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# YALE LAW & POLICY REVIEW

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## TRANSGENDER TROPES & CONSTITUTIONAL REVIEW

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*The Trump administration is aggressively and systematically rolling back policies that protect transgender people. History teaches that these governmental attacks are not new, but instead represent the latest salvo in a long but losing battle to disparage transgender people, who have been ruthlessly depicted as criminals, deviants, and selfish iconoclasts. Notwithstanding the current administration’s open hostility toward transgender people, constitutional protections endure. This Essay discusses the evolution of government discrimination against transgender people—from laws that criminalized the violation of gender norms in the late twentieth century to the present-day exclusion of transgender people from the U.S. military—and transgender people’s continued efforts to secure recognition of their rights under the Fourteenth Amendment.*

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## INTRODUCTION

This is an historic moment for transgender rights. After transgender people secured protection from healthcare discrimination through a federal regulation implementing the Affordable Care Act in 2016, a federal district court in Texas enjoined enforcement of portions of the regulation.<sup>1</sup>

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1. *Compare* 45 C.F.R. § 92.4 (defining discrimination “on the basis of sex” to include “discrimination on the basis of . . . gender identity”), *with Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation*:

The Trump administration appears poised to rescind the regulation by issuing a new regulation that defines “sex” in an artificially restrictive way that is designed to exclude transgender health concerns.<sup>2</sup> After transgender students secured express, full inclusion in educational programs and facilities through a federal government policy that prohibited schools from denying access to gender-appropriate restroom facilities, the Trump administration rescinded the policy.<sup>3</sup> And after transgender service members secured the right to serve openly following the toppling of the U.S. military’s “Don’t Ask, Don’t Tell” policy, the Trump administration attempted to reinstate a transgender ban on military service by issuing a White House memorandum claiming, without factual support, that transgender people undermined “military effectiveness and lethality.”<sup>4</sup>

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*Frequently Asked Questions*, NAT’L CTR. FOR TRANSGENDER EQUALITY (Apr. 8, 2019), <https://transequality.org/HCRL-FAQ> [<https://perma.cc/RD82-DZQK>] (discussing court decision (*Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016)) enjoining enforcement of portions of the healthcare antidiscrimination regulation, 45 C.F.R. § 92.4).

2. NAT’L CTR. FOR TRANSGENDER EQUALITY, *supra* note 1 (discussing the Trump administration’s plan to roll back portions of the healthcare antidiscrimination regulations).
3. *Compare* Scott Horsley, *White House Sends Schools Guidance on Transgender Access to Bathrooms*, NPR (May 13, 2016, 5:02 AM), <https://www.npr.org/sections/thetwo-way/2016/05/13/477896804/obama-administration-to-offer-schools-guidance-on-transgender-bathrooms> [<https://perma.cc/74AP-UF89>] (discussing 2016 guidance directing schools to permit students to use restrooms consistent with their gender identity), *with* Rebecca Hersher & Carrie Johnson, *Trump Administration Rescinds Obama Rule On Transgender Students’ Bathroom Use*, NPR (Feb. 22, 2017, 7:37 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use> [<https://perma.cc/PZ7L-XAEC>] (discussing 2017 guidance from the U.S. Department of Justice and the U.S. Department of Education rescinding 2016 guidance).
4. *Compare* Terri Moon Cronk, *Transgender Service Members Can Now Serve Openly, Carter Announces*, U.S. DEP’T OF DEFENSE (June 30, 2016), <https://dod.defense.gov/News/Article/Article/822235/transgender-service-members-can-now-serve-openly-carter-announces> [<https://perma.cc/E34V-2SAE>] (discussing Secretary of Defense Ash Carter’s announcement that transgender service members could “openly

It is not hyperbole to say that transgender rights are under attack; the Trump administration is aggressively and systematically rolling back policies that protect transgender people. History teaches that these governmental attacks are not new, but instead represent the latest salvo in a long but losing battle to disparage and diminish transgender people. These attacks are fueled by tired tropes about transgender people, who are ruthlessly depicted as criminals, deviants, and selfish iconoclasts.

Notwithstanding the current administration's open hostility toward transgender people, constitutional protections endure. Transgender people are seeking—and securing—the protection under the law of last resort: the Constitution's Fourteenth Amendment, which, in the words of Justice Ruth Bader Ginsburg, has served as a bulwark against oppression for "people once ignored or excluded."<sup>5</sup>

In Part I of this Essay, we begin with a brief discussion of three popular tropes that underlie opposition toward transgender people: transgender people as criminal, immoral, and disrespectful. In Part II, we describe the evolution of government discrimination against transgender people, from laws that criminalized the violation of gender norms in the late twentieth century to the present-day exclusion of transgender people from federal and state civil rights laws, single-sex services, and the U.S. military. We also analyze the government's reasons for such discrimination, which derive from one or more of the three transgender tropes, and explain why these reasons have consistently failed to withstand constitutional scrutiny. In Part III, we offer some concluding remarks about the legal, doctrinal, theoretical, and symbolic implications of courts' recognition of transgender rights under the Constitution.

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serve their country without fear of retribution"), *with* Doe 2 v. Mattis, 344 F. Supp. 3d 16, 23 (D.D.C. 2018) (stating that the Trump administration's "ban on military service by transgender individuals likely violates Plaintiffs' Fifth Amendment rights based on a number of factors, 'including the sheer breadth of the exclusion . . . , the unusual circumstances surrounding the President's announcement of [the exclusion], the fact that the reasons given for [the exclusion] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself.'" (quoting Doe 1 v. Trump, 275 F. Supp. 3d 167, 176 (D.D.C. 2017)); *accord* Doe 2 v. Trump, 315 F. Supp. 3d 474, 493 (D.D.C. 2018).

5. *United States v. Virginia*, 518 U.S. 515, 557 (1996).

I. TRANSGENDER TROPES

Three tropes fuel discrimination against transgender people: criminality, immorality, and disrespect.

The first trope is that transgender people are dangerous; they are criminals who threaten public safety. This view is predicated on myths, fears, and stereotypes about transgender people, who are seen as imposters trying to obtain an advantage through deception, or sexual predators trying to harm vulnerable people.<sup>6</sup> For those who subscribe to this view, transgender people are not to be trusted; their self-expression is fraudulent or worse, criminal. Accordingly, the role of law is to deter the expression and punish those who engage in it.

The second trope is that transgender people are immoral; they are deviants who threaten the moral health of the community. This view is predicated on animus toward transgender people, who are seen as neither male nor female, but rather something in between—something less than human.<sup>7</sup> This view often derives from religious conceptions of what is

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6. *See* Brief of NAACP Legal Defense and Educational Fund, Inc. and the Asian American Legal Defense and Education Fund as Amici Curiae in Support of Respondent at 7, *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273 (U.S. Mar. 2, 2017) [hereinafter NAACP Amicus Br.] (stating that “unfounded fears of sexual predation”—against transgender people and African-Americans—“have often been used to justify discrimination”); *see also* SUSAN STRYKER, *TRANSGENDER HISTORY, THE ROOTS OF TODAY’S REVOLUTION* 132-35, 227, 230 (2d ed. 2017) (discussing the “‘transsexual rapist’ trope [that] began to circulate in grassroots lesbian networks” in the 1970’s and persists among some feminists, “ex-gay ministries, religious fundamentalists, antiabortion activists, and bigots of many stripes”); Mark Joseph Stern, *The NAACP Legal Defense Fund’s Transgender Rights Brief is a Trenchant History Lesson*, SLATE (Mar. 3, 2017, 4:07 PM), <https://slate.com/human-interest/2017/03/naacp-ldfs-trans-rights-brief-is-a-trenchant-history-lesson.html> [<https://perma.cc/6BLS-VA4U>]; *infra* Part II (discussing discriminatory laws and policies that derive from tropes about transgender people being threatening).
  7. *See* Plaintiff Jane Doe’s Corrected Motion for Reconsideration of Order on Defendants’ Motion for Clarification at 4, *Doe v. Mass. Dep’t of Corr.*, No. 17-12255-RGS (D. Mass. Mar. 21, 2018), ECF No. 66 [hereinafter Pl.’s Mot. for Recon.] (stating that “one of the most pernicious stereotypes about transgender people [is that they are] . . . neither male nor female”—they are “less than human[,] . . . an objectified ‘it’ rather than a person”); *see also*

sinful, or pseudo-scientific conceptions of what is “natural.”<sup>8</sup> For those who subscribe to this view, transgender people engender discomfort, disgust, and disdain.<sup>9</sup> The role of the law, therefore, is to discourage the behavior for the sake of the community.

The third trope is that transgender people are iconoclasts; they are irreverent agitators who undermine community norms—particularly those relating to personal privacy.<sup>10</sup> Those who subscribe to this view do not want transgender people to upend settled expectations regarding seeing or being seen by someone perceived to be of a different sex—regardless of the resultant exclusion that those expectations impose on transgender people. Transgender people should not be fully integrated into the fabric of everyday life, the argument goes; they should stay in their lane, and the object of law should be to keep them there.

None of these tropes are accurate. Transgender people are not sexual predators; there is no evidence that transgender people pose more of a

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STRYKER, *supra* note 6, at 8 (discussing perception of transgender people as “not-quite-human,” and as “monstrous and frightening”).

8. *See infra* notes 22-24 and accompanying text (discussing biblical and pseudo-scientific defenses for transgender discrimination); *see also* STRYKER, *supra* note 6, at 26-27 (discussing disparagement of transgender people for defying expectation grounded in “scientific, cultural, or religious beliefs about what is natural, normal, or divinely given”).
9. *See, e.g.*, NAACP Amicus Br., *supra* note 6, at 7 (comparing “discomfort, fear, and hostility toward transgender students because of their gender identity” with justifications for racial segregation); *see also infra* Part II (discussing discriminatory laws and policies that derive from tropes about transgender people being immoral); *cf.* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY xiv (2010) (discussing “large segments of the Christian Right [that] openly practice a politics based upon disgust,” depicting “the sexual practices of lesbians and, especially, of gay men as vile and revolting [and]... suggest[ing] that such practices contaminate and defile society, producing decay and degeneration”).
10. *See, e.g.*, NAACP Amicus Br., *supra* note 6, at 15 (comparing school officials’ claims that transgender students would “violate the privacy of other students” with similar claims regarding racial desegregation); *see also infra* Part II (discussing discriminatory laws and policies that derive from tropes about transgender people violating others’ privacy).

“danger” than any other group.<sup>11</sup> Although moral animus toward transgender people has existed in some quarters for quite some time, history teaches that respect for transgender people is a tradition far more deeply rooted, with “individuals whom today we might call transgender[] . . . play[ing] prominent roles in many societies, including our own[,] . . . [f]rom prehistoric times to the present.”<sup>12</sup> And transgender people do not seek to violate others’ privacy; they seek merely to affirm and secure their own.

One might suggest a fourth trope: transgender people as mentally ill. Although this is certainly a common misconception about transgender people, it is not meaningfully distinct from—but instead interacts with—the three above-described tropes. Stated another way, one might believe that transgender people are criminal, immoral, or disrespectful for any number of reasons, *including* that they have a mental health condition. Such a view reflects not only stereotypes about transgender people but also stereotypes about people with mental health conditions more broadly, namely, that they are necessarily violent (e.g., people with bipolar disorder are often perceived as being prone to violence), they are morally deficient (e.g., people with cognitive limitations were once forcibly sterilized “to prevent those who are manifestly unfit from continuing their kind,”)<sup>13</sup> and they are disrespectful of norms (e.g., people with mental health conditions that require accommodations are often perceived as unfairly draining resources from those without such conditions).

## II. CONSTITUTIONAL REVIEW

Transgender people experience discrimination in a broad range of contexts across the private and public sectors.<sup>14</sup> Because the focus of this

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11. See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 161 (2010); *infra* note 84 and accompanying text.

12. Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in TRANSGENDER RIGHTS 171 (Paisley Currah et al., eds. 2006); see also STRYKER, *supra* note 6, at 40 (locating reverence for transgender people in various religious and spiritual traditions, including shamanic practices, ancient rabbinical texts, and the Qur’an).

13. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

14. NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY 2 (Dec. 2016),

Essay is on constitutional protections for transgender people, we focus on the latter, that is, discrimination by the government, namely, the legislature and the executive. This Part discusses government discrimination in four contexts: criminalization of gender nonconformity, denial of access to appropriate single-sex services, and exclusion from civil rights laws and service in the U.S. military. Although the context for such discrimination varies, the justifications are nearly identical; all derive from at least one of the three transgender tropes discussed above, and each has, by and large, failed to withstand constitutional scrutiny.

### *A. Criminalization*

From the mid-nineteenth century through the late twentieth century, states and localities broadly prohibited transgender people from participating in public life by criminalizing the violation of gender norms.<sup>15</sup> City ordinances did so explicitly—prohibiting one from “dress[ing] with the designed intent to disguise his or her true sex as that of the opposite sex.”<sup>16</sup> State laws, by contrast, prohibited “disguise” more generally.<sup>17</sup>

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<https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf> [<https://perma.cc/459J-EBPP>] (discussing discrimination against transgender people with respect to the “most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community”).

15. See WILLIAM N. ESKRIDGE, JR. ET AL., *SEXUALITY, GENDER, AND THE LAW* 106-07 (2018); see also Levi & Redman, *supra* note 11, at 152 (“Twenty-eight cities passed cross-dressing laws in the nineteenth century and an additional twelve passed laws in the twentieth century, with the most recent passed by Cincinnati in 1974.”). Much of the previous scholarship—including the authors’—refers to these laws as “cross-dressing” laws. This Essay substitutes the term “gender-norming” in order to emphasize the illegitimate purpose behind these laws, rather than the arbitrary means used to effectuate that purpose.
16. *Doe I v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (quoting City of Houston’s ordinance banning the violation of gender norms). These ordinances also targeted non-transgender feminist women in the late nineteenth and early twentieth centuries, whose desire to wear more comfortable and less restrictive women’s clothing was deemed “tantamount to cross-dressing”—with women seeking “to ‘pass’ as men.” Levi & Redman, *supra* note 11, at 153.
17. ESKRIDGE ET AL., *supra* note 15, at 107.

Although the original intent behind at least some of these state laws was the deterrence of criminality by non-transgender people—such as the armed insurrectionists of the Hudson Valley who dressed in ornate sheepskin masks and women’s calico dresses to disguise their identities during the anti-rent movement of the mid-1800s—by the mid-twentieth century, these laws were used to threaten and punish transgender people for expressing their gender identity in public.<sup>18</sup> Whether by intent or application, these laws often rendered transgender people invisible by forbidding them from participating in public life.

