

# THE PROMISE OF DISABILITY RIGHTS PROTECTIONS FOR TRANS PRISONERS

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## ABSTRACT

Trans rights are under attack. In 2022, lawmakers across the country introduced a record number of bills targeting trans people. In such a fraught moment, disability law holds promise as a vehicle for trans rights advocacy. Recently, courts have started to recognize gender dysphoria—a condition that describes a dissonance between an individual’s gender identity and assigned sex at birth—as a disability eligible for protection under the Americans with Disabilities Act (ADA). This Note suggests that advocates should leverage this newfound potential protection to litigate disability claims on behalf of trans people. In particular, it advances that such litigation may be particularly urgent in the prison context. Because incarcerated people face a dearth of constitutional rights, disability litigation is one of the only avenues of litigation available to trans prisoners. The ADA therefore has the power to serve as a stop-gap in the prison context. Accommodations available through disability litigation—such as placement in a facility that aligns with an individual’s gender identity and access to gender-affirming care—may help protect incarcerated trans people’s health and safety, materially improve the conditions they inhabit, and ameliorate the trauma they experience while incarcerated. Ultimately, disability law adds a potent tool to trans rights advocates’ arsenals.

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## INTRODUCTION

In the landmark 2017 case *Blatt v. Cabela's Retail, Inc.*, a federal court recognized, for the first time, that trans<sup>1</sup> plaintiffs can invoke disability rights protections under the Americans with Disabilities Act (ADA) based on a gender dysphoria diagnosis.<sup>2</sup> The plaintiff, Kate Lynn Blatt, pursued a disability claim for the discrimination she experienced as a trans woman in the workplace.<sup>3</sup> Blatt was routinely misgendered by her employer and coworkers, called transphobic slurs, refused access to the women's bathroom, and forced to wear a nametag bearing her dead-name.<sup>4</sup> Blatt had been diagnosed with gender dysphoria, defined as a discrepancy between an individual's gender identity and their assigned sex at birth.<sup>5</sup> Blatt sought relief under the ADA on the grounds that gender dysphoria constitutes a cognizable disability, and that her employer's refusal to provide her with reasonable accommodations—including a correct nametag and access to the women's bathroom—violated the ADA.<sup>6</sup> In a path-breaking ruling, the court allowed Blatt's case to move forward, marking the first time that a federal court did not categorically bar a trans plaintiff from pursuing disability claims based on gender identity under the ADA.

The ADA has not historically protected disabilities associated with gender identity, expressly denying coverage for “transvestism,” “transsexualism,” and “gender identity disorders not resulting from physical impairments.”<sup>7</sup> Until recently, this long-standing provision closed the door to trans litigants hoping to invoke ADA protections, who often proceeded claiming their diagnosis with Gender Identity Disorder (GID)

1. I use “trans” as an umbrella term to refer to any gender identity that does not align with an individual's sex assigned at birth. This necessarily encompasses a multiplicity of non-cisgender identities, including binary transgender, nonbinary, genderqueer, agender, bigender, Two-Spirit, gender non-conforming, gender-fluid, and more. For a fuller discussion of gender identity terminology, see Michael J. Ryan, *Communicating Trans Identity: Toward an Understanding of the Selection and Significance of Gender Identity-Based Terminology*, 8 J. LANGUAGE & SEXUALITY 221 (2019).

2. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017).

3. *Id.*

4. A deadname refers to the name a person used before their transition. For more on deadnames and how the experience of deadnaming can be invalidating and traumatizing, see KC Clements, *What Is Deadnaming?*, HEALTHLINE (Sept. 18, 2018), <https://www.healthline.com/health/transgender/deadnaming> [<https://perma.cc/Y3UF-RW65>].

5. AM. PSYCHIATRIC ASS'N, *Gender Dysphoria*, in DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451, 451–59 (5th ed. 2013).

6. Complaint & Jury Demand at ¶¶ 19–22, *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. Aug. 15, 2014) (No. 5:14-CV-04822).

7. Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25, 25–26 (2019) [hereinafter Barry & Levi, *The Future*].

created coverage under the statute.<sup>8</sup> However, the tide now seems to be turning. A year before *Blatt* was decided, the U.S. Department of Justice filed Statements of Interest in multiple federal district court cases “supporting coverage of gender dysphoria under the ADA.” As legal scholars and trans rights advocates Kevin Barry and Jennifer Levi highlight, “for over three years, and under two separate administrations, DOJ has supported ADA coverage of gender dysphoria as a matter of statutory interpretation.”<sup>9,10</sup> Fast-forward to the present, and there have been at least fifteen pending or decided cases alleging discrimination under the ADA based on gender dysphoria.<sup>11</sup>

Trans people face “severe and pervasive discrimination in nearly every aspect of life,” from the workplace to the doctor’s office to prisons.<sup>12</sup> However, a patchwork of legal protections can often leave trans people without recourse.<sup>13</sup> *Blatt* represents the first acknowledgement of this changing tide by any federal court. As a federal ruling, *Blatt* cracks open avenues for people experiencing gender dysphoria across the country to challenge discrimination in a variety of contexts, including offices, government facilities, public accommodations, and prisons.<sup>14</sup> The ADA’s broad scope brims with potential for trans rights—and, as I advance in this Note, may have a particularly urgent application in the prison litigation context.

The allure of leveraging the ADA as a tool to advance trans protections is particularly charged during the current moment: 2021 ushered in a historic high for anti-trans state legislation, with over one hundred anti-trans bills being introduced across the country,<sup>15</sup> from Arkansas’s bill curtailing gender-affirming treatment for trans youth<sup>16</sup> to Tennessee’s bill

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8. See Taylor Payne, Note, *A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act*, 83 Mo. L. REV. 799, 800–02 (2018).

9. Barry & Levi, *The Future*, *supra* note 7, at 49.

10. *Id.* at 48–49.

11. *Id.* at 52.

12. Brief of Amici Curiae Gay & Lesbian Advocates & Defenders et al. in Opposition to Defendant’s Partial Motion to Dismiss at 2, *Blatt v. Cabela’s Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. Aug. 15, 2014) (No. 5:14-CV-04822).

13. See Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the US Not Protected by State Non-Discrimination Statutes*, WILLIAMS INST. (Apr. 2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes> [<https://perma.cc/S69L-9CMX>].

14. See Americans with Disabilities Act of 1990, S. 93, 101st Cong. §§ 201–02 (1989) (codified at 42 U.S.C. §§ 12131–32 (2018)).

15. See Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021), <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html> [<https://perma.cc/PB4H-WVZX>].

16. See Devon Cole, *Arkansas Becomes First State to Outlaw Gender-Affirming Treatment for Trans Youth*, CNN (Apr. 6, 2021), <https://www.cnn.com/2021/04/06/politics/arkansas-transgender-health-care-veto-override/index.html> [<https://perma.cc/9A74-AJKZ>].

banning trans students from participating in school sports.<sup>17</sup> This alarming trend continues in 2022.<sup>18</sup> In March, Texas governor Greg Abbott issued an executive directive seeking to classify gender-affirming care as a “form of child abuse.”<sup>19</sup> The next month, Alabama’s House of Representatives passed legislation outlawing gender-affirming health care for transgender youth.<sup>20</sup> That bill makes providing gender-affirming care a felony, punishable by a decade in prison.<sup>21</sup> At such a fraught time for trans rights, the implications of *Blatt* are far-reaching.

In this Note, I take up the promise of *Blatt* and propose that advocates should leverage the shift to include gender dysphoria under the ADA to litigate disability claims on behalf of trans prisoners. Such litigation would achieve far more than mere symbolic victories; on the contrary, it carries the potential to materially change the conditions trans people are subjected to while incarcerated. It may help protect trans prisoners’ safety, mitigate the discrimination they experience, and ameliorate the trauma they endure while they are incarcerated. This Note proceeds in four parts: Part I offers a brief overview of the ADA and its treatment of conditions related to gender identity. Perhaps motivated by conservatism in the Senate,<sup>22</sup> the ADA as noted above excludes “transvestism,” “transsexualism,” and “gender identity disorders not resulting from physical impairments.”<sup>23</sup> However, in 2013 the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5)<sup>24</sup> replaced its classification for GID with a different diagnosis: gender

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17. See Jamiel Lynch, *Tennessee Governor Signs Transgender Sports Bill into Law Requiring Students to Prove Their Sex at Birth*, CNN (Mar. 26, 2021), <https://www.cnn.com/2021/03/26/us/tennessee-transgender-sports-bill-law/index.html> [https://perma.cc/S4ZY-584M].

18. See *Legislation Affecting LGBTQ Rights Across the Country*, ACLU (Feb. 25, 2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country> [https://perma.cc/8K73-U2YJ].

19. See *ACLU, Lambda Legal Sue to Block Texas From Investigating Parents Who Support Their Transgender Kids*, ACLU (Mar. 1, 2022), <https://www.aclu.org/press-releases/aclu-lambda-legal-sue-block-texas-investigating-parents-who-support-their-transgender> [https://perma.cc/W43D-WVYT].

20. See *Alabama Legislature Votes to Ban Gender-Affirming Medical Care for Transgender Youth*, NPR (Apr. 7, 2022), <https://www.npr.org/2022/04/07/1091510026/alabama-gender-affirming-care-trans-transgender> [https://perma.cc/8DE4-SNE9].

21. *Id.*

22. Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 *YALE L.J.F.* 373, 380–81 (2017) [hereinafter Barry & Levi, *A New Path*].

23. *Id.*

24. The DSM-5 is the “standard classification of mental disorders used by mental health professionals in the United States,” and “features the most current text updates based on scientific literature.” *Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR)*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm> [https://perma.cc/2U8Z-NUP5].

dysphoria.<sup>25</sup> I discuss the differences between the two diagnoses in this Part as well, as the *Blatt* court ultimately held that gender dysphoria, not GID, constituted a disability covered under the ADA.<sup>26</sup> I then consider the changing tide that *Blatt* signals and look to the future of gender dysphoria protections under the ADA.

In Part II, I turn to an urgent application of *Blatt*'s holding: trans prisoner advocacy. I review the many and varied traumas trans people endure while incarcerated<sup>27</sup>—from placements in prisons that do not align with their gender identities to strip searches conducted by hostile guards, to the elevated risk of verbal, physical, and sexual abuse<sup>28</sup>—and suggest that the ADA can act as a critical stopgap in the face of the limited avenues for legal recourse available to trans prisoners. More specifically, I propose that prisoners' rights advocates should pursue ADA litigation to minimize the harm that trans people endure while incarcerated.

Part III nuances the former section by noting that pursuing disability claims for trans prisoners may not be a perfect solution, nor a straightforward endeavor. The *Blatt* ruling suggests that courts will require plaintiffs to proffer an official gender dysphoria diagnosis before allowing cases to proceed.<sup>29</sup> However, such a requirement cleaves to the outdated medical model of disability.<sup>30</sup> Drawing on theoretical understandings of gender as a social construct,<sup>31</sup> I suggest that this "medicalization" approach cannot capture the capaciousness of an individual's gender identity, particularly in light of the trans community's fraught history with medical institutions that long sought to pathologize and "cure" their identities.<sup>32</sup> I also outline the access barriers trans individuals face in attempting to obtain a formal gender dysphoria diagnosis,<sup>33</sup> including financial burdens and pervasive gaps in medical providers' knowledge about trans health care.

Part IV aims to reconcile the tensions produced by the benefits of the proposed litigation and the drawbacks of overbroad medicalization.

25. See AM. PSYCHIATRIC ASS'N, *supra* note 5, at 459.

26. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123 at \*3 (E.D. Pa. May 18, 2017).

27. See Valerie Jenness & Sarah Fenstermaker, *Agnes Goes to Prison: Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of "The Real Deal"*, 28 GENDER & SOC'Y 5, 15–17 (2014).

28. *Id.* at 15.

29. See Barry & Levi, *The Future*, *supra* note 7, at 49.

30. See Theresia Degener, *A New Human Rights Model of Disability*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2017) (contrasting the older medical model of disability with the preferred contemporary social model).

31. See THE SOCIAL CONSTRUCTION OF GENDER (Judith Lorber & Susan A. Farrell eds., 1991).

32. See Dean Spade, *Resisting Medicine, Remodeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 24 (2003) [hereinafter Spade, *Resisting Medicine*].

33. See Joshua D. Safer et al., *Barriers to Health Care for Transgender Individuals*, 23 CURRENT OP. ENDOCRINOLOGY, DIABETES & OBESITY 168, 170 (2016).

I reiterate my argument that advocates should pursue disability claims for trans prisoners, but suggest that litigants should not be required to produce an official gender dysphoria diagnosis to access the courthouse and draw on the protections of the ADA. I propose eliminating the diagnosis requirement for three primary reasons: First, gender dysphoria is difficult to “prove” to medical providers because gender is itself fluid and tricky to define.<sup>34</sup> Second, the access barriers to obtaining a diagnosis are compounded for trans people due to intersecting factors—ranging from medicalized transphobia<sup>35</sup> to the disproportionate number of trans people living in poverty.<sup>36</sup> Third, de-emphasizing the medical aspects of disability moves us away from the outdated medical model and closer to the contemporary social model, which instead provides “structural analysis of disabled people’s social exclusion.”<sup>37</sup> The social model offers a nuanced understanding of disability as a fluid and evolving lived experience produced through interactions between an individual and their environment, a conceptualization that functions much like other axes of oppression. Striking the diagnosis requirement may be less infeasible than it initially sounds; indeed, it corresponds to a trend moving away from medicalization, as illuminated by the Federal Bureau of Prisons’s 2022 *Transgender Offender Manual* expressly noting that “[n]ot all transgender inmates will have a diagnosis of [gender dysphoria], and a diagnosis of [gender dysphoria] is not required for an individual to be provided services.”<sup>38</sup>

This final section also grapples with salient counterarguments rising from this understudied intersection of gender identity, disability law, and prisoners’ rights. I ultimately suggest that the material benefits of disability litigation for the uniquely vulnerable demographic of trans prisoners may outweigh the challenges such litigation poses. I conclude by spotlighting the ADA’s potential to serve as a stopgap in spaces with sparse civil rights, such as prisons.

While I engage with broader theoretical ideas, including gender justice and the de-medicalization of disability rights, the scope of this Note is

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34. See JUDITH BUTLER, *GENDER TROUBLE* (1990); see also *THE SOCIAL CONSTRUCTION OF GENDER*, *supra* note 31.

35. See Caroline Medina et al., *Protecting and Advancing Health Care for Transgender Adult Communities*, CTR. FOR AM. PROGRESS (Aug. 18, 2021), <https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities> [<https://perma.cc/6WQT-R54Y>].

36. See Jillian Edmonds, *Transgender People Are Facing Incredibly High Rates of Poverty*, NAT’L WOMEN’S L. CTR. (Dec. 9, 2016), <https://nwlc.org/blog/income-security-is-elusive-for-many-transgender-people-according-to-u-s-transgender-survey> [<https://perma.cc/G65J-EVRG>].

37. Tom Shakespeare, *The Social Model of Disability*, in *THE DISABILITY STUDIES READER* 197, 204 (Lennard J. Davis ed., 2010).

38. FED. BUREAU OF PRISONS, *TRANSGENER OFFENDER MANUAL* (2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf>.

limited to the possibility of promoting trans prisoner welfare through disability law. I specifically spotlight the potential of prison impact litigation to ameliorate the traumas experienced by incarcerated trans people, shifting the onus of prison litigation from those impacted to well-resourced organizations better equipped to undertake the litigation process. The fruits of such work extend far beyond the abstract: this litigation could facilitate safety, access to health care, and necessary accommodations for one of the most vulnerable populations. On a broader scale, prison litigation also gestures towards new horizons of trans rights advocacy through the vehicle of disability law.

## I. THE ADA AND GENDER DYSPHORIA

### A. *Historical Overview of the ADA and Gender Conditions*

The ADA is a milestone piece of legislation enacted in 1990 in response to decades of disability rights advocacy and agitation.<sup>39</sup> It protects people with disabilities from discrimination in several areas of public life, including employment, transportation, public accommodations, communications, and state and local governments' programs and services.<sup>40</sup> Passed in acknowledgement of legacies of "purposeful unequal treatment" that stretch into the present, the ADA provides the most robust legal protections for people with disabilities in the U.S.<sup>41</sup> It is often touted as an "equal opportunity" law for people with disabilities.<sup>42</sup> I discuss the requirements and steps of an ADA claim in greater detail below, in Part II.C.1.

