WHEN TRANS RIGHTS ARE DISABILITY RIGHTS:
THE PROMISES AND PERILS OF SEEKING
GENDER DYSPHORIA COVERAGE UNDER THE
AMERICANS WITH DISABILITIES ACT

Ali Szemanski*

Trans rights are under attack, and the once-promising pathway of workplace protections under Title VII now resemble shifting sands. With the recent trio of certiorari grants in Zarda, Bostick, and Harris Funeral Homes, the Supreme Court appears poised to eviscerate hard-fought protections under Title VII for trans people unless the Court fulfills its countermajoritarian role. This Note posits another more robust route for trans people, in the workplace and beyond it: the Americans with Disabilities Act (ADA). It begins with an introduction to the trans population in the United States, with a special emphasis on their systematic oppression through legal systems and insidious discrimination across society. This Note then discusses the practical limits of pursuing trans rights under Title VII, which has been the primary vehicle of litigants thus far. This Note then pivots to suggest that the ADA is the best vehicle for trans rights. It explores the distinctions between Gender Identity Disorder (GID) and trans identity, and the rightful coverage of GID as a disability under the ADA. The Note discusses the greater breadth of the ADA, before discussing the history of its specific carveout for those individuals who experience GID, and the constitutional infirmity of this carveout. The Note then focuses on the landmark case of Blatt v. Cabela’s Retail, Inc., which was the first decision recognizing a cause of action for individuals with GID under the ADA, before turning other cases outside of the employment context to demonstrate the great breadth of the ADA as a vehicle for trans rights as compared with Title VII. The Note then examines another recent case, Parker v. Strawser Construction, Inc., which reached the opposite result and criticized the ruling of the Blatt court in doing so. The Note concludes by turning to the potential limits of this approach, including theoretical critiques, doctrinal limits based on ADA case law, and the risk of litigating the constitutionality of the GID exclusion, each of which it dismisses as outweighed by the potential for the meaningful realization of rights offered by this pathway.

* 2019 Public Service Venture Fund Redstone Fellow at the ACLU of Pennsylvania; J.D., Harvard Law School, 2019; B.S., Social Policy & History, Northwestern University, 2014. I would like to acknowledge and lift up the litigants throughout this piece, whose very real struggles for dignity and equality in our society provide the subject matter for this academic exercise.
"We live with particular social and physical struggles that are partly consequences of the conditions of our bodies and partly consequences of the structures and expectations of our societies, but they are struggles which only people with bodies like ours experience."¹

I. Introduction

The fight for trans civil rights has significantly progressed in the past decade, but it has been a hard-fought battle.² Until recently, the only viable legal option for nationwide protection appeared to be under Title VII of the Civil Rights Act of 1964, which bans workplace discrimination “because of sex.” While not all courts have recognized Title VII protections for trans-gender individuals, several federal appellate courts have ruled on these protections, resulting in a circuit split, and the Supreme Court has recently granted a writ of certiorari on the issue for the 2019 term.³ Given the current

¹ Susan Wendell, Toward a Feminist Theory of Disability, 4 FEMINIST ETHICS & MED. 104, 117 (1989).
² The term trans has been utilized throughout this paper instead of transgender as it is considered “to be [more] inclusive of a wide variety of identities under the transgender umbrella.” See GLAAD Media Reference Guide, GLAAD, https://www.glaad.org/reference/transgender [https://perma.cc/6C9B-9N29]. In a litigation setting, language should always track that used by the client.
³ R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/ [https://perma.cc/747V] (indicating that certiorari was granted on the issues of whether transgender people can avail themselves of Title VII based on their status as transgender or under a sex
composition and jurisprudence of the Supreme Court, many are bracing for a decision that will deny coverage under Title VII for trans individuals. However, there is another route to robust protection for trans individuals, both in the workplace and beyond: the Americans with Disabilities Act (ADA). In 2017, the Eastern District of Pennsylvania held in *Blatt v. Cabela’s Retail, Inc.* that individuals with gender dysphoria, a condition experienced by many trans individuals, may receive ADA protections. ADA coverage for trans individuals would provide a wealth of substantive legal protections as it offers even more expansive protections than Title VII beyond the workplace, in virtually all public spaces.

Extending protections to trans individuals under the ADA is a significant frontier in the continued struggle for civil rights. If other courts follow *Blatt*, it will open a meaningful pathway to protection. However, other courts may remain unconvinced of these legal arguments and the potential for a circuit split looms: less than a year after *Blatt*, the Southern District of Ohio reached the opposite conclusion in *Parker v. Strawser Construction, Inc.*, despite hearing similar arguments. In its opinion, the *Strawser* court specifically critiqued the decision in *Blatt*, claiming it could “find no support, textual or otherwise, for the *Blatt* court’s interpretation.” Even if other courts do follow *Blatt*, the ADA will not be a silver bullet for trans individu-
als, as they will face the same host of challenges any ADA plaintiff faces and lurking equal protection issues could come to the fore. Some trans individuals and activists balk at what could be viewed as the further pathologization of trans identity, which may result in a cascade of harms for trans people; however, it is necessary to recognize the ableism present in many of these critiques and to consider whether the disability and trans rights movements could both benefit more from a unified front. Ultimately, using the recent district court decision in *Blatt* as a focal point illustrating a turning point from the status quo to a new frontier of opportunity, this Note argues that the recognition of gender dysphoria as a disability protected by the ADA can lead to the expansion of civil rights and the upsetting of the discriminatory status quo.

II. Trans People in the United States and the Need for Greater Protections Under Law

Trans individuals represent a significantly marginalized population in the United States. Despite the increasing visibility of the community in recent years, the trans community continues to face rampant discrimination and serious systemic barriers to equality. Current studies estimate the number of trans individuals living in the United States to be between 1 and 1.4 million, an estimate which has nearly doubled between 2011 and 2016. Adults age 18–24 report being trans at much higher percentages than any other age group, regardless of geography. Some have attributed the higher

---

7 See, e.g., Mauro Cabral, *I Am Transgender and Being Myself Is Not a Disorder*, THE GUARDIAN (Feb. 24, 2017), https://www.theguardian.com/global-development-professionals-network/2017/feb/24/im-transgender-why-does-the-who-say-i-have-a-mental-disorder [https://perma.cc/KF2C-A5WL] (“[Treating] trans people as psychologically abnormal suggests that just being ourselves is a disorder . . . [I]t also means that someone else . . . needs to provide a specific diagnosis for us to have access to those key but basic rights: identity, freedom of expression, bodily integrity, autonomy and healthcare.”); Kayley Whalen, *(In)Validating 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/PMY8-ZCHN] (“As long as gender variance is characterized by the medical field as a mental condition, transgender people will find their identities invalidated by claims that they are “mentally ill,” . . . This has even been used to justify discrimination against transgender people . . . in child custody cases, discrimination in hiring/workplace practices, or justifying them to be mentally unfit to serve in the military.”).


9 ANDREWS R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N.T. BROWN, *How Many Adults Identify as Transgender in the United States?* 1, 2 (2016),
rates of self-identification amongst young people as related to the increased access to resources, increased visibility of trans people, and greater advocacy for trans inclusion. Trans people are “more likely to be from racial and ethnic minorities, particularly from Latino backgrounds,” thus increasing the likelihood that these individuals will face overlapping and interdependent oppressions due to their intersectional identities.

Discrimination against trans individuals is neither speculative nor rare; rather, it is pervasive and severe. The National Center for Trans Equality (NCTE) surveyed 27,715 trans individuals in 2015 about their experiences with discrimination in the United States. Thirty percent of respondents who were employed reported being fired, denied a promotion, or experiencing other workplace mistreatment because of their gender identity within the past year. Trans individuals were also more likely to live in poverty than the general population, and experienced an unemployment rate of fifteen percent. Almost half of the trans individuals surveyed had been verbally harassed because of their gender identity and nearly one in ten were physically attacked within the past year because they were trans. Nearly one-third of those surveyed experienced mistreatment in public accommodations, including denial of equal treatment or service, verbal harassment, and physical attacks; one in five respondents avoided certain public accommodations in the past year out of fear they would be mistreated because they were trans. Trans people of color and those who were undocumented unsurprisingly experienced “deeper and broader patterns of discrimination” than their white counterparts. These statistics represent only a select number of the myriad forms of discrimination impacting trans people and give rise to serious concerns as to the rampant discrimination against this community.

III. The Limited Potential of Title VII for Robust Trans Rights

Some trans individuals pursue relief for discrimination against them based on their gender identity under Title VII of the Civil Rights Act of
1964, though this avenue is by its very nature circumscribed in its ability to provide expansive rights to the trans community. Within the realm of employment discrimination, Title VII may provide significant relief in some cases, but in others, it may not be sufficient to allow for more meaningful inclusion.