1. Justifications for Gender-Norming Laws

Transgender people arrested or at risk of arrest challenged these laws under the Fourteenth Amendment. Specifically, they argued that the laws were void for vagueness and also violated both equal protection and substantive due process. Defenders of the laws offered two primary justifications—public safety and morality—derived from tropes about transgender people as inherently threatening and morally depraved. Gender-norming laws furthered public safety, they argued, by “protect[ing] citizens from being misled or defrauded” and also by deterring criminal conduct—“aid[ing] in the description and detection of criminals” and “prevent[ing] crimes in washrooms.”<sup>19</sup> According to this reasoning, people—whether transgender or not—who dress in clothing inconsistent with their birth-assigned sex are misleading the public for nefarious and often criminal purposes, such as perpetrating assault in a single-sex facility or escaping responsibility for a crime.<sup>20</sup>

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18. *See id.*; *see also* Levi & Redman, *supra* note 11, at 152 (discussing routine enforcement of gender-norming laws in 1970’s and 1980’s “to punish people for their gender expression”).

19. *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978); *see also* *McConn*, 489 F. Supp. at 80 (quoting *City of Chicago*, 389 N.E.2d at 524); *City of Chicago v. Wilson*, 357 N.E.2d 1337, 1341 (Ill. App. Ct. 1976), *rev’d*, 389 N.E.2d 522 (Ill. 1978) (“Allowing a disguising of the sexes would hinder the detection of crime, would render uncertain the traditional separation of the sexes in public facilities, and would allow males to more easily victimize females, particularly in public ladies’ facilities where vulnerability to attack is already too great.”).

20. *See* *City of Columbus v. Zanders*, 266 N.E.2d 602, 604, 606 (Ohio Mun. Ct. 1970) (stating that “common sense and experience discloses that this ordinance has a real and substantial relation to the public safety and general

Gender-norming laws also furthered “the public morals,” defenders argued, by “prevent[ing] inherently antisocial conduct which is contrary to the accepted norms of our society.”<sup>21</sup> Unlike the public safety rationale, this second justification was explicitly directed at transgender people. Transgender people who dressed in clothing inconsistent with their birth-assigned sex were acting immorally, the argument went, for a number of reasons.

First, such conduct was said to violate gender norms rooted in religious tradition. As one court noted, according to the Book of Deuteronomy, “[t]he woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman’s garment: for all that do so are abomination unto the Lord, thy God.”<sup>22</sup> The same court offered a second moral defense for gender-norming laws, suggesting that the violation of gender norms was at odds with biology because it “frustrat[es] the reproductive urge” by making it more difficult for “the male and female of the species to recognize each other’s differences.”<sup>23</sup> Third and relatedly, defenders of gender-norming criminal laws argued that “dressing or disguising as a member of the opposite sex [wa]s a step toward creating homosexual relationships,” which were, themselves, immoral (and, prior to *Lawrence v. Texas*, effectively illegal in many states) because they were inconsistent with procreation and, therefore, with “the survival of the race.”<sup>24</sup> Fourth, such conduct was said to offend the general public’s

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welfare. There are numerous subjects who would want to change their sex identity in order to perpetrate crimes of homicide, rape, robbery, assault, etc.,” but holding ordinance unconstitutional as applied to plaintiff).

21. *City of Chicago*, 389 N.E.2d at 524-25.
22. *People v. Simmons*, 357 N.Y.S.2d 362, 365 (N.Y. Crim. Ct. 1974).
23. *Id.*
24. *See* *People v. Archibald*, 296 N.Y.S.2d 834, 838 (N.Y. Sup. Ct. Oct. 18, 1968) (Markowitz, J., dissenting) (stating that it was “within the province of legislative controls” to discourage “overt homosexuality in public places which is offensive to public morality”); *City of Chicago*, 357 N.E.2d at 1341 (“If a state may prohibit homosexual activity between consenting adults in private, it is clear that it may also prohibit the offensive display of homosexual conduct in public. In the instant case the Chicago City Council apparently believed the appearance in public of members of one sex pretending to be members of the opposite sex would have a detrimental effect on the morals of the community.”). As the City of Houston argued in support of its gender-norming law, “dressing or disguising as a member of the opposite sex is a step toward creating homosexual relationships” and,

“aesthetic preference[s]”; like state “ugly laws” that prohibited “unsightly” people (including many people with disabilities) from appearing in public, gender-norming laws prohibited transgender people from affronting the public’s sensibilities.<sup>25</sup> Lastly, defenders argued that transgender people who dress in clothing inconsistent with their birth-assigned sex incite *others* to engage in immoral, or even criminal, behavior: for example, an “ineffective [cross-gender] disguise may engender cat-calls and slurring remarks leading to a breach of the peace,” while an “efficient disguise could lead to trouble after an acquaintance is formed with the disguise and the true sex is disclosed when the friendship becomes amorous.”<sup>26</sup>

## 2. Constitutional Review of Gender-Norming Laws

Throughout the 1970s and 1980s, courts, by and large, rejected cities’ public safety and morality arguments and held that the gender-norming criminal laws violated Fourteenth Amendment due process under two distinct theories.<sup>27</sup>

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therefore, it can be “proscribed in the same manner as more overt homosexual conduct.” The City argued:

Society is presently thought to have an interest in barring homosexual acts since homosexuality is, at least partially, an acquired or taught trait. Our society deems it important not to have its youth learning to be homosexual rather than heterosexual. This interest is in part rooted in the survival of the race; procreation is necessary to ensure the continuation of the human race.

Levi & Redman, *supra* note 11, at 157-58 (quoting Respondent’s Brief in Opposition at 3, *Mayes v. Texas*, No. 73-627, 416 U.S. 909 (1974) [hereinafter *Texas Brief in Opposition*]).

25. *City of Chicago*, 389 N.E.2d at 525; *see* Note, 100 HARV. L. REV. 2035, 2035 n.2 (1987) (stating that “[u]ntil recently, a number of major American cities had so-called ‘ugly laws,’ generally part of their vagrancy laws, which imposed fines on ‘unsightly’ people who were seen in public places,” and quoting the City of Chicago’s ordinance, which was repealed in 1974, that imposed fines on people who appeared in public and were “diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object”).
26. Levi & Redman, *supra* note 11, at 155 (quoting *Texas Brief in Opposition*, *supra* note 24, at 4).
27. *See* I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 10 (2008).

Many courts struck down the gender-norming laws because they were unconstitutionally vague in violation of due process.<sup>28</sup> In *City of Columbus v. Rogers*, for example, the Supreme Court of Ohio concluded that a local ordinance's reference to "'dress not belonging to his or her sex,' when considered in the light of contemporary dress habits, make[s] the ordinance] 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"<sup>29</sup> In *City of Cincinnati v. Adams*, an Ohio trial court likewise concluded that the sheer breadth of a similarly-phrased law was unconstitutionally vague because it "encourages arbitrary and capricious enforcement of the law. It provides a convenient instrument for harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure."<sup>30</sup>

Other courts relied on substantive due process to invalidate gender-norming laws. Gender-norming laws infringed on transgender people's liberty—specifically, "values of privacy, self-identity, autonomy, and personal integrity that . . . the Constitution was designed to protect"—for no rational reason.<sup>31</sup> In *City of Chicago v. Wilson*, for instance, the Supreme Court of Illinois, applying rational basis, held that the City of Chicago's gender-norming ban infringed the plaintiffs' liberty in violation of

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28. The Supreme Court has held that a law is unconstitutionally vague in violation of the Fourteenth Amendment if it: fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute; encourages arbitrary and erratic arrests and convictions; makes criminal activities that by modern standards are normally innocent; or places almost unfettered discretion in the hands of the police. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-63, 168 (1972); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

29. *City of Columbus v. Rogers*, 324 N.E.2d 563, 565 (Ohio 1975) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)); see also *D.C. v. City of St. Louis*, 795 F.2d 652, 655 (8th Cir. 1986) (holding that "[cross-dressing] ordinance is unconstitutionally vague insofar as it attempts to proscribe conduct by use of the words 'indecent or lewd act of behavior'").

30. *City of Cincinnati v. Adams*, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

31. *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978) (quoting *Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting)).

substantive due process.<sup>32</sup> According to the court, the law did not “curb criminal activity” because the plaintiffs, who were “cross-dressing . . . as a part of a sex-reassignment preoperative therapy program,” were not engaged in criminal activity, and, “[a]bsent evidence to the contrary,” the court refused to assume that they were somehow “prone to commit crimes.”<sup>33</sup> Furthermore, the law did not “protect[] the public morals”; there was no evidence “that cross-dressing, when done as a part of a preoperative therapy program or otherwise, is, in and of itself, harmful to society”—regardless of whether it offends “the general public’s aesthetic preferences.”<sup>34</sup>

In *Doe v. McConn*, the Southern District of Texas, applying the most “minimal degree of scrutiny,” similarly struck down the City of Houston’s gender-norming ban on substantive due process grounds.<sup>35</sup> According to the court, the City’s purported reasons for the gender-norming ban—i.e., “the public’s desire and the police department’s need to know someone’s true sexual identity”—did not justify infringing the plaintiffs’ “well-being,” and the court could not conceive of any reason that *would* justify such an infringement.<sup>36</sup> In *McConn*, as in *City of Chicago*, the court recognized that for transgender as well as non-transgender people, one’s “choice of appearance” is a core aspect of one’s identity protected by the Fourteenth Amendment.<sup>37</sup> Intrusions into one’s “choice to be as he is” cannot be justified by the offense of others.<sup>38</sup>

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32. *Id.* at 525.

33. *Id.* at 524-25.

34. *Id.* at 525. In holding the City’s gender-norming law unconstitutional in violation of substantive due process, the Supreme Court of Illinois explicitly declined to reach the appellate court’s determination that the City’s gender-norming law did not violate equal protection based on sex because it served the “legitimate interest” of “maintaining the integrity of the sexes.” *See id.* at 523, *rev’g* *City of Chicago v. Wilson*, 357 N.E.2d 1337, 1342 (Ill. App. Ct. 1976).

35. 489 F. Supp. at 81.

36. *Id.* at 80.

37. *Id.* at 78 (stating that a transgender person “has not made a choice to be as he is, but rather that . . . choice has been made for him through many causes preceding and beyond his control”).

38. *Id.*; *see also id.* at 80 (“In this case, the aesthetic preference of society must be balanced against the individual’s well-being.”).

*B. Denial of Access to Appropriate Single-Sex Services*

Although governments no longer criminalize transgender people's public appearance through enforcement of gender-norming laws, governments continue to deny transgender people access to a broad range of appropriate single-sex public services by ignoring the legitimacy of transgender people's identity after they go through gender transition.<sup>39</sup> For example, public school policies and practices regularly require transgender students to use restrooms or comply with appearance norms associated with their assigned birth sex;<sup>40</sup> public employment policies similarly deny transgender public employees access to appropriate restrooms, uniforms, and nametags consistent with their gender identity;<sup>41</sup> prison policies incarcerate transgender inmates in prisons inconsistent with their gender identity, subjecting them to unsafe conditions and excluding them from various educational programs;<sup>42</sup> state laws require proof of gender confirmation surgery in order to amend the sex designation on one's birth certificate, or prohibit such amendments altogether;<sup>43</sup> and state laws prohibit transgender people from using restrooms consistent with their gender identity in a wide range of public settings, including libraries, parks, airports, state hospitals, police departments, and courthouses.<sup>44</sup>

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39. See, e.g., 2015 TRANSGENDER SURVEY, *supra* note 14, at 10-11, 14-15 (documenting denial of access to single-sex restrooms in employment and other settings).

40. See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1040 (7th Cir. 2017) (denial of access to appropriate restroom); *Doe v. Yunits*, 2000 WL 33162199, at \*1-2 (denial of appropriate uniform).

41. See, e.g., Compl. ¶¶ 17-19, 28-32, No. 14-4822, *Blatt v. Cabela's Retail, Inc.* (Nov. 5, 2014).

42. See, e.g., *Doe v. Mass. Dep't of Corr.*, No. 17-122555-RGS, 2018 WL 2994403, at \*3-4 (D. Mass. 2018).

43. See, e.g., Am. Compl. ¶ 41, No. 3:16-cv-08640-MAS-DEA, *Doe v. Arrisi* (D.N.J. Sept. 22, 2017) [hereinafter *Doe v. Arrisi Am. Compl.*]; see also TENN. CODE ANN. § 68-3-203(d) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.").

44. See *Carcaño v. Cooper*, 2018 WL 4717897, at \*3 (M.D.N.C. 2018) (discussing North Carolina law, which, among others things, "provided that all public agencies, including local boards of public education, must 'require' that 'every multiple occupancy bathroom or changing facility . . . be designated

Antidiscrimination statutes figure prominently in this context. Many transgender people over the past two decades have successfully challenged government discrimination under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in public (and private) employment,<sup>45</sup> and Title IX of the Education Amendments Act, which prohibits sex discrimination in federally funded education.<sup>46</sup> In addition to bringing Title VII and Title IX claims, or where these antidiscrimination statutes do not apply (as in the case of discriminatory prison policies and

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for and only used by persons based on their biological sex,’ defined as the ‘physical condition of being male or female, which is stated on a person’s birth certificate.’”) (quoting North Carolina’s Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known as House Bill 2).

45. *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571, 575 (6th Cir. 2018) (holding that discrimination against transgender employee violated Title VII because it was based on “the failure to conform to sex stereotypes” and, more straightforwardly, “on the basis of sex”—namely, changing one’s sex); *Whitaker*, 858 F.3d at 1049 (holding that transgender discrimination was sex stereotyping under Title IX); *Glenn*, 663 F.3d at 1317–18 & n.5, 1321 (holding that employer’s discrimination against transgender employee was sex stereotyping under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (same); *accord* *Schwenk v. Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000) (Gender Motivated Violence Act); *Rosa v. Park W. Bank Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 525, 527 (D. Conn. 2016) (holding that discrimination against transgender applicant violated Title VII because the discrimination was “on the basis of gender stereotypes” as well as “on the basis of sex”—namely, “factors that are sufficiently ‘related to sex or [that] ha[ve] something to do with sex’”) (citations omitted); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008) (holding that discrimination against transgender employee violated Title VII because the discrimination was based on “sex stereotyping” as well “based on sex”—namely, based on gender identity which “is a component of sex”); *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, EEOC, [https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm) [<https://perma.cc/H2GH-D4SM>] (compiling federal court decisions over the past two decades holding that discrimination against transgender employees is sex-based discrimination in violation of Title VII).
46. *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048-50 (7th Cir. 2017) (holding that discrimination against transgender student was sex stereotyping in violation of Title IX); *accord* *Bd. of Educ. v. U. S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 868 (S.D. Ohio 2016).

birth certificate laws), transgender litigants have challenged government exclusion under a number of constitutional theories.<sup>47</sup>

As with legal challenges to laws that criminalized the violation of gender norms, transgender litigants have argued that the denial of appropriate single-sex services infringes their liberty in violation of substantive due process. Specifically, laws and policies that tie transgender people without exception to standards associated with their birth-assigned sex infringe: (i) their fundamental right to privacy by forcing them to disclose sensitive, personal information about themselves—i.e., that they are transgender—thereby exposing them to discrimination and bodily harm;<sup>48</sup> (ii) their fundamental right to refuse unwanted medical treatment by forcing them to undergo unnecessary and inappropriate medical procedures;<sup>49</sup> and (iii) their fundamental right to “define and

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47. See *infra* notes 48-62 and accompanying text (discussing constitutional challenges to government discrimination against transgender people).