Since its passage in 1990, the ADA has excluded three categories of conditions related to gender: "transvestism," "transsexualism," and "gender identity disorders not resulting from physical impairments."<sup>43</sup> These exclusions are the result of the "moral opprobrium" of two conservative senators who viewed the above conditions as "undeserving of legal protection" and "decried the ADA's curtailment of an employer's right to make judgments about employees based on the employer's 'own moral

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39. See Julia Carmel, "*Nothing About Us Without Us*": 16 Moments in the Fight for Disability Rights, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/us/ada-disabilities-act-history.html> [<https://perma.cc/584P-W2ZZ>].

40. See *supra* note 14.

41. 42 U.S.C. § 12101(a)(7) (1990); see also TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, EXECUTIVE SUMMARY OF FINDINGS AND RECOMMENDATIONS AS OF SEPTEMBER 27, 1988 (1988), [https://dolearchivecollections.ku.edu/collections/ada/files/s-leg\\_761\\_007\\_all.pdf](https://dolearchivecollections.ku.edu/collections/ada/files/s-leg_761_007_all.pdf).

42. U.S. Dep't of Just. Civ. Rts. Div., *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) [<https://perma.cc/3MDK-GDSB>].

43. See Payne, *supra* note 8, at 799.

standards.”<sup>44</sup> GID, the condition most trans people were once diagnosed with, was therefore scrubbed from the ADA’s scope.<sup>45</sup>

*Blatt*, however, represents a watershed moment: the first case in which any federal court has not barred gender identity-related conditions from ADA coverage. *Blatt*’s claim was novel in that she did not argue that GID merited protection under disability law; instead, she contended that the ADA’s exclusion of gender identity disorders should not apply to *gender dysphoria*.<sup>46</sup> The distinction between the two conditions is key, as noted below, because the former pathologizes trans identity whereas the latter hones in on the specific physiological and psychological distress that an incongruence between a person’s gender identity and their assigned sex at birth can produce. *Blatt* argued that gender dysphoria should be protected because it is a disabling condition that “substantially limits one or more of [her] major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational functioning”<sup>47</sup>—and, for the first time, a federal court agreed.<sup>48</sup>

## B. *Gender Dysphoria*

The longstanding medical diagnosis once associated with trans people was GID.<sup>49</sup> GID was incorporated into the DSM-III in 1980 and encompassed conditions like “transvestism” and “transsexualism.”<sup>50</sup> The purpose of including those conditions in the DSM and diagnosing them as mental illnesses? To “cure” the pathological notion that an individual might not identify with their “biological sex.”<sup>51</sup>

For decades, trans rights activists campaigned to replace the GID diagnosis in the DSM. They asserted that the GID diagnosis pathologized and “othered” trans identity, thus exacerbating the stigmatization of trans

44. Barry & Levi, *A New Path*, *supra* note 22, at 379–80 (2017); *see also Gender Dysphoria Discrimination*, THE ADA PROJECT (2019), <http://www.adalawproject.org/gender-dysphoria-discrimination> [https://perma.cc/3P2Z-6EQF].

45. *See also* Barry & Levi, *The Future*, *supra* note 7, at 41 n.74 (2019) (noting that “[t]he House of Representative’s version of excluded conditions explicitly characterized the three transgender-related conditions as ‘sexual behavior disorders,’ inserted the words ‘not resulting from physical impairments’ after ‘gender identity disorders,’ and removed the exclusion of ‘current psychoactive substance induced organic mental disorders.’ H.R. Rep. No. 101–596, at 88 (1990), *reprinted in* 1990 U.S.C.A.N. 565, 597, 1990 WL 121679. This version of excluded conditions was accepted at conference. *Id.*”).

46. *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123 at \*2 (E.D. Pa. May 18, 2017).

47. *Id.*

48. *See* Barry & Levi, *A New Path*, *supra* note 22, at 382.

49. *See* Kenneth J. Zucker, *Gender Identity Disorder*, in *CHILD PSYCHOPATHOLOGY* 325 (Eric J. Mash & Russell A. Barkley eds., 2013).

50. *Id.* at 346.

51. Spade, *Resisting Medicine*, *supra* note 32, at 17.

people by branding them as deviant.<sup>52</sup> In the DSM-IV, for instance, GID was said to manifest through childhood participation in “stereotypical gender inappropriate behavior,” such as boys enjoying “drawing pictures of beautiful girls and princesses,” and girls drawn to “rough-and-tumble play.”<sup>53</sup> Dean Spade posits that the effect of such diagnostic criteria was to produce a conceptualization of the “normal” by actively constructing and condemning its opposite—by “creating and pathologizing a category of deviants.”<sup>54</sup> *Normal* children, Spade notes, are “simply those who do the opposite of what kids with GID are doing.”<sup>55</sup> Such early pathologization paved the road for heightened surveillance, policing, and disciplining of trans people in the name of curative treatment.<sup>56</sup>

The campaign to change the GID diagnosis eventually bore fruit: in 2013, gender dysphoria replaced GID in the DSM-5.<sup>57</sup> Responding to criticism of the GID diagnosis, the recent swap to gender dysphoria narrows the focus of the diagnosis and subsequent medical interventions to specific physical and mental symptoms, as opposed to diagnosing an identity in and of itself.<sup>58</sup> The DSM-5 takes care to articulate that “gender non-conformity is not in itself a mental disorder.”<sup>59</sup> Rather, a diagnosis of gender dysphoria merely names the physical and mental distress produced by a dissonance between an individual’s assigned sex at birth and their gender identity and expression.<sup>60</sup> People who experience gender dysphoria will often identify as trans.<sup>61</sup> Gender dysphoria can be grounded in the body, such as an individual experiencing discomfort because of their breasts. It can also arise from external social factors, like being misgendered or wearing gendered clothing.<sup>62</sup> Medical treatment following a gender dysphoria diagnosis should be tailored to an individual’s needs, but often includes some permutation of counseling, hormone therapy, and gender-affirming surgery.<sup>63</sup>

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52. *See id.* at 24.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.* at 25–28.

57. *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS’N (Nov. 2017), <https://www.psychiatry.org/psychiatrists/cultural-competency/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis> [<https://perma.cc/D352-AYDW>].

58. *Id.*

59. *Id.*

60. Aron Janssen & Samantha Busa, *Gender Dysphoria in Childhood and Adolescence*, in *COMPLEX DISORDERS IN PEDIATRIC PSYCHIATRY* 89, 92 (David Driver & Shari S. Thomas eds., 2018).

61. *Id.*

62. Jessie Earl, *Do You Need Gender Dysphoria to Be Trans?*, *ADVOCATE* (Jan. 18, 2019), <https://www.advocate.com/commentary/2019/1/18/do-you-need-gender-dysphoria-be-trans> [<https://perma.cc/9YX5-3KRD>].

63. *Gender Dysphoria*, *MAYO CLINIC*, <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/diagnosis-treatment/drc-20475262> [<https://perma.cc/>]

Trans people experience gender dysphoria at significantly higher rates than the general population; a 2020 study revealed that approximately 73% of trans women and 78% of trans men had experienced gender dysphoria by the age of seven, compared to only 0.6% of cisgender people.<sup>64</sup> Although the link between gender dysphoria and trans identity is strong, it is not a one-to-one relationship: not all trans people experience gender dysphoria, and not all people who experience gender dysphoria are trans.<sup>65</sup> Thus, a diagnosis of gender dysphoria does not inherently target or pathologize trans individuals. In fact, several common and relatively unstigmatized procedures aimed at alleviating gender dysphoria in cisgender people exist, such as “breast enhancement, pectoral implants, or laser vaginal reconstruction,” which serve to “enhance the femininity of birth-assigned women and the masculinity of birth-assigned men.”<sup>66</sup>

There is no universal approach to grappling with gender dysphoria; it is a deeply personal experience that necessitates individualized care.<sup>67</sup> The personal nature of an individual’s gender identity and the difficulty of codifying gender dysphoria into easily legible or uniform symptoms renders the process of obtaining a formal diagnosis fraught.<sup>68</sup> Despite these challenges, the DSM-5 outlines that a person must exhibit a “marked incongruence between one’s experienced/expressed gender and assigned gender, of at least six month’s duration” to receive a diagnosis. This incongruence must manifest in particular physical and mental symptoms, such as a “strong desire to be rid of one’s primary and/or secondary sex characteristics” or a “strong desire to be treated as the other gender (or some alternative gender different from one’s assigned gender).”<sup>69</sup> Moreover, the DSM-5 diagnosis necessitates that a person’s gender dysphoria be “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>70</sup>

The DSM-5 diagnostic criteria raise a number of thorny questions. What does gender dysphoria look like? Which symptoms are valid? How must a person with gender dysphoria present or explain their experience in order to receive medical validation and treatment? Medical settings endow an enormous amount of power to medical providers, who interpret and translate personal experiences into diagnoses. Much may be lost

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D352-AYDW].

64. Maurice Garcia, *Most Gender Dysphoria Established by Age 7 Study Finds*, CEDARS SINAI (June 16, 2020), <https://www.cedars-sinai.org/newsroom/most-gender-dysphoria-established-by-age-7-study-finds> [<https://perma.cc/2QQM-YMUK>].

65. See Earl, *supra* note 62.

66. Spade, *Resisting Medicine*, *supra* note 32, at 28.

67. MAYO CLINIC, *supra* note 63.

68. See Florence Ashley, *The Misuse of Gender Dysphoria: Toward Greater Conceptual Clarity in Transgender Health*, 20 PERSP. PSYCH. SCI. 174 (2019).

69. AM. PSYCHIATRIC ASS’N, *supra* note 5.

70. *Id.* at 459.

in this process of translation, especially when the provider is not fluent in trans issues, a concerning common occurrence. In a survey regarding medical discrimination against trans people by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, half of the respondents noted that they had to “teach” their doctors about trans identity.<sup>71</sup> I delve deeper into this medical knowledge gap, as well as the onus it places on trans patients, and the access barriers it imposes to obtaining a gender dysphoria diagnosis in Part III.C.

Irrespective of the difficulties inherent to the diagnostic process, however, obtaining a gender dysphoria diagnosis can nevertheless open up access to potentially life-saving medical treatment, including hormone therapy and gender-affirming surgery.<sup>72</sup> In fact, in most circumstances, a gender dysphoria diagnosis is *required* before insurers will cover such medical intervention.<sup>73</sup> *Blatt* and the other cases invoking ADA protections for gender dysphoria that followed also suggest that courts will likely mandate that litigants trans plaintiffs seeking ADA protections have an official gender dysphoria diagnosis before their cases can proceed. In Part III, I discuss the potential hazards of this requirement in greater depth.

### C. *Looking Forward*

*Blatt* fundamentally diverges from the ADA’s historical exclusion of gender identity-related conditions and marks a watershed moment illuminating a new path forward for trans rights. The next section builds on this theory, turning specifically to what the ADA’s coverage of gender dysphoria could mean for trans prisoners and their advocates.

## II. THE PROMISE OF ADA PROTECTION OF GENDER DYPHORIA FOR TRANS PRISONERS

Since *Blatt*, the landscape of queer and trans rights has changed dramatically. In the 2020 case *Bostock v. Clayton County*, the Supreme Court held that employment protections against “sex” discrimination under Title VII of the Civil Rights Act of 1964 extend to discrimination based on sexual orientation and gender identity.<sup>74</sup> If *Blatt* argued her case today, she likely would have pursued her claims primarily, if not exclusively, under Title VII. Following the *Bostock* decision, trans employees are now able to draw on protections outside the scope of disability law

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71. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 6 (2011).

72. *Id.* at 7.

73. *See, e.g.*, CORPORATE MEDICAL POLICY: GENDER AFFIRMATION SURGERY AND HORMONE THERAPY, BLUECROSS BLUESHIELD OF N.C., [https://www.bluecrossnc.com/sites/default/files/document/attachment/services/public/pdfs/medicalpolicy/gender\\_affirmation\\_surgery\\_and\\_hormone\\_therapy.pdf](https://www.bluecrossnc.com/sites/default/files/document/attachment/services/public/pdfs/medicalpolicy/gender_affirmation_surgery_and_hormone_therapy.pdf).

74. *Bostock v. Clayton Cty.*, 140 U.S. 1731 (2020).

for legal recourse against violations of their rights. However, it is critical to emphasize that even post-*Bostock*, Title VII's protections against sexual orientation and gender identity discrimination do not necessarily extend to incarcerated people.<sup>75</sup> Trans people who experience discrimination in the confines of prison are generally not covered under Title VII and so continue to have few options for legal recourse. The most pressing application of the ADA for advancing trans rights may therefore be as a means for protecting trans prisoners.

#### A. *Prisoner Rights and the ADA*

Prisoners face a severe dearth of constitutional rights.<sup>76</sup> They are, however, protected by Title II of the ADA,<sup>778</sup> which regulates even state and local government programs that do not receive federal funding. Although the realities of prison litigation are bleak—a point discussed further in Part IV.C.4 regarding the Prison Litigation Reform Act of 1995, which effectively “[s]lammed the courthouse door[s]” shut<sup>79</sup>—the ADA

75. Other anti-discrimination laws prohibiting sex discrimination have since been interpreted in accordance with *Bostock's* interpretation of Title VII, such as Title IX, meaning legal protections for LGBTQ+ people (see *infra* note 81) extend beyond the workplace; still, these protections are limited to a narrow set of laws that can be interpreted in line with Title VII and that may not always be inclusive of prisoners. See CHRISTINE J. BACK & JARED P. COLE, CONG. RES. SERV., POTENTIAL APPLICATION OF BOSTOCK V. CLAYTON COUNTY TO OTHER CIVIL RIGHTS STATUTES (2021), [https://www.everycrsreport.com/files/2021-07-02\\_R46832\\_8b7fcc31f98110a073f9487eda9a3b5e2b13ede.pdf](https://www.everycrsreport.com/files/2021-07-02_R46832_8b7fcc31f98110a073f9487eda9a3b5e2b13ede.pdf).

76. See SUSAN EASTON, PRISONERS' RIGHTS: PRINCIPLES AND PRACTICE (2011).

77. In the 1998 case *Pa. DOC v. Yeskey*, the Supreme Court ruled that the ADA guarantees reasonable accommodations to prisoners with disabilities. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998).

78. See 28 C.F.R. § 35.152 (2010); 29 U.S.C. § 794(a) (2018). Depending on the prison setting, disabled prisoners are also protected by Section 504 of the Rehabilitation Act of 1973 (Section 504). Section 504, however, is restricted to institutions receiving federal money and programs or activities conducted by any Executive agency. The ADA has far fewer restrictions than the Section 504, as it applies to institutions regardless of whether they receive federal funding, which is why I choose to focus on its potential in this Note. Courts typically interpret Section 504 and the ADA in parallel, so establishing rights under the ADA for trans prisoners may effectively translate to the recognition of trans rights under Section 504. The recognition of gender dysphoria as a disability can, therefore, allow trans prisoners to bring claims under both the ADA and Section 504. Between the ADA and Section 504, “every American prison and jail is covered.” Margo Schlanger, *How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities*, AM. CONSTITUTION Soc'Y ISSUE BRIEF 4 (2016), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1123&context=other>. For more on Section 504 in the prison context, see, for example, Betsy Ginsberg, *Out With the New, In With the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners With Disabilities*, 36 FORDHAM URB. L. J. 713 (2009).