In the past fifty years, the scope of sex discrimination under Title VII has rapidly been expanded by courts in such a way that trans individuals now have a solid foundation upon which to bring a successful Title VII claim. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination “because of . . . sex.”17 In the years immediately following its passage, courts narrowly interpreted this provision to prohibit discrimination on the basis of a plaintiff’s sex as assigned at birth.18 However, the Supreme Court’s decision in *Price Waterhouse v. Hopkins* significantly changed the legal landscape under Title VII for trans plaintiffs.19 The *Price Waterhouse* Court found that an employer acting upon gendered stereotypes in the workplace, such as withholding promotion opportunities from a woman who does not wear make-up, has acted in a manner that constitutes sex discrimination.20 This has become known as the “sex stereotyping” theory of gender discrimination.21 Following *Price Waterhouse*, a number of lower courts recognized a cause of action under Title VII for trans plaintiffs under the sex stereotyping framework where they have suffered discrimination because of gender non-conformity.22 Recently, the Sixth Circuit became the first federal appellate court to weigh in on whether discrimination against trans people is categorically discrimination on the basis of sex.23 In *Harris Funeral Homes*, the Sixth Circuit held that “discrimination on the basis of trans and transitioning status is necessarily discrimination on the basis of sex,” providing powerful support to trans plaintiffs under Title VII.24 While *Harris Funeral Homes*
When Trans Rights Are Disability Rights

*Homes* represents an important moment in Title VII jurisprudence, Title VII may still be insufficient for some.

Protections for trans individuals under Title VII is precarious at best, especially as the Supreme Court may potentially overturn *Harris Funeral Homes* this term and shut trans plaintiffs out of Title VII altogether.\(^{25}\) Even if the Supreme Court does find that Title VII extends coverage to trans individuals, Title VII’s protections, by their very nature, will remain circumscribed to the workplace. Trans individuals suffering from gender dysphoria need legal avenues to protection from discrimination that reach places far beyond the workplace “to all of the other places that intimately touch transgender lives.”\(^{26}\) These places include educational settings, housing, public accommodations, and even prisons.\(^ {27}\) Within the workplace, there are also limits as

\(^{25}\) At the time of this Note’s drafting, it remains unclear—even after oral arguments—how the Supreme Court will rule on the issue of transgender discrimination under Title VII. Justice Gorsuch described the textual argument as “close … very close.” Transcript of Oral Argument at 25:11–15, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC (Oct. 8, 2019) (No. 18-107), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf [https://perma.cc/7VEK-NX7Z]. Justice Gorsuch, a devoted textualist, then proceeded to question whether the justices should “take into consideration the massive social upheaval” that could follow the textual reading put forth by LGBTQ advocates. *Id.* at 25:16–20. As Professor Leah Litman succinctly noted, “There is no social upheaval exception to textualism.” Leah Litman, A Tale of Two Neil Gorsuches, *Take Care* (Oct. 8, 2019), https://takecareblog.com/blog/a-tale-of-two-neil-gorsuches [https://perma.cc/3VGG-PRVN]. Professor Richard Primus, in analyzing the oral arguments in *Harris Funeral Homes* and its companion cases, likewise focused on Justice Gorsuch and characterized the cases as “[t]esting the [l]imits of [his] [t]extualism.” Richard Primus, The Supreme Court Case Testing the Limits of Gorsuch’s Textualism, *POLITICO* (Oct. 15, 2019), https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850 [https://perma.cc/R4QY-TXUJ]. Professor Primus noted that, for textualists, “[w]hat matters is the text of the statute[,] a[nd the text that Congress adopted, read literally, covers LGBTQ scenarios,” and opined that, if Justice Gorsuch strays from his textualist principles, critics “will say that he pretends to have a consistent interpretive theory, but he’s willing to jettison that theory when he doesn’t like the result it would lead to.” *Id.* All eyes will remain on Justice Gorsuch as the October 2019 term comes to a close next year.


to what Title VII can offer trans employees. A victory under Title VII may
entitle an individual to damages, reinstatement, and/or back pay, but does
nothing to move the needle toward greater inclusion of trans individuals in
the workplace and accommodation to their needs in the first instance. As a
reactionary regime, Title VII punishes employers who discriminate but
places no affirmative obligation on employers to adequately accommodate
the unique needs of their trans employees. Title VII alone does not provide
sufficient protection for trans individuals “who need to modify their work
schedule or take leave to seek counseling, hormone therapy, electrolysis,
surgery, or other treatment.” Accordingly, trans individuals and advocates
seek a statute with a broader reach, both in terms of reliefs available and
contexts in which one can seek relief from discrimination.

IV. PROTECTION FOR GENDER DYSPHORIA UNDER THE
AMERICANS WITH DISABILITIES ACT

Title VII alone may be insufficient to protect trans individuals, but the
Americans with Disabilities Act (ADA) may provide a pathway to signifi-
cant relief, legal protection, and ultimately greater inclusion of trans individ-
uals. Blatt v. Cabela’s Retail Inc., a recent landmark decision, opened up an
approach to legal protection long thought to be foreclosed to trans people.
An examination of the Blatt litigation highlights the complex issues that
arise in advancing these claims, many of which remain live and show the
difficult landscape for future plaintiffs.

a. Possibilities for Greater Protections of Trans Individuals

The ADA was passed into law in 1990 and was amended to provide
more expansive coverage in 2008. It now offers broad legal protections for
individuals with disabilities against discriminatory treatment in a wide variety of settings. Congress sought to provide a “clear and comprehensive
national mandate for the elimination of discrimination” against individuals
with disabilities. Following the ADA Amendments Act (ADAAA) in 2008,
the statute employs a broad definition of disability to maximize the extent of
the ADA’s coverage, motivated in part by federal courts’ attempts to narrow
the reach of the ADA following its passage. The ADA utilizes a three-prong definition of disability, covering individuals who have a physical or mental impairment that substantially limits at least one major life activity, have a record of such an impairment, or who are regarded as having such an impairment. The ADA defines “major life activities” to encompass a wide-ranging swath of activities, including the impairment of major bodily functions. Congress specifically provided that the definition of disability “shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted.”

The ADA’s broad coverage of individuals, as well as its expansive sweep in terms of remedies and settings that it covers “would fill important gaps and provide another, and surer, layer of needed protections.” Unlike Title VII, the ADA compels a more proactive regime, conferring an affirmative obligation on employers and public entities to provide reasonable accommodations to disabled individuals. An employer could be required to provide accommodations such as modifying restroom-use policies or dress-code standards, as well as modifying a work schedule or granting leave to accommodate an individual’s need to seek counseling, hormone therapy, or reassignment surgery, for example—none of which can be compelled under Title VII. Furthermore, the ADA applies not only to employers but also to public entities and public accommodations. Protections for trans individuals could extend to restaurants, homeless shelters, public schools, social serv-

33 See ADA Amendments Act of 2008 § 2(a)(4), 42 U.S.C. § 12101 Historical and Statutory Notes (explaining that the Supreme Court’s decisions narrowing the scope of the ADA “eliminat[ed] protection for many individuals whom Congress intended to protect”); see also Alex B. Long, Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008, 103 Nw. L. Rev. 217, 219–23 (2008) (detailing the number of ways in which Congress expanded the scope of the ADA in the ADA Amendments Act through its alterations to the definition of disability).
37 Barry, supra note 26, at 40. There remains a persistent debate in the disability community about whether to utilize “person-first” (e.g., individual with a disability) versus “identity-” or “community-first” (e.g., disabled individual or Deaf individual) language. I have chosen to use identity-first language here as many self-advocates and their allies prefer identity-first language because it shows their disability “as an inherent part of [their] identity – the same way one refers to ‘Muslims,’ ‘African-Americans,’ [or ‘LGBTQ’].” E.g., Lydia Brown, Identity-First Language, AUTISTIC SELF ADVOCACY NETWORK, http://autisticadvocacy.org/about-asan/identity-first-language/ [https://perma.cc/QYD3-E97J]. Advocates should always use their client’s preferred terminology and be cognizant of the variety of different preferences that may exist.
38 Barry, supra note 26, at 38; see also 42 U.S.C. § 12112(b)(5)(A) (2012) (explaining that employers must make “reasonable accommodations to [a qualified employee’s] known physical or mental limitations”).
39 Barry, supra note 26, at 38.
VICES, PRISONS, AND SO ON. 42 THE EXPANSIVENESS OF THE ADA, IN TERMS OF WHO CAN SEEK COVERAGE, WHERE COVERAGE EXTENDS, AND WHAT REDRESS CAN BE PROVIDED, MAY MAKE IT AN ATTRACTIVE CHOICE.