48. See *Doe v. Massachusetts Dep’t of Corr.*, 2018 WL 2994403, at \*11 (D. Mass. 2018) (holding that transgender woman incarcerated in men’s prison stated claim that the State had deprived her of liberty interest in violation of substantive due process based, in part, on her “fears for her physical safety, the potential for sexual violence and assault, the trauma and stigmatization instilled by undergoing regular strip-searches by male guards and, on occasion, being forced to shower in the presence of male inmates”); Compl. ¶ 121, 170, No. 1:16-cv-00236, *Carcano v. McCrory* (M.D.N.C. Mar. 28, 2016) [hereinafter *McCrory Compl.*] (alleging that North Carolina law violated substantive due process “by require[ing] the disclosure of highly personal information regarding transgender people to each person who sees them using a restroom or other facility inconsistent with their gender identity or gender expression. This disclosure places them at risk of bodily harm”—namely, “harassment and potential violence by others”); see also Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. REV. 159, 192-93 (2015) (“[T]ransgender people are... outed when governments, schools, or employers refuse to let them use a bathroom consistent with their gender expression, and force them to use bathrooms that align with the sex assigned at birth or segregate them in unisex restrooms.”).

49. See Am. Compl. ¶ 99, No. 3:16-cv-08640-MAS-DEA, *Doe v. Arrisi* (D.N.J. Sept. 22, 2017) [hereinafter *Doe v. Arrisi Am. Compl.*] (alleging that (now repealed) New Jersey law requiring proof of gender confirmation surgery to amend birth certificate “depriv[ed plaintiff] of her fundamental rights, including to refuse unwanted surgery” in violation of substantive due process); *McCrory Compl.*, *supra* note 48, at ¶ 175 (alleging that North Carolina law “forces transgender people to undergo medical procedures that

express their identity” on equal terms with non-transgender people.<sup>50</sup> Because these rights are fundamental, transgender litigants argue, heightened scrutiny applies to their infringement.<sup>51</sup> Accordingly, laws and government policies that deny appropriate single-sex services are

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- may not be medically appropriate or available in order to access facilities consistent with their gender identity”); *see also* *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (invalidating state law that permitted involuntary sterilization of people convicted of crimes of moral turpitude).
50. *See* *Doe v. Arrisi Am. Compl.*, *supra* note 49, at ¶¶ 82, 99 (alleging that (now repealed) New Jersey law requiring proof of gender confirmation surgery to amend birth certificate “depriv[ed plaintiff] of her fundamental rights, including... the right to personal autonomy” and “the right to gender autonomy,” that is, “the right to express her gender as she sees fit”); *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence . . . Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”); Jillian Todd Weiss, *Protecting Transgender Students: Application of Title IX to Gender Identity or Expression and the Constitutional Right to Gender Autonomy*, 28 *Wis. J.L. GENDER & SOC’Y* 331, 339-40 (2013) (arguing “that there is a right to ‘gender autonomy,’ that protects people with transgender and transsexual identity, as well as those of traditional gender identity, from restrictions based on gender identity. This right to ‘gender autonomy’ is the right of self-determination of one’s gender, free from state control, and the right to self-identify as that gender, free from state contradiction.”).
51. *Compare* *Compl. ¶ 84, No. 1:17-cv-12255-RGS, Doe v. Mass. Dep’t of Corr.* (D. Mass. Nov. 15, 2017) [hereinafter *Doe v. Mass. Compl.*] (“Defendants’ treatment of Jane Doe . . . impermissibly burdens Jane Doe’s fundamental rights to autonomy and privacy, including her right to live as a woman and consistent with her female gender identity. By disregarding Jane Doe’s status as a woman and by disregarding her female gender identity as set forth above, Defendants have violated the Due Process Clause of the Fourteenth Amendment.”), *with* *Mass. Dep’t of Corr.*, 2018 WL 2994403, at \*11 (D. Mass. 2018) (denying defendant’s motion to dismiss plaintiff’s substantive due process claim); *see also* *McCrorry Compl. ¶¶ 171, 179* (“There is no compelling state interest that is furthered by [North Carolina law denying appropriate single-sex services to transgender people], nor is [North Carolina law] narrowly tailored or the least restrictive alternative for promoting a state interest.”).

unconstitutional because they are not narrowly tailored or substantially related to a compelling or important purpose.<sup>52</sup> Alternatively, even if the rights infringed upon are not considered fundamental, transgender litigants argue that the denial of appropriate single-sex services is not rationally related to any legitimate government purpose.<sup>53</sup>

Transgender litigants further argue that the denial of appropriate single-sex services violates equal protection in several ways. First, laws and policies that rest exclusively on a person's birth-assigned sex single out transgender people for different treatment because only transgender people have a sex that is different than that assigned to them at birth.<sup>54</sup> Discrimination on the basis of transgender status constitutes a suspect/quasi-suspect classification under the U.S. Supreme Court's four-factor test and is therefore subject to heightened scrutiny.<sup>55</sup> Specifically,

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52. *See, e.g.,* McCrory Compl. ¶¶ 171, 179 (invoking heightened scrutiny).
53. *See* Doe v. Mass. Compl., *supra* note 51, at ¶ 84 (alleging that “Defendants’ placement of Jane Doe in a men’s correctional facility and disregard of the fact that she is a woman and has a female gender identity is irrational” in violation of substantive due process); *see also* McCrory Compl. ¶¶ 171, 179 (“[North Carolina law denying appropriate single-sex services to transgender people] is not even rationally related to a legitimate state interest.”).
54. *See, e.g.,* Adkins v. City of New York, 143 F. Supp. 3d 134, 138 (S.D.N.Y. 2015) (stating that transgender man who was separated from other male detainees and handcuffed to a wall without food “adequately alleged that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination” in violation of Equal Protection Clause).
55. *See, e.g.,* Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (concluding that “all of the indicia for the application of the heightened intermediate scrutiny standard are present” for transgender individuals, and applying “an intermediate standard of Equal Protection review” to a school policy that prohibited students from using restroom consistent with their gender identity); *accord* Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (applying “heightened scrutiny” to transgender plaintiff’s equal protection claim based on “four-factor test to determine suspect and quasi-suspect classifications”); *Adkins*, 143 F. Supp. 3d at 139-40 (applying “intermediate scrutiny” because “transgender people are a quasi-suspect class”); *cf.* Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 524 n.8. (D. Conn. 2016) (citing *Adkins* for proposition that “transgender people are a ‘quasi-suspect’ class and therefore . . . disparate treatment alleged to violate

transgender people have suffered a history of discrimination; transgender status does not affect a person’s ability to participate in society; being transgender is a core aspect of a person’s identity, unchangeable, and impervious to external influences; and transgender people are a minority lacking political power.<sup>56</sup>

Second, laws and policies that are linked exclusively to a person’s birth-assigned sex trigger heightened scrutiny because they are, quite literally, sex-based classifications; they deny services to transgender people based on sex-related physiological characteristics, whether real or perceived.<sup>57</sup> In addition, these laws and policies reflect sex-stereotypes—i.e., the stereotype that no one ever lives in a sex different than that assigned to them at birth.<sup>58</sup>

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the Equal Protection Clause is subject to the elevated ‘intermediate scrutiny’ standard”).

56. *See, e.g., Adkins*, 143 F. Supp. 3d at 140 (stating that, “[u]pon consideration of the[ four] factors” used by the U.S. Supreme Court to decide whether a new classification qualifies as a quasi-suspect class, “the Court concludes that transgender people are a quasi-suspect class. Accordingly, the Court must apply intermediate scrutiny to defendants’ treatment of plaintiff.”) (citing *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013)); *accord. Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (applying four factors); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (same).
57. *See, e.g., Doe v. Mass. Dep’t of Corr.*, 2018 WL 2994403, at \*9 (holding that housing transgender inmates in facilities that correspond to their birth sex was discrimination “based on sex and is therefore subject to heightened judicial scrutiny above the normal ‘rational basis’ test”).
58. *See, e.g., Whitaker*, 858 F.3d at 1051 (holding that school district’s restroom policy that discriminated against transgender students was “inherently based upon” sex stereotyping under Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312, 1317-18 & n.5, 1321 (stating that “sex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms,” and holding that an employer’s termination of a transgender employee violated equal protection); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that transgender employee’s claims of gender discrimination “easily constitute” sex stereotyping under Equal Protection Clause); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288–89 (W.D. Pa. 2017) (holding that discrimination against transgender student was sex stereotyping under Equal Protection Clause); *Bd. of Educ. of the Highland*

Lastly, even if heightened scrutiny does not apply, transgender litigants argue that such laws and policies violate equal protection under any level of review because they are rooted in moral animus against transgender people.<sup>59</sup> As the Supreme Court has reiterated on numerous occasions, “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>60</sup> “[M]ere negative

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Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 872 (S.D. Ohio 2016) (same); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (holding that “discrimination against transgender individuals” was sex stereotyping “subject to intermediate scrutiny” under the Equal Protection Clause).

Numerous circuit and district courts have similarly held that discrimination against transgender people is sex-stereotyping in violation of sex discrimination *statutes*. See *supra* notes 45-46 (collecting statutory sex discrimination cases). These statutory sex discrimination cases are significant because they inform the equal protection analysis. See, e.g., Glenn, 663 F.3d at 1316-18 (relying on Title VII case law in holding that discrimination against transgender employee was sex discrimination in violation of Equal Protection Clause); *accord* Smith, 378 F.3d at 577; see also Christine Michelle Duffy, *Federal Equal Protection, in Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide* 15-5 (Christine Michelle Duffy ed., 2014) (“Constitutional discrimination claims by LGBT employees often rely significantly on case law interpreting federal statutes that prohibit sex discrimination, including Title VII.”).

59. See, e.g., McCrory Compl. ¶ 143 (stating that North Carolina law that denied transgender people access to appropriate single-sex services discrimination “is not substantially related to any important government interest. Indeed, it is not even rationally related to any legitimate government interest.”).
60. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *accord*. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (invalidating Section 3 of DOMA, which excluded same-sex marriages from the definition of “marriage” under federal law because the “essence” of the law was “the interference with the equal dignity of same-sex marriages”); Romer v. Evans, 517 U.S. 620, 632 (1996) (invalidating a state constitutional amendment that prohibited all existing and future antidiscrimination laws protecting lesbian, gay, and bisexual people because the “sheer breadth” of the law was “inexplicable by anything but animus toward the class that it affects”); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448, 450 (1985) (invalidating a local zoning ordinance that required a special use permit for group homes housing people with intellectual disabilities based on “irrational prejudice”—including “the negative attitude of the majority of property

attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . , are not permissible bases for [disparate treatment].”<sup>61</sup> This remains true regardless of whether such discrimination is pursuant to the will of the electorate. The government “may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic. ‘Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.’”<sup>62</sup>

### 1. Justifications for Denial of Appropriate Single-Sex Services

There are three primary reasons offered for laws and policies that deny appropriate single-sex services to transgender people. Two of these reasons echo earlier justifications for gender-norming laws: public safety and morality.<sup>63</sup> The third reason—privacy—looms largest in debates over single-sex services.

First consider public safety. Prohibiting transgender people from accessing appropriate single-sex restrooms consistent with their gender identity, some argue, protects non-transgender people from sexual predators, namely, transgender people who are perceived to be sexually threatening, and non-transgender people who “pretend” to be another sex in order “to gain access to vulnerable women and children in public restrooms.”<sup>64</sup> In *G.G. v. Gloucester County School Board*, for example, school officials enacted a policy prohibiting a transgender boy from using the boy’s restroom at school based, in part, on “safety concerns that could arise from sexual responses prompted by students’ exposure to the private body parts of students of the other biological sex” and fears of “sexual assault in restrooms. One commenter suggested that if the proposed policy

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owners” and “[unsubstantiated] fears of elderly residents of the neighborhood”—against people with intellectual disabilities).

61. *Cleburne*, 473 U.S. at 446; *see also id.* (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”).

62. *Id.* at 448–49 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

63. *See supra* Part II.A (discussing laws criminalizing the violation of gender norms).

64. Levi & Redman, *supra* note 11, at 142.

were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms."<sup>65</sup>

North Carolina officials advanced the same safety concerns in defense of HB 2, a law that denied appropriate single-sex public services to transgender people statewide, as did the State of Massachusetts in support of incarcerating a transgender woman in a men's prison.<sup>66</sup>

Conversely, and paternalistically, these prohibitions are also said to *protect* transgender people from the criminal actions of non-transgender people who might act violently out of panic and ignorance—for example, a non-transgender man's assault of a transgender man upon discovering that the latter is transgender.<sup>67</sup> In *Adkins v. City of New York*, for example, the State of New York defended its police department's treatment of a transgender man, who was separated from other male detainees and handcuffed to a wall without food, based on officers' concern that other men "posed a risk to [his] safety."<sup>68</sup> Significantly, those who advance this argument ignore the very real safety risks to transgender people who are

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65. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016); *see also Evancho*, 237 F. Supp. 3d at 278 ("[A] (if not *the*) prevailing concern raised by both those who spoke in favor of Resolution 2 and Board proponents alike was that a student would in essence masquerade as being transgender, and would then use a designated student restroom inconsistent with their assigned sex.").

66. *Compare Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at \*10 (D. Mass. 2018) (discussing prison officials' invocation of "generalized concerns for prison security" in "hous[ing] inmates according to their biological sex"), *with Carcaño v. Cooper*, 2018 WL 4717897, at \*2 (M.D.N.C. 2018) (discussing "possible danger from deviant actions by individuals taking improper advantage of" ordinance permitting transgender people to use restrooms consistent with their gender identity"), *McCrory*, 203 F. Supp. 3d at 652 ("As for safety, Defendants argue that separating facility users by biological sex serves prophylactically to avoid the opportunity for sexual predators to prey on persons in vulnerable places."), and *Carcano Compl.* ¶ 110 ("[North Carolina] lawmakers were forced to come back to session to address the serious safety concerns created by the dangerous ordinance . . . [which] created a loophole that any man with nefarious motives could use to prey on women and young children . . . How many fathers are now going to be forced to go to the ladies' room to make sure their little girls aren't molested?") (quoting North Carolina state legislators).