79. See Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html) [<https://perma.cc/V25B-MJ98>].

can, in theory, function as a civil rights stopgap in prisons. Incarcerated trans people stand to gain meaningful benefits from successful ADA litigation, including but not limited to: access to gender-affirming health care, transfers to facilities that align with their gender identities, searches being conducted by guards with their gender identities, separate shower times, and the right to be referred to by their correct names and pronouns.<sup>80</sup>

## B. *Trans Prisoners*

Despite the paucity of research focused on LGBTQ+<sup>81</sup> prisoners,<sup>82</sup> extant scholarship reveals that trans people are disproportionately likely to be incarcerated.<sup>83</sup> Nearly one in six trans Americans—and 50% of Black trans Americans—has been imprisoned.<sup>84</sup> This reflects a broader, systemic pattern of violence against trans people: Visibly trans people are likely to be targets of surveillance, policing, and disciplining simply for existing in non-cisnormative bodies in a transphobic society.<sup>85</sup> The Sylvia Rivera Law Project notes that “[o]ver-policing and profiling of trans and gender-nonconforming people intersect, producing a far higher risk than average of imprisonment, police harassment, and violence for trans people.”<sup>86</sup> The looming threat of criminalization is heightened

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80. These accommodations (with the exception of gender-affirming health care) were requested by the plaintiff in *Doe v. Massachusetts Dep’t of Corr.*, No. CV 17–12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018). A preliminary injunction granted Doe a separate, private shower time and strip searches conducted by women. *Id.* Doe ultimately received a transfer to a women’s facility, representing a milestone both for the plaintiff and the path of ADA-based trans rights litigation. See *In Groundbreaking Development, Incarcerated Transgender Woman is Transferred from Men’s to Women’s Prison in MA*, GLAD LEGAL ADVOCATES & DEFENDERS (Jan. 30, 2019), <https://www.glad.org/post/in-groundbreaking-development-incarcerated-transgender-woman-is-transferred-from-mens-to-womens-prison-in-ma> [https://perma.cc/2JB5-JK4J].

81. “LGBTQ+” is an initialism that stands for lesbian, gay, bisexual, transgender, queer/questioning, and includes other queer and trans identities, such as asexual, agender, and intersex. For a more detailed explanation, see Bill Daley, *As the Abbreviation Grows, What Does LGBTQIA Stand For?*, CHICAGO TRIBUNE (June 8, 2017), [https://www.chicagotribune.com/lifestyles/ct\\_lgbtqia\\_letters\\_defined-htmlstory.html](https://www.chicagotribune.com/lifestyles/ct_lgbtqia_letters_defined-htmlstory.html) [https://perma.cc/6AWF-PFAN].

82. See JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011) (discussing the dearth of legal scholarship on queer and trans communities, a gap which has significant implications on the policing and incarceration of LGBTQ+ people).

83. See *id.*

84. See *Transgender Incarcerated People in Crisis*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> [https://perma.cc/5M6W-BQVH].

85. See *Flow Chart: Disproportionate Incarceration*, SYLVIA RIVERA LAW PROJECT, <https://srplp.org/resources/flow-chart-disproportionate-incarceration> [https://perma.cc/6MP6-4EKP].

86. *Id.*

for trans people of color, trapped at the nexus of transphobia and white supremacy.<sup>87</sup>

Once behind bars, trans prisoners face extreme and particularized forms of discrimination.<sup>88</sup> Prisons typically subscribe to a general policy of placing trans individuals according to their sex assigned at birth, regardless of their current gender identity or expression.<sup>89</sup> This exposes trans people, especially trans women placed in men's facilities, to pervasive abuse. Trans people are systemically deprived of clothing that aligns with their gender identity, as well as basic needs, such as hygiene products and health care.<sup>90</sup> Even individuals who were once able to access gender-affirming health care prior to incarceration are frequently stripped of their care behind bars.<sup>91</sup>

Moreover, trans prisoners are often targets of overt violence. Verbal, physical, and sexual abuse is rampant in prisons, and trans people—especially those that do not easily pass<sup>92</sup> as cisgender—are too often the victims of this violence.<sup>93</sup> Such violence formed the underlying rationale for the Supreme Court's 1994 decision in *Farmer v. Brennan*, a precedential case establishing the standard for liability of prison officials under the Eighth Amendment.<sup>94</sup> In *Farmer*, a trans woman sued prison

87. See Kylar W. Broadus, *The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 561–70 (2008).

88. See Jenness & Fenstermaker, *supra* note 27.

89. *Id.* at 15.

90. See JUST DETENTION INTERNATIONAL, TARGETS FOR ABUSE: TRANSGENDER INMATES AND PRISONER RAPE 2 (2013), <https://justdetention.org/wp-content/uploads/2015/10/FS-Targets-For-Abuse-Transgender-Inmates-And-Prisoner-Rape.pdf>.

91. *See id.*

92. In the trans context, “passing” refers to the ability “to be correctly perceived” as the gender you identify as, and “beyond that, to not be perceived as transgender.” Jae Alexis Lee, *What Does “Passing” Mean Within the Transgender Community?*, HUFFPOST (June 10, 2017, 11:13 AM), [https://www.huffpost.com/entry/what-does-passing-mean-within-the-transgender-community\\_b\\_593b85e9e4b014ae8c69e099](https://www.huffpost.com/entry/what-does-passing-mean-within-the-transgender-community_b_593b85e9e4b014ae8c69e099) [<https://perma.cc/T8MZ-SW2W>]. Passing can be considered a “privilege,” because “people who aren’t perceived as transgender experience significantly less harassment than trans people who are visibly trans.” *Id.* Note, however, that “passing,” for the purposes of this Note, centers on the dominant cisnormative society’s perception and treatment of trans people; not every trans person wants to or aims to “pass.” See Evan Urquhart, *Why Passing is Both Controversial and Central to the Trans Community*, SLATE (Mar. 30, 2017, 10:03 AM), <https://slate.com/human-interest/2017/03/why-passing-is-both-controversial-and-central-to-the-trans-community.html> [<https://perma.cc/55TW-FA55>]. The social imperative to “pass” perpetuates “a harmful standard of acceptableness” and “negatively reinforces the gender binary.” Mandi Camille Hauwert, *Why the Focus On “Passing” Transgender People Harms the Trans Community*, HUFFPOST (July 14, 2016), [https://www.huffpost.com/entry/why-the-focus-on-passing-transgender-people-harms\\_b\\_57880b4ae4b0107a240a80d](https://www.huffpost.com/entry/why-the-focus-on-passing-transgender-people-harms_b_57880b4ae4b0107a240a80d) [<https://perma.cc/UXR7-P69Q>].

93. *Id.*

94. *Farmer v. Brennan*, 511 U.S. 825 (1994).

officials for “mental anguish” and “psychological damage” resulting from her placement in a men’s prison where she was raped and assaulted.<sup>95</sup> In a study of incarcerated people in California men’s prisons, 59% of trans inmates reported experiencing sexual assault, in stark contrast to 4.4% of their cisgender counterparts.<sup>96</sup> Trans prisoners must often navigate environments saturated with transphobic violence, forcing them to endure additional identity-specific trauma in conjunction with the prosaic trauma of incarceration.<sup>97</sup>

Despite ubiquitous abuse, trans prisoners have few opportunities for recourse. When they report the violence they face, staff members often brush off their complaints and even suggest that they are “asking for it.”<sup>98</sup> In the worst scenarios, staff may even be complicit in this abuse.<sup>99</sup> Insofar as prisons do acknowledge the elevated threat of abuse to trans prisoners, many facilities adopt policies that relegate trans individuals to solitary confinement either upon arrival or following a complaint.<sup>100</sup> Regardless of how well-intentioned the rationale behind solitary confinement is, prolonged isolation produces significant distress and has long-lasting negative consequences for prisoners’ mental and physical health.<sup>101</sup> In sum, trans prisoners are subjected to multilayered traumas while incarcerated, some endemic to the prison environment and some unique to trans people.

On a national scale, guidance on trans issues in prison is inconsistent and scattered. Some states provide comprehensive statutory or policy guidelines regarding classification procedures, counseling services, and health care.<sup>102</sup> However, most states lag behind deferring to individual facilities to determine how to address the concerns of trans prisoners on an arbitrary, unpredictable basis.<sup>103</sup> Fundamentally, then, incarcera-

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95. Chase Strangio, *Dee’s Triumph: One of the Most Important Trans Victories You Never Heard Of*,

ACLU (June 6, 2014, 2:45 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/dees-triumph-one-most-important-trans-victories-you-never-redirect=blog/dees-triumph-one-most-important-trans-victories-you-never-heard> [<https://perma.cc/XN9T-JUEK>].

96. Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 27 JUSTICE Q. 835, 839 (2010).

97. See Benjamin C. Hattem, Note, *Carceral Trauma and Disability Law*, 72 STAN L. REV. 995, 1003–13 (2020).

98. JUST DETENTION INTERNATIONAL, *supra* note 90, at 1.

99. *Id.* at 2.

100. *Id.*

101. See Jayne Leonard, *What Are the Effects of Solitary Confinement on Health?*, MEDICAL NEWS TODAY (Aug. 6, 2020), <https://www.medicalnewstoday.com/articles/solitary-confinement-effects#mental-health-effects> [<https://perma.cc/MK2N-WR29>].

102. See Douglas Routh et al., *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, 61 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 645, 657–61 (2017).

103. *Id.* at 658–61.

tion disproportionately harms trans individuals and there are severely limited roads for them to pursue justice.

### C. *Trans Prisoners and Disability Law*

The ADA can function as a critical stopgap given the limited paths to the courthouse available to trans prisoners.<sup>104</sup> Litigating disability claims on behalf of trans prisoners carries the potential to yield far-reaching change and could improve change the material conditions of confinement trans individuals inhabit while incarcerated. Historically, litigants aiming to challenge prison conditions have pursued claims under the Eighth Amendment's prohibition of cruel and unusual punishment, one of the few legal options available to incarcerated people seeking to vindicate their rights.<sup>105</sup> However, circuit courts are currently split on the question of whether denying gender-affirming care to trans inmates constitutes a violation of the Eighth Amendment.<sup>106</sup> Thus, the outcomes of trans prisoner litigation pushing for gender-affirming care on this theory have been arbitrary and unpredictable.<sup>107</sup>

Moreover, while critical reforms to the prison system have been achieved via Eighth Amendment litigation, the Eighth Amendment sets a high standard of proof: it demands prison officials' subjective awareness and conscious disregard of "an excessive risk to inmate health or safety."<sup>108</sup> Courts typically afford prison officials considerable discretion

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104. See *infra* Parts IV.B and IV.C.4 for additional discussion of barriers to the courthouse and the Prison Litigation Reform Act.

105. See generally Marissa Luchs, *Transgender Inmates' Right to Gender Confirmation Surgery*, 89 FORDHAM L. REV. 2809 (2021); see also Christine Peek, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1211–30 (2003).

106. The circuit split pits the First and Fifth Circuits in opposition to the Ninth Circuit. In 2014, the First Circuit ruled that the denial of gender-affirming care to a trans prisoner did not violate the Eighth Amendment in *Kosilek v. Spencer* (*Kosilek IV*), 774 F.3d 63 (1st Cir. 2014). This was the first federal circuit court case to weigh in on the issue of relief for trans prisoners under the Eighth Amendment. See *Kosilek v. Spencer* (*Kosilek III*), 740 F.3d 733, 736 (1st Cir. 2014). In the 2019 case *Gibson v. Collier*, the Fifth Circuit sided with the First Circuit's holding in *Kosilek III*, likewise holding that the denial of gender-affirming care was not an Eighth Amendment violation. See *Gibson v. Collier*, 920 F.3d 212, 218 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019) (mem.). However, months after *Gibson*, the Ninth Circuit diverged from the First and Fifth Circuits, holding in *Edmo v. Corizon* that prison officials violate the Eighth Amendment when they deny medically necessary care to an incarcerated trans individual. See *Edmo v. Corizon* 935 F.3d 757, 797 (9th Cir. 2019). Thus, the "proper standard for determining what amounts to deliberate indifference by prison officials now remains in question for incarcerated transgender individuals seeking . . . relief for gender dysphoria." Samantha Braver, Note, *Circuit Court Dysphoria: The Status of Gender Confirmation Surgery Requests by Incarcerated Transgender Individuals*, 120 COLUM. L. REV. 2235, 2238 (2020).

107. See generally Luchs, *supra* note 105.

108. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

in this area, even in cases involving life-or-death consequences, as seen in decisions affirming the denial of life-saving HIV treatment to an incarcerated individual like in *Perkins v. Kansas Department of Corrections*.<sup>109</sup> As Margo Schlanger writes, “the high bar Eighth Amendment liability demands has failed many individuals with disabilities.”<sup>110</sup>

By comparison, the evidentiary threshold for ADA claims relies on the objective conditions of the prison and whether discrimination could be mitigated through “reasonable modifications,”<sup>111</sup> a considerably lower bar than the Eighth Amendment’s examination of both objective conditions and a prison official’s subjective state of mind.<sup>112</sup> The difference between the two litigation strategies may be reflected in the district court case *Tate v. Wexford Health Sources, Inc.*<sup>113</sup> There, an incarcerated trans plaintiff brought forth, *inter alia*, Eighth Amendment and ADA claims against prison officials.<sup>114</sup> While the court permitted the plaintiff’s ADA claim to proceed, it only allowed the Eighth Amendment Claim to proceed for certain defendants. The court determined that the Eighth Amendment claim was not applicable to a defendant whose actions did not seem “deliberately indifferent to [the plaintiff’s] illness,” nor to three other defendants who were not aware of her condition.<sup>115</sup> While advocates should ideally bring claims under both the Eighth Amendment and the ADA, in order to maximize plaintiffs’ chances, the disparate treatment between the claims in *Tate* sheds light on the previously underutilized potential of the ADA as a tool of successful trans prison litigation.

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109. T. Howard Stone, *Prisoner Has No Eighth Amendment Right to Protease Inhibitors*, UNIV. HOUS. L. (Mar. 16, 1999), <https://www.law.uh.edu/Healthlaw/perspectives/Correctional/990316Prisoner.html> [<https://perma.cc/X7XS-83VD>] (citing *Perkins v. Kansas Dep’t of Corrs.*, 165 F.3d 803 (10th Cir. 1999)).

110. MARGO SCHLANGER, AM. CONSTITUTION SOC’Y ISSUE BRIEF: HOW THE ADA REGULATES AND RESTRICTS SOLITARY CONFINEMENT FOR PEOPLE WITH MENTAL DISABILITIES 4 (2016), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1123&context=other>.

111. See 42 U.S.C. §§ 12131–32 (2018). Note, however, that when the plaintiff in *Edmo* raised both ADA and Eighth Amendment claims to argue for access to gender-affirming care in prison, the court ruled in favor of the plaintiff on the grounds of the Eighth Amendment, not the ADA. See *Edmo*, 935 F.3d 757. This holding suggests that courts may currently be more receptive to Eighth Amendment claims (potentially due to years of precedent, in contrast to the newly-emerging case law regarding the ADA and gender dysphoria), and that advocates may be strategically better off if they were to raise both claims when litigating on behalf of trans prisoners. For surveys of Eighth Amendment case law pertaining to trans prisoners, see Braver, *supra* note 106, at 22, and Luchs, *supra* note 105, at 22.

112. *Farmer*, 511 U.S. at 834.

113. *Tate v. Wexford Health Source Inc.*, No. 3:16-CV-00092-NJR, 2016 WL 687618 (S.D. Ill. Feb. 19, 2016).

114. *Id.*

115. *Id.* at \*3.

## 1. The Requirements of an ADA Claim

Given the potency of the ADA in the trans rights prison litigation context, I want to briefly touch on what an ADA claim brought forward by an incarcerated trans plaintiff could look like. Title II of the ADA, one of the few statutes that expressly protects incarcerated people,<sup>116</sup> reads: “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>117</sup> To bring a claim under the ADA, a plaintiff must show that: first, that they are disabled within the meaning of the statute; second, that they are “qualified” to participate in the subject service, program, or activity; and third, that they are excluded from, are not allowed to benefit from, or have been subjected to discrimination in the service, program, or activity because of their disability.<sup>118</sup> Below, I will briefly explicate each of these three requirements, especially as they apply to the prison context.