SOME TRANS INDIVIDUALS EXPERIENCE GENDER DYSPHORIA, WHICH MEETS THE DEFINITION OF A DISABILITY UNDER THE ADA BECAUSE THE MENTAL DISTRESS ASSOCIATED WITH THE CONDITION INTERFERES WITH ONE’S ABILITY TO THINK AND CONCENTRATE, AMONGST OTHER DISABLING EFFECTS. THE AMERICAN PSYCHIATRIC ASSOCIATION (APA) DEFINES GENDER DYSPHORIA AS “A CONFLICT BETWEEN A PERSON’S PHYSICAL OR ASSIGNED GENDER AND THE GENDER WITH WHICH HE/SHE/THEY IDENTIFY.” 43 INDIVIDUALS WITH GENDER DYSPHORIA “OFTEN EXPERIENCE SIGNIFICANT DISTRESS AND/OR PROBLEMS FUNCTIONING ASSOCIATED WITH THIS CONFLICT.” 44 FOR SOME TRANS PEOPLE, THIS CONFLICT, “IF CLINICALLY SIGNIFICANT AND PERSISTENT, IS A SERIOUS MEDICAL CONDITION.” 45 THE FIFTH EDITION OF THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-V) LAYS OUT CRITERIA FOR FINDING A DIAGNOSIS OF GENDER DYSPHORIA, WHICH IS CHARACTERIZED BY “A DIFFERENCE BETWEEN ONE’S EXPERIENCED/EXPRESSED GENDER AND ASSIGNED GENDER,” CAUSING “Significant distress or problems functioning,” AND AS MEETING AT LEAST TWO OTHER BEHAVIORAL INDICATORS FROM A LONGER LIST, FOR AT LEAST A PERIOD OF SIX MONTHS. 46 LEFT UNTREATED, GENDER DYSPHORIA CAN LEAD TO DEBILITATING DEPRESSION, ANXIETY, AND, FOR SOME, SUICIDALITY AND DEATH. 47 HOWEVER, THE EFFECTS OF GENDER DYSPHORIA CAN BE AMELIORATED BY AN INDIVIDUALIZED APPROACH TO GENDER TRANSITION, WHICH MAY CONSIST OF “A MEDICALLY-APPROPRIATE COMBINATION OF HORMONE THERAPY, ‘LIVING PART TIME OR FULL TIME IN ANOTHER GENDER ROLE, CONSISTENT WITH ONE’S GENDER IDENTITY,’ GENDER REASSIGNMENT SURGERY, AND/OR PSYCHOThERAPY.” 48

HARVARD JOURNAL OF LAW & GENDER [VOL. 43

44 Id.
46 Am. Psychiatr. Ass’n, Diagnostic and Statistical Manual of Mental Disorders 451–53 (5th ed. 2013) [hereinafter DSM-V]; see id. at 453 (emphasizing that distress is key to diagnosis of gender dysphoria).
47 Id. at 454–55.
48 Blatt Amici Curiae Brief, supra note 45, at 8 (quoting World Pro’s, Ass’n for Transgender Health, Standards of Care 9 (7th ed., 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf [https://perma.cc/JA4C-MKK8] [hereinafter SOC]).
49 Francine Russo, Where Trans is No Longer a Diagnosis, Sci. Am. (Jan. 6, 2017), https://www.scientificamerican.com/article/where-transgender-is-no-longer-a-diagnosis [https://perma.cc/C2U2-ANYT] (“The new diagnosis recognized that a mismatch between one’s birth gender and identity was not necessarily pathological . . . [and] shifted the emphasis in treatment from fixing a disorder to resolving distress over the mis-
APA explained that its decision to focus on “gender dysphoria” in the DSM-V was to move away from treating gender nonconformity itself as a mental disorder.50 Instead, diagnosis is appropriate only when gender nonconformity is accompanied by “the presence of clinically significant distress.”51 The APA noted that its decision was motivated by a desire to fight stigma and that “[r]eplacing ‘disorder’ with ‘dysphoria’ in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, [but] it also removes the connotation that the patient is ‘disordered.’”52 There was criticism over the decision to leave any form of gender identity disorder in the DSM-V, grounded in the argument that “continued labeling of expressions of gender as pathological is discriminatory,”53 but the APA ultimately decided to include gender dysphoria as a diagnosis in hopes that it would provide a diagnostic name “more appropriate to the symptoms and behaviors [individuals] experience without jeopardizing their access to effective treatment options.”54 The shift toward gender dysphoria focuses on the mental distress experienced by individuals that may be associated with cross-gender identification, rather than cross-gender identification alone as sufficient to sustain any sort of diagnosis. Simply put, being trans alone cannot sustain a diagnosis of gender dysphoria under the DSM-V, as it could for a diagnosis of gender identity disorder under the DSM-IV. A trans person must also be experiencing significant mental distress, resulting from the difference between assigned gender and experienced/expressed gender, before any sort of diagnosis could be appropriate.

Thus, gender dysphoria is not the result of being trans per se, but the result of mental stress from the intolerance and discrimination many trans people face because of their gender identity.55 Gender dysphoria is characterized by debilitating mental impairments; any sufferer of anxiety or depression could detail how the symptoms of anxiety and depression match.”); see also Barry, supra note 26, at 11 (2013) (characterizing DSM-5’s changes as “less ‘stigmatizing’ and ‘better reflect[ing] the core of the problem’” that is the incongruence between gender identity and assigned gender).


51 APA, DSM-V Rationale, supra note 50.

52 Id.

53 Marvin, supra note 50, at 675.

54 APA, DSM-V Rationale, supra note 50, at 2; see also Marvin, supra note 50, at 675 (noting concern that removal of some form of gender identity disorder “would lead to denial of medical care for transgender individuals, hamper their ability to pursue discrimination claims, and deprive people, including children, with GID of the counseling and medical treatments demonstrated to be beneficial”).

substantially limit[ ]” one’s major life activities, especially when one considers that the ADA includes “concentrating, thinking, communicating, and working” as major life activities. On its face, gender dysphoria appears to be a disability under the ADA.

b. Historical Exclusion of Gender Identity Disorders

Despite the obvious case for gender dysphoria’s coverage under the ADA, trans individuals have historically faced a major roadblock to protection. For nearly thirty years, individuals with “gender identity disorders” (GIDs) have been excluded under the ADA. As discussed supra, GIDs were previously defined solely by a cross-gender identification, while the new category of gender dysphoria focuses on clinically significant distress that may accompany cross-gender identification. Separated from the ADA’s primary definitional provision, in a subchapter entitled “Miscellaneous Provisions,” is a secondary definitions section, which quietly excludes a number of disparate groups from coverage under the ADA. Section 12211(b) exempts the following conditions from coverage under the ADA: “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, [GIDs] not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.” Nestled between voyeurism and compulsive gambling is a carveout excluding those suffering from “[GIDs] not resulting from physical impairments.” The list of exclusions was drawn “directly from the DSM-III-R, the version of the DSM in effect at the time the ADA was being debated.” Professor Kevin Barry has detailed the legislative history of this exclusion at length and explained how the clause was motivated by moral, legal, and pragmatic concerns. Leading disability rights and LGBTQ advocate Chai Feldblum recalled feeling “sick to her stomach” as backroom deal-making resulted in the exclusion of GIDs under the ADA. The exclusion of certain mental

56 See 42 U.S.C. §§ 12102 (1–2) (2012); see also James et al., supra note 12, at 105 (“Thirty-nine percent (39%) of [trans] respondents reported currently experiencing serious psychological distress, a rate nearly eight times higher than in the U.S. population (5%).”) (emphasis added).

57 See generally Barry, Disabilityqueer, supra note 26, at 5–6 (discussing the origins of the exclusion of GIDs and the changed understanding of this exclusion).


59 42 U.S.C. § 12211(b)(1–3) (2012). The statute also makes clear that homosexuality and bisexuality are not impairments and thus not disabilities under the ADA. 42 U.S.C. § 12211(a) (2012).

60 Blatt Amici Curiae Brief, supra note 45, at 12.

61 See generally Barry, Disabilityqueer, supra note 26 (providing detailed legislative history of the passage of the amendment containing the exclusions and the motivations of the senators behind it).

62 Id. at 24.
impairments transformed the ADA into a sort of “moral code: ‘disability’ coverage applies to those we pity, not those we despise.”

The exclusion of GIDs from the ADA had powerful effects, both symbolically and practically. In a symbolic sense, some scholars posited that the exclusion of GIDs “[sent] a strong message: [that] people with [GIDs] [had] no civil rights worthy of respect.” Practically speaking, individuals with GIDs could not invoke the protections of the ADA, even if this impairment substantially limited their major life activities. When Congress amended the ADA in 2008, it ignored activists’ calls to jettison the exclusion, despite other legal changes evincing an acknowledgment of the discrimination faced by the trans community, changes in medical opinion about GIDs, and increased activism for trans inclusion. The ADAAA functioned as both a symbolic and practical strengthening of the barriers to trans equality and civil rights, confirming once more that trans individuals could not seek legal redress for disability discrimination. Trans people seeking relief still did not attempt to invoke the ADA for greater legal protection, as it seemed to offer only a dead end. However, the willingness of some litigants to pursue ADA claims finally bore fruit in the summer of 2017, shortly after the removal of GIDs from the DSM-V in 2013.

c. Blatt v. Cabela’s Retail, Inc.: Recognition of ADA Claims for Individuals with Gender Dysphoria