67. *See Levi & Redman, supra* note 11, at 144-45.

68. *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015).

*denied* appropriate single-sex services, such as transgender men who are forced to use a women’s restroom, or transgender women who are incarcerated in a men’s prison.<sup>69</sup>

Defenders of laws that require transgender people to undergo gender confirmation surgery in order to change the sex marker on their birth certificates similarly rely on public safety arguments. Permitting a transgender person to change the sex marker on a birth certificate absent surgery, the State of New Jersey argued in the case of *Doe v. Arrisi*, “would constitute a State-sanctioned inaccuracy” because sex “refers only to anatomical attributes.”<sup>70</sup> Besides enabling transgender people to obtain “inaccurate” documents, it would also allow a “bad actor” to “abuse the system” by creating multiple versions of otherwise genuine birth certificates “to use for nefarious purposes, such as identify theft, defrauding government benefits programs, and defrauding immigration officials.”<sup>71</sup>

A second reason that fuels the denial of appropriate single-sex services for transgender people is morality. Just as gender-norming laws were said to preserve the public’s “aesthetic preferences,” some argue that denying transgender people’s use of appropriate single-sex services preserves the expectations about how people *should* behave and what gender norms should apply.<sup>72</sup> People should not transition, the argument goes, and so recognition of transgender people’s gender identity should be discouraged.<sup>73</sup> Upending expectations about gender norms, defenders

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69. *Mass. Dep’t of Corr.*, 2018 WL 2994403, at \*4 (stating that Ms. Doe “fear[ed] . . . falling victim to sexual violence, and . . . she began experiencing difficulty sleeping after men gawked at her from the [prison] tier above her as she showered”) (citation omitted); *see also id.* (stating that, according to Ms. Doe, “prisoners often harass her sexually in the bathrooms, with the knowledge and tacit approval of DOC staff”) (citation omitted).

70. Motion to Dismiss Amended Complaint at 20, *Doe v. Arrisi*, No. 3:16-cv-08640-MAS-DEA (D.N.J. Nov. 6, 2017).

71. *Id.* at 19.

72. Compare *City of Chicago*, 389 N.E.2d at 525, *with Doe v. Yunits*, 2000 WL 33162199, at \*7 (Mass. Super. Ct. 2000) (discussing “the stifling of plaintiff’s selfhood merely because it causes some members of the community discomfort.”).

73. *See, e.g.*, Brief of Appellees at 27, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (No. 05-4193), *cited in Levi & Redman, supra* note 11, at 146 (“We live in a relatively conservative area and I think there are expectations of the customer in how a [public transit] employee is going to

argue, leads to “disruption”—for example, interruption of a company’s work routine based on the complaints of female employees who “indicate[] they would quit if [a transgender person] were permitted to use the restroom facilities assigned to female personnel.”<sup>74</sup> Urging passage of HB 2, North Carolina state senator David Curtis railed against those who would

try[] to redefine everything about our society. Gender and marriage—just the whole liberal agenda . . . . The gays would go into a business, make some outrageous demand that they know the owner cannot comply with and file a lawsuit against that business owner and put him out of business.<sup>75</sup>

North Carolina state senator David Brock similarly warned of “pervert[s] walk[ing] into a bathroom . . . [when] my little girls are in there.”<sup>76</sup> At a hearing on a school policy that limited restrooms “to the corresponding biological genders,” supporters of the school policy deliberately misgendered Gavin Grimm, a transgender boy; called him a “freak”; and “compared him to a person who thinks he is a ‘dog’ and wants to urinate on fire hydrants.”<sup>77</sup> Defenders of a similar school policy in *Board of Education of the Highland Local School District v. United States Department of Education* likewise cited the “dignity . . . of other students” and “lewdness concerns.”<sup>78</sup> To allow a transgender boy to use a boy’s restroom, they argued, was crude and offensive; it was beneath them.

A third and closely-related reason for denying transgender people access to appropriate single-sex services is privacy. This argument rests on the idea that transgender people violate the privacy of those who do not wish to see or be seen by someone they perceive or believe to be of a

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behave, and if a customer sees a bus operator entering a female restroom one day and a male restroom another day, that can be pretty disconcerting.”).

74. *Id.*

75. *Carcano* Compl. ¶ 110.

76. *Id.*

77. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

78. 208 F. Supp. 3d 850, 874.

different sex.<sup>79</sup> Because everyone has gendered body parts, these advocates argue, laws that segregate services based on externally visible sex characteristics are not discriminatory but are instead facially neutral.<sup>80</sup> Recognition of people's gender identity as the determinant of a person's sex, they further argue, would open the floodgates, eviscerating all reasonable sex-based restrictions.<sup>81</sup> As the State of Utah argued over a decade ago in *Etsitty v. Utah Transit Authority*, "any male . . . could dress as

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79. *See G.G.*, 822 F.3d at 731 (Niemeyer, J., dissenting) (arguing that majority's "unprecedented holding" permitting transgender student to access appropriate single-sex restroom "overrule[d] custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect"); *see also* Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ., 208 F. Supp. 3d at 874 (S.D. Ohio 2016) (discussing defendants' argument that plaintiff, "if allowed to use the girls' restroom, would infringe upon the privacy rights of . . . other students"); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) ("The School District did not permit Ash to enter the boys' restroom because[] it believed[] that his mere presence would invade the privacy rights of his male classmates."); *McCrory*, 203 F. Supp. 3d at 642 (discussing argument "that bodily privacy interests arise from physiological differences between men and women, and that sex should therefore be defined in terms of physiology for the purposes of bathrooms, showers, and other similar facilities"); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 278 (W.D. Pa. 2017) (discussing "concern that the partially clothed body of a student of a given assigned sex would be observed in a restroom by a student of the opposite assigned sex"); *Texas v. United States*, 201 F. Supp. 3d 810, 832 (N.D. Tex. 2016), *order clarified*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (discussing "privacy right to avoid exhibiting their 'nude or partially nude body, genitalia, and other private parts' before members of the opposite sex") (citation omitted).
80. *See G.G.*, 822 F.3d at 731 (Niemeyer, J., dissenting) (discussing "universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes").
81. *See id.* at 736 (stating that majority's decision permitting transgender students to access appropriate single-sex restrooms "would have to be applied uniformly . . . [to] separate living facilities, . . . locker rooms, and shower facilities"); *see also* Levi & Redman, *supra* note 11, at 145 ("Several courts treat bathroom access for transgender people as a bridge too far, after which all reasonable gender-based restrictions would fall.").

a woman, use female restrooms, shower rooms and locker rooms, and any attempt . . . to prohibit such conduct” would violate the law.<sup>82</sup>

## 2. Constitutional Review of Denial of Appropriate Single-Sex Services

### (a) Equal Protection

An overwhelming majority of lower courts over the past decade have held that laws and policies that deny transgender people access to appropriate single-sex services violate equal protection.<sup>83</sup> Applying heightened scrutiny on the theory that such discrimination is based on sex stereotypes, or that discrimination based on transgender status is, itself, a suspect/quasi-suspect classification, these courts have consistently rejected the three justifications offered in support of such laws and policies.

In *Highland*, for example, the court rejected “amorphous safety concerns” as a justification for prohibiting a transgender girl from using the girls’ restroom, noting that “no incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have ever occurred.”<sup>84</sup> According to the court, these concerns

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82. Brief of Appellees at 32, No. 05-4193, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007), cited in *Levi & Redman, supra* note 11, at 146. Numerous courts have called *Etsitty* into question. See, e.g., *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018) (stating that “it is unclear what, if any, significance to ascribe to th[e] holding[]” in, *inter alia*, *Etsitty* “because in light of *Price Waterhouse*, transgender individuals may bring sex-discrimination claims under a gender-stereotyping theory” (internal quotation marks omitted)).

83. See *supra* notes 54-58 and accompanying text (collecting cases holding that discrimination against transgender people violates equal protection).

84. *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 876 (S.D. Ohio 2016) (quoting *G.G.*, 822 F.3d at 723 n.11); see also *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 652 (M.D.N.C. 2016) (“[T]here is no evidence that transgender individuals overall are any more likely to engage in predatory behaviors than other segments of the population . . . . [T]he unrefuted evidence in the current record suggests that jurisdictions that have adopted accommodating bathroom access policies have not observed subsequent increases in crime.”).

“turned out to be wholly unfounded in practice.”<sup>85</sup> In *Evancho*, the court rejected the related argument that such policies are necessary to prevent “unlawful malicious ‘peeping Tom’ activity by anyone *pretending* to be transgender.”<sup>86</sup> According to the court, there was “no record evidence of an actual or threatened outbreak of other students falsely or deceptively declaring themselves to be ‘transgender’ for the purpose of engaging in untoward and maliciously improper activities in the High School restrooms,” and, even if there were, “existing disciplinary rules of the District and the laws of Pennsylvania would address such matters.”<sup>87</sup>

Justifications based on moral preference have similarly failed. In *Evancho v. Pine-Richland School District*, the court refused to credit school officials’ statements that “several parents had, and others would, move their children to other schools if the Board did not enact a policy” that denied transgender students access to appropriate single-sex services.<sup>88</sup> Echoing the Supreme Court’s warning against “deferring to the wishes or objections of some fraction of the body politic” in *Cleburne*, the *Evancho* court stated that:

[i]f adopting and implementing a school policy or practice based on those individual determinations or preferences of parents—no

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85. *Id.* (internal quotation marks omitted); *see also* *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017) (finding “no record” of “any actual or incipient threat, disturbance or other disruption of school activities by the Plaintiffs”); *accord* *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 724 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (“We are unconvinced of the existence of danger caused by ‘sexual responses prompted by students’ exposure to the private body parts of students of the other biological sex.’ The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent’s formulation, present a safety risk because of the ‘sexual responses prompted’ by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.”); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 639 & n.28 (M.D.N.C. 2016) (finding no evidence of people pretending to be transgender and entering a restroom anywhere in the University of North Carolina system, nor in any other educational institutions in North Carolina).

86. *Evancho*, 237 F. Supp. 3d at 291.

87. *Id.*; *see also* *Levi & Redman*, *supra* note 11, at 161 (discussing statutes and ordinances “prohibiting soliciting, importuning, pandering obscenity, public indecency, trespassing, or soliciting rides or hitchhiking”).

88. 237 F. Supp. 3d at 291–92.

matter how sincerely held—runs counter to the legal obligations of the District, then the District’s and the Board’s legal obligations must prevail. Those obligations to the law take precedence over responding to constituent desires. The Equal Protection Clause of the Fourteenth Amendment is neither applied nor construed by popular vote.<sup>89</sup>

Nearly two decades earlier, in *Doe v. Yunits*, the Massachusetts Superior Court similarly ordered school officials to permit a transgender girl to attend school wearing a girl’s uniform, notwithstanding the school’s stated interest in “fostering conformity with community standards.”<sup>90</sup> To rule otherwise, the court concluded, would “allow the stifling of plaintiff’s selfhood merely because it causes some members of the community discomfort.”<sup>91</sup>

Privacy arguments have also proved unavailing. In *Whitaker*, for example, the court rejected the school’s argument that its policy of excluding Ash Whitaker, a transgender boy, from using the boy’s restroom was necessary “to protect the privacy rights of all [of its] . . . students.”<sup>92</sup> According to the court, the school’s argument, when “weighed against the facts of the case and not just examined in the abstract, . . . [wa]s based upon sheer conjecture and abstraction.”<sup>93</sup> The facts demonstrated that for nearly six months, Mr. Whitaker had used the boys’ bathroom “without incident or complaint from another student”; there was little risk that Mr. Whitaker would violate others’ privacy given “the practical reality of how [Mr. Whitaker] . . . use[d] the bathroom: by entering a stall and closing the door”; and the policy was woefully under-inclusive: it did not apply to “an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions . . . [o]r for that matter, any other student who uses the bathroom at the same

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89. *Id.* at 292.

90. *Doe ex rel. Doe v. Yunits*, 2000 WL 33162199, at \*7 (Mass. Super. Ct. 2000).

91. *Id.*

92. *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017).

93. *Id.*; see also *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 n.10 (4th Cir. 2016) (“We doubt that G.G.’s use of the communal restroom of his choice threatens the type of constitutional abuses present in the [privacy] cases cited by the dissent.”).

time,” nor did it separate “pre-pubescent” from “post-pubescent children who do not look alike anatomically.”<sup>94</sup>

Likewise, in *Evancho*, the court concluded that, “[a]lthough the record reveal[ed] some specific concerns driven by the reputed presence (and presence alone) of a [transgender person] in a restroom matching her gender identity, there is no record evidence that this actually imperiled or risked imperiling any privacy interest of any person,” particularly “given the actual physical layout of the student restrooms at the High School.”<sup>95</sup> Furthermore, according to the court in *Carcano v. McCrory*, far from protecting privacy, denying access to appropriate single-sex facilities would “create privacy problems, as it would require the individual transgender Plaintiffs, who outwardly appear as the sex with which they identify, to enter facilities designated for the *opposite* sex (e.g., requiring stereotypically-masculine appearing transgender individuals to use women’s bathrooms), thus prompting unnecessary alarm and suspicion.”<sup>96</sup>

(b) Substantive Due Process

In addition to equal protection claims, some courts have addressed whether the denial of appropriate single-sex services violates substantive due process. In *Doe v. Massachusetts Department of Corrections*, for example, the District of Massachusetts held that a transgender woman who was incarcerated in a men’s prison stated a claim for a violation of her fundamental rights “to bodily autonomy and privacy” under the Due Process Clause.<sup>97</sup> By housing the plaintiff in a men’s prison, the State had imposed on her “atypical and significant hardship[s] . . . in relation to the normal incidents of prison life,” including “fears for her physical safety, the

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94. *Id.* at 1052–53.

95. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 290 (W.D. Pa. 2017) (stating that the protection of students’ privacy interests, “like any stated governmental interest, must be considered in the context of the ‘facts on the ground,’ not only as a broadly stated goal,” and concluding that “the facts in this case do not establish any threatened or actually occurring violations of personal privacy”); *see also* Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (“There is no evidence that Jane herself, if allowed to use the girls’ restroom, would infringe upon the privacy rights of any other students.”).

96. *McCrory*, 203 F. Supp. 3d at 652.

97. *Doe v. Mass. Dep’t of Corr.*, 2018 WL 2994403, at \*11 (D. Mass. 2018).

potential for sexual violence and assault, the trauma and stigmatization instilled by undergoing regular strip-searches by male guards and, on occasion, being forced to shower in the presence of male inmates.”<sup>98</sup>

Even when courts do not rule on substantive due process grounds, these claims serve an important secondary function. Like equal protection arguments regarding the immutability of being transgender,<sup>99</sup> substantive due process arguments regarding liberty, privacy, and the “autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct” help courts understand the seriousness of being transgender.<sup>100</sup> Treating a transgender woman as a man for purposes of accessing single-sex facilities not only subjects her to unequal treatment—it also violates a core aspect of her identity.