First, to invoke ADA protections, an individual must have a “disability” as defined under the statute: “a physical or mental impairment that substantially limits one or more major life activities,” a “record of such an impairment,” or “being regarded as having such an impairment.”<sup>119</sup> There are no codified definitions of any of these three prongs, and each ADA case turns on its own unique facts,<sup>120</sup> but the ACLU National Prison Project notes that: “A ‘physical or mental impairment’ could include hearing and vision problems, mental illness, physical disabilities, certain diseases, or many other conditions. ‘Major life activities’

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116. See ACLU NATIONAL PRISON PROJECT, KNOW YOUR RIGHTS: LEGAL RIGHTS OF DISABLED PRISONERS (2012), [https://www.aclu.org/sites/default/files/field\\_document/know\\_your\\_rights\\_-\\_disability\\_november\\_2012.pdf](https://www.aclu.org/sites/default/files/field_document/know_your_rights_-_disability_november_2012.pdf); see also Penn. Dep’t of Corrs. v. Yeskey, 524 U.S. 206 (1998) (“[The ADA] unmistakably includes State prisons and prisoners within its coverage”).

117. 42 U.S.C. § 12132 (2018). Note that Title II of the ADA does not cover the executive branch of the federal government, but Title V of the Rehabilitation Act of 1973 does. See *Is the Federal Government Covered by the ADA?*, ADA NATIONAL NETWORK, <https://adata.org/faq/federal-government-covered-ada> [<https://perma.cc/U9TF-RZCN>].

118. 42 U.S.C. § 12132 (2018); 29 U.S.C. § 794(a) (2018).

119. Americans with Disabilities Act of 1990, S. 93, 101<sup>st</sup> Cong. § 3(2) (1989) (codified at 42 U.S.C. § 12102(1) (2018)). Public entities covered under Title II of the ADA are not required to provide reasonable accommodations or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability under the “regarded as” prong only. 42 U.S.C. § 12201(h) (2018). Trans prisoners will therefore need to meet either of the first two definitions of disability under the ADA to secure accommodations or modifications related to their gender dysphoria in the prison setting. Individuals who meet the ADA definition of disability through the “regarded as” prong can still bring general claims for discrimination on the basis of disability. 42 U.S.C. § 12132 (2018).

120. ACLU NATIONAL PRISON PROJECT, *supra* note 116, at 2.

includes many private or public activities, such as seeing, hearing, sleeping, learning, reading, working, walking, various types of motion, or the operation of a major bodily function.”<sup>121</sup> In the context of trans prison litigation, the simplest way to fulfill this requirement might be a gender dysphoria diagnosis, since it serves as a “record” of the condition. The “regarded as” prong is a bit more nebulous;<sup>122</sup> perhaps, however, if a prisoner experiences discrimination on the basis of perceived gender nonconformity, regardless of their gender identity, they could pursue an ADA claim under this third definition of disability.

The second requirement is fairly straightforward to fulfill in prison litigation, since all incarcerated people are “qualified” to participate in the services, programs, and activities of the facility in which they are placed.

The third requires plaintiffs to show that they were “excluded from,” “not allowed to benefit from,” or “have been subjected to discrimination” in a service, program, or activity because of their disability. That means trans prisoners will have to show evidence of exclusion or discrimination because of their gender dysphoria. Such evidence could range from exclusion from social activities to being housed in a facility that does not align with the plaintiff’s gender identity in the first place; for instance, in one of the pioneering cases centering a trans prisoner suing for accommodations under the ADA that I discuss in greater depth later in this section, *Doe v. Massachusetts Department of Correction*, the court held that this prong was “satisfied by the factual allegations of the Complaint” because the plaintiff’s discrimination “is not about being denied services at [the prison], but about being housed there in the first place.”<sup>123</sup> Moreover, the *Massachusetts* court acknowledged that, “although the language of the statute speaks of ‘services, programs, or activities’ denied to an individual with disabilities, in reality this provision ‘has been interpreted to be a catchall phrase that prohibits all discrimination by a public entity.’”<sup>124</sup> Therefore, alleging the fact that the plaintiff, “unlike other female inmates . . . was assigned to a men’s prison by virtue of her gender assignment at birth and denied access to facilities and programs that would correspond with her gender identification” satisfies the requirements to advance an ADA claim. As the *Massachusetts* case indicates, the ADA is a viable—and, indeed, live—vehicle for trans rights-oriented prison litigation.

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121. *Id.*

122. For more on the “regarded as” prong, see Sharan E. Brown, *ADA Knowledge Translation Center Legal Brief No. 4*, ADA NATIONAL NETWORK (2021), [https://adata.org/legal\\_brief/regarded-as-having](https://adata.org/legal_brief/regarded-as-having) [<https://perma.cc/L9RC-JZDP>].

123. *Doe v. Mass. Dep’t of Corr.*, No. CV 17–12255-RGS, 2018 WL 2994403, at \*8 (D. Mass. June 14, 2018).

124. *Id.*

## 2. The Evolving Landscape of Trans Rights Prison Litigation Under the ADA

The immense potential of the ADA as a stopgap in trans prisoner rights at the present moment becomes even more clear when contrasting judicial rhetoric in *Doe v. Massachusetts Department of Correction* with an earlier case that centered an incarcerated trans plaintiff: *Maggert v. Hanks*.<sup>125</sup> In *Maggert*, decided in 1997, a trans prisoner brought an Eighth Amendment claim asserting that a prison's failure to provide estrogen therapy constituted a form of cruel and unusual punishment.<sup>126</sup> The Seventh Circuit held that the Eighth Amendment does not entitle prisoners to treatment for gender identity-related conditions. Chief Judge Posner's majority opinion noted that the lower court was "clearly right" to dismiss this suit, adding that "withholding from a prisoner an esoteric medical treatment . . . does not strike us as a form of cruel and unusual punishment" and that the court does "not want transsexuals committing crimes because it is the only route to obtaining a cure."<sup>127</sup>

In sharp contrast is the aforementioned 2018 case *Doe v. Massachusetts Department of Correction*, which followed *Blatt*<sup>128</sup> in demonstrating the ADA's power to advance trans rights—this time, in in the prison context.<sup>129</sup> The plaintiff in the *Massachusetts* case, a trans woman diagnosed with gender dysphoria, was placed in a men's prison, where she endured "a litany of humiliations and trauma caused by this placement."<sup>130</sup> She was regularly subjected to strip searches by male correctional officers who "frequently groped her breasts."<sup>131</sup> She was forced to shower in view of male prisoners, who would "harass her sexually in the bathrooms, with the knowledge and tacit approval of DOC staff."<sup>132</sup> Prison officers and staff refused to refer to her by her accurate name and pronouns, even "mak[ing] a point of asserting that Jane Doe's anatomy is different than any other woman and repeatedly stat[ing] that she is still a man." Prisoners would also "enter[] her cell and attempt[] to physically force themselves on her." The persistent discrimination impacted the plaintiff's health severely, leading her to "frequently skip meals in the prison mess hall and to avoid group activities made available to other prisoners."<sup>133</sup> In the plaintiff's words, "[b]eing a woman in a men's prison

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125. See *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997).

126. See *id.*

127. *Id.* at 671.

128. While, as an unreported district court case, *Blatt* is not binding on any courts, it is persuasive authority and has had far-reaching impact, as exemplified by the *Doe* court's citation to *Blatt* in footnotes. *Doe*, 2018 WL 2994403, at n.11.

129. *Doe v. Mass. Dep't of Corr.*, No. CV 17-12255-RGS, 2018 WL 1156227 (D. Mass. Mar. 5, 2018).

130. *Id.*, at \*3.

131. *Id.*

132. *Id.* at \*4 (quoting Compl. ¶ 44).

133. *Id.*

was daily torture. I was threatened, harassed, and humiliated nearly every day, and lived in constant fear for my safety. The stress and anxiety were totally unbearable . . . [N]o one should have to face what I did.”<sup>134</sup>

The plaintiff eventually sued the prison and several of its officials, alleging, *inter alia*, that the defendants’ conduct violated the ADA.<sup>135</sup> Like Blatt, the plaintiff here contended that gender dysphoria constituted a disability eligible for ADA protections.<sup>136</sup> Gender dysphoria, she posited, did not fall within the ADA carveout for “gender identity disorders not resulting from physical impairments,” because it is not a “‘gender identity disorder’ as that term was meant in crafting the ADA exclusions,” but even if it were, the statutory exclusion still would not be relevant here, because her dysphoria “*does* result from “physical impairments.”<sup>137</sup> To bolster this argument, she pointed to studies “demonstrating that GD diagnoses have a physical etiology, namely hormonal and genetic drivers contributing to the in utero development of dysphoria.”<sup>138</sup>

The court ultimately acknowledged that “Doe has the better of the arguments,”<sup>139</sup> noting, “[w]hile [we] need not take a position on whether GD may definitively be found to have a physical etiology—nor would [we] be confident doing so without the aid of expert testimony—the continuing re-evaluation of GD underway in the relevant sectors of the medical community is sufficient, for present purposes, to raise a dispute of fact as to whether Doe’s GD falls outside the ADA’s exclusion of gender identity-based disorders as they were understood by Congress twenty-eight years ago.”<sup>140</sup> Far from the brash transphobia that characterized the *Maggert* court’s rhetoric, the *Massachusetts* court exhibited great nuance and humility in acknowledging the limits of the judiciary in matters as multivalenced as gender identity. The court denied the Department of Correction’s Motion to Dismiss and allowed the plaintiff’s case to proceed on ADA grounds. It also granted in part her Motion for a Preliminary Injunction, ordering that the Massachusetts Department of Correction “utilize female correctional officers whenever feasible when conducting strip searches of Jane Doe,” that they “continue to house Jane Doe in the individual cell” and “continue to offer the separate shower time,” and that they “make available a separate correctional officer to ensure that male inmates do not enter the shower area during the period of time in which Jane Doe is showering.”<sup>141</sup> Eventually, the

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134. GLAD LEGAL ADVOCATES & DEFENDERS, *supra* note 80.

135. *See Doe v. Mass. Dep’t of Corr.*, No. CV 17–12255-RGS, 2018 WL 1156227 (D. Mass. Mar. 5, 2018).

136. *Id.* at \*1.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at \*7.

141. *Id.* at \*2.

plaintiff obtained a transfer to a women's facility, a monumental victory.<sup>142</sup> Jennifer Levi, the Director of GLAD's Transgender Rights Project and one of the attorneys involved in her case, lauded the transfer as a "hugely important development" for trans rights.<sup>143</sup>

That plaintiff's triumph gestures towards the sweeping possibilities of disability claims advanced by other trans prisoners. Yet despite this potential, I am aware of few cases argued on these grounds.<sup>144</sup> However, those that have been filed show flickers of promise.<sup>145</sup> One of the most recent, the 2021 case *Doe v. Pennsylvania Department of Corrections*,<sup>146</sup> centers a nonbinary incarcerated person diagnosed with gender dysphoria and placed in a women's facility. The plaintiff was denied medical care for gender dysphoria, and, "[d]ue to the fluctuations and inadequate dosages of testosterone, Doe's gender dysphoria worsened, and Doe became depressed, suicidal, and fixated on self-harm," which ultimately led to them committing "self-mutilation" by "removing their nipples."<sup>147</sup> The plaintiff also experienced harm from staff, who neglected to take any action even when informed of the plaintiff's intent to self-harm, and other prisoners, who "repeatedly sexually harassed and physically threatened Doe."<sup>148</sup>

As the plaintiff brought suit under the ADA, among other statutes, the *Pennsylvania* court outlined three distinct judicial approaches to determining whether gender dysphoria is "expressly excluded" from the ADA.<sup>149</sup> The first approach, the court noted, is to "view[] the text's

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142. See GLAD LEGAL ADVOCATES & DEFENDERS, *supra* note 80.

143. *Id.*

144. I found fewer than twenty prison litigation suits brought under the ADA by trans plaintiffs. This is based on searches of the databases Westlaw, LexisNexis, HeinOnline, and SSRN, using keywords including (but not limited to): transgender, prisoners, prison litigation, gender dysphoria, and Americans with Disabilities Act. I also checked the Citing References of the cases mentioned here.

145. See *Iglesias v. True*, 403 F. Supp. 3d 680, 688 (S.D. Ill. 2019) (denying motion to dismiss based on ADA's "gender identity disorders" exclusion, specifically noting the live issue of whether the ADA's transgender exclusion applied to gender dysphoria); *Tate v. Wexford Health Sources, Inc.*, SDIL Case No. 16-cv-92-NJR (permitting trans prisoner's claim to proceed under the ADA); *Hampton v. Baldwin*, SDIL Case No. 18-cv-550-NJR (permitting trans prisoner's claim to proceed under the ADA). Not all cases have turned out favorably for trans plaintiffs. See *Meadows v. Atencio*, No. 1:18-CV-00265-BLW, 2020 WL 2797787, at \*5 (D. Idaho May 29, 2020) (holding that "it is unclear whether gender dysphoria qualifies as a disability under the ADA" and that the Plaintiff "has failed to allege a disability" and thus "[the plaintiff's] ADA and Rehabilitation Act claims fail"); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 753–54 (S.D. Ohio 2018) (holding that gender dysphoria "is expressly excluded from the definition of 'disability'" under the ADA's historical carveouts for "gender identity disorders").

146. *Doe v. Pa. Dep't of Corr.*, No. CV 20–23 (W.D. Pa. Mar. 24, 2021).

147. *Id.* at \*4.

148. *Id.* at \*4–5.

149. *Id.* at \*7.

language as expressing Congress’s intent ‘to exclude from the ADA’s protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment.’<sup>150</sup> The second, à la *Blatt*, is to hold “that gender dysphoria falls outside of the ADA exclusion so long as the condition substantially limits the plaintiff’s major life activities.”<sup>151</sup> The third—and most compelling to the *Pennsylvania* court—is to follow *Doe v. Massachusetts Department of Correction* in recognizing “that a physical etiology underlying gender dysphoria may exist to place the condition outside of the [ADA] exclusion.” This approach, the court put forth, is also the most “faithful to the plain meaning of the statute.”<sup>152</sup>

Ultimately, the *Pennsylvania* court took the third route and allowed the plaintiff’s ADA claim to proceed.<sup>153</sup> The opinion acknowledges that because courts “typically lack sufficient expertise . . . to determine the cause or causes of gender dysphoria,” courts “should rarely hold as a matter of law . . . that a plaintiff’s gender dysphoria is or is not the result of a physical impairment.”<sup>154</sup> This statement reveals a humility on the part of the court and an openness to new ideas that judges may not have expertise in.

However, I do want to underscore that the viability of disability claims for gender dysphoria remains an unsettled area of law. The cases I have touched on here all played out in the lower courts; they do not have precedential authority, although they will likely influence the trajectory of trans rights prison litigation. The future of this litigation will turn on which of the three approaches to the gender-dysphoria-as-covered-disability question outlined in *Doe v. Pennsylvania Department of Corrections* higher courts take. Currently, most defenses raised by prisons revolve around the idea that gender dysphoria cannot be covered under the ADA.<sup>155</sup> In *Pennsylvania*, for instance, the defendants assert-

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150. *Id.* at \*8.

151. *Id.*

152. *Id.* at \*9.

153. *Id.* at \*7.

154. *Id.* at 9.

155. Common defenses also foreground the argument that the ADA is an inappropriate vehicle for trans prisoner litigation. For instance, the defendants in *Doe v. Pennsylvania* additionally argued that, “even if Doe’s gender dysphoria qualifies as a disability, Doe’s ADA and Rehab Act ‘claims fail on the merits’ because they have not alleged that they were ‘excluded from a DOC program or service *because* of a disability.” *Doe v. Pa. Dep’t of Corr.*, No. CV 20–23, at \*12 (W.D. Pa. Mar. 24, 2021). The court also rejected this argument. *See id.* Another frequent issue raised by defendants is the failure to exhaust administrative remedies before turning to the courts, per the requirements of the Prison Litigation Reform Act (I discuss the Prison Litigation Reform Act in greater depth in Part IV.C.4). *See, e.g., Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730 (S.D. Ill. Nov. 7, 2018). Other defenses are more specific to the facts of each case; for instance, the *Doe v. Pennsylvania* court asked, “that the Court parse the various accommodations Doe has requested and determine whether each is ‘reasonable,’” an analysis that the court

ed that “Doe’s condition and limitations are expressly excluded from the definition of ‘disability’ by another provision of the statute.”<sup>156</sup> Although the *Pennsylvania* court rejected this argument, we cannot predict where others will come down on this vexed question. As more cases work their way up the courts, we will be able to piece together a clearer picture of the promise and future of disability law for trans prisoners. If the trend indicated by our two *Doe* cases continues, however, the potential of trans prisoner litigation under the ADA is enormous.

