

# CIS-WOMAN-PROTECTIVE ARGUMENTS

Chan Tov McNamarah

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## ABSTRACT

*It has become common to oppose the equal citizenship of transgender persons by appealing to the welfare of cisgender women and girls. Such Cis-Woman-Protective (CWP) arguments have driven exclusionary efforts in an array of contexts, including restrooms, sports, college admissions, and anti-discrimination law coverage. Remarkably, however, this unique brand of anti-trans contentions has largely escaped being historicized, linked together, or subjected to extended analytical scrutiny as a group.*

*This Essay provides those missing pieces.*

*First, it situates CWP arguments within the longer history of woman-protective justifications in American law. Taking their well-known harms to women, alongside their use in lending legitimacy to discrimination against racial and religious minorities, forcefully demonstrates that the rationales' current use against transgender persons warrants closer inspection.*

*Second, the Essay canvasses recent CWP arguments to document the line of thought. Reading the heretofore-uncollected allegations reveals a far-reaching cluster of contentions, whose members bear striking family resemblances to, and inherit the disfigurements of, their historical priors.*

*Third, casting unsparing light on the claims, the Essay demonstrates that CWP arguments overwhelmingly fail to deliver. Structurally, the arguments' moves are questionable, at best. Substantively, most fall wide of their mark. And, instrumentally, the arguments backfire completely, since their operationalization harms the very persons they supposedly protect.*

*Tallied up, these problems make a strong case that, strategically, CWP arguments are ineffective and deeply flawed—even counterproductive—assuming that protecting cis women and girls is truly the goal. Building on that assessment, the Essay concludes with reasons for healthy skepticism that it actually is. Stripping away the veneer of protectionism begins to expose some less-palatable intentions and effects possibly driving the use of CWP arguments.*

## ABOUT THE AUTHOR

Visiting Assistant Professor, Cornell Law School (they/them pronouns). For helpful conversations, comments, and suggestions, my thanks to Sandra Babcock, Jessica Clarke, Taylor Davis, Michael Dorf, Jared Ham, Tyler Hepner, Doriane Lambelet Coleman, Mitchel Lasser, Stewart Schwab, Marc Spindelman, Jeffrey Rachlinski, Ezra Young, Monty Zimmerman, and the participants in the 2021 Cornell Law School faculty summer workshop series. For the masterful editorial work, my thanks to Angelle Henderson and the staff of the Columbia Law Review. Finally, I am deeply grateful to Sherry Colb; I’ve benefited tremendously from her always generous feedback, engagement, and particularly, her encouragement.

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## INTRODUCTION

By now, anti-transgender positions premised on the wellbeing and safety of cisgender women and girls have become standard fare. Over the past few years, a social movement of trans-antagonistic,<sup>1</sup> *cis-woman-protective*<sup>2</sup> (CWP) rhetoric has surfaced, and just as swiftly, gained a foothold in public conversation. Consider some recent snapshots.

In 2018, the Women's March was cast into controversy when multiple participants were accused of engaging in overt transphobia.<sup>3</sup> One marcher's sign declared: "Trans Women Are Men, Truth *Is Not* Hate," "Trans Ideology is Misogyny & Homophobia," and "Woman is *Not* a 'Feeling', a Costume, or a Performance of a *Stereotype!* Woman is a Biological Reality! There is *No* ethical or moral duty to LIE to soothe a male EGO."<sup>4</sup>

In 2019, Donald Trump, Jr., repeatedly accused trans-inclusive athletics policies of "destroy[ing] women's sports"<sup>5</sup>—a criticism he later doubled-down on and extended, calling trans women athletes "mediocre men . . . compet[ing] in women's sports."<sup>6</sup>

In 2020, CWP rhetoric thoroughly permeated media coverage of trans issues in the United Kingdom.<sup>7</sup> The British media supported Maya Forstater's wrongful termination tribunal,<sup>8</sup> following her dismissal for a series of transphobic

1. Julia Serano defines the term to refer to individuals that are "fundamentally opposed to transgender people for specific moral, political, and/or theoretical reasons." Julia Serano, *There Is No Perfect Word: A Transgender Glossary of Sorts*, JULIA'S TRANS, GENDER, SEXUALITY, & ACTIVISM GLOSSARY!, <https://www.juliaserano.com/terminology.html#trans-antagonistic> [<https://perma.cc/9NB6-K8WS>] (last visited Oct. 10, 2022).

2. The label is inspired by Marc Spindelman's extended meditation on the use of shower and locker room imagery in *Harris Funeral Homes* arguments. See Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases*, Part III, 81 OHIO STATE L.J. ONLINE 101, 108 (2020) (describing the arguments as "pro-cis-woman protectionist").

Spindelman's use is insightful and far-seeing, as it links CWP arguments to a larger family of oppressive justifications, in which women's interests form the crux. See *id.* at 110. Building on Spindelman's foundation, this Essay attempts to lay out the relationship in full.

3. See Sean Maulding, *Pussy Hats and Anti-Trans Sentiments: When Second-Wave and Third-Wave Collide*, 5 OSR J. STUDENT RSCH., No. 1, 2019, at 1, 14.

4. Josh Jackman, *The Women's March Was 'Made Unsafe' by Anti-Trans Signs and Pussy Hats*, PINKNEWS (Jan. 22, 2018), <https://www.pinknews.co.uk/2018/01/22/the-womens-march-was-made-unsafe-by-anti-trans-signs-and-pussy-hats/> [<https://perma.cc/C843-WK82>] (emphasis added).

5. See Donald Trump Jr. (@DonaldJTrumpJr), TWITTER (Oct. 21, 2019, 12:32 PM), <https://twitter.com/DonaldJTrumpJr/status/1186319353828036608> [<https://perma.cc/F5VU-XYLG>]; Donald Trump Jr. (@DonaldJTrumpJr), TWITTER (Oct. 21, 2019, 9:36 AM), <https://twitter.com/DonaldJTrumpJr/status/1186275133494910976> [<https://perma.cc/449Z-PRMC>].

6. DONALD TRUMP, JR., TRIGGERED: HOW THE LEFT THRIVES ON HATE AND WANTS TO SILENCE US 179 (2019).

7. See Sophie Lewis, *Opinion, How British Feminism Became Anti-Trans*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/opinion/terf-trans-women-britain.html> (on file with the *Columbia Law Review*) (describing the "Trans-Exclusionary Radical Feminist" movement's growth throughout Britain).

8. See Maya Forstater: *Woman Loses Tribunal Over Transgender Tweets*, BBC

remarks including amplifying a comparison of using gender-appropriate pronouns with the date-rape drug Rohypnol,<sup>9</sup> and they largely welcomed author J.K. Rowling's view that transgender equality jeopardizes cis women's progress.<sup>10</sup>

And, in 2021, within hours of newly elected President Joseph Biden taking office, an executive order designed to enforce the *Harris Funeral Homes* holding sparked online fervor, causing the hashtag #BidenErasedWomen to trend internationally.<sup>11</sup> Thousands of social media users accused the order, President Biden, and the Biden Administration of “[u]nilaterally imposing trans ideology on a nation with no thought for women’s rights,”<sup>12</sup> “erasing the sex-based rights of women and girls,”<sup>13</sup> and “eviscerat[ing] women’s sports . . . [by placing a] new glass ceiling . . . over girls.”<sup>14</sup>

Though rarely adopting such harsh language, the American legal community has not been immune to this line of thought. In case law, advocacy, and scholarship, this particular brand of trans-antagonistic rhetoric—which is to say, anti-transgender opposition rationalized on account of how transgender rights are thought to affect cisgender women and girls—has increasingly gained currency.

In response to the introduction of so-called “bathroom bills,” arguments premised on women’s safety concerns featured prominently in the hearings of state and local legislative bodies.<sup>15</sup> Likewise, in the lead up to the *Harris Funeral Homes* decision, a steady stream of amicus briefs purporting to advocate on the behalf of cis women urged against pro-trans outcomes, framing them as detrimental to cis women’s rights.<sup>16</sup> At the same time, the Trump Administration’s Housing and Urban Development Secretary, Ben Carson, who previously expressed concern that “big hairy men” would seek to enter

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(Dec. 19, 2019), <https://www.bbc.com/news/uk-50858919> [<https://perma.cc/FET2-N27Y>] (covering the case positively).

9. Forstater v. CGD Eur. [2019], No. 22200909/2019, HM COURTS & TRIBUNAL SERVICE (LONDON C. EMPLOYMENT TRIB.) at para. 34.2.

10. See Katelyn Burns, J.K. Rowling’s Transphobia Is a Product of British Culture, VOX (Dec. 19, 2019), <https://www.vox.com/identities/2019/12/19/21029874/jk-rowling-transgender-tweet-terf> [<https://perma.cc/8FKV-GHZL>] (explaining how the British media has legitimized those sharing Rowling’s opinion that trans rights conflict with cis women’s).

11. See Ebony Bowden, Biden Sparks TERF War With Gender Discrimination Order, N.Y. POST (Jan. 21, 2021), <https://nypost.com/2021/01/21/joe-biden-sparks-terf-war-with-gender-discrimination-order/> [<https://perma.cc/8KNP-CKU9>] (documenting the Twitter responses). *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* was a companion case to *Bostock v. Clayton County*. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (holding that a funeral home violated Title VII of the Civil Rights Act when it fired a woman for coming out as trans).

12. Dr. Janet Clare Jones (@janeclarejones), TWITTER (Jan. 21, 2021, 4:18 AM), <https://twitter.com/janeclarejones/status/1352183854874947590> [<https://perma.cc/LZR8-F29F>].

13. LGB Alliance (@ALLIANCELGB), TWITTER (Jan. 21, 2021, 3:37 AM) <https://twitter.com/ALLIANCELGB/status/1352173526741118977> [<https://perma.cc/754C-MULU>].

14. Abigail Shrier (@AbigailShrier), TWITTER (Jan. 21, 2021, 12:11 AM), <https://twitter.com/AbigailShrier/status/1352121732723666946> [<https://perma.cc/94UX-VY8X>].

15. See *infra* section III.A.

16. See *infra* section II.B.

women's shelters disguised as transgender women,<sup>17</sup> proposed a HUD rule that would allow federally funded shelters to deny trans women entry.<sup>18</sup> The list could go on.<sup>19</sup>

Responses have been mixed. One has been to broad-brush these views as “transphobic.” But that reaction is insufficient. Even if accurate, the rejoinder dismisses, rather than evaluates. The validity and soundness of the claims, then, remain unexamined. Of at least equal importance, with that approach, persons who hold and advocate these views are not likely to change them.

Alternatively, several commentators have taken aim at the individual forms of CWP legal argument.<sup>20</sup> As before, however, a piecemeal examination is not enough. Any such atomistic review fails to expose the problematics threading through the arguments at large. On the whole, many CWP arguments are built upon noxious stereotypes. Cisgender women are cast as helpless and in need of protection (most commonly in the form of cisgender male intervention), and trans women are portrayed as deceptive and opportunistic, not to mention animalistic, sexually predacious, and inherently dangerous.<sup>21</sup> Trans men, by contrast, are disappeared from the arguments altogether, and their identities and autonomy vanished with them.<sup>22</sup>

Perhaps most troublingly, when considered in unison, CWP legal arguments present a vexing quandary. Inherently, CWP arguments position the relationship between transgender rights and cisgender women's rights—and legal protections for either group—as acrimonious, if not directly oppositional. By that account, “wins” for transfolk mean “losses” for cisgender women and girls, and vice versa. Also, by that telling, to simultaneously hold feminist and

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17. See Tracy Jan & Jeff Stein, HUD Secretary Ben Carson Makes Dismissive Comments About Transgender People, Angering Agency Staff, WASH. POST (Sept. 19, 2019), <https://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff/> [<https://perma.cc/3ZA6-NAEA>].

18. Chris Cameron, HUD Rule Would Dismantle Protection for Homeless Transgender People, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/us/politics/hud-transgender.html> (on file with the *Columbia Law Review*) (last updated July 24, 2020).

19. See *infra* Part III.

20. On sex-segregated bathrooms, see, e.g., Susan Hazeldean, Privacy as Pretext, 104 CORNELL L. REV. 1719, 1719 (2019); Laura Portuondo, Note, The Overdue Case Against Sex-Segregated Bathrooms, 29 YALE J.L. & FEMINISM 465, 466 (2018). On the arguments for excluding trans women from domestic violence shelters, see Rishita Apsani, Note, Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause, 106 CALIF. L. REV. 1689, 1692 (2018). On the arguments for trans-exclusionary sports policies, see Shayna Medley, (Mis)Interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports, 49 N.Y.U. REV. L. & SOC. CHANGE 673, 674 (2022) [hereinafter Medley, (Mis)Interpreting Title IX].

21. Amanda Armstrong, Certificates of Live Birth and Dead Names: On the Subject of Recent Anti-Trans Legislation, 116 S. ATL. Q. 621, 623 (2017) (documenting the archetype).

22. Kristen Schilt & Laurel Westbrook, Bathroom Battlegrounds and Penis Panics, CONTEXTS, Summer 2015, at 26, 30 (finding trans men “relatively invisible” in discussion on bathroom laws).

pro-trans views is oxymoronic. Naturally, this last point is particularly concerning for the many persons who would like to support the social and political equality of both cis women and transfolk.

Thus framed, the time is ripe to conduct a closer study as to the origins and soundness of CWP rhetoric as used in legal argument, and this Essay begins that task. This Essay questions growing purchase in cis-woman-protective reasoning as a legal strategy to oppose transgender rights. By interrogating the logic of the CWP arguments marshalled in legislative hearings, case law, filings, and legal scholarship, this Essay will present the case that not only do these arguments come up short, but also that if the goal is truly to protect, support, and advance the interests of cis women and girls, the arguments are actually disadvantageous. In their place, this Essay suggests it is time to take up earlier invitations to more deeply probe the intersections between feminism and transgender legal activism.<sup>23</sup>

Here is how the discussion will proceed. Parts I and II provide the necessary historical background for understanding the alleged tensions between cis women and the movement for trans equality. As Part I will show, using woman-protective rationales is not a recent development. Uncovering the history of such justifications illuminates how laws and policies rooted in woman-protective rationales have both extensively harmed women themselves and have been used to argue against the progress and equality of minority groups. The contextualization provides ample reason why the modern-day use of woman-protective rationales should give pause.

On that foundation, Part II turns squarely to the use of woman-protective rationales against equality for transgender persons. Section II.A begins with a snapshot of the current prevalence and recent trajectory of CWP rhetoric in legal argument. Section II.B surveys a range of sources to distill and categorize the most frequently raised arguments. Doing so not only allows one to better appreciate the relationships between individual claims, but also forms the basis for the Essay's subsequent two-part appraisal. Section II.C then reveals the connections between modern CWP arguments and their historical priors. In doing so, it will make legible the harmful stereotypes and oppressive tropes that CWP arguments reanimate and solidify.

Working from the specific to the more general, Parts III and IV present the Essay's critique. Part III adopts a narrow analytical lens and spotlights CWP arguments' deficiencies on their own terms. It walks through the logic of each line of argument to show that many lack the necessary supporting evidence to work, are explanatorily weak, or are just plainly unsound.

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23. For examples, see Ezra Ishmael Young, What the Supreme Court Could Have Heard in *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 48 (2020); Demoya R. Gordon, Comment, Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?, 97 CALIF. L. REV. 1719, 1762 (2009); Angela P. Harris, *Transgender Rights and Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (book review), WOMEN'S STUD. Q., Spring/Summer 2008, at 315, 319.

Part IV then considers the arguments' shortcomings from a wider perspective, following the arguments to their logical end points to surface some problems of application. It will show that CWP arguments are further flawed and, in fact, actually undercut cis women's protection by relying on methods that injure cis women and girls.

Tallying up these problems, CWP arguments appear deeply flawed—if not detrimental—at least, if the aim of protecting cis women and girls is true. Building on that assessment, the Essay concludes with a final conjecture: Like many of the justifications of the past, in both intention and effect, CWP arguments are primarily pretextual. Stripping away the veneer of protectionism begins to expose the patriarchal motivations driving their current popularity.

By engaging with CWP rhetoric, this Essay has two larger ambitions worth outlining at the start. The first is theoretical, speaking to an important insight on the nature of discrimination: It repeats and evolves across identities.<sup>24</sup> These cross-identity transmissions and the associated evolutionary innovations, which this Essay collectively labels *discrimination intergroup spillover*, mean that discrimination (or its components) originating in one context or deployed against one population adapts to emerge in new contexts. Because of this dynamic, the author's previous works concluded a central task of antidiscrimination efforts must be to “uncover and understand hitherto hidden patterns between forms of oppression.”<sup>25</sup> In the Parts that follow, this Essay underscores and expands that thesis, by juxtaposing how woman-protective arguments mobilized in the past have found a ready home in the present debate over trans equality.

The second is practical. It is to help prepare the ground for what will surely be an uphill battle in the future of transgender rights. Identifying CWP arguments provides a useful first step for a more coordinated campaign to refute them. Even more urgently, if the countless studies documenting a robust and stable relationship between conservatism, benevolent sexism, and negative attitudes toward transgender persons are anything to go by,<sup>26</sup> the federal judiciary's recent rightward shift<sup>27</sup> signals that judges might increasingly credit

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24. See Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227, 2235 (2021) [hereinafter McNamarah, *Misgendering*] (tracing the relationship between misgendering and historical forms of verbal discrimination against women, Black persons, ethnic minorities, gays, and lesbians).

25. *Id.* at 2322.

26. *E.g.*, Lindsey Erin Blumell, Jennifer Huemmer & Miglena Sternadori, *Protecting the Ladies: Benevolent Sexism, Heteronormativity, and Partisanship in Online Discussions of Gender-Neutral Bathrooms*, 22 MASS COMMUN & SOC'Y 365, 369 (2018) (finding a relationship between conservative politics, benevolent sexism, and negative attitudes toward gender-appropriate bathroom usage); B.J. Rye, Olivia A. Merritt & Derek Straatsma, *Individual Difference Predictors of Transgender Beliefs: Expanding Our Conceptualization of Conservatism*, 149 PERSONALITY & INDIVIDUAL DIFFERENCES 179, 183 (2019) (same).

27. See Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> (on file with the *Columbia Law Review*) (last updated Mar. 16, 2020) (noting the trend).

arguments sounding in the protection of cis women and girls, for reasons completely unrelated to the arguments' merit. Anticipating that and clarifying where CWP arguments are valid—and where they are not—will do much to clear the path for the continued movement forward on issues of transgender equality.

## I. WOMAN-PROTECTIVE JUSTIFICATIONS IN AMERICAN LAW

It is easy to assume that arguments relying on appeals to women's welfare are recent developments. Though trans persons have always existed, popular attention to the community and the community's rights have only lately come to the fore.<sup>28</sup> Seen in that way, questions of how trans and cis women's rights interact must be new.

It is also easy to assume that such arguments are unique to debates over transgender equality. Since the nearly unwavering focus in trans rights conversations in recent years has been intimate facilities, the few historical parallels drawn by commentators have centered around anti-Black Jim Crow bathroom segregation.<sup>29</sup> Unfortunately, while those examples may clarify part of how women's interests were wielded against minority progress, they fail to reveal the whole picture.

This Part refutes both intuitions: that woman-protective arguments are recent and that they are unique to debates about trans equality. It reveals why they are shortsighted by placing CWP arguments alongside their full swath of historical antecedents. By recovering the underexamined history of how woman-protective justifications have affected the lives and livelihoods of racial, ethnic, and religious minorities, the Part expands the shared frame of reference. As this Part demonstrates, with laws and policies rooted in the protection of women dating back to the beginning of American settler colonialism, CWP claims are a part of a larger family of oppressive justifications for which women's interests form the crux.

### A. *Early Examples*

Throughout American history, laws and policies rooted in woman-protective rationales have taken various forms. Among the earliest was a class

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28. See, e.g., Catherine Armstrong, *The Trans History You Weren't Taught in Schools*, YES! MAG. (June 7, 2021), <https://www.yesmagazine.org/social-justice/2021/06/07/trans-history-gender-diversity> [https://perma.cc/E8SU-N3HX] (“Nonbinary and trans people have always been here . . . . Why is it then that they're often absent from . . . historical figures we hear about? The answer lies, in part, with how history is recorded and who records it.”); Erin Blakemore, *How Historians Are Documenting the Lives of Transgender People*, NAT'L GEOGRAPHIC (June 24, 2022), <https://www.nationalgeographic.com/history/article/how-historians-are-documenting-lives-of-transgender-people> (on file with the *Columbia Law Review*) (recounting examples of trans and nonbinary people and communities throughout history).

29. See, e.g., Marisa Pogofsky, *Comment, Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity*, 67 DEPAUL L. REV. 733, 753–54 (2018) (making the analogy). But see Medley, (Mis)Interpreting Title IX, *supra* note 20, at 680 (linking anti-trans sports bills to the historic exclusion of athletes of color).



centered around efforts to “protect” women entering the labor force. Starting in the 1850s, states sought to offer special protection to women workers in the form of mandatory rest periods, toilet separation requirements, and restrictions on working hours, night work, and weightlifting.<sup>30</sup> Often, states “protected” women by excluding them from certain professions entirely.<sup>31</sup>

Admittedly, making a clear assessment of woman-protective labor legislation is difficult, since the historical record is somewhat mixed.<sup>32</sup> On the one hand, it is true that many women supported the enactment of these policies.<sup>33</sup>

On the other, at least an equal number did not. To take just one example, in *Ritchie v. People*, in which the court considered Illinois’s law limiting women’s working hours, the overwhelming majority of women who testified at trial wished to work for longer than the law allowed.<sup>34</sup> And, their sentiments weren’t anomalies.<sup>35</sup> Indeed, the laws’ harms should not be discounted.<sup>36</sup> For one, the laws rendered women more expensive to employ and, thereby, less able to compete in the labor market.<sup>37</sup> For two, both directly and indirectly, the laws kept women’s wages low.<sup>38</sup> Indeed, as female nurse-practitioners and a female pharmacist explained in their challenge to California’s hour limitations in *Bosley v. McLaughlin*, the protective laws deprived them of work-study opportunities

30. Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 12–16 (2007) [hereinafter Kogan, *Sex-Separation*]; see also Allan D. Spritzer, *Equal Employment Opportunity Versus Protection for Women: A Public Policy Dilemma*, 24 ALA. L. REV. 567, 568–70 (1972); Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 705–07 (collecting examples).

31. See Andrew Shepard, Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1501 (1971); cf. Elizabeth C. Crable, *Pros and Cons of the Equal Rights Amendment*, WOMEN LAWS. J., Summer 1949, at 7, 8 (arguing that the result of “protective labor laws” is often to “‘protect’ women out of employment”).

32. Diane Balsler, *Sisterhood & Solidarity: Feminism and Labor in Modern Times* 101 (1987) (stating the effect of woman-protective labor laws is “complex”).

33. See, e.g., Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869–1895*, 84 MICH. L. REV. 1518, 1533–36 (1986) (recording those views in the Illinois Women’s Alliance).

34. Nancy S. Erickson, *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228, 241 (1989); David E. Bernstein, *Lochner’s Feminist Legacy*, 101 MICH. L. REV. 1960, 1963–64 (2003) [hereinafter Bernstein, *Feminist Legacy*] (book review).

35. See, e.g., *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, 384 (1876) (capturing one woman’s argument that work-hour laws violated her right to “labor in accordance with her own judgement”); *Women in Industry*, MONTHLY LAB. REV., March 1926, at 73, 80–81.

36. See Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1733, 1738–39, 1740–41 (1991) (discussing the negative impact).

37. See Sara Chatfield, *Competing Social Constructions of Women Workers in Lochner-Era Judicial Decision-Making*, 4 CONST. STUD. 105, 116 (2019).

38. Marilyn J. Boxer, *Protective Legislation*, in WOMEN’S STUDIES ENCYCLOPEDIA 1156, 1158 (Helen Tierney ed., 1999).

and higher pay.<sup>39</sup> Finally for three, protective legislation led to women's termination in favor of men.<sup>40</sup> Such was the case in the aftermath of *Muller v. Oregon*. After the Supreme Court upheld a maximum-hours limitation, Curt Muller, the appellant factory owner, reportedly replaced all his female workers with men.<sup>41</sup> These three ill effects were even more acute for women working in male-dominated occupations—where protection was all the more necessary.<sup>42</sup>

Just as revealing is male self-interested support for the introduction and later outcomes of protective legislation. Some women recognized the ruse from the start.<sup>43</sup> When the first laws were introduced, one female economist observed: "Such legislation is usually called 'protective legislation' and the women workers are characterized as a 'protected class.' But it is obviously not the women who are protected."<sup>44</sup> She therefore warned, "[N]o one should lose sight of the fact that such legislation is not enacted exclusively, or even primarily, for the benefit of women themselves."<sup>45</sup> And so it was. Beyond only allowing men to outcompete their female peers,<sup>46</sup> the law's motivating ideologies habitually ensured women were relegated to the domestic sphere.<sup>47</sup>

Male unionists welcomed the upshots.<sup>48</sup> Capturing the prevailing view, one quipped, "We cannot drive the females out of the trade, but we can restrict their daily quota of labor through factory laws."<sup>49</sup> On the ground, men's unions

39. See Transcript of Record at 5–8, *Bosley v. McLaughlin*, 236 U.S. 385 (1915).

40. See SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905–1925*, at 128 (1987).

41. Bernstein, *Feminist Legacy*, *supra* note 34, at 1971.

42. Ava Baron, *Protective Labor Legislation and the Cult of Domesticity*, 2 J. FAM. ISSUES 25, 28–29 (1981).

43. Bernstein, *Feminist Legacy*, *supra* note 34, at 1971 (citing S.P. Breckinridge, *Legislative Control of Women's Work*, 14 J. POL. ECON. 107, 108 (1906)).

44. S.P. Breckinridge, *Legislative Control of Women's Work*, 14 J. POL. ECON. 107, 107–08 (1906).

45. *Id.* at 108.

46. See SHARON KURTZ, *WORKPLACE JUSTICE: ORGANIZING MULTI-IDENTITY MOVEMENTS* 48–50 (2002); Leslie Marc Durant, *The Validity of State Protective Legislation for Women in Light of Title VII of the Civil Rights Act of 1964*, 6 SUFFOLK U. L. REV. 33, 40 (1971) (finding the laws "result in the monopolization of certain jobs for men, and many appear to be designed for just that purpose rather than for the protection of women"); Holly J. McCammon, *The Politics of Protection: State Minimum Wage and Maximum Hours Laws for Women in the United States, 1870–1930*, 36 SOCIO. Q. 217, 223–24 (1995).

47. See RUTH MILKMAN, *ON GENDER, LABOR, AND INEQUALITY* 97 (2016).

48. See ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 201–02 (1982); SHELTON STROMQUIST, *REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM* 122–23 (2006) (quoting unionist John R. Commons's argument that protective legislation should "be looked upon as a law to protect men in their bargaining power"); JODI VANDENBERG-DAVES, *MODERN MOTHERHOOD: AN AMERICAN HISTORY* 123 (2014) (discussing how male unionists supported restrictive legislation regarding women working); Gail Falk, *Women and Unions—A Historical View*, *WOMEN'S RTS. L. REP.*, Spring 1973, at 54, 60 (collecting examples).

49. KURTZ, *supra* note 46, at 50; see also Heidi I. Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, *CAP. & CLASS*, Summer 1979,

used protective labor laws to do just that, siloing women into low-paying jobs and depressing women's wages.<sup>50</sup> While this is not to say that male benefit was the sole goal of woman-protective labor legislations, undoubtedly, Representative Martha Griffith's statement in a 1964 congressional hearing that "[m]ost of the so-called protective legislation has really been to protect men's rights in better paying jobs,"<sup>51</sup> was not far off mark.

Outside of employment, laws and policies sought to "protect" women by restricting their exercise of constitutional rights. Some took the form of exclusions depriving women of their right to serve on juries, rationalized as protecting them from "vulgarity" of the courtroom atmosphere.<sup>52</sup> Others, like those aimed at protecting some "value" to be found in young white women's chastity,<sup>53</sup> appeared as sex-specific statutory rape and age-of-consent laws.<sup>54</sup> Protection, in the latter cases, came at the expense of young women's sexual autonomy.<sup>55</sup>

Safeguarding women was the original motivation behind abortion regulations.<sup>56</sup> After sidetracking to fetus-focused justifications for their abortion restraints,<sup>57</sup> states soon returned to paternalistic notions about abortion's effects on women's health.<sup>58</sup> The reroute worked. Upholding the Partial-Birth

at 1, 16.

50. See KURTZ, *supra* note 46, at 50; McCAMMON, *supra* note 46, at 223.

51. 110 Cong. Rec. 2580 (1964).

52. *J.E.B. v. Alabama*, 511 U.S. 127, 133 (1994); *Hoyt v. Florida*, 368 U.S. 57, 58 (1961) (justifying exclusion because it appropriately preserved women's position "as the center of home and family life"); *Bailey v. State*, 219 S.W.2d 424, 428 (Ark. 1949) (justifying exclusion to protect women from "elements that would prove humiliating, embarrassing and degrading to a lady"); *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966) (upholding exclusion to protect women from "the filth, obscenity, and noxious atmosphere" of jury trials).

53. Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 *YALE J.L. & FEMINISM* 279, 286 (2010) ("Statutory rape laws were enforced only against violations of white girls, as [B]lack girls' bodies were sexualized as open territory."); see also CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 11, 13–14, 28 (2004) (detailing the racial dynamics of statutory rape law prosecutions).

54. See Leslie Y. Garfield Tenzer, #MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes, 2019 *UTAH L. REV.* 117, 126; Maryanne Lyons, Comment, Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault, 29 *HOUS. L. REV.* 583, 586–87 & n.17 (1992).

55. Rita Eidson, Comment, The Constitutionality of Statutory Rape Laws, 27 *UCLA L. REV.* 757, 761–62, 766–70 (1980); Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 *YALE L.J.* 55, 75–76 (1952); Britton Guerrina, Comment, Mitigating Punishment for Statutory Rape, 65 *U. CHI. L. REV.* 1251, 1261 (1998).

56. *People v. Belous*, 458 P.2d 194, 200 (Cal. 1969) (tracing the health concerns underlying California's early abortion restrictions); *State v. Tippie*, 105 N.E. 75, 77 (Ohio 1913) ("The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice . . .").

57. Reva B. Siegel, The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions, 2007 *U. ILL. L. REV.* 991, 1014–17.

58. Reva B. Siegel, Lecture, The Rights Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument, 57 *DUKE L.J.* 1641, 1643–47 (2008);

Abortion Ban Act in *Gonzales v. Carhart*, Justice Anthony Kennedy worried that, despite “no reliable data to measure the phenomenon . . . some women come to regret their choice to abort the infant life they once created and sustained.”<sup>59</sup> Even without concrete proof, the need to protect women from the unsubstantiated “depression and loss of esteem” that might follow from their autonomous choices warranted, in his view, the procedure’s prohibition.<sup>60</sup>

A final group of laws—the one most relevant here—sought to protect specific classes of women, namely those who were white, from the “threats” posed by non-white groups. Since the foundation of the United States, these white-woman-protective rationales have successfully rubberstamped social and legal violence against racial minorities.