### *C. Exclusion of Transgender People from Anti-Discrimination Laws*

In addition to laws that once criminalized transgender people’s expression of identity and those that currently deny transgender people’s access to appropriate single-sex services, there are a number of laws that deprive transgender people of anti-discrimination protections. They do so in one of two ways: directly through facially discriminatory classifications, as demonstrated by various federal disability rights laws; and indirectly through facially neutral classifications that are motivated by discriminatory intent, as demonstrated by state laws preempting local anti-discrimination ordinances.<sup>101</sup> In the sections that follow, we discuss both in turn.

#### 1. Federal Disability Rights Laws

Three federal laws that protect people from discrimination based on disability—the Fair Housing Act, the Rehabilitation Act, and the Americans

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98. *Id.*

99. *See supra* note 56 and accompanying text.

100. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”).

101. *See* Erwin CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 698 (5th ed. 2015); *see also* *infra* notes 102-43 and accompanying text (discussing federal disability rights laws and state preemption laws).

with Disabilities Act (“ADA”)—facially discriminate against transgender people.<sup>102</sup> They do so by explicitly denying protections for obsolete medical conditions closely associated with transgender people, including “transsexualism” and “gender identity disorder.”<sup>103</sup>

Since 2014, transgender people have challenged their exclusion from the ADA and Rehabilitation Act.<sup>104</sup> In *Blatt v. Cabela’s Retail, Inc.*, for example, a transgender woman diagnosed with gender dysphoria, a serious medical condition characterized by a marked incongruence between one’s assigned sex at birth and one’s gender identity, which results in clinically significant distress, sued her employer for discrimination under the ADA.<sup>105</sup> When Cabela’s moved to dismiss the ADA claim based on the ADA’s transgender exclusion, Ms. Blatt argued that the exclusion violated equal protection.<sup>106</sup> The exclusion was entitled to heightened scrutiny, she argued, because discrimination based on transgender status is a suspect/quasi-suspect classification under the

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102. 42 U.S.C. § 12211(b)(1) (2012) (prohibiting disability discrimination in, *inter alia*, employment, government benefits and services, and public accommodations, and excluding, *inter alia*, “transsexualism” and “gender identity disorders not resulting from physical impairments” from ADA’s definition of disability); *id.* § 12208 (2018) (excluding coverage of “transvestites” from ADA’s definition of disability); 29 U.S.C. § 705(20)(F)(i) (2012) (prohibiting federal agencies and recipients of federal funds from discriminating based on disability, and excluding, *inter alia*, “transsexualism” and “gender identity disorders not resulting from physical impairments” from Rehabilitation Act’s definition of disability); 42 U.S.C. § 3602 (2012) (prohibiting housing providers and lending institutions from discriminating based on race, color, religion, sex, national origin, familial status, or disability, and excluding “transvestites” from definition of disability under Fair Housing Act and Rehabilitation Act through a statutory note to § 3602).

103. *See supra* note 102 and accompanying text.

104. Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 YALE L.J. F. 373 (2017) (stating that, “notwithstanding well-intentioned concerns, the overwhelming consensus among transgender rights advocates is strongly in favor of ADA coverage of gender dysphoria,” and arguing that well-intentioned criticism toward pursuing disability rights protections for transgender people reflects misunderstanding of both the realities of gender dysphoria and the definition of “disability” in disability rights laws).

105. No. 5:14-cv-4822-JFL, 2017 WL 2178123, at \*1-2 (E.D. Pa. May 18, 2017).

106. *Id.* at \*2.

Supreme Court's four-factor test and, alternatively, because transgender discrimination is necessarily sex-based.<sup>107</sup>

No matter what level of scrutiny is applied, Ms. Blatt argued that the exclusion violated equal protection because it was rooted in moral animus against transgender people, which is not a legitimate purpose—much less a compelling or important one.<sup>108</sup> For this proposition, she pointed to direct evidence of animus in the ADA's legislative history, as well as indirect evidence of animus gleaned from the structure and practical effect of the exclusion.<sup>109</sup> For example, the exclusion singled out a conspicuously narrow group of people—transgender people—from bringing claims despite the fact that the excluded medical conditions associated with being transgender are well-established and recognized by the medical community.<sup>110</sup> The exclusion was also overly broad: the ADA excludes not

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107. See Plaintiff's Memorandum of Law in Opposition to Defendant's Partial Motion to Dismiss Plaintiff's First Amended Complaint at 15-28, *Blatt v. Cabela's Retail, Inc.*, (E.D. Pa. Jan. 20, 2015) (No. 5:14-CV-04822), 2017 WL 2178123 [hereinafter *Blatt* Mem. Opp'n]; see, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316, 1319 (11th Cir. 2011) (affirming trial court's grant of summary judgment in favor of transgender employee because "discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause" and is therefore "subject to heightened scrutiny").

108. See *Blatt* Mem. Opp'n, *supra* note 107, at 28-39; see also *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (concluding that "a bare... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest"—much less a compelling or important one) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (alteration in original); *accord*, *United States v. Windsor*, 570 U.S. 744, 770 (2013).

109. See *Blatt* Mem. Opp'n, *supra* note 107, at 28-39; see, e.g., *Windsor*, 570 U.S. at 770 (invalidating Defense of Marriage Act (DOMA) based on evidence of animus in DOMA's text, legislative history, structure, and effect); *Romer*, 517 U.S. at 632 (invalidating constitutional amendment that prohibited civil rights protections for LGB people based on evidence of animus in amendment's structure and effect).

110. Compare 42 U.S.C. § 12102 (2012) (broadly defining "disability"), and AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 71-78 (3d ed. 1987) (recognizing medical diagnoses of "gender identity disorder" and "transsexualism"), with 42 U.S.C. § 12211(b) (2012) (excluding, *inter alia*, "transsexualism" and "gender identity disorders"); see also *Romer*, 517 U.S. at 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the

only people who have the listed conditions but also those who have treated their conditions or who are perceived as having them, and it flatly prohibits such people from bringing a disability discrimination claim in all settings, including employment, government services, and public accommodations.<sup>111</sup> Additionally, the exclusion is of an unusual character: civil rights laws generally do not exclude narrow groups of people; they apply to everyone based on identified characteristics.<sup>112</sup> The ADA, in particular, was intended broadly to prohibit discrimination based on a health condition, regardless of how limiting that condition may be—a fact made clear by the 2008 amendments to the ADA, which reversed several

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government is itself a denial of equal protection of the laws in the most literal sense.”); *accord. Windsor*, 570 U.S. at 771–72 (“DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”).

111. *See* 42 U.S.C. § 12102 (2012) (defining “disability” to include those with a record of a disability and those who are regarded as having a disability); *id.* §§ 12101(a)(3), (b)(1) (providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” in various settings, including “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services”); *see also Romer*, 517 U.S. at 633, 635 (invalidating constitutional amendment the prohibited civil rights protections for LGB people because it was “at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board . . . . The breadth of the amendment is so far removed from [legitimate] . . . justifications that we find it impossible to credit them.”); *accord. Windsor*, 570 U.S. at 765 (stating that “DOMA has a far greater reach [than congressional statutes which affect marriages and family status]; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations”).
112. *See e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976) (“Title VII of the Civil Rights Act of 1964 prohibits the discharge of ‘any individual’ because of ‘such individual’s race’ . . . . Its terms are not limited to discrimination against members of any particular race.”) (internal citations omitted); *see also Romer*, 517 U.S. at 633 (“[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”); *accord. Windsor*, 570 U.S. at 770 (“DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.”).

Supreme Court decisions that “narrowed the broad scope of protection intended to be afforded by the ADA.”<sup>113</sup> Lastly, the exclusion’s practical effect was to impose a stigma on transgender people as being unworthy of civil rights protection.<sup>114</sup>

(a) Justification for Federal Disability Laws that Deprive  
Transgender People of Anti-Discrimination Protections

As Ms. Blatt and other transgender litigants have argued, Congress’s reasons for excluding transgender people from various federal disability rights laws were explicitly moral, based on dislike of the group for a range of reasons including a view that transgender people are “deviant.”<sup>115</sup> The story behind these exclusions dates back to the mid-1980s, when at least two federal courts interpreted the Rehabilitation Act, a law that prohibits disability discrimination by federally-funded entities, to protect transgender employees.<sup>116</sup> In response, Senator Jesse Helms, a staunch

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113. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)-(5), 122 Stat. 3553; *see* 42 U.S.C. § 12102(3)(A) (2012) (prohibiting discrimination against an individual who “has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity”); *id.* §§ 12102(1), (4)(E)(i) (prohibiting the refusal to accommodate an individual whose physical or mental impairment would, *in the absence of treatment*, be “substantially limit[ing]”).

114. *See, e.g.*, United States v. Windsor, 570 U.S. at 770 (holding that DOMA’s “practical effect” was “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States”); Romer v. Evans, 517 U.S. 620, 634-35 (1996) (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected . . . Amendment 2, . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”).

115. *See supra* notes 116-24 and accompanying text.

116. Blackwell v. Dep’t of Treasury, 656 F. Supp. 713, 714-15 (D.D.C. 1986), *aff’d in part, vacated in part on other grounds*, 830 F.2d 1183 (D.C. Cir. 1987); Doe v. U.S. Postal Serv., No. 84-3296, 1985 WL 9446, at \*2-3 (D.D.C. June 12, 1985). The authors have written extensively about this history. For more information, see Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507 (2016); Barry &

critic of civil rights laws and a founding member of the Moral Majority,<sup>117</sup> attacked these decisions in an attempt to defeat passage of the Civil Rights Restoration Act, which sought to expand the reach of the Rehabilitation Act and other civil rights laws.<sup>118</sup> According to Helms, the Civil Rights Restoration Act would prevent private institutions that received federal financial assistance from refusing to hire a transgender person “because some Federal court may find that this violates the [person’s] civil rights to wear a dress and to wear foam, that sort of thing[.] Do we really want to prohibit these private institutions from making employment decisions based on moral qualifications?”<sup>119</sup>

Months later, during Senate debate on the Fair Housing Amendments Act, which sought to prohibit housing discrimination based on disability status, Helms successfully argued for the bill’s exclusion of protection for transgender people (whom he termed “transvestites”)—calling his

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Levi, *supra* note 104; Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1 (2013); *see also* Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 38 (2004) (discussing legislative history of the Civil Rights Restoration Act of 1987, Fair Housing Amendments Act of 1988, and Americans with Disabilities Act of 1990); Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch. 16-37—16-42 (2014) (discussing legislative history of the Americans with Disabilities Act of 1990).

117. The Moral Majority was a conservative lobbying firm led by Jerry Falwell and Jerry Nims. *See* 134 CONG. REC. 4602 (1988), *available at* 1988 WL 1084953 (special memorandum to pastors from the Moral Majority, Jerry Falwell, Chairman and Jerry Nims, President urging pastors to lobby members of Congress to sustain President Ronald Reagan’s veto of Civil Rights Restoration Act, and warning that the Act would “protect active homosexuals, transvestites, alcoholics and drug addicts, among others, under the government’s antidiscrimination laws. These sins will be considered to be diseases or handicaps” under “this perverted law”).
118. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, 28-30 (1988) (abrogating the Supreme Court’s 1984 decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), which limited the application of Title IX to federally-funded programs or activities *within* an institution rather than applying the statute to the institution as a whole). *Id.* at 573-74.
119. 134 CONG. REC. 4235 (1988) (statement of Sen. Helms), *available at* 1988 WL 1084657.

amendment “a little common sense.”<sup>120</sup> Notably, Senator Alan Cranston, one of only two senators to oppose Helms’s amendment, argued that the Helms amendment was fueled by moral animus against transgender people, “singl[ing] out one category of individuals who are already being discriminated against and say[ing] to them, ‘Sorry you now have no protections. Congress has decided that it no longer cares whether or not you are cast out of our society.’”<sup>121</sup>

In 1989, Senators Helms, Orrin Hatch, and William Armstrong successfully proposed two separate amendments to exclude transgender people from protection under the ADA. Senator Helms’s amendment to the ADA mirrored his amendment to the Fair Housing Act, while the Armstrong-Hatch amendment was even broader, excluding three now obsolete medical conditions associated with transgender people (transvestism, transsexualism, and gender identity disorders), together with approximately eight other medical conditions, including kleptomania, pyromania, psychoactive substance abuse orders resulting from illegal drug use, and sexual behavior disorders such as pedophilia, exhibitionism, and voyeurism.<sup>122</sup>

Echoing his remarks during the debate on the Civil Rights Restoration Act, Senator Helms defended the ADA’s exclusion of transgender people by arguing that an employer ought to be able to “set up . . . moral standards for his business” and to tell an employee, “[L]ook I feel very strongly about people who engage in sexually deviant behavior or unlawful sexual

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120. 134 CONG. REC. S10,470 (daily ed. Aug. 1, 1988) (statement of Sen. Helms) (on file with author); *see* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(b)(3), 102 Stat. 1619, 1622 (1988) (codified as a note to 42 U.S.C. § 3602) (excluding coverage of “transvestites” from both the Fair Housing Act and the Rehabilitation Act).

121. 134 CONG. REC. S10,470-71 (daily ed. Aug. 1, 1988) (statement of Sen. Alan Cranston).

122. *Compare* 42 U.S.C. § 12208 (2018) (excluding coverage of “transvestites” from the ADA), *and* 135 CONG. REC. S10,765, S10,776 (daily ed. Sept. 7, 1989), *available at* 1989 WL 183216 (referencing passage of Sen. Helms’s amendment to the Fair Housing Amendments Act and noting passage of Sen. Helm’s identical amendment no. 716 to the ADA), *with* 42 U.S.C. § 12211(b) (2018) (excluding coverage of various medical conditions from the ADA), *and* 135 CONG. REC. S10,785-86 (daily ed. Sept. 7, 1989) (noting passage of Armstrong-Hatch amendment no. 722 to the ADA), *available at* 1989 WL 183216.

practices.”<sup>123</sup> Senator Armstrong objected “to provid[ing] a protected legal status” to transgender people and others whose medical conditions “might have a moral content to them.”<sup>124</sup> Senator Warren Rudman likewise characterized the conditions excluded by the Armstrong-Hatch amendment as “socially unacceptable” and “lack[ing] any physiological basis. In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition . . . . [P]eople must bear some responsibility for the consequences of their own actions.”<sup>125</sup> Two years after passage of the ADA, Congress amended the Rehabilitation Act to exclude protection for the same conditions excluded by the ADA, including those associated with transgender people.<sup>126</sup> At the state level, approximately ten states followed suit, importing identical exclusions into their state anti-discrimination laws.<sup>127</sup>

(b) Constitutional Review of Federal Disability Laws that Deprive Transgender People of Anti-Discrimination Protections

No published court decision to date has expressly decided whether federal disability rights law’s exclusion of transgender people violates equal protection. Instead, courts have consistently eschewed the question

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123. 135 CONG. REC. S10,772 (daily ed. Sept. 7, 1989) (statement of Sen. Helms), *available at* 1989 WL 183216.