### III. THE POTENTIAL HAZARDS OF ENVELOPING GENDER DYSPHORIA PROTECTIONS UNDER THE ADA

Although the benefits of litigating disability claims for trans people are abundant, I would be remiss if I did not mention the potential pitfalls of this approach. This section touches on two primary drawbacks: the hazards of medicalization and the barriers to obtaining a diagnosis. Part IV then thinks towards how we might reconcile the tensions produced by championing disability claims for trans prisoners.

#### A. *Gender as a Construct: A Historical Overview*

Gender is a capacious category. Gender theorists posit that gender is a spectrum; in other words, an individual’s gender identity is not an inherent, static truth, but rather fluid, iterative, and ever-evolving.<sup>157</sup> The pervasive cultural understanding of gender as binary and typically conflated with biological sex<sup>158</sup> is largely a colonial export: the naturalization of the gender binary as it infected cultures across the world through European imperialism.<sup>159</sup> María Lugones dubs this “the coloniality of gender,” positing that today’s dominant binary gender system was taken up on the global stage through the imperial project.<sup>160</sup> Colonial powers assigned moral weight to imperial endeavors by erecting a sharp dichotomy between their own “evolved” notion of gender as binary and Indigenous understandings of gender.<sup>161</sup>

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notes is “fact-based.” *Doe*, No. CV 20–23, at \*12.

156. *Doe*, No. CV 20–23, at \*12.

157. See sources cited *supra* note 34.

158. Although gender is a social construct distinct from biological sex, it merits note that biological sex is not binary, either. See JULIAN GILL-PETERSON, HISTORIES OF THE TRANSGENDER CHILD 119–20 (2018) (noting that leading endocrinologists suggest that “all humans were, to a certain degree, normally intersex,” and that “masculinity and femininity were mere tendencies, rather than absolute forms, and human life existed along a range of benign variation.”).

159. María Lugones, *Heterosexuality and the Colonial/Modern Gender System*, 22 *HYPATIA* 186, 203–12 (2007).

160. *Id.* at 200.

161. SARA MILLS, GENDER AND COLONIAL SPACE 301 (2013).

In India, for instance, such dichotomies became metonymies for civilized and savage, for enlightened and backwards.<sup>162</sup> Colonialism essentially effaced robust genealogies of gender and sexual fluidity, imposing immutable binary gender and compulsory heterosexuality on the subcontinent.<sup>163</sup> As Mrinalini Sinha writes, the “figures of the ‘manly Englishman’ and the ‘effeminate Bengali babu’” were “tied to the entire ensemble of political, economic, and administrative imperatives that underpinned the strategies of colonial rule.”<sup>164</sup> The distinction between the superior British gender performance and the lacking Indigenous Indian one thus legitimized centuries of bloody colonial rule. By denouncing gender fluidity as unnatural, colonial powers did not merely subscribe to an overarching concept of gender as binary, but actively constructed it. Far from a natural or ahistorical phenomenon, then, binary gender was produced through and from the colonial encounter. It was also charged with moral force: binary gender was proper, enlightened, whereas alternative epistemologies of gender were denounced as primitive and savage.<sup>165</sup> The gender binary—a curated, codified construct—was thus propped up as natural to rationalize colonialism in the name of civilization.

Gender as a construct has long been wielded as a tool of violence—to draw sharp lines between feminine and masculine, and to punish those who failed to adequately conform to their respective categories. In the Jim Crow South, for instance, Black women were often deemed to occupy “a liminal space of gender ambiguity” in which they were “less sexually differentiated than white women,” and therefore “outside binary categories of woman and man.”<sup>166</sup> This white supremacist rhetoric exposes the category of womanhood to be specific and racialized, not universal. The archetypal woman in the Western imagination was a white woman, a “subject who was vulnerable and must be protected from violence.”<sup>167</sup> That Black women were denied access to this womanhood exposes the construct’s hollowness. Sarah Haley contends that “gender is constructed by and through race,” and that white supremacy is predicated on “associating gender normativity with whiteness and antinormativity with Blackness.” Moreover, this supposed “gender ambiguity” justified rampant medical abuse of Black women, from stripping them of access to women’s health care to outright eugenics.<sup>168</sup>

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162. RUTH VANITA, *QUEERING INDIA: SAME-SEX LOVE AND EROTICISM IN INDIAN CULTURE AND SOCIETY* 229 (2001).

163. *Id.*

164. MRINALINI SINHA, *COLONIAL MASCULINITY: THE “MANY ENGLISHMAN” AND THE “EFFEMINATE BENGALI” IN THE LATE NINETEENTH CENTURY* 11 (1997).

165. *Id.*

166. SARAH HALEY, *NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY* 92 (2016).

167. *Id.* at 99.

168. *Id.* at 92.

The legacy of the racist gender binary continues to this day. To name just one example, Black women are routinely assigned harsher prison sentences than their white counterparts for the same offenses. One of rationales behind this discrepancy is that white women are presented as “hapless casualties of circumstance in need of rescue,” while Black women are treated as “inherently criminal.”<sup>169</sup> In other words, the ascription of femininity and womanhood to white women continues to have material consequences for those individuals who do not conform to this standard: not just trans women and nonbinary people, but also cisgender women of color. Similar systems of policing and disciplining gender non-conformity apply to men who do not live up to the standards imposed by white masculinity. In sum, binary gender is an empty signifier—a colonial construct that has long been harnessed to enact material and epistemic harm on marginalized communities.

Despite the hollowness of the gender construct, the law persists in conceptualizing gender as “a legal reality predicated upon a biological fact,” resulting in the invisibility and misunderstanding of transgender identities.<sup>170</sup> This erasure has significant consequences: in the context of this Note, for instance, it means that trans prisoners face a high burden of proof to demonstrate to legal adjudicators that their gender identity is valid despite it differing from their sex assigned at birth. As Florence Ashley notes, “[l]egal provisions create tangible administrative and juridical difficulties for trans people, contribute to their alienation from civil society, and participate in the maintenance of a range of oppressive ideological structures,” thereby “engender[ing] discursive and material violence.”<sup>171</sup>

### B. *Medicalization and the LGBTQ+ Community*

The reification of binary gender categories subjects everyone who falls outside them to medical scrutiny. This includes trans and queer people, because heteronormativity is core to binary gender performance. For centuries, medicalization has been invoked as a “solution” to queerness and transness.<sup>172</sup> In the nineteenth century, medical professionals studied skull size and facial features as “legitimate indicators of criminal tendencies including homosexual leanings.”<sup>173</sup> Renowned psychiatrists boasted their ability to identify lesbians by their “obviously unsymmetrical faces.”<sup>174</sup> In search of a “cure” for homosexuality,

169. *Id.* at 22.

170. Florence Ashley, *The Constitutive In/visibility of the Trans Legal Subject: A Case Study*, 28 UCLA WOMEN’S L.J. 423, 438 (2021) [hereinafter Ashley, *Case Study*].

171. *Id.* at 457.

172. NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM 9 (2003).

173. *Id.* at 94.

174. *Id.* at 116.

anatomists routinely castrated queer men and transplanted testicular tissue from heterosexual men.<sup>175</sup> By the early twentieth century, a plethora of high-risk “treatments” were routinely administered on queer and trans people to “correct” their “deviance,” including but not limited to: chemical and electric shock treatments, lobotomies, hysterectomies, castrations, vasectomies, and clitoridectomies.<sup>176</sup> In 1972 alone, over four thousand lobotomies were performed as “curatives” for homosexuality in mental institutions and prisons.<sup>177</sup> Although gender-affirming surgeries were first performed in the 1960s,<sup>178</sup> they were largely discontinued in the wake of backlash led by Paul McHugh, Chief of Psychiatry at Johns Hopkins Hospital, who condemned trans identity as a mental illness that should not be supported with surgery.<sup>179</sup> For decades afterwards, gender-affirming surgery fell into the realm of private practice, rendering it expensive and often inaccessible to trans people.<sup>180</sup>

Fundamentally, trans identities have been pathologized and medicalized as a result of cisnormativity’s hegemonic power. This fraught history informs present conditions. Medical professionals still lack adequate training and competency with trans issues: 50% of trans patients report having to “teach” their doctors about their identities.<sup>181</sup> This knowledge gap implicates the demographic breakdown of the medical profession—less than 1% of U.S. medical students and physicians identify as anything other than heterosexual and cisgender, despite record numbers of Americans now identifying as LGBTQ+.<sup>182</sup> It also harkens to the systemic neglect of trans health care training in medical education: only a third of U.S. medical schools dedicate any curriculum space to LGBTQ+ health care.<sup>183</sup> Even hospital infrastructure is built with cisgender patients in mind; for example, common drop-down boxes in medical

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175. *Id.* at 226–71.

176. *Id.* at 231.

177. *Id.* at 406.

178. See Farah N. Khan, *A History of Transgender Health Care*, SCIENTIFIC AMERICAN (Nov. 16, 2016), <https://blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care> [<https://perma.cc/JNY6-6ZHQ>].

179. See Sonya Vatomsky, *Why It’s So Hard for Doctors to Learn About Transgender Health Issues*, THE CUT (Oct. 30, 2017), <https://www.thecut.com/2017/10/why-its-so-hard-for-doctors-to-learn-about-trans-health.html> [<https://perma.cc/8W5G-NG9U>].

180. *Id.*

181. *Id.*

182. See Lala T. Das, *We Need More Transgender and Gender Nonbinary Doctors*, ASS’N AM. MEDICAL COLLEGES (Sept. 1, 2020), <https://www.aamc.org/news-insights/we-need-more-transgender-and-gender-nonbinary-doctors> [<https://perma.cc/A7FN-MH6L>]; see also Alexandra Kelley, *New Poll Finds Record Number of Americans Identify as LGBT*, THE HILL (Feb. 25, 2020), <https://thehill.com/changing-america/respect/diversity-inclusion/540487-new-poll-finds-record-number-of-americans> [<https://perma.cc/E74J-X5A3>].

183. Juno Obedin-Maliver et al., *Lesbian, Gay, Bisexual, and Transgender-Related Content in Undergraduate Medical Education*, 306 JAMA 971, 975–77 (2011).

forms typically only list “male” and “female” options.<sup>184</sup> This bureaucratic pigeonholing has concrete consequences; if a physician cannot order a pap smear without selecting “female” as the gender of the patient, trans men, as well as nonbinary, agender, and genderqueer people, may not be able to receive the treatment they need. Trans people are also often forced to register as either male or female in a hospital’s system, which then determines the screening tests the patient is invited to, resulting in thousands of people missing out on sex-specific, potentially life-saving screenings like breast exams, pap smears, and prostate cancer screenings.<sup>185</sup> Matthew Dominguez, a Psychiatry Fellow at Mt. Sinai Center for Transgender Medicine, notes that trans-specific health care programs are sorely needed to bridge systemic knowledge gaps, because “most doctors have no way of knowing how to approach this population.”<sup>186</sup>

Moreover, in a society where medical recognition confers legitimacy, the power differential between trans patients and medical providers is salient. As Rabia Belt and Doron Dorfman highlight, “[m]edicalizing civil rights thus means taking the expertise and decision-making capacity away from patients and disabled individuals and handing it over to other experts to make decisions for them.”<sup>187</sup> For this reason, among others discussed in this Note, many trans public figures and organizations support the move to demedicalize trans identities.<sup>188</sup> Champions of demedicalization express concern about the power such medicalization vests in medical professionals at the expense of trans individuals, who are often not recognized as valid without a medical seal of approval.<sup>189</sup> Dean Spade notes that, “[i]f you are trans or gender transgressive, even your ability to use a gendered bathroom without getting harassed or arrested may be dependent on your ability to produce identification of your gender, which will only indicate your new gender if you have successfully submitted medical evidence to the right authorities.”<sup>190</sup> The “contentious and oppressive relationship between the medical establishment and gender transgressive people” complicates calls to litigate disability claims on behalf of trans prisoners.<sup>191</sup> As long as legal recognition and protection

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184. See Vatomsky, *supra* note 179.

185. See Zaria Gorvett, *Why Transgender People Are Ignored by Modern Medicine*, BBC FUTURE (Aug. 16, 2020), <https://www.bbc.com/future/article/20200814-why-our-medical-systems-are-ignoring-transgender-people> [<https://perma.cc/9FA4-MVSK>].

186. Vatomsky, *supra* note 179.

187. Rabia Belt & Doron Dorfman, Response, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 184 (2020), <https://www.stanfordlawreview.org/online/reweighing-medical-civil-rights> [<https://perma.cc/TS4E-E7XS>].

188. See Pieter Cannoot, #WontBeErased: *The Effects of (De)pathologisation and (De)medicalization on the Legal Capacity of Trans\* Persons*, 66 INT’L J.L. & PSYCH. 101478, 2019, at 1, 5.

189. *Id.* at 5–9.

190. Spade, *Resisting Medicine*, *supra* note 32, at 17.

191. *Id.* at 18.

hinges on medical recognition, such litigation is necessarily a space of uneasy, perpetual negotiation.

### C. *Access Barriers to a Gender Dysphoria Diagnosis*

Beyond macro concerns with medicalization, obtaining a gender dysphoria diagnosis also poses obstacles on a micro scale. Consider, once again, the *Blatt* case. Blatt was the quintessential “perfect plaintiff”<sup>192</sup>: She had an official diagnosis; she had documentation of her transition and her name change. The accommodations she sought were small and the discrimination she faced immense.<sup>193</sup> In other words, she checked all of the boxes that respectability politics<sup>194</sup> demands of marginalized litigants. However, most plaintiffs—especially those as vulnerable as trans prisoners—will likely not be as “perfect.” Requiring a diagnosis, therefore, may in reality harm the very people impact litigation purports to serve: the most marginalized among us.

The access barriers to a gender dysphoria diagnosis are many and varied. First, trans people are twice as likely to be living below the poverty line than cisgender people, a statistic that becomes even more dire when trans people of color are isolated; in a survey released by the National Center for Transgender Equality, 38% of Black respondents reported living in poverty, as did over 40% of Latinx and Indigenous respondents.<sup>195</sup> This socioeconomic gap has bleak implications for access to health care: one in five trans adults is uninsured.<sup>196</sup> Uninsured individuals may face exponential expenses for basic medical treatment, and the debilitating cost forces many trans people to postpone or avoid medical care altogether, even when they desperately need it.<sup>197</sup>

Even those trans individuals who have insurance coverage may still face an uphill battle to receive adequate medical treatment. Many insurance providers categorize forms of gender-affirming care as “cosmetic” and thus not eligible for coverage.<sup>198</sup> Ten states have Medicaid

192. See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. 136 (2015).

193. *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

194. See Jeremiah A. Ho, “*Find Out What It Means to Me*”: *The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 18 UTAH L. REV. 463 (2017).

195. Edmonds, *supra* note 36 (citing NAT’L CTR. TRANSGENDER EQUALITY, THE REPORT OF THE U.S. TRANSGENDER SURVEY (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>).

196. Corinne Lewis et al., *Federal Government Reinstates Health Care Protections for Transgender Americans*, COMMONWEALTH FUND (May 11, 2021), <https://www.commonwealthfund.org/blog/2018/federal-protections-health-care-risk-transgender-americans> [<https://perma.cc/3M4F-ZA3H>].