When Ms. Kate Lynn Blatt filed a lawsuit against her employer, Cabela’s, GIDs had been excluded from coverage under the ADA for nearly twenty-five years. Yet her complaint alleged claims of discrimination under both Title VII and the ADA. Ms. Blatt was designated male at birth and was diagnosed in October 2005 with gender dysphoria, which she alleged was a disability under the ADA as it substantially impaired her abilities to interact with others, reproduce, and socially and occupationally function. Ms. Blatt began to present more femininely and to engage in hormone therapy because of her gender dysphoria; she also ceased using the name she

---

63 Id. at 25; see also id. at 26 (characterizing gender identity disorders as “despised or, at best, misunderstood”).
64 Id. at 27 (drawing parallels to Michael Waterstone’s theory in the article Returning Veterans and Disability Law, 85 NOTRE DAME L. REV. 1081 (2010) that federal law serves an important expressive function).
65 Id. at 31.
66 Id. at 33.
68 Id.
70 Id. ¶ 9–10.
was given at birth, “James.”71 When she began to work for Cabela’s in fall 2006, she was already presenting herself to the world as Kate, in conformance with her gender identity; at her new employee orientation, she had no issues when she wore female attire and used the female restroom.72 Ms. Blatt then requested a female uniform and a nametag reading “Kate Lynn”; her request for the nametag was denied and her employer required her to wear a nametag reading “James.”73 Cabela’s then denied Ms. Blatt access to the women’s restroom until she presented documentation of a legal change in her gender marker. Even after she provided that documentation, her employer delayed allowing her access to that restroom because she had not undergone gender reassignment surgery.74 At one point, her employer attempted to make her use the restroom at a Dunkin Donuts located across the street but eventually allowed her to use the unisex family restroom, which was located far from other employee restrooms and was less clean.75 Throughout all of this, Ms. Blatt also faced a barrage of insulting comments and questions from her coworkers.76 Following her termination, Ms. Blatt filed her complaint alleging unlawful discrimination under Title VII and the ADA.

Cabela’s, unsurprisingly, moved to dismiss her ADA claim for failure to state a claim because of the exclusion of GIDs from ADA coverage.77 Cabela’s also claimed that she had pled no facts supporting her claim that she was “regarded as” having an impairment under the ADA.78 Cabela’s further argued for the dismissal of her failure to accommodate claim because, as she was not impaired, she had no legal entitlement to accommodations.79 In her response, Ms. Blatt, however, “did something that no litigant had ever done before” 80 and advanced an argument that the ADA’s exclusion of individuals with GIDs violated the Constitution’s guarantee of equal protection.81 Specifically, she argued that the exclusion of GIDs “fail[ed] strict, intermediate, and rational basis scrutiny” and that the exclusion impermissi-
bly resulted from moral animus.\textsuperscript{82} In over twenty pages, Ms. Blatt rigorously argued for a heightened standard of review for trans people and also argued that the exclusion would fail under less rigorous standards of review after \textit{Romer v. Evans} and \textit{United States v. Windsor}.\textsuperscript{83} In essence, she had thrown down the constitutional gauntlet against the exclusion of trans people suffering gender dysphoria.

Shortly thereafter, several leading trans rights organizations entered the fray by filing a joint amicus brief that advanced a separate, more narrow statutory argument in favor of coverage for individuals with gender dysphoria under the ADA. Amici curiae opened their brief by arguing that the exclusion of individuals with GIDs resulted from “moral opprobrium . . . without foundation in either medicine or law.”\textsuperscript{84} They argued that GIDs, and now gender dysphoria, had always been serious medical conditions, not disorders of sexual behavior, and were entitled to legal protection.\textsuperscript{85} Amici concurred in Ms. Blatt’s constitutional challenges but also presented the court with an alternative route—that gender dysphoria was squarely outside the scope of the ADA’s exclusion.\textsuperscript{86} Amici emphasized the numerous ways in which gender dysphoria is distinct from GIDs and advocated for a narrow reading of the ADA’s exclusion of GIDs.\textsuperscript{87} The DSM-III-R,\textsuperscript{88} which had shaped the view of Congress in its adoption of the ADA and its exclusions, required “[p]ersistent discomfort and sense of inappropriateness about one’s assigned sex” and a “[p]ersistent preoccupation” with acquiring the secondary sex characteristics of the other sex.\textsuperscript{89} Subsequent versions of the DSM focused on “strong and persistent cross-gender identification” and “persistent discomfort.”\textsuperscript{90} In contrast, amici explained that the DSM-V’s adoption of “gender dysphoria” was significant in several ways. First, the name of the diagnosis is different, focusing on dysphoria resulting from incongruence, not incongruence itself, as the condition to be treated.\textsuperscript{91} Additionally, the criteria for a diagnosis are distinct, broadening the category of diagnosis “to those who may not formerly have been diagnosed with GID.”\textsuperscript{92} Finally, and perhaps most notably, the underlying medical research supporting the gender dysphoria diagnosis is different because the research strongly suggests that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{82} Id. at 2; \textit{see also} id. at 9–15 (detailing legislative history discussed supra).
\item \textsuperscript{83} \textit{See generally} id. at 15–39 (arguing that transgender classifications require heightened review, as a suspect or quasi-suspect class, or, in the alternative, intermediate scrutiny, as a sex-based classification).
\item \textsuperscript{84} \textit{Blatt} Amici Curiae Brief, supra note 45, at 2.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. at 2–3.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} \textit{Am. Psychiatr. Assn., Diagnostic and Statistical Manual of Mental Disorders} 76 (3rd ed., rev. 1987).
\item \textsuperscript{89} DSM-III-R, at 76.
\item \textsuperscript{90} \textit{See Am. Psychiatr. Assn., Diagnostic and Statistical Manual of Mental Disorders} 537 (4th ed., rev. 2000).
\item \textsuperscript{91} \textit{Blatt} Amici Curiae Brief, supra note 45, at 13.
\item \textsuperscript{92} Id. at 13–14.
\end{itemize}
\end{footnotesize}
“physical impairments contribute to gender incongruence and, in turn, [gender dysphoria].” Amici charged that the ADA is at the very least silent as to its coverage of gender dysphoria; at best, gender dysphoria is squarely within the ambit of the ADA because “the burgeoning medical research underlying [gender dysphoria] points to a physical etiology . . . [and] GIDs resulting from physical impairments . . . have always been covered by the ADA.” By clearly laying out the ways in which gender dysphoria was distinctive from the GIDs excluded by the ADA, Amici offered the court a way to avoid the lurking constitutional question raised by Ms. Blatt, catering to courts’ desire to avoid such determinations, in line with the canon of constitutional avoidance.

The constitutional claims advanced by Ms. Blatt also drew the Department of Justice (DOJ) into the litigation where the DOJ filed two statements of interest. In its first statement of interest, the DOJ argued that the court should instead resolve Ms. Blatt’s Title VII claims first, as the favorable resolution of those claims could make her ADA claims superfluous. However, as discussed supra, following the suggestion of the DOJ would have been insufficient for the plaintiff here: resolution of a claim on Title VII grounds would not be a substitute for resolving a claim on ADA grounds because Title VII would not mandate reasonable accommodations, such as providing the appropriate nametag. Cabela’s quickly fired back that the DOJ’s resolution was unsupported, “[d[id] not fit within the strictures of the doctrine of constitutional avoidance because it simply cannot insure a dispositive resolution without a decision on Ms. Blatt’s constitutional challenge,” and that the doctrine of constitutional avoidance should not apply.

The DOJ then filed a second statement of interest that advanced an argument almost identical to that advanced by the trans advocacy groups—that gender dysphoria was not actually excluded under the ADA because of growing evidence that the condition likely results from a physical impairment, thus allowing a court to avoid the lurking constitutional issue. The DOJ argued that gender dysphoria could fall outside the gender identity disorder exclusion “even if [its] precise etiology is not yet definitely understood,” before citing to the brief of amici curiae and the scientific evidence therein. Cabela’s again responded to the DOJ, attacking its new statement of interest

93 Id. at 14–15.
94 Id. at 15.
96 Cabela’s Memorandum of Law in Response to the Statement of Interest at 2, Blatt, 2017 WL 2178123 (E.D. Pa. Aug. 21, 2015) (No. 5:14-CV-04822), 2015 WL 7188535; see generally id. at 4–11 (advocating that constitutional avoidance is a limited doctrine and that the case at bar does not satisfy the factors set forth by the Supreme Court in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), for invoking this justiciability doctrine).
98 Id. at 3–6 (citing Blatt Amici Curiae Brief, supra note 45, at 15 & n.57).
as “rooted in guesswork and surmise,” before arguing that none of the parties could adequately argue that gender dysphoria has a physical etiology, or even if some cases did, that no party could conclusively diagnose that Ms. Blatt suffered from a form of gender dysphoria that \textit{did} have a physical etiology.\footnote{Cabela’s Memorandum of Law in Response to the Second Statement of Interest at 2–3, Blatt, 2017 WL 2178123 (E.D. Pa. Nov. 30, 2015) (No. 5:14-CV-04822), 2015 WL 9907608.} While DOJ and amici curiae offered a narrow road of constitutional avoidance, the primary parties to the matter remained rooted to receiving a resolution of the constitutional claims underpinning the matter.

