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**Securing Safe Schools:
Using Title IX Liability to Address Peer
Harassment of Transgender Students**

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I. INTRODUCTION

It is not surprising that transgender¹ students face daily discrimination and harassment in America’s schools. In 2007 the Gay,

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Lesbian and Straight Education Network (GLSEN) conducted a survey of students in schools across America. The resulting report indicated that LGBTQ² students were subject to both verbal and physical harassment, and felt unsafe at higher rates than their heterosexual or cisgender³ identified classmates, sometimes to the extent that they would miss classes or entire days of school to avoid harassment and violence.⁴ The current situation in schools is dire and while there are many solutions, such as drafting and implementing state anti-bullying statutes, strengthening a network of Gay Straight Alliances in schools, and providing resources and education to school personnel on the unique situation of LGBTQ students,⁵ many state governments, school boards and school personnel themselves harbor prejudices towards LGBTQ students and contribute to the problem.⁶ Consequently, while waiting for attitudes to change, it is important that these students and their families are able to seek a remedy under existing federal law.

Title IX of the Patsy T. Mink Equal Opportunity in Education Act (Title IX)⁷ provides an alternative remedy to the bullying of transgender students in schools. In relevant part, it provides 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.”⁸ Enacted during the feminist movement of the 1970s, this statute has traditionally been relied upon by women seeking to receive equal money

1. “Transgender” is used in this Article broadly to include students who identify as or are perceived as transgender, transsexual, gender-queer or are otherwise questioning their gender identities or engaging in gender expression that is somehow different from normal gender expectations. Furthermore, when referring to a transgender student, the assigned gender refers to the student’s self-identified gender (if known).

2. Although the 2007 National School Climate Survey cited in this Part applies to all LGBTQ individuals, the Article’s focus is on transgender students as defined above. Harassment on the basis of sexual orientation is only included insofar as the research is inseparable from gender identity harassment or where it is part of the factual disposition of the cases (as I could not find any cases dealing with transgender students explicitly, many of the cases surround plaintiffs perceived to be gay, lesbian, bisexual or transgender).

3. “Cisgender” is a term that refers to individuals whose birth sex and gender identity are aligned, in contrast to “transgender,” which refers to individuals whose birth sex and gender identity diverge. H.C. Crethar & L.A. Vargas, *Multicultural Intricacies in Professional Counseling*, in *THE COUNSELOR’S COMPANION: WHAT EVERY BEGINNING COUNSELOR NEEDS TO KNOW* 61 (J. Gregoire & C. Jungers eds., 2007).

4. See Joseph G. Kosciw et al., *2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools* (2008), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf.

5. *Id.* at 148-49.

6. *Id.* at XX.

7. 20 U.S.C. § 1681 (2006).

8. *Id.*

in scholarships or equal access to athletic programs and resources historically reserved for or favoring men.⁹ Even though student-on-student bullying is not explicitly addressed in the statute, as early as 1988, a federal circuit court recognized a claim against a school for failing to intervene in peer sexual harassment.¹⁰ Following a wave of similar decisions in lower courts, the United States Supreme Court recognized such a claim approximately ten years later in *Davis v. Monroe County Board of Education*.¹¹ Over the next decade liability under Title IX's peer sexual harassment doctrine was expanded to parallel Title VII hostile work environment case law and include claims against schools for ignoring complaints of harassment based on gender stereotypes.¹² Nonetheless, courts have explicitly excluded claims of sexual orientation harassment as failing to qualify as harassment on the basis of sex.¹³

In this Article, I argue that Title IX's prohibition of discrimination on the basis of sex in federally funded education provides a right of action for students who are harassed due to their gender identity or expression using the *Price Waterhouse v. Hopkins*¹⁴ model for sex discrimination claims under Title VII.¹⁵ Part One of this Article presents an empirical understanding of the type of harassment faced by transgender students that would likely be covered by the statute. Part Two of this Article describes the Title IX statute and the precedents establishing and addressing what qualifies as peer sexual harassment under it. Finally, Part Three argues that Title IX renders actionable the harassment described in Part One under a *Price Waterhouse* gender stereotyping theory of sex discrimination, as applied in the cases discussed in Part Two to transgender students.

9. Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX To Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 129 (2000). Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988). It is important to note that peer sexual harassment itself is not prohibited under the statute or the case law. Rather, the statute makes the school liable for a failure to take appropriate action in the face of knowledge that pervasive and severe peer sexual harassment is occurring. 20 U.S.C. § 1681.

10. *Lipsett*, 864 F.2d at 895-97.