Begin with the woman-protective rationales used to justify Native American exclusion and extermination during the heart of colonialism and later Western expansion.<sup>61</sup> At the time, propaganda portrayed Native Americans as prone to unwarranted violence against defenseless white women.<sup>62</sup> This portrayal, in turn, legitimized Native removal as necessary to protect settler colonialist women from the alleged “savagery” of Native communities.<sup>63</sup> In barely revised forms, the rationales would undergird anti-miscegenation laws disallowing marriage between Native Americans and white women.<sup>64</sup>

Anti-Black legislation and policies were consistently supported with appeals to white women’s interests. Starting during the Civil War, the Confederate Congress passed a law exempting one white man from military service on any plantation with more than twenty enslaved persons. The Second

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Rebecca E. Ivey, Note, Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in *Gonzales v. Carhart*, 94 VA. L. REV. 1451, 1456–63 (2008).

59. 550 U.S. 124, 159 (2007).

60. *Id.*

61. SANDRA L. MYRES, WESTERING WOMEN AND THE FRONTIER EXPERIENCE, 1800–1915, at 37–38 (1982) (recording colonialists’ view that white men were “forced” to execute Native Americans in order “to protect white women from their fears and from their sexuality”); see also MELISSA A. MCEUEN & THOMAS H. APPLETON, JR., KENTUCKY WOMEN: THEIR LIVES AND TIMES 20–22 (2015) (stating that white women were often the impetus of the violence against Native American tribes).

62. WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM: A HISTORY 11 (2013); CARROLL P. KAKEL, III, THE AMERICAN WEST AND THE NAZI EAST: A COMPARATIVE AND INTERPRETIVE PERSPECTIVE 205 (2011); MICHAEL JOHN WITGEN, SEEING RED: INDIGENOUS LAND, AMERICAN EXPANSION, AND THE POLITICAL ECONOMY OF PLUNDER IN NORTH AMERICA 87 (2022).

63. LAUREL CLARK SHIRE, THE THRESHOLD OF MANIFEST DESTINY: GENDER AND NATIONAL EXPANSION IN FLORIDA 57–58 (2016); KAKEL, *supra* note 62, at 205; JOANNE REITANO, NEW YORK STATE: PEOPLES, PLACES, AND PRIORITIES: A CONCISE HISTORY WITH SOURCES 52–53 (2015); Lorena Oropeza, Women, Gender, Migration, and Modern US Imperialism, in THE OXFORD HANDBOOK OF AMERICAN WOMEN’S AND GENDER HISTORY 87, 88 (Ellen Hartigan-O’Connor & Lisa G. Materson eds., 2018); Christine M. Su, Race Mixing and Inter-marriage in the United States, in IMMIGRANTS IN AMERICAN HISTORY: ARRIVAL, ADAPTATION, AND INTEGRATION 1789, 1793 (Elliott Robert Barkan ed., 2013).

64. KATHERINE ELLINGHAUS, TAKING ASSIMILATION TO HEART: MARRIAGES OF WHITE WOMEN & INDIGENOUS MEN IN THE UNITED STATES AND AUSTRALIA, 1887–1937, at xxii-iv (2006).

Conscription Act—or, as it was better known, the “Twenty Negro Law”—was driven by fears of white women’s fate if left without the protection of a white man.<sup>65</sup>

Following Emancipation, a key driving force behind historical Southern segregation was the fear of the purported predatory inclinations of Black men and boys.<sup>66</sup> Take a well-known example. As the Court considered *Brown v. Board of Education*,<sup>67</sup> at a White House dinner, President Dwight D. Eisenhower quipped to Chief Justice Earl Warren that white Southerners weren’t “bad people”; rather “all they [were] concerned about [was] to see that their sweet little girls [were] not required to sit in school alongside some big overgrown Negroes.”<sup>68</sup>

Eisenhower’s comments reflected attitudes that were both widely shared and long held. A bizarre obsession with the image of Black men seated beside white women fueled efforts to “protect” white women through segregation on public transportation.<sup>69</sup> Comparable views buttressed outlawing interracial marriage.<sup>70</sup> Indicative of the white-woman-protective impulses at the heart, anti-miscegenation laws were both more likely to be enforced and the punishments were steeper when couples involved a white woman and Black man, rather than the reverse.<sup>71</sup>

White women’s welfare served as the principal reason behind the campaign of violent Ku Klux Klan terrorism<sup>72</sup> and brutal spectacle lynching.<sup>73</sup> It

65. Florence Kelley, *The Women at Hull House*, in *WOMEN’S AMERICA: REFOCUSING THE PAST* 269, 269–270 (Linda K. Kerber & Jane De Hart-Mathews eds., 2d ed. 1987); Logan Scott Stafford, *The Arkansas Supreme Court and the Civil War*, 7 *J.S. LEGAL HIST.* 37, 55–60 (1999).

66. See Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 *YALE J.L. & HUMANS.* 187, 194 (2006); Thomas D. Russell, “Keep Negroes Out of Most Classes Where There Are A Large Number of Girls”: The Unseen Power of the Ku Klux Klan and the Standardized Testing at the University of Texas, 1899–1999, 52 *S. TEX. L. REV.* 1, 4 (2010); see also KAREN ANDERSON, *LITTLE ROCK: RACE AND RESISTANCE AT CENTRAL HIGH SCHOOL* 53 (2010) [hereinafter *Anderson, Little Rock*].

67. 347 U.S. 483, 483 (1954).

68. EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 291 (1977).

69. Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, and the Road to Plessy, 1855–1914*, 13 *LAW & HIST. REV.* 261, 306–07 (1995).

70. Meghan Carr Horrigan, *Note, The State of Marriage in Virginia History: A Legislative Means of Identifying the Cultural Other*, 9 *GEO. J. GENDER & L.* 379, 397–98 (2008).

71. ANGELA ONWUACHI-WILLIG, *ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY* 138–39 (2013).

72. See William F. Pinar, *White Women in the Ku Klux Klan*, 163 *COUNTERPOINTS* 555, 561 (2001) (establishing the white-woman-protective goals of Klan violence); see also Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 *MICH. L. REV.* 675, 695–97 (2002) (same).

73. Chas C. Butler, *Lynching*, 44 *AM. L. REV.* 200, 212 (1910) (showing white-woman-protective justifications behind lynching); see also Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women’s Fight Against Race*

is important to note that white women were not passive bystanders as their protection lent legitimacy to violence. Quite the contrary. In 1897, feminist and later Georgia Senator Rebecca Latimer Felton gave a speech demanding more, stating “[I]f it needs lynching to protect woman’s dearest possession from the ravenous human beasts, then I say lynch, a thousand times a week if necessary.”<sup>74</sup> Simultaneously, white suffragettes Elizabeth Cady Stanton and Susan B. Anthony opposed the extension of voting rights to Black men, on the ludicrous claim that granting Black men the right to vote would increase their likelihood of raping white women.<sup>75</sup>

Black women were not immune to the fallout. History is replete with examples of blockades against Black women’s and girls’ educational, career, and economic progress, emerging out of concern for white women and girls’ “safety.”<sup>76</sup> The most common defense? Racist beliefs that Black women and girls were more prone to diseases and therefore would act as contaminants if allowed to work or sit beside white counterparts.<sup>77</sup> Segregationist propaganda demanding forced separation was wont to treat those falsehoods as fact.<sup>78</sup>

A startling amount of twentieth century federal policy turned on congressional desires to protect white women from Black men.<sup>79</sup> In 1910, horrified by wholly specious claims of white women engaging in sex work with non-white men, Congress passed the White-Slave Traffic Act.<sup>80</sup> Offering an insight into the urgency, one politician expressed, “[A]ll of the horrors which have ever been urged . . . against the [B]lack-slave trade pale into insignificance

and Gender Ideology, 1892–1920, 3 *UCLA WOMEN’S L.J.* 1, 2–4 (1993) (same).

74. Rebecca Latimer Felton, Needs of the Farmers’ Wives and Daughters, in *LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS* 143, 144 (Christopher Waldrep ed., 2006).

75. See FAYE E. DUDDEN, *FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA* 166–70 (2011); LAURA E. FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA* 154–59 (2015).

76. BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 133 (2014); see also ENOBONG HANNAH BRANCH, *OPPORTUNITY DENIED: LIMITING BLACK WOMEN TO DEVALUED WORK* 77–79 (2011) (collecting examples).

77. See STEPHEN G.N. TUCK, *WE AIN’T WHAT WE OUGHT TO BE: THE BLACK FREEDOM STRUGGLE FROM EMANCIPATION TO OBAMA* 214 (2010) (“[C]laiming the risk of venereal disease and contamination, white women (and white men on their behalf) would not tolerate [B]lack women workers at all. At Detroit’s U.S. Rubber plant, two thousand white women walked off the job in March 1943 because of shared bathroom facilities.”). For other examples of hate strikes to oppose workplace integration, see ANDERSON, *LITTLE ROCK*, *supra* note 66, at 53; EMILY YELLIN, *OUR MOTHERS’ WAR: AMERICAN WOMEN AT HOME AND AT THE FRONT DURING WORLD WAR II*, at 201 (2004); Eileen Boris, “You Wouldn’t Want One of ‘Em Dancing With Your Wife”: Racialized Bodies on the Job in World War II, 50 *AM. Q.* 77, 93–97 (1998).

78. Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 *ARK. HIST. Q.* 42, 63–64 (2003).

79. See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *YALE J.L. & FEMINISM* 31, 59–60 (1996).

80. Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2018)).

as compared [with] the horrors of the so-called ‘white-slave traffic.’”<sup>81</sup> Two years later, Georgia Congressman Seaborn Roddenbery introduced a constitutional amendment to prohibit marriage between Black men and white women.<sup>82</sup> Again, congressional statements illuminate the stakes. In Roddenbery’s words, “No more voracious parasite ever sucked at the heart of pure society, innocent girlhood, or Caucasian motherhood than . . . the sacred ties of wedlock between Africa and America.”<sup>83</sup>

Appeals to protecting white women’s livelihood<sup>84</sup> and safety<sup>85</sup> vindicated state-sponsored discrimination against Asian immigrants and Asian Americans. When Chinese Americans entered the West Coast’s female-predominated laundry industry in the 1870s, rhetoric of Chinese laundrymen threatening white women’s incomes formed the core of anti-Chinese labor protests.<sup>86</sup> “It is hard enough now for a white woman to make a living in the few, branches of honest livelihood that are open to them,” a newspaper editorial emotionally explained, before belligerently alerting readers those avenues were “being rapidly filled up with Chinamen [sic], who actually wrest the wash-tub from them, and invade those provinces of labor belonging to women.”<sup>87</sup> Calls to boycott Japanese and Chinese laundries in favor of using white women laundresses became common.<sup>88</sup> Protests would later turn to policy, when protectionism drove anti-Asian laundry legislation and taxation schemes.<sup>89</sup>

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81. Holden-Smith, *supra* note 79, at 70 (internal quotation marks omitted) (quoting 45 Cong. Rec. 1040 (1910) (statement of Rep. Mann)) (misquotation). Representative Horace Mann was a sponsor of the White-Slave Traffic Act.

82. 49 Cong. Rec. 503 (1913).

83. *Id.* at 504 (statement of Rep. Roddenbery).

84. KATHERINE BENTON-COHEN, *BORDERLINE AMERICANS: RACIAL DIVISION AND LABOR WAR IN THE ARIZONA BORDERLANDS* 75 (2009) (explaining that local leaders “couch[ed] Chinese exclusion as a way to protect women’s livelihood”); CHRISTOPHER CORBETT, *THE POKER BRIDE: THE FIRST CHINESE IN THE WILD WEST* 33 (2010) (documenting “confrontations between Chinese laundrymen and white women who objected to the competition”).

85. See *Chinese Restaurants and the Police Power*, 45 AM. L. REV. 884, 911–12 (1911) (discussing a decision overturning a law prohibiting white women under the age of twenty-one from entering a restaurant or hotel owned by a Chinese person).

86. See Martha Mabie Gardner, *Working on White Womanhood: White Working Women in the San Francisco Anti-Chinese Movement, 1877–1890*, 33 J. SOC. HIST. 73, 75 (1999); Margaret K. Holden, *Gender and Protest Ideology: Sue Ross Keenan and the Oregon Anti-Chinese Movement*, 7 W. LEGAL HIST. 223, 230 (1994); Emily A. Prifogle, *Law and Laundry: White Laundresses, Chinese Laundrymen, and the Origins of Muller v. Oregon*, in *STUDIES IN LAW, POLITICS, AND SOCIETY* 23, 41–45 (Austin Sarat ed., 2020); Joan S. Wang, *Race, Gender, and Laundry Work: The Roles of Chinese Laundrymen and American Women in the United States, 1850–1950*, J. AM. ETHNIC HIST., Fall 2004, at 58, 77.

87. David E. Bernstein, *Two Asian Laundry Cases*, 24 J. SUP. CT. HIST. 95, 96 (1999); see also Lisbeth Haas, *Conflicts and Cultures in the West*, in *A COMPANION TO AMERICAN WOMEN’S HISTORY* 132, 141 (Nancy A. Hewitt ed., 2005).

88. EDITH SPARKS, *CAPITAL INTENTIONS: FEMALE PROPRIETORS IN SAN FRANCISCO, 1850–1920*, at 48 (2006); Him Mark Lai, *The 1903 Anti-Chinese Riot in Tonopah, Nevada, From a Chinese Perspective: Two Letters Published in the Chung Sai Yat Po*, CHINESE AM.: HIST. & PERSPS. 47, 47 (2003).

89. See *Quong Wing v. Kirkendall*, 223 U.S. 59, 59 (1912) (upholding laundry taxation

Narratives about Chinese immigrants and Chinese American men's proclivity for white women, as well as the association between late-nineteenth-century Chinese society and the use of opium, fueled additional social hostility.<sup>90</sup> Grounded on those and other racist stereotypes, states prohibited white women from patronizing or working in Chinese-owned restaurants.<sup>91</sup> Beginning in the 1860s, the same prejudices led to prohibitions on marriages between Filipino, Indian, Korean, Japanese, and Chinese American men and white women.<sup>92</sup> So profound was the "need" to safeguard white women from the sexual threat posed by Asian men, scholars have argued that it partly explained the authorization of Japanese internment.<sup>93</sup>

Sitting at the conflux of the racist rationales previously outlined, defense of white women went on to inspire the development of American drug laws. States introduced the first drug laws based on claims that narcotics made non-white men more prone to committing sexual violence.<sup>94</sup> Tales of white women from "good families" being entrapped by Asian men to live in opium dens<sup>95</sup> would support the federal Harrison Narcotics Act and Federal Bureau of Narcotics policy.<sup>96</sup> Further on, during the hearings on the 1937 Marihuana Tax Act, Congress listened to testimony that "[m]ost marijuana smokers are Negroes, Hispanics, Filipinos and entertainers . . . . This marijuana causes white women to seek sexual relations with Negroes," and to "fictional stor[ies] of pot-crazed [B]lack college men impregnating white coeds."<sup>97</sup>

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scheme, while noting but declining to confront the scheme's anti-Chinese intent); David E. Bernstein, *Lochner*, Parity, and the Chinese Laundry Cases, 41 WM. & MARY L. REV. 211, 237–38, 264, 266, 287 (1999).

90. Henry Yu, *Mixing Bodies and Cultures: The Meaning of America's Fascination With Sex Between "Orientals" and "Whites"*, in *SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY* 444, 449–51 (Martha Hodes ed., 1999).

91. Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 707–16 (2018).

92. See, e.g., Hrishika Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 1, 25–26 (2002) (finding woman-protective notions underlying anti-miscegenation statutes); Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC'Y REV. 587, 611 (2007) (same); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 796 (2000) (same).

93. See Alison Dundes Renteln, *A Psychohistorical Analysis of the Japanese American Internment*, 17 HUM. RTS. Q. 618, 632–42, 646–47 (1995).

94. See JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* 21 (2d ed., 2012) (describing the laws as "fundamentally racist laws aimed at perceived threats to white women from drug usage by [B]lack, Mexican, and Chinese men").

95. See Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 LAW & SOC. INQUIRY 411, 420 & n.4 (1999).

96. See Gabriel J. Chin, *Race, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 257–58 (2002); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1292 n.42 (1995).

97. David Schlusell, Note, "The Mellow Pot Smoker": White Individualism in Marijuana Legalization Campaigns, 105 CALIF. L. REV. 885, 897 (2017).



Closing episodes from the Trump campaign and presidency confirm the place that white-woman-protective rhetoric continues to hold in the modern day. As far back as 2015, then-candidate Trump referred to Mexican immigrants as “rapists.”<sup>98</sup> The malignment intensified when Trump began touting the 2015 and 2018 deaths of Kate Steinle and Mollie Tibbetts, both caused by undocumented immigrants. Continuing his questionable practice of emphasizing women’s physical appearances, he consistently referred to Steinle as “beautiful Kate” and to Tibbetts as a “beautiful young woman.”<sup>99</sup> Trump’s frequent invocations become even more stark when viewed against the background of pleas from the victims’ relatives against politicizing the deaths, and the fact that he reportedly never contacted their families.<sup>100</sup> Clearly, his calling attention to Steinle’s and Tibbetts’s deaths and appearances was a dog whistle for “[w]hite womanhood under threat from immigrant criminality.”<sup>101</sup> Framed that way, the references were self-serving, used primarily to bolster the need to “build a wall” at the U.S.-Mexico border and to pursue aggressive deportation sweeps.<sup>102</sup>

President Trump’s speech about and policies toward Muslim immigrants followed an identical course. Defending against charges that his comments about Muslims were Islamophobic, he claimed they reflected concern for the treatment of women in Middle Eastern countries.<sup>103</sup> And, when he suspended entry from seven Muslim-majority countries in a January 27, 2017 Executive Order, the purported goal was excluding immigrants “engage[d] in acts of

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98. Cindy Casares, Opinion, Trump’s Repeated Use of the Mexican Rapist Trope Is as Old (and as Racist) as Colonialism, NBCNews (Apr. 7, 2018), <https://www.nbcnews.com/think/opinion/trump-s-repeated-use-mexican-rapist-trope-old-racist-colonialism-ncna863451> [<https://perma.cc/9XZQ-2QNT>]; Z. Byron Wolf, Trump Basically Called Mexicans Rapists Again, CNN (Apr. 6, 2018), <https://edition.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html> [<https://perma.cc/WF7Z-XUMA>].

99. See Ashley Reese, The Grim Politics of Dead White Women, JEZEBEL (Oct. 16, 2018), <https://jezebel.com/the-grim-politics-of-dead-white-women-1828535627> [<https://perma.cc/A72D-K9RF>].

100. *Id.* (reporting the remarks of Steinle’s brother); see also Terrence McCoy, Trump Used Her Slain Daughter to Rail Against Illegal Immigration. She Chose a Different Path, WASH. POST (Dec. 28, 2018), [https://www.washingtonpost.com/local/social-issues/trump-used-her-slain-daughter-to-rail-against-illegal-immigration-she-chose-a-different-path/2018/12/27/084f93a4-e9ce-11e8-a939-9469f1166f9d\\_story.html](https://www.washingtonpost.com/local/social-issues/trump-used-her-slain-daughter-to-rail-against-illegal-immigration-she-chose-a-different-path/2018/12/27/084f93a4-e9ce-11e8-a939-9469f1166f9d_story.html) [<https://perma.cc/ZB6X-VBZJ>].

101. DANIEL DENVER, ALL-AMERICAN NATIVISM: HOW THE BIPARTISAN WAR ON IMMIGRANTS EXPLAINS POLITICS AS WE KNOW IT 244 (2020).

102. See PETER DAOU, DIGITAL CIVIL WAR: CONFRONTING THE FAR-RIGHT MENACE 62–63 (2019); Jamie R. Abrams, The Myth of Enforcing Border Security Versus the Reality of Enforcing Dominant Masculinities, 56 CAL. W. L. REV. 69, 91–92 (2019).

103. Charlotte Alter, Muslim Women Say They Don’t Need Donald Trump’s Help, TIME (Mar. 11, 2016), <https://time.com/4255987/muslim-women-donald-trump-islam/> [<https://perma.cc/2GPX-H95K>]; Amanda Taub, Portraying Muslims as a Threat to Women, Donald Trump Echoes ‘Us vs. Them’ Refrain, N.Y. TIMES (Aug. 16, 2016), <https://www.nytimes.com/2016/08/17/us/politics/donald-trump-muslims-immigration.html> (on file with the *Columbia Law Review*).

bigotry or hatred [including ‘honor’ killings, [and] other forms of violence against women . . . .”<sup>104</sup> Yet, for all that talk, at no point in his tenure did President Trump ever express equal concern for violence against women by Americans.<sup>105</sup>

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The primary lesson from this historical review is that, in many cases, woman-protective arguments or policies warrant careful review. For a start, despite their purported intentions, they regularly undercut—rather than truly protected or advanced—women’s interests. Labor legislation harmed women in the workforce, and protective reasoning robbed women of opportunities to serve on juries, extinguished their sexual sovereignty, and stripped them of reproductive rights.

That women’s protection has continually provided cover for the male self-interest, both in intention and implementation, serves as warning. A not-insignificant number of labor laws were at least partially motivated by, and supported for, patriarchal reasons.<sup>106</sup> Restrictions on women’s participation in public life likewise benefitted men. Under the guise of protecting white women, U.S. policies have historically protected white men’s interests in white womanhood. And the ruse lives on; one need only reexamine how former-President Trump sought to wrap himself in the mantle of women’s defender, while simultaneously papering over policies and rhetoric that did the very opposite.

Finally, woman-protective reasoning has been used to further discrimination against minorities. Far too often, white women’s protection has been used to motivate the exclusion, economic decimation, and execution of people of color. There is no doubt that, throughout history, lawmakers genuinely believed such women needed protection. Even so, with modern eyes we can easily see how prejudice distorted logic, and how that resulted in devastating consequences. If this history instructs, we have ample cause to suspect the same is true today.

## II. CIS-WOMAN-PROTECTIVE ARGUMENTS

An integral component of CWP thought—perhaps the most acute motivation—is the idea that the interests of trans persons (almost exclusively trans

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104. Exec. Order No. 13,769, 3 C.F.R. 272, 273 (2018).

105. See Cristiano Lima, Trump: ‘I Am Totally Opposed to Domestic Violence of Any Kind’, POLITICO (Feb. 14, 2018), <https://www.politico.com/story/2018/02/14/trump-domestic-violence-409645> [<https://perma.cc/4HZ4-B6QV>] (“The president made no mention of the women who have accused his former staffers of abuse.”); Shefali Luthra, 26 Years in, the Violence Against Women Act Hangs in Limbo—While COVID-19 Fuels Domestic Violence Surge, USA TODAY (Sept. 26, 2020), <https://www.usatoday.com/story/news/politics/2020/09/26/26-years-in-violence-against-women-act-hangs-limbo-while-covid-fuels-domestic-violence-surge/5827171002/> [<https://perma.cc/DY9K-TCHF>] (“President Donald Trump has not focused on either [the Violence Against Women Act] or the issue of domestic violence, whether from the White House or the campaign trail.”).

106. See Rhode, *supra* note 36, at 1740–41.

women and girls) and those of cisgender women and girls are in conflict, with the former threatening the latter. More important is the alleged scope and scale of the “transgender threat.” As framed by CWP arguments, the threat advances from multiple angles, employs various tactics, and reappears across numerous—and disparate—contexts, and is, at once, both immediate and long-term. Seen that way, the “transgender threat” to cis woman and girls is formidable, and the risks are incredibly high.

This Part sketches the contours of the purported threat. It begins by marking the stakes, using opposition to the Equality Act as a brief case study. Next, it identifies and distills repeating lines of CWP arguments. Doing so provides the starting point for the Essay’s later analysis. Simultaneously, reading the heretofore uncollected allegations in unison brings important historical continuities into view. Accordingly, the Part ends by shedding light on the persistent problems with protectionist reasoning and the striking family resemblances between CWP arguments and their predecessors.

#### A. *Overview: The “Transgender Threat” to Cis Women’s Rights*

One of the largest spotlights shone on the alleged conflict between progress for transgender persons and cis women and girls has been the acrimonious, years-long dispute over the Equality Act.<sup>107</sup> If enacted, the Equality Act would amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of “sexual orientation and gender identity,” providing LGBTQ Americans with uniform protections under federal law for the first time.<sup>108</sup>

Efforts to pass the bill have been unsuccessful.<sup>109</sup> The primary impediment is the belief that the Act pits the rights of transfolk and cis women against each other. Professor Callie Burt’s widely read analysis of the version introduced in 2019 embodies such thinking.<sup>110</sup> To Burt, the absence of exceptions to the legislation’s gender identity protections “gives primacy to gender identity over sex,” resulting in “the erosion of females’ sex-based provisions.”<sup>111</sup> Thus, rather than “strike a balance,” in Burt’s view, the law “prioritizes the demands of trans people over the hard-won rights of female people.”<sup>112</sup>

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107. See Ellie Bufkin, *The Controversy Over the Equality Act*, ABC13 NEWS (Feb. 25, 2021), <https://wset.com/news/nation-world/the-controversy-over-the-equality-act> [<https://perma.cc/E2V4-VHAS>].

108. See Danielle Kurtzleben, *House Passes Equality Act: Here’s What It Would Do*, NPR (Feb. 24, 2021), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do> [<https://perma.cc/U43D-38LP>] (last updated Feb. 25, 2021).

109. See Karl Evers-Hillstrom, *Pride Month Concludes Without Equality Act Vote in Senate*, HILL (July 1, 2021), <https://thehill.com/business-a-lobbying/561060-pride-month-concludes-without-equality-act-vote-in-senate/> [<https://perma.cc/7KST-LWX9>].

110. See Callie Burt, *Scrutinizing the U.S. Equality Act 2019: A Feminist Examination of Definitional Changes and Sociolegal Ramification*, 15 *FEMINIST CRIMINOLOGY* 363, 363 (2020).

111. *Id.* at 365.

112. *Id.*

Many reached the same conclusion. During congressional hearings, lawmakers continually suggested that trans rights threatened those of cis women and girls.<sup>113</sup> Sports formed the most consistent sticking point.<sup>114</sup> Another common concern was the potential harm to vulnerable residents of women's shelters.<sup>115</sup> Others returned to more well-worn worries: the Act's purported impact on cis women and girls' safety and privacy in bathrooms.<sup>116</sup> Those fears provoked a predictably alarmist response. Several legislators sharply denounced the bill, among them Georgia Representative Marjorie Taylor Greene, who claimed that trans rights "completely destroyed women's rights,"<sup>117</sup> and Texas Representative Louie Gohmert who characterized the Act as a full-scale "war on women."<sup>118</sup>

Views outside of Congress largely followed suit. For weeks on end, television programs inundated audiences with an ever-growing list of disasters that would follow if the Act was passed, with each worse than the one before.<sup>119</sup> Facebook posts and ad campaigns stating that protections for transfolk imperiled cis women and girls recorded millions of engagements<sup>120</sup>—though, with

113. See, e.g., 167 Cong. Rec. H1086 (daily ed. Mar. 8, 2021) (statement of Rep. Marjorie Taylor Greene); 165 Cong. Rec. H3934 (daily ed. May 17, 2019) (statement of Rep. Tom McClintock).

114. See, e.g., 167 Cong. Rec. H1086 (daily ed. Mar. 8, 2021) (statement of Rep. Marjorie Taylor Greene); 167 Cong. Rec. H641 (daily ed. Feb. 25, 2021) (statement of Rep. Vicky Hartzler); 167 Cong. Rec. H655 (daily ed. Feb. 25, 2021) (statement of Rep. Greg Steube); 167 Cong. Rec. H593 (daily ed. Feb. 24, 2021) (statement of Rep. Virginia Foxx); 167 Cong. Rec. H570 (daily ed. Feb. 23, 2021) (statement of Rep. Doug Lamborn); 167 Cong. Rec. S291 (daily ed. Feb. 3, 2021) (statement of Sen. James Lankford); 165 Cong. Rec. H3934–50 (daily ed. May 17, 2019) (statement of Rep. Tom McClintock); 165 Cong. Rec. H3805 (daily ed. May 15, 2019) (statement of Rep. Vicky Hartzler).

115. See, e.g., 165 Cong. Rec. H3942 (daily ed. May 17, 2019) (statement of Rep. Louie Gohmert).

116. See 167 Cong. Rec. H625 (daily ed. Feb. 25, 2021) (statement of Rep. Andrew Clyde); 165 Cong. Rec. H3936 (daily ed. May 17, 2019) (statement of Rep. Debbie Lesko).

117. David Badash, Marjorie Taylor Greene Lies Pending LGBTQ Equality Bill Has 'Completely Canceled Women' and 'Destroyed Women's Rights', *NEW C.R. MOVEMENT* (Mar. 8, 2021) <https://www.thenewcivilrightsmovement.com/2021/03/marjorie-taylor-greene-lies-pending-lgbtq-equality-bill-has-completely-canceled-women-and-destroyed-womens-rights/> [<https://perma.cc/LB4E-42JH>].

118. Chris Johnson, Fears Over Men Playing in Women's Sports Dominate Equality Act Hearing, *WATERMARK* (Apr. 4, 2019) <https://watermarkonline.com/2019/04/04/fears-over-men-playing-in-womens-sports-dominate-equality-act-hearing/> [<https://perma.cc/2LWR-PCE8>].

119. Alex Paterson, Post-Trump Fox News Is a Hotbed of Anti-LGBTQ Extremism, *MEDIAMATTERS* (May 11, 2021), <https://www.mediamatters.org/fox-news/post-trump-fox-news-hotbed-anti-lgbtq-extremism> [<https://perma.cc/XMW2-L9H3>].

120. Brianna January, Facebook Is Profiting From Harmful Anti-Trans Political Ads Despite Its Hate Speech Policies, *MEDIAMATTERS* (Sept. 11, 2020), <https://www.mediamatters.org/facebook/facebook-profiting-harmful-anti-trans-political-ads-despite-its-hate-speech-policies> [<https://perma.cc/XHP3-XY3A>]; Brianna January, The Right Is Dominating Facebook Engagement on Content About Trans Issues, *MEDIAMATTERS* (July 20, 2020), <https://www.mediamatters.org/facebook/right-dominating-facebook-engagement-content-about-trans-issues> [<https://perma.cc/9K69-ZPE9>].

some 52% of Americans using Facebook as a news source, the content likely reached tens of millions more.<sup>121</sup> Polls confirmed as much. In a series of representative surveys, a significant portion of Americans—upwards of 70% of voters in Michigan, Pennsylvania, and Wisconsin—recognized the “threat,” taking issue with trans inclusion in prisons, shelters, public facilities, and athletics.<sup>122</sup>

These reactions offer a simplified portrait of the extent to which Americans apparently share the view that the rights of transfolk threaten those of cis women and girls. To many, the “transgender threat” is obviously significant. What sets it apart, however, is the purported scope. Certainly, while the idea that the women’s interests are in conflict with the equality of other minority groups is not aberrational historically, earlier conflicts tended to both be relatively contained and largely focused on threats to women’s health or physical safety.<sup>123</sup> By contrast, based on discourse over the Equality Act, the current “threat” attacks on many more fronts—implicating a wider range of interests, even while being uniformly catastrophic. Understandably, then, to those holding CWP views, staving off the so-called “transgender threat” to cis women’s rights is of utmost importance.

### B. *Mapping the “Threat”*

To capture CWP claims, this Essay first employed a multi-pronged repository and targeted search approach. Among others, the final corpus of arguments included those in: cases; legal filings; publicly available legislative

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121. Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering News*, PEW RSCH. CTR. (Oct. 2, 2019), <https://www.pewresearch.org/journalism/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/#share-of-americans-who-get-news-on-social-media-has-recently-increased> [<https://perma.cc/7CPX-6D2F>].