In May of 2017, Judge Joseph F. Leeson, Jr. issued a landmark ruling,\footnote{See, e.g., Barry & Levi, supra note 67, at 385 (characterizing the ruling as “a major step forward for transgender people”); Daniel Trotta, \textit{U.S. Judge Allows First Transgender Person to Sue Under Disability Law}, Reuters (May 19, 2017), https://www.reuters.com/article/usa-lgbt-idUSL2N1IL1NJ [https://perma.cc/QFK5-VAYV] (discussing precedential value of decision).} finding that Ms. Blatt had stated a claim under the ADA, as gender dysphoria was not subject to the ADA’s exclusion of GIDs.\footnote{Blatt, 2017 WL 2178123, at *1, *4 (E.D. Pa. May 18, 2017).} The court took note of Congress’s mandate that the ADA’s provisions be interpreted broadly, turning to a statutory interpretation of the provision at issue.\footnote{Id. at *2–3.} The court noted that when a “fairly possible” interpretation of a statute allows a court to avoid disposing of a larger constitutional question, it must engage in constitutional avoidance by reading the statute narrowly.\footnote{Id. at *3.} The court then did so, and advanced an interpretation raised by none of the parties to the litigation. The court noted that the ADA’s exclusion listed a number of conditions that fell into “two distinct categories: first, non-disabling conditions that concern sexual orientation or identity, and second, disabling conditions that are associated with harmful or illegal conduct.”\footnote{Id. at *4.} To read the ADA’s exclusion of GIDs to encompass gender dysphoria would mean that the “[GIDs] would occupy an anomalous place in the statute, as it would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct,” fitting in neither of the two major categories it outlined.\footnote{Id.} The court narrowly interpreted the statute so that GIDs only encompassed the condition of identifying with a different gender, whereas “disabling conditions that persons who identify with a different gender may have—such as Blatt’s gender dysphoria”—fell outside of the exclusion and warranted ADA coverage.\footnote{Id.} Thus, one’s trans identity, marked by an identification with a gender identity that they were not assigned at birth, is not a disability; but the mental impairment and suffering that may result from the incongruence between one’s gender identity and gender assigned at birth, diagnosable as gender dysphoria, would be a disa-
bility. Soon after the court’s opinion, the parties reached a settlement, leaving an open question of how plaintiffs with gender dysphoria would fare in terms of summary judgment, trials, and court-ordered remedies.\footnote{107} Nonetheless, the decision is impactful as the court’s narrow reading laid out a path for future trans parties\footnote{108} with gender dysphoria to argue for coverage and protection under the ADA.

V. THE POST-\textit{Blatt} BATTLE FOR THE EXPANSION OF RIGHTS

Trans advocates have filed other path-breaking lawsuits, some of which commenced prior to the court’s opinion in \textit{Blatt}, which seek to leverage the expansive coverage of the ADA and to show its transformative potential for trans people suffering from gender dysphoria. The recent litigation targets correctional policies, employer bathroom policies, and state policies that negatively impact trans plaintiffs with gender dysphoria. This section does not seek to provide a comprehensive catalog of the cases filed but rather to highlight a select few cases that distinctly demonstrate the potential of the ADA as an avenue for trans individuals with gender dysphoria beyond the workplace. This section concludes with a discussion of another recent employment decision in \textit{Parker v. Strawser Construction, Inc.}, which suggests the likelihood that this avenue for litigation will face further appellate scrutiny and underscores the continued importance of a unified, thoughtful strategy amongst advocates in this field.

In \textit{Doe v. Arrisi},\footnote{109} advocates challenged an exclusion of individuals with gender dysphoria under an analogous provision of the Rehabilitation Act (RA). The RA, which Congress passed in 1973, prohibits discrimination on the basis of disability by recipients of federal funds; when the ADA was


\footnote{108} At the time of this writing, another case, \textit{EEOC v. Deluxe Financial Services, Inc.}, is pending in Minnesota. Some of the facts are strikingly similar to \textit{Blatt}, but Ms. Austin faces compounded injustice in that her employer health plan does not cover certain procedures for trans individuals, including gender reassignment surgery, yet her employer would not allow her to have her personnel records altered or to use the appropriate restroom until she underwent gender reassignment surgery. \textit{See} Complaint in Intervention at 7–14, 16, EEOC v. Deluxe Fin. Servs., Inc., No. 0:15-cv-02646 (D. Minn. Oct. 22, 2015).

\footnote{109} In the Eastern District of Pennsylvania, where Ms. Blatt’s suit was filed, another case has recently been filed against the Hospital of the University of Pennsylvania, alleging in part that plaintiff had been fired as a result of her gender dysphoria. \textit{See} Complaint at 11–12, 16–18, Doe v. Hosp. of the Univ. of Pa., No. 2:19-cv-02881 (E.D. Pa. July 2, 2019).

When Trans Rights Are Disability Rights

subsequently passed, it incorporated the RA’s definition of disability. The plaintiff in Arrisi challenged a New Jersey policy that required confirmation of gender reassignment surgery before the State would change the sex classification on an individual’s birth certificate. The plaintiff, who suffered from gender dysphoria, argued that the policy was intentionally discriminatory, discriminatory in effect, and constituted a failure to accommodate in violation of the ADA and RA. Amici in Arrisi highlighted that “[p]eople with disabilities and transgender people share in common a lengthy history of societal prejudice and neglect” and that trans individuals “with gender dysphoria are frequently subjected to discrimination in multiple areas of their lives (e.g., housing, employment, school, healthcare, interactions with police and other government officials) that exacerbates [gender dysphoria’as] negative health outcomes.” Amici further argued that denying an individual the change of a sex classification on their birth certificate based on failure to undergo a gender reassignment surgery constituted discrimination based on how someone chooses to treat their disability, which ADA Enforcement Guidance clearly considers discrimination. The matter is still pending before the district court and its outcome will be important, as at least twenty-six states also require trans individuals with gender dysphoria to go through gender reassignment surgery prior to changing sex designations on their birth certificates, despite the fact that this likely constitutes discrimination on the basis of how an individual chooses to treat their disability.

A trans individual with gender dysphoria also challenged her incarceration in a men’s prison as violating the ADA and RA in Doe v. Massachusetts Department of Corrections (“Mass. DOC”). She alleged that the prison “forced her to shower in view of—and having to view—men, to be strip-searched by men, to be vulnerable to taunts and ridicule by men, and to live

---

110 Jennifer L. Levi & Bennett H. Klein, Pursuing Protection for Transgender People through Disability Laws, in TRANSGENDER RIGHTS 74, 79 (Paisley Currah, Richard M. Juang, & Shannon Price Minter, eds. 2006). Thus, the RA represents another path to protection for transgender people if the source of the discrimination against the plaintiff is a recipient of federal funding.

111 Id. at ix–x.

112 Id. at 1, 6.


her life in fear of being sexually victimized by men.”

117 Defendants in *Mass. DOC* maintain a “blanket prison policy that segregates prisoners based on anatomy, external genitalia, or assigned birth sex” and does not accommodate individuals with gender dysphoria.118 Defendants attempted to defeat the plaintiff’s disability discrimination claims by invoking one of the ADA’s exceptions—arguing that accommodating the plaintiff’s gender dysphoria would be a risk to public safety.119 Amici were adept to point out that the public safety exception to the ADA is only available for “actual risks, not on mere speculation, stereotypes, or generalizations.”120 Amici argued that the defendants must adopt a policy based on inmates’ gender identity, or in the alternative, provide inmates with gender dysphoria reasonable accommodations.121 Most notably, two prominent disability rights organizations, the Bazelon Center for Mental Health Law and the Disability Rights Education & Defense Fund, joined transgender advocates and demonstrate a more unified effort between the trans and disability communities in fighting for coverage of individuals with gender dysphoria.

In March 2018, the court granted in part the plaintiff’s motion for a preliminary injunction, reserving its ruling on the motion to dismiss while it awaited the DOJ’s possible intervention on the constitutional question.122 While it did not yet grant the plaintiff’s request to be transferred to a women’s facility, the court required defendants to use female correctional officers for strip searches to the extent possible and to provide for separate accommodations and shower time.123 In June 2018, the court denied the defendants’ motion to dismiss, finding that the “ADA’s exclusion applies only to gender identity disorders not resulting from physical impairments,” and Doe has raised a dispute of fact that her gender dysphoria may result from physical causes.124 The court further noted that reading Doe’s gender dysphoria as not covered by the ADA would cause serious constitutional issues, as it is “virtually impossible to square the exclusion of otherwise bona fide disabilities with the remedial purpose of the ADA, which is to redress discrimination against individuals with disabilities based on anti-
2020] When Trans Rights Are Disability Rights 157

quoted or prejudicial conceptions of how they came to their station in life.”125 Thus, the court concluded that “to the extent that the statute may be read as excluding an entire category of people from its protections because of their gender status, such a reading is best avoided.”126 The case was eventually dismissed as moot because Doe received all of the relief sought, including her request to be transferred to a women’s prison.127 This case and Doe’s eventual transfer to the correct facility show a route of vital reform for trans individuals who are incarcerated. Nearly one in six trans individuals have been to prison, and the rate is significantly higher for black trans people—one in two have been to prison.128 There, they face higher risks of assault, a lack of access to medical treatment, and a higher likelihood of being placed in solitary confinement.129 With the trans prison population facing daily discrimination, the potential impact of this case could be significant.