197. *Id.*

198. Jo Yurcaba, *Transgender People Report Years of Battles for Health Insurance Coverage*, NBC NEWS (Sept. 22, 2021), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/transgender-people-report-years-battles-health-insurance-coverage-rcna2145> [<https://perma.cc/X6GE-VTQD>].

policies that explicitly exclude gender-affirming care.<sup>199</sup> Several government-funded insurance companies have placed blanket bans on gender-affirming surgery, such as TRICARE, the military's insurance for service members, which "generally doesn't cover surgery for gender dysphoria."<sup>200</sup> A Center for American Progress report found that 40% of insured trans people—and 56% of insured trans people of color—have been denied insurance coverage for gender-affirming care.<sup>201</sup>

Even procedures covered by insurance are not always easily accessible in practice. The National Center for Transgender Equality survey revealed that 60% of respondents are not out to their medical providers, due to concerns about backlash, harassment, and refusal of care.<sup>202</sup> Their fears are far from unfounded: Almost 30% of out trans patients report experiencing harassment in a medical setting, and almost 20% have been refused medical care on the basis of their gender identity.<sup>203</sup> When trans patients cannot be open about their identities in medical settings, their providers lack critical information that must inform their patients' diagnoses and treatment plans, thereby precluding the provision of adequate care. One trans patient, for example, almost died of kidney disease because his doctors failed to consider the fact that he had been taking testosterone for fifteen years.<sup>204</sup>

On top of interpersonal anxiety, trans people also face the constant threat that the government will thwart their access to health care. During a global pandemic, for instance, the Trump administration planned to eliminate nondiscrimination protections for LGBTQ+ people in health care spaces.<sup>205</sup> Although these protections have since been reinstated under the Biden administration, their permanence is not guaranteed.<sup>206</sup> A record number of states have also passed bills denying vital gender-affirming care to trans youth in recent years.<sup>207</sup>

These access barriers are particularly acute for trans people of color, who constitute a disproportionate percentage of trans prisoners.<sup>208</sup> Race is a key determinant in access to health care, with people of color

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199. *Id.*

200. *Id.*

201. Medina et al., *supra* note 35.

202. See Edmonds, *supra* note 36.

203. *Id.*

204. Gorvett, *supra* note 185.

205. *Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation: Frequently Asked Questions*, NAT'L CTR. TRANSGENDER EQUALITY (Apr. 2020), <https://transequality.org/HCRL-FAQ> [<https://perma.cc/DME5-P9RQ>].

206. See Lewis, *supra* note 196.

207. Kerith J. Conron et al., *Prohibiting Gender-Affirming Medical Care for Youth*, WILLIAMS INST. (Apr. 2021), <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care> [<https://perma.cc/VHK9-DCSU>].

208. See LAMBDA LEGAL, *supra* note 84.

relegated to “lower-quality health care” than their white counterparts.<sup>209</sup> On balance, people of color are more likely to lack insurance,<sup>210</sup> more likely to have their pain dismissed or disbelieved by medical professionals,<sup>211</sup> more likely to live in areas with health care provider shortages,<sup>212</sup> and more likely to die prematurely from treatable conditions.<sup>213</sup> A 2016 study even found that forty percent of medical students agreed with the statement that “Black people’s skin is thicker than white people’s.”<sup>214</sup> Trans people of color must therefore contend with the mutual imbrications of racism and transphobia when attempting to access medical care.

Finally, these access barriers are compounded for those who are incarcerated. Samantha Braver writes that “access to mental health professionals capable of issuing a diagnosis of gender dysphoria can be a particular challenge” in prisons.<sup>215</sup> Braver bolsters this claim through the case study of the New York State Department of Corrections and Community Supervision, which contracted with only one doctor able to issue gender dysphoria diagnoses over a period of five years, resulting in an average wait time of six months to see this doctor and delayed diagnoses for potentially life-saving treatment.<sup>216</sup> Moreover, even with a diagnosis, it remains “exceedingly difficult for transgender inmates . . . to receive proper medical care.”<sup>217</sup> Prisons frequently employ policies such as blanket bans on gender-affirming care or “freeze frames,” which “freeze treatment options for incarcerated transgender individuals at the level of treatment they received prior to their incarceration.”<sup>218</sup> The numerous impediments littered on the road to health care fundamentally trap trans individuals—and specifically, for the purposes of this Note,

209. Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, AM. BAR, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/#:~:text=NAM%20found%20that%20%E2%80%9Cracial%20and,physicians%20give%20their%20black%20patients](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/#:~:text=NAM%20found%20that%20%E2%80%9Cracial%20and,physicians%20give%20their%20black%20patients) [https://perma.cc/K3W7-2UEM].

210. Samantha Artiga et al., *Health Coverage by Race and Ethnicity*, KAISER FAMILY FOUND, (July 16, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity> [https://perma.cc/FKT6-RPUP].

211. Janice A. Sabin, *How We Fail Black Patients in Pain*, ASS’N OF AM. MED. COLLS. (Jan. 6, 2020), <https://www.aamc.org/news-insights/how-we-fail-black-patients-pain> [https://perma.cc/Z9PH-4HV4].

212. Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, THE CENTURY FOUND. (Dec. 19, 2019), <https://tcf.org/content/report/racism-inequality-health-care-african-americans/?session=1> [https://perma.cc/UFP9-NBND].

213. David C. Radley, *Diving into the Data: How Many Americans Die Prematurely from Treatable Causes?*, THE COMMONWEALTH FUND (Aug. 6, 2019), <https://www.commonwealthfund.org/blog/2019/americans-die-prematurely-treatable-causes> [https://perma.cc/U8AP-MX3F].

214. Sabin, *supra* note 211.

215. Braver, *supra* note 106, at 2247.

216. *Id.*

217. Luchs, *supra* note 105.

218. Braver, *supra* note 106, at 2247.

trans prisoners—in a liminal state of precarity. The most marginalized people are also those with the least access to a formal diagnosis and gender-affirming care.<sup>219</sup>

#### D. *Translation Politics in Medical Spaces*

The question of validity animates contemporary trans rights discourse. The answer is too often found in a doctor's office; if an individual can obtain an official diagnosis from a medical profession, their identity is deemed valid, deemed *real*.<sup>220</sup> However, even for trans individuals who make it into a doctor's office, the struggle to obtain a gender dysphoria diagnosis is far from over. As discussed above, gender is not a binary, nor is it a fixed, static condition.<sup>221</sup> But medical terminology has not kept pace with evolving societal understandings of gender. Because most medical providers are taught the bare minimum about trans issues, they typically approach gender as a binary, and transpose outdated notions of gender on their clients' deeply personal experiences.<sup>222</sup> As Aron Janssen, Founder and Director of the Gender and Sexuality Service at New York University Langone Center, reflected, "[t]he medical world is very far behind. It is a conservative organization. Things are slow to move."<sup>223</sup>

Under this conservative approach, only the most visible categories of trans experience are legible to medical providers. In a clinical study, a trans man described an encounter with a physician who could not fathom how he could get pregnant.<sup>224</sup> "He had some kind of block," the patient said. "I told him that I had been diagnosed with postpartum psychosis. And he was like, 'How could you possibly have been pregnant?' Well, it's not that hard to understand."<sup>225</sup> Another patient noted that their gynecologist looked at them as though they were "the most bizarre thing on the planet."<sup>226</sup> To receive gender-affirming surgery, Dean Spade noted that he had to "perform a desire for gender normativity," and that his "quest for body alteration had to be legitimized by a medical reference to, and pretended belief in, a binary gender system that [he] had been working to dismantle since adolescence."<sup>227</sup> Translation politics inher-

219. Safer et al., *supra* note 33.

220. See Kayley Whalen, *Invalidating Transgender Identities: Progress and Trouble in the DSM-5*, NAT'L LGBTQ TASK FORCE, <https://www.thetaskforce.org/invalidating-transgender-identities-progress-and-trouble-in-the-dsm-5> [<https://perma.cc/ZGB7-TZEX>].

221. See BUTLER, *supra* note 34; see also THE SOCIAL CONSTRUCTION OF GENDER, *supra* note 31.

222. See Vatomsky, *supra* note 179.

223. *Id.*

224. Deborah McPhail, Marina Rountree-James & Ian Whetter, *Addressing Gaps in Physician Knowledge Regarding Transgender Health and Healthcare Through Medical Education*, 7 CANADIAN MED. ED. J. 70, 73 (2016).

225. *Id.*

226. *Id.*

227. Spade, *Resisting Medicine*, *supra* note 32, at 24.

ent in any medical encounter are particularly fraught for trans patients; the onus is on them to, in essence, justify their identity and experiences to a (likely cisgender) provider who has little to no training in trans health care.

The dissonance between provider comprehension and the lived experiences of gender are perhaps best exemplified by medical approaches to treating nonbinary<sup>228</sup> people. Nonbinary identities can be encompassed under the trans umbrella in that nonbinary people do not identify with their assigned sex at birth.<sup>229</sup> However, nonbinary people are distinct from binary trans people in that nonbinary people do not aim to transition to the “opposite” gender.<sup>230</sup> They do not identify neatly with the binary categories of “male” or “female.” This does not mean that they are a third gender, nor that they fall somewhere between “males” and “females.” Instead, it means that they do not fit into the gender binary at all.<sup>231</sup> Approximately one third of all trans people identify as nonbinary.<sup>232</sup> People who do not conform to the Western gender binary have existed in ancient societies long before the terminology “nonbinary” existed. Consider the “hijras” in ancient India for instance, who possessed qualities of both men and women but did not identify as either.<sup>233</sup> There are infinite ways to be nonbinary—a nonbinary person can use any pronouns, and express their gender in any way, even ways that cisgender people may not perceive as non-normative.

Being nonbinary is not the same as being intersex; intersex is a descriptive term for people may have anatomy, genes, or hormones that do not conform to binary biological definitions of cisgender males and females.<sup>234</sup> Nonbinary identity, on the other hand, is not a question of

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228. I am use nonbinary here as an umbrella term to encompass all gender identities that do not conform to the male-female dichotomy. This includes nonbinary, gender non-conforming, agender, genderqueer, or genderfluid. See Surya Monro, *Nonbinary and Genderqueer: An Overview of the Field*, 20 INT’L J. TRANSGENDERISM 126, 126–31 (2019), for a more robust discussion of nonbinary identities.

229. *Non-Binary Inclusion*, LGBT FOUND., <https://lgbt.foundation/who-we-help/trans-people/non-binary> [<https://perma.cc/T8YM-RVD4>].

230. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Oct. 5, 2018), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [<https://perma.cc/3V35-QK23>].

231. *Id.*

232. M. Paz Galupo et al., “*There Is Nothing to Do About It*”: *Nonbinary Individuals’ Experience of Gender Dysphoria*, 6 TRANSGENDER HEALTH 110 (2021).

233. Mere Abrams, *What Does It Mean to Identify as Nonbinary?*, HEALTHLINE (Dec. 20, 2019), <https://www.healthline.com/health/transgender/nonbinary> [<https://perma.cc/PN6U-XAJM>].

234. *See What’s Intersex?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity/whats-intersex> [<https://perma.cc/C534-59XK>]; *see also* NAT’L CTR. FOR TRANSGENDER EQUAL., *supra* note 230.

biological sex but of gender identity.<sup>235</sup> The only assumption appropriate to draw about nonbinary people is that they do not identify as cisgender men or women. Beyond that, their gender identity is deeply personal and, just as there is no “right” way to be binary trans, there is also no right way to be nonbinary. Still, nonbinary and intersex people are often absent from legal formulations of gender, which “reveals an attachment to gender as binary and biological through the fabrications of language and legal sex.”<sup>236</sup>

Scholarship suggests that approximately 75% of nonbinary people experience gender dysphoria.<sup>237</sup> They may also seek medical transition; a nonbinary transmasculine person, for instance, may wish to take testosterone or undergo top surgery without identifying as a transgender man.<sup>238</sup> However, this nuance is often elided in medicine. To the extent that trans health care is taught and understood in medicine, it is, by and large, limited to the needs of binary trans people.<sup>239</sup> Because “normative expressions of gender within a singular category”<sup>240</sup> are valorized, binary trans identities are often more palatable to a cisnormative society—they slot neatly into an existing binary.

The consequences for those who refuse to conform to that binary altogether can be dire. Many nonbinary individuals who seek medical treatments like hormone therapy or gender-affirming surgery are dismissed, disbelieved, even scoffed at.<sup>241</sup> A study published in *LGBT Health* revealed that nearly all nonbinary participants reported encountering medical providers who did not know or understand their experiences, and who did not provide gender-affirming care.<sup>242</sup> One gender-nonconforming patient who uses he/him pronouns was refused hormone replacement therapy on the grounds he was not “trans enough.”<sup>243</sup> He said, “[i]t sent me into a deep depression and messed up my dysphoria that was under control.”<sup>244</sup> After an invalidating appointment in which their therapist claimed nonbinary gender identity did not exist, another nonbinary teenager said, “[i]f my therapist says I’m not real, maybe I’m not real.”<sup>245</sup> To

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235. LGBT FOUND., *supra* note 229.

236. Ashley, *Case Study*, *supra* note 170, at 436.

237. Galupo et al., *supra* note 232.

238. *Id.*

239. *Id.*

240. See Spade, *Resisting Medicine*, *supra* note 32, at 26.

241. See Tatyana Bellamy-Walker, *For Nonbinary Patients, Seeking Health Care Can Be a Painful Task*, NBC NEWS (Nov. 29, 2018), <https://www.nbcnews.com/feature/nbc-out/nonbinary-patients-seeking-health-care-can-be-painful-task-n941341> [<https://perma.cc/4DBG-G6PW>].

242. James E. Lykens et al., *Healthcare Experiences Among Young Adults Who Identify as Genderqueer or Nonbinary*, 5 *LGBT HEALTH* 191, 191–96 (2018).

243. See Bellamy-Walker, *supra* note 241.

244. *Id.*

245. *Id.*

be taken seriously enough to gain access to treatment, many nonbinary people feel forced to conceal their gender identities. “Most of the non-binary people who have been seeking to transition have had to lie,” one patient said.<sup>246</sup> They added, “I don’t personally know any nonbinary people who are out . . . as nonbinary people who have been able to undergo treatment successfully.”<sup>247</sup>

The DSM-5 attempts to break down gender dysphoria in a legible, simplified way for health providers unfamiliar with the nuances of non-cisnormative gender. Recall, however, that this codification can be problematic. To receive a diagnosis of gender dysphoria, an individual must exhibit attendant disabling physical symptoms, in addition to manifestations of “clinically significant distress” or “impairment in social, occupational, or other important areas of functioning.”<sup>248</sup> This appraisal is not only rigid, but deeply subjective. It empowers medical providers to dismiss a patient’s dysphoria as not “clinically significant,” or not a significant enough to qualify as an “impairment,”—rhetoric that harkens back to the aforementioned provider’s suggestion that certain trans people are not “trans enough.”<sup>249</sup>

Furthermore, gender dysphoria does not always present in a way that can be deciphered by strictly following the DSM-5 criteria.<sup>250</sup> Not all trans people experience both physical and mental manifestations of dysphoria.<sup>251</sup> Consider for instance a person who was assigned female at birth who identifies as nonbinary and presents as femme. If this person sought a gender dysphoria diagnosis, it may be onerous for them to translate their unique experience and identity to medical providers who struggle to understand that a person can experience gender dysphoria without necessarily wanting to change their physical appearance or medically transition.<sup>252</sup> Moreover, some trans people do not experience gender dysphoria at all; they may identify as trans and still be content with their body, gender expression, and presentation, and not wish to actively change any of it.<sup>253</sup> My hope in laying out the many and varied ways gender dysphoria can present is to urge courts to not solely

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246. Chris Godfrey, *How the Healthcare System Screws Over Nonbinary People*, VICE (Mar. 14, 2016), <https://www.vice.com/en/article/vv59my/how-the-healthcare-system-screws-over-non-binary-people> [<https://perma.cc/R2SR-9MDK>].

247. *Id.*

248. *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/KV3J-CNTE>].

249. *Id.*

250. Jack Drescher et al., *Expert Q&A: Gender Dysphoria*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a> [<https://perma.cc/Z9W2-MPBZ>].

251. *Id.*

252. See Godfrey, *supra* note 246.

253. See Drescher et al., *supra* note 250.

consider the typical diagnostic symptoms outlined in the DSM-5 (such as the desire to undergo gender-affirming surgery), but to instead take a holistic approach that considers both personal accounts of gender identity and various mental and physical manifestations of gender dysphoria.