122. Memorandum from Terry Schilling, Exec. Dir., Am. Principles Project, to Interested Parties 4 (July 28, 2020), <https://americanprinciplesproject.org/wp-content/uploads/2020/07/APP-Swing-State-Polling-Memo-7-28-20.pdf> [<https://perma.cc/9W2M-RWW5>]; see also *National Poll Reveals Majority of Voters Support Protecting Single-Sex Spaces*, WOMEN’S LIBERATION FRONT (Oct. 27, 2020), <https://womensliberationfront.org/news/national-poll-support-for-womens-spaces> [<https://perma.cc/4BJW-WYKC>] (claiming that poll of 3,500 people showed most did not support trans-inclusive policies); *Polling From 13 States Reveals Widespread Disapproval of “Gender Identity” Policies*, WOMEN’S LIBERATION FRONT (Mar. 12, 2021), <https://womensliberationfront.org/news/polling-from-13-states-reveals-widespread-disapproval-of-gender-identity-policies> [<https://perma.cc/CQK2-8HCW>] (showing poll results that indicate most respondents did not support trans-inclusive sports policies).

123. See *supra* section I.A. Notable exceptions were discriminatory taxation schemes, which viewed minorities as threats to livelihood, and white suffragettes’ arguments against Black men’s enfranchisement, which viewed Black voting rights as a threat to white women’s position in society. My thanks to Professor Jessica Clarke for underscoring this point.

audio, transcripts, and submitted testimony associated with trans-related state laws; prisoner grievance complaints; recordings from various school board meetings; and comments submitted on federal rulemaking.

Adopting a wide shot of the sources, cohesive patterns emerge. Repeated lines of argument loosely cluster around a few related, but distinct, themes, demarcated by the rights or interests that trans inclusion is claimed to threaten. At their simplest, the arguments are outlined as follows.

1. *Facilities*: Trans women's access to sex-segregated bathrooms, changing or locker rooms, and showers, shelters, or prisons, threatens cis women and girls' *physical safety* and *privacy*.

2. *Athletics*: Trans women's access to sex-segregated sports teams is fundamentally unfair to cis women and girls, because of trans women and girls' "*inherent biological advantages*."

3. *Respite and Rehabilitation*: Trans women's presence in sex-segregated domestic violence housing and prisons has the potential to *traumatize* cisgender women and girls, particularly those who have previously been victims of male violence.

4. *Community Building*: Trans women's attendance at women's colleges deprives cis women and girls of the ability to gain the benefits associated with single-sex educational environments, by fundamentally *disrupting* the character or atmosphere of those spaces.

5. *Representation*: Viewing trans women as women threatens cis women's right to *accurate statistical information*.

6. *Voices*: Acceptance of transgender persons threatens cis women and girls' right to free speech, by restricting their ability to *voice* perspectives or opinions that are, or appear to be, critical of, antagonistic to, or hateful toward trans persons.

7. *Advancement*: Viewing trans women as women threatens cis females' social and political advancement by: *diluting* the pool of potential recipients of policies, grants, scholarships, and programs aimed at remedying the effects of sex discrimination; giving trans women access to programs that they do not *deserve*; and allowing cis men, under the guise of being trans, to *defraud* these remedial interventions.

8. *Liberation*: Trans equality diminishes the possibility of cis females' liberation from patriarchy and sex oppression because it threatens to: *destabilize* the concept of sex and therefore sex-based interventions altogether; or *solidify detrimental sex-stereotypes*.

### C. *Structural Issues: The Persistent Problems of Protectionism*

Having laid the arguments out, many aspects of the current iteration of woman-protective rationales should not seem unusual against the backdrop of the prior Part's discussion. Like before, the interests sought to be protected include only those of a subset of women, and, as before, woman-protective justifications are being used to oppose the equality of minority groups. More

significantly, the many structural problems bedeviling earlier woman-protective justifications also persist.<sup>124</sup>

Commencing with the most obvious, CWP arguments habitually resort to generalizations about cis women and girls' vulnerability. Think of the claim that transgender women should be excluded from women's intimate facilities. Typically, the underlying concern is twofold: that cis women are unable to resist attack and that they are "by nature sexually seductive victims."<sup>125</sup> The one-sidedness of these tropes is obvious since trans-exclusionary policies have rarely, if ever, been justified with concerns about cis men's safety in intimate facilities. Some policies even account for such stereotypes. Rationalizing that Texas's Senate Bill 6 only applied to trans women, Texas Lieutenant Governor Dan Patrick offered matter-of-factly, "men can defend themselves."<sup>126</sup> At bottom, the offensive message is that cis women—but not cis men—need protection. At the heart are "archaic and stereotypic notions" about the need to "protect [women] because they are presumed to suffer from an inherent handicap."<sup>127</sup> These very same ideas justified "protective" policies impeding women's participation in civic life.<sup>128</sup>

Related stereotypes rear their heads in the arguments that trans women's access to public facilities infringes cis women's privacy. Conceptions of privacy are, of course, quite explicitly gendered.<sup>129</sup> For instance, in *Kyllo v. United States*—the case reviewing the constitutionality of heatseeking technology—to Justice Antonin Scalia, it was "the lady of the house['] . . . daily sauna and bath," and not the defendant, Mr. Kyllo's, that represented the prototypical intimate detail and privacy concern.<sup>130</sup> Underlying such thinking, women and girls are expected to have more and different requirements for privacy, and,

124. See *supra* text accompanying notes 98–105.

125. See Portuondo, *supra* note 20, at 522 (quoting Jami Anderson, Bodily Privacy, Toilets, and Sex Discrimination: The Problem of "Manhood" in a Women's Prison, in *LADIES AND GENTS: PUBLIC TOILETS AND GENDER* 90, 101 (Olga Gershenson & Barbara Penner eds., 2009)) (noting the stereotype); see also Hazeldean, *supra* note 20, at 1770–73 (same); Elizabeth Sepper & Deborah Dinner, Sex in Public, 129 *YALE L.J.* 78, 142 (2019) (same).

126. Mike Ward, Lt. Gov. Patrick and Allies Spoiling For Brawl Over Planned State Bathroom Law, *HOUSTON CHRON.* (Nov. 24, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Lt-Gov-Patrick-and-allies-spoiling-for-brawl-10634982.php> [<https://perma.cc/C8E2-YF24>].

127. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

128. See Portuondo, *supra* note 20, at 473–74; see also Alice Kessler-Harris, The Paradox of Motherhood: Night Work Restrictions in the United States, in *PROTECTING WOMEN: LABOR LEGISLATION IN EUROPE, THE UNITED STATES, AND AUSTRALIA, 1880–1920*, at 337 (Ulla Wikander, Alice Kessler-Harris & Jane Lewis eds., 1995); Kogan, Sex-Separation, *supra* note 30, at 12–16.

129. See Anita L. Allen & Erin Mack, How Privacy Got Its Gender, 10 *N. ILL. U. L. REV.* 441, 443 (1990) (tracing gender stereotypes of female modesty underlying privacy conceptions).

130. *Kyllo v. United States*, 533 U.S. 27, 38 (2001); see also Jeannie Suk, Is Privacy a Woman?, 97 *GEO. L.J.* 485, 487–93 (2009) ("Justice Scalia's *Kyllo* reveals the lady in the bath to illustrate the imperative to shield her.").

simultaneously, they are held to higher standards of modesty.<sup>131</sup> Quite often, CWP arguments seek to harness the gendered assumptions underlying views of whose privacy needs defense.<sup>132</sup>

Additionally, descriptions painting minorities as sexually dangerous receive an encore. Recall the racist policies extinguishing women's ability to choose whom they could marry, whom they could sit beside, and the places they frequented or worked. Behind them were offensive images of racial minorities as sexual savages, from whom white women had to be secured. With some minor updates, the same stories are retold today. Many CWP arguments implicitly suggest that transgender persons are more likely to be sexual predators than their cisgender counterparts.<sup>133</sup> A few go further. One *Harris Funeral Homes* brief opened with a comparison of Caitlyn Jenner's entry to a women's shower with Harvey Weinstein's.<sup>134</sup> Hidden away is the acute distinction that Weinstein was accused of allegedly sexually victimizing over ninety women—and has been found guilty of doing so—while Jenner has not.<sup>135</sup> Said out loud, the quiet part is the connotation that the danger caused by Jenner's mere use of a restroom is equivalent to that of the use by someone actually convicted of sexual crime. More than simply being unfounded, that innuendo offensively maligns.<sup>136</sup>

CWP arguments supporting trans-exclusionary sports bans bring together the sweeping assumptions about women's physical capabilities that once supported labor legislation, in tandem with finetuning the framing of minorities as dangerous. After assuming that all trans women and girls are physiologically

131. Portuondo, *supra* note 20, at 518.

132. *E.g.*, Transcript of Proceedings—Preliminary Injunction Hearing at 126, Students & Parents for Priv. v. U.S. Dep't of Educ., No. 16 C 4945 (N.D. Ill. argued Aug. 15 2016), ECF No. 127 (suggesting boys expect less privacy because they “primarily use a urinal without any kind of stalled facility”); Complaint at 9–10, Women's Liberation Front v. U.S. Dep't of Just., No. 1:16-cv-00915-WPL-KBM (D.N.M. filed Aug. 11, 2016); Portuondo, *supra* note 20, at 517.

133. See Shayna Medley, Note, Not in the Name of Women's Safety: *Whole Woman's Health* as a Model for Transgender Rights, 40 HARV. J.L. & GENDER 441, 459–60 (2017).

134. Amicus Brief of Free Speech Advocates in Support of Petitioner at 1, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (No. 18–107), 2019 WL 4013300.

135. See Jan Ransom, Harvey Weinstein Is Found Guilty of Sex Crimes in #MeToo Watershed, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-trial-rape-verdict.html> (on file with the *Columbia Law Review*) (“Harvey Weinstein, the powerhouse film producer whose downfall over sexual misconduct ignited a global movement, was found guilty of two felony sex crimes . . .”); Jan Ransom, These Are the 6 Women Who Are Testifying Against Harvey Weinstein, N.Y. TIMES (Jan. 26, 2020), <https://www.nytimes.com/2020/01/26/nyregion/harvey-weinstein-trial-accusers-testimony.html> (on file with the *Columbia Law Review*) (last updated Feb. 7, 2020) (“More than 90 women have accused Mr. Weinstein of sexual misconduct including rape, unwanted touching and harassment.”).

136. Cf. David Cole & William N. Eskridge, Jr., From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct, 29 HARV. C.R.-C.L. L. REV. 319, 341 (1994) (calling the queer predator shower narrative “a raw appeal to prejudice”).



equivalent to cis men and boys, advocates sound the alarm for trans exclusion as necessary to “protect” or “save” cis women and girls from unfair competition.<sup>137</sup> Sexist generalizations that men are “naturally” superior athletes, and that “all women are always athletically inferior to all men,” provide the foundation.<sup>138</sup> Evidence of that is not hard to find. As one senator advocating trans exclusion put it, “indisputable physiological facts” demonstrate “the male is a genetically and time-engineered superior machine.”<sup>139</sup>

Portrayals of trans women and girls as a forceful threat replay moves that white-woman-protective policies long perfected.<sup>140</sup> Allegations that masses of Chinese Americans entered predominantly female industries sound strikingly similar to current charges that girls’ “sports are being invaded by biological males that are taking over all across the United States.”<sup>141</sup> By the same token, segregationists’ signature practice of depicting Black male students as larger and older—and thus, more threatening—carries over. Previously, woman-protectionists buttressed school segregation with illustrations of “old Black, Black Buck Negro[s],” sitting alongside “some poor little white girl[s].”<sup>142</sup> Now,

137. Elizabeth A. Sharrow, *Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy*, 10 *LAW*s, no. 63, 2021, at 1, 17 (noting the alarmist use of “save” and “protect” in the legislations’ titles).

138. Alex Channon, Katherine Dashper, Thomas Fletcher & Robert J. Lake, *The Promises and Pitfalls of Sex Integration in Sport and Physical Culture*, 19 *SPORT IN SOC.* 1111, 1113 (2016).

139. John Hanna, *Kansas Bill on Trans Athletes Advances Amid Misogyny Charges*, *AP NEWS* (Mar. 17, 2021), <https://apnews.com/article/business-legislature-discrimination-kansas-gender-identity-64dcb878d8f393098437dcd87e6a352f> [<https://perma.cc/DK2A-DH36>] (internal quotation marks omitted) (quoting Kan. State Sen. Virgil Peck).

140. See, e.g., Gary Bai, *House Republicans Attempt to Advance Transgender Athletes Bill*, *EPOCH TIMES* (Apr. 29, 2022), [https://www.theepochtimes.com/house-republicans-attempt-to-advance-transgender-athletes-bill\\_4436601.html](https://www.theepochtimes.com/house-republicans-attempt-to-advance-transgender-athletes-bill_4436601.html) [<https://perma.cc/B5ED-2J2N>] (last updated May 1, 2022) (internal quotation marks omitted) (quoting a coalition of parent advocacy groups as claiming that trans inclusion “rob[s] girls and women”); Morgan Trau, *Ohio GOP Passes Bill Aiming to Root Out ‘Suspected’ Transgender Female Athletes Through Genital Inspection*, *NEWS 5 CLEVELAND* (June 2, 2022), <https://www.news5cleveland.com/news/politics/ohio-politics/ohio-gop-passes-bill-aiming-to-root-out-suspected-transgender-female-athletes-through-genital-inspection> [<https://perma.cc/F2GU-P68L>] (quoting a Republican state representative claiming that cis girls’ “dreams” are “crushed by biological males”).

Other scholars pressing the issue have insightfully noted that this reaction has deeply racialized roots, which further fuel spread of transphobia. See Medley, (Mis)Interpreting Title IX, *supra* note 20, at 699–704 (noting that two Black transgender athletes’ success triggered the wave of legislative backlash); Zein Murib, *Don’t Read the Comments: Examining Social Media Discourse on Trans Athletes*, 11 *LAW*s, no. 53, 2022, at 1, 11 (noting racial constructions in trans-exclusionary sport sentiment).

141. Jess Clark, *Ky. Lawmakers Override Veto, Banning Trans Athletes From Girls and Women’s Sports Teams*, 89.3 *WFPL* (Apr. 13 2022), <https://wfpl.org/ky-lawmakers-override-veto-banning-trans-athletes-from-girls-and-womens-sports-teams/> [<https://perma.cc/4Y6S-N3HT>]; see also Lora Korpar, *Iowa Becomes 11th GOP-Run State to Ban Transgender Women in Sports*, *NEWSWEEK* (Mar. 3, 2022), <https://www.newsweek.com/iowa-becomes-11th-gop-run-state-ban-transgender-women-sports-1684690> [<https://perma.cc/7R47-NX7M>].

142. BOBBY L. LOVETT, *THE CIVIL RIGHTS MOVEMENT IN TENNESSEE: A NARRATIVE HISTORY*

they juxtapose six-foot and seven-foot trans girls competing against “little” cis girls.<sup>143</sup> The modern hyperbolics inherit their forerunners’ stratagems: resorting to histrionics to amplify the urgency of protection, using dehumanizing distortions to depict minorities as flattened monoliths, and simultaneously adultifying some children while infantilizing others, in order to justify discrimination.

Also returning is the benefit of exclusionary arguments to male supremacy.<sup>144</sup> One issue that reemerges is the normalization of male violence. Congressman Randall Weber relayed reports of a young Texan girl being followed into a bathroom by a “male who said he self-identified as a female.”<sup>145</sup> The follower’s teeth were “knocked out by the girl’s father who self-identified as the tooth fairy.”<sup>146</sup> None of it was true.<sup>147</sup> Nonetheless, the moral is hard to miss: When in service of the protected, extralegal male violence is refashioned as legitimate and worthy of veneration.<sup>148</sup> The plethora of cis men’s public statements proudly advocating physical attacks against any transfolk sharing a restroom with their wives, or competing against their daughters, suggest the lesson behind Congressman Weber’s fable has been learned.<sup>149</sup>

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50 (2005) (internal quotation marks omitted) (quoting a letter from a constituent to then-Governor of Texas, Frank G. Clement); see also JOSEPH BAGLEY, *THE POLITICS OF WHITE RIGHTS: RACE, JUSTICE, AND INTEGRATING ALABAMA’S SCHOOLS* 20 (2018).

143. Carmen Forman, Oklahoma House GOP Advances New Bill to Ban Transgender Athletes From Women’s Sports, *OKLAHOMAN* (Mar. 3, 2022), <https://www.oklahoman.com/story/news/2022/03/03/oklahoma-republican-bill-block-transgender-athletes-womens-sports-advances-lgbtq/6878671001/> [https://perma.cc/WWN8-EDLP] (reporting a Republican lawmaker’s statement that a family told her that “their daughter was competing against a child that was born as a man”); House Bill Regulates Transgender Participation in School Sports, *AUGUSTANA MIRROR* (Feb. 24, 2022), <https://augiemirror.com/2022/02/24/house-bill-regulates-school-sports/> [https://perma.cc/RP2B-63E3] (citing a hypothetical “six-foot-eight former guy”); Romney Speaks Against Allowing Transgender Youth in Girls’ Sports, *FOX13* (Feb. 3, 2021), <https://www.fox13now.com/news/local-news/sen-mitt-romney-speaks-against-allowing-transgender-youth-in-girls-sports> [https://perma.cc/C7MG-GGL3] (quoting Senator Rand Paul as commenting, “Frankly, some boy that’s 6-foot-2 competing against my 5-foot-4 niece doesn’t sound very fair”).

144. See Spindelmann, *supra* note 2, at 107–08.

145. 167 Cong. Rec. H658 (daily ed. Feb. 25, 2021) (statement of Rep. Weber).

146. *Id.*

147. Fact Check: Story of Girl’s Father Punching the Person Who Followed Her Into a Target Bathroom Likely Stems From Meme Pages and Features Unrelated Photo, *REUTERS* (Feb. 10, 2021), <https://www.reuters.com/article/uk-factcheck-target-bathroom-father-daughter/fact-check-story-of-girls-father-punching-the-person-who-followed-her-into-a-target-bathroom-likely-stems-from-meme-pages-and-features-unrelated-photo-idUSKBN2AA289> [https://perma.cc/MWJ2-EPHG].

148. See Jennifer Carlson, Mourning Mayberry: Guns, Masculinity, and Socioeconomic Decline, 29 *GENDER & SOC’Y* 386, 388–89 (2015) (explaining how “masculinist protection” places men in a “privileged position in the gendered hierarchy by repackaging violence as a necessary, honorable social duty that men perform on behalf of women and children”).

149. *E.g.*, EQUAL FED’N INST., *FREEDOM FOR ALL AM.S., NAT’L CTR. FOR TRANSGENDER EQUAL. & MOVEMENT ADVANCEMENT PROJECT, THE FACTS: BATHROOM SAFETY, NONDISCRIMINATION LAWS, AND BATHROOM BAN LAWS* 12 (2016) (collecting examples); On YouTube, Charlie Kirk Calls For Men to Confront and Physically Prevent Trans Student Athletes From Competing, *MEDIA-MATTERS* (Mar. 30, 2022), <https://www.mediamatters.org/charlie-kirk/>

Another issue is the self-serving positioning of men, this time cis, as “defenders.” No example better captures that than Kansas State Senator Virgil Peck’s call for his colleagues to protect “God’s special creation—females” by supporting a trans athlete sports ban.<sup>150</sup> He began, “Are we, American men, going to take a stand and defend our young ladies . . . ?”<sup>151</sup> Then: “Are there no longer any alpha males who will stand and defend our young ladies, our wives, our daughters, our granddaughters, our neighbor’s wives, daughters and granddaughters?”<sup>152</sup>

Peck’s statements don’t reinvent the wheel. His use of possessive language to describe the persons he’s allegedly defending, along with the implication that none of the girls and women he depicts have identities independent of their relationships to others,<sup>153</sup> tip his hand. So does his construction of masculinity. Since, by his account, a willingness to defend women and girls determines authentic manhood, the obvious issue is what that ideology spells for “legitimate” woman- and girlhood. A wider view confirms the increasingly obvious. Peck’s previous characterizations of migrants as “immigrating feral hogs” and advocacy for their violent execution as “a (solution) to our illegal immigration problem” call into question exactly which women and girls his heartfelt defensive sentiments apply to.<sup>154</sup> Should any doubts remain, his decades of supporting restrictions on reproductive freedom and on-record digs at feminists put them to rest.<sup>155</sup> True to historical form, Peck’s veil of “protecting women and girls”—admirable at first glance—functions to provide self-serving cover for his many less-laudable beliefs.

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youtube-charlie-kirk-calls-men-confront-and-physically-prevent-trans-student-athletes [https://perma.cc/CK3F-WM57] (recording Kirk advising men to physically confront trans student athletes).

150. Sherman Smith, Kansas Senate Passes Transgender Sports Ban After ‘Incredibly Insulting’ Debate, *LAWRENCE TIMES* (Mar. 18, 2021), https://lawrencekstimes.com/2021/03/18/ksleg-sen-passes-transgender-sports-ban/ [https://perma.cc/Z9RE-YBGM].

151. *Id.*

152. Hanna, *supra* note 139.

153. Given Peck’s vocal opposition to gay marriage, the “neighbors” he refers to are most likely cis heterosexual men. Julie Clements, Legislators Talk About Upcoming Issues, *OBSERVER-DISPATCH* (Jan. 9, 2014), https://www.uticaod.com/story/news/local/2014/01/09/legislators-talk-about-upcoming-issues/41041102007/ [https://perma.cc/6AVD-CJK9] (recording Peck labeling gay marriage as “perverted marriage”).

154. See Kansas Lawmaker Suggests Immigrants Be Shot Like Hogs, *REUTERS* (Mar. 25, 2011), https://www.reuters.com/article/us-immigration-kansas/kansas-lawmaker-suggests-immigrants-be-shot-like-hogs-idUSTRE72071H20110325 [https://perma.cc/573T-ZQHR].

155. See KS Legislature, Senate Chamber Proceedings, *YOUTUBE*, at 36:42 (Apr. 26, 2022), https://www.youtube.com/watch?v=\_qRpa3FVOE (on file with the *Columbia Law Review*) (expressing incredulity that “more of those who are, if you will ‘feminists’” were not “standing up for our young ladies”); Protect the Rights of the Unborn, *VIRGIL4SENATE* (May 30, 2020), https://www.virgil4senate.com/post/protect-the-rights-of-the-unborn [https://perma.cc/ZS78-SGWL] (detailing his anti-abortion history).

### III. SUBSTANTIVE ISSUES

Thus far, this Essay has suggested that woman-protective arguments should generally be taken with a grain of salt. It now begins to apply exacting scrutiny to CWP arguments. Over the course of this and the subsequent Part, the remainder of the Essay appraises the arguments from different angles. This Part considers only the substance of the arguments. Shortcomings, in terms of method, are saved for later.

The below sections build upon the outline in Part II.B. They walk through and flesh out the arguments laid out above, with the goal being as much to explore the arguments as it is to assess them. Additionally, the focus is whether the arguments work analytically, and as a matter of good policy, rather than whether they work legally.<sup>156</sup> Taking the asserted concerns seriously, the sections will tease out underlying assumptions, verify the claims based on the evidence, and consider whether the proposed policies are justified.

#### A. *Facilities: The “Safety” and “Privacy” Arguments*

The perennial “bathroom problem” has featured ad nauseam in public debate over transgender rights. However, while the nationwide wave of policies aimed at policing transgender persons’ use of bathrooms gained notoriety in the mid-2010s, recorded accounts suggest the issue dates back decades.<sup>157</sup>

Early on, much of the obsession with which facilities trans women use has been held by cis men. In 1976 in Berkeley, California, it was cis men who mobilized to prevent a transgender employee from using the women’s room.<sup>158</sup> Another cis man, Sidney Jones, outed Toni Ann Diaz in a 1975 column, announcing: “I suspect his [sic] female classmates in P.E. 97 may wish to make other showering arrangements.”<sup>159</sup>

Anecdotes do provide nominal proof of cis women’s uneasiness with trans use of gender-appropriate bathroom facilities as well. For instance, in the 1982 case *Sommers v. Budget Marketing, Inc.*, a trans woman, Ms. Audra Sommers, was terminated from her job as a clerk when cis women coworkers threatened to resign if she was permitted to share a bathroom.<sup>160</sup> Trans women were not alone. In a curious outlier, a 1972 *New York Times* article profiled a

156. That approach differs for the *silencing* arguments, for which many of the claims deliberately sound in First Amendment law. See *infra* section III.F. For that discussion, the footnotes provide ancillary doctrinal analysis. See *infra* notes 311–330.

157. See Jillian T. Weiss, Arguments Against ENDA: The Bathroom (Part IV), *TRANS WORKPLACE LAW & DIVERSITY* (Oct. 5, 2009), <https://transworkplace.blog-spot.com/2009/10/arguments-against-enda-bathroom-part-iv.html> [<https://perma.cc/8NWS-K8RR>] (discussing the tradition of separating bathroom by sex and its transphobic origins).

158. See D.M., ‘P.O. Hassles Transsexuals,’ *BERKELEY BARB* (Mar. 26, 1976), <https://revolution.berkeley.edu/post-office-harasses-trans-worker/> [<https://perma.cc/N2PM-9CX5>].

159. *Diaz v. Oakland Trib., Inc.*, 139 Cal. App. 3d 118, 124 (Ct. App. 1983).

160. 667 F.2d 748, 748–49 (8th Cir. 1982). Note, here, how the threat of resignation mirrors that of white women’s identical threats following workplace racial integration. See *supra* note 77 and accompanying text.

trans man, Robert, who was forced to use the female locker room at work—a decision his cis female coworkers “were not exactly happy about.”<sup>161</sup>

Still, cis women’s tensions over trans bathroom use emerged more prominently in the late 1990s. In *Goins v. West Group*, it was cis female employees who “expressed concern” about shared restrooms when a trans employee, Ms. Julianne Goins, transferred to a new facility.<sup>162</sup> The objections in *Cruzan v. Special School District Number 1* are comparable.<sup>163</sup> There, Carla Cruzan, a cis female teacher, sued the school district for allowing her trans colleague to use the women’s restroom.<sup>164</sup> Upon entering the facility and seeing her colleague exiting a privacy stall, Cruzan filed an action for hostile work environment.<sup>165</sup>

Around a decade later, the issue truly picked up steam. During that time, four states enacted rules allowing trans students to use gender-appropriate intimate facilities,<sup>166</sup> and the Colorado Civil Rights Division ruled that an elementary school was required to allow a transgender girl, Coy Mathis, to use girls’ facilities.<sup>167</sup> Further fueling the fire, in 2016 the Obama-era Departments of Education and Justice jointly issued guidance on identical requirements at a national level.<sup>168</sup> Backlash was immediate. Between 2013 and 2016, at least twenty-four states considered legislation aimed at policing trans persons’ use of public restrooms.<sup>169</sup>

Throughout, the concerns raised came from two angles. The first positioned trans bathroom access as a threat to cis women’s safety,<sup>170</sup> with the second framing trans bathroom access as a threat to their privacy.<sup>171</sup> In

161. Transsexual Tries to Build a New Life, N.Y. TIMES (Nov. 20, 1972), <https://www.nytimes.com/1972/11/20/archives/transsexual-tries-to-build-a-new-life.html> (on file with the *Columbia Law Review*).

162. 635 N.W.2d 717, 721 (Minn. 2001).

163. 294 F.3d 981, 982–83 (8th Cir. 2002).

164. *Id.* at 983.

165. *Id.*

166. See Parker Marie Molloy, Year in Review: 10 Important Transgender Moments of 2013, *ADVOCATE* (Jan. 4, 2014), <https://www.advocate.com/year-review/2014/01/04/year-review-10-important-transgender-moments-2013> [<https://perma.cc/Z47G-T3AN>].

167. *Mathis v. Fountain-Fort Carson Sch. Dist. No. 8, State of Colo. Div. of C.R. Determination*, Charge No. P20130034X at 12 (Colo. Div. of C.R. June 17, 2013).

168. Chan Tov McNamarah, Repeated Victories in the “Bathroom Wars” During Summer 2018, 2018 *LGBT L. NOTES* 405, 406 [hereinafter McNamarah, Repeated Victories].

169. Joellen Kralik, ‘Bathroom Bill’ Legislative Tracking, *NAT’L CONF. OF STATE LEGISLATURES* (Oct. 24, 2019), <https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/U5WR-QSJY>].

170. See, e.g., Transcript of North Carolina General Assembly Proceedings, House Judiciary IV Committee at 19–20 (Mar. 23, 2016) (recording one woman’s safety concerns in hearings on Charlotte’s nondiscrimination ordinance).

171. See, e.g., Leslie Wolfgang, Opinion, Transgender Bill Invades Women’s Privacy in Bathroom, *HARTFORD COURANT* (Apr. 24, 2011), <https://www.courant.com/opinion/hc-xpm-2011-04-24-hc-op-wolfgang-transgender-bill-0424-20110424-story.html> (on file with the *Columbia Law Review*) (last updated Sept. 15, 2021) (recording privacy concerns raised against Connecticut’s nondiscrimination bill). Since 2016, several lawsuits against trans-inclusive bathroom policies, filed under the group monikers “Parents for Privacy,” “Privacy Matters,” or “Students and Parents for Privacy,” have employed similar arguments. See

practice, the bases are typically braided together, with those seeking trans exclusion rarely distinguishing between the two. That notwithstanding, on the thinking that the arguments cannot stand together if they fail to convince independently, the below analysis separates the arguments in order to emphasize some key distinctions.

### 1. Safety

By far the most common argument related to intimate facilities is that trans-inclusive policies endanger the physical safety of cis women and girls. The argument features repeatedly in hearings on “bathroom bills,” case law,<sup>172</sup> filings challenging trans-inclusive policies,<sup>173</sup> and legal scholarship.<sup>174</sup> It is made in a few ways. One is that transgender persons themselves are a direct danger to cis women and girls.<sup>175</sup> Another is as a concern that cisgender men and boys will exploit gender-appropriate facility policies to victimize cis women or girls.<sup>176</sup>

In either form, the safety argument falls flat in the face of real-world evidence. Barely short of accusing all trans women of being sexual predators or as having a proclivity for sexual predation, this first form of the argument has already been thoroughly debunked. A study investigating crime reports from Massachusetts found no relationship between the implementation of trans-inclusive policies and the number or frequency of criminal incidents in intimate spaces by trans individuals.<sup>177</sup> Testimony from law enforcement, state

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Complaint, *Parents for Priv. v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d (D. Or. 2018) (No. 3:17-cv-01813-HZ), 2017 WL 5479874; Verified Complaint for Declaratory and Injunctive Relief, *Priv. Matters v. U.S. Dep’t of Educ.*, No. 0:16-cv-03015 (D. Minn. filed Sept. 7, 2016), 2016 WL 4691526; Verified Complaint for Injunctive and Declaratory Relief, *Students & Parents for Priv. v. U.S. Dep’t of Educ.*, No. 16 C 4945 (N.D. Ill. filed May 4, 2016), 2016 WL 2591322.

172. See Colin Pochie, Note, Sick and Tired of Hearing About the Damn Bathrooms, 93 *CHI.-KENT L. REV.* 281, 307 (2018) (citing cases in which courts have “indicated that they view transgender people as inherently threatening to the . . . safety of cisgender people”).

173. *E.g.*, Complaint at 9–10, *Women’s Liberation Front v. U.S. Dep’t. of Just.*, No. 1:16-cv-00915-WPL-KBM (D.N.M. filed Aug. 11, 2016).

174. See, e.g., W. Burlette Carter, Sexism in the “Bathroom Debates”: How Bathrooms Really Became Separated by Sex, 37 *YALE L. & POL’Y REV.* 227, 287–89 (2018); Christen Price, Women’s Spaces, *Women’s Rights: Feminism and the Transgender Rights Movement*, 103 *MARQ. L. REV.* 1509, 1540 (2020).