11. *See* 526 U.S. 629 (1999), discussed in greater detail in Part II.

12. *See, e.g.*, *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) (noting that Title IX claims should be analyzed under Title VII standards and precedents). The term commonly employed in the case law for "gender stereotyping" claims is "sex stereotyping," but to promote consistency in this Article, I will use gender stereotyping because it is related to the individual's social construction of gender.

13. *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 377 F. Supp. 2d 952, 977 (D. Kan. 2005) (denying defendants' Motion for Reconsideration of Order Denying Summary Judgment on plaintiff's Title IX claim where defendants unsuccessfully argued that plaintiff alleged peer harassment on the basis of uncovered sexual orientation rather than covered sex).

14. *See generally* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

15. *See infra* Part II.A.

II. PERVASIVE ANTI-TRANS BULLYING IN TODAY'S SCHOOLS

Transgender students face the most harassment of any group of students harassed on the basis of a personal characteristic¹⁶ in school. They are more often victims of verbal and physical harassment than any other students who are harassed on the basis of a personal characteristic, including nontransgender lesbian, gay, bisexual and female students, as well as students of color or of a minority religious or ethnic background.¹⁷ Two thirds of transgender students surveyed by GLSEN reported feeling unsafe in school due to their gender identity and/or sexual orientation.¹⁸ Moreover, nearly half of all transgender students frequently missed school due to verbal harassment regarding their gender identities and/or sexual orientations.¹⁹ These students were twice and three times as likely respectively to have missed school due to harassment or threats of harassment than students harassed on the basis of other personal characteristics (with the exception of those harassed on the basis of sexual orientation, who missed school in similar numbers).²⁰ Because people often first explore and express their gender identities during their adolescence,²¹ and hence, school years, this sort of

16. Personal characteristic is used to refer to an individual's identifying quality as a member in a social group such as her gender, race, religion, sexual orientation or gender identity. For a transgender individual, the relevant personal characteristic is her gender identity or expression. Gender expression includes statements self-identifying one's gender or gender nonconformity as well as conduct that others (notably harassers) perceive to be gender nonconforming.

17. See Tonei Glavinic, *Research Shows Lack of Support for Transgender and Gender-Nonconforming Youth in U.S. School Systems*, STUDENT PULSE, <http://www.studentpulse.com/articles/135/research-shows-lack-of-support-for-transgender-and-gender-nonconforming-youth-in-us-school-systems> (last visited Feb. 22, 2011). It should be noted that many transgender students have identities that intersect with another (or more than one other) personal characteristic, which may make them more vulnerable to discrimination and vulnerable in a unique way; most commonly, transgender students who are not heterosexual experience harassment from both angles—gender nonconformity and being of a minority sexual orientation. Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, at 14, GLSEN (2009), available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/2388.html?state=research&type=research> (last visited Mar. 20, 2010).

18. Greytak et al., *supra* note 17, at xi. I include sexual orientation along with gender identity in some of these statistics because the GLSEN report makes note of them explicitly and also to demonstrate the commonality of the intersection for the purposes of the Title IX cases to be discussed later. Students who are heterosexual but whose self-determined gender identity does not conform to their birth sex are perceived as gay or lesbian by peers, while those who are transgender and also bisexual, gay, or lesbian are also subject to sexual orientation harassment if they openly express their sexual orientation.

19. *Id.* at 25-26.

20. *Id.*

21. See *Trans Youth at School: Y-Gap Community Bulletin*, Youth Gender Action Project, Toronto, Ont.) (2009), http://www.ctys.org/documents/YGAP_School.pdf (last visited Mar. 22, 2010).

harassment can be especially harmful for transgender and gender-questioning youth. There are two kinds of harassment that are relevant for the Title IX inquiry: personal characteristic harassment and sexual harassment.²²

A. *Personal Characteristic Harassment of Transgender Students*

The kind of personal characteristic harassment that a transgender youth faces often takes the form of comments or actions ridiculing or denigrating his gender expression or identity. For instance, according to the 2007 school climate survey, the verbal harassment tends to take the form of comments about students failing to be “masculine enough” or “feminine enough.”²³ This is harassment that targets the student’s gender expression, which can range from using a lower or higher register of voice than is common for persons of the individual’s assigned biological sex at birth²⁴ to wearing gender nonconforming clothing and asking to be referred to by pronouns not typically associated with his birth sex. Almost ninety-percent of transgender students were subject to verbal harassment on the basis of their gender identity and/or sexual orientation.²⁵ In addition to verbal harassment, transgender students are subject to physical harassment and assault for their expressions of their gender identities. Over half of surveyed transgender students had experienced physical harassment relating to their gender expressions and almost half had been physically assaulted.²⁶ On the whole, with respect to personal characteristic harassment, transgender students were subject to more harassment and assault than any other group in the 2007 School Climate Survey.²⁷

22. Greytak et al., *supra* note 17. In addition to personal characteristic harassment and sexual harassment, transgender students are also subject to relational aggression (which includes spreading rumors or excluding transgender students from social activities or friend cliques), property damage or stolen property. *Id.* Sometimes peers use electronic harassment (“cyberbullying”) to threaten transgender students. *Id.* Nevertheless, these forms of harassment are unlikely to be considered harassment on the basis of sex for the purposes of Title IX. Consequently, I will exclude them from my analysis unless the nature of the relational aggression, property theft/damage or cyberbullying can also be considered either harassment based on a personal characteristic or sexual harassment.

23. Greytak et al., *supra* note 17, at x.

24. Hereafter, an individual’s assigned biological sex at birth will be referred to as “birth sex.” “Gender” will be used throughout the Article to refer to social understandings of biological sex, and, most often in this Article, an individual’s gender identity.

25. Greytak et al., *supra* note 17, at xi.

26. *Id.* at 18-19. Physical assault includes “being punched, kicked or injured with a weapon.” *Id.* at 18.

27. *See id.* at 19.

B. *Sexual Harassment of Transgender Students*

Transgender youth *in particular* are subject to sexual harassment,²⁸ which is the other major form of harassment covered by Title IX.²⁹ Surveyed students report that the harassment they experienced in response to their gender expressions was “often sexual in nature.”³⁰ This sexual harassment includes “receiving unwanted sexual remarks or being touched inappropriately.”³¹ This harassment differs from personal characteristic verbal and physical harassment in that it is sexual in nature rather than about the individual’s gender expression, even though it is a reaction to the gender expression.³² Seventy-six percent of transgender students experienced sexual harassment at school.³³

C. *Conclusion*

Currently, transgender students are subject to pervasive harassment, including harassment that takes the forms of not only verbal and physical denigration of their gender expression but also sexual harassment. The former harassment is based on the personal characteristic of gender identity (as well as often other intersectional characteristics such as sexual orientation) and the expression of that gender identity through nonconforming gender behaviors—such as, behaving more masculine or feminine than is expected of an individual with one’s birth sex. Transgender students experience more harassment than other similarly situated groups of students, and this harassment results commonly in these students’ staying home from school or otherwise feeling unable to participate and excel in school.

III. TITLE IX AND PEER SEXUAL HARASSMENT LAW

In this Part, I give a background of Title IX litigation and the evolution of the peer sexual harassment cause of action. Part A examines the use of Title VII case law in adjudicating Title IX claims and notes Title VII’s hostile environment and sex stereotyping case law. Part B examines the first Supreme Court case to recognize school liability under Title IX for student-on-student harassment.³⁴ Part C identifies the link

28. See Kosciw et al., *supra* note 4, at 32.

29. 20 U.S.C. § 1681 (2006).

30. Kosciw et al., *supra* note 4, at 32.

31. *Id.*

32. *See id.*

33. Greytak et al., *supra* note 17, at 21.

34. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

between peer sexual harassment and sex discrimination. Part D chronicles the evolution of peer sexual harassment case law that identifies harassment on the basis of gender nonconformity as peer sexual harassment.

A. *Title IX and Its Link to Title VII*

As noted above, Title IX provides 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.”³⁵ During the women’s movement of the 1970s, Congress enacted Title IX to respond to the disparate treatment men and women faced as employees and students in the educational field, specifically “in school admissions policies, hiring and promotions policies, and the allocation of federal funds in school athletic programs, and generally to assure that girls and boys have the same educational opportunities.”³⁶ Because of its connection to employment in the educational context, many courts have interpreted Title IX using interpretations and precedents that evolved from case law under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex (among other qualities).³⁷ Title VII protects against sexual harassment in the workplace and has been interpreted to cover instances where an employer makes an employment decision based on sex stereotypes, such as the stereotype that women are or ought to be less aggressive and softer in dress or appearance than similarly situated men.³⁸ Stereotypes are beliefs individuals hold about the members of certain groups who have a personal characteristic in common.³⁹ These stereotypes can be descriptive or prescriptive.⁴⁰ For instance, in the above example, certain individuals view those with the personal characteristic of a female gender as descriptively soft-spoken or believe women *should be* soft-spoken (which is prescriptive). Prescriptive and descriptive stereotypes can and do work together, but one can also exist without the other.⁴¹

35. 20 U.S.C. § 1681 (2006).

