were taken from their parents and raised in a government compound, Quintland, where for several years they were put on public display. JAMES BROUGH, "WE WERE FIVE": THE DIONNE QUINTUPLETS' STORY FROM BIRTH THROUGH GIRLHOOD TO WOMANHOOD (1st ed., Simon & Schuster 1965). In adulthood, some of the siblings spoke bitterly of the way in which the press treated them as objects and animals. The Ontario government apologized to the three surviving sisters in 1998. Barry Brown, *Dionne Sisters to Get Settlement, Ontario's Apology*, BUFF. NEWS, Mar. 7, 1998 ("Though the sisters generated up to $350 million as wards of the province on public display at the Quintland theme park for 9 1/2 years, they saw little, if any, of that money."). More recently, black parents of multiple birth children have complained about the disparate treatment they received—less media attention or unfavorable media attention about their families, fewer product endorsement contracts, and less public charity. See, e.g., *The How and Why of Sextuplets, Quintuplets, and Other? Miracle? Multiple Births*, http://www.syl.com/articles/thehowandwhyofsextupletsquintupletsandothermiraclemultiplebirths.html (last visited Sept. 03, 2010) ("Some claims have been made recently that companies provide assistance to white families, but not to black families with sextuplets. One African-American couple in D.C., whose sextuplets occurred naturally, received far less attention than an Iowa couple who also gave birth to sextuplets at about the same time."). See also *The Harris Family Sextuplets: America's First Surviving African-American Sextuplets*, http://www.harrissextuplets.net/background.shtml (last visited Sept. 3, 2010) ("Despite some family an [sic] community support and public appearances including the new home they received through the Extreme Makeover Home Edition TV show, the couple has found meeting the financial demands of their large family a constant struggle. They rely on their faith in God to keep them going.").
The Suleman story unfolds to reveal a complex picture. She doesn’t work, but she is not entirely without income. Over an eight-year period, Suleman received disability payments of approximately $170,000 on account of a work-related injury. But that’s not all that is suspicious about Suleman. She is divorced and, at the time of the octuplets’ births, lived at home with her parents in a 3-bedroom home. By the way, her mother was behind on the mortgage payments, too. Most distressing of all, there is no father in the children’s family portrait. Suleman’s former husband is not the father of the octuplets. A former boyfriend says he might be the father, but he wants DNA testing. So what woman with no husband wishes to be implanted with multiple embryos, when she already has six children? If she is not racially Other, then she must be plain crazy.

B. Anxiety #8: Baby Crazy in California

Definitions of mental health have varied over time and within particular contexts. Some early definitions focused on the ability to adjust to new situations and to handle problems without marked distress. Other definitions noted the ability to be active and productive, having a life purpose, and accepting limits. The definition has expanded over the years, but these core aspects have remained. These definitions, however, rely upon normative parameters that exclude consideration of gender, race or

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94. Kimi Yoshino et al., supra note 5. Suleman worked in a psychiatric hospital and was injured in a patient riot. Id.
95. Shaya Tayefe Mohajer, Octuplets’ Grandpa Buys 4-Bedroom Home, Mom OKs Nursing Care for Babies, SAN JOSE MERCURY NEWS, Mar. 10, 2009, at 4A.
96. Id.
97. See Posting of Anonymous to usmagazine.com (Feb. 18, 2009, 09:18 EST ) (“I wouldn’t watch a show with Nadya Suleman. The poor children don’t even have a father let alone she is having her own mom take care of the children while Nadya doesn’t have a job, gets money from the government and basically she does nothing. I think it is so sad . . .”).
98. See Smolowe, supra note 17.
101. Id.
102. Id.
class and the ways in which these identity markers may intersect.\textsuperscript{103} Raced, classed and gendered others may, for example, exhibit what some commentators have described as “cultural paranoia”—a heightened level of vigilance necessary to navigate an alien and/or hostile social setting.\textsuperscript{104} They may also have alternate ideas about life priorities born of their own unique, Outsider experiences. When women of all colors, racial minorities or other outsiders exhibit these differences, they are more likely than their white male counterparts to be labeled as “crazy.” Witness the case of Nadya Suleman.

First, observe that even without other indicia of outsider status, Nadya Suleman is a Californian. For some critics, Suleman’s geographic location made it all the more likely that she was crazy. California is derided as the “land of nuts and fruits.”\textsuperscript{105} Second, and more importantly, Nadya Suleman’s choice to bear fourteen children while being unmarried and without visible means of support marks her as crazy for many. In a culture that is only nominally child-friendly, the decision to center one’s life around caring for so many children (perhaps to the exclusion of seeking market employment or, its presumed alternative, a man) strikes many observers as evidence of impaired judgment. A number of media accounts, apparently in an effort to bolster the narrative of her mental impairment, suggested that Nadya Suleman had acted erratically even before the birth of her octuplets. One series of stories, for example, seized upon the fact that several months prior she called 911 when she noticed that one of her children, a five-year old was missing.\textsuperscript{106} Suleman frantically reported that her son was missing, worrying that he has been kidnapped: “I’m losing my mind... Please, God, help me... oh, God, I’m going to kill myself... I’m going to kill myself....”\textsuperscript{107} While Suleman was on the line with the 911

\textsuperscript{103} Id.

\textsuperscript{104} Id.

\textsuperscript{105} Because of what many deem to be the proliferation of unusual behaviors and lifestyles and less rigid norms of sexual identity, Californians are frequently subjected to the slur (or the good-natured ribbing, depending on whom you ask) “nuts and fruits” indicating mentally unstable and the homosexual. See People v. Feagley, 535 P.2d 373, 393 n.25 (Cal. 1975) (describing how California prison guards would mock mentally ill inmates at “nuts, and fruits, and sex fiends”). See also THOMAS TRYON, CROWNED HEADS 331 (Knopf 1976). One character in that fictional story says to another, “Wimp, you’re in California, the land of nuts and fruits. They’re used to this sort of thing. You can get out in seven years, with good behavior.” Id.

\textsuperscript{106} OctoMom 911 - We Got the Calls! post to TMZ.com, (18:33 PM, Mar. 4, 2009); see also Good Morning America (ABC television broadcast Mar. 9, 2009). In that recording, Suleman screams, “Where’s my son? Where’s my son? Where’s my son? . . . Please help me . . . I’m going to die . . . oh, God, help me, God help me ... Where’s Jay-Jay? Where’s Jay-Jay? . . . I’m losing my mind . . . Please, God, help me . . . oh, God, I’m going to kill myself . . . I’m going to kill myself . . . I’m sorry [to the Operator].” Id.

\textsuperscript{107} TMZ.com.
operator, the child returned; he had taken a walk in the neighborhood.\textsuperscript{108} Is it really so “crazy” for a parent to call 911 when a child is missing? Many, many mothers and fathers would do just that.\textsuperscript{109}

VI. CONCLUSION: MULTIPLE ANXIETIES AND THE LIMITATIONS OF TOLERANCE

Applying mocking, scolding, jeering or (supposedly) humorous epithets to Nadya Suleman makes (and marks) her clearly and distinctly as the Other. Calling Suleman the “Octomom” is to liken her to an animal. To call her “Octopussy” is to make Suleman into a metonymic body part, a fictional character or a crude joke.\textsuperscript{110} The choice of a woman to risk her own health and the health of her children, when she has no visible means of support, is not a wise one. Such a woman will need tremendous support of all kinds and from all corners. It is legitimate to be curious about and even to criticize that choice. But make no mistake that for choice to have any meaning at all – in theory and in practice – then we must embrace the complexity and ambiguity arising out of a commitment to a woman’s right to control her own body. Derision of Suleman reveals the limitations of tolerance for women who deviate from prescribed norms, including norms of “choice.” Suleman’s story is not just about multiple births, then, but about society’s multiple anxieties when a woman breaches the bounds of racial, class and gender expectations.

\textsuperscript{108} Id.

\textsuperscript{109} Some television commentators sympathized with Suleman. See, e.g., Today Show (NBC television broadcast Feb. 10, 2009) (comments of reporter Natalie Morales: “[W]e’re talking a little bit more about Nadya Suleman, the mother of the octuplets, of course, and the controversy that was sparked by that 911 phone call . . . Some moms [are] sympathizing with her because if you have that moment of panic when your child is missing . . . If you’ve been there, you know what that’s like. But at the same time, others saying this could be another example of perhaps her being a not fit mother.”).

\textsuperscript{110} In the film \textit{Octopussy}, the 13\textsuperscript{th} in the James Bond series, a mysterious wealthy woman known as “Octopussy” (played by Maud Adams) hopes to avenge her the suicide of her father, an officer in the British Secret Service whose dishonesty had been discovered by Agent 007, James Bond (played by Roger Moore). \textit{Octopussy} (MGM/UA Entertainment Co. 1983).
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TRANSGENDER FOSTER YOUTH: A FORCED IDENTITY

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I. INTRODUCTION

Foster care should be a safe place for children to be nurtured and cared for until they reach the age of majority and are able to take care of themselves or until they are reunited with their birth parents or placed in other permanent homes. Yet foster care in this country is not a safe, nurturing environment for everyone. Services for lesbian, gay, bisexual, and transgender ("LGBT") foster youth are severely lacking, despite the fact that LGBT youth make up a disproportionately large number of minors in foster care.¹

Transgender youth in particular face enormous obstacles. Some scholars define the term "transgender" as referring to any person "whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are ‘supposed’ to be."² Generally, to be considered transgender, a person must stray significantly from traditional gender norms. Transgender youth are more likely than their peers to be placed in group foster homes because they are often rejected by their own families and are less likely to be adopted by or temporarily placed with private families.³ A group foster home is simply a residential facility where multiple foster children live full time. Unlike a placement with a private foster family where a child is cared for by foster parents, minors in group homes are cared for by employees working at the home. A group home is an alternative to placement with a private family, which is often out of reach for transgender adolescents because appropriate placements

¹. See SHANNAN WILBER, CAITLIN RYAN, & JODY MARKSAMER, CHILD WELFARE LEAGUE OF AMERICA, CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE 1 (2006), available at http://www.lsc-sf.org/wp-content/uploads/bestpracticeslgbtyouth.pdf (noting that LGBT youth are often rejected, harassed, and discriminated against in foster care and that LGBT youth are commonly moved from home to home due to overt discrimination or harassment from peers, caregivers, and staff, and reporting that there is a disproportionate number of LGBT youth in foster care). LGBT youth often face insensitive and discriminatory treatment, outright harassment, and violence at the hands of the child welfare staff. COLLEEN SULLIVAN ET AL., LAMBDA LEGAL DEFENSE & EDUCATION FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE 7, 11 (2001), available at http://www.jimcaseyyouth.org/docs/youthinthemargins_2001.pdf (also noting that LGBT youth make up a disproportionate number of the youth in foster care).


³. See WILBER ET AL., supra note 1, at 4 (noting that "[a] high proportion of LGBT youth who end up in state care leave home or are rejected from their homes as a result of conflict related to their sexual orientation or gender identity").
Transgender Foster Youth are difficult to find.

Despite the need for safe placements for transgender foster youth, there are currently only a few group homes in the United States specifically designed to meet the needs of LGBT youth, including Green Chimneys in New York City, the Waltham House in Waltham, Massachusetts, and GLASS in Los Angeles and Oakland. In practice, transgender youth are often sent to unfriendly group homes which reject the minor's deep-seated sense of identity, insisting that he or she dress and act in conformance with his or her birth sex. Studies have shown and many professionals agree that this is very harmful to adolescent development.

I had the opportunity to view this harm firsthand while working as a caseworker at Green Chimneys in New York City. Green Chimneys is a group foster home specifically designed to be a safe place for LGBT youth from the ages of 16 to 21. In 2002, a 16-year-old child, who I will refer to as “Natasha,” was placed at Green Chimneys. She had been in foster care for several years and had been moved from home to home. When Natasha first arrived at Green Chimneys, she was wearing traditionally male clothing, no make-up, and had very short hair. She seemed sullen, withdrawn, depressed, and devoid of almost all personality. Within a few weeks, Natasha began dressing as a female. She wore dresses, make-up, jewelry, and had a full head of long black hair. She immediately came alive and was able to express her personality. She was suddenly sweet,

4. See id. at xi (noting that Gay and Lesbian Adolescent Social Services (GLASS), the nation’s first group home for LGBT youth, was founded in 1984 in Los Angeles by Teresa DeCrescenzo). In 1987, Gary Mallon developed a residential program for LGBT youth at Green Chimneys Children’s Services in New York City. Id. GLASS and Green Chimneys “provide a range of services to LGBT youth in state custody, including foster care, mentoring, education, health care, transitional services, and residential care.” Id. Los Angeles and New York City provide “group facilities specifically for LGBT youth, while few LGBT youth services can be found elsewhere in the states’ foster care systems.” SULLIVAN ET AL., supra note 1, at 7. The Waltham House in Waltham, Massachusetts also provides residential services to LGBT youth. Barbara Fedders, Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth, 6 NEV. L.J. 774, 795 (2006); The Home for Little Wanderers: Waltham House, http://www.thehome.org (follow “Programs” hyperlink, then follow “Residential Care” hyperlink, then follow “Waltham House” hyperlink) (last visited September 14, 2009).

5. See Doe v. Bell, 754 N.Y.S.2d 846, 848-49 (N.Y. Sup. Ct. 2003); WILBER ET AL., supra note 1, at 6 (reporting that one study found that 78% of LGBT youth were removed or ran away from their foster care placements because of hostility toward their sexual orientation or gender identity); see also Anne Tamar-Mattis, Implications of AB 458 for California LGBTQ Youth in Foster Care, 14 LAW & SEXUALITY 149, 151 (2005) ("Transgender youth in foster care may not be allowed to dress or live as their identified gender, may be forced to use bathrooms and sleeping quarters inappropriate to their identified gender, and may be unable to access appropriate health and mental health care").

6. “Natasha’s” name has been changed for purposes of this Article to protect her anonymity.
loud, warm, and funny. After Natasha had been in the home for approximately one year, it was decided that she could not remain at Green Chimneys. She had been consistently breaking curfew and violating other house rules. She was sent to live in a new group home in Tennessee. When she arrived at the group home, she was told that she had to dress in masculine attire. She would not be allowed to wear a hair piece, make-up, skirts, dresses, etc., she would be referred to as “he,” and would be called by her masculine birth name. She ran away within the first few days and has not been seen or heard from since. It is likely that she chose to live on the streets rather than take on a forced gender identity.

There are currently very few explicit protections for transgender youth in foster care. Because federal and state law are largely silent on the issue, it is likely that many transgender foster youth suffer as Natasha did. This Article argues that minors in group foster homes cannot legally be forced to wear traditionally gender-conforming clothing or otherwise perform traditional gender roles, regardless of their biological sex. Although this Article focuses primarily on clothing and physical appearance, the arguments also apply to other aspects of gender expression, which may include walking, talking, choice of romantic partner, etc. Part I examines the importance of allowing adolescents to freely express their own gender identity and also explores relevant federal and state law. Part II argues that to force minors in group foster homes to wear traditionally gender-conforming clothing or otherwise perform traditional gender roles violates the right to free speech under the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. The Article concludes by recommending federal and state legislation as well as state agency policies explicitly protecting a foster youth’s freedom to express his or her own gender identity while living in a group home.

7. See Sullivan et al., supra note 1, at 12 (state agencies are often blind and indifferent to the plight of LGBT youth in foster care, which “translates into closeted and isolated, or abused and unprotected, LGBT adolescents”).

8. The treatment of transgender foster youth placed with private families is beyond the scope of this Article.

9. It is important to note that although this Article focuses on the treatment of foster youth in group homes, the majority of the arguments apply equally to minors in state institutions generally. The bulk of the arguments also apply to state-sponsored discrimination against foster youth or youth in general on the basis of sexual orientation.
II. BACKGROUND: THE IMPORTANCE OF GENDER IDENTITY AND THE STATE OF THE LAW

A. The Importance of Allowing Young People to Express Their Gender Identity

Many courts, psychiatrists, scholars, child welfare specialists, and social scientists agree that it is harmful to prevent a transgender adolescent from expressing his or her gender identity. The Child Welfare League of America, for example, issued a report in 2006 explaining that "[e]xploration, expression, and integration of identity are crucial parts of positive adolescent development."\(^{10}\) The report asserts that when these normal processes are interrupted, there may be tragic results.\(^{11}\) The report further explains that discrimination against LGBT youth eventually leads to increased bias and fear and, in turn, to increased harassment and violence.\(^{12}\) The Child Welfare League urges caregivers to allow transgender youth to "wear clothing that is consistent with their gender identity" in order to promote self-esteem and counsels against "forc[ing] them to wear clothing according to their birth sex."\(^{13}\)

Courts have also given weight to the testimony of professionals asserting the importance of allowing young people to express their gender identity. The court in Doe v. Bell, for example, took note of a psychiatrist's testimony that the treatment plan for the transgender youth at issue called for her "to dress according to her identity as a woman, including 'wearing girls' clothing, accessories, and make-up, and sometimes other items to make [herself] look . . . more feminine, such as breast enhancers."\(^{14}\) The psychiatrist explained that forcing minors to dress in conflict with their identity causes "significant anxiety, psychological harm, and antisocial behavior."\(^{15}\) The court also noted that Gerald P. Mallon, Ph.D., a professor at the Hunter College School of Social Work and founder of Green Chimneys, testified that "[t]he proper course of treatment for transgendered boys is to allow them to wear feminine clothing in an integrated

\(^{10}\) WILBER ET AL., supra note 1, at 27.

\(^{11}\) Id. at 27-28.

\(^{12}\) Id. at 28.

\(^{13}\) Id. at 29; SULLIVAN ET AL., supra note 1, at 13 (noting that hostility towards non-traditional gender identity can lead to a severe loss of self-esteem in LGBT youth).

\(^{14}\) Doe v. Bell, 754 N.Y.S.2d 846, 848 (N.Y. Sup. Ct. 2003); see also Doe v. Yunits, 2000 WL 33162199, at *3 (Mass. Super. Ct. 2000) (noting that "plaintiff's ability to express herself and her gender identity through dress [was] important to her health and well-being, as attested by her treating therapist").

\(^{15}\) Bell, 754 N.Y.S.2d at 848.
environment." The court gave credence to Dr. Mallon and the psychiatrist’s testimony and ordered the group home at issue to allow the child to wear gender non-conforming clothing.  

Similarly, experts generally agree that attempts to “cure” individuals with non-conforming gender identities through aversion therapy or other techniques are unsuccessful and can cause severe psychological and sometimes even physical damage. Thus, many professionals today believe that it is vital to facilitate a young person’s gender expression rather than stifle it.

B. The Current State of the Law

1. Relevant Statutory Law

Despite the importance of embracing a young person’s gender identity, there are currently no federal laws that explicitly require state foster care agencies to refrain from discriminating against foster youth because of sexual orientation or gender identity. California is the only state that has enacted a law that explicitly protects LGBT youth from discrimination in foster care. California passed AB 458, the Foster Care Nondiscrimination Act, on September 6, 2003. The Act provides that

16. Id. at 848-49.
17. See id. at 856.
18. Compare Michael G. Gelder & Isaac M. Marks, Aversion Treatment in Tranvestism and Transsexualism, in TRANSEXUALISM AND SEX REASSIGNMENT 402-03 (Richard Green & John Money eds., 2nd prtg. 1975) (concluding “that faradic aversion therapy is a valuable treatment for patients with transvestism, but it is less useful in patients in whom transsexualism is pronounced”), with Gerald P. Mallon, Practice with Transgendered Children, in SOCIAL SERVICES WITH TRANSGENDERED YOUTH 49, 55-58 (Gerald P. Mallon ed., 1999) (asserting that “because they are told they do not fit in . . . transgendered youth are at risk for depression, anxiety, self-abuse, suicide, and family violence,” and that treatments may be “little more than abuse, professional victimization, and profiteering”), and Tamar-Mattis, supra note 5, at 164 (noting that “[t]here are numerous reports of LGBTQ foster youth being forced into ‘reparative’ therapy intended to change their sexual orientation or gender identity. This kind of treatment is now widely recognized as inappropriate and harmful, but unfortunately it has not yet entirely vanished”).
19. See 42 U.S.C. § 671(a)(18)(B) (2000) (federal law prohibiting agencies that receive federal funding for foster care from denying or delaying foster care placements “on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved,” omitting sexual orientation or gender identity); see also James W. Gilliam, Jr., Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System, 37 LOY. L.A. L. REV. 1037, 1045 (2004).
20. Gilliam, supra note 19, at 1045; see also Tamar-Mattis, supra note 5, at 150.
Transgender Foster Youth

LGBT foster children have a right to equal access to all services, placement, care, treatment and benefits of the foster care system, without discrimination or harassment on the basis of sexual orientation or gender identity. The Act also requires training for group home administrators on the rights of LGBT foster youth. The Act does not specifically define what constitutes discrimination on the basis of gender identity. Such discrimination, however, would presumably include forcing a minor to conform to a particular gender identity.

Although California is the only state that expressly protects against discrimination on the basis of gender identity in foster care, many states have statutes that prohibit discrimination by governmental agencies on the basis of gender identity in general. For example, Rhode Island's law provides that “[e]very state agency shall render service to the citizens of this state without discrimination based on race, color, religion, sex, sexual orientation, gender identity or expression, age, national origin, or disability.” Some states have relevant laws that protect youth who are living in “institutional settings,” which likely include group foster homes. Iowa, for example, prohibits state employees from engaging in sex-based discrimination against a person in the care or custody of a state institution. Other states prohibit discrimination in businesses or other facilities that are “public accommodations.” Hawaii, for example, prohibits discrimination on the basis of gender identity or expression in

CODE §§ 16001.9, 16003, 16013 (West Supp. 2004).

22. Tamar-Mattis, supra note 5, at 151.
23. Id.
24. Id. at 152.
25. Moreover, state agencies generally do not provide explicit protection for transgender foster youth. The Lambda Legal Defense Fund published a report based on a survey of LGBT-related foster care policies and services in several states, including California, Colorado, Connecticut, Florida, Illinois, Kentucky, Montana, New Jersey, New York, North Carolina, Ohio, Texas, and Washington. Sullivan et al., supra note 1, at 7. The 2001 report concluded that not a single surveyed state foster care agency maintained formal policies prohibiting discrimination against LGBT foster care youth (including California). Id at 12. The study also showed that no state required training for foster care staff on sensitivity to LGBT youth, and only a handful offered any form of optional training. Id.

28. See Estrada & Marksamer, supra note 26, at 438 n.81.
29. See id. (citing Iowa Code Ann. § 19B.12(2) (West Supp. 2006)). It is unclear whether the statute prohibits discrimination based on gender identity as well as on biological sex.
30. See id.
Finally, many states have disability laws that prohibit discrimination against the disabled or that require reasonable accommodations for the disabled. Some courts have held that being transgender or having "Gender Identity Disorder" ("GID") constitutes a disability and therefore requires reasonable accommodation. For example, the court in Doe v. Bell held that a 17-year-old male-to-female minor must be allowed to wear dresses and skirts in her group foster home because she was entitled to reasonable accommodation for her GID. The federal Americans with Disabilities Act, however, is not helpful to transgender youth in foster care because it expressly excludes "transvestism, transsexualism . . . [and] gender identity disorders not resulting from physical impairments." Thus, advocates for transgender foster youth may find it useful to investigate the above-mentioned state laws.

2. Relevant Caselaw

Although courts across the country have differing views on the issue of gender identity discrimination, there are many cases which have prohibited discrimination based on the failure to conform to stereotypes of how men and women should behave. In Price Waterhouse v. Hopkins, for example, the Supreme Court found that impermissible sex stereotyping occurred when members of an accounting firm denied a woman a promotion because she did not walk, talk, or dress femininely. In addition, in Rosa v. Park West Bank, the court found that refusing to grant a biological male dressed in feminine attire a loan until he went home to change clothes would likely constitute unlawful sex discrimination.

Most of the existing cases addressing gender identity discrimination concern sexual harassment of transgender people or employment discrimination on the basis of gender identity. There are very few cases that specifically address gender identity discrimination in foster care. In 2003, however, a New York court decided such a case in Doe v. Bell, as

32. See, e.g., R.I. GEN. LAWS § 28-5.1-7(a) (2003); MINN. STAT. ANN. § 363A.02(1)(a)-(5) (2004); see also Hispanic Aids Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 45-46 (2005).
38. Tamar-Mattis, supra note 5, at 156.
Transgender Foster Youth discussed above. The case concerned a 17-year-old male-to-female transgender youth (Jean) living in a group foster home. Jean’s group foster home, Atlantic Transitional, told her that she could not wear “feminine attire” in the facility. Atlantic Transitional argued that allowing her to wear feminine attire would jeopardize the safety of the residents and might lead to unsafe and emotionally harmful sexual behavior. After Jean petitioned the court to require the home to allow her to dress in feminine clothing, the home changed its policy. The home narrowed its restriction so that no resident could wear dresses or skirts. Jean had been diagnosed by a psychiatrist with GID. Her psychiatrist recommended that Jean wear feminine clothing as part of her treatment. Jean argued that GID is a disability under state law. The court agreed and found that the State Human Rights Law required the home to provide reasonable accommodations not offered to others in order to provide equal opportunity. The court concluded that allowing Jean to wear skirts and dresses was a reasonable accommodation.

Although this New York court prohibited the foster home from discriminating based on gender identity, it is far from clear whether other state courts will agree. Most states have not directly addressed the issue of gender identity discrimination in foster care and most group foster homes are therefore left with little to no guidance.

40. Id. at 847-48.
41. Id. at 849.
42. Id. at 855.
43. Id. at 849-50.
44. Id.
45. Id. at 848.
46. Id.
47. Id.
48. Id. at 850, 850-53.
49. Id. at 853.
50. But see Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Ct. 2000). Although set in a public school rather than a group foster home, the case of Yunits is an important case that should provide guidance to group foster homes as discussed below.
III. ARGUMENT: GROUP FOSTER HOMES MAY NOT LEGALLY FORCE MINORS TO WEAR TRADITIONALLY GENDER-CONFORMING CLOTHING OR OTHERWISE PERFORM TRADITIONAL GENDER ROLES

A. The First Amendment Right to Free Speech

Prohibiting a young person living in a group foster home from expressing his or her own gender identity violates the minor’s First Amendment right to free speech. Although there are not many cases addressing First Amendment rights in foster care, some courts have found that public school officials may not suppress a student’s expression of his or her gender identity or sexual orientation. In Doe v. Yunits, for example, a Massachusetts Superior Court found that a 15-year-old male-to-female student, Pat Doe, would likely prevail on a First Amendment claim against the school district and school officials for prohibiting her from dressing in a manner consistent with her gender identity.

In Yunits, the court applied the federal free speech analyses set forth in Texas v. Johnson and Tinker v. Des Moines Community School District. In Johnson, the Supreme Court found that courts must first determine whether a plaintiff’s conduct or symbolic speech is expressive. In making this determination, courts have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” If the conduct or speech is expressive, courts must then decide whether the regulation is related to the suppression of free expression. If it is related, then courts should subject the regulation the “most exacting scrutiny.”

51. See U.S. Const. amend. I (guaranteeing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).
53. Yunits, 2000 WL 33162199 at *3-56.
54. Id. at *3-54 (citing Texas v. Johnson, 491 U.S. 397, 403 (1989); Tinker v. Des Moines Cnty. Sch. Dist., 393 U.S. 503 (1969)).
55. Johnson, 491 U.S. at 403.
56. Id. at 404 (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)).
57. Id. at 403.
58. Id. at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
“materially and substantially interfere[s] with . . . appropriate discipline in the operation of the school.” 59

In Yunits, Pat Doe’s junior high school told her that she could not enroll in school if she wore girls’ clothing or accessories. 60 Applying Johnson, the court found that Doe was likely expressing her identification with the female gender by dressing in traditionally feminine clothing and that this expression was a “necessary symbol of her very identity.” 61 The court also explained that Doe’s message was understood by those perceiving it and that the school’s conduct was meant to suppress Doe’s speech. 62 Applying Tinker, the court found that Doe’s conduct did not “materially and substantially [interfere] with the work of the school” and therefore could not be suppressed. 63 The court noted that the defendants only found Doe’s clothing distracting because Doe was a biological male. 64 The court concluded that prohibiting Doe from wearing traditionally female clothing to school was likely an unconstitutional suppression of free speech. 65

Likewise, prohibiting a young person in a group foster home from dressing in a manner consistent with his or her gender identity violates that individual’s First Amendment right to free speech. Applying Johnson, a foster youth’s gender identity is expressive conduct and a “necessary symbol” of identity. It is difficult to imagine a more personal and important form of expression than that of one’s own gender identity. This is particularly true for transgender youth, who often take purposeful measures to dress and behave in certain ways in order to express themselves. 66 In addition, people generally understand that a transgender person’s attire conveys the particularized message of association with a specific gender. For example, a male-to-female transgender person may dress in feminine clothing to convey the message that she is female and society generally understands that message. 67 Although the cases above

59. Tinker, 393 U.S. at 509.
61. Id. at *3 (citing Johnson, 491 U.S. at 403).
62. Id. at *4 (citing Bivens v. Albuquerque Pub. Sch., 899 F.Supp. 556 (D.N.M.1995) (student did not provide evidence that wearing sagging pants to express his identity as a black youth was understood by others and so wearing sagging pants was not speech)).
63. Id. at *3 (citing Tinker, 393 U.S. at 739).
64. Id.
65. Id. at *3-6.
67. Cases such as Richards v. Thurston are distinguishable. See 424 F.2d 1281 (1st Cir. 1970). In Richards, the court rejected the notion that a young man’s long hair was of a sufficiently communicative character to warrant the full protection of the First Amendment. Id. at 1283. In that case, however, the young man’s choice to wear his hair long was likely not intended to convey his gender identity. Whether his hair was long or short, it is likely that others understood him to be male. If a male-to-female transgender individual chose to
focus on manner of dress, the same principles would apply to cases involving other conduct. Such cases are likely to be less clear-cut and would need to be analyzed on a case-by-case basis to determine whether the conduct was an integral part of one's gender expression. Moreover, courts should find that attempting to force foster youth in group homes to conform to particular gender stereotypes is directly related to the suppression of free expression and that there is no persuasive justification for such suppression. Thus, suppressing a foster child's gender expression is not permissible under *Johnson*.

Some may argue that requiring youth in group homes to conform to gender norms is permissible under *Tinker* because such conformity is necessary to avoid disruption or to protect the rights of others. They may argue that because foster youth in group homes are likely to be more difficult to control than their peers and because they live together full time, allowing a foster child to express a non-traditional gender identity is likely to cause significant disruption or even violence in the home. The case of *Fricke v. Lynch* is instructive on this point. In that case, a school official refused to allow a student to bring a same-sex date to the high school prom. The school officials argued this was necessary to prevent violence. The court found, however, that this refusal violated the student's First Amendment right to free speech. The court held that schools have an obligation to protect and foster the students' right to free speech and to "not stand helpless before unauthorized student violence." The court also explained that "[t]o rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard. The first amendment does not tolerate mob rule by unruly school children." In the case of group foster homes, any disruption caused by a non-conforming gender identity would likely be caused by animosity towards transgendered persons. "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." Group foster homes should therefore not be permitted to wear her hair long, however, it is more likely that she would be trying to convey the particularized message that she identifies as female.

69. *Id.* at 382-83.
70. *Id.* at 383.
71. *Id.* at 387.
72. *Id.*
73. *Id.*
stand by and allow "hecklers" to cause disruption based on such animus. If this requires state agencies to create more transgender or LBGT friendly group homes, then states should be required to do so in order to protect free speech. To the extent that any disruption is caused by basic concerns other than pure animosity, it is easy to imagine solutions. For example, group foster homes could provide single occupancy bathrooms and bedrooms for its transgender youth. Thus, suppressing a foster child’s gender expression is not permissible under Tinker.

Furthermore, protecting a young person’s right to express his or her gender identity is even more important in the context of a group home than in a school and therefore the state should be required to show a greater degree of disruption than contemplated in Tinker in order to suppress such expression. A group foster home is just that: a home. The home has traditionally had the highest level of free speech protection. For example, obscenity or hard core sexual materials are generally not protected by the First Amendment. In 1969, however, the Supreme Court found that obscene materials are generally protected in the home.

It is clear why the freedom to express one’s gender identity in the home is so important: one’s home is the one place where a person should be able to express who he or she truly is. It is easy to imagine how devastating it would be for the average person to be forced to take on a foreign gender identity at all times in his or her own home. It is also important to note that young people in group foster homes generally have no choice but to live in the home. It is absurd for a state to require a child to live in a group home and then require that child to perform an uncomfortable and unwelcome gender identity.

Thus, given the importance of expressing one’s gender identity in the home and the lack of an adequate justification for prohibiting such expression, courts should find that prohibiting a minor in a group foster home from expressing his or her gender identity through clothing and/or conduct is an unconstitutional suppression of speech, even assuming a certain amount of disruption.

Finally, forcing a young person to take on an unfamiliar gender identity is also compelled speech in violation of the First Amendment. In Wooley v. Maynard, the Supreme Court held that “the right of freedom of thought protected by the First Amendment against state action includes

75. See Tinker v. Des Moines Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (noting that “[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”).
both the right to speak freely and the right to refrain from speaking at all.\textsuperscript{78} The Court further explained that the state may only compel speech if it has a sufficiently compelling countervailing interest.\textsuperscript{79} If a male-to-female transgender youth is required to remove all make-up and accessories, to wear male clothing, and to respond to a male name, she is being compelled to declare that she associates with the male gender (although requiring a female to wear pants might not constitute compelled speech, given that a woman wearing pants today generally does not convey that she is male). The point becomes even more obvious if one imagines a young man who is not transgender being required to wear make-up, feminine clothing, and accessories. This would clearly be compelled affirmation: the state would be requiring the young man to express that he is female. For the reasons discussed above, the state does not have a sufficient countervailing interest in requiring gender conformity for foster youth.

Therefore, a group foster home may not force its residents to take on an unwelcome gender identity without violating the First Amendment right to free speech.

B. \textit{The Due Process Clause of the Fourteenth Amendment}

Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct . . . '[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'\textsuperscript{80}

The Due Process Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law."\textsuperscript{81} Refusing to allow a young person in a group foster home to express his or her gender identity through clothing or conduct is a violation of the Due Process Clause for two reasons. First, a minor in a group foster home has a liberty interest in expressing his or her gender identity and there is no legitimate reason to infringe on that interest. Second, states have an affirmative duty under the Due Process Clause to care for and protect foster youth in state custody.

\textsuperscript{79} Id. at 716.
\textsuperscript{80} Lawrence v. Texas, 539 U.S. 558, 562, 574 (2003).
\textsuperscript{81} U.S. CONST. amend. XIV.
Forcing transgender youth to conform to traditional gender norms can cause serious emotional harm.

1. Liberty Interest in Gender Expression

Turning to the first point, many courts, including the Supreme Court, agree that a person has a liberty interest in appearance and manner of dress.82 "In general, '[l]iberty under law extends to the full range of conduct which the individual is free to pursue.'"83 In Richards v. Thurston, for example, the First Circuit found that a high school student had a liberty interest in wearing his hair long, despite declining to find that a fundamental right was involved.84 In Zalewska v. County of Sullivan, New York, the Second Circuit found that a female county employee had a liberty interest in wearing a skirt to work.85 In Yunits, the court found that a 15-year-old male-to-female public school student had a liberty interest in being allowed to dress in traditionally feminine clothing while at school.86 Thus, courts should find that a transgender foster child living in a group home has a liberty interest under the Due Process Clause to express his or her gender identity.

Finding a liberty interest does not, however, end the due process analysis. If that liberty interest involves a "fundamental" right, such as the right to travel, a state may only infringe on that right if it has a compelling reason to do so.87 If a liberty interest is not "fundamental," that interest is "afforded only the minimal protection of the rational basis test."88 Under a rational basis review, "the . . . regulation must be . . . rationally related to a legitimate government interest."89

It is conceivable that courts might find that youth in group foster

83. Id. at 321 (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).
85. Zalewska, 316 F.3d at 321.
87. Richards, 424 F.2d at 1284.
88. Zalewska, 316 F.3d at 321.
89. Id. at 322 (quoting McCulloch v. Maryland, 17 U.S. 316, 421-23 (1819)).
homes have a fundamental right to express their gender identity. In Richards, the First Circuit quoted the Supreme Court in stating that:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, ‘The right to one’s person may be said to be a right of complete immunity: to be let alone.’

Expressing one’s gender identity involves basic possession and control over oneself. In addition, the First Circuit explained that “a narrower view of liberty in a free society might, among other things, allow a state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.” Indeed, it is difficult to imagine the federal government or the states prescribing a manner of dress and a required level of “femininity” or “masculinity” for citizens. This would more than likely offend the majority’s notion of basic freedom. Such regulation should not be more acceptable if it only effectively limits a minority of citizens.

Given the courts’ reluctance to recognize new fundamental rights, however, it is more likely that the right to one’s gender identity while in state custody would be subject to a rational basis review. Courts should find that states do not have a legitimate interest in forcing youth in group foster homes to conform to traditional gender norms. The case of Yunits is instructive. There, a junior high school told a 15-year-old male-to-female transgender student that she could not enroll in school if she wore girls’ clothing or accessories. The court explained that the due process analysis turned on whether the government’s interest in restricting liberty was strong enough to overcome the student’s liberty interest. The court concluded that because the student’s attire was not sufficiently distracting, she would likely prove that the state’s interests did not overcome her liberty interest in her appearance.

Richards is also instructive on this point. In Richards, the First Circuit found that a high school student had a liberty interest in wearing his

90. Richards, 424 F.2d at 1285 (citing Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891)).
91. Id.
93. Id. at *6.
94. Id.
95. Richards, 424 F.2d at 1281.
hair long and that there was no “outweighing state interest justifying the intrusion.”\textsuperscript{96} The court explained that when looking to the state interest, courts “must take into account the nature of the liberty asserted, the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served.”\textsuperscript{97} Focusing on the importance of context, the court gave the example that one has the right to be nude in one's home but not in public and also explained that students have somewhat limited rights while in public school.\textsuperscript{98} The court also explained that “[o]nce the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown.”\textsuperscript{99} The court concluded that the school had not shown a legitimate reason for requiring the student's hair to be short, noting that “compelled conformity to conventional standards of appearance [do not] seem a justifiable part of the educational process.”\textsuperscript{100}

Applying the reasoning in both \textit{Yunits} and \textit{Richards}, it is important to note that the liberty interest at stake for transgender foster youth is of critical importance. As discussed above, a young person's ability to express his or her gender identity is vital to that person's development, self-esteem, and emotional well-being. In addition, the freedom to present oneself as either male or female is arguably more important than the freedom regarding hair length at issue in \textit{Richards}. \textit{Richards} also involved personal appearance at school, while the issue here is appearance or conduct in the home. As the court in \textit{Richards} made clear, people generally have more freedom in their homes. Thus, the liberty interest at stake for transgender foster youth is significant.

Furthermore, state foster care agencies simply cannot provide a legitimate justification for the intrusion on such an important right. As discussed above with respect to free speech, the argument that group foster homes must dictate the dress or gender expression of their foster children to avoid violence or disruption is not persuasive. Any violence or disruption would likely be based merely on transgender animus.\textsuperscript{101} Group foster

\textsuperscript{96} Id. at 1285.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 1286.
\textsuperscript{100} Id.
\textsuperscript{101} See Doe v. Bell, 754 N.Y.S.2d 846, 855 (N.Y. Sup. Ct. 2003). Foster care agencies might also argue that wearing non-traditionally gendered clothing could be distracting to other children by creating a sexually charged atmosphere. Again, any distraction would likely be the result of animus. As the Bell court held, the notion that transgenderism would cause a sexually charged atmosphere is simply not a legitimate reason for discrimination. \textit{Id.} Putting a group of adolescents together always comes with the risk of creating a sexual atmosphere. Courts would not be likely to say that homosexual children could not be placed in foster care because they might create an inappropriate sexual atmosphere.
homes should have an obligation to protect foster children from such animus. If a transgender youth simply cannot be placed safely in a group home, the state should be required to create transgender-safe group homes, such as Green Chimneys. To the extent that disruption would be caused by issues other than mere animus, states should be required to implement more appropriate remedies before trampling on important liberty interests. As discussed above, group homes could implement simple remedies such as single occupancy bathrooms and bedrooms. Given these more appropriate and reasonable solutions, it is not legitimate for states to require foster youth to conform to a style of dress or behavior that is inconsistent with their gender identity.

Thus, even if a court were to apply a mere rationality test, there is no legitimate justification for forcing a foster child in a group home to conform to a particular gender stereotype given the child’s liberty interest in gender expression. Therefore, forced gender conformity in this context violates a foster child’s due process rights.

2. The State’s Affirmative Duty to Protect Foster Youth

Turning to the second main point in the due process analysis, refusing to allow a young person in a group foster home to express his or her gender identity violates the Due Process Clause because states have an affirmative duty under the Clause to protect foster youth in state custody. While the government generally has no affirmative duty under the Due Process Clause to protect individuals, it is well established that the government does have such a duty with respect to individuals in its custody. As discussed above, forcing transgender youth to conform to traditional gender norms can cause serious emotional harm.

The Supreme Court case of Youngberg v. Romeo is particularly instructive on this point. In Youngberg, a mentally impaired individual, Romeo, was involuntarily committed to a Pennsylvania state institution. While in the hospital, Romeo was injured numerous times by other residents and by his own actions. His mother filed a complaint for violation of his due process rights under the Fourteenth Amendment, claiming that Romeo had a constitutional right to safe conditions of confinement, freedom from bodily restraint, and training or habilitation.

The Supreme Court found that “[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its

103. Id. at 309-10.
104. Id. at 310.
105. Id. at 310, 315.
The Court explained, however, that "[w]hen a person is institutionalized—and wholly dependent on the State . . . a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities." The Court also noted that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." The Court concluded that the substantive component of the Fourteenth Amendment’s Due Process Clause requires states to provide involuntarily committed mental patients with such services as are necessary to ensure “reasonable safety” from themselves and others. In accordance with Youngberg, courts should find that states have an affirmative duty under the Due Process Clause to provide certain services and care to young people living in group foster homes. Like Romeo, foster youth in group homes are institutionalized and are largely dependent on the state.

It is not entirely clear whether the Court in Youngberg only intended its finding of an affirmative state duty to extend to those who are involuntarily placed in state custody. Like Romeo, who was involuntarily committed, however, at least the large majority of children in group homes are not there by choice. Even if parents voluntarily send their child to live in foster care, the child himself likely has no choice in the matter. It is true that some states provide young people with the option of remaining in care after the age of eighteen, and thus, those young people may be said to be in care voluntarily. It is arguable, however, that once a state agency agrees to allow a child to remain in foster care, the state should be obligated to provide that child with a certain degree of care. It would seem absurd to allow a state to permit a young person to live in a group foster home but then fail to provide that child with reasonable care. Even if there is no due process requirement to provide care to young people who are voluntarily living in group foster homes (i.e., those over the age of eighteen), the federal government and states should nevertheless require the same standard of care for those young people as for others who are involuntarily placed in foster care. To do otherwise would simply create an unequal and unworkable system. Thus, like Romeo, all young people in group foster homes should receive at least such services as are necessary to ensure their reasonable safety under the Due Process Clause.

106. Id. at 317.
107. Id.
108. Id. at 321-22.
109. Id. at 314-25.
The Supreme Court case of *DeShaney v. Winnebago County Dept of Social Services* is also instructive. There, a county department of social services received complaints that a young child was being abused by his father. The department took certain steps to protect the child but did not remove him from his father's custody. After the child was severely beaten to the point of permanent injury, his mother brought suit against the department and several of its social workers, claiming that their failure to act deprived the child of his liberty in violation of the Due Process Clause.

The Court found no violation of the Clause, explaining that the Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." The Court explained, however, that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." The Court also emphasized that the injury to the child "occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor." The Court then acknowledged that "[h]ad the State by the affirmative exercise of its power removed [the child] from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." Thus, *DeShaney* supports the notion that states have an affirmative duty to protect young people in group foster homes. Since *DeShaney*, several circuit courts have held that foster children have a liberty interest in being free from harm and that states have a duty to protect them from such harm.

The next question is whether forcing a transgender child to conform to a traditional gender identity violates that child's due process right to be

112. *Id.* at 192-93.
113. *Id.* at 193.
114. *Id.* at 196.
115. *Id.* at 199-200.
116. *Id.* at 201.
117. *Id.* at 201 n.9.
118. Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL’Y 381, 403 (2003) (citing Nicini v. Morra, 212 F.3d 798, 808 (3d Cir. 2001) (en banc); Meador v. Cabinet for Human Res., 902 F.2d 474 (6th Cir. 1990); Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1997); Norfleet v. Arkansas Dep’t of Human Servs., 989 F.2d 289 (8th Cir. 1993); Yvonne L. v. N.M. Mexico Dep’t of Human Servs., 959 F.2d 993 (10th Cir. 1992); Roska v. Peterson, 304 F.3d 982, 994 (10th Cir. 2002); Taylor ex rel. Walker, 818 F.2d 791, 794 (11th Cir. 1987)).
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provided reasonable services and care. The case of *R.G. v. Koller* is instructive on this point. There, the court found that the Due Process Clause governed the constitutionality of conditions at Hawaii's juvenile corrections facility.\(^{119}\) The court held that the facility's use of isolation to "protect" LGBT wards was not an acceptable practice and constituted punishment in violation of their Due Process rights.\(^{120}\) These practices were unconstitutional because they were an "excessive . . . response to legitimate safety needs of the institution."\(^{121}\) In addition, staff members routinely referred to one female ward as "butchie" and "used other slurs based on sexual orientation or failure to conform to gender stereotypes."\(^{122}\)

The court found that this treatment violated the ward's due process rights.\(^{123}\)

Likewise, forcing a transgender foster child in a group home to wear gender conforming clothing or otherwise conform to traditional gender norms violates that child's right to due process. Some courts have found that the right to freedom from harm includes the right to be free from "unreasonable and unnecessary intrusions upon [one's] physical and emotional well-being."\(^{124}\) The court in *K.H. v. Morgan*, for example, held that the Constitution requires state officials to take steps to prevent children in state institutions from deteriorating physically and psychologically.\(^{125}\)

The studies discussed in Part I above show that forcing a transgender child to conform to traditional gender norms can be psychologically harmful to the child.\(^{126}\) The magnitude of potential harm to the child outweighs any possible need to force gender conformity. Using the language of *R.G.*, requiring traditional gender conformity would be an excessive response to any purported legitimate needs of group foster homes.\(^{127}\)

Moreover, requiring a young female-to-male transgender minor to dress in feminine clothing, for example, would be tantamount to calling her "butchie." The home is telling that minor that her preferred gender expression is too "butch." If such conduct violates the rights of inmates in juvenile corrections facilities, it certainly violates the rights of youth in group foster homes.

In short, group foster homes may not control the gender expression of their residents because doing so causes harm, and states have an affirmative


\(^{120}\) *Id.* at 1154-55.

\(^{121}\) *Id.* at 1155-56.

\(^{122}\) *Id.* at 1143.

\(^{123}\) *Id.* at 1155-56.


\(^{125}\) *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

\(^{126}\) *See supra* Part I.

\(^{127}\) *See R.G.*, 415 F. Supp. 2d at 1155-56 (citing *Bell v. Wolfish*, 441 U.S. 520, 538 (1976)).
duty to protect foster youth in state custody under the Due Process Clause.

C. The Equal Protection Clause of the Fourteenth Amendment

Furthermore, the Equal Protection Clause of the Fourteenth Amendment prohibits group foster homes from requiring youth to dress in clothing or otherwise behave in a manner inconsistent with their own gender identity. Such a requirement would unconstitutionally discriminate against the youth on the basis of gender and would not pass intermediate scrutiny. Intermediate scrutiny requires that the state demonstrate an important governmental purpose and that the classification be substantially related to achieving that purpose. In addition, even if one were to view this as discrimination against transgendered persons as a class, rather than as gender-based discrimination, it would not pass a rational basis review. Under a rational basis review, a classification must be rationally related to a legitimate governmental purpose.

1. Gender Discrimination

First, requiring transgender youth living in group foster homes to conform to gender norms is gender discrimination under the Equal Protection Clause. Imagine, for example, that a male-to-female transgender adolescent living in a group foster home is forbidden from wearing make-up while in the home. If that child were biologically female, she would be allowed to wear the make-up. The child is not being treated the same as a biological female because she was born biologically male. Thus, the issue turns on the child’s biological gender.

Some argue that such treatment should be viewed as discrimination against transgenders as a class subject only to rational basis review, and not discrimination based on gender subject to intermediate scrutiny. Indeed, transgenders can be viewed as a class of people who stray significantly from the traditionally accepted range of gender expression. However, discrimination against transgenders is also necessarily discrimination based on sex or gender. As illustrated in the hypothetical above, discrimination

128. The Fourteenth Amendment provides that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.
129. In this section, I use the phrase “gender discrimination” to refer to classifications based on biological sex in conformance with well-established equal protection jurisprudence. See, e.g., Craig v. Boren, 429 U.S. 190, 192 (1976) (referring to a differing standard for males and females as a “gender-based differential”). It is well established that intermediate scrutiny applies to classifications based on gender, while a rational basis review applies to classifications based on groups not involving suspect classes.
against a transgender individual is based on the notion that a person of a
given biological sex should not engage in conduct traditionally reserved for
the opposite sex. If that person were of a different biological sex, there
would be no transgender animus. Thus, discrimination against
transgenders is always also discrimination based on biological sex or
gender.\textsuperscript{132}

Perhaps the confusion lies in the fact that discrimination against
transgenders is based on the transgender individual's conduct and not just
their biological sex. For example, if an employer refuses to hire a male-to-
female transgender person, that employer might argue that he did not act as
he did because the prospective employee was biologically male, but
because the person chose to dress in feminine clothing. Such a distinction,
however, does not comport with well-established caselaw or logic. A
simple hypothetical will further illustrate the point. Imagine, for example,
that an employer had a policy of never hiring assertive, opinionated
females. The employer's discriminatory policy is not based on biological
sex alone but is also based on the conduct of certain female applicants. The
female applicants are not permitted to engage in conduct that the employer
finds to be traditionally associated with men. Clearly, a court would find
that this constitutes gender discrimination because if a man were to exhibit
the same assertive qualities, he would be hired. Indeed, it would be
laughable for a court to find that this is not gender discrimination, but
rather, discrimination against a certain species of female. Although
transgender individuals tend to form a more definable group, the
underlying principle remains: if a person would not have been
discriminated against but for their biological sex, then gender
discrimination has occurred.

A myriad of cases support this point. In \textit{Price Waterhouse v. Hopkins},
for example, a firm's policy board refused to promote a senior manager to
partner, not simply because she was a woman, but because her behavior did
not conform to female stereotypes.\textsuperscript{133} She was told that she did not walk
"femininely," wear make-up, style her hair or wear jewelry.\textsuperscript{134} The
Supreme Court found that an employer who acts on the basis of a belief
that a woman must not be aggressive has "acted on the basis of gender."\textsuperscript{135}
The Court explained that "sex discrimination may occur based upon actions
taken because of the victim's failure to conform with sex stereotypes,

\begin{itemize}
  \item \textsuperscript{132} The same holds true for discrimination based on sexual orientation. Although
    people can be classified according to sexual preferences (i.e., straight, gay, lesbian,
    bisexual), discrimination against a person based on their sexual orientation will also
    necessarily be discrimination based on that person's gender or biological sex.
  \item \textsuperscript{133} Price Waterhouse v. Hopkins, 490 U.S. 228, 229 (1989).
  \item \textsuperscript{134} \textit{Id.} at 235.
  \item \textsuperscript{135} \textit{Id.} at 250.
\end{itemize}
rather than because of his or her gender per se."\(^{136}\) Although the claims in *Price Waterhouse* were brought pursuant to Title VII rather than the Equal Protection Clause, the general principle remains that discrimination based on gender stereotypes is also discrimination based on gender, or biological sex.\(^{137}\)

Similarly, in *Smith v. City of Salem*, the court held that a transgender employee, who was discriminated against because of the employee’s gender non-conforming behavior and appearance, was a victim of sex discrimination grounded in the Equal Protection Clause.\(^{138}\) Smith was a city fire department male-to-female transgender employee who was suspended from work due to gender non-conformity.\(^{139}\) The *Smith* court found that this “thoroughly and obviously sound[ed] in a constitutional claim of equal protection.”\(^{140}\) The court aptly addressed the logical fallacy in arguing that discrimination against transgenders is not gender discrimination, explaining that some courts have held that discrimination against transgenders as a group:

is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination “because of . . . sex,” but rather, discrimination against the plaintiff’s unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as “transsexual” on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.

Such analyses cannot be reconciled with *Price Waterhouse*. . . . As such, discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against Ann

\(^{136}\) *Id.* at 228.

\(^{137}\) *See id.* at 232 (citing 42 U.S.C. § 2000e).

\(^{138}\) *Smith v. City of Salem*, 378 F.3d 566, 577-78 (6th Cir. 2004). Although the court in *Smith* uses the term “sex” discrimination rather than gender discrimination, the meaning of the two terms for purposes of this section is the same: discrimination based on biological sex.

\(^{139}\) *Id.* at 568.

\(^{140}\) *Id.* at 577.
Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.141

Likewise, in the *Yunits* case discussed above, the court found that the school board perpetrated sex discrimination when it prevented a biologically male student from attending school in feminine clothing.142 The court pointed out that even though a female would similarly be disciplined for wearing a fake beard, the issue was whether a female student would be disciplined for wearing feminine clothes.143 If not, then the student was discriminated against on the basis of sex.144

Thus, discrimination based on gender expression or gender identity (or discrimination against transgenders) constitutes gender discrimination within the meaning of equal protection jurisprudence and should therefore be subject to intermediate scrutiny.

Some argue, however, that discrimination against transgenders applies equally to males and females and thus does not violate the Equal Protection Clause. The argument is that both males and females must conform to the traditional trappings of their biological gender, and therefore, they are treated equally for purposes of the Clause. The caselaw is unclear and unsettled on this point but the Supreme Court should resolve the issue and reject such an argument.

The California Supreme Court took a nearly identical stance in addressing same-sex marriage in *In re Marriage Cases*.145 The Court found that statutes prohibiting same-sex marriage did not discriminate on the basis of sex or gender.146 The Court held that the challenged statutes did not treat men and women differently because “[p]ersons of either gender are treated equally and are permitted to marry only a person of the opposite gender.”147

The California Supreme Court failed to recognize, however, the fact that the Supreme Court has already dealt with and rejected such arguments. In *Loving v. Virginia*, the state of Virginia argued that state anti-

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141. *Id.* at 574-75 (citations omitted).
143. *Id.*
144. *Id.*
146. *Id.* (analyzing the statute pursuant to the California equal protection clause).
147. *Id.*
miscegenation laws did not violate the Equal Protection Clause because they applied equally to both blacks and whites.\textsuperscript{148} Neither race was permitted to marry the other.\textsuperscript{149} The Court, however, "reject[ed] the notion that mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations."\textsuperscript{150} There is no reason that the same would not hold true for gender classifications.

Moreover, the California Supreme Court was looking at the issue of equal application through too broad of a lens. It is true that, in some sense, men and women are being treated equally when they are discriminated against based on gender. Upon closer inspection, however, the discrimination is not, in fact, equal and that the sexes are not being treated equally. With respect to a statute prohibiting same-sex marriage, men are prohibited from marrying men while women are prohibited from marrying women. Thus, the sexes have distinct liberties and face distinct prohibitions, even if the prohibitions have a common thread. Actual equal treatment of the sexes would be, for example, if neither men nor women were permitted to marry at all. The same holds true with respect to discrimination against transgender individuals. If a man is required to conform to a traditional male role while a woman is required to conform to a traditional female role, men and women are treated equally in the very broadest sense of the word: they must both conform to the norms of their biological sex. However, the limitations are also distinct: for example, a man may be prohibited from wearing a dress while a woman is required to wear one. This is simply not equal treatment.

Moreover, categorizing the discrimination too broadly creates logical problems and does not comport with the caselaw. A simple hypothetical illustrates the point that almost any unequal treatment based on gender can be viewed as equal when viewed through the broadest lens. For example, imagine an employment policy which states that men can spit on the job but women cannot. This appears to be a case of straightforward unequal treatment based on one’s sex. However, following the reasoning above, one could argue that men and women are being treated equally: they are both required to conform to traditional notions of how men and women should behave (assuming for the sake of the hypothetical that it is traditionally more appropriate for a man to spit). In other words, they are both required to conform to traditional gender norms. Yet, clearly, our

\textsuperscript{148} Loving v. Virginia, 388 U.S. 1, 7-8 (1967) (noting that “[T]he state contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based on race . . . ”).

\textsuperscript{149} Id. at 8.

\textsuperscript{150} Id.
Transgender Foster Youth

courts would not take such a broad view. Rather, courts would look more closely at the specific differences in allowable behavior: men can spit while women cannot. The same holds true with gender expression. It is not sufficient to say that men and women are being treated equally because they both must conform to stereotypes and traditional norms. We must look at the specific limitations to see if men and women are being treated equally. If, for example, an employer requires women to wear dresses and prohibits men from doing so, the employer is treating the sexes unequally.

Some may argue, however, that even if men and women are being treated unequally or differently because of their gender, such unequal treatment only constitutes gender discrimination under the Equal Protection Clause if one sex is being "put down" as a group in relation to the other sex. In other words, to make out a claim, the sexes must not only be treated differently, but one group must be treated overall worse than the other. The argument is that requiring men and women to conform to traditional gender norms does not disadvantage women more than men or vice versa. Courts should find, however, that no such "unequal group harm" requirement exists under the Equal Protection Clause.

At first blush, it may appear that Loving stands for the proposition that an unequal group harm is required to make out a gender discrimination claim under the Equal Protection Clause. The Loving Court struck down the anti-miscegenation statutes discussed above, finding that they were intended "as measures designed to maintain White Supremacy." The Court explained that because the statutes were designed for "invidious racial discrimination," there was no overriding justification for the classification.

However, the fact that the racial classification in Loving was intended to create an unequal group harm, or to elevate one group over another, does not mean that the same must be true in all equal protection cases. In fact, the Supreme Court has found otherwise. In "affirmative action" cases in which rules or regulations are designed to remedy past harms to women, the Supreme Court has held that intermediate scrutiny is nevertheless appropriate. In Mississippi University for Women v. Hogan, for example, the Supreme Court found that a state-supported nursing school’s policy of excluding all males from the program violated the Equal Protection Clause. The Court explained that its decisions "establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification" and that intermediate scrutiny

151. Id. at 11.
152. Id.
The Court then stated that “[t]he same searching analysis must be made, regardless of whether the State’s objective is to eliminate family controversy, to achieve administrative efficiency, or to balance the burdens born by males and females.”

Thus, even if a classification is intended to create a fair balance between men and women and has no “invidious” discriminatory purpose such as the one in Loving, intermediate scrutiny nevertheless applies.

In addition, the Supreme Court has not articulated an “unequal group harm” requirement. In fact, the plain language in numerous of its gender discrimination cases suggests that there is no such requirement. In Craig v. Boren, for example, the Court explained that “statutory classifications that distinguish between males and females are ‘subject to scrutiny under the Equal Protection Clause’” and that intermediate scrutiny applies. Likewise, in U.S. v. Virginia (“VMl”), the Court held that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” The plain language in these cases suggests that intermediate scrutiny should apply to any classification based on gender.

Moreover, if states are permitted to discriminate based on gender without an important reason, there is always the lurking danger of causing group harm and perpetuating harmful and limiting stereotypes. Indeed, the Supreme Court has repeatedly noted its concern with perpetuating stereotypes in this context. In Mississippi University for Women, the Court found that “[a]lthough the test for determining the validity of a gender-based classification is straight-forward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.” Similarly, in Zaleweska v. County of Sullivan, the court asserted that “[s]tate action is impermissible if it perpetuates old gender stereotypes by the disparate treatment of similarly situated men and women based on sex.” Finally, in VMl, the Court held that a state cannot pass a law that is based on broad gender stereotypes. Importantly, the Court stated that “‘[i]nherent differences’ between men

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154. Id. at 724.
155. Id. at 728 (citations omitted) (emphasis added).
159. Miss. Univ. for Women, 458 U.S. at 724-25.
161. Virginia, 518 U.S. at 533.
and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."\textsuperscript{162} This is a clear statement that gender classifications cannot be used to "put down" members of either sex (i.e., cause a harm to the group) or create artificial constraints on an individual's opportunity. This indicates that a gender classification that limits individual freedom is not permissible unless it passes intermediate scrutiny.

Furthermore, the wisdom of adding a "group harm" requirement to the test for gender classifications is highly questionable. In this day and age, determining which group is disadvantaged by a particular gender classification is often deceptively difficult. For example, at first blush the nursing school's policy of excluding men in Mississippi University for Women may appear to be discriminatory towards men. Thus, it might seem that not allowing men to enter the nursing school unequally burdens men as a group. However, in that case, the Supreme Court found that "rather than compensat[ing] for discriminatory barriers faced by women, [the school's] policy of excluding males . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."\textsuperscript{163} For obvious reasons, such stereotypes may be said to harm women as a group. Thus, it is unclear on the facts of Mississippi University for Women which group is more disadvantaged by the policy or whether men and women are equally disadvantaged. Such questions are highly complex and highly subjective. Therefore, it would be wise to simply apply intermediate scrutiny to all gender based classifications.

In addition, the following hypothetical set forth by Judge Johnson in Baker v. Vermont demonstrates the unworkability of a group harm requirement.\textsuperscript{164} Imagine, for example, that a statute requires courts to give custody of male children to fathers and female children to mothers. It would be difficult to articulate how such a statute would disadvantage one sex more than the other as a group. Yet, surely courts would apply intermediate scrutiny in this case. This is the type of invidious, unfair gender classification that should require an exceedingly persuasive justification because it perpetuates potentially harmful stereotypes and limits individual freedom based on gender.

In summary, a requirement that a young person living in a group foster home conform to traditional gender norms is a gender classification and should therefore be subject to intermediate scrutiny under the Equal Protection Clause.

\textsuperscript{162} Id. (emphasis added).
\textsuperscript{163} Miss. Univ. for Women, 458 U.S. at 718.
\textsuperscript{164} See Baker v. Vermont, 744 A.2d 864, 906 n.10 (Vt. 1999) (J. Johnson, concurring in part and dissenting in part).
Moreover, such a requirement would not pass intermediate scrutiny. Intermediate scrutiny requires that the state demonstrate an important governmental purpose and that the classification be substantially related to achieving that purpose. For the reasons discussed above with respect to free speech and due process, states do not have a legitimate, let alone important reason to compel gender conformity for foster care youth. Any violence or disruption caused by non-traditional gender expression would likely be based on mere transgender animus, either on the part of the other foster children or the state employees. In *Romer v. Evans*, the Supreme Court made it clear that pure animus towards a particular group is not a legitimate state interest. To the extent that a state agency has interests not based on animus, it is nevertheless unreasonable to require gender conformity as the remedy. Foster homes could instead create single occupancy bedrooms, bathrooms, and transgender-safe group homes. Given these more appropriate remedies, requiring gender conformity is not legitimate, nor is it substantially related to achieving the state’s potential purposes.

Finally, in the equal protection context, the Supreme Court has made it clear that a state cannot pass a law or regulation based on broad gender stereotypes. The notion that boys must wear traditionally male clothing and “act like boys” and girls must wear traditionally female clothing and “act like girls” is an artificial constraint on personal freedom based on broad gender stereotypes. Therefore, such a requirement would not pass intermediate scrutiny.

2. Discrimination Against Transgender Foster Youth as a Class

Second, even if a court were to find that requiring foster youth to conform to a particular gender stereotype is not gender discrimination but discrimination against transgenders as a class, such discrimination would nevertheless fail a rational basis review. As discussed above, states

166. See *Romer v. Evans*, 517 U.S. 620, 632 (1996). In *Romer*, the Court examined a Colorado statute repealing all state laws that prohibited discrimination based on sexual orientation. *Id.* at 620. The Court held that the Colorado statute did not have a rational basis because it was motivated by sheer animus towards homosexuals. *Id.* at 632. Although the case involved animus towards homosexuals rather than animus based on gender identity, it is likely that the Court would not uphold discrimination based on animus toward any group.
167. See *Virginia*, 518 U.S. at 533.
168. See Gilliam *supra* note 19, at 1056 (noting that “[t]hough the question remains unanswered, sexual orientation-based distinctions would likely be evaluated under the more lenient rational basis review standard. Because the United States Supreme Court has failed
cannot show that forcing gender conformity on transgender foster youth is rationally related to a legitimate government interest.

Some may argue that requiring all youth to conform to traditional gender norms associated with their biological sex does not treat transgenders unequally and thus would not be a basis for an equal protection claim. They might point out, for example, that a transgender male-to-female individual receives the same treatment as a non-transgender biological male: neither would be permitted to take on a female gender identity. As discussed above, mere equal application of a discriminatory classification does not preclude a claim under the Equal Protection Clause. In addition, a transgender male-to-female youth is treated differently than a non-transgender biological female. The former cannot express her chosen gender identity while the latter can. Put another way, non-transgenders are permitted to express a gender identity that they are comfortable with while transgenders are not. This is unequal treatment.

Thus, requiring young people in a group foster home to take on a particular gender identity does not pass a rational basis review and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

IV. RECOMMENDATIONS

Despite the above constitutional limitations, federal and state law are largely silent on the issue of discrimination against transgender foster youth. Although numerous states have anti-discrimination, housing, public accommodation, and disability laws that could be construed as prohibiting discrimination based on gender identity in foster care, California is currently the only state that explicitly prohibits such discrimination. Congress and state legislatures should follow California’s lead and enact legislation explicitly protecting a foster child’s right to express his or her gender identity while living in a group foster home.\textsuperscript{169}

\textsuperscript{169} The federal government currently prohibits discrimination on the basis of sex in the workplace as well as in public education pursuant to Title VII and Title IX respectively. 42 U.S.C. § 2000e-2(a)(1) \textit{et seq.} (providing in pertinent part that “[i]t shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); 20 U.S.C. § 1681(a) \textit{et seq.} (providing in
Such legislation should require state foster care agencies to implement policies specifically prohibiting discrimination against transgender youth. These policies should (1) clarify that youth cannot be forced to wear traditionally gender-conforming clothing or otherwise perform traditional gender roles; (2) set forth rules to enhance the physical and emotional safety of transgender youth in foster care; and (3) require training for all foster care employees regarding the rights of transgender youth in care as well as sensitivity training regarding transgender issues. This legislation is necessary and appropriate to protect our foster youth from unwarranted harm and impermissible intrusion.

V. CONCLUSION

In conclusion, no child living in a group foster home can be legally required to wear traditionally gender-conforming clothing or otherwise perform traditional gender roles. Forcing a gender identity on transgender foster youth can cause severe emotional and psychological harm and is a violation of the First Amendment right to free speech, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. Requiring a transgender youth to take on a forced gender identity violates the First Amendment because it suppresses expressive speech without adequate justification and is also a form of impermissible compelled speech. In addition, requiring gender conformity violates the Due Process Clause because such treatment unjustifiably infringes on an important liberty interest and because such treatment harms youth in violation of a state’s duty to protect youth in its custody. Furthermore, requiring gender conformity for transgender youth violates the Equal Protection Clause because it constitutes impermissible gender discrimination. Alternatively, such treatment also constitutes impermissible discrimination against transgenders as a group. To remedy potential constitutional violations and protect our foster youth, I recommend that Congress and state legislatures enact laws explicitly protecting a foster child’s freedom to express his or her own gender identity while living in a group foster home.
It is commonly said that a society should be judged by how it treats its most vulnerable members. Transgender foster youth are arguably among our country’s most vulnerable and most in need of assistance and care. Yet services for these youth are severely lacking. It is time that we recognize these youth and provide them with explicit rights and protections.
TEACHING TOLERANCE: A HARVEY MILK DAY WOULD DO A STUDENT BODY GOOD

By Michael J. Ritter*

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* J.D. candidate, The University of Texas School of Law, 2010; B.A. Trinity University, 2007. I would like to thank my family for their guidance and unconditional support throughout the years, and my dear friends, Kelley L. Kalchthaler and Ryan J.W. Cicero, for always being there for me.
“I ask for the Movement to continue because my election gave young people out there hope. You gotta give ‘em hope.”

Harvey Bernard Milk, Hope Speech, 1978

I. INTRODUCTION

Heterosexism—the fear and hatred of people with alternative sexual orientations and forms of gender expression—pervades our country’s public schools. Half of all students witness some form of sexuality- or gender-related harassment.1 In 2008, Brandon McInerney, a fourteen-year-old student at E.O. Green Junior High School in Oxnard, California, verbally harassed his classmate, Larry King, for dressing in feminine clothing and coming out as gay.2 The following day, Brandon brought a gun to school and shot Larry in the head.3 Shortly after Larry’s death, Representative Mark Leno introduced a bill in the California Assembly that aimed to make schools safer for students like Larry.4 The proposal, which has now become law in California, declared May 22 of each year to be a special day for California’s public schools—a day to commemorate the life accomplishments of Harvey Milk, the first openly gay man elected to a significant public office.5 By encouraging schools to discuss gender and sexual orientation issues with their students, the new law seeks to teach tolerance to California’s public school children; provide a much-needed role model to lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ) students; and educate them about past and present discrimination against LGBTQ members of society.6 After passing both the Assembly and Senate, Governor Arnold Schwarzenegger vetoed the initial bill, but the California Legislature passed an identical bill last year.7


3. Id.


7. See Wyatt Buchanan, Budget Woes Don’t Stop Lawmakers from Passing Bills, S.F.
Because the harassment and bullying of LGBTQ students undermines the ability of public schools throughout the country to provide equal educational opportunities to all students in a safe environment, other states should consider taking California’s lead and implement a Harvey Milk Day or a similar day of LGBTQ student appreciation in their public schools. By teaching students acceptable ways to interact with others of alternative sexual orientations and modes of gender expression, schools would reduce verbal and physical assaults motivated by students’ heterosexist attitudes, which would not only improve the quality and equality of educational opportunities, but also lessen lawsuits brought against schools by harassed students.

Part II of this Note contends that the prejudicial views held by many students and school administrators have culminated in an educational culture that gives preference to heterosexual and gender-conforming students. Part II also avers that without addressing the harassment of LGBTQ students, public schools increase the likelihood that these youths will drop out, commit suicide, and abuse drugs. School districts’ and administrators’ failures to address sexuality- and gender-based bullying also invites litigation from harassed students under various theories of recovery. Part III discusses current state and federal policies designed to deter and respond to student-on-student bullying and deduces that these policies insufficiently address the plight of LGBTQ students and the vulnerabilities of schools to legal actions. Parts IV and V argue and conclude that a Harvey Milk Day, or a similar day of LGBTQ student appreciation, would aid in correcting these deficiencies by teaching tolerance to children in public schools throughout the country.

II. THE EDUCATIONAL CULTURE OF HETEROSEXISM

A. The Two Characteristics: Outward Animosity & Administrative Neutrality

Two related aspects of public schools comprise the educational culture of heterosexism. The first characteristic is students’ outward antagonism

CHRON., May 15, 2009, at B8; Tran, supra note 5.
8. See Daiv Russell, Maslow’s Hierarchy and Education (January 15, 2008), http://searchwarp.com/swa289889.htm (last visited Apr. 16, 2009) (noting that the students at the lower levels of Maslow’s hierarchy, discussed infra Part II.B.1, may be more difficult to teach and need more attention).
10. See infra Part II.B.2.
toward their LGBTQ peers, which fosters fears that ripple through all groups of students regardless of their sexualities or gender identities.\(^\text{11}\) The second aspect is the lack of school support from official school policies, teachers, and administrators. Given the backdrop of students’ animosity, administrative neutrality may be perceived as, at most, an implicit encouragement of this harassment or, at least, a disregard for the hostilities that these students must face.\(^\text{12}\)

Open ill will toward LGBTQ students presents a substantial threat to public school students across the United States.\(^\text{13}\) The Gay, Lesbian and Straight Education Network (GLSEN) reported in 2005 that nearly two-thirds of all LGBTQ students experience some sort of harassment because of their sexual orientation or gender identity.\(^\text{14}\) Significantly, students that identify as heterosexual, but are suspected by their peers of being queer, also face similar harassment as openly-LGBTQ students.\(^\text{15}\) GLSEN further stated that one-third of high school students report experiencing recurrent harassment because they are merely perceived as being or are LGBTQ.\(^\text{16}\) And unsuspected students frequently fear persecution for being perceived as different, as are openly LGBTQ students. Even students that support LGBTQ students have been the targets of violence in schools.\(^\text{17}\) Thus, heterosexism in public schools indiscriminately and adversely affects all students, regardless of their sexual orientations or gender identities.\(^\text{18}\)

The absence of school rules that explicitly prohibit physical or verbal assaults motivated by victims’ sexual orientation or gender identity and programs that teach positive methods to interact with their LGBTQ peers suggests to harassed students that their schools are either unaware of, or apathetic to, their harassment.\(^\text{19}\) While administrative neutrality may not

\(^{11}\) See Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611, 614 (2001) (“Environments like this present narrow conceptions of humanity, stunting the minds and psychosexual development of all.”).

\(^{12}\) See *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996).


\(^{14}\) GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, *supra* note 1, at 4 (“Because of their sexual orientation, two-thirds of LGBT students have been verbally harassed, 16% have been physically harassed and 8% have been physically assaulted.”).

\(^{15}\) GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, *supra* note 1, at 4; see also Hirschfeld, *supra* note 11, at 614.

\(^{16}\) GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, *supra* note 1, at 3.

\(^{17}\) See, e.g., John Tunison, *Victim Fears Return to School: One Attacker, 15, Pleads Guilty in Wayland High Assault*, GRAND RAPIDS PRESS, Aug. 27, 2008, at B1 (reporting a story of a high school sophomore who was physically assaulted for her pro-gay views).

\(^{18}\) See GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, *supra* note 1, at 3-4.

\(^{19}\) Id. at 5.
have as direct of an effect as targeted physical and verbal abuse by student bullies, it nevertheless signals a preference for heterosexuality and gender conformance and compounds the scourge of anti-LGBTQ bullying. This second aspect of the educational culture of heterosexism therefore reinforces the impact of student-on-student harassment in at least two ways. First, it signals to LGBTQ students that their schools are unconcerned with their troubles. Schools’ failures to discourage sexuality- and gender-based bullying further indicates that the school is unwilling to take a stance on, and thereby implicitly consents to, this harassment. Second, it communicates to students that verbal or physical affronts may not be a problem worth reporting. Sending this message is particularly problematic given that many students encountering such harassment do not report the incidents because they already perceive them to be unimportant.

B. The Impact of the Educational Culture of Heterosexism

Public schools attempt, but frequently fail, to educate their students who are forced to encounter this culture of heterosexism. The primary purposes of the public education system include, inter alia, educating children, preparing them for college, increasing their cultural awareness, and grooming them to “compete in a global marketplace.” However, harassment of LGBTQ youth frustrates many of these purposes by inflicting not only immediate, negative physical and psychological harm, but also short- and long-term educational and social injuries on these students. Moreover, the failures of school officials to fulfill the promises of the public education system has resulted—and will continue to result—in lawsuits against school districts and administrators, which can zap schools’ resources and detract from their main mission of educating students.

20. Nabozny, 92 F.3d at 459.
21. Id.
22. Id.
23. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, supra note 1, at 5.
24. Id.
25. Id.
27. See, e.g., Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 257 (6th Cir. 2000) (stating that harassment caused one particular student to slide into depression and drop out of school).
1. Physical Insecurity Undermines the Quality and Equality of Public Education

The psychological impacts from physical or verbal harassment carry beyond the confrontation into the classroom. Because the feeling of safety and security is a prerequisite to effective learning, the physical and verbal assaults targeted at LGBTQ students incidentally diminishes the ability of schools to effectively teach students core subjects. The hierarchy of needs—a psychological theory developed by Abraham Maslow—illustrates that feelings of personal safety and security are essential to the learning process. Maslow theorized that baser needs must be fulfilled before a person will seek fulfillment of higher-order needs and desires. After fulfilling physiological needs, Maslow argued, people need physical security. Given the insidiousness of LGBTQ student bullying, many feel unsafe in their schools. In fact, the results of one particular study showed that LGBTQ youth have disproportionately lower grade point averages and more difficulty in completing their assignments than their heterosexual counterparts. Thus, the lack of physical safety may distract students and thereby render them less apt learners.

Students experiencing harassment and teasing because of their actual or perceived sexual orientation or gender identity—especially at schools that take no official position on this behavior—may also grow to resent learning environments. The incessant hassling of LGBTQ children and the lack of school policies disparaging this behavior may cause harassed students to associate schools with intolerance and homophobia, and discourage them from attending class or continuing their post-secondary education. The fact that a little more than one-fourth of LGBTQ students drop out of school suggests that a substantial portion of LGBTQ youths are not receiving the intended benefits of public education through to

Expense Reasons].

29. See Russell, supra note 8 (noting that the students at the lower levels of Maslow’s hierarchy may be more difficult to teach and need more attention).
31. Id. at 375.
32. Id. at 376.
34. Hirschfeld, supra note 11, at 613.
37. See id.
graduation. Those that drop out of school are also more likely to abuse illegal drugs. This may contribute to the statistically higher rates of drug use among people identifying as LGBTQ. Another side effect associated with harassment in school and dropping out is the increased suicide rate for LGBTQ teens who are up to three times more likely than heterosexual and gender-conforming youth to take their own lives.

2. Liabilities Under Federal Law of Schools Failing to Address Harassment of LGBTQ Students

In addition undermining the quality and equality of public education for LGBTQ children, student-on-student bullying has left school districts and administrators susceptible to a variety of lawsuits. Students harassed and bullied because of their actual or perceived sexual orientations or gender identities have sought recovery under federal law, including Title IX of the Education Amendments of 1972 and the equal protection, due process, and free speech guarantees of the United States Constitution. In

38. See id.
40. Id.
44. See infra Part II.B.2. Students have also brought state law claims against their schools for failing to address bullying based on sexual orientation. Some states have enacted statutes to guarantee the rights of gay and lesbian students to be free from harassment based on sexual orientation. California statutorily provides that “[i]t is the policy of . . . the State . . . to afford all persons in public schools, regardless of their . . . sexual orientation . . . equal rights and opportunities in the educational institutions of the state,” CAL. EDUC. CODE § 200 (West 2008), and under New Jersey’s Law Against Discrimination (LAD), “[i]t . . . shall be . . . an unlawful discrimination . . . [f]or any . . . superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof . . . on account of . . . sexual orientation.” N.J. STAT. ANN. § 10:5-12(f) (West 2008). Similarly, the Minnesota Human Rights Act considers it “an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status . . . sexual orientation, or disability.” MINN. STAT. ANN. § 363A.13 (West 2009). However, because these laws lack provisions for private rights of action, courts in these states have come out differently on whether to read such actions into those statutes. Compare Sandoval v. Merced Union High Sch., 2006 WL 1717828, *2 (E.D. Cal. May 3, 2006) (holding that a private right of action was unnecessary because students could vindicate their rights guaranteed by the California statute through federal causes of action under Title IX of the Education Amendments and 42 U.S.C. § 1983), and Donovan v. Poway Unified Sch. Dist.,
seeking recovery under constitutional theories, student-plaintiffs have often relied on Section 1983 of the Civil Rights Act of 1871. Recent suits filed by students in federal court have been rather successful in establishing the liability of schools for failing to address student bullying.

Title IX of the Education Amendments of 1972 announces that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." The Title applies to school districts accepting federal funds under the statute. While Title IX does not expressly contain a private cause of action, the Supreme Court has read one into the statute to afford citizens more protection against discrimination. To maintain a claim against a school district under Title IX, the Supreme Court has required that student-plaintiffs show that their harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the [students] of access to the educational opportunities or benefits provided by the school." Moreover, school districts may be liable "only where the[y]... act[ ] with deliberate indifference to known acts of harassment in its programs or activities."

A school's deliberate indifference must, at least "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." In determining whether a defendant is "deliberately indifferent," a court will consider whether "the [Title IX] recipient's response to the harassment or

167 Cal. App. 4th 567, 603-08 (4th Dist. 2008) (holding that Title IX is almost coextensive with protections in the California Education Code), with L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 547 (N.J. 2007) (determining that the LAD contained an implied private right of action because in "recognizing a cause of action against school districts for failing to reasonably address peer-based, affectional orientation harassment, [it] further[ed] the Legislature's goal of eradicating the invidious discrimination faced by students in our public schools."). In other cases, students have relied on common law theories of recovery. See, e.g., Seiwert v. Spencer--Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 950 (S.D. Ind. 2007) (student alleged claims including, "breach of contract, negligent entrustment, negligent supervision and respondent superior liability [and] intentional or negligent infliction of emotional distress."). But because state legislatures may repeal protections that result in lawsuits against their public schools, and because this Note does not advise repealing these protections, liability under federal statutes seems to present an unavoidable risk of litigation against states' public schools for failing to adequately address bullying based on sexual orientation and gender expression.

47. Id.
50. Id. at 633.
51. Id. at 645.
lack thereof is *clearly unreasonable in light of the known circumstances.*" 52

Title IX does not therefore require that a school actually stop or prevent harassment, only that a school act reasonably under the circumstances, which a judge may determine as a matter of law. 53 Student-plaintiffs have successfully brought Title IX claims in federal district courts against schools for being deliberately indifferent to incidents of harassment and bullying that were motivated by their actual and perceived sexual orientations. 54 As recent as this year, the Sixth Circuit Court of Appeals has upheld a favorable trial court decision and established broad rulings helping student-plaintiffs seek relief from school districts under Title IX. 55

In addition to Title IX claims, students experiencing peer harassment have established that school boards and officials are liable for violations of their constitutional rights via the Civil Rights Act of 1871. 56 Section 1983 of Chapter 42 of the U.S. Code provides that:

52. *Id.* at 648 (emphasis added).

53. *Id.* at 648-49.

54. Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 952-68 (D. Kan. 2005) (denying school district’s motion for summary judgment in holding that male-on-male student harassment was “sexual harassment” because remarks made, such as “Dylan’s a fag. Dylan likes to suck cock,” were sexual in nature and that the school’s threatened punishment of the harassing students and its prohibiting the use of the words “queer” and “fag” were not, as a matter of law, reasonable responses to the harassment); Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 815-34 (S.D. Iowa 2004) (holding that plaintiff had satisfied all three elements of a Title IX claim because he alleged to have had been harassed by his peers for over three years, to have complained to school officials about the harassment, and that the school took no corrective measures); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) (“conclud[ing] that by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to [the student’s] failure to meet masculine stereotypes, plaintiff ha[d] stated a cognizable claim under Title IX.”); see, e.g., Seiwert, 497 F. Supp. 2d at 950-54 (denying school’s motion for summary judgment because a jury could have reasonably decided that the school’s failure to deter all students from harassing the student-plaintiff was unreasonable given the circumstances of his harassment); The Third Circuit, on the other hand, has rejected similar arguments made by plaintiffs; see, e.g., Patterson v. Hudson Area Sch., 551 F.3d 438, 448-50 (6th Cir. 2009) (rejecting the school-defendant’s argument that, because it took *some* action, it was not deliberately indifferent, and holding that a jury could have reasonably decided that the school’s failure to deter all students from harassing the student-plaintiff was unreasonable given the circumstances of his harassment); see, e.g., Doe v. Bellefonte Area Sch. Dist., 106 F. App’x 798, 800 (3rd Cir. 2004) (“Davis does not require school districts to purge their schools of actionable peer harassment or to engage in particular disciplinary action.”).

55. Vance, 231 F.3d, at 259-62 (holding that student’s harassment was “severe and pervasive” because it had resulted in her sliding into depression, that school officials had actual notice from letters student’s parent sent, and that a jury could have reasonably found the school’s decision to only talk to students about their harassment of the plaintiff unreasonable in light of the harassment of the plaintiff). The Third Circuit, on the other hand, has rejected similar arguments made by plaintiffs; see, e.g., Patterson v. Hudson Area Sch., 551 F.3d 438, 448-50 (6th Cir. 2009) (rejecting the school-defendant’s argument that, because it took *some* action, it was not deliberately indifferent, and holding that a jury could have reasonably decided that the school’s failure to deter all students from harassing the student-plaintiff was unreasonable given the circumstances of his harassment); see, e.g., Doe v. Bellefonte Area Sch. Dist., 106 F. App’x 798, 800 (3rd Cir. 2004) (“Davis does not require school districts to purge their schools of actionable peer harassment or to engage in particular disciplinary action.”).

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

To establish Section 1983 liability, student-plaintiffs must show that a school board or school official acting under color of law caused the plaintiff a violation of a specific right.

Student-plaintiffs usually allege two constitutional rights in attempting to establish Section 1983 liability: equal protection and due process. To establish an equal protection violation, student-plaintiffs must generally prove that school officials or school boards either acted with discriminatory intent or were deliberately indifferent to the harassment. This can be difficult to prove if school officials have simply failed to protect students from the bullying. Similarly, to establish a due process claim, there must be some affirmative act or deliberate indifference by a state entity or official that deprives the student-plaintiff of life, liberty, or property.

School officials may assert qualified immunity against a Section 1983 claim when they are "performing discretionary functions... insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Despite these requirements, student-plaintiffs have also successfully established the liability of schools officials for bullying and harassment under Section 1983 for violations of due process, equal protection, and free speech rights.

Settlements from these cases have ranged from about $40,000 to

57. Id.
59. For an example of a case where a student-plaintiff has alleged violations of due process and equal protection rights, see Nabozny, 92 F.3d 446 (7th Cir. 1996). In some cases, students have alleged violations of other constitutional rights. E.g., Henkle v. Gregory, 150 F. Supp. 2d 1067, 1071 (D. Nev. 2001) (in which a student-plaintiff claimed schools violated his free speech rights under the First and Fourteenth Amendments).
60. See Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988); see also Washington v. Davis, 426 U.S. 229, 239 (1976) (“It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.”).
63. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1134-35, 1137 (9th Cir. 2003) (holding that the student-plaintiffs had a viable equal protection claim because they had shown they belonged to “an identifiable class,” that the school’s failure to enforce their anti-discrimination policy was intentional, and that the right was clearly established as per its prior decision in High Tech Gays v. Defense Industry Security Clearance Office, 895 F.2d 563 (9th Cir. 1990)); Nabozny, 92 F.3d at 449-60 (upholding Nabozny’s equal protection claim under Section 1983 because the evidence “demonstrate[d] that [Nabozny]
Thus, LGBTQ students—and heterosexual students whose classmates perceived them to be LGBTQ—have successfully sued school districts and officials with federal law claims for failing to adequately address harassment. While the results of attempts to establish schools’ liability for their failures to remedy physical and verbal harassment of LGBTQ students have varied from jurisdiction to jurisdiction, many plaintiffs have survived motions for judgments on the pleadings65 and summary judgment challenges.66 The harassment and bullying of LGBTQ students in public schools should therefore cause school officials, school districts, and state legislatures grave concern. In addition to the many students being deprived of educational opportunity, schools are facing more and more lawsuits that threaten to drain their financial resources and distract them from their main mission of educating students.67

III. INSUFFICIENT ACTION BY SCHOOLS, STATES, AND THE FEDERAL GOVERNMENT

The several lawsuits filed against school districts and administrators strongly suggest that schools, states, and the federal government are falling short of sufficient efforts to teach tolerance of those with alternative sexual

was treated differently" because of his sexual orientation, as was made clear by school officials’ comments that he “should expect to be harassed because he is gay,” but rejected his Section 1983 due process claims because the evidence presented did not establish that the defendants’ inaction put Jamie at a greater risk and because his claim rested on a “failure to act,” which was not a supportable basis to establish Section 1983 liability under the Circuit’s previous decisions); Massey v. Banning Unified Sch. Dist., 256 F. Supp. 2d 1090, 1096 (C.D. Cal. 2003) (denying the school’s motion to dismiss because sexual orientation is a class that is protected under the rational basis standard of review by the Equal Protection Clause and “that the [school officials] [were] not entitled to qualified immunity [because] [t]he law had been clearly established for several years that discrimination on the basis of sexual orientation gives rise to an equal protection claim.”); Henkle, 150 F. Supp. 2d at 1072-74 (D. Nev. 2001) (holding that student-plaintiff’s coming out as gay on a local public access program was free speech that was clearly protected by the First Amendment against retaliatory actions by public schools, as the Supreme Court declared in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969), “[s]tudents in public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”); O.H. v. Oakland Unified Sch. Dist., No. C-99-5123, 2000 WL 33376299, at *11 (N.D. Cal. Apr. 14, 2000) (denying defendants’ motion to dismiss because, under equal protection guarantees, there was no rational basis for the school telling O.H., who had been sexually abused, to “be a man” and “just deal with it,” and that this “affirmatively encouraged the misconduct,” especially since the defendants disciplined students harassing their female classmates).

64. Fifteen Expensive Reasons, supra note 28.
66. E.g., Vance, 231 F.3d at 257-8.
orientations and gender identities. While it is difficult to imagine that any school district or state would not discourage violence or harassment of students in its schools, schools' general policies to punish disruptions, physical violence, and verbal altercations have not been equally applied to students who have or are believed to have minority sexual orientations or gender identities. And by not educating all students about various gender and sexual identities, schools are epically failing to prevent much of the harassment faced by LGBTQ students.

One barrier to such governmental action is the attitudes and expressed preferences of the parents of students in public schools. Many oppose in-school discussion of homosexuality or alternative gender expression because of their religious beliefs. Pressures from parents can cause members of school boards and state and federal legislatures consternation about addressing LGBTQ issues. Two salient examples are the moves to suppress gay and lesbian student groups and the lack of gay and lesbian sex education, which parents frequently object to on moral grounds.

While the federal government has facilitated some discussion of LGBTQ issues in public schools, its role has been merely passive and largely limited to permitting voluntary student activities rather than encouraging or requiring schools and states to establish official policies. The federal Equal Access Act (EAA) recognizes that public schools holding out their facilities for extra-curricular activities create a limited open forum for student speech. Federally funded schools that create such limited open forums may not discriminate against certain student groups based on the content of student groups’ speech. Though the EAA does not explicitly prohibit discrimination against LGBTQ student groups, the EAA's legislative history shows congressional intent that these groups

68. See, e.g., O.H., 2000 WL 33376299, at ***1-11 (a case arising out of school's application of disciplinary measures against students who had harassed a female classmate, but not against a student harassing a male classmate).

69. See Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008), cert. denied, 129 S. Ct. 56 (2008) (concerning First Amendment challenges raised by two sets of Massachusetts parents against the introduction of issues pertaining to homosexuality during their children’s classes).


71. See id. at 615.

72. See id. at 642 (discussing the Equal Access Act’s provision for LGBTQ student organizations).

73. Id. at 622.

receive some protection. Federal laws, like the EAA, that do not encourage schools to take any particular stance on LGBTQ tolerance leave that decision to states and local school districts.

In the absence of federal encouragement, many states have not taken any official policy on the targeted bullying of LGBTQ students beyond their general anti-harassment policies. Many states leave the choice of whether to take an administrative position against anti-LGBTQ harassment in the hands of individual school districts. Unfortunately, only five of the twenty-five largest school districts in the country have policies discouraging the targeted harassment of LGBTQ students. Nationally, only one hundred school districts in twenty-four different states have similar anti-harassment policies. The dearth of official statewide policies thus leaves holes in what is a mere patchwork of protections for LGBTQ students. As an illustrative example, students in the Los Angeles Unified School District benefit from a district-specific LGBTQ anti-harassment policy while students in the Palm Beach County School District, Orange County School District, and San Diego Unified School District do not.

To their credit, some states have not been completely inactive on the issue of LGBTQ student harassment. In 2007, Governor Schwarzenegger signed into law the California Student Civil Rights Act, which proscribed the negative portrayal of homosexuality in public schools. The Student Civil Rights Act also prohibits discrimination on the basis of actual or perceived gender identity, "gender related appearance," and sexual orientation. But even state legislation aimed at stopping harassment targeted at LGBTQ students may be insufficient to address the first aspect of the educational culture of heterosexism that contributes to the social isolation and general animosity toward LGBTQ students that stops short of harassment. Without federal policies requiring states that receive federal funds to adopt policies prohibiting harassment of LGBTQ students, independent action by the states is necessary to maximize students' tolerance of others with minority sexual orientations and gender identities.

75. Id.
77. Id.
78. Id.
79. Id.
82. CAL. EDUC. CODE §§ 210.7, 212.6 (West 2008).
IV. PUBLIC SCHOOL STUDENTS WOULD BENEFIT FROM A HARVEY MILK DAY

A. The Life and Accomplishments of Harvey Milk

In 1930, Harvey Milk was born to William and Minerva Milk. When he was young, Milk’s mother warned him of homosexuals, frequently conflating homosexuality with pedophilia and cross-dressing and transvestitism. His mother’s warnings and jokes about homosexuality convinced him that his sexuality was an issue not to be discussed and contributed to his discretion about his identity while living in New York City.

After his study at the New York State College for Teachers at Albany and service in the United States Navy, Milk and his partner, Scott Smith, moved to San Francisco and founded “Castro Camera,” a camera shop in the city’s Castro District. In San Francisco, Milk became a political hero when he established the Castro Valley Association of Local Merchants and vocalized the Association’s concerns to the local government; the community came to know him as the “Mayor of Castro Street.” After unsuccessfully running for public office twice, Milk was elected to the Board of Supervisors of the City and County of San Francisco and became the first openly gay man to be elected to a major public office. While in office, Milk sponsored and promoted gay rights legislation, and successfully defeated a state initiative that would have prohibited gays and lesbians from teaching in California’s public schools. He fervently advocated for challenging oppression of all minorities throughout his political career.

84. Id. at 5.
85. Id. at 6.
86. Id.
87. Id. at 12.
88. Id. at 15.
90. Id.
91. Id.
92. Id.
93. Id.
94. See id. ("His message was one of unity against oppression in all its forms. In the same Gay Freedom Day speech, he said, 'I call upon all minorities and especially the millions of lesbians and gay men to wake up from their dreams ... to gather on Washington
In 1978, Dan White, Milk’s political opponent, resigned from his position on the Board of Supervisors. Shortly after his resignation, White requested that George Moscone, Mayor of San Francisco, reinstate him. When Mayor Moscone refused White’s request, White shot and killed him in his office. White then went to Milk’s office and shot and killed him, too. The night of Milk’s funeral, thousands of people attended an impromptu candlelight service in his memory. White was eventually convicted of killing Milk, but the jury in White’s trial returned a lenient verdict based on a diminished capacity defense.

B. A New and Improved Vision of Harvey Milk Day

“If a bullet should enter my brain, let that bullet destroy every closet door,” Milk declared in a recording prior to his death. His declaration exemplified the heart of his strategy to achieve political and social equality for gays and lesbians throughout the country. Coming out played a lead role in achieving his goal of dismantling negative stereotypes held by the heterosexual population by forcing them to put a known face to the idea of homosexuality. To further achieve that goal, Milk intended the event of his anticipated murder to inspire gays and lesbians to brave coming out to their friends, family, coworkers, acquaintances, classmates, and teachers. Unfortunately, the heterosexist climates of public schools around the country make coming out nearly impossible for many students.

Schools should not be places where students like Larry King must fear for their lives because of who they are. States should thus consider taking California’s lead and designating a day out of the year to incorporate discussion of LGBTQ issues into the classroom. On such a day, students could learn about the life and accomplishments of Harvey Milk or other
LGBTQ role models from their respective communities, and discuss positive ways to interact with other students and people in society who are of minority sexual orientations or gender identities. School officials and administrators could take the time to discuss their anti-bullying and harassment policies and how they apply to everyone equally, regardless of sexual orientation or gender identity. Teachers could also incorporate commemoration of Milk’s social, economic, and political accomplishments into almost any subject. For example, commemorative activities on a Harvey Milk Day could take the form of history lessons, art projects, speeches, debates, and reading and writing assignments.

Commemorating Harvey Milk’s successes in advancing the equality of gays and lesbians might send the much-needed message to public school students that their schools appreciate and accept their sexualities and gender identities. That almost half of LGBTQ students feel unsafe at school, and that over two-thirds have been physically or verbally harassed or assaulted, speak to the importance of such efforts. Opening classrooms to dialogue on sexuality and gender issues is therefore a necessary step toward providing a safe environment for all students. A variety of factors, including “the behaviors and attitudes of the students, teachers and other school staff as well as the school’s official policies,” can help shape students’ perception of their educational environments. By promoting discourse on differences in sexual orientation and gender identities, schools commemorating Harvey Milk Day could shape safer and more welcoming environments for their students. Schools would thus see fewer incidents of LGBTQ students being harassed and assaulted, dropping out of school, skipping class, abusing drugs, and attempting suicide, as well as lawsuits arising out of those incidents.

Representative Leno’s bill designating May 22nd as Harvey Milk Day made several legislative declarations about the facts of Harvey Milk’s life pertaining to his educational background; service in the Navy; commercial success; political accomplishments; assassination and its aftermath; and

107. See Nichols, supra note 9, at 517 (“Until all schools embrace an open dialogue about the existence, tolerance, and acceptance of students’ differences in sexual orientations, the threat of violence, harassment, suicide, truancy, and dropping out will continue.”).
109. Id.
110. See id.
This new declares May 22nd of each year "Harvey Milk Day" and adds Harvey Milk Day to the list of days holding special significance for California's public schools. On this day, schools are encouraged to commemorate Milk's political contributions.

Despite its good intentions, the new law is insufficient to adequately protect the interests of LGBTQ students in California's public schools. Ironically, the proposal would decrease the actual and perceived safety of these students by merely encouraging commemoration of Harvey Milk Day. California law does not currently prohibit public schools from discussing or hosting activities that concern sexual orientation or gender expression. Prior to the new statute, California schools could have chosen to celebrate (or not celebrate) any day of the year as Harvey Milk Day or hold a day of LGBTQ appreciation and diversity training.

Now that Representative Leno's proposal is on the books, May 22nd is Harvey Milk Day, and schools may still decide against hosting commemorative activities. The LGBTQ students at schools ignoring Harvey Milk Day, in defiance of the California Legislature's encouragement, might come to understand that their schools really are not the accepting environments that the Legislature wished them to be. Similarly, in refusing the California Legislature's direction by not commemorating Milk's accomplishments on Harvey Milk Day, schools might validate the prejudice of hostile students and even encouraged them to act on their hostilities.

Another weak point of this new law is the selection of May 22nd as the date for Harvey Milk Day. Schools that decide to commemorate Harvey Milk Day every year would do so only seven times over the next decade, as May 22nd falls on Saturday in 2010 and on Sunday in 2011 and 2016. Moreover, because May 22nd tends to fall toward the end of the school year, the proposal passes on a chance to start the school year off by sending a welcoming message to LGBTQ students.

California and other states should recognize the infirmities of this new

112. Id.
113. Id. See also CAL. EDUC. CODE § 37222(a)(4) (West 2008) (statute listing significant days for California public schools).
114. SENATE FLOOR ANALYSIS OF AB 2567, supra note 6, at 5.
115. See Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1014 (9th Cir. 2008).
116. See id. (noting that schools "may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides").
117. See CAL. EDUC. CODE § 37222(b) (encouraging, rather than requiring, schools to celebrate and hold commemorative activities for days having special significance).
118. See Nabozny v. Podlesny, 92 F.3d 446, 459 (7th Cir. 1996) (explaining that the plaintiff argued that his school's policy increased the risk of violence toward LGBTQ students).
law and adopt even stronger measures to promote tolerance of LGBTQ students. Instead of merely encouraging commemoration of Harvey Milk Day, states should pass laws mandating that their public schools hold commemorative activities on a Harvey Milk Day or a similar day of LGBTQ student appreciation. The obligatory nature of this policy would not be a wide deviation from the pre-existing law in many states since other laws establish similar state holidays. Despite its compulsory nature, states declaring a Harvey Milk Day or requiring that schools hold commemorative activities or diversity training should leave enough flexibility for schools to integrate commemoration or training with various curricula, age ranges, and parental preferences. Moreover, selecting a particular school day of a particular week of a particular month that fell toward the beginning of the academic year would ensure that public schools start the school year off by sending a strong message to all of its students that they are welcome regardless of their sexual orientations or gender identities.

While all states should consider such a day of commemoration, California would be the ideal first state to require commemoration of Harvey Milk Day. Most of Milk’s political activity occurred in San Francisco, and had significant effects for the entire state and the country. If the state where Milk had the most significant impact refuses to designate such a day of commemoration, many other states will not perceive the importance of declaring a similar day of recognition and appreciation of Milk’s accomplishments. Moreover, in the context of LGBTQ student rights, California’s legislation could set a model for other states to pass similar laws.

However, such a proposal may seem inappropriate to many legislatures—particularly in more conservative states with relatively few legal protections of sexual orientation or gender expression. Attempting to muster up support for a Harvey Milk Day in many states would thus be met with resistance and could quite possibly fail. In the absence of both state and federal action, though, individual school districts should then consider implementing a mandatory Harvey Milk Day or a day of LGBTQ student appreciation and diversity training. Whether at the state or school district

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119. For example, California requires its public schools to close for Thanksgiving, Cal. Educ. Code § 37220(a)(9) (West 2008) & Cal. Gov’t Code § 6700(o) (West 2009), and to hold activities celebrating or commemorating other holidays, Cal. Educ. Code § 37221(a)-(d) (West 2009) (including the anniversary of the adoption of the Constitution of the United States; Susan B. Anthony Day; Black American Day; Conservation, Bird, and Arbor Day).
121. Id.
level, these policies should heed the deficiencies of California’s new law and implement mandatory programs on a specific day at the beginning of the year. Instituting a mandatory Harvey Milk Day or day of LGBTQ student appreciation would not only undercut the educational culture of heterosexism, but also shield schools from federal liability for bullying and harassment of LGBTQ students.

C. Addressing the Criticisms of a Harvey Milk Day

The critics of Harvey Milk Day vocalized several additional apprehensions. They were concerned that Harvey Milk Day would distract students from learning core subjects by adding to the proliferation of special holidays for students to commemorate; impose values on students, violate rights of freedom of speech and religion, and thus result in more litigation against schools; and require discussing “inappropriate” topics—gay and lesbian sex—with very young students. However, these concerns are insufficient to abandon the idea of a Harvey Milk Day.

The commemoration of Harvey Milk’s contributions and the effective teaching of curricular subjects are not mutually exclusive. Initially, Milk’s accomplishments could be easily integrated into various subjects. For example, an economics class could incorporate a discussion of Milk’s entrepreneurialism and labor contributions; a civics class could interweave a lesson on Milk’s political campaigns and the political theory he employed; an English class could partake in reading or writing lessons using the story of Milk’s accomplishments as content; and a debate class could argue about the extent of Milk’s accomplishments or the logical validity of Milk’s arguments. The potential for teachers’ lack of creativity in integrating pertinent content does not constitute a compelling reason to not commemorate Milk’s contributions. Second, since educational climates hostile to LGBTQ students may already interfere with students’ academic performance, fostering a safer and more inclusive learning environment might enhance students’ ability to learn core subjects, as demonstrated by Maslow’s hierarchy of needs. Third, failing to provide a safe environment for LGBTQ students exposes public schools to litigation that may drain their resources that could otherwise be used to attract more qualified teachers and purchase better teaching materials that would enhance the quality of education.

122. Interview with Jeff Green, Office of Assemblyman Kevin Jeffries, California’s Sixty-Sixth Assembly District (July 7, 2008).
123. See supra II.B.1.
124. CAL. EDUC. CODE § 201(c) (West 2008).
125. See supra Part II.B.2; Fifteen Expensive Reasons, supra note 28 (discussing fifteen separate lawsuits filed against school districts in various states including California, Nevada,
Additionally, mandating commemoration of a Harvey Milk Day will not necessarily require students to celebrate any form of sexuality or otherwise necessitate that schools impose any moral values on students. Assuming to the contrary, arguendo, the resulting imposition of moral values is inescapable because schools inevitably impose moral values on students through “social norms, discipline practices, rule structures, and even curriculum.” In the absence of recognition and appreciation of LGBTQ students, public schools run the risk of imposing prejudicial values on the students who must attend class with others who hold discriminatory viewpoints. In an educational setting where some imposition of values on students is unavoidable, schools must choose to promote the values that are the most beneficial to most students, which would be to value tolerance over intolerance. Moreover, the argument that teaching students about homosexuality or promoting homosexuality violates students’ and teachers’ freedom of speech and religion has not fared well in court.

The fear that discussion of LGBTQ issues would require lessons in sex education is equally unfounded. Informing students that some people love people of their own gender instead of people of the opposite gender does not necessitate any discussion about the anatomy of gay and lesbian sex with very young students, as many opponents of a Harvey Milk Day fear. Neither does informing students that some people do not identify with their biological sex require graphically discussing any particular surgical procedures. Simply informing students about others they may encounter at school or in public places, and discouraging inappropriate methods of interaction with those equal members of society, are not any more imposing than a similar discussion about people of a minority race, color, or national origin.

Kansas, Pennsylvania, Kentucky, Minnesota, and Missouri).

126. Nichols, supra note 9, at 508.

127. Morrison v. Bd. of Educ. of Boyd County, 521 F.3d 602, 608-10 (6th Cir. 2008) (holding that a student claiming that his school chilled his free speech rights by showing a video that taught tolerance of gay and lesbian students lacked Article III standing because he had failed to show any injury-in-fact); Downs, 228 F.3d at 1005-13 (rejecting a teacher’s claim that the school district violated his First Amendment free speech rights when it removed his bulletin postings expressing his disapproval of his school’s awareness raising efforts regarding students of minority sexual orientations); see, e.g., Parker, 514 F.3d at 105-07 (rejecting parents’ claims that their First Amendment religious freedoms were violated when schools did not provide notice that teachers were going to read to their classes books that discussed gay marriage because “the balance the school struck here does not offend the Free Exercise or Due Process Clauses of the U.S. Constitution. We do not suggest that the school’s choice of books for young students has not deeply offended the plaintiffs’ sincerely held religious beliefs. If the school system has been insufficiently sensitive to such religious beliefs, the plaintiffs may seek recourse to the normal political processes for change in the town and state.”).
V. CONCLUSION

This Note has contended that the bullying and harassment of LGBTQ students combined with neutrality and non-responsiveness by school administrators fashion an educational culture of heterosexism that gives preference to heterosexual and gender-conforming students. Administrative detachment from the plight of LGBTQ youths is especially worrisome because it fails to discourage student-on-student harassment. Some students have chosen to fight back against other students, school districts, and school officials at the courthouse rather than at the schoolhouse. To schools’ chagrin, federal courts have been receptive to the claims of these students. These lawsuits drain state schools of the financial resources and focus needed to execute their primary missions of educating students.

As students who bully and harass other students based on their actual or perceived sexual orientations or gender identities have stepped up the frequency and severity of their antics, public schools across the country must respond in kind to provide all of their students with safer places to learn. One of the best ways to teach tolerance and discourage student-on-student bullying would be for states to declare a Harvey Milk Day or a similar day of LGBTQ student appreciation. In the absence of state legislation, school districts should seriously consider implementing similar policies to shield themselves from federal liability for student harassment.

An annual Harvey Milk Day on which public schools held activities honoring Milk’s accomplishments, or a day of LGBTQ student appreciation and diversity training, would jumpstart student discussion and education on positive ways to interact with people of minority sexual orientations and gender identities. By sending a welcoming message to LGBTQ students in public schools, a Harvey Milk Day would also diminish incidents of physical and verbal harassment of students, which would further decrease the likelihood of LGBTQ students dropping out, committing suicide, and abusing drugs. Lastly, students appreciating and learning about Milk’s accomplishments would also feel more comfortable expressing their identities in school and coming out to their classmates and teachers. Such a scenario would actualize Milk’s hope of letting the bullet that killed him destroy the closet doors of hundreds, if not thousands, of students throughout the country.