175. *E.g.*, Wolfgang, *supra* note 171 (pointing out that some trans women “are attracted to, date and marry women”).

176. *E.g.*, Brief of Amici Curiae Public Safety Experts in Support of Petitioner at 5, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16–273), 2017 WL 104592 (stating that cis men will “exploit” policies to “facilitate their illicit sexual behavior”); Mike Clark, Opinion, *LGBT People in Jacksonville Do Not Need a Human Rights Ordinance*, *FLA. TIMES-UNION* (Dec. 8, 2015), <https://www.jacksonville.com/story/opinion/columns/mike-clark/2015/12/08/guest-column-lgbt-people-jacksonville-do-not-need-human-rights/15691490007/> [https://perma.cc/2Z4X-RW7Z] (making similar arguments).

177. Amira Hasenbush, Andrew R. Flores & Jody L. Herman, Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms, 16 *SEXUALITY*

legislators, and individual school administrators who have enacted or adopted trans inclusive policies says the same.<sup>178</sup>

While the second form of the argument repositions the source of danger from trans persons to trans rights, it still suffers from want of evidence. Researchers find “[i]nstances of cisgender men dressing as women to gain access to women in various stages of dress . . . an extremely rare phenomenon.”<sup>179</sup> Further, police officials from states that have implemented trans-inclusive policies uniformly agree.<sup>180</sup> Therefore, by all accounts, fears that non-transgender persons will exploit trans-inclusive policies are “unfounded.”<sup>181</sup>

The safety argument has other flaws. Chiefly, it fails to recognize that even without trans inclusion, perpetrators find ways to victimize cis women and girls using public facilities.<sup>182</sup> Trans-exclusionary policies do not deter this behavior. If anything, by segregating and isolating potential cis female victims in designated locations, they potentially mark cis women as easy targets.<sup>183</sup>

More generally, the logic of the safety arguments is much too narrow. The argument takes as given that men are sexual predators, and women and girls are victims.<sup>184</sup> In doing so, the argument overlooks any possibility of same-sex sexual crimes in public facilities.<sup>185</sup> Since the goal is preserving the

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RSCH. & SOC. POL’Y 70, 80 (2019).

178. See Lou Chibbaro, Jr., Predictions of Trans Bathroom Harassment Unfounded, WASH. BLADE (Mar. 31, 2016), <https://www.washingtonblade.com/2016/03/31/predictions-of-trans-bathroom-harassment-unfounded/> [<https://perma.cc/JRE9-MJJ2>]; School Officials Agree: Policies Protecting Transgender Student[s] Do Not Compromise the Privacy or Safety of Other Students, NAT’L CTR. TRANSGENDER EQUALITY, <https://transequality.org/school-officials> [<https://perma.cc/G6MS-XXQF>] (last visited Oct. 11, 2022).

179. Brian S. Barnett, Ariana E. Nesbit & Renée M. Sorrentino, The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science, 46 J. AM. ACAD. PSYCHIATRY & L. 232, 236 (2018).

180. See Emanuella Grinberg & Dani Stewart, 3 Myths that Shape the Transgender Bathroom Debate, CNN HEALTH (Mar. 7, 2017), <https://edition.cnn.com/2017/03/07/health/transgender-bathroom-law-facts-myths/index.html> [<https://perma.cc/6UM5-TNQX>]; Carlos Maza, Debunking the Big Myth About Transgender-Inclusive Bathrooms, MEDIAMATTERS (Mar. 20, 2014), <https://www.mediamatters.org/fox-nation/debunking-big-myth-about-transgender-inclusive-bathrooms> [<https://perma.cc/T3H8-C9PD>].

181. Brief of Amici Curiae Law Enforcement Officers in Support of Respondent at 2, *G.G.*, 137 S. Ct. 1239 (No. 16–273), 2017 WL 836845; see also Barnett et al., *supra* note 179, at 239.

182. Christine Overall, Public Toilets: Sex Segregation Revisited, ETHICS & ENV’T, Fall 2007, at 71, 82.

183. See Terry S. Kogan, Public Restrooms and the Distorting of Transgender Identity, 95 N.C. L. REV. 1205, 1237–38 (2017); Portuondo, *supra* note 20, at 512–13.

184. Mary Ann Case, Why Not Abolish Laws of Urinary Segregation, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 211 (Harvey Molotch & Laura Noren eds., 2010).

185. See Portuondo, *supra* note 20, at 513 (“[I]f we reject the stereotype that men cannot be assaulted by men, or women by women, we quickly see that sex segregation cannot be an effective solution to a general interest in preventing sexual assault.”).

safety of all cis women and girls, logically, the most efficient solution must be policing behaviors inside facilities, rather than who is let in the door.<sup>186</sup>

## 2. Privacy

Infringement of cis women and girls' bodily privacy is the next objection to trans-inclusive facilities. Normally, the argument is talismanic. Proponents gesture toward a "right to bodily privacy" or "privacy rights" in broad, unspecific terms. Rhetorically compelling as they may be, arguments that cis women and girls "object to the privacy violations created by allowing biological males the right of entry and use of restrooms and locker rooms" do little to say what the supposed privacy violations actually consist of.<sup>187</sup>

Reading the arguments charitably suggests "privacy" could mean at least one of three things.<sup>188</sup> In a first form, the contention is that trans-inclusive facility use violates privacy because cis women and girls should have a right to choose whom to reveal their body to. By that account, trans equality threatens cis women and girls' right to "enjoy free consent regarding who can share private, sexually revealing places with them."<sup>189</sup>

On its face that is a praiseworthy idea, but the reasoning isn't quite right. Unless a facility is single use, normally, persons don't get to choose whom they share them with. By their very nature, public facilities are partly communal, and users have no control over who uses them simultaneously. Most can relate to seeing or being seen by others while inside a public bathroom—outside of a stall—even when they'd rather not. Such is the character of the space. So, the argument cannot be that the privacy violation stems from an inability to choose whom to expose oneself to, because if it is, then most public facilities would infringe cis women and girls' privacy rights.<sup>190</sup>

In a second form, the argument appears to hinge privacy violations on the presence of members of the "opposite sex."<sup>191</sup> To what end? The core concern,

186. See McNamara, Repeated Victories, *supra* note 168, at 408 (arguing that measures against those "who behave[] inappropriately" will better further the goal of safety in these facilities); Brittany, Florida Experts Debunk the Transgender "Bathroom Predator" Myth, EQUAL FLA. (Jan. 12, 2016), <https://www.eqfl.org/florida-experts-debunk-transgender-bathroom-predator-myth> [<https://perma.cc/BAH7-R3Z7>].

187. Complaint at 18, *N. Carolinians for Priv. v. U.S. Dep't of Justice*, 5:16-cv-00245-FL (E.D.N.C. filed May 10, 2016).

188. See Hazeldean, *supra* note 20, at 1746 (using six definitions of privacy to interpret the arguments).

189. Brief of Military Spouses United as Amici Curiae in Support of Petitioner at 5, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 4192153.

190. See Louise M. Antony, Back to Androgeny: What Bathrooms Can Teach Us About Equality, 9 J. CONTEMP. LEGAL ISSUES 1, 5 (1998) (arguing that sex-segregated bathrooms "cannot be meant to secure privacy for the performance of intimate bodily functions, for then the sex of the person in the next stall would be irrelevant—the crucial factor ought to be the presence or absence of other people period").

191. Brief of Military Spouses United as Amici Curiae in Support of Petitioner, *supra* note 189, at 5–6, 21; see also Burt, *supra* note 110, at 375 (defining it as the right to "not be exposed to male genitalia").



it seems, is one about sexuality.<sup>192</sup> A federal judge divulged as much when he stated that the “privacy concern . . . arise[s] from sexual responses prompted by students’ exposure to the private body parts of students of the other biological sex.”<sup>193</sup> Because of sex (understood as both sexual attraction and sexual intercourse), society has a vested interest in segregating and concealing aspects of the body from persons with different anatomy.

The flaw with that telling is exposed by its obliviousness to persons who are not heterosexual. By assuming that all individuals are sexually attracted to the types of genitals that they themselves do not possess, the reasoning overlooks the possibility that persons may sexually desire persons with the types of genitals they have themselves or may not have those desires at all.<sup>194</sup> Training our attention toward the experiences of lesbians, gay men, and bisexual persons unravels the logic. If sexual desire is what drives the privacy concern, then LGB persons’ ability to use intimate facilities without raising the same privacy concerns demonstrates that the issue is at least overblown.

In a third, rarer form, the argument is about information. Construing some actions in intimate facilities as communicative, the appeal is about cis women and girls’ ability to control what others know about them. Illustrating this line of reasoning, in *Doe v. Boyertown Area School District*, several cis students opposed sharing a restroom with a trans girl<sup>195</sup> since “even hearing urination or the female plaintiffs (or other female students) tending to menstruation issues and the sounds commonly associated with that (such as the opening of wrapping for pads and tampons)” caused privacy violations.<sup>196</sup>

There are many reasons why this version of the argument still comes up wanting.<sup>197</sup> It rests on two unwarranted assumptions: first, that persons interpret anything they hear while using public facilities; and second, that if they correctly deduce what is occurring in an adjacent stall, persons will be able to associate that information with the user. More than that, the underlying idea is illogical. Users cannot possibly have an expectation of privacy in the non-verbal information they convey, and third-parties witness normally, when they are in a public space.<sup>198</sup> Digging deeper: What, precisely, is private about

192. See David S. Cohen, Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity, 33 HARV. J.L. & GENDER 509, 530 (2010); Paisley Currah, Locker Rooms Are the New Bathrooms—Bodily Privacy and the Opposite Sex, MEDIUM (May 3, 2018), <https://medium.com/@pcurrah/locker-rooms-are-the-new-bathrooms-bodily-privacy-and-the-opposite-sex-56d40aebd870> [<https://perma.cc/3VGW-WFMU>].

193. *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 735 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part).

194. See Overall, *supra* note 182, at 80 (arguing the “sex segregation of toilets . . . assumes, falsely, both that heterosexuality is universal and that one needs to be private from members of the other sex but not those of one’s own”).

195. 276 F. Supp. 3d 324, 330 (E.D. Pa. 2017).

196. *Id.* at 403.

197. See Hazeldean, *supra* note 20, at 1766–70 (reaching the same conclusion).

198. Cf. Julie E. Cohen, Privacy, Visibility, Transparency, and Exposure, 75 U. CHI. L. REV. 181, 191 (2008) (“[N]o privacy interest attaches to most activities in public spaces and nonresidential spaces owned by third parties: persons who voluntarily enter such premises

auditory evidence of bodily functions? Homing in on the *Doe* plaintiffs' second anxiety—auditory privacy for tending to menstruation—explains. Sexist cultural attitudes stigmatize menstruation so that, instead of being seen as natural, it is viewed negatively and even transformed into a source of humiliation that must be hidden.<sup>199</sup> Alluding to menstruation, then, is meant to marshal these shared stigmatizing narratives to fill in the blanks of an otherwise deficient account of privacy violation.<sup>200</sup> Yet, in the sense that it is normal bodily activity, nothing beyond misogynistic cultural attitudes makes the awareness that a person is menstruating private information.<sup>201</sup> On all fronts, therefore, the informational privacy version of the argument still leaves much to be desired.

### B. *Athletic Activities: The “Natural Biological Advantages” Argument*

Recently, concerns about transgender persons' participation in women's athletics and sports have stolen the focus once held by the bathrooms. Accompanying the attention is legislation aimed at preventing trans youth from joining sex-segregated school sports teams corresponding to their gender. Thirty-five states have proposed such laws.<sup>202</sup> Thus far, eighteen have enacted bans.<sup>203</sup> Of those, fourteen apply to sports starting in kindergarten, with the rest combining exclusions at middle school, high school, or college levels.<sup>204</sup>

Concerns about trans inclusion in women's sports can be traced back to 1970s hostility to tennis player Renée Richards. At the time, women's tennis organizations expressed that it would be “‘damn unfair to a woman who has devoted her whole life to tennis’ to lose a spot in a draw to a man and to become involved in the ‘psychological effects’ of losing to” a trans woman.<sup>205</sup> In one of the first women's tournaments Richards entered, twenty-five of the thirty-two cis competitors withdrew, citing fairness concerns.<sup>206</sup> When

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have impliedly consented to being seen there.”).

199. Jami Anderson, *Bodily Privacy, Toilets and Sex Discrimination: The Problem of “Manhood” in a Women’s Prison*, in *LADIES AND GENTS: PUBLIC TOILETS AND GENDER* 90, 97–99 (Olga Gershenson & Barbara Penner eds., 2009) [hereinafter Anderson, *Bodily Privacy*]; Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 15–22 (2019).

200. See Portuondo, *supra* note 20, at 519–20.

201. Anderson, *Bodily Privacy*, *supra* note 199, at 99. Separately, one must wonder how underscoring the sexist view that menstruation is shameful advances cis women and girls' welfare.

202. See Reid Wilson, *Majority of States Considering Bills Limiting Transgender Access*, HILL (Mar. 3, 2021), <https://thehill.com/homenews/state-watch/541322-majority-of-states-considering-bills-limiting-transgender-access/> [<https://perma.cc/BR6V-ACGQ>].

203. LGBTQ Youth: Bans on Transgender Youth Participation, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf> [<https://perma.cc/QR2Y-CRT4>] (last updated Sept. 15, 2022).

204. *Id.*

205. Neil Amdur, *Vexed U.S.T.A. Orders Sex Test for Women*, N.Y. TIMES (Aug. 15, 1976), <https://www.nytimes.com/1976/08/15/archives/vexed-usta-orders-sex-test-for-women-results-are-shown.html> (on file with the *Columbia Law Review*).

206. Robin Herman, *‘No Exceptions,’ and No Renee Richards*, N.Y. TIMES (Aug. 27, 1976), [http://archive.nytimes.com/www.nytimes.com/pack-ages/html/sports/year\\_in\\_sports/08.27.html](http://archive.nytimes.com/www.nytimes.com/pack-ages/html/sports/year_in_sports/08.27.html) [<https://perma.cc/GNX3-NXTX>]; Johnette Howard, *Renee Richards*:

Richards challenged the United States Tennis Association's (USTA) attempt to ban her from the U.S. Open in 1977, the USTA raised parallel objections.<sup>207</sup> Despite all of the controversy, after winning entry to the Open, Renée lost in her first round.<sup>208</sup>

Identical accusations press on in recent litigation. In *Hecox v. Little*, challenging Idaho's Fairness in Women's Sports Act, the state defended its policy on the grounds that it was constitutional to exclude trans girls "due to unfair physiological advantages."<sup>209</sup> Likewise, in *Soule v. Connecticut Association of Schools, Inc.*, a challenge to Connecticut's trans-inclusive athletics policies, plaintiffs contended that trans girls' participation robbed their cis peers of "the experience of fair competition, and the opportunities for victory and the satisfaction."<sup>210</sup>

Here, inclusion is viewed as a threat to "fairness." Put too briefly, the reasoning has three steps. Its footing is the "differences" between the sexes.<sup>211</sup> From there, the next premise is that these differences cause persons assigned male at birth to possess physical prowess over persons assigned female at birth.<sup>212</sup> Justice Samuel Alito suggested as much, when he characterized the *Bostock* majority opinion as "forc[ing] young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female."<sup>213</sup> As the last step, the "physiological advantages" are said to make athletic competition "unfair."<sup>214</sup> The thinking is that cis women and girls do not have an even shot

A New York Original, ESPN (Oct. 4, 2011), [https://www.espn.com/new-york/story/\\_id/7057906/30-30-renee-richards-new-york-original](https://www.espn.com/new-york/story/_id/7057906/30-30-renee-richards-new-york-original) [<https://perma.cc/2GT9-LUG4>].

207. See *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 269 (Sup. Ct. 1977).

208. Neil Amdur, *Miss Wade Beats Dr. Richards by 6-1, 6-4*; Chris Evert Gains, N.Y. TIMES (Sept. 2, 1977), <https://www.nytimes.com/1977/09/02/archives/miss-wade-beats-dr-richards-by-61-64-chris-evert-gains-miss-wade.html> (on file with the *Columbia Law Review*).

209. Appellants' Opening Brief at 10, *Hecox v. Little*, Nos. 20-35813, 20-35815 (9th Cir. Nov. 12, 2020), 2020 WL 6833365.

210. Complaint at 22, *Soule v. Conn. Ass'n of Schs.*, No. 3:20-cv-00201-RNC (D. Conn. Feb. 12, 2020), 2020 WL 724902.

211. *E.g.*, Fairness in Women's Sports Act, Idaho Code § 33-6202(8) (2020) (citing "inherent, physiological differences between males and females").

212. Appellants' Opening Brief, *supra* note 209, at 20; Complaint, *supra* note 210, at 11; see also *The Equality Act: Hearing on H.R. 5 Before the H. Comm. on the Judiciary, 116th Cong. 48* (2019) (statement of Doriane Lambelet Coleman, Professor of Law, Duke Law School).

213. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1779-80 (2020) (Alito, J., dissenting).

214. In addition to "fairness" claims, others appeal to the removal of opportunity, issues of safety, and the deprivation of representational benefits. Both the opportunity removal and safety points fail. See *infra* section III.G; *supra* section III.A.

The representational benefits claim is the most interesting and warrants closer review. It starts with the premise that seeing cis women and girls win serves important antidiscrimination goals and diminishes negative sex-stereotypes. See Doriane Lambelet Coleman, *Sex in Sport*, 80 L. & CONTEMP. PROBS., no. 4, 2017, at 63, 96 [hereinafter Coleman, *Sex in Sport*]. Next, some argue that, conversely allowing trans women or girls to win amounts to individuals who may "look male" claiming the victory—which, they contend, would reinforce the stereotypes

at winning.<sup>215</sup> On that view, trans inclusion deprives cis women and girls of “an equal chance to be champions.”<sup>216</sup> Accordingly, categorical exclusion<sup>217</sup> is seen as the only means to ensure cis women and girls “do not become sideline spectators of their own sports.”<sup>218</sup>

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that “male bodies” are athletically superior. *Id.* at 106.

Here are three reasons for skepticism. Firstly, the argument rests on several assumptions with little by way of proof. One is that trans women are universally not—or will not be—seen as women. There is no evidence that is true. Another is that representation is only beneficial when role-model athletes share one’s exact traits. That cannot be right. Surely, persons can be inspired by an athlete, without sharing most, or any, of the traits that make the athlete successful. Finally, there is the assumption that all trans women athletes will “look like men.” Not only is that wrong as a matter of fact, but operationalizing such beliefs about what bodies look like depends on wrongful stereotyping. See *infra* Part IV.A.

Secondly, the logic of the justification is applied inconsistently. Lost in the accounting are the equally important representative benefits for trans girls and how those benefits are diminished by trans exclusion. For example, fifty years ago, a Black boxer’s victory in a segregated match did not have the same impact for the Black community as a victory in an interracial matchup—nor did it pose the same threat to stereotypes of Black inferiority undergirding white supremacist segregation. See *Boxing the Color Line*, PBS THIRTEEN, <https://www.pbs.org/wgbh/americanexperience/features/fight-black-boxers-and-idea-great-white-hope/> [<https://perma.cc/64TE-QG9Z>] (last visited Oct. 10, 2022) (noting how early Black boxing champions defeating white competitors “represented the awful possibility of [B]lack superiority”). Analogously, a trans woman athlete’s win in the women’s category undercuts the stereotypes that trans people are not their asserted sex and thereby challenges structural transphobia.

Thirdly, the conclusion that trans women should be excluded doesn’t follow. Crediting for the moment the premises that trans women athletes “look like men” or that “male” and “female” bodies might or should be sorted, excluding trans women for representational reasons is counterintuitive. Even under those premises, in competitions in which cis women surpassed their trans rivals—such as Renée Richards’s initial match—or in which trans men defeated trans women—such as a 100-yard freestyle event where swimmer Iszac Henig, a trans man, beat Lia Thomas, a trans woman—the outcomes would considerably erode the stereotype of “male body” supremacy, offering the same, if not weightier, representational benefits for cis women and girls. See *supra* notes 205–208 and accompanying text (discussing Renée Richards’s loss in the 1977 U.S. Open); see also Katie Barnes, *Lia Thomas Finishes 8<sup>th</sup> in 100-Yard Freestyle, Final Race of Collegiate Swimming Career*, ESPN (Mar. 19, 2022), [https://www.espn.com/college-sports/story/\\_/id/33550045/lia-thomas-finishes-8th-100-yard-freestyle-final-race-collegiate-swimming-career](https://www.espn.com/college-sports/story/_/id/33550045/lia-thomas-finishes-8th-100-yard-freestyle-final-race-collegiate-swimming-career) [<https://perma.cc/5UD4-K467>] (discussing outcomes of Thomas’s 100-yard freestyle event).

215. See, e.g., Declaration of Madison Kenyon in Support of Intervention at 5, *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184-DCN) (“Sex separation in sports helps ensure that . . . women like me . . . have a shot at winning.”).

216. Complaint, *supra* note 210, at 37; see also Coleman, *Sex in Sport*, *supra* note 214, at 66 (arguing trans inclusion “would mean that females were not competitive for the win”).

217. Since fourteen of the eighteen bans (77%) apply to K-12 sports, and sixteen of the eighteen apply to higher education (88%), in practice trans women and girls have essentially been excluded from women’s and girls’ sports altogether. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 203.

218. Fairness in Women’s Sports Act: Floor Debate on CS/HB 1475, Fla. H.R., at 2:05:00 (Apr. 13, 2021), <https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=7183> (on file with the *Columbia Law Review*) (statement of Rep. Kaylee Tuck introducing trans-exclusionary policy).

From this sketch, can it ever be fair for trans girls and women to participate in competitive sports against their cisgender counterparts? Absolutely.

Let's set aside the easier cases first. Exclusion ignores the fact that, prior to puberty, athletic performance is statistically indistinguishable.<sup>219</sup> Studies reviewing sex-related divergences indicate that it is only after the age of eleven to twelve that performance differentiates.<sup>220</sup> Notwithstanding that, more than 75% of states with trans sports bans have policies that prohibit transgender girls' participation from the kindergarten level upwards.<sup>221</sup> Slightly less expansive, Tennessee's ban also covers students under eleven.<sup>222</sup> As far as prepubescent transgender girls go, the arguments are overbroad for being scientifically unsupportable.<sup>223</sup>

Exclusion also overlooks trans athletes who employ hormone blockers prior to puberty. Commentators have claimed that, even with hormone blockers, trans women and girls still have an unfair advantage over their cis counterparts.<sup>224</sup> That cannot be. Again, the alleged concern is "advantage" traceable to puberty. So that class of trans athletes cannot have such an advantage, since they did not experience the effects of pubertal testosterone.<sup>225</sup> Applied to athletes on blockers, therefore, the arguments fall apart.<sup>226</sup>

219. See Scott Skinner-Thompson & Ilona M. Turner, Title IX's Protections for Transgender Student Athletes, 28 *WIS. J.L., GENDER & SOC'Y* 271, 287 (2013).

220. *E.g.*, David J. Handelsman, Sex Differences in Athletic Performance Emerge Coinciding With the Onset of Male Puberty, 87 *CLINICAL ENDOCRINOLOGY* 68, 70 (2017) (finding "the gender divergence in performance . . . aligned to the timing of the onset of male puberty, which typically has onset at around 12 years of age").

221. MOVEMENT ADVANCEMENT PROJECT, *supra* note 203.

222. See Tenn. Code Ann. § 49–6-310 (2020) (covering any "school in which any combination of grades five through eight (5–8) are taught").

223. See Doriane Coleman and Nancy Hogshead-Makar, Opinion, It's Not Wrong to Restrict Transgender Athletes. But Base It on Evidence, Ethics, *AZCENTRAL* (Mar. 18, 2020), <https://www.azcentral.com/story/opinion/op-ed/2020/03/17/ban-transgender-athletes-ok-but-base-evidence-ethics/5023130002/> [<https://perma.cc/8T4F-2L6R>] (finding Arizona's House Bill 2706 "legally and scientifically flawed" for those reasons).

224. Charlie O'Neill, Fair or Foul? PA State Reps Introduce Fairness in Women's Sports Act, *DEL. VALLEY J.* (Apr. 7, 2021), <https://delawarevalleyjournal.com/fair-or-foul-pa-state-reps-introduce-fairness-in-womens-sports-act/> [<https://perma.cc/DGV8-M9DE>].

225. Letter from Nancy Hogshead-Makar, CEO, Champion Women, and Doriane Lambelet Coleman, Professor of Law, Duke L. Sch., to Brian Wonderlich, Gen. Counsel, State of Idaho (Mar. 19, 2020) (opposing Idaho's HB 500, the "Fairness in Women's Sports Act," for those reasons) (on file with the *Columbia Law Review*).

226. See NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 7 (2011) [https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC\\_TransgenderHandbook.pdf](https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf) [<https://perma.cc/S3S4-4E99>] (stating trans girls who did "not go through a male puberty" do not "raise the same equity concerns that arise when transgender women transition after puberty"); Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule, 27 *DUKE J. GENDER L. & POL'Y* 69, 122 (2020) ("[T]ransgender women and girls should not be excluded from girls' and women's sport if they have not gone through any part of male puberty.").

The more fraught cases involve athletes who are experiencing, or who have experienced, the onset of puberty. At that juncture, the argument picks up a few more moving parts, centered around what testosterone is thought to do:<sup>227</sup> underscoring differences between testosterone levels; attributing the “average 10–12% performance gap” between cis male and female athletes to “the bimodal and non-overlapping production of testosterone”;<sup>228</sup> and asserting that the disparities in testosterone and performance carry over for trans women and girls. Together, those additions are said to mean pubertal and postpubertal trans athletes have an unfair advantage against cis women and girls that necessitates their exclusion.

That seems simple enough at first glance. On closer review, however, there are several sticking points in the reasoning. In order to see them, imagine a five-person final at a high school young women’s swim meet. Assume that all of the swimmers are seventeen years old, and that three are cis and two are trans. Here is the lineup:

Lane 1: Swimmer *A*, who is cisgender, attends a school with a two-day-a-week swim program. She frequently misses training due to her afterschool job. *A* has been swimming competitively for two years.

Lane 2: Swimmer *B*, who is cisgender, attends a school with a four-day-a-week swim program. At home, a nutritionist prepares her meals designed to support sports performance, and on the days *B* doesn’t train with the school team, she does in-pool and dry-land training with a private coach in her private pool and home gym. For the past five years *B* has attended various swim camps and training clinics, often featuring Olympic swim team coaches. Furthermore, during competitions, *B* wears a privately purchased \$500 tech suit, accepted by the High School Athletics Association, that has been shown to improve swim performance by up to 3.2%.<sup>229</sup> To top it all off, *B* has been swimming competitively for ten years.

Lane 3: Swimmer *C*, who is cisgender, stands a foot taller than the others. Due to the genetic lottery, her wingspan is unusually large (meaning her stroke reach is longer), she has a lung capacity larger than the other swimmers (meaning her lungs receive more oxygen), and her legs are longer (meaning she kicks off the wall after a lap faster).

Lane 4: Swimmer *D*, who is transgender, has been undergoing hormonal intervention for a year. Her testosterone levels are within the average range of her cis female peers, and she has started hormone therapy with estrogen.

Lane 5: Swimmer *E*, who is transgender, has had no hormonal intervention whatsoever.

Now, according to CWP claims, it is fine for swimmers *A*, *B*, or *C* to win. With “fairness” and “advantage” being the asserted concerns, it would seem that *B* or *C* taking the gold should give pause.

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227. See Sharrow, *supra* note 137, at 14 (explaining the reasoning).

228. Coleman, *Sex in Sport*, *supra* note 214, at 74.

229. See Jean-Claude Chatard & Barry Wilson, Effect of Fastskin Suits on Performance, Drag, and Energy Cost of Swimming, 40 *MED. & SCI. SPORTS & EXERCISE* 1149, 1149 (2008).

Definitionally, *B* has an “advantage” over *A*. Accepting *B*’s win means that the CWP hitch is not that any advantage is “unfair.” More to the point, *B*’s win would be considered acceptable even if her advantage over *A* was, to use Justice Alito’s words, “very significant.”<sup>230</sup> Said differently, the problem also isn’t that disproportionate advantages are unfair *per se*. Without a distinguishing factor between those tied to biology, and those associated with access to financial resources, nutrition, coaching, facilities, or opportunity, the purported concerns are underinclusive.<sup>231</sup> Oddly, the arguments don’t appear to offer any such distinction.

On the facts, *C* has an advantage over the other swimmers. Her win is acceptable too, meaning “biological advantages” are not the issue. Nothing about that is particularly surprising. What is unclear, however, is why some biological advantages are allowable and others are not. In other words, what exactly is the dividing line between the two?<sup>232</sup> Professors Veronica Ivy and Aryn Conrad aptly emphasize, “We permit tall women to compete with large competitive advantages against short women in sports that heavily select for being tall . . . . And we call such competition ‘fair’, even though height is a natural physical characteristic that can confer large competitive advantages . . . .”<sup>233</sup>

*B* and *C* have helpfully narrowed the focus. How about the trans athletes: *D*, who has undergone hormone intervention, and *E*, who has not?

Excluding *D* ignores the science on the athletic performance of trans athletes undertaking hormone therapy. Sports bans in five states cited a not-yet-peer reviewed study to support the claim that the “benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones.”<sup>234</sup> Contra that account, scientific evidence does in fact demonstrate that the physiological effects of testosterone dissipate with intrapubertal hormonal suppression and estrogen.<sup>235</sup> Quite tellingly, the study on which the aforementioned bills relied removed the

230. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1779 (2020) (Alito, J., dissenting).

231. See Veronica Ivy & Aryn Conrad, Including Trans Women Athletes in Competitive Sport: Analyzing the Science, Law, and Principles and Policies of Fairness in Competition, *PHIL. TOPICS*, Fall 2018, at 103, 138 (“Fairness cannot require the elimination of all significant competitive advantages.”).

232. Veronica Ivy, If “Ifs” and “Buts” Were Candy and Nuts: The Failure of Arguments Against Trans and Intersex Women’s Full and Equal Inclusion in Women’s Sport, 7 *FEMINIST PHIL. Q.*, no. 2, art. 3, 2021, at 1, 34 n.61 (“We already permit *huge* competitive advantages on the basis of natural physical traits as well as sociological and economic factors.”).

233. Ivy & Conrad, *supra* note 231, at 123.

234. Sharrow, *supra* note 137, at 14 (collecting bills).

235. Compare Timothy A. Roberts, Joshua Smalley & Dale Ahrendt, Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organizations and Legislators, 55 *BRITISH J. SPORTS MED.* 577, 577 (2021) (finding the athletic advantage that trans women had over persons assigned female at birth declined with feminizing therapy), with Joanna Marie Harper, Race Times for Transgender Athletes, 6 *J. SPORTING CULTURES & IDENTITIES* 1, 4 (2015) (finding that the age-graded scores for eight transgender female runners were the same before and after they transitioned).

supporting statement prior to publication.<sup>236</sup> Moreover, a categorical ban is incomplete for failing to consider how transition may actually disadvantage trans athletes. In other words, there is a real possibility that the side effects of hormonal intervention may actually impose performance disadvantages on trans athletes.<sup>237</sup> Putting these points together, we still do not have a solid case for excluding *D*.

Truthfully, swimmer *E*—who has not transitioned medically—is the person CWP arguments primarily take issue with. Taking fairness as the goal, if there was direct evidence establishing such an athlete had an unfair advantage against cis women, worries might be understandable. There isn't. The evidence is all circumstantial.<sup>238</sup> As it stands, there is no “direct physiological performance-data for transgender females,” that could support prohibiting any of them from women and girls' athletics.<sup>239</sup> Said plainly, the arguments lack direct proof of the “biological advantages” claimed to warrant keeping *E* out of the race.<sup>240</sup>

CWP arguments attempt to bridge the gap by pointing to the differences in testosterone levels between cis men and cis women. That workaround assumes, of course, that trans women like *E* are equivalent to—and therefore, interchangeable with—cis men (at least physiologically).<sup>241</sup> Grounding exclusionary policies on unproven assumptions is undoubtedly problematic. Putting that aside, the evidence on effects of testosterone is ambiguous. Most studies find it an inaccurate predictor of athletic performance.<sup>242</sup> Those that do find

236. See *Hecox v. Little*, 479 F. Supp. 3d 930, 981 (D. Idaho 2020) (“[T]he study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed.”).

237. See Coleman et al., *supra* note 226, at 97–98.

238. See Cláudio Heitor Balthazar, Marcia Carvalho Garcia & Regina Celia Spadari-Bratfisch, Salivary Concentrations of Cortisol and Testosterone and Prediction of Performance in a Professional Triathlon Competition, 15 INT'L J. BIOLOGY STRESS 495, 498–99 (2012); A.R. Hoogveen & M.L. Zonderland, Relationships Between Testosterone, Cortisol and Performance in Professional Cyclists, 17 INT'L J. SPORTS MED. 423, 423 (1996).

239. Bethany A. Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, Authors' Reply to Richardson and Chen: Comment on “Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies”, 50 SPORTS MED. 1861, 1861 (2020) (writing whether trans “athletes do have an unfair advantage” is a “question that remains unanswered”).

240. See Benjamin James Ingram & Connie Lynn Thomas, Transgender Policy in Sport, A Review of Current Policy and Commentary of the Challenges of Policy Creation, 18 CURRENT SPORTS MED. REPS. 239, 244 (2019) (noting the “noticeable paucity of medical literature establishing a scientific basis for determining advantage, or lack thereof, for transgender athletes in competitive sport”); Sarah Teetzel, On Transgendered Athletes, Fairness and Doping: An International Challenge, 9 SPORT SOC'Y 227, 233 (2006) (“[W]hether transgender[] athletes truly possess unfair advantages when they compete at the elite level of sport in their self-defined gender categories remains vastly unknown.”).

241. See Ivy & Conrad, *supra* note 231, at 117–19; see also Medley, (Mis)Interpreting Title IX, *supra* note 20, at 688 n.77 (detailing reasons why “cisgender boys are not an appropriate comparator for transgender girls”).

242. See REBECCA M. JORDAN-YOUNG & KATRINA KARKAZIS, TESTOSTERONE: AN UNAUTHORIZED BIOGRAPHY 160–63 (2019); Mindy Millard-Stafford, Ann E. Swanson &



links between testosterone and traits thought to be beneficial for sports caution that the hormone “does not necessarily translate to overall improved performance or demonstrate causation.”<sup>243</sup>

None of this is to say the asserted performance differentials between cis women and cis men do not exist. They do. Accepting *arguendo* that they apply to postpubertal trans women athletes, excluding *E* still relies on a series of unsubstantiated assumptions. First, it is wrong to assume that any physical traits are necessary or sufficient for any specific sport.<sup>244</sup> “[P]hysiology alone,” Professor Erin Buzuvis correctly reminds us, “does not predict athletic performance.”<sup>245</sup> Many other factors, including sheer skill, training, motivation, dedication, coaching, and nutrition play a part.<sup>246</sup> Second, whether physiology grants trans women any advantages will depend on the individual sport. Opposing a trans woman’s entry as a rule, because her height falls above the average or upper range of cis women’s statistics, is irrational where the sport in question is women’s chess, or women’s shooting. Third, again, physiology may be a disadvantage, like when Cecé Telfer, a trans hurdler, expressed that her height and stride length are a hindrance in women’s hurdles races.<sup>247</sup>

Bringing these factors together, at most, the arguments are only able to establish that *some* postpubertal trans women, who have not undergone medical intervention, *could* have traits that *may* or *may not* confer an advantage in *some* sports. That says nothing about *E*’s eligibility. Without assessment of individual circumstances—which the infinitesimal number of trans women athletes would make easy to operationalize<sup>248</sup>—there are still not sufficient grounds to automatically ban *E*.

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Matthew T. Wittbrodt, *Nature vs. Nurture: Have Performance Gaps Between Men and Women Reached an Asymptote?*, 13 INT’L J. SPORTS PHYSIOLOGY & PERFORMANCE 530, 533, 540 (2018); Sara Chodosh, *The Complicated Truth About Testosterone’s Effect on Athletic Performance*, POPULAR SCI. (Nov. 20, 2019), <https://www.popsci.com/story/science/testosterone-effect-athletic-performance/> [<https://perma.cc/H43V-QDMR>].

243. Medley, (Mis)Interpreting Title IX, *supra* note 20, at 687 n.72 (citing Jordan-Young & Karkazis, *supra* note 242, at 162).

244. See Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NPR (Mar. 18, 2021), <https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s> [<https://perma.cc/M3SU-N3LP>].

245. Erin E. Buzuvis, *Challenging Gender in Single-Sex Spaces: Lessons From a Feminist Softball League*, 80 LAW & CONTEMP. PROBS. 155, 164 (2018).

246. *Id.*; see also Medley, (Mis)Interpreting Title IX, *supra* note 20, at 688 n.77 (suggesting examples); Chodosh, *supra* note 242 (same).

247. Dawn Ennis, *Exclusive: NCAA Champion CeCé Telfer Says ‘I Have No Benefit’ by Being Trans*, OUTSPORTS (June 3, 2019), <https://www.outsports.com/2019/6/3/18649927/ncaa-track-champion-cece-telfer-transgender-athlete-fpu-trans-testosterone> [<https://perma.cc/VJJ7-5UPH>].

248. Rachel Tomlinson Dick, *Comment, Play Like a Girl: Bostock, Title IX’s Promise, and the Case for Transgender Inclusion in Sports*, 101 NEB. L. REV. 238, 310 (2022).

To preempt the objection that individual assessments are too cost prohibitive to implement, here are some important factors suggesting otherwise. Outside funding would help lower the costs substantially, especially since investing in assessment procedures aligns

The point can be pressed even further. Even if the underlying claim that *E* has performance advantages in swimming due to puberty is shown to be true in a particular case, it still does not make the case for excluding her. That is not as radical as it seems at first glance. Athletic governance bodies have well-known and widely accepted counterweighing practices to ensure a relatively even playing field.<sup>249</sup> Golf, for example, distributes swings among players to balance skill levels. Wrestling, likewise, balances athletes by weight. Applying such competitive redistribution to offset for whatever advantage *E* is found to have would still allow her participation, while preserving the fairness the arguments seek.

### C. *Respite and Rehabilitation: The “Trauma” Arguments*

Trans women’s inclusion in congregate living settings—namely housing for the vulnerable and housing in women’s prisons—has formed another flashpoint. In *Downtown Hope Center v. Anchorage*, a faith-based homeless shelter for women in Alaska refused shelter to a transgender woman, prompting a discrimination investigation by the Anchorage Equal Rights Commission.<sup>250</sup> Represented by an anti-LGBTQ Christian advocacy group, Alliance Defending Freedom (ADF), attorneys argued that the Equal Rights Commission sought to “force the Hope Center to . . . allow biological men into its women’s shelter.”<sup>251</sup> Descriptions of transgender women as a danger to cis women’s emotional well-being permeated the filings. The Hope Center alleged that it “only accepts biological women to protect the physical, psychological, and emotional safety of the women seeking refuge from abuse, primarily from men.”<sup>252</sup> Concurrently, the Center undertook an extensive public relations campaign, emphasizing an inverse relationship between trans inclusion and refuge for

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with various parties’ interests. Additionally, significant funding is already directed at the issue, without cis girls actually receiving any benefit. Between 2019 and 2020, a single political interest group, the American Principles Project, spent \$5.6 million in local election campaign ads almost entirely focused on trans exclusion in sports, with plans to spend up to \$6 million campaigning on the same theme during the 2022 midterms. See Madeleine Carlisle, *Inside the Right-Wing Movement to Ban Trans Youth in Sports*, TIME (May 16, 2022), <https://time.com/6176799/trans-sports-bans-conservative-movement/> [<https://perma.cc/XZN3-3KAC>]. Surely, if the concern about fairness is genuine—as opposed to merely serving as a means of galvanizing voters—diverting even a portion of that combined \$11.6 million ad spend to policies that actually protect fairness in sports is not an unreasonable ask.

249. See Andria Bianchi, *Transgender Women in Sport*, 44 J. PHIL. SPORT 229, 235–39 (2017); Joanna Harper, *Transgender Athletes and International Sports Policy*, 85 L. & CONTEMP. PROBS. 151, 165 (2022); Taryn Knox, Lynley C. Anderson & Alison Heather, *Transwomen in Elite Sport: Scientific and Ethical Considerations*, 45 J. MED. ETHICS 395, 401 (2019).

250. Complaint at 2–4, 14, *Downtown Soup Kitchen v. Mun. of Anchorage*, 406 F. Supp. 3d 776 (D. Alaska 2019) (No. 3:18-cv-00190-SLG), 2018 WL 9815914.

251. *Id.* at 4–5; see also Memorandum in Support of Plaintiff’s Motion for Preliminary Injunction at 16, *Downtown Soup Kitchen*, 406 F. Supp. 3d 776 (No. 3:18-cv-00190-SLG), 2018 WL 10799616.

252. Complaint, *supra* note 250, at 8; see also Memorandum in Support of Plaintiff’s Motion for Preliminary Injunction, *supra* note 251, at 16.

vulnerable cis women.<sup>253</sup> In other instances, ADF equated nondiscrimination to sexist violence, describing the Equal Rights Commission’s investigation as an “attack on hurting women.”<sup>254</sup>

Appeals to trauma also appear in federal lawmaking. When the Trump Administration’s HUD proposed a rule allowing shelters to restrict access to transgender persons,<sup>255</sup> hundreds of comments defended the restrictions as essential for preventing retraumatization.<sup>256</sup> In a form witness statement submitted over three hundred times, commenters relayed that trans exclusion was “critical for women seeking to heal from the trauma of sexual and physical abuse.”<sup>257</sup>

At a state level, the Maine legislature introduced the now-failed Bill 1238, which, had it passed, would offer an exemption to nondiscrimination provisions for any facility “that provides emergency shelter to women or temporary residence to women who are in reasonable fear of their safety.”<sup>258</sup> Speaking in favor of the bill, the trans-antagonistic radical feminist advocacy group Women’s Liberation Front (WoLF) suggested that trans-inclusive policies could retraumatize “the most vulnerable in society.”<sup>259</sup> Other supporters took the cue.<sup>260</sup> The most explicit witness strongly admonished that cis women

253. Homeless Shelter to Court: Stop Anchorage’s Hostility Toward Battered Women, ALL. DEFENDING FREEDOM LEGAL (Jan. 10, 2019), <https://adfmedia.org/press-release/homeless-shelter-court-stop-anchorage-hostility-toward-battered-women> [<https://perma.cc/R9CT-8GFT>].

254. Women’s Shelter to Court: End Anchorage’s Attack on Hurting Women, ALL. DEFENDING FREEDOM LEGAL (Nov. 1, 2018), <https://adfmedia.org/press-release/womens-shelter-court-end-anchorage-attack-hurting-women> [<https://perma.cc/YC6F-B2L2>].

255. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811, 44816 (proposed July 24, 2020).

256. *E.g.*, MARY BROWNLEE, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Sept. 19, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-17193> (on file with the *Columbia Law Review*) (arguing it would “compound the psychological crises of some victims”); LORIE MARTIN, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Sept. 24, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-15933> (on file with the *Columbia Law Review*) (“Real women and girls who have been traumatized are only further traumatized when men [sic] who claim to be women are given access to women’s spaces.”); JENNIFER PEPPER, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Sept. 18, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-16817> (on file with the *Columbia Law Review*) (“These are traumatizing circumstances for already vulnerable women.”).

257. WOMEN’S LIBERATION FRONT, PETITION IN RESPONSE TO PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Oct. 29, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-20366> (on file with the *Columbia Law Review*).

258. Me. Leg. 1238, 130th Leg., 1st Sess. (Me. 2021).

259. Letter from Lauren Adams, Legal Dir., Women’s Liberation Front, to Me. Comm. on Judiciary (May 20, 2021) (on file with the *Columbia Law Review*).

260. *E.g.*, Letter from Dozier Bell to Me. Comm. on Judiciary (May 1, 2021) (on file with the *Columbia Law Review*); Letter from Annie Christy to Me. Comm. on Judiciary (May 4, 2021) (on file with the *Columbia Law Review*); Letter from Jodi Mills to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*); Letter from Aura Moore to Me.

must “have access to single-sex shelters where they can heal without the added trauma of a 6-foot stranger with a deep voice and 5-o’clock-shadow in the next bed.”<sup>261</sup>

With regards to sex-segregated prisons, only about 3% of all incarcerated trans persons are housed in gender-appropriate state facilities,<sup>262</sup> and as a result, assertions of psychological threats stemming from transgender persons’ placement in women’s correctional facilities are less common. Even so, the topic has occasionally surfaced.<sup>263</sup> In 2008, Patricia Wright, a cis woman then incarcerated in the Central California Women’s Facility (CCWF) filed a grievance against the transfer of a transgender prisoner, Sherri Masbruch.<sup>264</sup> Wright alleged that Masbruch, was “just . . . a man [sic] without a penis,” since “his [sic] DNA still read [] and show[ed] him [sic] to be a male, that of which God made him [sic].”<sup>265</sup> Contending that Masbruch’s presence caused her “constant panic attacks,” Wright’s complaint resolved: “I will not be able to sleep easy until I am far away from this animal.”<sup>266</sup> Striking a similar chord, a 2019 complaint argued being housed with trans women constituted cruel and unusual punishment, since women were “forced to hear male voices in their living spaces, see men in their living spaces . . . and directly interact with a roommate who is obviously male. This retraumatizes the female born inmate and has a significant, negative impact on the mental well-being of female born inmates.”<sup>267</sup>

Across these examples, the focal point is the intangible effects of trans presences.<sup>268</sup> To be clear, the notion that exposure to trans bodies is psycho-

Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*); Letter from Jennifer White to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*); Letter from Michael Whitney to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*).

261. Letter from Jennifer Gingrich to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*).

262. Kate Sosin, *Trans, Imprisoned—and Trapped*, NBC NEWS (Feb. 26, 2020), <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436> [<https://perma.cc/978B-X4NB>].

263. See, e.g., *Complaint, Driever v. United States*, No. 1:19-cv-01807 (D.D.C. Oct. 19, 2020) (alleging that sharing cells with trans inmates “endangers the physical and mental health of the female Plaintiffs . . . and causes mental and emotional distress”); *Complaint, Guy v. Espinoza*, No. 1:19-cv-498 (E.D. Cal. Feb. 27, 2020) [hereinafter *Guy Complaint*]; *Amended Verified Complaint, Little v. United States*, No. 7:17-cv-009-O (N.D. Tex. Apr. 12, 2019); *Complaint, Marshall v. United States*, No. 18-cv-1258-RDM (D.D.C. filed May 18, 2018).

264. CDCR 602 Inmate/Parolee Appeal Form, Patricia Wright (CCWF Nov. 18, 2008).

265. *Id.* at 2.

266. *Id.* at 2, 4.

267. *Guy Complaint*, *supra* note 263, at 8.

268. Professor Dean Spade recognized years ago that, particularly in shelter and prison contexts, the trauma arguments are typically informed by a variant of the safety arguments previously addressed—that residents and prisoners who are trans are a physical threat to those who are cis women. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 809–12 (2008). For the purposes of this section’s analysis, the ancillary safety arguments have been set aside. Nonetheless, because safety issues already exist in segregated facilities,

logically harmful is not especially unique. For example, one *Harris Funeral Homes* commentator's peculiar emphasis that Aimee Stephens's "sharing a bathroom with grieving widows would cause them further discomfort," gestured in that direction.<sup>269</sup> What sets these arguments apart is the zeroing in on acutely vulnerable persons. That move has dual effects. For one, it appeals to avoiding additional harm to an already victimized group.<sup>270</sup> And, for two, it plays to the intuition that traumatized persons are inculpable for their triggers.<sup>271</sup> Read in unison, those points are meant to fend against any exceptions to trans exclusion, since any trans women's presence risks unintentionally retraumatizing the already vulnerable cis women victims.<sup>272</sup>

Certainly, the driving motivations are not unfounded. Women face appallingly high rates of victimization. In their lifetimes, 1 in 3 women will experience sexual violence, physical violence, or stalking at the hands of an intimate partner, 1 in 5 women will experience completed or attempted rape, and stalking will cause almost 1 in 6 women fear.<sup>273</sup> The #MeToo movement shed a much-needed light on the startling frequency at which women face sexual harassment and assault, verbal harassment, and unwanted touching.<sup>274</sup>

if the goal is truly to protect the vulnerable, "supervision," rather than "segregation," is the more appropriate response. *Id.* at 812.

269. Marina Medvin, *If Anyone Can Be a Woman, Then No One Is a Woman*, TOWNHALL (Sept. 3, 2019), <https://townhall.com/columnists/marinamedvin/2019/09/03/if-anyone-can-be-a-woman-then-no-one-is-a-woman-n2552516> [<https://perma.cc/HL4Z-DPFU>].

270. Brief for *Defend My Privacy et al. as Amici Curiae Supporting Respondents at 7*, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 17–1618), 2019 WL 4014068 ("Establishing safe spaces free from such [triggers] is the most urgent aspect of treating trauma survivors, because if they don't feel safe, it can significantly set back recovery.") [hereinafter DMP *Bostock* Brief].

271. CANICE LIGHTHALL, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Sept. 1, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-8622> (on file with the *Columbia Law Review*) ("Having a trauma response around a male is being rebranded as transphobia, which it is not!"); LILLIENNE RIVERA, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Sept. 24, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-15919> (on file with the *Columbia Law Review*) ("[P]eople who have endured terrorizing and even life-threatening circumstances . . . can't help what triggers/frightens them.").

272. *E.g.*, KATHLEEN HANOVER, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Sept. 28, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-17107> (on file with the *Columbia Law Review*) ("No amount of makeup or cosmetic surgery can change a larger, heavier, stronger, and faster man [sic] into someone that a female victim of violence won't perceive as a man, and find traumatizing."); BRITTANY REGULA, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Oct. 2, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-17221> (on file with the *Columbia Law Review*) ("The women who seek out these shelters are extremely vulnerable, for some just being housed with a male bodied person could be traumatic.").

273. SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE 2, 5, 8 (2018), <https://www.nsvrc.org/sites/default/files/2021-04/2015data-brief508.pdf> [<https://perma.cc/V6MG-BRH6>].

274. HOLLY KEARL, STOP STREET HARASSMENT, THE FACTS BEHIND THE #MeToo MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT (2018), <https://www>.

Also relevant, marked rates of unhoused women report abuse and trauma as the cause of their homelessness.<sup>275</sup>

These statistics are deeply troubling, as are the real-life impacts that numbers alone do not adequately capture. That being said, it is prudent to press the asserted aims behind CWP shelter and prison placement policies. Doing so reveals some inconsistent commitments and unusual line drawing that provide reasons to have misgivings.

Could the goal be to entirely prevent victims from being retraumatized? Unlikely. Given trauma's complexity, anything can be a trigger.<sup>276</sup> That includes other non-trans residents and shelter staff members.<sup>277</sup>

Perhaps some triggers are statistical outliers, while others are not? Reframed in this way, the aim could be to significantly reduce the likelihood that residents and incarcerated women will be retraumatized. Even so, that retelling still misses several common triggers.<sup>278</sup> Hence, likelihood alone cannot not suffice.

Alternatively, the tack most arguments appear to take is to hierarchize, such that the trauma resulting from sexual victimization and intimate partner violence (IPV) is distinctive. Expressed more directly: Is the goal is to prevent women with those specific traumas from being triggered? That interpretation only convinces if we assume victimization by cis men. Statistics on woman-to-woman IPV disprove that notion. Lesbians are more likely to experience IPV than their heterosexual counterparts.<sup>279</sup> They are also overrepresented in homeless and incarcerated populations.<sup>280</sup> Accommodating those victims

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nsvrc.org/sites/default/files/2021-04/full-report-2018-national-study-on-sexual-harassment-and-assault.pdf [https://perma.cc/UU77-3KMC].

275. JANEY ROUTREE, NATHAN HESS & AUSTIN LYKE, HEALTH CONDITIONS AMONG UNSHELTERED ADULTS IN THE U.S. 3 (2019), <https://www.capolicylab.org/wp-content/uploads/2019/10/Health-Conditions-Among-Unsheltered-Adults-in-the-U.S.pdf> [https://perma.cc/PMA2-8FKZ].

276. JULIE DARKE & ALLISON COPE, TRANS INCLUSION POLICY MANUAL FOR WOMEN'S ORGANIZATIONS 86 (2002), <https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566ca8ca0e4c116bdc06d599/1449961674575/2002-Trans-Inclusion-Policy-Manual-for-Womens-Organizations.pdf> [https://perma.cc/D7QF-RK68].

277. Letter from Ali Lovejoy, Vice President of Soc. Work, Preble St., to Me. Comm. on Judiciary (May 19, 2021) (on file with the *Columbia Law Review*) (giving examples).

278. DARKE & COPE, *supra* note 276, at 86.

279. See MIKEL L. WALTERS, JIERU CHEN & MATTHEW J. BREIDING, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 18 (2013); Kimberly F. Balsam, Esther D. Rothblum & Theodore P. Beauchaine, Victimization Over the Life Span: A Comparison of Lesbian, Bisexual, and Heterosexual Siblings, 73 J. CONSULTING & CLINICAL PSYCH. 477, 477 (2005) (finding higher rates of partner physical assault); Alicia K. Matthews, Jessica Tartaro & Tonda L. Hughes, A Comparative Study of Lesbian and Heterosexual Women in Committed Relationships, 7 J. LESBIAN STUD., no. 1, 2002, at 101, 103 (reviewing literature studying IPV in female same-sex couples and finding similar rates to those in heterosexual couples).

280. See EMMA STAMMEN & MAZGOL GHANDNOOSH, INCARCERATED LGBT ADULTS AND YOUTH (2022), <https://www.sentencingproject.org/app/uploads/2022/10/Incarcerated-LGBTQ-Youth-and-Adults.pdf> [https://perma.cc/9NML-PGWJ]; BIANCA D.M. WILSON, SOON

therefore presents some complications. Still, shelters would not exclude every other woman to avoid triggering the victims of same-sex IPV.<sup>281</sup> Neither would women's prisons, despite the fact that the chances of being assaulted by a cis woman inmate—and consequently being retraumatized—are significantly higher than being assaulted by a cis male guard.<sup>282</sup> That being the case, it is underinclusive to exclude trans women on the logic that victims should not be exposed to persons they view as being in the category of their victimizers.<sup>283</sup>

Where do these inconsistencies leave the argument? Much of the argument's persuasive force, gained through the focus on particularly vulnerable women, tempers meaningfully. Singling out transgender women looks unjustified insofar as one accepts exposing survivors—the many victims of same-sex violence especially—to a wide range of equally retraumatizing situations. With that as ground, it can be recognized that the probability of being retraumatized by trans persons' presence is difficult to pin down. There is no way of telling whether or how many cis women residents will be affected by sharing spaces with transgender residents. In light of this gap, the more appropriate path forward would be to make accommodations for trauma victims as the spaces already do for other triggers, rather than branding an entire class a trigger.<sup>284</sup>

#### D. *Community Building: The “Disruption” Arguments*

Questions of how trans women's attendance might affect women's colleges gained national attention in 2012, when Smith College rejected applicant Calliope Wong for being assigned male at birth.<sup>285</sup> In the years that followed,

KYU CHOI, GARY W. HARPER, MARGUERITA LIGHTFOOT, STEPHEN RUSSELL & ILLAN H. MEYER, HOMELESSNESS AMONG LGBT ADULTS IN THE US (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness> [<https://perma.cc/AYW5-EC8V>].

281. ZAYA A. GILLOGLY, BEING TRANS-INCLUSIVE AND TRAUMA-INFORMED: EXAMINING TRAUMA-INFORMED CARE PRACTICES FOR THE TRANSGENDER POPULATION IN SHELTER SETTINGS 45 (Apr. 2017) (unpublished B.A. Thesis, Ohio Univ.) (on file with the *Columbia Law Review*).

282. Lara Stemple, Andrew Flores & Ilan H. Meyer, Sexual Victimization Perpetrated by Women: Federal Data Reveal Surprising Evidence, 34 *AGGRESSION & VIOLENT BEHAV.* 302, 306 (2016).

283. See ANGELA LARSON, VIOLENCE INTERVENTION PROJECT, COMMENT ON PROPOSED HUD RULE TO MAKE ADMISSION DETERMINATIONS BASED ON SEX (Sept. 22, 2020), <https://www.regulations.gov/comment/HUD-2020-0047-20106> (on file with the *Columbia Law Review*) (pointing out that, in light of same-sex violation, trans-exclusion “does nothing to prevent traumatization”); Kae Greenberg, Still Hidden in the Closet: Trans Women and Domestic Violence, 27 *BERKELEY J. GENDER, L. & JUST.* 198, 238–39 (2012).

284. LISA MOLLET & JOHN M. OHLE, NAT'L GAY & LESBIAN TASK FORCE, TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE 37 (2003), <https://srp.org/wp-content/uploads/2012/08/TransitioningOurShelters.pdf> [<https://perma.cc/A7YB-B58J>]; TRANS PRIDE INITIATIVE, INTEGRATING TRANSWOMEN INTO WOMEN-ONLY SHELTERS FOR DOMESTIC VIOLENCE SURVIVORS, 11, <https://tpride.org/documents/transwomenDVshelters.pdf> [<https://perma.cc/767T-VY7W>] (last visited Jan. 20, 2023); Apsani, *supra* note 20, at 1710.

285. Shannon Weber, “Womanhood Does Not Reside in Documentation”: Queer and Feminist Student Activism for Transgender Women's Inclusion at Women's Colleges, 20 *J. LESBIAN STUD.* 29, 33–34 (2016).

women's colleges began adopting formal admissions policies allowing trans female applicants and, today, twenty-six of the thirty-nine Women's College Coalition (WCC) member institutions in the United States have policies allowing trans female admission.<sup>286</sup>

Not everyone has supported the trend. A vocal minority of alumnae have taken issue, framing trans women's attendance as threatening women's college's "institutional mission to empower women."<sup>287</sup> As an illustration: In an open letter to Smith College, lawyer and activist Elizabeth Hungerford argued that allowing trans women to enroll would undercut the benefits cis women receive.<sup>288</sup> Contending that admitted trans women "may retain offensive, stereotypical ideas about what 'being a woman' means," she warned that trans students would change the classroom dynamic by "talk[ing] loudly over [cis] women or *on behalf of women* while looking and sounding exactly like men."<sup>289</sup>

In this context, the move is to frame trans persons' presences as disruptive. Essentially, the claim is that transfolk may drastically alter the structure of single-sex spaces. Thus, trans inclusion conflicts with cis women's interests, since it jeopardizes women's colleges' ability to "offer[] unique opportunities for women to explore the world and expand their minds."<sup>290</sup>

These justifications are not new. Disruption concerns were used to justify racial segregation,<sup>291</sup> the exclusion of Black people, gay people, women, or transgender persons from the military,<sup>292</sup> and women's exclusion from previ-

286. Anna North, *Can Transgender Students Go to Women's Colleges? Across the Country, the Answer Is Evolving*, Vox, <https://www.vox.com/identities/2017/9/21/16315072/spelman-college-transgender-students-womens-colleges> [<https://perma.cc/G9HD-BUT8>] (last updated Sept. 22, 2017).

287. Collin Binkley, *Women's Colleges More Welcoming to Transgender Students*, AP NEWS (Sept. 5, 2017), <https://apnews.com/article/north-america-us-news-ap-top-news-ca-state-wire-pa-state-wire-334ddcd3983a4163aa5b88b71a7427f5> [<https://perma.cc/TPR5-NRAD>]; see also Monica Potts, *Why Women's Colleges Still Matter in the Age of Trans Activism*, NEW REPUBLIC (Feb. 16, 2015), <https://newrepublic.com/article/121071/women-colleges-still-matter-age-transactivism> [<https://perma.cc/UXK3-LCJU>] (suggesting trans inclusion threatens leadership development opportunities); Katherine Timpf, *Women's Colleges Left Trying to Decide What 'Women's College' Means*, NAT'L REV. (Feb. 11, 2015), <https://www.nationalreview.com/2015/02/womens-colleges-left-trying-decide-what-womens-college-means-katherine-timpf/> [<https://perma.cc/WFQ8-NBEF>] (capturing some alumnae's view that trans inclusion "taints what used to be a safe, women-only space and risks rendering it a male-dominated, patriarchal world").

288. Elizabeth Hungerford, *An Open Letter to Smith College About Transwomen*, SEX. GENDER. FEMINIST. (Dec. 15, 2014), <https://ehungerford.com/?p=65> [<https://perma.cc/6SKV-EUJ2>].

289. *Id.*

290. *Id.*

291. *Watson v. Memphis*, 373 U.S. 526, 535 (1963); *Cooper v. Aaron*, 358 U.S. 1, 16 (1958); see also *Buchanan v. Warley*, 245 U.S. 60, 70–71 (1917); T.B. Benson, *Segregation Ordinances*, 1 VA. L. REV. 330, 331 (1915); Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 LAW & HIST. REV. 491, 520–26 (2013).

292. KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, *DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 15*, 35 (June



ously all-male institutions.<sup>293</sup> The arguments were previously dismissed and for the same reasons, they should fail today.

It isn't clear that admitting trans women: (1) forces the institutions to change their goals or aims in any way; or (2) deprives cis women of any of the benefits associated with single-sex environments. To the first point, one would have to assume that acceptance of transgender women is inherently antithetical to the goal of supporting women. Simply, that isn't true.<sup>294</sup> To the contrary, women's colleges that have admitted trans women have reported that trans inclusion "fits naturally" within their missions to educate and empower women.<sup>295</sup> Evidence from educators at trans-inclusive women's institutions likewise refutes the second point. Mills College, the first women's college adopting a trans-inclusive admissions policy, confirmed, "Admitting transgender women has not significantly altered the classroom environment,"<sup>296</sup> and in fact, has enhanced it.<sup>297</sup> Based on those reports disruption concerns are, in a word, unfounded.

#### E. *Representation: The "Distorted Statistics" Argument*

WoLF can largely be credited with the body of arguments that trans inclusion infringes cis women's right to accurate information.<sup>298</sup> In multiple

5, 2019), <https://crsreports.congress.gov/product/pdf/R/R44321/15> [<https://perma.cc/29ZJ-LBZB>]; see also Michele Goodwin & Erwin Chemerinsky, *The Transgender Military Ban: Preservation of Discrimination Through Transformation*, 114 Nw. L. Rev. 751, 777 (2019).

293. *United States v. Virginia*, 518 U.S. 515, 540 (1996); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

294. Cf. Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL OF RTS. J. 595, 602–03 (2001) ("That a Catholic university employs a Jew as a law professor does not undermine the ability of the president or trustees of the university to express their views on religion, nor does it connote that the university has somehow abandoned its commitment to Catholicism.").

295. Brief for Mills College as Amici Curiae Supporting Respondents at 3, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16–273), 2017 WL 929686. For similar statements, see Admission Policy Announcement, Smith College (n.d.), <https://www.smith.edu/studygroup/faq.php> [<https://perma.cc/P27Y-UFXL>] (last visited Oct. 11, 2022); Margo Burns, *Mount Holyoke College's Official Policy on Transgender Students*, YOUTUBE (Sept. 2, 2014), <https://www.youtube.com/watch?v=R0sdw9nblKo> (on file with the *Columbia Law Review*); PRESIDENT'S LETTER TO THE COMMUNITY, SPELMAN COLLEGE (Sept. 5, 2017), <https://www.spelman.edu/about-us/office-of-the-president/letters-to-the-community/letter/2017/09/05/spelman-admissions-and-enrollment-policy-update> [<https://perma.cc/6ZS9-J26Q>]; TRANSGENDER POLICY, BARNARD (n.d.), <https://barnard.edu/admissions/transgender-policy> [<https://perma.cc/H5RE-YC7C>] (last visited Oct. 11, 2022).

296. Brief for Mills College as Amici Curiae Supporting Respondents, *supra* note 295, at 3.

297. See *id.*

298. See Brief of Amicus Curiae Women's Liberation Front in Support of Petitioner at 15, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n*, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 3987628 [hereinafter *WoLF Harris* Brief]; Brief of Amicus Curiae Women's Liberation Front in Support of Petitioners at 23, *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019) (No. 18–658), 2018 WL 6716868 [hereinafter *WoLF Boyertown* Brief]; Brief of Amici Curiae Women's Liberation Front & Family Pol'y All. in

statements, the organization has echoed the identical warning that trans inclusion will “skew” or “wreak havoc” on important statistics.<sup>299</sup>

Two specific problems are raised. One is crime data. A comment on proposed rulemaking warned recording trans women as women would render “crime statistics that are crucial in the fight to end violence against women” unusable, or worse, even “help individual violent men to evade law enforcement efforts at apprehending them.”<sup>300</sup>

Another is health care.<sup>301</sup> In a recent article, philosopher Kathleen Stock predicted “informational confusion” arising from trans-inclusive statistics.<sup>302</sup> As an example, she offered a hypothetical “campaign to reduce cervical cancer . . . focusing only on the behaviour of ‘cervix-havers,’ but not at any point conceptualising this as the behaviour of women.”<sup>303</sup> The campaign would fail, in Stock’s telling, because it would ignore “a wide range of characteristics and behaviours in virtue of . . . womanhood” that would be “useful to the health campaign.”<sup>304</sup>

The arguments on crime statistics hinge on the belief that recording transgender women as women simultaneously disallows recording sex assigned at birth. Nothing requires that. It is possible, if not exceedingly likely, that trans inclusive recording will be additive. Just as including additional racial and ethnic categories to police data recordings allowed for more accurate crime and crime victimization tracking in the past, recording gender could expand and improve tracking as well.<sup>305</sup> In fact, to the extent that those advocating CWP and trans-antagonistic positions wish to track transgender-related criminal statistics—in order to buttress their exclusionary efforts—trans-inclusive collection would offer them the very data they seek.<sup>306</sup>

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Support of Petitioner at 16, Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16–273), 2017 WL 192762 [hereinafter WoLF & FPA *Grimm* Brief]; Brief of Amicus Curiae Women’s Liberation Front in Support of Reversal on Behalf of Defendant-Appellant School Board of St. Johns County, Florida at 18, Adams v. Sch. Bd. St. Johns Cnty., 968 F.3d 1286 (11th Cir. 2020) (No. 18–13592), 2018 WL 6837415 [hereinafter WoLF *Adams* Brief].

299. See, e.g., WoLF *Boyertown* Brief, *supra* note 298, at 12 (noting examples of statistics that would be affected).

300. Letter from Women’s Liberation Front, Hands Across the Aisle Coal., Safe Spaces for Women & Just Want Priv. Campaign, to Dr. John Weisman, Sec’y of Health, Wash. State Dep’t of Health 4 (Sept. 28, 2017), [https://handsacrosstheaislenet.files.wordpress.com/2017/09/comment-on-wac-246-490-075-birth-certificates\\_final\\_9-28-17.pdf](https://handsacrosstheaislenet.files.wordpress.com/2017/09/comment-on-wac-246-490-075-birth-certificates_final_9-28-17.pdf) [<https://perma.cc/BYZ9-MQNE>].

301. See KARA DANSKY, *THE ABOLITION OF SEX* 59 (2021).

302. Kathleen Stock, The Importance of Referring to Human Sex in Language, 85 *LAW & CONTEMP. PROBS.* 25, 43–44 (2022).

303. *Id.* at 44.

304. *Id.*

305. See Andi Fugard, Should Trans People Be Postmodernist in the Streets but Positivist in the Spreadsheets? A Reply to Sullivan, 23 *INT’L J. SOC. RSCH. METHODOLOGY* 525, 529–30 (2020); Paul Knepper, Race, Racism and Crime Statistics, 25 *S.U. L. REV.* 71, 75–76 (1996).

306. So far, such advocates have only been able to rely on anecdotal evidence to support their claims. See, e.g., DANKY, *supra* note 301, at 57–60.

Trans exclusion has its own statistical costs in medical and healthcare settings. Stock's hypothetical ignores the costs a cervical cancer campaign limited to cis women would have. To wit, the campaign would exclude any persons with cervixes who are not women. It would ignore, for instance, nonbinary persons and trans men who, in Stock's words, would not conform with the "wide range of characteristics and behaviours in virtue of . . . womanhood."<sup>307</sup> Thus, if the motivation behind the *distorted statistics* argument is to collect the most accurate data possible, the argument is self-defeating; a trans-exclusionary campaign would result in less-inclusive and therefore less-valuable data.

#### F. *Voices: The "Silencing" Arguments*

Some arguments assert that transgender equality threatens cis women and girls' free speech rights. They suggest that, directly and indirectly, cis women and girls' speech on transgender issues is suppressed. Laid out in more detail, the sources of suppression arise through: (i) publication; (ii) de-platforming; (iii) court instructions; (iv) social and economic sanctions; and (v) chilling effects on speech. Each will be reviewed in turn, with related doctrinal commentary provided in footnotes.

By a first gloss, cis women face viewpoint suppression in publishing. Alluding to a "scheme[]" of censorship, Professor W. Burlette Carter took "the paucity of law review articles offering different viewpoints on transgender issues" as a strong signal that "something is awry."<sup>308</sup> Another commentator characterized unpaid student editors' 2021 decision to collectively resign from Duke Law School's *Law and Contemporary Problems*, rather than publish a trans-critical piece by philosopher Kathleen Stock, as an example of "censorship."<sup>309</sup>

A few problems arise. For a start, these portrayals overlook conflicting interests on the other side of the ledger. Cis women's speech cannot override publications' right to choose who or what they publish. Nor can it entitle them to force specific third parties to participate in that publication process; doing so would infringe the third parties' autonomy and, insofar as their refusal is expressive, their free speech is as well.<sup>310</sup> Furthermore, not having the venue of one's choice does not equate to being silenced.<sup>311</sup>

307. Stock, *supra* note 302, at 44.

308. Brief of Amicus Curiae Professor W. Burlette Carter in Support of Petitioner at 33, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 4034609.

309. Jonathan Turley, Opinion, The Rise of a Generation of Censors: Law Schools the Latest Battlement Over Free Speech, HILL (July 6, 2021), <https://thehill.com/opinion/judiciary/561632-rise-of-generation-of-censors-law-schools-latest-battlement-free-speech/> [<https://perma.cc/4GFA-TF38>].

310. Cf. Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. CHI. L. REV. 225, 237 (1992) (explaining that "[p]rivate impositions and limitations differ fundamentally from state impositions" since "they issue from the limiting person's own exercise of liberty").

311. From a First Amendment view, the Constitution "does not prohibit *private* abridgement of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557,

In a second telling, de-platforming—social media companies’ restriction of user access—is framed as a restriction on speech.<sup>312</sup> Attorney Christen Price explained that “Twitter bans women for saying that men are not women, even though men routinely use Twitter—without apparent consequence—to threaten the women for speaking out in the first place.”<sup>313</sup> Price’s sentiments are at least partly supported. Journalist Meghan Murphy sued Twitter when she was permanently banned for violating the platform’s harassment policy against misgendering.<sup>314</sup>

The forum is different, but the snags are not. This version runs into the same problems as the last. Private companies have a right to editorial control, alongside the right to refuse hosting speech they find discriminatory.<sup>315</sup> Furthermore, with thousands of substitutes, nothing prevents deplatformed users from voicing their opinions elsewhere.

A third way of thinking accuses legal institutions of subduing cis women’s voices. WoLF has raised the example of a court’s barring attorneys from misgendering trans parties as proof that trans equality “deprives women who appear before the court of the ability to speak accurately about the issues they face as a sex-class.”<sup>316</sup>

Lack of contextual awareness dooms this version of the argument. For practical reasons, judges should have the right to control speech during proceedings.<sup>317</sup> Judges also have an interest in maintaining public confidence in

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566 (1995) (explaining the constitutional free speech guarantees do not apply to private conduct). Under state actor analysis, none of the law reviews described would qualify. See *Halleck*, 139 S. Ct. at 292–29 (identifying the limited circumstances in which a private entity qualifies as a state actor). Putting the argument to rest, private editorial decisions do not skew the marketplace of ideas in the same way state action does. See *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 153 (1973) (Douglas, J., concurring) (“[F]or one publisher who may suppress a fact, there are many who will print it.”).

312. Meghan Murphy, *Twitter Wants Me to Shut Up and the Right Wants Me to Join Them; I Don’t Think I Should Have to Do Either*, *FEMINIST CURRENT* (Nov. 20, 2018), <https://www.feministcurrent.com/2018/11/20/twitter-wants-shut-right-wants-join-dont-think-either/> [<https://perma.cc/58NJ-XP3N>].

313. Price, *supra* note 174, at 1558.

314. See *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360, 364–65 (Ct. App. 2021).

315. The result is the same under the First Amendment. *Mia. Herald v. Tornillo*, 418 U.S. 241, 258 (1974) (finding that the First Amendment protects “exercise of editorial control and judgment”); *Pittsburgh Press Co. v. Pittsburg Comm’n Hum. Rels.*, 413 U.S. 376, 391 (1973) (“[W]e reaffirm unequivocally the protection afforded to editorial judgment . . . .”); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8–9, 15 (1986) (finding that the regulation of company newsletters infringed First Amendment rights in part because it forced the company to “associate with speech with which [it] may disagree”).

316. Brief of Amicus Curiae Women’s Liberation Front Supporting Plaintiff-Appellant at 6, *Meriwether v. Trs. of Shawnee State Univ.*, 992 F.3d 492 (6th Cir. 2021) (No. 20–3289), 2020 WL 3152702 [hereinafter *WoLF Meriwether Brief*].

317. Speech in court has always been necessarily, and constitutionally, limited. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”); *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005) (finding “the First Amendment rights of everyone (attorneys included) are at their constitutional nadir” in

the judiciary by disallowing discriminatory or even discourteous speech in court. Allowing cis women to misgender stands at odds with those important interests and risks giving the appearance of judicial bias.<sup>318</sup> Beyond that, WoLF disfigures the example it cites.<sup>319</sup> The referenced court narrowly prevented the verbal abuse of trans parties, which had no impact on the attorneys' arguments; characterizing the judge's civility instruction as a deprivation of "accura[cy]" is purely untrue.<sup>320</sup>

The fourth line says cis women face economic and social sanctions for advocating trans-antagonistic views.<sup>321</sup> Examples cited include cis women being terminated by private employers, facing in-person protests or heckling, or being publicly denounced or criticized for their views.<sup>322</sup>

This gun isn't smoking. At an elemental level, the very idea of speech expects response. Setting aside harassment and threats of physical violence, which are contemptible for distinct reasons, none of the proffered examples amount to silencing; rather, they are reactions that CWP advocates dislike. Insulating speakers from nonviolent reactions to their speech would itself suppress speech.<sup>323</sup> In cases of termination, private employers should be allowed to expressively disassociate with employees whose views are at odds with their principles.<sup>324</sup> In typical cases of heckling and counterprotests, third parties

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court (citation omitted)). Moreover, judges have a duty to require those before them to be dignified, respectful, and courteous during the adversary process. See JUD. CONF., CODE OF CONDUCT FOR UNITED STATES JUDGES 6 (2019), [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf) [<https://perma.cc/KNE9-3ALJ>] (Canon 3(A)(3)).

318. See McNamarah, *Misgendering*, *supra* note 24, at 2265, 2269–71, 2273–76 (explaining how misgendering contributes to the dehumanization and social subordination of gender minorities); Chan Tov McNamarah, *Some Notes on Courts and Courtesy*, 107 VA. L. REV. ONLINE 317, 333 (2021) [hereinafter McNamarah, *Courts and Courtesy*] (same).

319. See Brief for Defendants-Appellees at 63–66, *Soule v. Conn. Ass'n of Schs., Inc.*, 57 F.4th 43 (2d Cir. 2022) (No. 21–1365), 2021 WL 4888885 (explaining the facts).

320. See *Hecox v. Little*, 479 F. Supp. 3d 930, 957 & n.11 (D. Idaho 2020); Brief for Defendants-Appellees at 63–66, *Soule*, 57 F.4th 53 (No. 21–1365), 2021 WL 4888885; McNamarah, *Courts and Courtesy*, *supra* note 318, at 332–34 (countering the "accuracy" justification for misgendering litigants).

321. See, e.g., WoLF *Meriwether* Brief, *supra* note 316, at 3–4; WOMEN'S LIBERATION FRONT, PETITION FOR RULEMAKING TO PROTECT THE TITLE IX RIGHTS OF WOMEN AND GIRLS at 6 (Feb. 8, 2021), [https://static1.squarespace.com/static/5f232ea74d8342386a7ebc52/t/6022e55eae05fe1efe9187d6/1612899681917/Petition+for+Rulemaking+to+Protect+the+Title+IX+Rights+of+Women+and+Girls+\(with+Exhibits\)+2-8-21.pdf](https://static1.squarespace.com/static/5f232ea74d8342386a7ebc52/t/6022e55eae05fe1efe9187d6/1612899681917/Petition+for+Rulemaking+to+Protect+the+Title+IX+Rights+of+Women+and+Girls+(with+Exhibits)+2-8-21.pdf) [<https://perma.cc/GCB3-VJFU>].

322. For instance, ADF's general counsel, Kristen Waggoner, was protested at Yale Law School. Mark Joseph Stern, *The Truth About the Yale Law Protest that Prompted a Federal Judge to Threaten a Clerkship Blacklist*, SLATE (Mar. 18, 2022), <https://slate.com/news-and-politics/2022/03/yale-law-school-laurence-silberman-free-speech-blacklist.html> [<https://perma.cc/55HM-MQSJ>].

323. The sanctions described are analogous to boycotts of individuals, which are constitutionally protected. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908–09 (1982).

324. Under federal discrimination law, they can. See 42 U.S.C. § 2000e-2 (2018) (listing

have just as robust a right to counter-speak.<sup>325</sup> Again, setting aside threats and harassment, it cannot be said that most reactions—regardless of how unpleasant—have stifled cis women’s voices.

Related to the prior, the final iteration of the argument similarly claims that speech is chilled. By this account, cis girls and women self-censor their opinions on trans-related topics because they fear being socially ostracized or vilified. With increasing frequency, the argument is raised in discussions about sports. Representative Barbara Ditrich remarked that cis women were afraid to testify in support of Wisconsin’s sports bill, having been “shamed into silence.”<sup>326</sup> Members of the University of Pennsylvania women’s swim team shared their opposition to Lia Thomas’s inclusion anonymously, out of concern that they would be labeled “transphobic.”<sup>327</sup> And Christina Mitchell, the mother of a plaintiff in *Soule*, spoke of the chilling effect of “accus[ations] . . . of discrimination, bigotry, and human rights violations.”<sup>328</sup>

Much of this version has real persuasive force.<sup>329</sup> It is right that social dynamics do restrict the voices of women and girls through self-censorship.<sup>330</sup> For this reason, it is also right to worry about social pressure’s effects on women’s speech. It is wrong, however, to attribute the chilling effect to trans equality. That is more appropriately credited to a larger polarized atmosphere where it has become acceptable to vilify those with whose views we disagree. Consequently, the solution to the issues raised by the final argument must be to demand more civil forms of public discourse—not to oppose trans rights.

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characteristics, not including political belief, on which employers cannot base employment decisions).

325. If the public platform has been offered—that is, the actual speech has not been canceled by the hosting institution—the First Amendment requirements have been met. See Alyson R. Hamby, Note, *You Are Not Cordially Invited: How Universities Maintain First Amendment Rights and Safety in the Midst of Controversial On-Campus Speakers*, 104 CORNELL L. REV. 287, 295 (2018).

326. Letter from Barbara Ditrich, Wis. State Rep., to Wis. Assemb. Comm. on Educ. (May 26, 2021), [https://docs.legis.wisconsin.gov/misc/lc/hearing\\_testimony\\_and\\_materials/2021/ab196/ab0196\\_2021\\_05\\_26.pdf](https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2021/ab196/ab0196_2021_05_26.pdf) [<https://perma.cc/8885-698V>].

327. Patrick Reilly, *Teammates Say They Are Uncomfortable Changing in Locker Room With Trans UPenn Swimmer Lia Thomas*, N.Y. POST (Jan. 27, 2022), <https://nypost.com/2022/01/27/teammates-are-uneasy-changing-in-locker-room-with-trans-upenn-swimmer-lia-thomas/> [<https://perma.cc/QH3Z-M3WZ>].

328. Christine Stuart, *Girls Sue to Block Transgender Athletes From Competing in CT High School Sports*, CTPOST (Feb. 12, 2020), <https://www.ctpost.com/local/article/Girls-sue-to-block-transgender-athletes-from-15051468.php> [<https://perma.cc/R4CU-H8NQ>].

329. Though, it would fail under First Amendment analysis. See Thomas Healy, *Who’s Afraid of Free Speech?*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (July 14, 2017), <https://knightcolumbia.org/content/whos-afraid-free-speech> [<https://perma.cc/MUS3-6C5V>] (assessing claims of “cancellation” under First Amendment principles, and showing why, since cancelling is counterspeech, they fail).

330. Carlin Meyer, *Sex, Sin, and Women’s Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1192 (1994); see also Mary Anne Franks, *Witch Hunts: Free Speech, #MeToo, and the Fear of Women’s Words*, 2019 U. CHI. LEGAL F. 123, 133–39 (tracing laws and social norms silencing women).

G. *Advancement: The “Dilution,” “Undeserved Access,” and “Gender Fraud” Arguments*

Several arguments cluster around concerns about how transgender women’s access to scholarships, preferences, and set-asides will affect cisgender women and girls.<sup>331</sup> They are captured in the following statement made by feminist author, Meghan Murphy:

If we say that a man [sic] is a woman because of something as vague as a feeling or because he [sic] chooses to take on stereotypically feminine traits, what impact does that have on women’s rights and protections? Should he [sic] be allowed to apply for positions and grants specifically reserved for women, based on the knowledge that women are underrepresented or marginalized in male-dominated fields or programs and based on the fact that women are paid less than men and often will be fired or not hired in the first place because they get pregnant or because it is assumed they may become pregnant one day?<sup>332</sup>

Murphy’s statement folds together three innuendos. One is about *dilution*: that transgender women dilute access to resources set aside for women. Another pertains to trans women’s *deservedness*: suggesting that transgender women do not merit access to resources set aside for women. Far more subtly, the last is an anxiety about *fraud*: in the backdrop of the former two allusions, anxieties linger pertaining to worries that some cis men will falsely claim transgender status to gain access to resources that have been set aside for women.

1. Dilution

The first subargument contends that allowing trans women to access remedial resources dilutes the limited pool of resources available for cis females and, as a result, deprives them of opportunities.<sup>333</sup> Along those lines, one brief stated that “the very preferences used to . . . encourage women’s education—most importantly . . . scholarships for women—will [] . . . [now] now be reduced by the demands of any men who ‘identify’ as [women.]”<sup>334</sup> On such accounts, trans women’s access to women’s scholarships would mean “the loss of an indispensable tool in [women’s] struggle to achieve equality in education.”<sup>335</sup>

331. DANSKY, *supra* note 301, at 20.

332. Complaint at 24, *Murphy v. Twitter, Inc.*, CGC-19-573712 (Sup. Ct. Cal. filed Feb. 11, 2019) (misgendering in original).

333. Brief of Amici Curiae Women Business Owners and CEOs at 2, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n*, 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 4054889 (claiming trans access would “require [women] to, among other things, compete with biological men for limited resources earmarked for women, and . . . otherwise revers[e] measures carefully crafted to ‘level the playing field’ for women”).

334. *WoLF Adams* Brief, *supra* note 298, at 11; *WoLF Boyertown* Brief, *supra* note 298, at 15-16 (arguing trans women and girls would undercut women and girls’ access to educational resources).

335. *WoLF & FPA Grimm* Brief, *supra* note 298, at 3.

The strength of the argument lies in its simplicity. Intuitively, more persons making use of the same resources means less access for everyone.

The argument's strength is also its downfall; it oversimplifies. If the underpinning worry is about swaths of transgender women overwhelming the pool of scholarships set aside for women, then quantifying what the potential "dilution" actually looks like is important. According to the best estimates, 0.6% of the adult population in the United States, or around 1.4 million persons, is transgender.<sup>336</sup> By contrast, 50.8%, or 162.06 million persons, is assigned female at birth. That any women's scholarship applicant is substantially more likely to be cisgender than transgender indicates any potential dilution will be trivial, at best.

Nonetheless, if the contention is that any dilution is a problem, holding all else constant, then the argument makes its point. It would be remiss not to note, however, why that deliberately narrow rendering relies on a false choice.<sup>337</sup> Expanding the pool of scholarships set aside for women (cis and trans) would easily offset any "dilution," since just on the numbers, any increase is significantly more likely to benefit a cis woman than one who is trans.

## 2. Undeserved Access

The next subargument homes in on whether transgender women and girls are worthy of scholarships, preferences, and set-asides. On those accounts, collectively, these scholarships, preferences, and remedial set-asides were implemented strictly to remedy the discrimination faced by cis women and girls.<sup>338</sup> Accordingly, because they are supposedly not victims of that discrimination, transgender women are not the intended beneficiaries.

Whether the argument works requires case-by-case evaluation, turning on the purpose of the specific scholarship, preference, or set-aside. Hypothetically, at least, in instances where they are designed to combat specific elements of the discrimination faced by women, then it is conceded that some might take some issue with granting trans women access. Depending on the details, trans women may not be suitable beneficiaries for a resource specifically focused on the biological aspects<sup>339</sup> of pregnancy.<sup>340</sup> Though, they—and

336. ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N.T. BROWN, WILLIAMS INST., *HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 2 (2016). The statistics do not detail what portion are trans women and girls, so this Essay's analysis employs the entire population.

337. Once more, political groups have spent millions campaigning against trans inclusion, claiming to support cis women and girls. See *supra* note 248 and accompanying text. If the concerns are in fact genuine, contributing a portion of those funds to the pool of resources that actually benefit cis women and girls directly is not an unreasonable ask.

338. DMP *Bostock* Brief, *supra* note 270, at 21; WoLF *Harris* Brief, *supra* note 298, at 26; see also, e.g., DANSKY, *supra* note 301, at 20.

339. The term is meant as literal gestation. Such a policy may, for instance, prevent an employer from discriminating against a pregnant person for absences stemming from pregnancy-related morning sickness.

340. Even then, non-women with the capacity for pregnancy should benefit if they so desire.



all parents—would be appropriate recipients of a benefit covering pregnancy’s non-biological facets.<sup>341</sup>

By contrast, the goal of most women’s scholarships, preferences, and set-asides is not so specific.<sup>342</sup> There, the purpose of the efforts is to provide women with equal opportunities, support women’s career and educational pursuits, and promote women’s progress and visibility in society by rectifying the harms of misogyny and the devaluation of the feminine. With that in mind, it is difficult to see why trans women do not deserve access to them.

A brief thought experiment will show why. Imagine Sandra, a woman, who for the majority of her life has considered herself heterosexual. In her senior year of high school Sandra realizes she is queer. Despite this, she does not come out publicly. Does Sandra’s experience and choice not to previously come out make her undeserving of a college scholarship designed for lesbian students?

The answer is “no.”<sup>343</sup> Sandra is, after all, a lesbian. If we extend the hypothetical either backward or forward in time, the problems with denying Sandra the scholarship readily emerge. We cannot say that, because she is not openly lesbian, in the past Sandra has not experienced homophobia. To do so would be to erase any direct homophobia she has experienced, and any indirect homophobia she has experienced via the internalized emotional toll that often marks the closeted queer experience. We cannot say that, in the future, Sandra will not experience homophobia. Indeed, one day Sandra may very well face the homophobic discrimination that the scholarship is designed to remedy. Additionally, we cannot say that if she is successful in her educational pursuits, in the future, Sandra will not provide positive representation for the lesbian community—which the scholarship is designed to promote.

The logic carries over to the case of transgender women. Said plainly, transgender women do face misogyny. For trans women who pass, the misogyny is obvious: Because discriminators do not know they are trans, they

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341. For instance, preventing an employer from retaliating against an expectant parent who needs to care for a pregnant spouse or surrogate, or to attend prenatal medical appointments. See David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 *COLUM. L. REV.* 309, 327–30 (2019) (explaining the necessary non-biological care work related to pregnancy).

342. To be clear, the advancement resources do not seek only to remedy biological discrimination against women. Since many of the inequalities faced by women and girls are not based on tangible physical features, restricting the resources that way drastically weakens their remedial reach. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 *U. PA. L. REV.* 1, 36 (1995); see also Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 *PENN. L. REV. ONLINE* 1, 8–9 (2021); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1309 (1991).

343. In such an example, the purpose of the scholarship would be to provide lesbian students with equal opportunities, support lesbian students’ career and educational pursuits, and promote lesbians’ progress and visibility in society, by rectifying the harms of lesbophobic oppression. Sandra may not, however, be the appropriate candidate for a scholarship with a more specific goal, such as ones aimed at openly lesbian students.

are discriminated against as women.<sup>344</sup> Those who do not pass face a specific variant of misogyny intersecting with transphobia, but it is misogyny nonetheless.<sup>345</sup> One would not deny a scholarship preference or set-aside to a Black woman, a woman living with a disability, an old woman, or a woman in poverty, simply because the specific form of misogyny they face is intertwined with anti-Blackness, ableism, ageism, or classism, respectively. On that logic, because transgender women face misogyny, and because the purpose of these women's scholarships, preferences, and set-asides is to combat misogyny, transgender women deserve access to them.

### 3. Gender Fraud

The final subargument of the bunch is that cisgender men will misuse transgender rights for nefarious reasons.<sup>346</sup> Basically, once transgender women can access women's scholarships, preferences, and set-asides, cis men will pretend to be trans as well. On that view, some have expressed "concern[] that men will say that they are women for the purpose of helping themselves to benefits . . . intended for actual women."<sup>347</sup>

Say this for the argument: "Identity fraud" abounds. Think of the phenomenon of *reverse passing*, by which white persons present themselves as nonwhite.<sup>348</sup> In 2020 alone, it was revealed that multiple white academics and activists repositioned themselves as people of color, using their fabricated racial identities to gain access and bolster their credibility.<sup>349</sup>

So, apprehensions about identity fraud are warranted. Be that as it may, advocating trans exclusion is not the correct response. Consider a related illustration. In the shadow of the #MeToo movement's explosive revelations, many companies and employees have adopted policies or behaviors that, unwittingly, restrict women's advancement in the workplace.<sup>350</sup> Fearing false allegations or

344. Unquestionably, a passing trans woman who faces sexual harassment at work is facing those experiences as a woman. It is just as true that a passing trans woman who is denied a job because an employer believes that she is more likely than a male employee to get pregnant and leave the job faces discrimination as a woman.

345. Laura Kacere, *Transmisogyny 101: What Is It and What Can We Do About It*, BATTERED WOMEN'S SUPPORT SERVS. (Aug. 14, 2018), <https://www.bwss.org/transmisogyny-101-what-it-is-and-what-can-we-do-about-it/> [<https://perma.cc/TG77-FDGA>].

Many scenarios do not rely on passing or not. As one example, an employer determined not to have women in the workplace might reject a trans applicant because of the female-coded name on her résumé.

346. Cf. Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 895 (2020) ("The boogeyman is the worry . . . that cisgender men will assume a false trans identity to invade women's spaces.").

347. WoLF & FPA *Grimm* Brief, *supra* note 298, at 16.

348. See Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 330–39 (2017) (providing examples).

349. See Helen Lewis, *The Identity Hoaxers*, ATLANTIC (Mar. 16, 2021), <https://www.theatlantic.com/international/archive/2021/03/krug-carrillo-dolezal-social-munchausen-syndrome/618289/> [<https://perma.cc/VP6T-QSE4>].

350. Anthony Michael Kreis, *Defensive Glass Ceilings*, 88 GEO. WASH. L. REV. 147, 153 (2020).

to preempt the appearance of wrongdoing, some have adopted the Billy Graham rule—a refusal to work, interact, or socialize individually with coworkers that are women—while other men express increased reluctance to mentor female juniors.<sup>351</sup> The result is that women are deprived of opportunities, the ability to build important professional relationships, and the feeling of inclusion in the workplace. Such responses should be denounced. Obviously, they punish innocent women for men’s bad behavior. That cannot be right.

Along roughly similar lines, transgender women and girls should not have to face exclusion or additional scrutiny because of possible behavior that they did not contribute to. Put another way, it is wrong to scapegoat one group out of concern for the actual or potential actions of another. Just as it would be mistaken to impose unwarranted burdens on women for what some men did in the past, it is equally incorrect to blockade trans women for what some cis men might do in the future.

#### H. *Liberation From Patriarchal Oppression: The “Destabilization” and “Stereotype Solidification” Arguments*

During the lead up to *Harris Funeral Homes*, advocates increasingly introduced claims that trans-protective interpretations of Title VII would hamper the progress of cis women and girls. Writing that a decision in “Stephens’ favor” would be “the [worst-case scenario] from a feminist legal perspective,” Hungerford suggested doing so could position being trans “as the superior protected characteristic that can *override* the traditional meaning of sex in contexts that are harmful to women.”<sup>352</sup> Those sentiments spilled over into the *Harris Funeral Homes* briefing, where the petitioner warned that a trans-protective holding would “undermine[] critical efforts to advance women’s employment and educational opportunities.”<sup>353</sup> Returning to the opposition to the U.S. Equality Act in the months following *Harris Funeral Homes* oral arguments, recall the vocal concerns that the law prioritized trans-folk and simultaneously eliminated the rights of cis women and girls.<sup>354</sup>

Connecting those moments is the belief that trans-protective policies undercut cis women’s advancement. Here, the arguments interpret antidiscrimination protections for transgender persons as both (1) threatening to abolish protections for women, and (2) “enshrining” negative sex-stereotypes into the law.

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351. Katrin Bennhold, Another Side of #MeToo: Male Managers Fearful of Mentoring Women, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/world/europe/metoo-backlash-gender-equality-davos-men.html> (on file with the *Columbia Law Review*).

352. Elizabeth Hungerford, Sex and Gender: The Law in the USA, WOMAN’S PLACE UK (Oct. 19, 2019), <https://womansplaceuk.org/2019/10/19/sex-and-gender-the-law-in-the-usa/> [<https://perma.cc/6VJA-3C8E>].

353. Petition for a Writ of Certiorari at 14, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 18–107), 2018 WL 3572625.