In sum, the work of translation that undergirds any patient-provider interaction is particularly freighted for trans individuals. Systematizing a category as fluid as gender flattens its nuances and forces people into inflexible compartments that may not align with their identities. The project of translation raises a number of sticky questions. How do you render your personal experience of gender legible to hegemonic gatekeepers? What does gender dysphoria have to look like to be medically validated? How do you *prove* gender dysphoria? The dissonance between lived experiences and medical understandings of gender produces negative, often harmful outcomes for trans people seeking a diagnosis and treatment. They face the heavy burdens of seeking out trans-friendly medical providers, advocating for themselves, explaining their personal experiences to people who may not understand them, and educating their providers about trans bodies and issues. These challenges with translation in medical spaces are further exacerbated in the prison context, where incarcerated people lack even basic health care and access to qualified health practitioners.

#### E. *Translation Politics in the Courts*

The politics of translation do not end after a trans person obtains a gender dysphoria diagnosis. If they wish to litigate a claim under the ADA, they will also have to grapple with the conservative legal system. The mutability of gender is at odds with legal frameworks, which strive to catalog the most nebulous of categories into static doctrines.<sup>254</sup> The reasonable person standard, for instance, posits that a person is negligent if they do not exercise the same level of care that a hypothetical reasonable person would under the similar circumstances.<sup>255</sup> This standard lies at the core of the American legal system: It “enables judgment, allocates culpability, furnishes a basis by which defenses are validated or invalidated, . . . facilitates remedy and punishment,” and “provides a rational justificatory schema for dispensing justice.”<sup>256</sup> The snarl here, of course, is that such a standard assumes that the default reasonable person is a white neurotypical person.<sup>257</sup> Actions that may be consid-

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254. See Dean Spade, *For Those Considering Law School*, 6 UNBOUND: HARV. J. LEGAL LEFT 110, 110–19 (2010).

255. Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 820 (2001).

256. See Marvin L. Astrada & Scott B. Astrada, *Law, Continuity, and Change: Revisiting the Reasonable Person Within the Demographic, Sociocultural, and Political Realities of the Twenty-First Century*, 14 RUTGERS J.L. & PUB. POL’Y 196, 200 (2016).

257. *Id.*

ered reasonable in other cultures or contexts could rise to the level of negligence under this standard,<sup>258</sup> as could behavior associated with neurodivergence.<sup>259</sup> The legal system elides nuance in its drive to produce facile categories and bright-line rules. This attempted universalization perpetuates harm and penalizes actions or identities that are inscrutable to the dominant culture.

The illegibility of non-normative categories is particularly acute with regard to gender and sexuality. Courts struggle to accommodate non-dichotomous identities, which results in the erasure and invisibility of identities like bisexuality from legal discourse.<sup>260</sup> Extant literature reveals an “almost complete systemic erasure of bisexuals in briefings and opinions,” even those associated with milestone LGBTQ+ cases.<sup>261</sup> This erasure has material ramifications for bisexual individuals, as well as the broader queer community. For instance, bisexual asylum seekers are routinely turned away from the U.S. if they have ever had heterosexual relationships and under the current immigration system, prior heterosexual relationships can invalidate queer migrants’ asylum claims, deeming them not “gay enough” to require protection from persecution.<sup>262</sup> At the root of it, “requiring fixed and permanent categories is characteristic of the legal system of a neoliberal state, which seeks clarity and avoids ambiguity.”<sup>263</sup>

Although there have been too few cases invoking ADA protections for gender dysphoria to make any generalizations as of now, it is likely that future litigants—especially those who might not be the “perfect plaintiff” that Blatt was—will be subjected to such heightened forms of scrutiny. Trans plaintiffs, and especially vulnerable incarcerated plaintiffs, may feel painfully exposed when lawyers, judges, and juries to dissect and scrutinize the validity of their deeply personal identities. Such gatekeeping and invalidation can be triggering, even traumatizing, and serve to exacerbate the dysphoria that trans prisoners will be in court seeking to alleviate in the first place.

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258. See Paul T. Hayden, *Cultural Norms as Law: Tort Law’s “Reasonable Person” Standard of Care*, 15 J. AM. CULTURE 45, 51 (1992).

259. See Kristin Harlow, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733, 1733–39 (2007).

260. See Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. GENDER & L. 291, 295 (2015).

261. *Id.* at 298.

262. *Id.* at 316.

263. Stefan Vogler, *Legally Queer: The Construction of Sexuality in LGBTQ Asylum Claims*, 50 L. & SOC. REV. 856, 864 (2016).

#### IV. RECONCILING THE BENEFITS AND DIFFICULTIES OF GENDER DYSPHORIA CLAIMS UNDER THE ADA

The decision to litigate disability claims on behalf of trans prisoners is not a simple one. It draws us into a political minefield brimming with freighted, ideologically-valanced questions around medicalization, access, and who such litigation would actually serve. In this section, I grapple with the tensions inherent to litigating such claims, and address the concerns raised in the previous section. Ultimately, I propose that a gender dysphoria diagnosis should not be required for a plaintiff's claim to proceed under the auspices of the ADA.

##### A. *Moving Away from Pathologizing Identity*

Naming gender dysphoria as a disability enveloped under the ADA need not be a step on the slippery slope towards pathologization. It could instead represent a step towards a nuanced understanding of disability not as a medical diagnosis, but a lived experience produced through the encounter between an individual and their environment. To think through this reframing, I want to revisit the distinction between gender dysphoria and GID. While GID pathologized transness as an identity and categorized it as a mental disorder, a diagnosis of gender dysphoria does not target trans identity in the same way. Instead, it focuses on the mental and physical discomfort that comes from a discrepancy between a person's gender identity and their assigned sex at birth.

This shift from identity to concrete, localized conditions is potent. Not all trans people experience gender dysphoria, and not all people who experience gender dysphoria are trans. For instance, when Amanda Bynes played a male character in the film *She's the Man*, she "went into a deep depression" for months; because she "didn't like how [she] looked as a boy," watching herself onscreen became a "super strange and out-of-body experience."<sup>264</sup> Although we are not accustomed to seeing cisgender people experience gender dysphoria, that is precisely what Bynes's discomfort is. Bynes, a cisgender woman, felt so perturbed at seeing herself presenting in a way that did not align with her gender identity that her onscreen portrayal triggered a "deep depression."<sup>265</sup> Recall, also, that the many unstigmatized medical procedures aimed at "enhanc[ing] the femininity of birth-assigned women and the masculinity of birth-assigned men," such as breast augmentation for cisgender women, constitute medical interventions that alleviate gender dysphoria.<sup>266</sup> A label like GID would not name the particular form of distress Bynes or cisgender

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264. Callie Ahlgrim, *Amanda Bynes "Went into a Deep Depression" Because She Disliked How She Looked As a Boy in She's The Man*, INSIDER (Nov. 27, 2018), <https://www.insider.com/amanda-bynes-paper-magazine-interview-depression-shes-the-man-2018-11> [<https://perma.cc/6RMZ-BPNY>].

265. *Id.*

266. Spade, *Resisting Medicine*, *supra* note 32, at 28 n.41.

women seeking breast enhancement surgeries experience—but gender dysphoria, a term not limited to any gender or demographic, does so aptly.

The recent move away from GID and towards gender dysphoria as a diagnosis is part and parcel of a broader aspiration to prioritize, rather than pathologize, trans people's needs. The World Health Organization further advanced the aim of demedicalization in 2019 by removing GID from the category of “mental disorders” in its International Classification of Diseases, and including “gender incongruence” in a chapter on sexual health instead.<sup>267</sup> Many trans activists celebrate this reframing as a strategic step towards the ultimate goal of ensuring access to health care for trans people on a global scale.<sup>268</sup> Mauro Cabral, Executive Director of Global Action for Trans\* Equality, noted that “gender incongruence” might not be an apt term for him and many other trans people, but that this change is a means to an end. He explained, “[w]e are accepting this as a way of people in different countries getting access to the healthcare that they need.”<sup>269</sup>

Demedicalization does not mean stripping trans people of the means through which they can access critical treatment. Rather, it urges us to imagine a framework of health care that centers the needs of trans people without stigmatizing or pathologizing their identities. Dean Spade posits that trans health care should parallel health care for other stigmatized groups, much like pregnancy care. Gender-affirming health care should be treated simply as “something that happens to some bodies and requires care but is not an illness or a pathology.”<sup>270</sup> While we are far from scrubbing the stigma that decades of pathologization and transphobic medical discrimination has left behind, the replacement of GID with gender dysphoria and the incorporation of gender dysphoria into the ADA's scope can illuminate a way forward. Litigating disability

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267. Suyin Haynes, *The World Health Organization Will Stop Classifying Transgender People as Having a Mental Disorder*, TIME (May 28, 2019), <https://time.com/5596845/world-health-organization-transgender-identity> [<https://perma.cc/99U5-V6FT>].

268. *Id.* Note, however, that not all trans advocates agree that gender dysphoria should be classed as a disability. As Jennifer Levi and Kevin Barry point out, there exists “a resistance on the part of some in the transgender and allied advocacy communities to pursue protections under federal disability rights laws for fear of associating transgender people with disability.” Jennifer L. Levi & Kevin M. Barry, *Embracing the ADA: Transgender People and Disability Rights*, HARV. L. REV. BLOG (Feb. 22, 2021), <https://blog.harvardlawreview.org/embracing-the-ada-transgender-people-and-disability-rights> [<https://perma.cc/HCE9-EEE3>]. As Levi and Barry go on to elucidate, however, this resistance is “misguided,” and derives largely from disability stigma. *Id.* Rather than perpetuating stigma against people with disabilities, Levi and Barry contend that we should embrace the promise of disability law and its “powerful legal protections that are particularly well-suited to remedy many of the kinds of discrimination that transgender people face.” *Id.*

269. Haynes, *supra* note 267.

270. Dean Spade, *Law as Tactics*, 21 COLUM. J. GENDER & L. 40, 51 n.32 (2011).

claims for people experiencing gender dysphoria is, of course, an imperfect solution—for one, as mentioned above, it leaves trans people who do not experience gender dysphoria out in the cold—but perhaps it could serve as a steppingstone towards imagining a framework that serves trans people instead of harming them.

### B. *Eliminating Access Barriers to the Courthouse*

The road to a gender dysphoria diagnosis is strewn with potholes, for the reasons explicated in Part III. While access roads technically exist for obtaining any diagnosis, the ones to obtaining a gender dysphoria diagnosis are uniquely difficult to traverse. Gender dysphoria differs from many medical conditions in that it can be difficult, if not impossible, to prove.<sup>271</sup> The metrics offered by the DSM-5 do not encompass all possible presentations of gender dysphoria.<sup>272</sup> Moreover, they vest an inordinate amount of power in medical providers, many of whom are not trained in trans health care and carry their own biases, to validate or invalidate a person's unique experience of gender dysphoria.<sup>273</sup> This is particularly charged given the history of medical institutions pathologizing and disbelieving trans people.<sup>274</sup> Finally, because the most marginalized people are also those least likely to obtain a gender dysphoria diagnosis, it is likely that the very people who represent an urgent application of disability litigation—trans prisoners—will be the same people barred from courts for want of an official diagnosis. Ultimately, because there is no single, infallible way to prove gender dysphoria, any attempt to force a diagnosis requirement will only further marginalize the people the ADA purports to protect. As it stands, no clear-cut means to address this disparity exists; ensuring equitable access to a diagnosis would demand overhauling medical education, providing universal insurance, and other actions beyond the scope of this Note (and, indeed, the legal system).

Given the inequities inherent in accessing a diagnosis in a country that does not even guarantee health care, I suggest that plaintiffs should not be required to have a gender dysphoria diagnosis to pursue disability claims. The legal system should not rely on the outdated medical model of disability. Striking the diagnosis requirement moves us away from the medical model, and towards the contemporary theorization of disability as “complex and ‘fluid’ . . . multidimensional, dynamic, bio-psycho-social, and interactive in nature.”<sup>275</sup> The social model de-emphasizes medical seals of validation and understands disability as a condition produced

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271. See Whalen, *supra* note 220.

272. *Id.*

273. See Vatomsky, *supra* note 179.

274. See Antonio Prunas, *The Pathologization of Trans-Sexuality: Historical Roots and Implications for Sex Counselling with Transgender Clients*, 28 *SEXOLOGIES* e54 (2019).

275. Belt & Dorfman, *supra* note 187, at 186–87.

through the dialectical interaction between an individual and their environment. Rabia Belt and Doron Dorfman underscore that this nuanced understanding of disability is reflected in a number of institutions' approaches to disability rights, including the United Nations' Convention on the Rights of Persons with Disabilities—which states that disability is an “evolving concept” that “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”<sup>276</sup>—and the World Health Organization, which incorporated the updated social model into the International Classification of Functioning, Disability, and Health.<sup>277</sup>

Striking conventional standards of evidence is also not unprecedented. Katherine Macfarlane draws a parallel between eliminating medical proof requirements and the emergence of the documentation-free model of religious accommodations in employment law.<sup>278</sup> She notes that employers and courts “take a hands-off approach to employees' representations that their religious beliefs are sincere.”<sup>279</sup> It follows, then, that “[d]isability deserves the same deference.”<sup>280</sup> I suggest that this is particularly true for a condition as amorphous and difficult to prove as gender dysphoria. Much like religious beliefs, a person's gender identity is personal, complicated, and private. Claims based on gender identity thus merit the same respect and generosity as those based on religious beliefs.

If courts were to apply the same vein of reasoning to plaintiffs with gender dysphoria, they would “shift the focus from class-based identification . . . to the function of the job or the service that is denied from the plaintiff because of their disability.”<sup>281</sup> That is to say, if a trans woman is placed in a men's prison, it is immaterial whether she had the resources and ability to obtain a gender dysphoria diagnosis. Courts should instead focus on the circumstances of the case, and the ways in which the plaintiffs are harmed on the basis of their disability. Under the social model, “others' prejudicial, stereotypical, or neglectful attitudes and actions” are vital factors in producing conditions of disability.<sup>282</sup> In other words, disability “connotes oppression,” and oppression needs no diagnosis.<sup>283</sup> Courts should therefore eschew a diagnosis requirement in favor of what Laura Lane-Steele dubs a “context-informed approach to identity

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276. *Preamble*, UN.ORG, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/preamble.html> [https://perma.cc/NSC6-J3Y4].

277. Belt & Dorfman, *supra* note 187, at 187.

278. Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59 (2021).

279. *Id.*

280. *Id.*

281. Belt & Dorfman, *supra* note 187, at 187.

282. Barry & Levi, *The Future*, *supra* note 7, at 51.

283. *Id.*

adjudication, where the question of identity is linked to the function of the specific law rather than treated as an independent and stable ‘truth’ about an individual.”<sup>284</sup> In sum, if gender dysphoria materially impacts the way a person navigates their world, they should be able to pursue a claim under the ADA, diagnosis or no diagnosis. It is true, however, that this position has its challenges, and I engage with three primary counterarguments below in hopes of demonstrating that the factors ultimately militate towards broader protections of trans prisoner rights under disability law.

### C. *Engaging Counterarguments*

#### 1. Difficulty in Eliminating Diagnosis

First, I must outline the salient limitations of my argument. Because there is no way to conclusively prove gender dysphoria,<sup>285</sup> there is also no easy way to disprove it or weed out “authentic” cases from inauthentic ones. In other words, there is no straightforward method of answering the question: who *cannot* receive a gender dysphoria diagnosis? By extension, it becomes difficult to bar a person pretending to be trans from the courtroom if the diagnostic requirement were to be eliminated. It would be unreasonable to allow any individual to bring forth a claim under the ADA, with absolutely no guidelines for courts on how to recognize gender dysphoria.

In response, I suggest that mandating rigid criteria for allowing such claims is equally unfeasible, as gender dysphoria can present in a plethora of ways; some people experience mental and physical symptoms, while others only exhibit mental symptoms.<sup>286</sup> There is no single “correct” way to experience gender dysphoria, and this inclusive conceptualization is already difficult to translate to the courtroom. In an attempt to ameliorate this difficulty, I propose drawing on doctrinal precedents of how courts currently handle other mental conditions to provide a model for how to move forward. For instance, courts recognize emotional distress as a concrete damage recoverable through a civil lawsuit.<sup>287</sup> Emotional distress can encompass trauma, depression, anxiety, and a range of other mental conditions.<sup>288</sup> Much like gender dysphoria, there is no single “right” way to prove emotional distress. Instead of relying solely on medical documentation, courts consider a plethora of evidentiary factors; support for a claim of emotional distress can include a personal

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284. Laura Lane-Steele, *Adjudicating Identity*, 9 TEX. A&M L. REV. 267 (2022).