Perhaps the most notable post-Blatt case to date, however, is Parker v. Strawser Construction, Inc., because it specifically addresses the Blatt court’s analysis and found it wanting.130 Tracy Parker was working as a truck driver in Ohio for several years before she began her transition. When she informed her employer of her gender dysphoria diagnosis and intent to transition, she began facing regular harassment from her co-workers, as well as discipline by her immediate supervisor for non-existent or minor errors in her logbook.131 Ms. Parker’s therapist eventually requested accommodations for Ms. Parker’s gender dysphoria in the workplace, including allowing her to use female restrooms and ensuring that she would be referred to using “female gender terminology.”132 Ms. Parker was sexually assaulted by a co-worker, which resulted in the co-worker’s termination but also increased harassment of Ms. Parker by her co-workers and supervisor.133 When Ms. Parker approached the company superintendent about the pervasive harassment, the superintendent said there was nothing he could do and instructed her to resign.134 Ms. Parker did not end up resigning, but she was demoted following her reporting of the sexual harassment, and one of her harassers filled her position.135 When Ms. Parker complained that she was being discriminated against because of her gender, disability, and protected com-

125 Id. at *8.
126 Id.
128 Transgender Incarcerated People in Crisis, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people [https://perma.cc/3FY4-6LL2].
131 Id. at 748.
132 Id. at 748–49.
133 Id. at 749.
134 Id.
135 Id. A pay-cut also accompanied the demotion. Id.
plaints, she was suspended without pay and ordered to see a company-approved therapist or risk termination.\textsuperscript{136} Ms. Parker complied, but returned to a work environment still replete with pervasive, gender-based harassment.\textsuperscript{137} Not long after her return, Ms. Parker was terminated for insubordination; her letter of termination addressed her as “Mr. Parker.”\textsuperscript{138} After her termination, Ms. Parker filed charges with the EEOC before eventually bringing a lawsuit in federal court, alleging violations of Title VII, the ADA, and Ohio’s anti-discrimination laws.\textsuperscript{139}

In April 2018, the district court issued its opinion, finding that Ms. Parker had successfully pled claims for sex discrimination, sexual harassment, and retaliation under Title VII, but dismissing her ADA claims on grounds that gender dysphoria was not a disability under the ADA.\textsuperscript{140} In deciding the sex discrimination claims under Title VII, the court was directly following the Sixth Circuit’s precedent in \textit{Harris Funeral Homes}.\textsuperscript{141} Her employer resorted to a familiar argument in claiming her ADA claim had to be dismissed; that her gender dysphoria fell into the ADA’s exclusion of “gender identity disorders not resulting from physical impairments.”\textsuperscript{142} Ms. Parker, in turn, employed similar arguments to those raised in \textit{Blatt}, and specifically cited to the Eastern District of Pennsylvania’s decision in \textit{Blatt}.\textsuperscript{143} The Southern District of Ohio, however, did not find this framing of gender dysphoria availing. In its decision, the court claimed it could find “no support, textual or otherwise, for the \textit{Blatt} court’s interpretation.”\textsuperscript{144} The court dismissed the \textit{Blatt} court’s reasoning that the ADA only intended to exclude “non-disabling” gender identity disorders, noting that any disorders that “do not substantially limit a major life activity are already excluded from coverage, and an additional exclusion for any non-disabling condition would be superfluous.”\textsuperscript{145} Instead, it found Congress’s intent to exclude all gender identity disorders not resulting from a physical impairment, disabling or not, to be obvious.\textsuperscript{146} While Ms. Parker had argued in her opposition to the motion to dismiss that medical research was showing that gender dysphoria may have biological roots, the court dismissed these arguments on procedural grounds because Ms. Parker had failed to raise them in her com-

\textsuperscript{136} Id. at 749–50.
\textsuperscript{137} Id. at 750.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 750–51.
\textsuperscript{140} See id. at 753–61.
\textsuperscript{141} Id. at 755–56.
\textsuperscript{142} Id. at 753–54.
\textsuperscript{143} Id. at 754; see also Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 23–25, Strawser Constr., 307 F.Supp.3d 744 (S.D. Ohio Oct. 19, 2017) (No. 2:17CV00541), ECF No. 27.
\textsuperscript{144} Strawser Constr., 307 F.Supp.3d at 754.
\textsuperscript{145} Id.
\textsuperscript{146} Id. The court also noted that the “majority” of federal cases have concluded as much. \textit{Id.}
plaint. Even if she had properly pled such a theory, however, the court noted that it was “not convinced” by such a line of reasoning. In just a few paragraphs, the Strawser court exemplified the resistance to these arguments that advocates and litigants continue to face in some courts. The Strawser court portends the looming appellate challenges to these arguments lying ahead, which could ultimately wend their way to the Supreme Court. Arrisi and Mass. DOC represent just two of the ways in which the ADA can be leveraged on behalf of trans individuals—such as to fight bureaucratically-mandated surgical interventions and to achieve safer prisons—and show the vast, under-realized potential of this new frontier of civil rights. Strawser, following on the heels of Blatt, however, suggests the need for vigilance amongst advocates in the field and demonstrates the likelihood that some courts will continue to resist this logical reading of the ADA. This continued resistance by some courts may lead to a similar Supreme Court standoff to the one this term in Harris Funeral Homes, and remains an important variable to watch as the fight for equal rights continues.

VI. THE LIMITS OF THE ADA AS A VEHICLE FOR TRANS RIGHTS

Both theoretical critiques and practical concerns may arise when pursuing trans rights under disability law. The theoretical critiques, while quite prevalent in academia, tend to misunderstand the nature of the claims or draw on ableist arguments, and thus should cause no concern moving forward. “Ableism is a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society.” Distilled to the basics, ableism is the ways in which discrimination against disabled people is manifested in every facet of society. However, some practical concerns—both with the limits of disability law jurisprudence and the lurking constitutional concerns underpinning this area of the law—should remain in the minds of advocates as they continue to pursue relief for trans clients.

a. Theoretical Critiques

Some critique the pursuit of trans rights under a disability framework by charging that this further pathologizes being trans. Pathologization impacts trans people in two major ways. First, pathologization casts trans identity itself as an “impairment” in need of a “cure” and creates troubling implications that trans people are sick or otherwise abnormal. Second, pathologization may compound and augment the harms already faced by

147 Id. at 755.
148 Id.
trans people, through increased stigmatization and potential ramifications and loss of rights that may accompany a formal diagnosis. Both angles raise compelling critiques; however, many of these critiques parallel similar issues also faced by the disability rights community and suggest the need for solidarity rather than further marginalizing disabled people by trading in problematic ableism.

Pathologization of trans identity and its potential intrinsic harms to trans individuals’ concepts of identity has long been a subject of discourse. Advocates have expressed concerns that pursuing a disability claim requires one to engage with the medical apparatus and to seek a diagnosis of gender dysphoria in a way that they fear ultimately legitimizes the idea that trans rights must be dependent upon gender dysphoria and contributes to a “regime of coercive binary gender.” 150 By diagnosing trans identity as something in need of treatment and/or a cure, pathologization reifies the idea that to be cisgender is to be normal and healthy. Society already defines normality as “able-bodied/minded”, white, [cisgender] male, heterosexual, young and financially secure.”151 Those who stray from any of these “dominant” categories, whether by being trans or disabled, are rendered “Other,” and to be both trans and disabled would cause one to be “rendered multiply Other.”152 For trans individuals who already experience marginalization on account of being trans, being further marginalized on account of being considered disabled may only add further harm. In the words of the gender theorist and philosopher Judith Butler, “[t]o be diagnosed . . . is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all.”153 Historically, such diagnoses have often not been the product of savvy legal strategy but have “been given to people against their will.”154 The very process of receiving a diagnosis itself, even under the “improved” DSM-V, also presupposes the gender binary norm by asking whether such norms are being embodied or challenged in any particular instance.155 It also must be questioned, whether the very act of submitting to diagnosis results in “internalizing some aspect of the diagnosis, conceiving of oneself as mentally ill or ‘failing’ in normality . . . even as one seeks to take a purely instrumental attitude toward these terms.”156 The current approach to trans rights through

150 See Dean Spade, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women’s L.J. 15, 35 (2003).
152 Id.
153 Judith Butler, Undiagnosing Gender, in TRANSGERDER RIGHTS, supra note 110, at 275.
154 Id. at 276.
155 Id. at 276.
156 See id. at 279, 287 (“One has to submit to labels and names, to incursions, to invasions, one has to be gauged against measures of normalcy, and one has to pass the test.”).
157 Id. at 280.
the ADA appears to hinge distinctively on the growing support in medical research for a physical (or biological) etiology for gender dysphoria, which may create troubling associations, rejected by feminist and queer theorists, that biology is the determinative factor in the “making of the gendered . . . body.” Such critiques line up with critiques of the medical model of disability, which focuses on “curing” disabled people, views “disability as an infirmity of the individual to be responded to with treatment and pity,” and perpetuates stigma and social prejudice by viewing disabled people as inherently inferior.