124. 135 CONG. REC. S10,753-54 (daily ed. Sept. 7, 1989) (statement of Sen. William Armstrong), *available at* 1989 WL 183115 (stating that he had “a whole list of [protected health conditions] . . . drawn from court cases,” and that he would “submit this list” to the ADA’s sponsors for exclusion from the ADA); *see also* 135 CONG. REC. S111,75 (daily ed. Sept. 14, 1989), *available at* 1989 WL 183785 (listing various health conditions protected under the Rehabilitation Act, including “Sexual Disorders: Transvestism and Transsexualism”); 135 CONG. REC. S10,785 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong), *available at* 1989 WL 183216 (proposing amendment to exclude, *inter alia*, “transvestism . . . transsexualism . . . [and] gender identity disorders”).

125. 135 CONG. REC. S10,796 (daily ed. Sept. 7, 1989) (statement of Sen. Warren Rudman), *available at* 1989 WL 183216.

126. 29 U.S.C. § 705(20)(F) (2018); H.R. REP. NO. 102-973, at 158 (1992) (Conf. Rep.), *available at* 1992 WL 322488 (discussing amendment of the Rehabilitation Act to include the ADA’s exclusion of coverage of certain health conditions).

127. Barry et al., *A Bare Desire to Harm*, *supra* note 116, at 523.

by invoking the canon of constitutional avoidance and ruling in favor of transgender litigants on statutory grounds.<sup>128</sup> In *Blatt*, for example, the Eastern District of Pennsylvania denied an employer's motion to dismiss on grounds that the ADA's exclusion of "gender identity disorder" refers only to transgender identity—not the medical condition of gender dysphoria that is associated with transgender people.<sup>129</sup> In *Edmo v. Idaho Department of Corrections*, the District of Idaho denied the State's motion to dismiss on grounds that the plaintiff had raised "a genuine dispute of material fact" regarding whether gender dysphoria fell within the ADA's and Rehabilitation Act's safe harbor for gender identity disorders "not resulting from physical impairments."<sup>130</sup> And in *Doe v. Massachusetts Department of Correction*, the District of Massachusetts dismissed the State's motion to dismiss on grounds that, *inter alia*, gender dysphoria "is not merely another term for 'gender identity disorder,'" but is instead a distinct diagnosis with different diagnostic criteria and, therefore, is not excluded by the ADA's and Rehabilitation Act's exclusion of "gender identity disorders."<sup>131</sup>

Courts' reliance on the canon of constitutional avoidance in this context is significant because it implicitly underscores the dubious constitutionality of federal disability law's exclusion of transgender people. As the District of Massachusetts reasoned, interpreting the ADA and Rehabilitation Act to exclude medical conditions associated with

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128. Under this canon of statutory construction, "a court has a duty where 'a serious doubt of constitutionality is raised' with respect to a statutory provision to 'first ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided.'" *Doe v. Mass. Dep't. of Corr.*, No. 17-12255-RGS, 2018 WL 2994403, at \*7 (D. Mass. June 14, 2018) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

129. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017) ("[I]t is fairly possible to interpret the term gender identity disorders narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have—such as Blatt's gender dysphoria.").

130. *Edmo v. Idaho Dep't of Corr.*, No. 1:17-cv-00151-BLW, 2018 WL 2745898, at \*8 (D. Idaho June 7, 2018); *see also Blatt*, 2017 WL 2178123, at \*1 (discussing plaintiff's claims under ADA and Section 504 of the Rehabilitation Act).

131. *Doe v. Mass. Dep't of Corr.*, No. 17-12255-RGS, 2018 WL 2994403, at \*6-7.

transgender people would raise “a serious doubt of constitutionality” because it would “exclude an entire category of people from its protections” for no apparent reason other than to express disapproval of their transgender status.<sup>132</sup> “The pairing of gender identity disorders with conduct that is criminal or viewed by society as immoral or lewd,” the court stated,

raises a serious question as to the light in which the drafters of this exclusion viewed transgender persons. Also excluded are ‘(2) compulsive gambling, kleptomania, or pyromania’ and ‘(3) psychoactive substance use disorders resulting from current illegal use of drugs.’ Here, again, the statute excludes from a possible ADA claim activities that are illegal, dangerous to society, or the result of harmful vices.<sup>133</sup>

Invoking Justice Harlan’s dissent in *Plessy v. Ferguson*, the District of Massachusetts concluded that an interpretation of federal disability law to exclude transgender people would be tantamount to “tolerat[ing] classes among citizens” and was therefore “best avoided.”<sup>134</sup>

## 2. State Preemption Laws

In addition to federal disability rights laws that explicitly exclude protections for transgender people, at least one state, North Carolina, has passed two successive laws that achieve a similar result by prohibiting municipalities from passing “new or amended” anti-discrimination ordinances to protect transgender people.<sup>135</sup> Although North Carolina’s prohibition applies to the enactment or amendment of *all* new or amended anti-discrimination ordinances, and is therefore facially neutral, transgender litigants argue that the effect of these laws is to deprive anti-discrimination protections to those not already protected by existing anti-discrimination laws—namely, transgender people.<sup>136</sup> Accordingly, they

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132. *Id.* at \*7-8.

133. *Id.* at \*7.

134. *Id.* at \*8 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

135. *See Carcaño v. Cooper*, 350 F. Supp. 3d 388, 398-401 (M.D.N.C. 2018) (discussing North Carolina’s enactment of HB 2 and HB 142, the former of which was subsequently repealed).

136. *See id.* at 418.

argue, state preemption laws discriminate against transgender people in violation of equal protection.<sup>137</sup>

(a) Justifications for State Preemption Laws that Deprive  
Transgender People of Anti-Discrimination Protections

States' justifications for these preemption laws, although couched in terms of an interest in "state-wide uniformity,"<sup>138</sup> are premised on familiar concerns regarding criminality, morality, and privacy, which, in turn, derive from standard tropes about transgender people. North Carolina's preemption laws, for example, were part and parcel of a broader effort to deny transgender people access to appropriate single-sex services under local law—an effort fueled by hurtful tropes about hypothetical "sexual predators . . . prey[ing] on persons in vulnerable places," "men" using "women's bathrooms and locker rooms," and the "common sense" infringement of non-transgender people's privacy.<sup>139</sup> North Carolina's justifications for its preemption laws are closely analogous to those offered in support of Colorado's constitutional amendment over two decades ago, which similarly preempted civil rights protections for gays, lesbians, and bisexual people based on "personal or religious objections to homosexuality"—what Justice Antonin Scalia referred to as "traditional American moral values."<sup>140</sup>

(b) Constitutional Review of State Preemption Laws that Deprive  
Transgender People of Anti-Discrimination Protections

In *Carcano v. Cooper*, the Middle District of North Carolina denied the State's motion to dismiss an equal protection challenge to a facially neutral state preemption law on grounds that the law was "motivated, at least in part, by discriminatory intent" toward transgender people.<sup>141</sup> Of

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137. *Id.* at 419.

138. *Id.* at 422 ("Plaintiffs argue . . . [that] any governmental purpose for HB142's preemption provisions resting on statewide uniformity can only be a 'pretext' for the same sort of discrimination that was more explicit in HB2.").

139. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 652 (2016); Compl. at ¶ 110, *Carcano v. McCrory* (M.D.N.C. Mar. 28, 2016) (No. 1:16-cv-00236).

140. *Romer v. Evans*, 517 U.S. 620, 635 (1996); see *id.* at 651 (Scalia, J., dissenting).

141. 350 F. Supp. 3d at 419.

significance to the court was the fact that HB 142 and its predecessor, HB 2, were passed in response to a “Charlotte ordinance that granted anti-discrimination protections to transgender individuals”; the laws’ disproportionate impact on transgender people who, unlike other vulnerable groups, lacked protections under existing state and local anti-discrimination laws; and “[d]epartures from the normal procedural sequence” used to pass the laws, which were “introduced, debated, passed, signed, and went into effect within a single day.”<sup>142</sup> Given this evidence, and a lack of support for the law’s “conceivable purpose of statewide uniformity,” the court concluded that the plaintiffs had stated a claim that the preemption law lacked any “rational basis” in violation of the Equal Protection Clause.<sup>143</sup>

*D. Exclusion from the U.S. Military*

Prior to 2016, the U.S. Department of Defense explicitly prohibited transgender people from enlisting or serving in the military.<sup>144</sup> In June 2016, the Department changed course, based on its high level review, supported by a detailed study by the RAND Corporation, which concluded that there was no evidence that allowing transgender individuals to serve would have any effect on “unit cohesion,” and rejected any readiness and

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142. *Id.* at 418-19.

143. *Id.* at 422; *see also Romer*, 517 U.S. at 632 (invalidating state constitutional amendment that preempted civil rights protections for lesbian, gay, and bisexual people on grounds that it “impos[ed] a broad and undifferentiated disability on a single named group,” and “its sheer breadth [wa]s so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”).

144. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 180 (2017) [hereinafter *Doe v. Trump* ¶] (discussing Secretary of Defense Ash Carter’s issuance of memorandum on June 30, 2016 “establishing a policy, assigning responsibilities, and prescribing procedures for the retention, accession, separation, in-service transition and medical coverage for transgender personnel serving in the Military Services”) (internal quotation marks omitted); *see also id.* at 178-79 (discussing changes to regulations in August 2014 disqualifying transgender service). In 2011, the Department of Defense repealed its “Don’t Ask Don’t Tell” policy of excluding of LGB people—but not transgender people. *See Duffy*, *supra* note 116, at 16-140.

cost justifications for the exclusion.<sup>145</sup> Accordingly, the Department adopted a protocol to permit transgender service members to transition genders, and stated that, within one year, it would begin allowing transgender candidates who had completed gender transition at least 18 months prior to the date of submission of materials to enlist in the military.<sup>146</sup>

In the summer of 2017, following the election of Donald Trump, the Department changed course once again, abruptly reverting to its pre-2016 policy banning transgender people from service. On July 26, 2017, the President announced via Twitter that “the United States Government will not accept or allow [t]ransgender individuals to serve in any capacity in the U.S. Military.”<sup>147</sup> Transgender people were, in his words, a “burden[]” on the military, imposing “tremendous medical costs and disruption.”<sup>148</sup> A formal Presidential Memorandum followed on August 25, 2017, which, among other things, directed the Department of Defense to submit a plan to the President that prohibited “openly transgender individuals from [enlisting in] . . . the United States military and authorized the discharge of such individuals” until such time as the Department could conclude that openly transgender service members would not “hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.”<sup>149</sup>

On January 1, 2018, after current and aspiring transgender service members successfully sued to enjoin the implementation of the 2017 Presidential Memorandum, the military began permitting transgender individuals to enlist.<sup>150</sup> But the Department did not relent. In March 2018, President Trump released the recommendations of Secretary of Defense James Mattis (Mattis Plan) with respect to implementing the transgender

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145. *Doe v. Trump I*, 275 F. Supp. 3d at 179. The RAND Corporation is “a nonprofit research institution that provides research and analysis to the Armed Services.” *Id.*

146. *Id.* at 180-81 (discussing Secretary of Defense Ash Carter’s June 30, 2016 memorandum).

147. *Id.* at 182-83 (quoting President Trump’s tweets).

148. *Id.* at 183.

149. *Id.* at 183-84 (quoting August 25, 2017 Presidential Memorandum).

150. *Doe 2 v. Trump*, 315 F. Supp. 3d 474, 481 (2018) [hereinafter *Doe v. Trump II*].

ban announced in the 2017 Presidential Memorandum.<sup>151</sup> The Mattis Plan achieved the same result as President Trump's announced ban by excluding transgender people from service in three separate ways:<sup>152</sup>

1. Disqualifying all those with "a history or diagnosis of gender dysphoria" who do not live consistently with their "biological sex" or require "a change of gender," unless they fall within a narrow safe harbor provision that allows those transgender service members who relied on the 2016 open-service policy to transition in order to remain in service as exceptions to the ban.<sup>153</sup>
2. Disqualifying all "persons who require or have undergone gender transition."<sup>154</sup>
3. Requiring all service members to serve in their biological sex.<sup>155</sup>

Because transgender people do not identify or live in accord with their "biological sex," and because only transgender people undergo gender transition, the policy bans all transgender people from service who do not suppress their transgender identity.<sup>156</sup>

Aspiring and enlisted transgender service members across the country challenged the Mattis Plan.<sup>157</sup> As in the criminalization, single-sex access,

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151. *See id.* at 482-83.

152. *See id.* at 482 ("[T]he plan effectively implements such a ban by targeting proxies of transgender status, such as 'gender dysphoria' and 'gender transition,' and by requiring all service members to serve "in their biological sex.").

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.* ("By definition, transgender persons do not identify or live in accord with their biological sex, which means that the result of the Mattis Implementation Plan is that transgender individuals are generally not allowed to serve openly in the military.").

157. *Doe v. Trump II*, 315 F. Supp. 3d 474 (D.D.C. 2018); *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Ca. 2018); *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017). Each of these cases originally involved challenges to President Trump's 2017 tweet and Presidential Memorandum. When the Trump administration released the Mattis Plan in March 2018,

and civil rights exclusion cases, the plaintiffs in each case alleged that the military's exclusion of transgender service members violated equal protection and substantive due process.<sup>158</sup> Specifically, the plaintiffs argued that the Trump administration's exclusion of transgender people from military service violated equal protection by discriminating based on transgender status (e.g., excluding "transgender persons who require or have undergone gender transition" and those "with a history or diagnosis of gender dysphoria") and sex (e.g., excluding those who defy gender stereotypes by "undergo[ing] gender transition")—both of which receive heightened scrutiny.<sup>159</sup> Even absent heightened scrutiny, the plaintiffs argued, the transgender exclusion failed even the most minimal level of scrutiny because it was "inexplicable by anything but animus toward the class it affects," given its novelty (revoking rights previously given), over-inclusiveness (excluding transgender people who meet all requirements of fitness for service apart from the criteria designed to exclude them for being transgender) and under-inclusiveness (not excluding non-transgender people whose medical needs are comparable to transgender persons).<sup>160</sup>

In addition, the plaintiffs argued that the Trump administration's exclusion of transgender people from military service violated substantive due process because it infringed the exercise of a fundamental right, namely, the right "to live in accord with a basic component of their

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"implement[ing] the President's directive that transgender people be excluded from the military," the plaintiffs in these cases challenged the Mattis Plan. *Doe v. Trump II*, 315 F. Supp. 3d at 484 (emphasis in original).