354. See *supra* notes 111–114 and accompanying text.

### 1. Category Destabilization

By some accounts, trans-protective antidiscrimination policies erode the category, “woman.”<sup>355</sup> As expressed in one brief, “When the law requires that any man who wishes (for whatever reason) to be treated as a woman *is* a woman, then ‘woman’ (and ‘female’) lose all meaning.”<sup>356</sup> As the result, “women’s existence—shaped since time immemorial by their unique immutable biology—has been eliminated by Orwellian fiat.”<sup>357</sup> Other commentators flesh out the consequences of the “linguistic defanging” of woman-protective legislation in greater detail: “If a woman is merely ‘anyone who identifies as a woman,’ the term ‘woman,’ and the legislation that describes and/or protects women specifically, is completely useless, legally and culturally.”<sup>358</sup>

To ground the analysis, let us take the argument as phrased in WoLF’s *Harris* amicus brief:

Legally redefining “female” as anyone who claims to be female results in the erasure of female people as a class. If, as a matter of law, *anyone* can be a woman, then *no one* is a woman, and sex-based protections in the law have no meaning whatsoever. The ruling below effectively repeals the sex-based protections in Title VII—a ruling that Congress surely did not intend.<sup>359</sup>

There is quite a lot happening here.<sup>360</sup> Viewed in light of the facts in *Harris*, the logic runs like this:

1. Title VII covers discrimination “because of . . . sex.”
2. Ms. Stephens can recover under Title IX if, in discriminating against her as a transgender woman, the employers discriminated “because of . . . sex.”
3. For the employers to have discriminated against Ms. Stephens “because of . . . sex,” Ms. Stephens must be considered a woman.

It’s all downhill from there. Once (3) is true, according to WoLF, the following results are inevitable:

4. The group “woman” is obliterated. If trans women are considered part of the class, then the class itself ceases to exist.
5. If, in this specific instance, call it time T1, Ms. Stephens recovers under Title VII, then, at some point in the future, say time T2, courts

355. WoLF *Harris* Brief, *supra* note 298, at 9.

356. WoLF & FPA *Grimm* Brief, *supra* note 298, at 18.

357. *Id.*

358. Andrea Orwoll, Note, Pregnant “Persons”: The Linguistic Defanging of Women’s Issues and the Legal Danger of “Brain-Sex” Language, 17 NEV. L.J. 667, 696 (2017).

359. WoLF *Harris* Brief, *supra* note 298, at 1–2 (citations omitted).

360. For commentary on the confusion, see Elizabeth Hungerford, Bad Things and Very Bad Things: Feminists Working With the Religious Right, SEX MATTERS (Feb. 5, 2020), [https://sexnotgender.com/2020/02/05/bad-things-and-very-bad-things-feminists-working-with-the-religious-right/#\\_edn7](https://sexnotgender.com/2020/02/05/bad-things-and-very-bad-things-feminists-working-with-the-religious-right/#_edn7) [<https://perma.cc/5ZLJ-9SNE>] [hereinafter Hungerford, Bad Things].

will interpret *all* other woman-protective statutes designed to eliminate sex discrimination as applying to transgender persons.

6. Statutes established to improve the wellbeing of women will no longer be useful to women who are cis.

Which all leads to the conclusion:

7. *Ergo*, if, in this *specific case*, T1, Ms. Stephens recovers under Title VII, then: Not only do women *cease to exist* as a class, but in the future, T2, *all* woman-protective statutes will be extended to transgender persons and, as a result, *every* woman-protective statute will be useless to combat discrimination against cis women.

Seen schematically, the bald spots in the logic reveal themselves. Only steps (1) and (2) are actually true.

Take (3), the premise that, for Ms. Stephens to have been discriminated against “because of . . . [her] sex,” she must be considered a woman. As commentators from either side of the aisle have shown, that is not a given.<sup>361</sup> It is, in fact, possible to come to that conclusion without considering her a woman. Implicitly as well, (3) inaccurately suggests that Title VII only covers discrimination against “women.”<sup>362</sup> *Oncale v. Sundowner Offshore Services, Inc.*<sup>363</sup> and the portions of *Bostock v. Clayton County*<sup>364</sup> covering the other plaintiffs, who were not trans women, disprove that.

Take (4), the premise that, if Ms. Stephens is considered a woman, women as a class are harmed. If the reasoning sounds familiar, that’s because it is. Notice how the argument that progressive inclusion contributes to definitional instability and thereafter decline mirrors tactics used in debates over marriage equality.<sup>365</sup>

Lest we forget, recognizing same-sex relationships as equivalents to heterosexual marriages—as opposed to relegating them to nomenclatural inferiors like “civil unions” or “domestic partnerships”—“fundamentally changed the meaning of,” “cheapened,” or “threatened” the institution of (opposite-sex) marriage.<sup>366</sup> For defenders of the so-called conventional view of marriage, a

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361. See, e.g., Brief of Professors Samuel R. Bagenstos, Michael C. Dorf, Martin S. Lederman, Leah M. Litman, and Margo Schlanger as Amici Curiae in Support of Respondent Stephens at 2–3, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n*, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 2915048; Kyle Blanchette, A Dilemma for Gorsuch’s Core Reasoning in *Bostock*, *NAT’L REV.* (June 18, 2020), <https://www.nationalreview.com/2020/06/a-dilemma-for-gorsuchs-core-reasoning-in-bostock/> [<https://perma.cc/DHB8-8GKB>]; Ed Whelan, *Bostock* Majority: A ‘Trans Woman’ Is Not a Woman, *NAT’L REV.* (June 18, 2020), <https://www.nationalreview.com/bench-memos/bostock-majority-a-trans-woman-is-not-a-woman/> [<https://perma.cc/FE9M-SMPP>].

362. See Hungerford, *Bad Things*, *supra* note 360.

363. 523 U.S. 75 (1998).

364. 140 S. Ct. 1731.

365. Cf. Sherry F. Colb, *Trans Identity and Truth*, *DORF ON LAW* (May 23, 2018), <http://www.dorfonlaw.org/2018/05/trans-identity-and-truth.html> [<https://perma.cc/BX8K-5M82>] (alluding, presciently, to this point).

366. See, e.g., DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 201 (2007) (making the argument); Lynn D. Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in

definition of marriage that included same-sex couples—in their words, a “revisionist” account—rendered the institution “meaningless.”<sup>367</sup>

Significantly, the two main ideas underlying the arguments against same-sex marriage mirror the ones in the present case.<sup>368</sup> One is based on biology—that marriage was defined as being ordered by biology or, put in blunter terms, biological function (i.e., procreation and child-rearing).<sup>369</sup> The other idea is an appeal to history—that, traditionally, the term marriage applied to unions between a man and a woman.

Reasons for rejecting those arguments shed much-needed light. The logic of (4) wrongly assumes that new interpretations subsume and override old ones, rather than existing simultaneously with the old definition. History attests to the latter.<sup>370</sup> Society has developed increasingly nuanced language, without erasing what has come before. Contrary to marriage traditionalists’ predictions, marriage (understood as a union between one man and one woman) has yet to disappear; we have little reason to think women will either.

Take (5), a slippery slope in itself. (5) slopes fallaciously from T1, a *Harris Funeral Homes* holding that a single statute prohibiting discrimination “because of . . . sex” covers discrimination against a transgender woman, to T2, a point in the future where all woman-protective statutes will apply to trans women.

What warrants this prognosis? It’s hard to say. Purely as a matter of statutory interpretation, at best, premise (5) is speculative, and at worst, it is counterfactual.<sup>371</sup> While it is true that Title VII jurisprudence is used to interpret some statutes covering “sex” discrimination,<sup>372</sup> countless exceptions

Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL’Y 771, 780 (2001) (same).

367. See An Argument Against Same-Sex Marriage: An Interview With Rick Santorum, PEW RSCH. CTR. (Apr. 24, 2008), <https://www.pewresearch.org/religion/2008/04/24/an-argument-against-same-sex-marriage-an-interview-with-rick-santorum/> [<https://perma.cc/7U6C-FCFN>].

368. For an argument against marriage equality that tracks the CWP argument against trans equality almost perfectly, see Monte Neil Stewart, Jacob D. Briggs & Julie Slater, Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts, 2012 BYU L. REV. 193, 206 n.68.

369. Sherif Girgis, Robert P. George & Ryan T. Anderson, What Is Marriage?, 34 HARV. J.L. & PUB. POL’Y 245, 253–55 (2011) (emphasizing the biological function of marriage); Douglas W. Kmiec, The Procreative Argument for Proscribing Same-Sex Marriage, 32 HASTINGS CONST. L.Q. 653, 654–55 (2004) (same).

370. Additionally, traditional interpretations tend to predominate. Even after same-sex marriage was legalized, many gay men can attest that when referring to their “spouse,” strangers assume they are married to a woman.

371. See Hungerford, *Bad Things*, *supra* note 360 (commenting that the “slippery slope argument” between *Bostock* and all other statutes covering sex discrimination “forms the primary basis of Wolf’s brief, yet fails to articulate legal causation between Title VII and any/all other federal laws or protections”).

372. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (collecting cases in which the Supreme Court “looked to its Title VII interpretations of discrimination in illuminating Title IX”).

exist.<sup>373</sup> In some instances, additional statutory text would expressly instruct against extending coverage to transgender persons.<sup>374</sup> Moreover, the ruling interpreted “sex,” not the terms “women” or “females.”<sup>375</sup> Based only on the *Harris Funeral Homes* holding, it cannot be said that laws employing the latter language will apply to trans women. All told, nothing necessitates the decision to carry over to all woman-protective statutes.<sup>376</sup> In fact, sharply reversing course since the opinion was released, WoLF has admitted as much.<sup>377</sup>

Take (6), the premise that, once statutes established to combat or eliminate sex discrimination or improve the wellbeing of women apply to trans women, they will no longer be useful to cis women. The step attempts to claim too much. Even assuming, for argument’s sake, that every statute covering “sex” discrimination will be extended to trans persons, it does not follow that statutory coverage of the discrimination faced by cisgender women is diminished, much less extinguished.

Here’s why. Imagine a statute that aims to protect a class of “older persons” from discrimination, recognizing that “older persons” have been subjected to mistreatment based on stereotypes about their abilities and have been disproportionate targets of violence based on the same. Call this the Older Persons Act (OPA). Imagine, further, that “older persons” is not defined in the text, but in applying it, the Supreme Court has interpreted “older persons”—and thus the coverage of OPA—as those over the age of eighty. Now, suppose in a case examining discrimination against persons aged sixty-five and up, the Court finds they, too, qualify as “older persons.”<sup>378</sup> So the Court holds that the OPA does provide protection to everyone above the age of sixty-five. In reconsidering the definition of “older persons,” has the protection offered by OPA to persons over eighty been reduced or eliminated? It hasn’t. The only change is that the scope of the protected class is understood more broadly. The effect

373. *Bostock*, itself, acknowledged that statutes are interpreted “in accord with the ordinary public meaning of [their] terms at the time of . . . enactment.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). Whether *Bostock*’s interpretation can apply is therefore a fact-specific inquiry. See Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021) (acknowledging *Bostock* only extends “so long as the laws do not contain sufficient indications to the contrary”). But see Susannah Cohen, Note, Redefining What It Means to Discriminate Because of Sex: *Bostock*’s Equal Protection Implications, 122 COLUM. L. REV. 407, 439–43 (2022) (arguing, persuasively, that *Bostock*’s widespread extension is “highly likely”).

374. See Adam P. Romero, Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?, 10 ALA. C.R. & C.L. L. REV. 35, 91–92 (2019) (demonstrating why, despite covering discrimination based on “sex,” the Equal Pay Act does not cover sexual orientation or gender identity discrimination).

375. *Bostock*, 140 S. Ct. at 1739–41.

376. *Id.* at 1753 (noting the holding is limited to Title VII).

377. See Brief of Amicus Curiae Women’s Liberation Front in Support of Appellants and Reversal at 36–38, *Hecox v. Little*, Nos. 20–35813, 20–35815, 2023 WL 1097255 (9th Cir. Jan. 30, 2023), 2020 WL 7029422 [hereinafter WoLF *Hecox* Brief] (arguing for a limited reading of *Bostock*).

378. Assume that the legislative history of the OPA is such that, unequivocally, no one in Congress would have applied “older person” to persons under eighty.

of the statute remains the same. Understood thusly, the underlying proposition of (6) is illogical.

Putting these points together, it is impossible to reach conclusion (7), since the argument cannot take any of the steps necessary to get there.

## 2. Stereotype Solidification

The last set of CWP arguments contends that transgender persons merely adopt different sex-stereotypes without challenging or dismantling them.<sup>379</sup> On those accounts, the only “basis on which people might perceive themselves as the opposite sex . . . invariably involves malignant sex-stereotypes.”<sup>380</sup> Illustratively, WoLF’s *Harris* brief reasoned that Ms. Stephens “wanted to wear a skirt while at work, and [her] ‘gender identity’ argument is an ideology that dictates that people who wear skirts must be women, precisely the type of sex-stereotyping forbidden by *Price Waterhouse*.”<sup>381</sup> Following the thinking that trans women reinforce “essential ideas of womanhood by aiming to occupy it,”<sup>382</sup> legal protections for trans woman are thought to ultimately preserve the very sex-stereotypes that harm cis women.

The defects of this line of thinking are fivefold. It can be rejected on experiential, theoretical, doctrinal, consequential, and moral grounds.

The experiential flaw is that the argument mischaracterizes the relationship between identity and stereotypes. Trans women are not women *because* they conform to sex-stereotypes about women; they are women who—like cis women—may choose to express their womanhood in some ways we might consider stereotypical.<sup>383</sup> Even so, there’s no reason to assume that all transgender women do.<sup>384</sup> Many transfolk defy sex-stereotypes.<sup>385</sup> Butch trans women

379. WoLF *Meriwether* Brief, *supra* note 316, at 9.

380. WoLF *Boyertown* Brief, *supra* note 298, at 8 (“Gender is simply a set of sex-based stereotypes that operate to oppress female people.”); WoLF *Hecox* Brief, *supra* note 377, at 10 (“[B]eing ‘transgender’ depends on the continued existence of sex-stereotypes.”); WoLF *Meriwether* Brief, *supra* note 316, at 9.

381. WoLF *Harris* Brief, *supra* note 298, at 5.

382. Lucy Nicholas, Remembering Simone de Beauvoir’s ‘Ethics of Ambiguity’ to Challenge Contemporary Divides: Feminism Beyond Both Sex and Gender, 22 *FEMINIST THEORY* 226, 230 (2021).

383. See Sherry F. Colb, The Perceived Threat of Trans Identity, *VERDICT* (May 23, 2018), <https://verdict.justia.com/2018/05/23/the-perceived-threat-of-trans-identity> [<https://perma.cc/3ARN-AX7V>] (“[T]rans people tend to resist rather than embrace oppressive societal attempts to tell men and women what each gender ought to be, so feminists needn’t view trans women as enemies of the movement for gender freedom.”).

384. See JULIA SERANO, *EXCLUDED: MAKING FEMINIST AND QUEER MOVEMENTS MORE INCLUSIVE* 66 (2013) (“Anyone who knows multiple actual trans women knows that this monolithic image of trans women as ‘hyperfeminine’ is nothing more than a ruse . . .”).

385. See Deborah L. Davis, Are Transgender Women Just Reinforcing Sexist Stereotypes?, *PSYCH. TODAY* (Sept. 15, 2015), <https://www.psychologytoday.com/us/blog/laugh-cry-live/201509/are-transgender-women-just-reinforcing-sexist-stereotypes?page=1> [<https://perma.cc/6J3B-DN89>]; Zinnia Jones, Why Trans People’s Genders Aren’t Reinforcing Gender Stereotypes, *HUFFPOST* (June 4, 2017), [https://www.huffpost.com/entry/why-trans-peoples-genders-arent-reinforcing-gender\\_b\\_5934aa9ce4b062a6ac0ad12b](https://www.huffpost.com/entry/why-trans-peoples-genders-arent-reinforcing-gender_b_5934aa9ce4b062a6ac0ad12b)



exist, as do femme trans men.<sup>386</sup> To the extent that heterosexuality is a sex-stereotype,<sup>387</sup> the existence of trans lesbians and gay men undercuts that as well.<sup>388</sup> More fundamentally still, by their very existence, trans persons challenge the ultimate sex-stereotype: biology as destiny.

One might analogize trans persons to adoptive parents.<sup>389</sup> When someone adopts a child, even though they are not biologically a parent, they are still a parent. One might hold some negative stereotypes about parents in general—say, that they are controlling, domineering, or overprotective. One might also hold some misguided beliefs about parents that are not overtly negative but are nonetheless harmful—say, that “real parents” are biologically related to their children. No reasonable person would assume all adoptive parents solidify the first set of negative stereotypes. Conceivably, they may not align with these notions, and that they may even behave in ways that diminish them. The same logic follows for transgender women.

The theoretical flaw lies in the description of how protecting transgender women supposedly “enshrines” sex-stereotypes into the law. Normally, the phrase “enshrines into law” signifies that laws or state action rely on, reflect, or are motivated by reasoning rooted in stereotypical thinking. In doing so, the laws or state actions effectively preserve the stereotypes on which they are based. An illustration from *Orr v. Orr* will help clarify:<sup>390</sup>

- (a) Stereotype: Men’s natural role is to provide for women.
- (b) Reasoning: Based on (a), women should not be required to provide for men, but men should provide for women.
- (c) Law/Action: Statute requires divorced husbands, but not wives, to pay alimony.
- (d) Result: (c) enshrines (a).

Conversely, the relationship between trans women, stereotypes, and laws and state actions related to transgender persons is far more complex. Once again, an illustration will be useful. Consider antidiscrimination protections for trans persons, and the sex-stereotype WoLF accuses Ms. Stephens of solidifying:

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[<https://perma.cc/Q5JF-EUM8>].

386. Kaylee Jakubowski, No, The Existence of Trans People Doesn’t Validate Gender Essentialism, EVERYDAY FEMINISM (Mar. 9, 2015), [https://everydayfeminism.com/2015/03/trans-people-gender-essentialism/?mc\\_cid=7acf0211e2](https://everydayfeminism.com/2015/03/trans-people-gender-essentialism/?mc_cid=7acf0211e2) [<https://perma.cc/223L-KCX7>].

387. See Chan Tov McNamarah, Note, On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School With Title IX, 104 CORNELL L. REV. 745, 763–64 (2019).

388. E.g., Hannah Rossiter, She’s Always a Woman: Butch Lesbian Trans Women in the Lesbian Community, 20 J. LESBIAN STUD. 87, 87 (2016) (collecting accounts).

389. Sophie Grace Chappell, Transgender and Adoption: An Analogy, THINK, Autumn 2021, at 25, 25.

390. 440 U.S. 268 (1979).

- (a\*) *Stereotype*: Women wear skirts.
- (b\*) *Identity*: “[P]eople who wear skirts must be women”;<sup>391</sup> trans women are women, *because* they wear skirts.
- (c\*) *Reasoning*: Transgender persons face wrongful discrimination in employment, which they should be protected from.
- (d\*) *Law/Action*: Law protecting transgender persons against employment discrimination.
- (e\*) *Result*: (d\*) enshrines (a\*).

The steps by which laws in the final illustration enshrine sex-stereotypes are, at best, puzzling. It has been established that people are not transgender just because they conform to sex-stereotypes, so (b\*) cannot be true.<sup>392</sup> Moving on, it is hard to see how by protecting trans people, the law is preserving any sex-stereotypes at all. Law (d\*) is based on facts that transgender persons face discrimination in employment, (c\*). Simply, there is no proof that the reasoning is rooted in, reflects, or preserves the stereotype, (a\*).

By way of comparison, imagine a religious convert to Rastafarianism. Say one holds some stereotypes about Rastafarians, namely that they have loc’d hair. It would be ludicrous to accuse the hypothetical convert of solidifying that stereotype, because they decide to grow locs following their conversion. It would be just as preposterous to claim a law protecting a newly converted Rastafarian’s right to wear locs at work enshrines that stereotype. Instead, one would rightly understand the law as protecting the employee from religious (and possibly, hair) discrimination. Returning to the case of transfolk, how then can the assertion that trans rights will enshrine stereotypes be true? It isn’t.

The doctrinal flaw of the argument is that it misunderstands the rationale of the anti-stereotyping principle. Stereotypes are not per se harmful, nor is anyone’s conforming with them. Rather, the problem is stereotypes’ regulative social function. In other words, the harm occurs when persons make decisions or enact laws based on stereotypes, and depends on how those decisions or laws can limit stereotyped individuals’ personal freedom.<sup>393</sup>

Set against that background, the argument quite clearly misfires. Think of the facts in *Price Waterhouse v. Hopkins*.<sup>394</sup> Envision that in addition to Ann Hopkins, there were other female accountants who conformed to the stereotypes about women that the Price Waterhouse managers held, and that

391. WoLF *Harris* Brief, *supra* note 298, at 5.

392. See *supra* note 379 and accompanying text.

393. See Anita Bernstein, What’s Wrong With Stereotyping?, 55 ARIZ. L. REV. 655, 659 (2013) (“[S]tereotyping is wrong to the extent that it functions to deprive individuals of their freedom without good cause.”); Deborah Hellman, Two Concepts of Discrimination, 102 VA. L. REV. 895, 920 (2016) (“Where laws use gender stereotypes that confine individuals to particular gender roles, the Court rejects them.”).

394. 490 U.S. 228 (1989).

Hopkins did not conform with. In such a scenario, how culpable are those other accountants for confirming or solidifying the managers' views about women? It shouldn't matter. Criticizing them misses the point; the managers' expectation that all women conform to sex-stereotypes and how those expectations affected Hopkins was the problem. Similarly, whether transgender women and girls conform to sex-stereotypes is not the wrong at issue.

The consequential flaw of the "stereotype enshrinement" argument is what it means for cis women. Following the argument's logic, if trans women's feminine behavior reinforces sex-stereotypes, then what of cis women's?<sup>395</sup> Most would agree that it would be wrong to police a cis woman for actions that might align with stereotypical femininity. Doing so would ignore the autonomy, fulfillment, and even empowerment that she may experience. In fact, demanding that she not do so would limit her freedom in the very way wrongful stereotyping does. Neither demanding she align with nor demanding she combat the stereotypes carries us any closer to promoting her autonomy, fulfillment, or empowerment.

Finally, the moral flaw is that this line asks people to make judgments about other persons' behavior that they aren't equipped to make. We do not typically judge persons for their conformity with stereotypes, nor do we impose any onus on them to personally fight stereotypes they are subjected to.<sup>396</sup> It is unfairly presumptuous to ask any one person to do so; it should not be any individual's responsibility to subvert or dismantle stereotypes that they did not have a hand in creating.<sup>397</sup>

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395. Lori Watson, *The Woman Question*, 3 *TRANSGENDER STUD. Q.* 246, 249 (2016) ("Why should trans women, as individuals, bear a special burden in getting us closer to [the abolition of sex roles]? Most women (including radical feminist women) live a gender that is socially recognized as in the category of 'woman'; that is, they conform to certain gender stereotypes of femininity.").

396. It would be wrong to tell a Black woman not to become angry in public lest she conform with the "Angry Black Woman" stereotype. See Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 *IOWA L. REV.* 2017, 2044 (2017) (documenting the stereotype). It would be equally wrong to praise her for not conforming to the stereotype.

397. Two vignettes to bring this insight home. First, take a person of color who engages in race-play—roughly, a sexual practice centering the races of various parties, racial dynamics, and role-playing parts such as "master" and "slave." See Donovan Trott, *Race Play 101: My Introduction to the World of Racist Sex Play*, *HUFFPOST* (July 5, 2017), [https://www.huffpost.com/entry/raceplay-101-my-introduction-into-the-world-of-racist\\_b\\_595b8fb7e4b0326c0a8d130a](https://www.huffpost.com/entry/raceplay-101-my-introduction-into-the-world-of-racist_b_595b8fb7e4b0326c0a8d130a) [<https://perma.cc/K5CT-975V>] (describing this practice). Some may have reasons to find this troubling. Arguably, the role-play reanimates racial stereotypes. But on reflection, what right do others—as third parties who are not their sexual partners—have to tell that person that they should deny themselves whatever pleasure they receive from race-play, for the greater goal of combatting racial stereotypes? Second, take a gay man in a relationship, with romantic roles that are heteronormative—where one partner happily accepts the gender role of "the man" and the other "the woman." Jeanne Marecek, Stephen E. Finn & Mona Cardell, *Gender Roles in the Relationships of Lesbians and Gay Men*, 8 *J. HOMOSEXUALITY*, no. 2, 1982, at 45, 45 (describing such relationships). Again, this may initially give one pause; the dynamic furthers stereotypes about the proper role for "the man"

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Up to this point, this Essay has focused solely on the substance of CWP arguments. Viewed from that angle, most of the arguments appear to fall woefully short. Several fail outright, such as ones dealing in concerns for *safety*, *privacy*, *disruption*, *silencing*, and *distorted statistics*. The *biological advantage* argument stops short of justifying categorical exclusion. Those rooted in *trauma* make an incredibly important point; but scrutiny reveals critical inconsistencies or just a plain lack of concern for equally significant sources of trauma. There are important moral and consequential reasons to resist the *gender fraud* argument's attempts to persuade us to pin cis men's potential misbehavior on trans women. Numerous gaps in the *category destabilization* and the *stereotype solidification* arguments make them difficult to credit. Of the lot, only the *dilution* and *unwarranted access* arguments make their case and even then, with several caveats.

#### IV. INSTRUMENTALIZATION ISSUES

This Part moves beyond the confines of the logic of the arguments themselves. It provides final reasons for doubt, by examining the methods necessary to put CWP arguments into practice and probing the many problems with how they are operationalized.

##### A. *Sex Policing*

The central difficulty with seeking to exclude trans persons from women's intimate facilities based on *privacy* or *safety* arguments, or from women's shelters based on *trauma* arguments, is operationalizing such exclusion. Short of genital inspection or genetic testing, no one can tell a user's sex assigned at birth. Impracticalities have not stopped persons from trying, however. In the absence of any realistic method to determine sex assigned at birth, the result of CWP arguments about intimate facilities has been an increase in gender policing that focuses on users' appearances.<sup>398</sup> The underlying assumption, unmistakably, is that persons can tell who is or is not trans, based on their gender conformity. In other words, implementing the exclusion that CWP arguments advance requires relying on stereotypes about what "real women" look, dress, and behave like.<sup>399</sup> Quite literally, this is the injury with which the *stereotype solidification* argument claims to be concerned.

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and "the woman" in a relationship. Even so, what authority do others—as third parties, who are not within that relationship—have to tell persons not to structure their intimate lives in the way that makes them feel most comfortable?

Both illustrations point toward the same truth. The public has no right to tell the targets of stereotypes how to structure their relationships to the stereotypes imposed upon them. Respecting individual autonomy means allowing persons to choose their own methods of survival while living under the heel of stereotypes—whether by embracing, appropriating, satirizing, repudiating, or remaining agnostic toward them.

398. See Ellen D.B. Riggle, Experiences of a Gender Non-Conforming Lesbian in the "Ladies' (Rest)room", 22 J. LESBIAN STUD. 482, 483 (2018).

399. Cf. Sherrie A. Inness & Michele Lloyd, "G.I. Joes in Barbie Land":

Many cis women get caught in this dragnet.<sup>400</sup> Trans-exclusionary policies have particularly impacted those deemed insufficiently feminine.<sup>401</sup> Such cis women have been questioned, verbally assaulted, followed, and even forcibly removed from facilities, for simply failing to meet what others view as the appropriate standard of femaleness.

Here are a few examples. Aimee Toms was verbally harassed when a stranger wrongly assumed she was not cisgender because of her short haircut.<sup>402</sup> Cortney Bogorad was physically removed from a restaurant bathroom and assaulted, despite her offers to show identification.<sup>403</sup> Occasionally, cis men have even confronted cis women. Jessica Rush was followed and confronted by a man when she entered a women's restroom because she "dress [ed] like a man."<sup>404</sup>

In light of these examples, it is easy to see how gender policing in intimate facilities injures cisgender women. It may cause psychological harms related to public scrutiny, or the humiliation of being publicly questioned.<sup>405</sup> Anticipating harassment also acts as a source of anxiety.<sup>406</sup> Physical harm may result as well.<sup>407</sup> Gender policing can additionally limit cis women's freedom

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Recontextualizing Butch in Twentieth-Century Lesbian Culture, *NAT'L WOMEN'S STUD. ASS'N J.*, Autumn 1995, at 1, 19 (describing gender policing against butch lesbians in bathrooms).

400. See Charlotte Jones & Jen Slater, *The Toilet Debate: Stalling Trans Possibilities and Defending 'Women's Protected Spaces'*, 68 *SOCIO. REV. MONOGRAPHS* 834, 844 (2020); Julie Compton, *Opinion, I'm a Lesbian Targeted by the Bathroom Police*, *ADVOCATE* (July 7, 2015), <https://www.advocate.com/commentary/2015/07/07/op-ed-im-lesbian-targeted-bathroom-police> [<https://perma.cc/FZV8-VTVU>] (providing examples); Sadhbh O'Sullivan, *The Rise in Gender Policing Is Shaming Those It Claims to Protect*, *REFINERY29* (Apr. 2, 2021), <https://www.refinery29.com/en-gb/gender-policing-single-sex-spaces-uk> [<https://perma.cc/U9WX-UYNM>] (same).

401. See, e.g., DARA BLUMENTHAL, *LITTLE VAST ROOMS OF UNDOING: EXPLORING IDENTITY AND EMBODIMENT THROUGH PUBLIC TOILET SPACES* 113–14 (2014); KC Councilor, *The Specter of Trans Bodies: Public and Political Discourse About "Bathroom Bills"*, in *THE ROUTLEDGE HANDBOOK OF GENDER AND COMMUNICATION* 274, 275–81 (Marnel Niles Goins, Joan Faber McAlister & Bryant Keith Alexander eds., 2020); Sherrie A. Inness, *Flunking Basic Gender Training: Butches and Butch Style Today*, in *LOOKING QUEER: BODY IMAGE AND IDENTITY IN LESBIAN, BISEXUAL, GAY, AND TRANSGENDER COMMUNITIES* 233, 233–34 (Dawn Atkins ed., 2012).

402. Brittney McNamara, *This Woman Was Allegedly Harassed in a Restroom Because Someone Thought She Was Transgender*, *TEEN VOGUE* (May 17, 2016), <https://www.teen-vogue.com/story/woman-mistaken-transgender-bathroom-attack> (on file with the *Columbia Law Review*).

403. Kat Stafford, *Lawsuit: Fishbone's Mistakes Woman for Man, Ejects Her*, *DETROIT FREE PRESS* (June 11, 2015), <https://www.freep.com/story/news/local/michigan/detroit/2015/06/11/fishbones-lawsuit-filed/71056630/> [<https://perma.cc/JX4Q-5EHS>].

404. Eric Nicholson, *Self-Appointed Bathroom Cop Catches Dallas Woman Using Women's Restroom*, *DALL. OBSERVER* (Apr. 29, 2016), <https://www.dallasobserver.com/news/self-appointed-bathroom-cop-catches-dallas-woman-using-womens-restroom-8259104> [<https://perma.cc/ER6A-BR99>].

405. See *infra* notes 413–417.

406. Riggie, *supra* note 398, at 486–87.

407. *Id.* at 488.

through behavioral modification. Some report avoiding public restrooms, or only using them with the company of a friend who can testify to their gender, should it be challenged.<sup>408</sup> Also, there are dignitary injuries; one woman who experienced being questioned, scrutinized, and denied access to women's restrooms remarked: "[E]motionally[,] it is very damaging when someone states that you are not 'woman enough' to use a deemed 'female' area . . . ."<sup>409</sup>

In other contexts, different injuries arise. Consider the gender policing advocated to operationalize the *trauma* argument. Promoting a rule to exclude transgender women from women's shelters, the Trump-era HUD instructed facilities to assess the physical characteristics of those seeking entry.<sup>410</sup> Judging from the above examples, with that approach there are very real possibilities that vulnerable cis women will be unfairly denied entry to protective housing.<sup>411</sup> Undoubtedly, to be denied refuge when one needs it the most, simply on the basis of appearance, would be incredibly traumatizing. Somewhat ironically, the policies that are meant to protect vulnerable cis women from trauma stand to do the very opposite.

## B. *Sex Verification*

Operationalizing the *biological advantages* arguments presents comparable troubles. Implementing trans-exclusionary sports policies requires sorting athletes' bodies which, as seen before, is not an easy task. As one means of excluding trans athletes, some policies have deputized third-party citizens to challenge the sex of an athlete they suspect is transgender. Few of these policies impose any limitations, meaning any third party can challenge any athlete for any reason.<sup>412</sup> The endless possibilities for abuse are entirely foreseeable.<sup>413</sup> Worse, Idaho's law immunizes challengers, "regardless of whether the report was made in good faith or simply to harass a competitor"—only increasing the likelihood that reporting will be abused.<sup>414</sup> Since, even by itself, having one's

408. Emma Powys Maurice, Butch Lesbian Confronted 'Tens of Times' in Public Toilets as Anti-Trans Hostility Spills Over, PINKNEWS (Jan. 19, 2021), <https://www.pinknews.co.uk/2021/01/19/public-toilets-trans-bathroom-butch-lesbian-harassed-gender-critical-feminists/> [https://perma.cc/N3UP-KNX6]; Kate, Butch Please: Butch in the Bathroom, AUTOSTRADDLE (May 3, 2013), <https://www.autostraddle.com/butch-please-butch-in-the-bathroom175366/> [https://perma.cc/6TJD-NTMS].

409. HEATHER PANTER, TRANSGENDER COPS: THE INTERSECTION OF GENDER AND SEXUALITY EXPECTATIONS IN POLICE CULTURES 62 (2018).

410. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811, 44,816 (July 24, 2020).

411. WoLF acknowledged such exclusions were likely. HUD'S PROPOSED SHELTER RULE: BETTER, BUT LEAVES MANY WOMEN UNPROTECTED, WoLF (July 24, 2020), <https://womensliberationfront.org/news/huds-proposed-shelter-rule> [https://perma.cc/LL42-MYPC].

412. *Hecox v. Little*, 479 F. Supp. 3d 930, 985 (D. Idaho 2020).

413. Complaint at 22–24, *L.E. v. Lee*, No. 3:21-cv-00835 (M.D. Tenn. Nov. 4, 2021); Nico Lang, Adults in Arizona Are Trying to Stop Trans Girls From Playing School Sports, VICE (Mar. 13, 2020), <https://www.vice.com/en/article/n7jkqx/adults-in-arizona-are-trying-to-stop-trans-girls-from-playing-school-sports> [https://perma.cc/ZJD9–9KHG].

414. *Hecox*, 479 F. Supp. 3d at 944.

sex disputed is psychologically wounding, here again, the methods necessary to make trans exclusion work harm cis girls.<sup>415</sup>

The policies compel athletes, if challenged, to verify their sex assigned at birth. This process threatens harm to cisgender girl's bodily integrity. A striking number of laws require verification through medical examination of "internal and external reproductive anatomy."<sup>416</sup> In more explicit terms, verification tests include not only a blood test and chromosomal analysis, but also invasive "measuring and palpating the clitoris, vagina [,] and labia, as well as evaluating breast size and pubic hair"<sup>417</sup> as well as the use of "transvaginal pelvic ultrasound[s] (insertion and manipulation of a probe with a camera several inches into the vagina)" to examine internal reproductive organs.<sup>418</sup>

It is not hard to grasp the harm of forcing a cisgender girl who has had her sex challenged—possibly for frivolous or malicious reasons—to undergo "invasive . . . testing."<sup>419</sup> Worse, there is the possibility of inappropriate behavior by medical professionals—which the enacted laws have curiously failed to account for or guard against.<sup>420</sup> Worst of all, since the majority of the trans-exclusionary policies cover girls' sports at every grade level, there is the truly haunting prospect that a cisgender kindergartner may be forced to undergo a pelvic examination, just to play the sport she wishes to. *That* is the very antithesis of "protection."

\* \* \*

If the analyses over the course of the previous Part are sound, then there are ample reasons to worry about the methods promoted by CWP arguments. On review, sex policing is detrimental to cis women's emotional wellbeing, psychological safety, and autonomy. For its part, sex verification exposes cis girls to unwarranted scrutiny, malicious challenges, invasive testing, and potential misconduct. In either case, operationalizing CWP arguments harms the very persons they supposedly protect.

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415. Sarah Fielding, *Legislation Nationwide Seeks to Ban Trans Girls From Playing on Girls' Teams*, VERY WELL MIND (Mar. 19, 2021), <https://www.verywellmind.com/legislation-nationwide-seeks-to-ban-trans-girls-from-participating-in-sports-5116469> [<https://perma.cc/8MFF-R668>].

416. Sharrow, *supra* note 137, at 16 & n.52.

417. Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES MAG. (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> (on file with the *Columbia Law Review*).

418. Complaint at 18, *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184-CWD).

419. Brief for Nat'l Women's L. Ctr. as Amici Curiae in Support of Appellees and Affirmance at 17–18, *Hecox v. Little*, Nos. 20–35813, 20–35815, 2023 WL 1097255 (9th Cir. Jan. 30, 2023).

420. See Britni de la Cretaz, *Attacks on Transgender Athletes Are Threatening Women's Sports*, GLAMOUR (Mar. 22, 2021), <https://www.glamour.com/story/attacks-on-transgender-athletes-are-threatening-womens-sports> [<https://perma.cc/8YPX-ETMS>] (noting the potential for misconduct).

## CONCLUSION

Throughout the course of this Essay, the main objective has been to question the alleged impasse between the rights of trans persons and cis women and girls, as expressed in the line of CWP arguments. By now, two takeaways stand out.

The first is the troubling way justifications for discrimination repeat over time, even as the targeted groups change—a dynamic I have labelled *inter-group spillover*. Seen from afar, CWP arguments reanimate woman-protective rationales that lend legitimacy to the exclusion, economic decimation, and execution of racial and ethnic minorities. What's more, they revise and incorporate facets of reasoning used to oppose civil rights progress, beyond the realm of woman-protectionist logic. Misguided beliefs that inclusion causes disruption, formerly used to support segregation, find new homes in arguments for excluding trans women from women's spaces. Warnings against extending antidiscrimination protections to transfolk breathe new life into the historical and biological argument made against same-sex marriage. Similarly, in the current rendition, the fictional figure ominously lurking in showers, who we were once told was a gay man, has been recast as a trans woman—or, at the very least, a cis man pretending to be one.<sup>421</sup>

The second takeaway is that the belief that CWP arguments actually protect cis women is dubious. On their own terms, the logic of CWP arguments leaves much to be desired. Scrutinizing their substance revealed that most of the arguments miss their mark entirely, and the few that make their case do so tenuously. As applied, the methods promoted are actually detrimental to cis women's physical and psychological safety and privacy. Those outcomes become starker by recalling how CWP arguments repeat the problems of their priors: reviving oppressive stereotypes, legitimizing male violence, and underscoring traditional notions of men's roles as defenders. Taken with the rest, those shortcomings provide the final nail in the coffin: Arguably, CWP arguments stand to cost cis women and girls more than they potentially provide.

If that is true, we are left to question what purposes CWP arguments do serve. To close the Essay, I will spell out my suspicions. Return to the history outlined in the Essay's first Part. Across the contexts, whether in intention or effect, tacitly or explicitly, circuitously or directly, woman-protective reasoning and the policies it generated all too commonly served men's interests rather than women's. I suspect, based on an interrogation of CWP arguments' practical, structural, and expressive consequences, that the historical trend continues. Let us walk through the evidence, moving from concrete and immediate examples to the more abstract:

*In the public conversation involving CWP rhetoric, who are the loudest voices? And what, if any, are their reasons for engaging in CWP talking points?* The answer to the first question is religious conservatives and Republican politicians and super PACs.

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421. Spindelmann, *supra* note 2, at 164–65 (making the connection).



As for motives, at the 2017 Values Voter Summit, an annual conference for Christian conservative activist groups and politicians, speakers laid out an aggressive strategy to counteract recent LGBT gains, by “separat[ing] the T from the alphabet soup.”<sup>422</sup> Primarily, the playbook involved three tactics: (1) framing trans rights as coming “at the expense of” cis women and girls; (2) using secular-sounding arguments rather than religious ones; and (3) collaborating with anti-trans feminists.<sup>423</sup> Attendees quickly set the plan in motion. They reoriented their advocacy toward CWP-related cases, alongside platforming, partnering with, and funding WoLF’s work.<sup>424</sup>

Despite having a woman-protective face—both rhetorically and through the associations they foster—these developments do not primarily benefit cis women or girls. Seen as part of the “divide and conquer” strategy, at one level, the groups’ use of CWP arguments is intended to function as a newfound Trojan horse through which to continue advancing preexisting attacks on the LGBT community as a whole. That long game, at the very least, places cis lesbians’ rights at risk.

Recognize, also, that no form of oppression stands alone.<sup>425</sup> WoLF’s partners are not single-issue groups; for decades they have been major leaders in the fight against reproductive rights. To give just one example, as part of a strategic plan to overturn *Roe*, ADF crafted and later defended<sup>426</sup> the fifteen-week abortion ban upheld in *Dobbs v. Jackson Women’s Health Organization*.<sup>427</sup> Focusing solely on how their use of CWP arguments immediately threatens transgender persons, therefore, will not do. Indeed, “one train may hide another.”<sup>428</sup> As it turns out, ADF reuses the very same strategies, arguments, and

422. Hélène Barthélemy, Christian Right Tips to Fight Transgender Rights: Separate the T from the LGB, S. POVERTY L. CTR. (Oct. 23, 2017), <https://www.splcenter.org/hate-watch/2017/10/23/christian-right-tips-fight-transgender-rights-separate-t-lgb> [<https://perma.cc/WCF4-CGTF>] (recording the speech).

423. *Id.*; see also Peter Montgomery, Values Voter Summit Panelist: ‘Divide & Conquer’ to Defeat ‘Totalitarian’ Trans Inclusion Policies, RIGHT WING WATCH (Oct. 19, 2017), <https://www.rightwingwatch.org/post/values-voter-summit-panelist-divide-conquer-to-defeat-totalitarian-trans-inclusion-policies/> [<https://perma.cc/6ST7-P3AD>].

424. See, e.g., Heron Greenesmith, A Room of Their Own: How Anti-Trans Feminists Are Complicit in Christian Right Anti-Trans Advocacy, POL. RSCH. ASSOCS. (July 14, 2020), <https://politicalresearch.org/2020/07/14/room-their-own> [<https://perma.cc/Y5RC-96RT>] (detailing the connection); Esther Wang, The Unholy Alliance of Trans-Exclusionary Radical Feminists and the Right Wing, JEZEBEL (May 9, 2019), <https://jezebel.com/the-unholy-alliance-of-trans-exclusionary-radical-femin-1834120309> [<https://perma.cc/V39S-4XU9>] (collecting examples).

425. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

426. See Amy Littlefield, *The Christian Legal Army Behind the Ban on Abortion in Mississippi*, NATION (Nov. 30, 2021), <https://www.thenation.com/article/politics/alliance-defending-freedom-dobbs/> [<https://perma.cc/N9C3-4NAH>] (“ADF wrote the law at issue in *Dobbs v. Jackson Women’s Health Organization*.”).

427. 142 S. Ct. 2228 (2022).

428. Kenneth Koch, *One Train May Hide Another*, in *ONE TRAIN* 3 (1994).

likely the funds raised in their CWP-related work in other projects.<sup>429</sup> There is reason to believe that the groups' use of CWP arguments ultimately supports the rolling back of reproductive rights, again harming cis women and girls.

Should the prior connection between CWP arguments and the rolling back of cis women and girls' reproductive rights fail to convince, here is another. Take the example of the 2022 midterm elections. Statements across numerous internal documents reveal a coordinated plan among Republicans to divert voters' attention from *Dobbs*<sup>430</sup> through trans-antagonistic messaging.<sup>431</sup> Thus illuminated, Republicans' invariable focus on the ostensible "transgender threat" was partly a sleight of hand meant to obscure the very real threat of the party's own anti-abortion stances.<sup>432</sup> Even if we set aside the paradox of right-wing politicians spending millions on ads sounding in CWP rhetoric though hesitating to direct the equivalent to cis women and girls outright,<sup>433</sup>

429. See generally Melissa Gira Grant, *The Groups Pushing Anti-Trans Laws Want to Divide the LGBTQ Movement*, *NEW REPUBLIC* (Feb. 17, 2022), <https://newrepublic.com/article/165403/groups-pushing-anti-trans-laws-want-divide-lgbtq-movement> [<https://perma.cc/EG2E-HM8C>] ("ADF's playbook is a glossy replication of an old manual.").

430. 142 S. Ct. 2228 (2022).

431. See, e.g., HOUSE REPUBLICANS, *THE REPUBLICAN COMMITMENT TO A FUTURE THAT'S FREE* (n.d.), [http://qrcgcustomers.s3-eu-west1.amazonaws.com/account16699398/29315854\\_1.pdf?0.9994317393426588](http://qrcgcustomers.s3-eu-west1.amazonaws.com/account16699398/29315854_1.pdf?0.9994317393426588) <https://perma.cc/UME6-5EFW> (last visited Mar. 25, 2023) (advising candidates to "meet with female athletes in your community who have had to compete against biological males to hear about the unfairness of this disadvantage"); INDEPENDENT WOMEN'S VOICE 2022 FALL ISSUE ENGAGEMENT Plan, DOCUMENTED (Oct. 13, 2022), <https://documented.net/media/2022-fall-issue-engagementplan-september-update> [<https://perma.cc/A792-8Y9S>] (advising Republican candidates to "counteract . . . the emotional response [of] the Dobbs decision" by using CWP rhetoric, since it provides inroads to "moderate women, independents, and increase[d] leads with Hispanics" and "creates an important . . . opportunity to redefine the narrative about who exactly is waging a war on women"); MICHIGAN FAMILIES UNITED PAC, MEMO RE: IMPACTING THE ISSUE ENVIRONMENT 2–3 (n.d.) (on file with the *Columbia Law Review*) (advising that CWP sports arguments are "the biggest and best message by intensity" in the Michigan Governor's race); *New APP Poll: Swing State Voters Strongly Oppose Transgender Agenda*, AM. PRINCIPLES PROJECT (May 12, 2022), <https://americanprinciplesproject.org/media/new-app-poll-swing-state-voters-stronglyoppose-transgender-agenda/> [<https://perma.cc/Q2YQ-8PQH>] (instructing Republicans of the "massive opportunity" to gain voter support, given "majorities of voters support defending women's sports"); cf. MEMORANDUM FROM KACONSULTING, THE TARRANCE GRP. & THE REPUBLICAN NAT'L COMM. TO INTERESTED PARTIES 3 (Sept. 13, 2022), [https://prodstatic.gop.com/media/documents/RNC\\_Data\\_Issue\\_Memo\\_1663072983.pdf](https://prodstatic.gop.com/media/documents/RNC_Data_Issue_Memo_1663072983.pdf) [<https://perma.cc/HUG6-PQFK>] (suggesting messaging defending against abortion fallout, including urging talking points on "keeping our daughters, sisters, and mother safe" and that "Democrats[ ] failed policies disproportionately effect [sic] women").

432. See Jarrell Dillard, Kelsey Butler & Ella Ceron, *GOP Looks to Fire Up Base With Attacks on Transgender Rights*, *BLOOMBERG* (Oct. 10, 2022), <https://www.bloomberg.com/news/articles/2022-10-10/gop-looks-to-fire-up-base-with-attacks-on-transgender-rights> [<https://perma.cc/5885-6QD8>] (detailing Republicans' "legislative and messaging barrage").

433. See PRESS RELEASE, HRC STAFF, IN FINAL WEEKS OF ELECTION, EXTREMIST CANDIDATES, ANTI-LGBTQ+ ORGS FUNNEL TENS OF MILLIONS OF DOLLARS IN ADS ATTACKING TRANS YOUTH, TARGETING BLACK AND SPANISH-SPEAKING VOTERS (Oct. 28, 2022), <https://www.hrc.org/press-releases/>

indirectly, the rhetoric benefits efforts to limit cis women and girls' bodily autonomy through obfuscation.

*Whose interests are protected by arguments for exclusion of trans women and trans girls from public restrooms, locker rooms, and showers?* Take rationalizing broad bathroom exclusions with fears that cis men will pretend to be trans. Who does this serve? Scapegoating innocent trans women for cis men's past or hypothetical bad behavior falls precisely within patriarchy's modus operandi: forcing women to shoulder the burden for actions that are not their own, and that they should not have to bear.

*Whose interests are protected when the exclusion of trans women and trans girls is carried out?* Policing women's spaces to exclude trans women based on visual appraisals inevitably relies on ideas about what "real women" look like. This does patriarchal oppression's work for it. For one thing, it continues the disproportionate dissecting of women's appearances. For another, it threatens cis women deemed "insufficiently feminine"—overwhelmingly sexual and racial minorities—with assault and harassment, forcing them in line in order to avoid unwarranted harm. All the while, cis male bodies remain unfettered.

*Whose interests are protected by the idea that sex verification is necessary to "save" girls' sports and by being told that cis girls are "inherently" athletically inferior?* Starting with sex verification, the express effect is to add another barrier to cis girls' participation in sports—being subjected to invasive medical testing and examination of their reproductive organs. Not surprisingly, the result will be to disincentivize cis girls' participation. Conversely, cis boys face no such hurdle. Against the backdrop of a society that already positions sports as "male" and strongly encourages boys to pursue them, the practical effects of additional obstacles are to reserve the benefits of participation in sports to cis boys.

Now, turn to stereotypes about cis girls' athletic inferiority. As they do in other male-dominated fields, negative stereotypes about women rationalize women's exclusion and naturalize male control. Tropes about women's athletic inferiority underlying sex segregation in sport both normalize male physical dominance and support the social hierarchy that treats men's sports as more legitimate and worthy of support, visibility, and resources.

*Closely linked, we might ask whose interests have been served by the consequences of exclusionary sports policies themselves?* Some policies will remove cis girls' ability to participate in their desired sport completely. Michigan High School Athletic Association's policy allows cis girls to participate in football, wrestling, golf, tennis, and swimming.<sup>434</sup> If pending Michigan

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breaking-in-final-weeks-of-election-extremist-candidates-anti-lgbtq-orgs-funnel-tens-of-millions-of-dollars-in-ads-attacking-trans-youth-targeting-black-and-spanish-speaking-voters [https://perma.cc/TFR6-NCNN] (reporting candidates or PACs spent \$50 million on ads "attacking LGBTQ+ people—and especially transgender youth—in the 2022 midterm elections").

434. Brad Emons, Michigan Senate Bill Targeting Transgender High School Athletes

Senate Bill 218 passes, those days are gone. In other instances, cis girls will have their wins challenged—their efforts undercut—not by trans rivals, but by false accusations from third parties. In Utah, the High School Activities Association legislative representative detailed one such investigation, after a cis athlete won first place “by a wide margin.”<sup>435</sup> He also admitted to frequent complaints “when an athlete doesn’t look feminine enough.”<sup>436</sup> Effectively, the exclusionary tactics send a message to cis girls about how well they should perform or that they must balance athleticism alongside “appropriately” feminine presentation.

*What is protected by the notion that cis women and girls must be safeguarded from trans women?* The answer is likely cis men’s psychological investments in their roles as women’s defenders. Realistically, CWP arguments mobilize and encourage patriarchal protective paternalism. The reason why is simple. If cis women’s safety, privacy, or advancement is in need of protection, someone must do the protecting. Social science confirms the inkling. In a 2016 review of user comments on almost 200 articles on trans bathroom use, 72% of all negative comments were authored by men, and the study found that “cisgender males are more likely to be concerned with safety . . . surrounding transgender females in female bathrooms than cisgender females.”<sup>437</sup> The likely cause: according to the researchers, cis men’s view of their role as “protector[s].”<sup>438</sup>

This is not desirable. The price of masculinist protection is, and has always been, the control and subordination of the “protected.”<sup>439</sup> Thus, the flip side to Justice Joseph P. Bradley’s statement that “[m]an is, or should be, woman’s protector and defender,” is captured in the sentence that immediately follows: “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>440</sup>

*Whose interests are protected by enacting sharp boundaries around who is, and who is not, considered a “real” woman or girl?* Historical examples lead one to think that the answer is men’s. For centuries, American constructions of womanhood were restricted to women who were white.<sup>441</sup> During

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Threatens Girls, DETROIT FREE PRESS (Aug. 17, 2021), <https://www.freep.com/story/sports/high-school/2021/08/17/michigan-high-school-transgender-athlete-bill-laura-theis-jeff-irwin/8126319002/> [<https://perma.cc/H4DP-WKN7>].

435. Courtney Tanner, Utah Parents Complained a High School Athlete Might Be Transgender After She Beat Their Daughters, SALT LAKE TRIB. (Aug. 18, 2022), <https://www.sltrib.com/news/education/2022/08/18/utah-parents-complained-high/> [<https://perma.cc/2P2Z-VHAH>].

436. *Id.*

437. Rebecca J. Stones, Which Gender Is More Concerned About Transgender Women in Female Bathrooms?, 34 GENDER ISSUES 275, 281 (2017).

438. *Id.* at 282.

439. See Iris Marion Young, The Logic of Masculinist Protection: Reflections on the Current Security State, 29 SIGNS 1, 4 (2003) (“Central to the logic of masculinist protection is the subordinate relation of those in the protected position.”).

440. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

441. See Kathy Deliovsky, Normative White Femininity: Race, Gender and the Politics

chattel slavery, deemphasizing and denying Black women's femininity played a necessary role in the exploitation of enslaved labor. Since Victorian attitudes surrounding womanhood would have prevented the subjugation and abuse of enslaved women, Black women were recast as unfeminine or unsexed.<sup>442</sup> Motherhood, for example—traditionally considered the apex of womanhood—was rebranded and redefined as “breeding for profit” in the context of Black women.<sup>443</sup> Only then were enslavers able to rationalize inhumane practices that would be unimaginable had the mothers been white.<sup>444</sup> From that view, the restrictive definitions of womanhood protected white men's property interests in Black enslavement generally, and enslaved Black women's reproductive capacities in particular. For other non-white women, defining them as outside of womanhood allowed white men unfettered sexual entitlement. Native women, for instance, were excluded from womanhood by being branded “savage [s],”<sup>445</sup> papering over manifest sexual violence against them, both as just another acceptable facet of Western expansion and colonial conquest,<sup>446</sup> and for decades thereafter.<sup>447</sup>

Newer examples find the same result. Decades ago, similar restrictive borders supported lesbians' exclusion from the burgeoning women's rights movement.<sup>448</sup> The beliefs were largely organized around the idea that womanhood was defined by both desiring sexual intimacy with, and being sexually

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of Beauty, 33 ATLANTIS, no. 1, 2008, at 49, 57 (observing that, traditionally and still in many ways today, white women serve as the “benchmark” of femininity).

442. ANDREA ELIZABETH SHAW, THE EMBODIMENT OF DISOBEDIENCE: FAT BLACK WOMEN'S UNRULY POLITICAL BODIES 23 (2006) (observing that the presentation of the enslaved as “defeminized” provided a “‘moral’ rationale for those engaged in the dehumanization of [B] lack women in its myriad forms”).

443. See hooks, *supra* note 76, at 39 (1981) (“Breeding was another socially legitimized method of sexually exploiting Black women.”); Debbie Clare Olson, Motherhood, *in* WRITING AFRICAN AMERICAN WOMEN 645, 647 (Elizabeth Ann Beaulieu ed., 2006).

444. See Olson, *supra* note 443, at 46.

445. See Bethany Ruth Berger, After Pocahontas: Indian Woman and the Law, 1830 to 1934, 21 AM. INDIAN L. REV. 1, 10 (1997).

446. See ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 10 (2005); see also Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 68 n.86 (2002) (“European beliefs of white superiority and the lack of legal repercussions made Indian women easy targets for sexual attack.”); Berger, *supra* note 445, at 9–10 (“Indian women provided a convenient contrast with the demure ‘true’ woman.”); Rebecca Tsosie, Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination, 15 UCLA J. INT'L L. & FOREIGN AFF. 187, 204 (2010) (noting that writing Native women's placement outside the ideal of “womanhood” served to “label them as a savage and uncivilized race”).

447. See Sarah Deer, Toward an Indigenous Jurisprudence of Rape, 14 KAN. J.L. & PUB. POL'Y 121, 125 (2004); Hossein Dabiri, Comment, Kiss the Ring, but Never Touch the Crown: How U.S. Policy Denies Indian Women Bodily Autonomy and the Save Native Women Act's Attempt to Reverse that Policy, 36 AM. INDIAN L. REV. 385, 394 (2011).

448. Cristan Williams, Repeating the Cycle at MichFest: The Clash of Two Feminisms, TRANSADVOCATE, [https://www.transadvocate.com/repeating-the-cycle-at-michfest-the-clash-of-two-feminisms\\_n\\_15109.htm](https://www.transadvocate.com/repeating-the-cycle-at-michfest-the-clash-of-two-feminisms_n_15109.htm) [<https://perma.cc/V4MG-84G9>] (last visited Oct. 10, 2022).

available to, men.<sup>449</sup> Lesbians checked neither box. The result was the “double accusation” that lesbians weren’t “real women,” or alternatively, that they sought to be men themselves.<sup>450</sup> So potent were the associations of lesbianism with the antithesis of womanhood that the label could be easily weaponized by men; branding a woman a lesbian—particularly one thought to dare leave her “proper place”—worked to place her back in line.<sup>451</sup>

It was in that context that a wave of moral panic swept through the leading women’s liberation group, National Organization of Women (NOW), starting in the late 1960s.<sup>452</sup> Driven by fears that the movement would be delegitimized through an association with lesbianism, and that their members’ own womanhood would be extinguished by accusations of being lesbians, for years NOW undertook a large-scale lesbophobic campaign. In addition to the group’s president, Betty Friedan, referring to lesbians as a “lavender menace,”<sup>453</sup> NOW retracted its policy of issuing couples memberships once lesbian couples

began applying,<sup>454</sup> refused to list the oldest lesbian rights organization in the United States as a sponsor for the First Congress to Unite Women in 1969,<sup>455</sup> ousted openly lesbian officials, and purged lesbian members.<sup>456</sup> When lesbian activist Rita Mae Brown spoke in favor of lesbian inclusion at a NOW meeting, the resounding response was “lesbians want to be men and . . . N.O.W. only wants ‘real’ women.”<sup>457</sup> Lesbians’ exclusion based on restrictive definitions of womanhood therefore also benefitted men by sowing seeds of division and threatening to destabilize the nascent feminist movement.

*Whose interests are protected by defining trans women—or, for that matter, any women—strictly by their “biology”?* The answer cannot be cis women or girls since, as Professor Catharine MacKinnon rightly reminds us, “Male dominant society has defined women as a discrete biological group forever. If this was going to produce liberation, we’d be free.”<sup>458</sup> Traditionally, the

449. See CHESHIRE CALHOUN, *FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT* 33 (2000); Charlotte Bunch, *Lesbians in Revolt*, in *LESBIANISM AND THE WOMEN’S MOVEMENT* 29, 30 (Charlotte Bunch & Nancy Myron eds., 1975).

450. MONIQUE WITTIG, *ONE IS NOT BORN A WOMAN* 3 (1980).

451. See *RADICALESBIANS, THE WOMAN-IDENTIFIED WOMAN* 2 (1970).

452. See Judy Klemesrud, *The Lesbian Issue and Women’s Lib*, *N.Y. TIMES*, Dec. 18, 1970, at 47 (on file with the *Columbia Law Review*) (noting the rising tensions).

453. Stephanie Gilmore & Elizabeth Kaminski, *A Part and Apart: Lesbian and Straight Feminist Activists Negotiate Identity in a Second-Wave Organization*, 16 *J. HIST. SEXUALITY* 95, 96 (2007).

454. *Id.* at 102.

455. LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* 235 (2016).

456. Clark A. Pomerleau, *Empowering Members, Not Overpowering Them: The National Organization for Women, Calls for Lesbian Inclusion, and California Influence, 1960s-1980s*, 57 *J. HOMOSEXUALITY* 842, 845 (2010).

457. Rita Mae Brown, *Take a Lesbian to Lunch*, *LADDER*, Apr.-May 1972, at 17, 20.

458. *Sex, Gender, and Sexuality: An Interview With Catharine A. MacKinnon*, *CONVERSATIONS PROJECT* (Nov. 27, 2015), <http://radfem.transadvocate.com/sex-gender-and-sexuality-an-interview-with-catharine-a-mackinnon/> [https://perma.cc/3HJ6-V8HX].

oppression of women has long been justified by arguments rooted in biology.<sup>459</sup> Conversely, biological determinism served men's interests since it associated facets of male biology with superiority. We have little reason to think those cultural associations have dissolved. Accepting that biology is dispositive to womanhood, then, only works to continue cis women's subordination in the long run.<sup>460</sup>

*Whose interests are protected when trans women are reduced to their genital characteristics—in other words, when persons are related to, and classified by, solely their physical components?* Reduction to body has long formed part of the oppression cis women and girls face;<sup>461</sup> the sexual objectification of women—that is, evaluating them based on their bodies and body parts, rather than as full moral equals—has been integral to male domination.<sup>462</sup> To continue to promote or engage in such practices, whether the target group has changed, can only serve to sanction the very same logic used to harm cis women. Returning to the question, it is clear that the reduction of trans women to their genital characteristics serves patriarchal interests in defining persons by their bodies or parts thereof.

All of this brings me to what I see as the heart of the matter: *Whose interests are served when women and girls are pitted against each other—the central logic of CWP thinking and arguments—including those who are cis versus those who are trans?* The answer, it seems to me, is obvious.

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459. Ann E. Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 YALE L.J. 913, 915 (1983) (“The subordination of women has traditionally been justified by arguments drawn from biology or nature.”).

460. See ELIZABETH GROSZ, SPACE, TIME, AND PERVERSION: ESSAYS ON THE POLITICS OF BODIES 48 (2018) (“Insofar as biology is assumed to constitute an unalterable bedrock of identity, the attribution of biologicistic characteristics amounts to a permanent form of social containment for women.”); Carolyn McLeod & Françoise Baylis, Feminists on the Inalienability of Human Embryos, HYPATIA, Winter 2006, at 1, 11.

461. See Rae Langton, Autonomy-Denial in Objectification, in SEXUAL SOLIPISM: PHILOSOPHICAL ESSAYS ON PORNOGRAPHY AND OBJECTIFICATION 223, 228–29 (2009).

462. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 123–24, 140–41 (1989) (recording several facets); see also AM. PSYCH. ASS'N TASK FORCE ON THE SEXUALIZATION OF GIRLS, REPORT (2007), <https://www.apa.org/pi/women/programs/girls/report-full.pdf> [<https://perma.cc/S9JY-EGX3>] (same); Dawn M. Szymanski, Lauren B. Moffitt & Erika R. Carr, Sexual Objectification of Women: Advances to Theory and Research, 39 COUNSELING PSYCH. 6, 6 (2011) (same).