However, this side of the pathologization critique ignores the lived realities and needs of many trans people, specifically the need for strong, immediate legal protections against the pernicious discrimination faced daily by the community. A world without pathologization may indeed be ideal, but fighting for trans rights using the provisions of the ADA may provide necessary relief to individuals who live in the current world and not an idealized future world. Some trans people desire medical interventions and rely upon a formal diagnosis to access treatments that could otherwise be inaccessible because of bureaucratic policies or cost. The ADA itself does not require a formal diagnosis to gain protection and can even encompass individuals who are “regarded as” being disabled but who do not consider themselves to be so. Eschewing a disability framework altogether may ignore the reality that “different forms of social oppression,” such as for being transgender or being perceived as disabled, “are not invariably experienced at the same time on a daily basis.”

---

157 Helen Meekosha, Body Battles: Bodies, Gender, and Disability, in The Disability Reader, supra note 151, at 174.
158 Levi & Klein, supra note 110, at 77; see also Disabilityqueer, supra note 26, at 30 (“The newly amended ADA underscores that disability is not something wrong with some of us—it is something wrong with the way society may treat any of us.”); see also Meekosha, supra note 151, at 174 (“Disability theorists . . . have similarly rejected biology as the determining factor in the making of the disabled body. They have questioned the dominance of the medical and rehabilitation paradigms which seek to transform and normalize, indeed ‘cure’ the disabled body.”); Alison Kafer, Introduction: Imagined Futures, in Feminist Queer Crisp 1, 5 (2013) (“The medical model of disability frames atypical bodies and minds as deviant, pathological, and defective, best understood and addressed in medical terms. . . . Solving the problem of disability, then, means correcting, normalizing, or eliminating the pathological individual, rendering a medical approach to disability the only appropriate approach.”).
159 See Butler, supra note 153, at 280 (“Although there are strong criticisms to be made of the diagnosis . . . it would nevertheless be wrong to call for its eradication without first putting into place a set of structures through which transitioning can be paid for and legal status attained . . . [Diagnosis] cannot be simply disposed of without finding other, durable ways to achieve those same results.”).
160 See id. at 275; see also Kafer, Introduction, supra note 158, at 7 (noting the limits of a purely social model that could serve to “marginalize those . . . who are interested in medical interventions or cures”).
161 Jennifer L. Levi, Clothes Don’t Make the Man (or Woman), but Gender Identity Might, 15 Colum. J. Gender & L. 90, 106 (2006); see also Barry, Disabilityqueer, supra note 26, at 42–43 (discussing the ADAAA’s sweeping coverage).
162 Vernon, supra note 151, at 203–04.
of disability “is broad and flexible enough to encompass many different visions of transgender identity.” These laws “are intended to cover both persons whose lives are impacted ‘naturally’ by their physical or mental health conditions,” but also “those whose lives are impacted by the social consequences” of having such conditions. Advocates should, however, remain vigilant in future litigation that pursuit of rights for some within the medical framework does not jeopardize the ability for others in the future to seek rights without engaging with a medical framework.

Critics have also raised compelling arguments that the additional pathologization of trans identity could increase extrinsic harms already associated with being trans, such as further stigmatization and a potential loss of rights. Linking diagnosis to trans identity may create difficulties for individuals to change their name or legal gender if they do not wish to pursue medical interventions; “[i]t seems contradictory that for a civil, legal, and administrative matter there must be a medical diagnosis.” The diagnosis, a means to pursue a more authentic self, “takes on a life of its own, . . . mak[ing] life harder for those who suffer by being pathologized and who lose certain rights and liberties, including child custody, employment, and housing, by virtue of the stigma attached to the diagnosis.” Pathologization could jeopardize equal access to healthcare and economic opportunity. It is this very same type of discrimination—discrimination from diagnosis or perception of a disability—that the disability rights movement, and the ADA itself, seeks to rectify. Many disability rights advocates adopt a social model of disability, which is embedded in the ADA and understands that society’s prejudice against the disabled, not any physical or mental impairment,
causes disadvantage and discrimination. Scholars recognize that “[t]he barriers to equal opportunity . . . are found not in physical incapacity or inferiority but in the prejudice, hostility, and misunderstanding of others about their health conditions.” This is true for both disabled people and trans people: it is stigma resulting from identity, not anything pernicious or wrong with the identity itself, that is the problem to be solved. ADA coverage would not further pathologization of individuals with gender dysphoria, and to avoid “relying on disability law for protections because of stigma would exacerbate the problem the laws seek to redress.” Embracing federal disability rights laws, and the social model embedded therein, would acknowledge that the issues with being trans do not “reside[ ] in the minds or bodies of individuals but in . . . social patterns that exclude or stigmatize particular kinds of bodies, minds, and ways of being.” Trans individuals, including those with gender dysphoria who seek a diagnosis for gender-affirming treatment, are already stigmatized by society, but coverage under the ADA, including under its “regarded as” prong, would finally give them a powerful tool to fight such discrimination.

A latent element of the pathologization critique boils down to the notion that trans rights should not be pursued under disability law because disability law is reserved for those who are inferior and “Other,” notions that ultimately sound in ableism. Some trans individuals and advocates have resisted the use of disability law claims for a core, visceral reason: they do not want to be considered disabled because they believe it connotes that trans people are flawed and fear the ways in which this concept of trans identity could further marginalize and stigmatize the community. There is a fear that pursuit of justice via a disability framework “will perpetuate social myths and stereotypes that transgender people are sick, abnormal, or inferior.” These visceral reactions to disability law, a powerful and appropriate tool, likely stem from ableist presumptions of what disability is and “exacerbate[ ] the stigma that disability laws seek to redress while ignoring

169 See Levi & Klein, supra note 110, at 79.
170 Id. at 75.
171 Levi, supra note 161, at 106 (acknowledging serious impairment for some trans individuals does not “universalize that experience or suggest that to be the case for everyone who identifies as transgender”).
172 Kafer, Introduction, supra note 158, at 6.
173 Spade, supra note 150, at 34; see also Levi, supra note 161, at 105 (“[P]eople have a reflexive aversion to being included within the stigmatized community of disability.”). Kafer, Introduction, supra note 158, at 2 (“If disability is conceptualized as a terrible unending tragedy, then any future that includes disability can only be a future to avoid. A better future, in other words, is one that excludes disability and disabled bodies; indeed, it is the very absence of disability that signals this better future.”). Some disability advocates have expressed concern that the inclusion of trans issues under a disability umbrella would lead to an overall dilution in the struggle for disability rights. See, e.g., Alison Kafer, Accessible Futures, Future Coalitions, in FEMINIST QUEER CRIP, supra note 158, at 156.
174 Levi & Klein, supra note 110, at 74.
the reality of the transgender condition and identity for many individuals.”\textsuperscript{175}

These concerns and hesitancies about associating with disability law arise because of “the stigma still associated with the term disability, which in its colloquial sense is all too often misunderstood to mean physical infirmity, debilitation, or inability to work.”\textsuperscript{176} In fearing the stigma associated with the disability community, trans advocates may marginalize another community in the exact same way they fear marginalization of their own community: trading on “bias, bigotry, and misunderstanding.”\textsuperscript{177} Some disability theorists and advocates are emphasizing the importance of melding both the medical and social models in a way that may resonate for some trans people.\textsuperscript{178} As Professor Helen Meekosha notes, “The rigid dualism of either a socially constructed disability or a disability grounded in biology is being disputed in the subjective discourse—the lived experience.”\textsuperscript{179} The social model of disability “does not explore a changing body image or identity and functioning” or the fact that some may choose “solutions which may improve or remove their impairment to improve their bodily functioning to achieve harmony between body and mind in distress.”\textsuperscript{180} A rigid dualism pitting social constructions of gender against an individual’s lived experience of dysphoria, rather than acknowledging the interplay between these two elements, may likewise harm trans people.