158. Because the U.S. military's ban on transgender service members was federal—not state—action, the plaintiffs challenged the ban pursuant to the Fifth Amendment, which, like the Fourteenth Amendment, guarantees equal protection and substantive due process. *See, e.g., Stone*, 280 F. Supp. at 768.

159. *Doe v. Trump II*, 315 F. Supp. 3d at 482 (quoting Mattis Plan); *see* Pls.' Cross-Motion for Summary Judgment at 6-8, 10-11, *Doe v. Trump* (D.D.C. May 11, 2018) (No. 1:17-cv-01597-CKK) [hereinafter *Doe* Pls.' Cross-Motion], available at <https://www.glad.org/wp-content/uploads/2017/08/dvt-plaintiffs-opp-to-defendants-msj-and-cross-msj-judgment-5-11-18.pdf> [<https://perma.cc/9FDA-GD5X>] (discussing discrimination on the basis of transgender status and sex); *see also Doe v. Trump I*, 275 F. Supp. 3d 167, 208-10 (D.D.C. 2017) (same).

160. *Doe* Pls.' Cross-Motion, *supra* note 159, at 2, 23, 27; *see Doe v. Trump I*, 275 F. Supp. 3d at 212-13.

identity, just as non-transgender people are able to do.”<sup>161</sup> The decision to exclude transgender service members was also arbitrary and irrational, the plaintiffs argued, because it was “made suddenly, with no deliberative process, and for no legitimate reason.”<sup>162</sup> According to the plaintiffs, “the only effect of the transgender ban is to exclude transgender applicants who are otherwise qualified and fit to serve,” which *impedes*—not advances—military readiness.<sup>163</sup>

### 1. Justifications for Exclusion from Military Service

The Trump Administration has offered several reasons for excluding transgender people from the military, all of which echo the familiar tropes used to justify laws that criminalized gender-nonconformity, deny access to appropriate single-sex services, and deprive transgender people of the protection of various anti-discrimination laws.<sup>164</sup>

According to the Trump Administration, transgender service members threaten public safety. The administration has carefully avoided expressing the safety concern in terms of criminality or fraud; instead, the administration couches the concern in terms of the impact of service by

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161. *Doe Pls.’ Cross-Motion*, *supra* note 159, at 37.

162. *Id.* at 37-39. According to the plaintiffs, the Mattis Plan’s “grandfather provision,” which permitted service members diagnosed with gender dysphoria after July 2016 and before the effective date of the Mattis Plan to “continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria,” did not cure the discrimination. *Doe v. Trump II*, 315 F. Supp. 3d at 482, 486. Instead, it further contributed to the discrimination by stigmatizing the grandfathered group “as mentally unstable, burdensome, and dangerous to the safety and privacy of others.” *Doe Pls.’ Cross-Motion*, *supra* note 159, at 19, 40-41. The fact of their continued service also undercuts the administration’s argument that transgender individuals are not capable of equal service. *See id.* at 34.

163. *Id.* at 24.

164. *See, e.g., Doe v. Trump I*, 275 F. Supp. 3d at 183 (discussing President’s concern that transgender people would “hinder military effectiveness and lethality, disrupt unit cohesion, [and] tax military resources”); *see also Doe v. Trump II*, 315 F. Supp. 3d at 483-84 (discussing Mattis Plan’s underlying reasons for excluding transgender people, which included “military readiness,” “unit cohesion,” and “disproportionate costs”).

transgender people on “military readiness.”<sup>165</sup> Because untreated gender dysphoria can lead to self-injury, the administration argues, service members with gender dysphoria are a threat to themselves and, by extension, other service members who rely on them.<sup>166</sup> Second, in addition to casting doubt on whether gender dysphoria is, in fact, treatable as every major medical association has concluded,<sup>167</sup> the administration argues that the *treatment* of gender dysphoria itself threatens safety because it renders people with gender dysphoria non-deployable, thereby inhibiting the military’s capacity to fulfill its obligations.<sup>168</sup> Lastly, the administration argues that the “disproportionate” costs of such treatment undermine military “efficiency,” siphoning resources that could be better used elsewhere.<sup>169</sup>

Morality also drives the exclusion of transgender service members. On July 26, 2017, President Donald Trump ordered the Department of Defense to purge the military of transgender service members, calling them a “burden[]” and a “disruption.”<sup>170</sup> Although the administration has struggled mightily to distinguish the formality of the Mattis Plan from the rancor of the President’s tweets, animus remains a central motivation for the exclusion.<sup>171</sup> Indeed, in defending the exclusion, the Administration

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165. See Defs.’ Mot. to Dismiss Pls.’ Second Amended Complaint or Mot. for Summary Judgment, at 23-2, *Doe v. Trump II*, 315 F. Supp. 3d 474 (D.D.C. Apr. 20, 2018) (No. 17-cv-1597 (CKK)) [hereinafter *Doe* Defs.’ Mot. Dismiss], available at <https://notransmilitaryban.org/wp-content/uploads/2018/07/2018-04-20-Motion-to-Dismiss-or-Motion-for-Summary-Judgment.pdf> [<https://perma.cc/6773-AGGH>].

166. See *id.* at 25 (discussing “life-and-death consequences of warfare”).

167. See *Doe v. Trump II*, 315 F. Supp. 3d at 483 (discussing medical community’s “immediate” denunciation of Trump Administration’s assertion that there is “uncertainty” regarding the efficacy of treatment for gender dysphoria).

168. *Doe* Defs.’ Mot. Dismiss, *supra* note 165, at 25-27.

169. *Id.* at 32-33.

170. *Doe v. Trump I*, 275 F. Supp. 3d at 182-83.

171. See *Doe v. Trump II*, 315 F. Supp. 3d at 494 (observing that Mattis Plan was “crafted over the course of months (clearly with assistance from lawyers and an eye to pending litigation) [and] is a longer, more nuanced expression of the President’s policy direction than the brief, blanket assertions made by the President himself in 2017”). As explained by Justice Kennedy (for himself and Justice O’Connor), animus arises not only from “malice or hostil[ity],” but also from “insensitivity caused by simple want of careful, rational

has argued that transgender service members would cause “frustrat[ion]” and “friction in the ranks.”<sup>172</sup> For this proposition, the administration suggested that there are non-transgender service members who may resent the application of less exacting fitness standards to transgender women, non-transgender women who may resent being “pitt[ed] . . . against biological males who identify as female,” and non-transgender men “who would like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity.”<sup>173</sup>

Lastly, the Administration has argued that permitting transgender people to serve would undermine “order, discipline, leadership, and unit cohesion” by “invad[ing] the expectations of privacy of . . . non-transgender service members”—particularly with respect to “sleeping and latrine areas.”<sup>174</sup> These arguments mirror those repeatedly raised in the context of denials of appropriate single-sex services.<sup>175</sup>

## 2. Constitutional Review of Exclusion for Military Service

### (a) Equal Protection

In *Doe v. Trump*, the first of four cases to challenge the Trump administration’s exclusion of transgender service members, a federal district court for the District of Columbia preliminarily enjoined the Trump Administration’s transgender military ban on equal protection grounds.<sup>176</sup> According to the court, the exclusion of transgender people warranted “an intermediate level of scrutiny” for two reasons: first, because “transgender

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reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

172. *Doe Defs.’ Mot. Dismiss*, *supra* note 165, at 30-31.

173. *Id.*; *see also Doe v. Trump I*, 275 F. Supp. 3d at 212 n.10 (stating that, “[t]o the extent that [the administration’s argument regarding unit cohesion] is a thinly-veiled reference to an assumption that other service members are biased against transgender people, this would not be a legitimate rationale for the challenged policy”).

174. *See Doe Defs.’ Mot. Dismiss*, *supra* note 165, at 27-30.

175. *See supra* Part II.B and accompanying text.

176. *Doe v. Trump I*, 275 F. Supp. 3d at 213; *see also Doe v. Trump II*, 315 F. Supp. 3d at 498 (declining to dissolve preliminary injunction).

individuals . . . appear to satisfy the criteria of at least a quasi-suspect classification” under the Supreme Court’s four-factor test, and second, because the exclusion is “a form of discrimination on the basis of gender [stereotypes], which is itself subject to intermediate scrutiny.”<sup>177</sup>

Applying heightened scrutiny, the court rejected the administration’s safety, morality, and privacy justifications. The ban did not further safety, or “military readiness,” the court reasoned, based on a number of factors, including the sheer breadth of the exclusion, which “appear[ed] to be divorced from any transgender individual’s *actual* ability to serve.”<sup>178</sup> According to the court, the military ban “establishes a special *additional* exclusionary rule [that] precludes individuals who would otherwise satisfy the demanding standards applicable to all service members simply because they have certain traits that are associated with being transgender.”<sup>179</sup>

The court also identified and rejected what appeared to be an “improper animus or purpose[.]” for the transgender military ban, based on the highly “unusual circumstances” surrounding its issuance.<sup>180</sup>

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177. *Doe v. Trump I*, 275 F. Supp. 3d at 209-10; *see also* Stockman v. Trump, 331 F. Supp. 3d 990, 1002 (2018) (applying “intermediate scrutiny”); Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at \*11 (W.D. Wash. April 13, 2018) (holding that transgender people are “a suspect class” and applying “strict scrutiny”); Stone v. Trump, 280 F. Supp. 3d 747, 768 (2017) (applying intermediate scrutiny, but concluding that the 2017 Memorandum was “unlikely to survive a rational review. The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest.”).

178. *Doe v. Trump II*, 315 F. Supp. 3d at 497 (emphasis added).

179. *Id.* (emphasis in original); *see also id.* (“In the absence of the challenged policy, transgender individuals are subject to all of the same standards and requirements for accession and retention as any other service member.”); *see also Doe v. Trump I*, 275 F. Supp. 3d at 179 (stating that, by 2016, “senior uniformed officers and senior civilian officers from each department of the military . . . conclude[d] that . . . *prohibiting* transgender people from serving undermines military effectiveness and readiness because it excludes qualified individuals on a basis that has no relevance to one’s fitness to serve, and creates unexpected vacancies requiring expensive and time-consuming recruitment and training of replacements”) (emphasis in original).

180. *Doe v. Trump I*, 275 F. Supp. 3d at 213; *id.* (“[D]epartures from the normal procedural sequence also might afford evidence that improper purposes are

“[A]fter a lengthy review process by senior military personnel,” the court observed,

the military had recently determined that permitting transgender individuals to serve would not have adverse effects on the military and had announced that such individuals were free to serve openly. Many transgender service members identified themselves to their commanding officers in reliance on that pronouncement. Then, the President abruptly announced, via Twitter—without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans—that all transgender individuals would be precluded from participating in the military in any capacity. These circumstances provide additional support for Plaintiffs’ claim that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.<sup>181</sup>

Given the ban’s overbreadth and improper animus, the court refused to credit the Administration’s concern that transgender people’s presence would “erode reasonable expectations of privacy that are important in maintaining unit cohesion”<sup>182</sup>—dismissing the “unit cohesion” argument as a “thinly-veiled reference” to other service members’ “bias[] against

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playing a role.”) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)); see *Doe v. Trump II*, 315 F. Supp. 3d at 497 (“[B]ecause the plan fundamentally implements the policy directives set forth by the President in 2017, the unusual factors associated with the issuance of the 2017 directives are still relevant.”).

181. *Doe v. Trump I*, 275 F. Supp. 3d at 213; see *Doe v. Trump II*, 315 F. Supp. 3d at 497 (“[T]he Court is still concerned that, immediately prior to the announcement of the 2017 Presidential directives, the military had studied the issue and found no reason to exclude transgender service members. The Court is likewise still concerned that the President’s 2017 directives constituted an abrupt reversal in policy, and a *revocation* of rights, announced without *any of the formality, deliberative process, or factual support usually* associated with such a significant action.”) (emphasis in original); see also *Stone v. Trump*, 280 F. Supp. 3d at 768 (“agree[ing] with the D.C. Court that there is sufficient support for Plaintiffs’ claims that ‘the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy’”).

182. *Doe Defs.’ Mot. Dismiss*, *supra* note 165, at 28.

transgender people,” which is an “illegitimate rationale for the challenged policy.”<sup>183</sup> In *Stockman v. Trump*, the Central District of California likewise rejected the administration’s privacy concern. “In the history of military service in this country,” the court concluded,

“the loss of unit cohesion” has been consistently weaponized against open service by a new minority group. Yet, at every turn, this assertion has been overcome by the military’s steadfast ability to integrate these individuals into effective members of our armed forces. As with blacks, women, and gays, so now with transgender persons. The military has repeatedly proven its capacity to adapt and grow stronger specifically by the inclusion of these individuals. Therefore, the government cannot use “the loss of unit cohesion” as an excuse to prevent an otherwise qualified class of discrete and insular minorities from joining the armed forces.<sup>184</sup>

On January 4, 2019, in a per curiam decision, the D.C. Circuit Court of Appeals vacated the district court’s preliminary injunction in *Doe v. Trump*, allowing the transgender military ban to go into effect temporarily while the case proceeded.<sup>185</sup> “Although the Mattis Plan continues to bar

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183. *Doe v. Trump I*, 275 F. Supp. 3d at 212 n. 10.

184. *Stockman*, 331 F. Supp. 3d at 1004; *see also* Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at \*12 (W.D. Wash. April 13, 2018) (“[T]he Court notes that Defendants’ claimed justifications for the Ban—to promote ‘military lethality and readiness’ and avoid ‘disrupt[ing] unit cohesion, or tax[ing] military resources’—are strikingly similar to justifications offered in the past to support the military’s exclusion and segregation of African American service members, its ‘Don’t Ask, Don’t Tell’ policy, and its policy preventing women from serving in combat roles.”); *cf. Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at \*3 (D.C. Cir. 2017) (“[I]t must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them.”).