36. Eisemann, *supra* note 9, at 129.

37. *See id.* at 128-29.

38. *See id.* at 143.

39. *See* Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL’Y & L. 665, 665-66 (1999).

40. *Id.*

41. *Id.*

*B. The Evolution of a Cause of Action for Peer Sexual Harassment:
Davis v. Monroe County Board of Education*

Despite Congress's broad remedial purposes behind its enactment of Title IX, the Supreme Court did not extend a right of action against a school under Title IX for student-on-student (or "peer") sexual harassment until 1999 in *Davis*.⁴² *Davis* concerned a fifth grade student, LaShonda Davis, who had been subject to sexual harassment including inappropriate name-calling and touching by her male classmates, which resulted in her not wanting to go to school.⁴³ She sued her school and school board for failing to remedy or adequately address the harassment after she and her mother made numerous complaints.⁴⁴ The defendants moved to dismiss, claiming that no school personnel were involved in the harassment and that they had no liability for the actions of other students under Title IX.⁴⁵ The Supreme Court reversed the trial court and the United States Court of Appeals for the Eleventh Circuit's en banc rehearing and held that educational institutions which receive federal funding are liable under Title IX for peer sexual harassment if they have "actual knowledge" of student-on-student sexual harassment and are "deliberately indifferent" to the harassment.⁴⁶ The Court defined peer sexual harassment as harassment "that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."⁴⁷

Although *Davis* concerned male on female harassment, the ruling did not limit applicability to different-sex harassment.⁴⁸ Nor did it limit the meaning of sexual harassment to exclude gender nonconformity.⁴⁹ Over the past decade, many lower courts have had the opportunity to decide peer sexual harassment cases, including cases involving same-sex harassment focusing on perceived sexual orientation and gender nonconformity.

C. Peer Sexual Harassment as Sex Discrimination

The cause of action for a school's failure to appropriately address peer sexual harassment is a claim that the school's actions discriminated

42. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

43. *Id.* at 633-34.

44. *See id.* at 633-35.

45. *See id.* at 636.

46. *Id.* at 650.

47. *Id.*

48. Eisemann, *supra* note 9, at 132.

49. *See id.*

against the student on the basis of sex.⁵⁰ However, unlike teacher on student sexual harassment under Title IX or an employer's harassment of an employee in the workplace under Title VII, the mere existence of peer sexual conduct or language is not prima facie evidence of sex discrimination sufficient to make out a cause of action to impose liability on schools under the statute.⁵¹ The action has to be so severe and pervasive that it "effectively den[ies] access to a federally funded educational program."⁵²

In *Davis* the Court declined to definitively identify what constitutes sufficiently severe harassment, but instead suggested that the sort of peer harassment that would effectively constitute sex discrimination would "depend . . . 'on a constellation of surrounding circumstances, expectations and relationships,' . . . including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."⁵³ In identifying peer harassment as a kind of sex discrimination, the majority in *Davis* relied on a "formal equality model" of sexual harassment as sex discrimination.⁵⁴ This model understands peer sexual harassment as sex discrimination in that the school's unreasonable disregard of a victim's harassment complaint "creates an unequal educational environment between males and females."⁵⁵

D. Extensions of Davis To Allow Title IX Liability for Peer Sexual Harassment of Students on the Basis of Non-Conformity to Gender Stereotypes

Just one year after *Davis*, a Minnesota federal trial court decided a case involving a plaintiff complaining of same-sex peer sexual harassment that focused on his perceived sexual orientation and failure to conform to gender stereotypes. In *Montgomery v. Independent School District*, Jesse Montgomery sued his school district after enduring persistent harassment due to his perceived sexual orientation and failure to conform to male gender stereotypes from elementary through high

50. *See id.*

51. Patricia Romano, *Davis v. Monroe County Board of Education: Title IX Recipients' "Head in the Sand" Approach to Peer Sexual Harassment May Incur Liability*, 30 J.L. & EDUC. 63, 65 (2001).

52. *Id.*

53. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998); citing 62 Fed. Reg. 12034, 12041-42 (1997)).

54. Joan E. Schaffner, *Davis v. Monroe County Board of Education: The Unresolved Questions*, 21 WOMEN'S RTS. REP. 79, 84 (2000).