Jennifer L. Levi and Bennett H. Klein have suggested that “[t]ransgender activists and supporters would do well to learn from the disability movement, rather than to adopt and perpetuate social myths and stigmas about disabilities.”\textsuperscript{181} Both the trans community and the disability community may benefit from working together under a new model that recognizes both societal discrimination and lived experiences of impairment. A unified front on shared sites of oppression, particularly the bathroom, may result in substantial victories for both disabled and trans people. As Alison Kafer observes, an individual’s gender non-conformity may result in an experience of inaccessibility with regards to a public bathroom, just as narrow doorways may bar access to disabled people.\textsuperscript{182} People in Search of Safe and

\textsuperscript{175} Levi, supra note 161, at 105.
\textsuperscript{176} Levi & Klein, supra note 110, at 74.
\textsuperscript{177} Id. at 77.
\textsuperscript{178} Vernon, supra note 151, at 208 (“[T]he social model of disability has significance for all disabled people despite the fact that for many disabled people it does not account for the whole of their experience. . . . [T]he problem lies in how the social model is being applied. That is, if the ensuing discussion does not take account of the fact that for the majority of disabled people their experience of oppression is shaped by additional dimensions of their lives, then the application of that methodology needs to be examined, for it represents only a partial picture.”); Levi & Klein, supra note 110, at 79 (“[A] new concept of disability ‘must acknowledge the existence of functional impairments, but it must also focus on ways society can reasonably adapt to a wider range of mental and physical differences than the handicapped-or-normal dichotomy has permitted.’”).
\textsuperscript{179} Meekosha, supra note 157, at 175.
\textsuperscript{180} Id.
\textsuperscript{181} Levi & Klein, supra note 110, at 89.
\textsuperscript{182} Kafer, Accessible Futures, supra note 173, at 155.
Accessible Restrooms (PISSAR), a coalition movement founded at UC-Santa Barbara, is linking disability and gender access by providing guidelines for disability-accessibility “right alongside its genderqueer-accessibility” guidelines. Solidarity on issues of inaccessible public spaces, sexuality, stigma, and over-medicalization could create a world that is more accessible to both disabled people and trans people. Whichever path is chosen, trans individuals and advocates should be wary of falling prey to and continuing to perpetuate ableist notions in deciding on a course of legal action.

b. Doctrinal Limits of Disability Law

Disability law’s protections are under fire not only in the courts but also in Congress; any trans plaintiff with gender dysphoria will contend with the regular hurdles that ADA plaintiffs face, as well as the possibility that Congress may eviscerate some of the ADA’s vital protections. Battles over Article III standing to bring a claim are often fought in the federal courts but are especially contentious in suits under the ADA. The Supreme Court’s recent decision in Spokeo, Inc. v. Robins may make standing an even more contested battle for plaintiffs bringing claims under Title III of the ADA against places of public accommodation. Disability rights are quite distinct in terms of movement lawyering, with cases often staying far from the Supreme Court, and thus, the struggles faced by ADA plaintiffs and their advocates often remain hidden from public view. Disability rights advocates tend to view the Supreme Court as inhospitable to the disabled, especially following the 1999 trio of cases (known as the Sutton trilogy) that so curtailed rights under the ADA that it prompted Congress to pass the ADAAA. How the current Supreme Court will rule on an ADA case remains unknown: since the amendment of the ADA in 2008, no ADA cases have come before the Supreme Court. Critiques of the ADA and its limits
fall into “three broad camps: that the statute is poorly written and structurally flawed; that the ADA has been betrayed by judicial backlash; or that disability-based workplace accommodations are inefficient.” Title II claims against state and local governments, as well as Title III claims against places of public accommodation, have been somewhat successful, but scholars question the vitality of the law’s sweeping promises. Professors Michael Ashley Stein, Michael Waterstone, and David B. Wilkins argue that the disability rights community is wanting for a cohesive litigation strategy in the Supreme Court that will allow the community to achieve progress despite its internal contradictions.

Currently, in Congress, a bill misleadingly titled the “ADA Education and Reform Act of 2017” has passed the House and been received in the Senate. This bill would create even more “onerous red tape” for potential ADA plaintiffs by imposing a notice requirement to public accommodations not in compliance and giving that entity time to make “substantial progress” before a suit could be filed—even though they have been obligated to be ADA-compliant since 1990. In essence, this proposed reform “outlaws discrimination but permits entities to discriminate with impunity until victims experience that discrimination and educate the entities perpetrating it about their obligations not to discriminate. Such a regime is absurd, and would make people with disabilities second-class citizens.” Thus, while there are significant opportunities for trans plaintiffs under the ADA, these plaintiffs must not be mistaken that ADA claims are not necessarily easy to succeed on, nor safe from congressional curtailment.

noted in the aforementioned article, two disability law cases decided by the Court in 2017, brought under statutes other than the ADA, could be characterized as “very plaintiff-friendly” and were also unanimous decisions. However, Nicole Buonocore Porter concludes her analysis by opining that the current Court will likely be unfriendly to disability interests in future ADA cases, as it has not interpreted the ADA as broadly as it has other disability law statutes. See id. at 460. She also explores the potential role of Justice Gorsuch’s presence on the court, based on his previous employer-friendly decisions.

191 Stein, Waterstone & Wilkins, supra note 188, at 1659.
192 Id. at 1664. Stein, Waterstone, and Wilkins also note that disability-cause lawyers may be engaging in “healthy skepticism about using the Supreme Court as a tool to change the lived experiences of a targeted group.” Id. at 1691.
c. Lurking Constitutional Challenges

Currently, the only court to have rendered a decision on the availability of ADA coverage to plaintiffs with gender dysphoria adopted a narrow reading of ADA’s coverage exclusion, discussed supra, in order to avoid needing to dispose of a larger constitutional challenge to that exclusion. However, other courts may not continue to interpret the clause so narrowly and thus will need to face a plaintiff’s constitutional claims regarding the exclusion head-on. Judge Richard G. Stearns, presiding over Doe v. Mass. DOC, alluded at oral argument that he did not think he could settle the dispute without making a constitutional determination and certified the constitutional question to the DOJ; the court will delay ruling on the merits of the motion to dismiss at least until the time has elapsed for the DOJ to intervene on this issue.\(^\text{197}\) If the court does rule on the constitutional issue, scholars suspect that the issue could end up before the Supreme Court.\(^\text{198}\) It is currently unknown what level of scrutiny a constitutional challenge to a classification based on one’s transgender status would face.\(^\text{199}\) Advocates have argued that such classifications would fail under all standards of review.\(^\text{200}\) Because transgender advocacy groups have filed briefs in all pending trans litigation under the ADA, the argument has been advanced in all cases that the exclusion of individuals with GIDs is a case of “moral animus” that cannot withstand even rational basis review, the least demanding level of judicial scrutiny.\(^\text{201}\) Transgender groups have also deftly argued that transgender individuals, in line with footnote four in Carolene Products, are a suspect class deserving of the highest level of judicial scrutiny.\(^\text{202}\) While the result of constitutional challenges in the Supreme Court can be hard to predict, a ruling on trans classifications would provide much-needed clarification to trans people and their advocates as they continue the struggle for trans civil rights in the courts.

\(^{197}\) See Personal Conversation, supra note 122; see also Memorandum and Order, supra note 122, at 2–3.


\(^{199}\) See id. at 509 (discussing general uncertainty about the applicable standard of review).

\(^{200}\) See, e.g., Plaintiff’s Memorandum of Law in Opposition to Defendant’s Partial Motion to Dismiss, Blatt, supra note 81, at 34 (“GID’s exclusion from the ADA still fails [the] less stringent form of judicial scrutiny”); Arrisi Amici Curiae Brief, supra note 109, at 1 (summarizing standards of review applied in various cases).

\(^{201}\) See Barry, Farrell, Levi & Vanguri, supra note 198, at 574–77; see also various court filings, supra note 200.

\(^{202}\) See Barry, Farrell, Levi & Vanguri, supra note 198, at 550–67; see also various court filings, supra note 200.
VII. CONCLUSION

Utilizing the ADA to fight for trans civil rights represents an enormous opportunity to achieve meaningful change for plaintiffs nationwide. Advocates, building on the landmark victory in Blatt, should continue to bring ADA claims in other contexts, especially in light of the fact that the Supreme Court will soon decide whether Title VII even offers transgender plaintiffs any protection. Challenges could be brought to meaningfully improve trans lives by suing schools, homeless shelters, businesses, and social services, for starters, under Titles II and III. Advocates should also look anew at the Fair Housing Act’s exclusions of GIDs as a way to further combat discrimination faced in the realm of housing.203 However, advocates must also keep a wary eye on similar litigation to see when the lurking constitutional claims may surface in the Supreme Court. The DOJ, even after a change in administration, has maintained its position that the ADA exclusions can and should be read narrowly to avoid the constitutional problem while also providing coverage for trans people with gender dysphoria.204 At present, there has been no indication of a change in course by the DOJ, but a changed position by the DOJ in a future case may prove weighty. It seems likely that courts will continue to read the GID exclusion of the ADA narrowly, but at least one federal court in Strawser has vehemently dismissed this reading as lacking “support, textual or otherwise.”205 Litigants and advocates should prepare for the possibility of a circuit split, and both the trans and disability communities should play a vital role in shaping the litigation of this issue—together. In a time of great uncertainty, trans plaintiffs should not be discouraged from filing lawsuits under the ADA. It may very well come to pass in the next few years that expansive protections for gender dysphoria under the ADA will become the norm due to continued narrow statutory interpretation or, hopefully, the Supreme Court’s recognition of the validity of trans and disabled lives.

203 See Barry & Levi, supra note 67, at 392. Nearly one-quarter of trans individuals faced housing discrimination in the past year, and one in eight trans individuals have been homeless because they are transgender. See James et al., supra note 12, at 13.