285. See *supra* Part III.A and its accompanying footnotes (discussing the social construct of gender and its inherent unprovability).

286. Drescher et al., *supra* note 250.

287. See, e.g., David B. Millard, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617 (1982).

288. *Id.*

journal entry, an employer evaluation, or even a Fitbit tracking sustained elevated heartrates.<sup>289</sup>

Similar to emotional distress claims, support for a claim of gender dysphoria can come from a variety of sources beyond a medical diagnosis. These evidentiary sources can include testimonials from friends and family, personal journals, workplace records, social media records photographs social transition if one took place, and so on. Moreover, shifting the focus from medical to legal adjudication allows courts to exercise discretion in determining the credibility of claims on a case-by-case basis. Though this is still not a flawless approach, nor one that strikes bias and gatekeeping from the equation, perhaps it hopefully a cut above a blanket bar on claims from undiagnosed trans prisoners. Moreover, self-identification is not unprecedented in the legal system; after all, checking a box indicating race or gender is all the Census requires.<sup>290</sup> Similarly, in June 2021, the federal government announced that it would begin allowing individuals to self-select an “M” or “F” gender marker for their passport and would no longer require supporting documentation or medical records to do so.<sup>291</sup> It also announced that there would soon be an option to self-select an “X” gender marker, although this option has not yet been made available.<sup>292</sup> This policy is one of the first in the U.S. to remove the requirement of medical proof of transition. Even more arrestingly, as I mentioned in the Introduction, the Federal Bureau of Prisons’s 2022 *Transgender Offender Manual* explicitly states that “[n]ot all transgender inmates will have a diagnosis of GD, and a diagnosis of GD is not required for an individual to be provided services.”<sup>293</sup> Fundamentally, the point is not to allow simply anyone into the courtroom but to lower the barriers to accessing it.<sup>294</sup> Acknowledging evidence beyond medical diagnoses helps lower those barriers for particularly vulnerable demographics like trans prisoners.

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289. See *Suing for Emotional Distress*, VALIENTE MOTT, <https://valientemott.com/blog/blog-suing-for-emotional-distress> [<https://perma.cc/F39E-FUH7>].

290. See Lane-Steele, *supra* note 284.

291. *Selecting Your Gender Marker*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> [<https://perma.cc/H4WJ-6CRJ>].

292. See *id.*; Kate Sosin & Orion Rummler, *U.S. to Add ‘X’ Gender Marker on Passports*, PBS (June 30, 2021, 3:27 PM), <https://www.pbs.org/newshour/nation/u-s-to-add-x-gender-marker-on-passports> [<https://perma.cc/QYH4-JVNS>].

293. FED. BUREAU OF PRISONS, *supra* note 38.

294. As I mentioned in the Introduction, there may be an argument to be made for eliminating diagnoses-based access to protections altogether, which would require amending the ADA. However, that lies beyond the scope of my argument, which focuses on eliminating the diagnosis requirement specifically for gender dysphoria claims, given the unique difficulty of proving gender dysphoria and the access barriers outlined in this Note.

## 2. Disability Fraud

Permitting claims on the basis of self-identification inevitably raises the question of disability fraud, or people feigning a disability to achieve particular advantages. This counterargument presumes that incorporating the various evidentiary sources proposed above would fail to prevent fraud from entering the courtroom. Disability fraud is a valid concern, especially in the prison context: It is not implausible to imagine a number of prisoners who would seek the sorts of accommodations that an ADA claim may provide, such as private strip searches and showers. Such pretense as a means of obtaining favorable conditions would also not be unprecedented; for instance, the chairman of the Jewish Prisoner Services International estimates that enough prisoners lie about being Jewish to access kosher meals for prisons to lose over forty million dollars each year.<sup>295</sup>

Disability fraud is a serious and pressing concern, and there is a possibility of it factoring into trans prisoner litigation under the ADA. However, typical ADA accommodations for trans prisoners based on those requested in *Doe v. Massachusetts Department of Correction* are not particularly appealing for cisgender prisoners.<sup>296</sup> The Supreme Court ruled in *Barnes v. Gorman* that punitive damages are not available in private suits brought under Title II of the ADA.<sup>297</sup> Other, non-monetary forms of relief provided to trans prisoners are unlikely to be appealing to cisgender prisoners. The court eventually allowed Doe to be transferred to a women's prison, and in the interim, Doe was searched only by female correctional officers, provided a separate shower time, and was referred to by her correct name and pronouns.<sup>298</sup> Cisgender prisoners would have little need for any of the accommodations except the separate shower time, which was only in effect until Doe was transferred to a women's prison. The ultimate accommodation, a transfer to a prison that corresponds to an inmate's gender identity, would be useless to a person already in such an environment.

The argument that cisgender prisoners may take advantage of such a move accommodations like for predatory purposes (such as access to strip searches conducted by guards of the opposite gender or placement in prisons with inmates of the opposite gender) also risks falling into transphobic rhetoric. Such rhetoric dramatically inflates the risk of people pretending to be trans in order to sexually assault others, and is most often deployed to sever trans people's access to gender-segregated spaces

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295. *Unkosher: A Lie That's Costing Prisons Millions*, CORRECTIONAL NEWS (May 17, 2012), <https://correctionalnews.com/2012/05/17/unkosher-lie-thats-costing-prisons-millions> [<https://perma.cc/E7SD-LZSZ>].

296. *Doe v. Mass. Dep't of Corr.*, No. CV 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018).

297. *Barnes v. Gorman*, 536 U.S. 181 (2002).

298. *Id.*

like bathrooms.<sup>299</sup> But this hypothetical fake trans person is just an anti-trans strawman: there is no evidence to suggest that cisgender people are prone to faking transness for reasons predatory or otherwise.<sup>300</sup>

Still, this does not change the fact that as with the kosher food example, there might be instances of people taking advantage of the system to gain certain accommodations. However, prisons have not stopped serving kosher meals<sup>301</sup> simply because of the possibility of prisoners lying about their religious affiliations; to do so would be patently unfair to Jewish people who require kosher food. Similarly, stripping trans people of gender-affirming accommodations simply to minimize the risk of disability fraud would be unjust.

As more trans prisoner cases are litigated under the ADA, it will become clearer whether—and how—people take advantage of disability accommodations. This will be an evolving landscape, and perhaps my response will change if instances of cisgender prisoners faking transness escalate dramatically. These situations are tricky and always call for a balancing test. In this circumstance, which scenario causes more harm: the risk of cisgender people faking transness to gain benefits like separate showers, or the risk of trans people enduring unnecessary trauma from gender dysphoria? I submit that the latter scenario is more harmful; protecting the most vulnerable communities should take priority over curtailing benefits to cisgender people.

Lastly, I would be remiss if I did not note that the potential threat of fraudulent claims seeking to secure access to accommodations may gesture towards a larger issue that haunts all prison litigation: underlying systemic problems with prison conditions. The dangers of such fraudulent claims may be mitigated by providing alternative avenues for incarcerated people to self-advocate, as well as by holistically improving living conditions so that no one needs to advance a fraudulent suit.

### 3. The Slippery Slope

The second notable counterargument is the “slippery slope” threat. Proponents of the slippery slope caution that extending so-called special benefits like disability accommodations will open the floodgates to overly broad accommodations. For example, the slippery slope argument for the kosher food debacle described above could be that all religious minorities will begin insisting on receiving their own specific meals. A slippery slope argument in the trans prisoner context might be that permitting separate strip searches for trans prisoners will give way to all prisoners demanding separate strip searches.

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299. Katy Steinmetz, *Why LGBT Advocates Say Bathroom “Predators” Argument Is a Red Herring*, TIME (May 2, 2016), <https://time.com/4314896/transgender-bathroom-bill-male-predators-argument> [<https://perma.cc/D2XE-8K2H>].

300. *Id.*

301. See CORRECTIONAL NEWS, *supra* note 295.

The slippery slope argument is also valid and difficult to rebut, especially since we still lack enough precedent to definitively gauge what disability accommodations will look like for trans prisoners. For instance, it is possible that in the future, ADA accommodations could provide gender-affirming surgery to trans prisoners. This medical accommodation could spark demands for other types of treatment that most prisoners do not currently have access to. However, looking to our contemporary example *Doe v. Massachusetts Department of Correction*, the ultimate goal of trans prisoner litigation under the ADA seems to be securing a transfer to a gender-congruent facility. This precedent is unlikely to lead prisons down a true slippery slope because the prison transfer appears to act as a ceiling for trans prisoners' accommodations.

Though it may be proven naïve with time, my belief is that it is important to fully assess the developing landscape of what disability accommodations for trans prisoners includes before hand-wringing over the dangers that granting such accommodations will produce. As with the disability fraud counterargument, we can only accurately assess the slippery slope threat once we have a sufficiently robust precedent reflecting how accommodations could snowball. As the body of precedent grows in this emerging field of litigation, courts can—and should—critically evaluate whether providing disability accommodations to trans prisoners pose a credible slippery slope threat. Until we have more information, such fears may be premature. The slippery slope argument presupposes that we are on the peak of a slope; we should get to that peak first before worrying about the fall.

#### 4. The Prison Litigation Reform Act

The last—and perhaps most difficult—issue I grapple with in this Note is the existence of the Prison Litigation Reform Act of 1995 (PLRA). The PLRA significantly limits prisoners' access to courts by only permitting prisoners to pursue their claims after exhausting all of their institution's onerous internal grievance processes.<sup>302</sup> These processes are not standardized, typically operate on tight deadlines, involve strict technical requirements, and contain complex administrative hurdles.<sup>303</sup> As a result, these processes are often fruitless and yield no tangible relief for the prisoner.<sup>304</sup> Since the PLRA's enactment, rates of prison litigation have plummeted.<sup>305</sup> Margo Schlanger notes that the PLRA fundamentally “undermined prisoners' ability to bring, settle, and win lawsuits” by enforcing the exhaustion requirements, increasing filing fees without waivers for indigent people, decreasing attorneys' fees, creating high

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302. Fenster & Schlanger, *supra* note 79.

303. *Id.*

304. *Id.*

305. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 161 (2015).

bars to settlements, and limiting possible damages.<sup>306</sup> Two decades on, the overall impact of the PLRA has been a “decline in civil rights filings and plaintiffs’ victories, and a parallel decline in the prevalence of court-ordered regulation of jails and prisons.”<sup>307</sup>

Advocates have long called for the repeal of the PLRA, condemning its numerous and significant barriers that “add up to a system where it is next to impossible to get any relief from the courts.”<sup>308</sup> However, the PLRA continues to exist and must be taken into account when advocating for increased litigation on behalf of trans prisoners. I do not presume to have any facile solutions to the challenges it poses. Still, meeting the PLRA’s arduous requirements is not impossible; it has been done, and prisoners like Doe have had their day in court. But the issue remains that trans prisoners, who are already marginalized within the general prison population, are less likely to have the time, security, resources, and ability to overcome the PLRA’s burdens on their own. Although most prison litigation is brought forth by *pro se* litigants,<sup>309</sup> further guidance and financial assistance from experienced attorneys and advocacy groups could be key to scaling the obstacles that the PLRA poses.

This Note focuses on the potential benefits of the ADA to trans prisoners, but this litigation could also benefit advocacy groups themselves, especially impact litigation groups. Trans prisoner litigation is an urgent intersectional issue that lives at the nexus of trans rights, gender justice, disability justice, and prisoners’ rights. In addition, because incarcerated trans people are disproportionately low-income people of color,<sup>310</sup> this litigation also concerns issues of race and class. The interplay of these topical, high-stakes issues renders trans rights litigation a fecund field for civil rights advocates of all stripes. One of my hopes in writing this Note is that underscoring the urgency of trans prisoner litigation will result in more impact litigation organizations taking up this cause. It is much easier for a well-resourced advocacy organization to overcome the PLRA than it is for *pro se* incarcerated trans plaintiffs on a micro scale.<sup>311</sup> Even more promisingly, while the PLRA substantially

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306. *Id.* at 153.

307. *Id.* at 154.

308. Fenster & Schlanger, *supra* note 79.

309. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. COURTS (Feb. 11, 2021), <https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019> [https://perma.cc/TS6F-YMUT].

310. See LAMBDA LEGAL, *supra* note 84.

311. Although most prison litigation is brought by *pro se* litigants, I want to urge impact litigation organizations and advocates to ameliorate trans prisoners’ burdens by litigating their claims. See U.S. COURTS, *supra* note 309. Litigation requires considerable resources, that are better provided by organizations than by vulnerable incarcerated individuals who must navigate the complex civil system without guidance. Some organizations particularly suited to working at the nexus of trans rights and prison litigation may include Lambda Legal’s Transgender Rights Project,

limits attorneys' and paralegals' fees far below typical market rates, this fee limitation likely will not apply to claims brought by trans prisoners under the ADA.<sup>312</sup> In *Armstrong v. Davis*, the Ninth Circuit "held that the PLRA [fee restriction] does not apply to fees awarded under the ADA [or Section 504 of the Rehabilitation Act of 1973.]"<sup>313</sup> The court reasoned that since both statutes have their own attorneys' fees provisions, the PLRA's fee cap simply does not apply.<sup>314</sup> Therefore, advocates likely will not confront the same financial barriers they do with other forms of prison litigation, hopefully incentivizing them to utilize disability law to further trans rights in the prison context.

The obstacle of the PLRA cannot be eliminated immediately, but perhaps it can be eroded and eventually eradicated by devoting public interest resources to the cause of trans prisoner litigation. Taking on trans prisoner cases sheds light not only on the issues of trans people, but also on the heavy burden that the PLRA unjustly imposes on vulnerable incarcerated people more broadly. Perhaps that will constitute the first step to rallying the widespread public support needed to repeal the PLRA entirely.

Ultimately, all the counterarguments above hold water and merit serious consideration. No simple answer exists for any of them; it is true that calling for trans prisoner litigation is not an easy or perfect solution. At its core, the proposal to both litigate trans prisoner claims under the ADA and eliminate the gender dysphoria diagnostic requirement is somewhat aspirational. Advocates must balance the benefits and drawbacks of litigation as a strategy before taking on any case, and the calculus with trans prisoners is no different. But risks are inherent to any civil rights case, and in my view, the risks undergirding trans prisoner litigation are nevertheless outweighed by the benefits that disability claims can achieve. After all, disability law militates "in favor of broad coverage of individuals . . . to the maximum extent permitted."<sup>315</sup>

## CONCLUSION

This Note explores the promise of pursuing disability claims for people experiencing gender dysphoria. It makes two proposals to maximize that potential: first, that advocates should litigate disability claims for trans prisoners, and second, that plaintiffs should not be required to

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the Transgender Law Center, the National Center for Transgender Equality, the Sylvia Rivera Law Project, and the ACLU's LGBT & HIV Project.

312. See Ginsberg, *supra* note 78, at 716 ("Furthermore, the Prison Litigation Reform Act's severe restrictions on attorneys' fees do not apply to the disability statutes.").

313. *Armstrong v. Davis*, 318 F.3d 965, 973–74 (9th Cir. 2003).

314. *Id.*

315. See Americans with Disabilities Act Amendments Act of 2008, S. 3406, 110th Cong. § 2(a)(2) (2008) (codified at 42 U.S.C. §§ 12101–13 (2018)).

have a formal gender dysphoria diagnosis to advance their cases. This vein of impact litigation could materially change the safety, health, and wellbeing of trans prisoners on a national scale. It could also open the door to exploring similar reforms in other areas of trans rights, such as access to gender-neutral bathrooms, or to potentially life-saving medical treatment for trans youth in response to the record number of anti-trans bills passed this year. Litigating disability claims may not be a perfect solution—in a utopian world, of course, trans prisoners would not need to turn to disability law for justice; in fact, in *my* ideal world, prisons themselves would not exist—but when faced with such a dearth of alternative legal options in the short term, such litigation has the potential to mitigate discrimination and provide some semblance of relief for some of the most vulnerable among us. Ultimately, disability law adds a potent tool to trans rights advocates' arsenals.