55. *Id.* (quoting Daniel G. McBride, *Guidance for Student Peer Sexual harassment? Not!*, 50 STAN. L. REV. 523, 542 (1998)).

school.⁵⁶ He was verbally harassed by other students who called him “‘fagott [sic],’ ‘fag,’ ‘gay,’ ‘Jessica,’ ‘girl,’ ‘princess,’ ‘fairy,’ ‘homo,’ ‘freak,’ ‘lesbian,’ ‘femme boy,’ ‘gay boy,’ ‘bitch,’ ‘queer,’ ‘pansy,’ and ‘queen.’”⁵⁷ Moreover, he was subject to physical abuse and unwanted sexual advances.⁵⁸ These advances included grabbing his legs, inner thighs, chest, crotch, and buttocks.⁵⁹ Furthermore, a student asked to see Jesse naked after class.⁶⁰ Another grabbed his own genitals while grabbing Jesse’s buttocks; some students would grind their penises against Jesse’s backside; one student pretended to anally rape Jesse; and another would sit on his lap and simulate intercourse.⁶¹ The school district argued that Title IX does not apply to this conduct because the harassment was based on his perceived sexual orientation and not on his sex.⁶² In denying the school district’s motion for summary judgment on his Title IX claim, the court determined that while Title IX does not apply to harassment on the basis of (perceived) sexual orientation, it does make schools liable for harassment on the basis of gender nonconformity.⁶³ In Jesse’s case, he was a victim of offensive conduct “because he did not meet . . . stereotyped expectations of masculinity.”⁶⁴ The court also considered heavily the explicitly sexual nature of the harassment and analogized it to harassment prohibited in Title VII cases.⁶⁵ The alleged harassment was sufficient to be considered harassment “on the basis of sex” for the purposes of Title IX.⁶⁶

More recently, in *Theno v. Tonganoxie Unified School District No. 464*,⁶⁷ the court held that students may demonstrate harassment on the basis of sex for purposes of Title IX liability by showing that the harassment was a response to the student’s failure to conform to gender

56. *Montgomery v. Indep. School Dist.*, 109 F. Supp. 2d 1083, 1090 (D. Minn. 2000).

57. *Id.* at 1084.

58. *Id.*

59. *Id.*

60. *Id.* While it is possible that such an advance could be a welcome invitation out of its context, taken with the derogatory taunts and unwanted touching Jesse’s peers subjected him to, as well as the severe emotional distress he experienced as a result, it is clear that the request to see him naked was neither intended to be inviting nor welcomed by Jesse.

61. *Id.*

62. *Id.* at 1089-90.

63. *See id.* at 1090-92 (noting especially that it would be unlikely for children to perceive sexual orientation at an age as young as kindergarten (when Jesse’s harassment began) and positing instead that the students were responding most likely to the fact that Jesse’s behavior was feminine in nature and not like that of other boys his age.).

64. *Id.* at 1090.

65. *Id.* at 1091-93.

66. *Id.*

67. 377 F. Supp. 2d 952, 964 (D. Kan. 2005).

stereotypes.⁶⁸ Plaintiff Dylan Theno was harassed by his peers over a four-year period beginning in seventh grade because of his perceived sexual orientation and failure to adhere to gender norms.⁶⁹ He claimed that throughout this time the school inadequately addressed or ignored his complaints regarding the harassment, and as a result, he needed to leave school completely in eleventh grade to pursue a GED.⁷⁰ Dylan was subject to physical assault, physical harassment, and verbal harassment, including “crude gestures with various sexual overtones.”⁷¹ Over the four years he was called names such as “faggot,” “flamer,” “gay,” “queer,” “masturbator,” “pussy” and “banana boy.”⁷² Moreover, like the bullying in *Montgomery*, the anti-gay bullying here had sexual components to it.⁷³ For instance, one student simulated oral sex with a piece of string cheese and another student suggested that Dylan “likes to suck cock.”⁷⁴ Many of the comments surrounded masturbation, where students consistently taunted plaintiff over the years by suggesting that Dylan enjoys masturbating often and while at school.⁷⁵ The school moved for summary judgment on the Title IX claim because they attributed the harassment to Dylan’s perceived sexual orientation, which is not sufficiently “gender-related” for the purposes of the statute.⁷⁶ The court disagreed and noted that harassment is actionable under Title IX using the standards developed in *Oncale v. Sundowner Offshore Services*,⁷⁷ a Title VII hostile work environment harassment case in which a male was subject to harassment by other males,⁷⁸ and also under the gender

68. *Id.* at 977.

69. *See id.* at 954.

70. *Id.*

71. *Id.*

72. *Id.* at 954-61.

73. *Id.*

74. *Id.* at 955.

75. *Id.* at 955-62. Early on it was also suggested that Dylan masturbated with fish. *Id.* at 955.

76. *Id.* at 962. In addition to suggesting that the harassment was not gender related and thus did not fall under Title IX, the school board also moved for summary judgment on alternative grounds that it was not sufficiently pervasive or severe and that they had not demonstrated “deliberate indifference” to the actions of other students. *Id.*

77. 523 U.S. 75, 78-82 (1998).

78. *Id.* at 77. In the case at issue, however, the court held that the plaintiff would not survive summary judgment on an *Oncale* theory. Because I do not use the *Oncale* approach to extend Title IX liability for harassment on the basis of gender nonconformity, I will not address the arguments made by the court in *Theno* regarding the requirements to demonstrate sexual harassment under an *Oncale* theory. *Theno*, 377 F. Supp. 2d at 964 (citing *Oncale*, 523 U.S. at 80-81).

stereotyping theory recognized in *Price Waterhouse v. Hopkins*.⁷⁹ Although the plaintiff did not allege sufficient facts to meet the standard for same-sex sexual harassment under *Oncale*, the court held that the plaintiff alleged facts sufficient to make out a cause of action under a *Price Waterhouse* gender stereotyping theory.⁸⁰ Specifically, the harassment was based on impermissible gender stereotypes, specifically, that Dylan was harassed because he was insufficiently masculine.⁸¹

E. Conclusion

Title IX makes educational institutions receiving federal funding liable for sex discrimination in education. In *Davis* the Court interpreted Title IX to hold a school liable for deliberate indifference to actual knowledge of severe and pervasive peer sexual harassment. In *Theno* and *Montgomery* the federal trial courts held that peer sexual harassment includes harassment on the basis of gender nonconformity.

IV. TITLE IX COVERS HARASSMENT ON THE BASIS OF GENDER IDENTITY

In this Part, I apply the *Price Waterhouse* gender stereotyping theory to harassment on the basis of gender identity. The extension of Title IX's peer sexual harassment law to apply to harassment based on gender stereotyping would render both personal characteristic and sexual harassment against transgender students for their gender identity actionable under federal law. Because the harassment of transgender students stems from their nonconforming gender expression or identification, it is harassment on the basis of a failure to adhere to a sex stereotype.

The approach that was successful in the *Theno* case and, less explicitly, in the *Montgomery* case uses the principle espoused in *Price Waterhouse*, where the court held that making an adverse employment decision based on an employee's failure to comply with sex stereotypes is actionable under Title VII.⁸² This approach has been used as an alternative to *Oncale* in lower courts for dealing with same-sex employment harassment where the harassment is on the basis of gender

79. 490 U.S. 228, 235 (1989) (holding that gender stereotyping was evidence of sex discrimination under Title VII); *Theno*, 377 F. Supp. 2d at 964.

80. *Theno*, 377 F. Supp. 2d at 964-65.

81. *Id.* at 965.

82. *Id.* at 964 (citing *Price Waterhouse*, 490 U.S. at 235).

nonconforming behavior.⁸³ In *Theno*, the court held that the plaintiff had successfully demonstrated that the alleged harassment was on the basis of sex because his harassers used sex stereotypes to ridicule him.⁸⁴ For instance, the court noted that the rumors of him masturbating at school when conjoined with the names he was called and the sexually explicit simulations in effect deprecated him for “not act[ing] as a man should act” by masturbating at school.⁸⁵ Similarly, in *Montgomery*, when denying summary judgment on the Title IX claim, the court noted that the plaintiff’s harassment was based on sex stereotypes, albeit not explicitly citing *Price Waterhouse*, by emphasizing the way Jesse’s harassers attempted to feminize him, calling him “Jessica” and were likely hostile to aspects of his gender expression that were “not . . . befitting a boy.”⁸⁶ In both these recent cases, the courts rejected the schools’ arguments that the harassment was not on the basis of sex by understanding the harassment as a form of gender stereotyping; these students were harassed because they did not conform to stereotypical expectations of masculinity.

An individual who is harassed for his gender identity or gender expression encounters a form of sex harassment, which, if treated with deliberate indifference by the school, creates liability for the school under Title IX. This harassment constitutes sex harassment because it is based on gender stereotypes. As described in Part I, personal characteristic harassment for transgender students includes verbal or physical harassment that is not inherently sexual in nature but focuses on how the individual’s gender expression fails to be masculine or feminine enough for his or her birth sex. Because transgender individuals do not identify with their birth sexes (or the genders that their biological sex represents), they are likely to express their gender identities in a way that does not conform to the traditional expectations of someone with their birth sexes. This harassment parallels the experiences of the plaintiffs in *Montgomery* and *Theno*, even though neither plaintiff identified as transgender. In both those cases the plaintiffs’ harassers identified them

83. *Id.* (citing *Smith v. City of Salem*, 378 F.3d 566, 571-75 (6th Cir. 2004); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Nicols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999)).

84. *Id.* at 977.

85. *Id.* at 965. The court states, however, that the names alone would be insufficient. *Id.* (citing *Benjamin v. Metro Sch. Dist. of Lawrence Twp.*, No. 00-0891-C-T/K, 2002 WL 977661 at *3-4 (S.D. Ind. Mar. 27, 2002); *Burwell v. Pekin Cmty. High Sch. Dist.* 303, 213 F. Supp. 2d 917, 930-31 (C.D. Ill. 2002)).

86. *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

as too feminine both in the name-calling and in the students' perception of Jesse as gay at an age when children are not familiar with sexual orientation and the focus on Dylan as a masturbator.⁸⁷ *Theno* maintains that the name-calling on its own would be insufficient because gender-deprecating language does not necessarily signal that the harassment is on the basis of sex.⁸⁸ However, as discussed above, for transgender students the name-calling is not simply in the abstract; it is a persistent form of harassment aimed to target the nonconforming gender expression. For instance, in the case of a female transgender student wearing a dress to school, the taunts that she looks like a "bitch" or "femme boy" are connected to the gender nonconforming behavior, the same way that Jesse's taunting was connected to his "feminine personality traits."⁸⁹

Moreover, the sexual harassment is also actionable under the gender-stereotyping framework. The inappropriate and unwelcome touching of and sexual advances toward a transgender student, like those in *Montgomery*, and the comments about a student's sexual activities, such as the comments about Dylan being a masturbator in *Theno* might not be a product of the harasser's sexual desire (and inability to express that desire because of social norms or personal prejudices). Once again, it might be the harasser's way of punishing the student for failing to conform to gender stereotypes in the situation where society considers gender most important—sexual conduct. The harassment is a way to

87. *See id.*; *see Theno*, 377 F. Supp. 2d at 955-62.

88. *Theno*, 377 F. Supp. 2d at 965. Even though this is the conclusion the court came to, given the clearly gender-focused nature of the name-calling, it seems that the name-calling on its own should be sufficient to demonstrate that the harassment was based on gender stereotypes. Some courts have held that name-calling is sufficient to establish sex discrimination due to gender stereotyping in a hostile work environment claim. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, the United States Court of Appeals for the Ninth Circuit held that name-calling about a male waiter's lack of masculinity, which was similar to the name-calling Dylan Theno and Jesse Montgomery faced, was sufficient to meet the requirements of Title VII, as long as they were not offhand comments. *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870, 872 (9th Cir. 2001).

89. *Montgomery*, 109 F. Supp. 2d at 1090. Although the court emphasizes that the words themselves would not be enough to demonstrate that the harassment was on the basis of gender nonconformity (and, thus, on the basis of sex), I would disagree. While "bitch" is used to deride both men and women (and transmen and transwomen), the derision is due to the inherently sex discriminatory nature of the word, albeit the word has different meanings when used against men and women. The use of "bitch" to harass someone perceived to be female derides the woman for being too masculine, aggressive or abrasive and thus not feminine enough. Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 387-89 (2004). On the other hand, in its less common usage, "bitch" when used in reference to someone perceived to be male, criticizes the individual for being inadequately masculine, oftentimes for showing a lack of aggression; the term, in reference to men, originated as a way to describe a submissive prison inmate who was sexually victimized and called by feminine names. *See id.* at 403-04.

target students who do not comply with gender stereotypes. These advances, perhaps more than personal characteristic harassment, are a way to create shame or guilt about the individual's gender nonconformity.⁹⁰ Moreover, they aim to inspire fear through simulations of rape or other nonconsensual sexual acts in order to inhibit the student's gender expression. Because sexuality is a private and sensitive matter, especially for high school students, the overt humiliation of sexual harassment as a response to open expression of gender identity suggests that not conforming to gender stereotypes makes public a very private aspect of life in a degrading way. Treating such conduct as actionable gender stereotyping is an appropriate way to conceptualize these claims because they deal with stereotyped notions of how women and men ought to appear and behave, specifically the sexual gender roles that men and women ought to adopt in a heterosexual relationship. A male but ordinarily feminine-presenting transgender student who comes to the prom in a tuxedo, for instance, is rebuking society's standards for what is sexually attractive and appropriate in displays of femininity. It is expected at a social event where traditionally dates are brought and represents a romantic (and perhaps, for some, sexual experience) for many students that females will wear dresses in an effort to perform a particular gender role; dresses are what society considers attractive attire for a female at such an event. A "girl in a tuxedo" as s/he may be perceived is choosing to disrupt these norms of what is sexually attractive. The ensuing sexual harassment is a response to the nonconformity with the gender performance society expects of the student.

Montgomery and *Theno* provide a great resource to transgender students who are harassed because of their gender identity as well as sexually harassed for their nonconforming gender expression in seeking redress under Title IX when their schools ignore the harassment. Because transgender students are often either perceived to be "impersonators" or inadequate representations of their birth sex, they are perceived not to conform to gender stereotypes and transgress expected gender norms (such as in appearance, interests or self-identification). The harassment is a response to the disjunct the harassers perceive

90. Sexual harassment, in a similar way to sex crimes, tends to create shame in victims and their gender presentation. For instance, in the classic heterosexual sexual harassment case where a male boss makes sexual comments regarding a female employee's legs, the female employee may believe that had she not worn a short skirt, she would not have been subject to the harassment. Analogously, a student who is harassed with sexual comments and touched inappropriately because her gender expression does not conform with traditional gender norms is a way of creating shame in the harassed student for choosing to express her gender identity.

between their biological birth sex and their performance of their gender, which does not cohere with that birth sex. Thus it is a reaction to the lack of conformity with what an individual's perceived gender stereotype demands or describes.

V. CONCLUSION: THE FUTURE OF PEER SEXUAL HARASSMENT AND SNDA

Nonetheless, while it is true that recent interpretations of Title IX provide a valuable tool for transgender students whose schools ignore the pervasive harassment they face, *Theno* and *Montgomery* are both district court decisions binding in Kansas and Minnesota, respectively. It is unlikely that most courts will apply the *Price Waterhouse* gender stereotyping theory to cases involving transgender students partially because many schools will use the exclusion of sexual orientation harassment from Title IX liability as a tool to convince judges that harassment based on perceived gender identity was really harassment based on sexual orientation. After all, both Dylan Theno and Jesse Montgomery's harassers believed them to be gay. Moreover, with precedent like *Ulane v. Eastern Airlines* in the United States Court of Appeals for the Seventh Circuit,⁹¹ it is unclear that courts would be willing to recognize that harassment targeting an individual for his expression of a nonconforming gender identity is "on the basis of sex" for the purposes of Title IX liability.⁹²

Consequently, the real goal seems to be to create a statute that provides a right of action explicitly for students who experience gender identity, gender expression, and sexual orientation harassment. At the end of January 2010, Representative Jared Polis of Colorado introduced the Student Non-Discrimination Act of 2010.⁹³ As proposed, the bill would prohibit discrimination in schools on the basis of actual or perceived sexual orientation or gender identity.⁹⁴ The bill would also protect individuals from discrimination based on the actual or perceived sexual orientation or gender identity of anyone with whom they associate in school.⁹⁵ The bill currently has sixty cosponsors.⁹⁶ The bill was

91. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086-87 (7th Cir. 1984) (holding that a transsexual pilot did not have a valid cause of action for sex discrimination under Title VII because the adverse employment action was not taken on the basis of her sex).

92. 20 U.S.C. § 1681(a) (2006).

93. *Student Non-Discrimination Act of 2010 Introduced in U.S. House*, (Human Rights Campaign, D.C.), Jan. 27, 2010, available at <http://www.hrc.org/14041.htm> (last visited Mar. 23, 2010).

94. *Id.*

95. *Id.*

modeled after Title IX and even includes language that parallels that of *Davis*.⁹⁷ Furthermore, it allows the federal government to terminate funding for institutions that fail to comply.⁹⁸

This act addresses the problems delineated above with using Title IX. Nonetheless, until the Student Non-Discrimination Act of 2010 becomes law, transgender plaintiffs should still exercise their right to sue schools that ignore peer harassment by invoking Title IX. By holding schools liable under the statute, transgender students gain visibility as victims of harassment and give schools incentives to protect them from violence, regardless of personal biases that may exist among school personnel themselves. Harassment of transgender individuals for their gender expression qualifies as discrimination “on the basis of sex” for the purposes of Title IX because it targets individuals for gender nonconformity, which is impermissible sex stereotyping.

96. *Id.*

97. H.R. 4530: The Student Non-Discrimination Act of 2010 (Human Rights Campaign), available at <http://www.hrc.org/14041.htm>; see *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 620 (1999).

98. *Id.*