185. *See Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309, at \*22 (D.C. Cir. 2019) (per curiam); *id.* at 1 (Wilkins, J., concurring), *available at* [https://www.cadc.uscourts.gov/internet/opinions.nsf/3E489A75776A7837852583B700530113/\\$file/18-5257-1776653.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3E489A75776A7837852583B700530113/$file/18-5257-1776653.pdf) [<https://perma.cc/J3YS-KF5A>].

many transgender persons from joining or serving in the military,” the court reasoned, it did not bar *all* transgender people—namely, those protected by the Mattis Plan’s narrow safe harbor provision, and those “[w]illing to serve in their biological sex.”<sup>186</sup> The court’s reasoning is fatally misguided for two reasons. First, as the district court concluded, the safe harbor provision applies to only “a small group of individuals” who are willing to be “single[d] . . . out from all other service members and mark[ed] as categorically unfit for military service.”<sup>187</sup> This provision is also a part of effectuating a ban because, once members of that small group retire or otherwise conclude their service, no transgender people will be allowed to remain. This is hardly sufficient to salvage an irrational ban. Second, the court’s assumption that transgender people may serve “in their biological sex” is premised on the fallacy that a policy that requires transgender people to suppress a core aspect of their identity is not a ban.<sup>188</sup> As the district court concluded, requiring transgender service members to live “in their biological sex” is like requiring Muslim service members to renounce their Muslim faith.<sup>189</sup> In either case, it is effectively a ban on military service.<sup>190</sup>

On January 22, 2019, the U.S. Supreme Court likewise allowed the transgender military ban to go into effect in two other cases—*Karnoski v. Trump* and *Stockman v. Trump*—pending disposition of the administration’s appeals of those cases in the Ninth Circuit Court of Appeals.<sup>191</sup> And on March 7, 2019, in *Stone v. Trump*—the fourth and last

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186. *Id.* at \*2 (emphasis added).

187. *Doe v. Trump II*, 315 F. Supp. 3d at 486, 495 n.12.

188. *Shanahan*, 2019 WL 102309, at \*2.

189. *See Doe v. Trump II*, 315 F. Supp. 3d at 494-95.

190. *See id.* at 494 (“Tolerating a person with a certain characteristic only on the condition that they renounce that characteristic is the same as not tolerating them at all.”). Despite overwhelming evidence to the contrary, the D.C. Circuit also credited what it found to be “substantial steps” taken by the administration—after issuing the 2017 Presidential Memorandum and before issuing the Mattis Plan—“to cure the procedural deficiencies the court identified in the enjoined 2017 Presidential Memorandum.” *Shanahan*, 2019 WL 102309, at \* 2.

191. *Trump v. Karnoski*, 2019 WL 271944, at \*1 (2019); *Trump v. Stockman*, 2019 WL 271946, at \*1 (2019). In a separate order, the Supreme Court denied the Trump administration’s extraordinary request that it hear an immediate appeal before judgment issues from the Ninth Circuit. *See Adam*

case to address the issue—the District of Maryland similarly allowed the ban to take effect pending the court’s determination on the merits.<sup>192</sup> On April 12, 2019, the Department of Defense began enforcing the ban.<sup>193</sup>

### (b) Substantive Due Process

Of the four cases challenging the transgender military ban, *Stone v. Trump* addressed substantive due process most significantly. In that case, the District of Maryland denied the Trump administration’s motion to dismiss on substantive due process grounds, based on the President’s “capricious, arbitrary, and unqualified tweet of new policy” that “degrade[d]” and “demean[ed]” transgender people.<sup>194</sup> According to the court, the President’s unexpected announcement of a blanket ban on transgender service members, which lacked “methodical and systematic review by military stakeholders,” could fairly be said to “shock the contemporary conscience.”<sup>195</sup>

## III. IMPLICATIONS OF CONSTITUTIONAL REVIEW OF TRANSGENDER DISCRIMINATION

This Essay has described several prominent examples of government discrimination against transgender people, the tropes advanced by the government in support of such discrimination, and the failure of those tropes to persuade the courts. We now consider some of the broader implications of courts’ rejection of transgender tropes as a basis for government decision-making.

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Liptak, *Supreme Court Revives Transgender Ban for Military Service*, N.Y. TIMES (Jan 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html> [https://perma.cc/5WPJ-MRRX].

192. Order at 6, *Stone v. Trump*, No. 1:17-cv-02459-GLR (Mar. 7, 2019), available at <https://www.documentcloud.org/documents/5763942-Stone-order-staying-injunction.html> [https://perma.cc/YA9Z-49HM].

193. *Trump Administration Begins Enforcing Its Transgender Military Ban Amid Ongoing Legal Challenges*, GLAD (April 12, 2019), <https://www.glad.org/post/trump-administration-begins-enforcing-its-transgender-military-ban-amid-ongoing-legal-challenges> [https://perma.cc/F9SG-8HLH].

194. *Stone v. Trump*, 280 F. Supp. 3d 747, 770-71 (D. Md. 2017) (citing *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013)).

195. *Id.* at 771.

*A. Legal*

First consider the obvious legal implications. By refusing to credit government officials' assertions that transgender people are threatening, immoral, and disrespectful of gender norms, lower courts have recognized the rights of transgender people to access a range of public spaces, benefits, and services previously denied to them. Lawmakers' efforts to criminalize transgender people's existence, and laws and policies that deny transgender people appropriate access to sex-differentiated services, exclude them from anti-discrimination protection, or ban them from military service are rightfully viewed with skepticism.<sup>196</sup> Transgender people, once "ignored [and] excluded" on the basis of outdated, inaccurate assumptions, are demanding and securing the right to be fully integrated into the American mainstream.<sup>197</sup>

*B. Doctrinal*

Courts' recognition of transgender rights also has implications for constitutional doctrine, namely equal protection and substantive due process. Over the past two decades, lower courts reviewing transgender classifications have broadened the scope of the Equal Protection Clause in two significant ways. First, courts have expanded the application of heightened scrutiny by holding that transgender status is, itself, a suspect/quasi-suspect class and, alternatively, that discrimination against transgender people is a form of sex discrimination subject to intermediate scrutiny.<sup>198</sup> Second, when reviewing transgender classifications under the more deferential rational basis test, courts have engaged in a searching review, scrutinizing the record for evidence of animus against transgender people. Substantive due process doctrine has likewise evolved, with lower courts acknowledging transgender people's fundamental right to liberty, privacy, and autonomy—the right to manifest and live consistent with a

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196. *See supra* Part II (discussing invalidation of laws and policies that discriminate against transgender people).

197. For an excellent summary of the progress of transgender rights in recent decades, see Kylar W. Broadus & Shannon Price Minter, *Legal Issues, in TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY* ch. 10 (Laura Erickson-Schroth ed., 2014).

198. *See supra* Part II (discussing equal protection cases).

core feature of their identity without fear of stigmatization or bodily harm.<sup>199</sup>

### C. Theoretical

Courts' recognition of transgender rights likewise informs normative theories of government responsibility. We briefly discuss three such theories here. Natural law theory, which is dedicated to the promotion of "moral" behavior based on conceptions of what is "natural," has long fueled the trope that transgender people are immoral.<sup>200</sup> Although trumpeted by defenders of gender-norming criminal laws in the mid-twentieth century and by members of Congress who voted to exclude transgender people from the ADA in 1990, natural law defenses for the disparate treatment of transgender people have lost currency in the courts.<sup>201</sup> Indeed, public officials often go out of their way to avoid invoking moral opposition toward transgender people as a basis for decision-making, opting instead for less morally charged rhetoric, such as "unit cohesion" in the military context, and "personal privacy" in the education context.<sup>202</sup>

Utilitarian theory, which, generally speaking, seeks "the greatest good for the greatest number,"<sup>203</sup> has played contradictory roles in the debate over whether the Constitution permits laws that criminalize gender nonconformance, deny access to appropriate single-sex services, or exclude transgender people from anti-discrimination protections and the military. Invoking tropes that transgender people are a threat to public safety and privacy, public officials argue that the challenged laws are a

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199. See *supra* Part II (discussing substantive due process cases).

200. See ESKRIDGE ET AL., *supra* note 15, at 349-50 (stating that natural law "posits humans' *natural* or *universal* needs or constitution and argues for certain *basic goods* that best meet those needs or fit that constitution").

201. See *supra* Part II (discussing courts' rejection of moral justifications for transgender discrimination).

202. See *supra* Part II.C-D (discussing government justifications for transgender discrimination in the military and in schools).

203. ESKRIDGE ET AL., *supra* note 15, at 365; see also Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1292 (2007) (discussing utilitarianism).

proper utilitarian response to the purported harm.<sup>204</sup> Rejecting as baseless the argument that transgender people threaten public safety or privacy, transgender litigants argue that the challenged laws violate utilitarian principles by harming a minority of people without any corresponding benefit to the majority.<sup>205</sup> As with natural law arguments depicting transgender people as immoral, governments' utilitarian arguments depicting transgender people as a threat to public safety and privacy have consistently failed, with courts demanding evidence of predatory behavior or the imperiling of private interests—and finding none.<sup>206</sup>

A third theory, little mentioned in the constitutional or gender and sexuality literature, is disability theory's "social model of disability."<sup>207</sup> This theory, which emerged from the disability rights movement of the 1970's, posits that the concept of disability is socially constructed and contingent.<sup>208</sup> No one's body "works perfectly, or consistently, or

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204. *See supra* Part II (discussing public safety and privacy justifications for transgender discrimination); *cf.* William E. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1373 (2000) (discussing utilitarian defense of anti-LGB laws).

205. *See supra* Part II (discussing transgender litigants' challenges to discriminatory laws); *see also* ESKRIDGE ET AL., *supra* note 15, at 366 (discussing utilitarian argument against state regulation that "imposes harm upon a minority without corresponding benefit for the majority"); *accord.* NUSSBAUM, *supra* note 9, at 56, 123.

206. *See supra* Part II (discussing courts' rejection of public safety and privacy justifications for transgender discrimination).

207. *See, e.g.*, ESKRIDGE ET AL., *supra* note 15, at 108-17 (discussing concerns with the purported "medicalization" of transgender identity but not addressing the subordination of people with gender dysphoria and the social model of disability that informs disability rights laws); *accord.* KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* 7-8, 106 (2016).

208. *See* MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* 10-11 (1990) (advancing a "social (oppression) theory of disability," which holds that "[d]isability [is] the disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical [or mental] impairments and thus excludes them from the mainstream of social activities"); *see also* Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 Va. L. Rev. 397, 428-29 (2000) ("The social model . . . treats disability as the interaction between societal barriers (both physical and otherwise) and the impairment: 'From this perspective, disability is

eternally,” the model holds; we all have health conditions that exist on a spectrum, ranging from those that significantly restrict how our bodies function to those that impose no such restrictions.<sup>209</sup> According to the social model of disability, people are “disabled” not by the functional limitations imposed by their health conditions, but rather by prejudice, stereotypes (both conscious and unconscious), and indifference toward those conditions.<sup>210</sup> Simply put, disability lies not with the individual, but rather with society’s negative treatment of the individual.<sup>211</sup> Under this

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attributed primarily to a disabling environment instead of bodily defects or deficiencies.”) (citation omitted).

209. Tom Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?*, in 2 *Research in Social Science and Disability* 24 (Sharon N. Barnartt & Barbara M. Altman eds., 2001); see also Robert L. Burgdorf Jr., *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 519 (1997) (“[T]here are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional.” (quoting U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 87 (1983))).
210. See Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENER RIGHTS* 74-92 (Paisley Currah et al. eds., 2006) (“[B]arriers to full equality faced by persons with a wide range of health conditions [a]re caused not so much by physical attributes as by the prejudice and attitudinal barriers they experience[.]”); see also Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 654 (1999) (“[T]he disadvantaged status of persons with disabilities is the product of a hostile (or at least inhospitable) social environment, not simply the product of bodily defects.”).
211. See Kevin Barry, *Towards Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 211-12 (2010) (“What distinguishes us, and what makes some of us ‘disabled’ and others not, is not whether our medical impairments limit our bodily functions, but rather whether our society limits us based on those impairments.”); see also H.R. REP. NO.101-485(II), at 41 (May 15, 1990) (House Comm. on Educ. & Lab) (“The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools, being denied employment opportunities, and being deemed an ‘unfit parent.’”) (quoting testimony of Arlene Mayerson of the Disability Rights Education and Defense Fund).

model, disability is a civil rights issue, and society's proper response is to remedy the disadvantage of those whom society has "disabled."<sup>212</sup>

The social model of disability figures prominently in cases challenging the constitutionality of transgender discrimination. Laws that discriminate against transgender people often target gender transition, which is the recognized treatment for gender dysphoria.<sup>213</sup> Accordingly, laws that criminalize or otherwise disadvantage those who undergo transition are necessarily "disabling"; they subject people with gender dysphoria to a host of exclusions and indignities.<sup>214</sup> Society's appropriate response, transgender litigants argue, is for courts to remedy disability discrimination by invalidating such laws under the Constitution.<sup>215</sup> Significantly, lower courts have agreed, striking down a range of laws and policies that have criminalized or otherwise thwarted the prescribed treatment and well-being of people with gender dysphoria "in direct contravention of medical and psychological indications."<sup>216</sup>

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212. See Bagenstos, *supra* note 208, at 426, 430.

213. See WORLD PROF. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 9-10 (7th ed. 2011), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPAT%20H.pdf> [<https://perma.cc/QY67-TZUT>].

214. See Levi & Klein, *supra* note 210, at 80 (stating that "transgender people who face discrimination because of being transgender may bring a claim" under disability rights laws because "they have a physical or mental health condition or because they experience discrimination based on the perception that they do"); see also DISABILITY RIGHTS EDUC. & DEF. FUND, *Health Disparities at the Intersection of Disability and Gender Identity*, <https://dredf.org/health-disparities-at-the-intersection-of-disability-and-gender-identity> [<https://perma.cc/6B3Y-Y5YX>] (stating that "transgender people with disabilities" disproportionately face health-specific barriers, including "discrimination in the health care and social service setting").

215. See, e.g., *Doe v. Mass. Dep't of Corr., Correction*, No. 17-12255122555-RGS, 2018 WL 2994403, at \*6-8 (D. Mass. 2018); *Doe I v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980)

216. *McConn*, 489 F. Supp. at 79; see also *Mass. Dep't of Corr.*, 2018 WL 2994403, at \*8 ("[T]he DOC's biological sex-based assignment policy has a disparate impact on inmates with GD because it injects them into a prison environment that is contrary to a critical aspect of their prescribed treatment (that they be allowed to live as, in Doe's case, a woman).").

*D. Symbolic*

Lastly, courts' recognition of the rights of transgender people under the Constitution has implications beyond the law. The Constitution serves an important expressive function, particularly for those who are marginalized.<sup>217</sup> Its conferral of rights is, as Patricia Williams has written, "symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being."<sup>218</sup> The attainment of constitutional rights, then, does more than empower transgender people to contest government discrimination; as Kylar Broadus, a transgender advocate and attorney, has thoughtfully written, these rights allow transgender people "to envision [them]selves, and to be seen by others, as fully human."<sup>219</sup>

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217. See NUSSBAUM, *supra* note 9, at xxi (discussing constitutional law's "profound[] relevan[ce] for the politics of humanity" and the struggle of subordinated people "to find respect and understanding").

218. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 416 (1987).

219. Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in TRANSGENDER RIGHTS 99 (Paisley Currah et al. eds., 2006) (citing Patricia Williams's work); see also *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring in order vacating preliminary injunction) (stating that recognition of the rights of transgender people is "about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity").