When Anti-Discrimination Law Discriminates: A Right to Transgender Dignity in Disability Law

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The Americans with Disabilities Act of 1990 (ADA) and its subsequent amendments in 2008 provided comprehensive protection against discrimination based on actual or perceived disabilities. In a compromise necessary to pass the bill, however, the drafters excluded certain disorders deemed to be morally reprehensible, including gender identity disorders. Gender identity disorder, which has since been reclassified in the Diagnostic and Statistical Manual of Mental Disorders as gender dysphoria, describes the distress experienced by transgender individuals as a result of the incongruence between their gender identity and their biological sex. While not all transgender individuals have gender dysphoria, gender dysphoria is exclusively associated with transgender people. Unlike many of the other disorders excluded from protection under the ADA, gender dysphoria neither involves criminal conduct nor causes harm to oneself or others. This Note argues that the exclusion of gender dysphoria from the ADA violates the dignitary rights of transgender individuals because it stigmatizes and demeans them by refusing to apply the broad, almost universal, definition of disability established by the Act to gender dysphoria. The result is that transgender individuals are ineligible to seek access to anti-discrimination protection that they might otherwise qualify for under the ADA. This Note considers the Supreme Court's analysis of dignity in recent gay-rights jurisprudence, asserts that the Supreme Court recognizes dignitary rights, and argues that the ADA's exclusion imposes a dignitary harm on all transgender people. This Note concludes that, because the exclusion of gender identity disorder is based on animus, which the Supreme

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Court has held to lack a rational relationship to a legitimate state interest, the provision is unconstitutional.

In 2015, the LGBT community won a major legal success when the Supreme Court held in *Obergefell v. Hodges*[1] that the Equal Protection and Due Process Clauses of the Fourteenth Amendment provide same-sex couples the right to marry. This decision was a watershed moment in a movement that has gained both increasing social acceptance and legal protection throughout the early 21st century. While discrimination based on sexual orientation remains a serious problem, most notably in the realm of employment, there is no question that the gay-rights movement has gained mainstream popularity and has achieved major legal successes.[2] The term LGBT, however, does not solely refer to sexual orientation; the "T" in LGBT stands for transgender, a label that refers to an individual "who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth."[3] The transgender community suffers from discrimination, lack of access to healthcare and insurance, and, in many states, refusal to recognize their gender identities on official documents.[4] Transgender individuals also face high rates of violence, homelessness, and general societal disparagement.[5]

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. *See, e.g.*, John Harwood, *A Sea Change in Less Than 50 Years as Gay Rights Gained Momentum*, N.Y. TIMES (Mar. 25, 2013), http://www.nytimes.com/2013/03/26/us/in-less-than-50-years-a-sea-change-on-gay-rights.html?_r=0 [https://perma.cc/7QLD-8KVW] ("In a 1996 Gallup survey, 68 percent of respondents *opposed* legal recognition for same-sex marriages. . . . In November [2013], Gallup found that 53 percent of respondents *favored* legal recognition of same-sex marriages." (emphasis added)).

3. *Transgender*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/transgender [https://perma.cc/52G4-CSTS] (last visited Feb. 23, 2016); *see also Transgender FAQ*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/transgender-faq [https://perma.cc/WW53-9FDY] (last visited Jan. 11, 2017) (describing "transgender" as an "umbrella term," defining words such as "gender identity" and "gender expression," and explaining the difference between "sex" and "gender"). "Transgender" includes those who identify as male or female, nonbinary, agender, as well as other identities that fall "somewhere else on or outside the spectrum of what we understand gender to be." *Understanding the Transgender Community*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/understanding-the-transgender-community [https://perma.cc/K985-N7Q9] (last visited Oct. 23, 2016).

4. *Understanding the Transgender Community*, HUMAN RIGHTS CAMPAIGN, *supra* note 3.

5. *Id.* (listing lack of legal protections, poverty, harassment and stigma, anti-transgender violence, barriers to healthcare, and identity documents as challenges faced by transgender people); *see also* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. AND NAT'L GAY AND LESBIAN TASK FORCE 2011 (Oct. 23, 2016, 1:44 PM),

Some of the animus and discrimination that the transgender community faces is not only an unfortunate truth of society, but also is enshrined in the law. This Note addresses one such official statement that demeans the transgender community by labeling them immoral and unworthy of protection: the Americans with Disabilities Act of 1990 (ADA).[6] This Note argues that the Supreme Court has recognized a right to dignity, and that the ADA violates the dignity of transgender individuals by explicitly excluding gender identity disorders, such as gender dysphoria, from its coverage, thus ensuring that the Act applies differently to transgender individuals than it does to almost all others. The right to dignity, while not clearly defined, is a developing concept springing from recent Supreme Court jurisprudence, particularly those opinions authored by Justice Kennedy that emphasize a person's liberty "to define and express their identity."[7] This Note argues that this liberty, which intertwines the concepts of due process and equal protection, implicitly includes the right not to be demeaned for expressing one's identity, a right that is violated by the ADA's exclusion of gender dysphoria.

Part I of this Note will introduce the purpose, history, and text of the ADA and will provide background information about gender dysphoria, previously known as gender identity disorder, the medical diagnosis associated with many transgender people.[8] Part II will provide an overview of the legal framework of the right to dignity, as developed by recent scholarship. Part III will illustrate how the ADA's exclusion of gender dysphoria implicates this right to dignity, and will argue that the exclusion should be found unconstitutional on dignity grounds.

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http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [https://perma.cc/MH5P-AKPY].

6. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

7. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

8. AM. PSYCHIATRIC ASS'N, *Gender Dysphoria*, *in* DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013). Although gender dysphoria is the current diagnosis, the language of the ADA refers to "gender identity disorders," based on an older version of the Diagnostic & Statistical Manual of Mental Disorders (discussed further *infra*, Part I.B). This Note will use "gender identity disorders" when referring to the language of the statute, and "gender dysphoria" when referring to the condition that is functionally excluded by the ADA.

I. BACKGROUND

A. THE AMERICANS WITH DISABILITIES ACT OF 1990

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[9] The ADA was enacted to provide protection against discrimination in the workplace (Title I), in public benefits and services (Title II), and in places of public accommodation (Title III).[10] Notably, the ADA affirmatively required covered entities to make reasonable accommodations for the known mental or physical limitations of any individual with a qualifying disability, thus going further than most anti-discrimination laws by imposing a positive obligation to accommodate, rather than simply issuing a negative mandate prohibiting discrimination.[11] This is significant because it recognizes that a failure to accommodate a disability constitutes a form of discrimination in itself. Furthermore, instead of designating specific categories of qualifying conditions, the drafters of the ADA used the sweeping definition of disability employed in the Rehabilitation Act, a disability anti-discrimination statute covering certain government agencies, contractors and government-funded programs.[12] The Rehabilitation Act defined a disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[13]

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9. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

10. *Id.* at 330–65 (codified as amended at 42 U.S.C. §§ 12111–17, 12131–65, 12181–89) (Titles I, II, and III respectively).

11. *See, e.g.*, *id.* at 331 (codified as amended at 42 U.S.C. § 12112).

12. *See* Rehabilitation Act, Pub. L. No. 93-516, 88 Stat. 1617, 1619 (1974); Michelle A. Travis, *Impairment as Protected Status: A New Universality For Disability Rights*, 46 GA. L. REV. 937, 945–46 (2012) (explaining the ADA incorporated the Rehabilitation Act's definition of disability).

13. *See* Rehabilitation Act, 88 Stat. at 1619; Americans with Disabilities Act, 104 Stat. at 329 (codified as amended at 42 U.S.C. § 12102).

1. *Broad Impairment-based Coverage*

In 2008, Congress revised the ADA in response to several Supreme Court decisions that severely narrowed the scope of ADA coverage.[14] The ADA Amendments Act of 2008 (ADAAA)[15] abolished the restrictive interpretation of disability that had been imposed by the Supreme Court and expanded the scope of the ADA to accord with Congress's original intent.[16] One of the most significant changes the ADAAA made was the addition of a provision clarifying the requirements of Paragraph 1(c) of Section 12102, the "regarded as" prong. The clarification reads:

> (A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an *actual or perceived* physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*.
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> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.[17]

The breadth of the ADA's definition of disability is clear not only from the revision to the "regarded as" prong, but also is explicitly stated in the Act: "[t]he definition of disability in this chapter shall be construed *in favor of broad coverage* of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[18] Thus, after the ADAAA, the standard for an impairment that "substantially limits [a] major life activity" is

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14. *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471 (1999) (holding the effects of ameliorative measures must be taken into account prior to determining whether an individual has a qualifying disorder); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187–89, 197–98 (2002) (holding an impairment must "prevent or severely restrict life functions" in order to qualify as a disability).

15. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. § 12101–12213 (2012)) (amending Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327).

16. 42 U.S.C. § 12101 ("Congress finds that . . . the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect . . . .").

17. 42 U.S.C. § 12102 (emphasis added).

18. *Id.* (emphasis added).

not a demanding one, and the requirement is essentially meaningless for the "regarded as" prong. Since the implementation of the ADAAA's revisions, the ADA has in fact been described as providing coverage for "nearly all forms of impairment-based coverage."[19]

2. *Limiting "Disability"*

Despite the ADAAA's statements indicating almost universal coverage, a small number of conditions are explicitly excluded from the ADA's definition of disability, and have been excluded since the ADA was initially passed. These conditions appear in Title IV, which covers Miscellaneous Provisions.[20] The section includes two types of exclusions: the first excludes homosexuality and bisexuality, recognizing that these are not impairments; the second excludes "certain conditions," regardless of whether these conditions are generally considered impairments.[21] The text reads:

> (a) Homosexuality and bisexuality
>
> For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.
>
> (b) Certain conditions
>
> Under this chapter, the term "disability" shall not include —
>
> (1) *transvestism*, *transsexualism*, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments*, or other sexual behavior disorders;
>
> (2) compulsive gambling, kleptomania, or pyromania; or
>
> (3) psychoactive substance use disorders resulting from current illegal use of drugs.[22]

19. Travis, *supra* note 12, at 984.
20. 42 U.S.C. § 12211.
21. *Id.*
22. *Id.* (emphasis added).

Modern readers may wonder why the drafters would need to explicitly exclude homosexuality and bisexuality. There is widespread agreement that sexual orientation is not a medical impairment — neither homosexuality nor bisexuality is included in the Diagnostic and Statistical Manual of Mental Disorders (DSM), the standard of psychiatric diagnosis in the United States.[23] The drafters acknowledged this view by separating the exclusion of sexual orientation, which "are not impairments" according to section 12211(a), from section 12211(b)'s exclusion of "certain conditions."[24] This distinction shows that the drafters likely recognized that the conditions in section 12211(b) are impairments that could otherwise constitute disabilities, whereas the items listed in section 12211(a) (homosexuality and bisexuality) simply do not fit the definition of disability. Few people believe, both today and at the time the ADA was passed, that homosexuality and bisexuality would be covered by the ADA even had they not been explicitly excluded,[25] and thus the scope of the ADA's coverage was not affected by the clarification of section 12211(a). By contrast, as will be discussed later in this Note, section 12211(b)'s exclusion of "gender identity disorders" very much alters the scope of the ADA by making ineligible for protection members of the transgender community who suffer from gender dysphoria and would otherwise be covered by the ADA's definition of disability. Section III.B.2 delves further into the legislative history of the ADA to reveal the motivations that led to these exclusionary provisions; the exclusion was a compromise required by certain key Senators who were concerned about potential use of the ADA to protect disorders with a "moral content."[26]

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23. Homosexuality and bisexuality were removed from the DSM in 1973. *See* Delvia R. Arriola, *The Penalties For Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GEND. RACE & JUST. 429, 456 (1998).

24. 42 U.S.C. § 12211(a), (b).

25. *See, e.g.*, 135 Cong. Rec. S19,884 (1989) (statement of Sen. Kennedy: "[o]f course, I do want to point out that some of the behavior characteristics listed such as homosexuality and bisexuality are not, even without this amendment, considered disabilities."); *see also id.* at S19,885 (statement of Sen. Harkin: "[f]irst, I would like to point out that some of the behavior characteristics included on this list are not disabilities to begin with and individuals with such characteristics would not be considered people with disabilities even without this amendment. For example, homosexuality and bisexuality are not disabilities under any medical standards." Senator Harkin went on to state, "I do not think this amendment was necessary in any form.").

26. 135 Cong. Rec. S19,853 (1989) (statement of Sen. Armstrong: "I could not imagine the sponsors would want to provide a protected legal status to somebody who has such

Understanding the breadth of the ADA's definition of disability, discussed in Part I.A.1, is crucial to understanding the impact of this narrow exclusion. This Act does not simply extend coverage to a small group of people, as is the case with the majority of federal anti-discrimination laws. Instead, the ADA created a broad, almost universal definition of disability, under which any person could argue eligibility, regardless of a formal disability diagnosis. The drafters then carved out of that broad definition a small group of people suffering from certain conditions deemed to be morally reprehensible, including gender identity disorders. This exception treats the individuals suffering from gender identity disorders, such as gender dysphoria, as second-class citizens to whom the law applies differently and labels those suffering from such disorders as immoral and unworthy of protection.

B. DISORDER TO DYSPHORIA: A MEDICAL DIAGNOSIS FOR TRANSGENDERISM

This Note focuses on the ADA's exclusion of "[c]ertain conditions," specifically, "transvestism, transsexualism . . . [and] gender identity disorders not resulting from physical impairments."[27] Transgender is an umbrella term used to refer to an individual whose gender identity, or "public . . . lived role as boy or girl, man or woman,"[28] does not align with the person's sex at birth.[29] In this Note, the term transgender will also be used to include transsexuals, who have undergone or desire to undergo a social and/or physical transition to align with their gender identity, often including hormone therapy and sex reassignment surgery,[30] and cross-dressers, who prefer to dress in attire traditionally associated with the opposite sex.[31] Gender identity disorder (GID)

disorders, particularly those who might have a moral content to them or which in the opinion of some people have a moral content.").

27. 42 U.S.C. § 12211 (2012).

28. AM. PSYCHIATRIC ASS'N, *supra* note 8.

29. *See, e.g.*, *Transgender*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/transgender [https://perma.cc/52G4-CSTS] (last visited Feb. 23, 2016); *see also supra* note 3 for further discussion of transgender as an umbrella term covering various gender identities.

30. *See* AM. PSYCHIATRIC ASS'N, *supra* note 8.

31. *See Transgender Terminology*, NAT'L CTR. FOR TRANSGENDER EQUALITY, http://www.transequality.org/issues/resources/transgender-terminology [https://perma.cc/UX82-UALC] (last visited Jan. 13, 2017) (defining "cross-dresser" and explaining that it is a more appropriate term than the older term "transvestite," which is considered derogatory by many people). The term "transgender" is used in this Note to include cross-dressers,

was the medical diagnosis previously used in the DSM to describe the "strong and persistent cross-gender identification [and] persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex" generally experienced by transgender individuals.[32] Notably, the ADA only excludes "gender identity disorders *not resulting from physical impairments*."[33] According to this language, gender dysphoria suffered by intersex individuals, who are born with the anatomy of both sexes, would likely be covered by the protections of the ADA, while transgender people would not.[34]

The DSM-5, the most recent version of the DSM, removed "gender identity disorder" as a diagnosis and replaced it with gender dysphoria. The DSM defines gender dysphoria as "[a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."[35]

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because they share many of the same characteristics of transgender individuals with regard to gender expression, and are similarly excluded from the ADA; however, it should be noted that cross-dressers do not necessarily identify as transgender. *GLAAD Media Resource Guide — Transgender*, GLAAD, http://www.glaad.org/reference/transgender [https://perma.cc/C45M-YVFK] (last visited Jan. 13, 2017) ("Cross-dressers do not wish to permanently change their sex or live full-time as women").

32. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed. 2000).

33. 42 U.S.C. § 12211 (2012).

34. *See* Kevin M. Barry, *Disabilityqueer*, 16 YALE HUM. RTS. & DEV. L.J. 1 n.35 (2013). This is the common interpretation of the text; however, in a recent case in the Eastern District of Pennsylvania, amici curiae asserted that modern knowledge of gender dysphoria attributes the condition to a hormonal reaction, and thus that transgender people would in fact have gender identity disorder "resulting from physical impairments." The United States later supported this statement in its Statement of Interest in that case. Under this interpretation, the ADA would provide protection for many transgender people currently excluded. Brief of Amici Curiae Gay and Lesbian Advocates & Defenders, Mazzoni Ctr., Nat'l Ctr. for Lesbian Rights, Nat'l Ctr. for Transgender Equality, Nat'l LGBTQ Task Force, and Transgender Law Ctr. in Opposition to Defendant's Partial Motion to Dismiss at 13–14, Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822 (E.D. Pa. Feb. 23, 2015); *see also* Second Statement of Interest of the United States, Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822 (E.D. Pa. Nov. 16, 2015).

35. AM. PSYCHIATRIC ASS'N, *supra* note 8, at 452–53. The DSM also includes several criteria a person must meet in order to be diagnosed with gender dysphoria. For adolescents and adults, a person must have at least two of the following criteria:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

Although the diagnoses of gender identity disorder and gender dysphoria are substantively similar, the new diagnosis emphasizes the "clinically significant distress" that many transgender people experience as a result of the incongruence of their sex and gender, rather than labeling the transgender identity itself a clinical problem.[36] Thus, while only transgender individuals can be diagnosed with gender dysphoria, not all transgender individuals suffer from gender dysphoria. The American Psychiatry Association (APA), which publishes the DSM, explicitly notes that "gender nonconformity is not in itself a mental disorder."[37] In revising the diagnosis, the APA hoped to provide a diagnostic term that would minimize stigma while protecting transgender individuals' access to necessary care.[38] Such care may include treatment options such as counseling, hormone therapy, and sex reassignment surgery.[39]

C. APPLICATION OF DISABILITY LAW TO TRANSGENDER INDIVIDUALS

There is an ongoing discussion within transgender scholarship about the wisdom of using disability law to achieve greater protection and to request accommodations for transgender individu-

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3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

Id.

36. *Id.*

37. *Gender Dysphoria Fact Sheet*, AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [https://perma.cc/GED2-QZPT] (last visited Jan. 13, 2017).

38. *See id.* (recognizing that diagnostic terms can have a "stigmatizing effect," and explaining that "[u]ltimately, the changes regarding gender dysphoria in DSM-5 respect the individuals identified by offering a diagnostic name that is more appropriate to the symptoms and behaviors they experience without jeopardizing their access to effective treatment options"); *see also id.* ("To get insurance coverage for the medical treatments, individuals need a diagnosis. The Sexual and Gender Identity Disorders Work Group was concerned that removing the condition as a psychiatric diagnosis — as some had suggested — would jeopardize access to care.").

39. *See id.*

als.[40] Some fear the stigma that comes from labeling one's gender identity as a disability,[41] while others see the value in using disability law to achieve anti-discrimination protections, noting that disability law provides broad coverage based on a social model of disability (being "regarded as" having a disability).[42] Still others are concerned that medicalizing the transgender experience excludes people of lower socioeconomic statuses, who may be unable to obtain a diagnosis and thus may be denied access to the disability protections provided.[43] Finally, some are concerned that relying on a disability model for transgender discrimination claims will delay or impede efforts to recognize discrimination against transgender individuals as gender discrimination.[44]

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40. *See generally* Zach Strassburger, *Disability Law and the Disability Rights Movement for Transpeople*, 24 YALE J.L. & FEMINISM 337 (2012) (arguing disability law should be used to protect transgender individuals from discrimination, despite the potential drawbacks of stigma and the medicalization of disability).

41. *See* Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 106 (2002) ("[S]ome activists are concerned about the implications of having their identities classified as a mental disability. . . . Transsexual activists . . . cite concerns that [the] DSM definition of gender dysphoria will be used against them to prevent them from entering mainstream society as healthy, and therefore equal, human beings.").

42. *See* Strassburger, *supra* note 40, at 339 ("New disability law defines disability more broadly, emphasizing its social aspect, and we can change our litigation strategy to similarly emphasize the social. The 'social model' of disability separates bodily incapacity from the socially disabling consequences of that impairment, but recognizes both as having real effects."); *see also* Jeannie J. Chung, *Identity or Condition?: The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, 21 COLUM. J. GENDER & L. 1, 2 (2011) (explaining the debate and noting that advocates of the disability model "point out that the modern disability rights movement has instead embraced a social model of disability, in which 'disability' is not inherent to the individual person, but arises from an environment that assumes only able-bodied people live in it. These advocates look favorably upon the social model of disability and believe that it should be applied to claims involving disability discrimination against transgender individuals"); *id.* at 11–12 ("Several transgender advocates have incorporated the social model of disability into understanding transgender experience. As Pooja Gehi and Gabriel Arkles of the Sylvia Rivera Law Project explain, "the primary problem [does not reside] in individuals and communities that are uncomfortably different or even sick, but [stems] from a coercive, violent binary gender system or an intolerant, inaccessible, and ableist society").

43. *See, e.g.*, Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 34 (2003) ("I do not want to make trans rights dependent upon GID diagnoses, because such diagnoses are not accessible to many low income people; because I believe that the diagnostic and treatment processes for GID are regulatory and promote a regime of coercive binary gender; and because I believe that GID is still being misused by some mental health practitioners as a basis for involuntary psychiatric treatment for gender transgressive people. I do not want to legitimize those practices through my reliance on the medical approach to gender nonconformity.").

44. *Id.* at 35 ("[A]nother part of me recognizes the ease with which non-trans people might approach a medicalized and pathologizing approach to gender difference, and that this may cause judges to continually choose disability law claims and thus ignore more

This Note is not intended to resolve this debate or to minimize the issue, but rather to emphasize that the ADA's exclusion of gender dysphoria violates the dignity of transgender people regardless of whether one supports a disability model. While many articles discuss the advantages and disadvantages of using a disability model to protect transgender rights,[45] this Note does not rely on the idea that a transgender identity is a disability. Rather, it examines the constitutionality of a law that discriminates against and demeans transgender people as a class by excluding them based solely on a moral disapproval of their identity expression and by categorizing them with individuals who suffer from disorders associated with behavior that is morally reprehensible, harmful to society, and often illegal.[46] Eliminating the exclusion from the ADA would not make a statement about whether transgender identity is a disability, but rather would simply remove a legal classification that prevents transgender people from seeking the same protection that all others who meet the stated requirements are entitled to seek.

Absent the ADA's exclusion, transgender individuals could potentially be covered under the ADA's definition of disability, pursuant to the requirements laid out in 42 U.S.C. § 12102.[47] For example, if an individual has been diagnosed with gender dysphoria, and their dysphoria has substantially limited one or more

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appropriate claims of gender discrimination."). Spade's article was written prior to the EEOC's decision in *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), which found that transgender discrimination constitutes a form of sex discrimination under Title VII. While *Macy* provides some authority that transgender individuals may make sex discrimination claims under Title VII, and some circuit courts have found similarly, it is not binding precedent and thus the struggle to classify transgender discrimination as sex discrimination may continue. *See, e.g.*, Fabian v. Hospital of Central Conn., 172 F. Supp. 3d 509, 522–25 (D. Conn. 2016) (providing a review of the treatment of transgender discrimination under Title VII, and noting "discrimination on the basis of transgender identity is now recognized as discrimination 'because of sex' in the Ninth Circuit . . . and in the Eleventh Circuit . . . and the E.E.O.C. . . . . Discrimination on the basis of transgender identity is regarded as not constituting discrimination "because of sex" in the Tenth Circuit . . . .").

45. *See, e.g.*, *supra* notes 40–44.

46. Not all of the excluded disorders are related to exclusively illegal conduct. In addition to the disorders related to gender identity, the ADA excludes compulsive gambling. While gambling is legal under federal law, many states prohibit at least some forms of gambling, and two states forbid it altogether. *See, e.g.*, HAW. REV. STAT. § 712-1223 (2013); UTAH CODE ANN. § 76-10-1102 (West 2012).

47. The requirements are: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1)(A)–(C) (2012).

major life activities[48] pursuant to the broad definition of the ADAAA,[49] that individual would be covered. Furthermore, if an individual has been discriminated against because an employer or other entity bound by the ADA has perceived an impairment based on a person's transgender status, the "regarded as" prong would apply regardless of whether the person has received a diagnosis of gender dysphoria, and the individual would be covered.[50] This is because Congress included perceived disabilities in the broad definition of disability in the ADA.

Disability law has previously been and is currently used in some states and municipalities to provide protection for those suffering from gender dysphoria.[51] In fact, the Rehabilitation Act, the precursor to the ADA and the source of its definition of disability, had been interpreted to include transgender people under its definition of disability. In an employment discrimination case under the Rehabilitation Act in the District of Columbia, the District Court held that the plaintiff (a male-to-female transsexual) made a valid claim of disability discrimination when the Postal Service rescinded the plaintiff's offer of employment after learning of her intention to undergo gender reassignment surgery.[52] Despite the defendant's argument that "transsexualism is not a physical or mental handicap subject to the protec-

48. Although not the focus of this Note, there are various ways in which either suffering from gender dysphoria, or in fact simply being transgender, could satisfy this prong of the ADA's broad definition of disability. The ADA provides that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2). Some advocates have suggested that the various health care needs of transgender individuals, particularly with regard to transitioning, prevent these individuals from being able to "care for oneself" without access to quality health care. *See, e.g.*, Chung, *supra* note 42, at 12 (citing Jennifer Levi & Bennett Klein, *Pursuing Protection for Transgender People through Disability Laws*, *in* TRANSGENDER RIGHTS 74–92 (Paisley Currah et al. eds., 2006)). The Act further provides that "major life activities" may include "major bodily functions," which may be relevant to transgender individuals whose endocrine and reproductive functions may be affected by hormone treatments or surgeries. 42 U.S.C. § 12102(2)(B).

49. *See supra* Part I.A.1.

50. The "regarded as" prong represents the "social model of disability," under which the "'disability' becomes . . . the societal stigma associated with noncompliance with gender norms." Chung, *supra* note 42, at 11; *see also supra* note 42.

51. *See, e.g.*, Wilson v. Phoenix House, 42 Misc. 3d 677, 697 (N.Y. Sup. Ct. 2013) ("Gender identity disorder is a disability under both the New York State Human Rights Law and the New York City Human Rights Law.").

52. Doe v. U.S. Postal Serv., No. 84-3296, 1985 WL 9446, at *2–*3 (D.D.C. June 12, 1985).

tions of the Rehabilitation Act," the Court analyzed the plaintiff's claim according to the Rehabilitation Act's definition of disability and found that "the complaint adequately alleges the necessary 'physical or mental impairment' to state a claim under the Rehabilitation Act." The court noted in particular that "[t]he language of the Rehabilitation Act and of the accompanying regulations is broadly drafted, indicating a legislative intent not to limit the Act's coverage to traditionally recognized handicaps."[53] Thus, applying a definition of disability identical to the one included in the narrower 1990 version of the ADA, transgender individuals were eligible for disability protection under the Rehabilitation Act. However, Congress amended the Rehabilitation Act in 1992 to realign its definitions with those in the ADA, and thus transvestites, transsexuals, and those suffering from gender identity disorders not resulting from a physical impairment, such as gender dysphoria, are now explicitly excluded from coverage.[54]

II. LEGAL FRAMEWORK: THE CONCEPT OF DIGNITY

The American legal system has traditionally relied upon the Due Process Clause to protect liberties[55] and the Equal Protection Clause to root out discrimination and ensure equality.[56] In several recent cases, however, the Supreme Court has acknowledged that these doctrines are not as distinct as they once seemed to be.[57] Rather, due process and inequality concerns are often intertwined in the concept of dignity.[58] While dignity is not explicitly

53. *Id.* at *2.

54. *See* Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 (1992).

55. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (holding the Due Process Clause protects a woman's liberty to terminate her pregnancy).

56. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding segregation in public education is a violation of the Equal Protection Clause).

57. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) ("Too much emphasis has been placed on the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees. In practice, the Court does not abide by this distinction.").

58. Leading scholars in this area have referred to this doctrine in different ways. *See, e.g.*, Laurence Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. F. 16, 17 (2015) ("*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity . . . ."); *see also*

protected in the Constitution, the Supreme Court has repeatedly invoked it as a constitutional basis for striking down laws that demean and subordinate classes of people. Professor Reva Siegel explains that the Court uses the concept of dignity to "vindicate, often concurrently, the value of life, the value of liberty, and the value of equality."[59] Whereas many scholars analyze dignity by noting that it can be differentiated into various "types" of dignity, such as "equality as dignity" or "liberty as dignity,"[60] Siegel emphasizes the interrelatedness of these concepts, noting that dignity:

> concerns questions of autonomy and self-definition and questions of social standing and respect: the right to be treated as a full member of the polity, not excluded, subordinated, or denigrated. There is no reason to split these rationales apart; the point is to appreciate the deep ways in which they are entangled.[61]

Some scholars have taken notice of the Court's use of dignity as an "anti-humiliation" principle in response to laws that impose a stigma and create institutionalized humiliation; they have asserted that this use has been particularly evident in cases involving LGBT discrimination.[62] According to Professor Bruce Ackerman, the anti-humiliation principle has its roots in *Brown v. Board of Education*, in which Chief Justice Warren's opinion outlawing segregation in public schools relied in part on the way in which segregation created a "feeling of inferiority as to [African Americans'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[63] The *Brown* Court further recognized that the impact of such humiliation "is greater when it has the sanction of law."[64] Ackerman contends

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Yoshino, *supra* note 57, at 749 (referring to "dignity claims"); Kenji Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 147, 174 (2015) (referring to "anti-subordination liberty").

59. Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1736 (2008).

60. *See, e.g.*, Elizabeth Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 16 (2015).

61. Siegel, *supra* note 59, at 1742.

62. *See, e.g.*, Cooper, *supra* note 60, at 16; *see also* Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3078 (2014).

63. BRUCE ACKERMAN, WE THE PEOPLE 128, 131 (2014) (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

64. Brown v. Bd. of Educ., 347 U.S. at 494.

that the Justices' use of their own "situation sense" to determine the social meaning of discrimination and to weed out institutionalized humiliation is the "lost logic" of *Brown*.[65]

According to Ackerman, the Court's interest in weeding out humiliation derives from a constitutional right to dignity. Ackerman explains that while "American lawyers generally derive their basic principles from the ideas of equal protection and due process . . ., [t]his is a misconception."[66] Ackerman asserts that such focus on due process and equal protection has led the American legal system to overlook, or in fact deny, that the concept of dignity can serve, and has previously served, as a foundation for constitutional rights.[67] Ackerman writes that upon closer inspection of American history, and particularly the logic of *Brown* and the Second Reconstruction, "we will find that constitutional appeals to dignity abound."[68] Dignity, according to Ackerman, "require[s] the elimination of the 'humiliation' that had been systematically imposed on people."[69] Ackerman then discusses the Court's trend away from utilizing the anti-humiliation principle in its constitutional analysis;[70] however, he notes that the principle was recently resurrected in *United States v. Windsor*, in which Justice Kennedy examined the social meaning of denying homosexuals the right to marry and found that such "differentiation demeans the couple."[71] Ackerman views Justice Kennedy's opinion in *Windsor* as "a restatement of *Brown*'s anti-humiliation principle"[72] and a hopeful indication

65. *See, e.g.*, ACKERMAN, *supra* note 63, at 131 ("Warren's contribution in this phase of the argument involved constitutional principle, not judicial method. He was insisting that the Constitution called upon the Justices to use their situation-sense to determine whether segregated schools systematically humiliated black children.").

66. *Id.* at 137.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See, e.g.*, *id.* at 302–03 (describing how the Warren Court's reasoning in *Loving v. Virginia*, 388 U.S. 1 (1967), departed from *Brown*'s anti-humiliation principle and focused instead on imposing "'rigid scrutiny' on suspect racial classifications"); *see also* Yoshino, *supra* note 62, at 3080 (discussing Ackerman's view that the Loving Court "replaced a moral principle with a more technocratic legal one concerned with 'tiers of scrutiny,'" and noting Ackerman was "correct that in many contexts we have lost sight of the anti-humiliation principle in favor of a more technocratic doctrine that speaks of prongs, tiers, and classifications").

71. *Id.* at 307–08 (citing United States v. Windsor, 133 S. Ct. 2675, 2694 (2013)); *see also id.* at 309 ("In handing down *Windsor*, not only did the Roberts Court reaffirm the anti-humiliation principle, but it went far beyond the zone of its original application to address a high-stakes controversy of the twenty-first century.").

72. *Id.* at 308.

that the Court will restore the anti-humiliation principle to the important position it once held in Supreme Court jurisprudence.[73] Professors Kenji Yoshino and Elizabeth Cooper have subsequently expounded on this assertion. Yoshino points out that "[t]he closest the Supreme Court has come to embracing the anti-humiliation principle is through its use of the term 'dignity.'"[74] Similarly, Cooper finds that "humiliation and stigma . . . are significantly the same, and . . . the 'opposite' of both terms is dignity."[75] By interpreting the Court's use of the term dignity as a reframing of the anti-humiliation principle, Yoshino contends that the resurgence of this principle began not with *United States v. Windsor*, but rather ten years earlier with the Court's decision in *Lawrence v. Texas*. There, the Court struck down a Texas statute that, as Yoshino asserts, demeaned the dignity of homosexuals by "cast[ing] the act as 'diseased, disreputable, and criminal.'"[76] The line of cases involving LGBT rights[77] has indicated both the Court's aversion to laws that impose a stigma upon a class of people and its use of the concept of dignitary rights to extend the "anti-humiliation principle" to strike down such laws. Yoshino writes that the Court's dignity doctrine "open[s] the door to the anti-humiliation principle in a manner that could meaningfully transform constitutional jurisprudence more generally."[78]

This Note examines the ADA exclusion under a dignity framework, and argues that the ADA exclusion is unconstitutional because it demeans, subordinates, and humiliates transgender people by labeling their identity as immoral and quasi-criminal. This Part will review the case law surrounding dignitary rights, particularly with regard to sexual orientation and identity, and will examine how the Supreme Court has moved away from tiered scrutiny in cases involving dignitary rights.

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73. However, Ackerman notes that other Roberts Court decisions, including *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), provide a basis to be skeptical about the "current vitality of the civil rights legacy." *Id.* at 309.

74. Yoshino, *supra* note 62, at 3082.

75. Cooper, *supra* note 60, at 15.

76. Yoshino, *supra* note 62, at 3083.

77. *See supra* Part II.A.

78. *Id.* at 3103.

A. GAY RIGHTS AND DIGNITY

The concept of dignitary rights has emerged in large part from the Supreme Court's gay-rights jurisprudence, including *Romer v. Evans*, *Lawrence v. Texas*, *United States. v. Windsor*, and *Obergefell v. Hodges*.[79] Both individually and collectively, these cases demonstrate that due process and equal protection are interconnected, and synthesizing these protections gives rise to the notion that the Constitution recognizes dignitary rights and protects people from governmental infringements on these rights.

Although *Romer v. Evans*[80] was decided on equal protection grounds rather than on the basis of dignitary rights, it remains an important starting point to review the Court's protection of dignity, because the anti-subordination and anti-humiliation principles on which it relies are at the heart of the Court's dignity jurisprudence.[81] In *Romer*, the Supreme Court struck down a Colorado constitutional amendment that repealed all laws protecting homosexuals from discrimination and prohibited any such laws from being passed in the future.[82] The Court recognized that the amendment did not simply "put[ ] gays and lesbians in the same position as all other persons . . . [by] deny[ing] homosexuals *special* rights,"[83] but rather it "impose[d] a special disability upon those persons alone . . . [because h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint."[84] Furthermore, Justice Kennedy began the majority opinion by quoting Justice Harlan's dissent in *Plessy v. Ferguson*:

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79. While the Court's gay-rights jurisprudence is most relevant here, the Supreme Court has also invoked dignity in other constitutional contexts. For example, dignity has played an important role in several of the Court's abortion decisions. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); *see also* Gonzales v. Carhart, 550 U.S. 124, 157, 170 (2007) (discussing the importance of dignity to *Casey* and finding that "the Act expresses respect for the dignity of human life"); *see generally* Siegel, *supra* note 59 (discussing the Court's use of dignity in *Casey* and *Carhart*).

80. Romer v. Evans, 517 U.S. 620 (1996).

81. *See* Cooper, *supra* note 60, at 8 (discussing *Romer* in the context of the evolution of the Court's dignity jurisprudence).

82. *Romer*, 517 U.S. 620.

83. *Id.* at 626.

84. *Id.* at 631.

"the Constitution 'neither knows nor tolerates classes among citizens.'"[85] The Court found that both the intent and effect of the Colorado amendment were to subordinate a class of people by denying them access to a right that all others have: the right to seek legislative protection.

Romer is particularly relevant to assessing the constitutionality of the GID exclusion in the ADA because the statute at issue in *Romer* was also an affirmative anti-discrimination law. The Court's holding in no way implied that homosexuals were entitled to anti-discrimination protection, but rather held that specifically denying them the right to seek such protection violated their right to equal protection. In doing so, the Court utilized what Ackerman would call its "situation sense"[86] to determine that the "status-based enactment divorced from any factual context . . . [and] undertaken for its own sake" demeaned and subordinated a class of people.[87]

Romer is also notable in the evolution of constitutional doctrine because the Court applied "a more searching form of rational basis review."[88] The Supreme Court has never declared homosexuality to be a suspect class such that strict scrutiny would apply. Thus, the *Romer* Court applied only rational basis review, in which the Court generally defers to the legislature as long as the law "bears a rational relation to some independent and legitimate legislative end."[89] There, the Court denied the legitimacy of the state's interest in passing the amendment. The Court noted that "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn *for the purpose of disadvantaging the group burdened by the law*."[90] Under *Romer*, when a law's purpose rests solely upon animus toward, or a bare desire to harm, a politically unpopular group, that law must be held unconstitutional regardless of whether the group has been labeled a suspect class.[91] Thus, *Romer* is significant both for protecting the

85. *Id.* at 623.
86. *See* ACKERMAN, *supra* note 63, at 131.
87. *Id.* at 635.
88. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (discussing *Romer*, 517 U.S. 620).
89. *Romer*, 517 U.S. at 621.
90. *Id.* at 633 (emphasis added).
91. *See id.* at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."); *see also* United States Dep't. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means any-

right of homosexuals to seek anti-discrimination protection, as well as for the anti-animus principle it employed. This anti-animus principle served as a precursor to the principle of dignity the Court developed in subsequent cases.

The first case to explicitly recognize and protect the dignitary rights of homosexuals was *Lawrence v. Texas*. In *Lawrence*, the Court struck down a Texas statute criminalizing homosexual sodomy as a violation of due process, overruling its prior decision in *Bowers v. Hardwick*.[92] The opinion emphasized the importance of liberty from governmental intrusion in "certain spheres of our lives and existence" and in the "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[93] The Court reiterated its determination in *Planned Parenthood v. Casey*[94] that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[95] quoting *Casey*'s central passage invoking dignity:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[96]

While *Lawrence* is seemingly about the liberty to engage in private conduct and relationships, and thus was framed as a due process case, it also has deep implications for equality. Arguably, *Lawrence* could have been an equal protection case, as the statute itself criminalized sodomy only as between same-sex couples,

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thing, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

92. *Lawrence*, 539 U.S. 558 (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

93. *Id.* at 562.

94. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

95. *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

96. *Id.* (quoting *Casey*, 505 U.S. at 851) (emphasis added); *see also* Yoshino, *supra* note 62, at 3078 (discussing the importance of dignity to the reasoning in abortion cases).

thus allowing heterosexuals to engage in the same conduct that was criminal for homosexuals.[97] However, the Court decided instead to directly overrule *Bowers*, in which the statute criminalized sodomy regardless of the sex of the participants.[98] In explaining its decision to ground its ruling in the Due Process Clause rather than the Equal Protection Clause, the Court clarified that the problem with the law was not simply the criminal punishment that attended prosecution for such a crime, but rather, the stigmatizing effect of labeling conduct closely associated with one's identity as criminal. The Court stated, "[t]he *stigma* the Texas criminal statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with *all that imports for the dignity of the persons charged*."[99] Thus, the *Lawrence* Court emphasized the stigma imposed by a law criminalizing sodomy and its effect upon the equality of homosexuals, regardless of whether such a law was enforced:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its *stigma* might remain even if it were not enforceable as drawn for equal protection reasons. *When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.*[100]

Thus, the Court recognized that criminalizing conduct generally associated with homosexuals imposes a dignitary injury even when doing so in a manner that treats homosexual and heterosexual individuals equally.[101] Because of this, the problem with

97. *See, e.g.*, Laurence H. Tribe, Lawrence v. Texas: *The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1903–17 (2004) (analyzing the implications of the Court's due process holding and arguing a holding based on equal protection would have been "woefully inadequate" to address the stigmatization and discrimination against homosexuals caused by an anti-sodomy law).

98. *Lawrence*, 539 U.S. at 578.

99. *Id.* at 560 (emphasis added).

100. *Id.* at 575 (emphasis added); *see also* Tribe, *supra* note 97, at 1905 ("The stigmatization of same-sex relationships is concretized and aggravated by the law's denunciation as criminal of virtually the only ways of consummating sexual intimacy possible in such relationships." (footnote omitted)).

101. *See* Tribe, *supra* note 97, at 1905–06 ("It follows that even if the Texas law, like the Georgia law at issue in Bowers, had been applied to opposite-sex as well as same-sex

the law was not merely that it formally prohibited a specific sexual act, but that it imposed a stigma and subordinated a class of people.[102] In finding a due process liberty with regard to one's private, intimate relationships and sexual conduct, the Court utilized a dignity framework to alleviate inequality by protecting the dignitary rights of homosexuals.[103] By eliminating the Texas anti-sodomy statute, the Court recognized not only a right for homosexuals to engage in sodomy, but also a right not to be stigmatized as a criminal by the state for doing so.[104] This dignity rationale provides the basis for Professor Yoshino's argument: that the Court embraced the anti-humiliation principle and revived "the lost logic" of *Brown* in the *Lawrence* opinion.[105]

United States v. Windsor also implicitly employed a rationale based on dignitary rights.[106] *Windsor* did not proclaim a right to marriage but instead guaranteed federal recognition of those marriages already made legal within any state.[107] However,

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sodomy and had been enforced equally against both (or not enforced at all), it would still have been 'anti-gay' in terms of both its practical impact and its cultural significance.").

102. *Id.* at 1896 ("[T]his reductionist conflation of ostracized identity with outlawed act in turn reinforces the vicious cycle of distancing and stigma that preserves the equilibrium of oppression in one of the several distinct dynamics at play in the legal construction of social hierarchy."); *see also id.* at 1903–04 ("The vice of the Texas prohibition of same-sex sodomy was not principally, as some have argued, the cruelty of punishing some people for the only mode of sexual gratification available to them. . . . Rather, the prohibition's principal vice was its stigmatization of intimate personal relationships between people of the same sex.").

103. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. . . . *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians . . . .").

104. *See* Tribe, *supra* note 97, at 1915 ("[T]he Court's rejection of all bans on consensual sodomy because of their demeaning effects on the lives of 'adults who . . . engage in sexual practices common to a homosexual lifestyle' reveals that the Court understood itself to be protecting the right to dignity and self-respect of those who enter into such relationship." (quoting *Lawrence*, 539 U.S. at 2484)).

105. *See supra* notes 74–78 and accompanying text.

106. *See e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not 'Argle Bargle': The Inevitability of Marriage Equality After* Windsor, 23 TUL. J.L. & SEXUALITY 17, 27 (2014) (discussing the Court's adoption of an "equal liberty" framework in *Windsor* and "its underlying themes of equal dignity, respect, and freedom from stigmatizing second-tier status"); Tribe, *supra* note 58, at 7–11 (discussing *Windsor* in the context of Justice Kennedy's LGBT decisions employing a concept of "equal dignity").

107. *Windsor*, 133 S. Ct. 2675.

Windsor is rife with language about dignity, stigma, and subordination. For example, in holding DOMA invalid, *Windsor* recognized that:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and *make them unequal*. . . . The differentiation *demeans* the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it *humiliates* tens of thousands of children now being raised by same-sex couples.[108]

The Court referred to the law's "interference with the equal dignity of same-sex marriages" and found "strong evidence of a law having the purpose and effect of disapproval of that class."[109] Furthermore, the Court stated that "[t]he avowed purpose and practical effect of the law here in question are to *impose a disadvantage, a separate status, and so a stigma* upon all who enter into same-sex marriages," and it denounced treating such marriages as "second-class marriages."[110] As discussed *supra*, various scholars, including Professors Ackerman and Yoshino, have noted *Windsor*'s importance for the Court's return to, or continued application of, the anti-humiliation principle embodied in *Brown v. Board of Education*.

In a similar manner to its anti-animus rationale in *Romer*, the Court decided *Windsor* under rational basis review and rested its opinion on the illegitimate purpose of DOMA. The Court determined that the "principal purpose [of DOMA was] to impose inequality, not for other reasons like governmental efficiency."[111] The Court further held that "[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[112] Thus, *Windsor* provides a basis for the argument that, much like *Romer*'s equal protection analysis,[113] a court can strike down a statute under

108. *Id.* at 2694 (emphasis added).
109. *Id.* at 2693.
110. *Id.* (emphasis added).
111. *Id.* at 2694.
112. *Id.* at 2696.
113. *See supra* notes 87–91 and accompanying text.

rational basis review when the purpose of the statute is simply to violate dignitary rights.[114]

The *Windsor* Court held DOMA to be a violation of the Fifth Amendment's due process and equal protection guarantees. While the Fifth Amendment does not have an Equal Protection Clause, it has been interpreted to include equal protection since *Bolling v. Sharpe*.[115] Interestingly, the *Windsor* Court did not simply cite *Bolling* for the proposition that the Equal Protection Clause of the Fourteenth Amendment is part and parcel of the Fifth Amendment, but rather it noted:

> While *the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does*, the equal protection guarantee of the Fourteenth Amendment *makes that Fifth Amendment right all the more specific* and all the better understood and preserved.[116]

Thus, the Court seemed to indicate that DOMA would be a violation of the Fifth Amendment Due Process Clause, and that incorporating equal protection, though helpful, would not be necessary to hold DOMA unconstitutional. In his dissent, Justice Scalia considered whether this statement meant the majority's holding was based on due process, rather than equal protection.[117] Arguably, this confusion can be resolved under a theory that *Windsor* is based on the violation of dignitary rights, which, as discussed *supra*, often encompass both liberty and equality, and which are utilized to prevent laws from stigmatizing and subordinating classes of people.

Finally, in 2015, the Supreme Court held in *Obergefell v. Hodges* that marriage is a fundamental right and thus every state must extend the right to marry to same-sex couples. Writ-

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114. For discussion on Windsor's treatment of dignity as being conferred by the state, rather than being inherent, see *infra* note 123 and accompanying text.

115. *See* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." (citing Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954))).

116. *Id.* (emphasis added).

117. *See id.* at 2705–06 ("The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding. . . . The majority never utters the dread words 'substantive due process,' perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean.").

ing for the majority, Justice Kennedy began the opinion: "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[118] Although *Obergefell* was ultimately decided on due process grounds, Kennedy expressly noted the connection between the Due Process and Equal Protection Clauses in this case:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way. . . . [I]n some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[119]

The Court also hearkened back to the interplay between due process and equal protection present in *Lawrence*, noting that "[a]lthough *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State."[120]

Much of the Court's reasoning in *Obergefell* relied on the dignitary rights implicated by a denial of the right to marry.[121] While some of this discussion of dignity focused on the dignity of the institution of marriage,[122] another aspect emphasized the stigma and subordination implicit in the denial of the right to marry.[123] While Justice Kennedy acknowledged that some indi-

118. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

119. *Id.* at 2602–03.

120. *Id.* at 2604.

121. *See id.* at 2608 (holding homosexual couples seeking to marry "ask for equal dignity in the eyes of the law. The Constitution grants them that right").

122. *See id.* at 2599 ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.").

123. *See id.* at 2602 ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."). Some scholars have criticized Justice Kennedy's descriptions of hierarchical notions of dignity. In *Windsor*, for example, Justice Kennedy described how DOMA "robbed same-sex couples of the 'personhood and dignity' which state legislatures conferred upon them" rather than emphasizing the dignity inherent in individuals. United States v. Windsor, 133 S. Ct. 2675, 2710 (2013). While this language may be troublesome, it should not detract from the strength of the dignity doctrine or its application to protecting the inherent dignity of individuals. Justice Kennedy's discussion of stigma and the demeaning effect of a discriminatory law shows his recognition of the inherent nature of dignity. Laurence Tribe, while acknowl-

viduals have a moral or religious opposition to same-sex marriage, he asserted that such personal opposition does not justify a governmental infringement on the dignity of those affected:

> But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put *the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes* those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and *it would disparage their choices and diminish their personhood* to deny them this right.[124]

Thus, the two key elements of the holding in *Obergefell* were the recognition of the fundamental right to marry and acknowledgment of the dignitary rights of same-sex couples seeking to marry.

B. SCRUTINIZING DIGNITY

The gay-rights cases show an emerging recognition of dignitary rights to protect against humiliation and subordination of classes of people, under a theory that encompasses both equal protection and due process. What is not clear, however, is what framework the Court uses to analyze whether a law violates such rights. The Court has traditionally used a tiered scrutiny to evaluate due process and equal protection claims, but in many of the cases discussed above, the Court either did not explicitly define the level of scrutiny applied, or it applied the level of scrutiny inconsistently.

In *Romer*, the Court applied rational basis review.[125] In *Lawrence*, however, the Court did not specify what scrutiny it was

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edging Justice Kennedy's historical tendency to view dignity hierarchically, explains that Justice Kennedy views institutions as a means to protecting the liberties of individuals, and that "the dominant strain in Justice Kennedy's writings on dignity — the strain that achieved full expression in *Obergefell* — has become the notion of *equal dignity* as the very foundation of individual human rights." Tribe, *supra* note 58, at 22.

124. *Obergefell*, 135 S. Ct. at 2602 (emphasis added).

125. *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996) ("We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. . . . Amendment 2 fails, indeed defies, even this conventional inquiry.").

using.[126] Professor Pamela Karlan notes that *Lawrence* "marks a striking departure" from the tiered scrutiny approach, and posited that "[t]he reason the level of scrutiny did not matter is that laws that reflect nothing more than class-based animosity against gay people lack even a legitimate government purpose,"[127] suggesting that, as in *Romer*, the *Lawrence* Court applied rationality review.[128] Justice Scalia took this view in his dissent, stating:

> Most of the rest of today's opinion has no relevance to its actual holding — that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. . . . Though there is discussion of "fundamental proposition[s]," . . . and "fundamental decisions," . . . nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right."[129]

Other scholars have argued the *Lawrence* Court clearly utilized strict scrutiny.[130] Traditional due process strict scrutiny requires the finding of a fundamental right. If one accepts the idea that *Lawrence* utilized strict scrutiny, the question arises: what right did the Court hold to be fundamental? *Lawrence* explicitly rejected the suggestion that it found only a right to engage in certain sexual conduct, as this would "demean the claim the individual put forward."[131] Perhaps the right may be de-

126. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

127. Pamela Karlan, *Loving* Lawrence, 102 MICH. L. REV. 1447, 1450 (2003).

128. Professor Jillian Todd Weiss has framed the Court's rationality review somewhat differently, arguing the Court recognized a legitimate state interest in the protection of morals, but held the criminalization of homosexual relationship was "not properly considered a violation of moral standards, and therefore the Texas statute was not rationally related to the otherwise legitimate state interest." *See* Jillian Todd Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding A Rational Basis for* Lawrence v. Texas, 5 TOURO J. RACE, GENDER, & ETHNICITY 1, 34 (2010).

129. *Id.* at 15 (quoting *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting)).

130. *E.g.* Laurence H. Tribe, Lawrence v. Texas*: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004) ("In any event, the strictness of the Court's standard in *Lawrence*, however articulated, could hardly have been more obvious.").

131. *Lawrence*, 539 U.S. at 567.

scribed as a liberty interest in controlling one's intimate personal relationships,[132] but the language of *Lawrence* suggests something much broader: that the right to control one's personal relationships is fundamental because it falls within rights to privacy, autonomy, and dignity.[133]

If *Lawrence* was indeed based on identifying a broad fundamental right to dignity, it would greatly alter the narrow view of fundamental rights the Court previously set out in *Washington v. Glucksberg*.[134] There, the Court held that a fundamental right must be "deeply rooted in this Nation's history" and required "a careful description of the asserted fundamental liberty interest."[135] In any case, it seems clear from *Lawrence* and *Obergefell* that *Glucksberg*, although technically binding precedent, has been significantly weakened and perhaps limited to its facts.[136] In fact, the Court explicitly addressed *Glucksberg* in *Obergefell*, noting that "while [the *Glucksberg*] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy,"[137] and invoking instead the broader fundamental rights analysis from Justice Harlan's dissent in *Poe v. Ullman*.[138] Thus, *Lawrence* leaves open to interpretation whether dignitary rights are themselves a fundamental right on which infringements will be strictly scrutinized, or whether a dignitary right

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132. *See* Yoshino, *supra* note 57, at 777 ("[I]t contended that the better course was to find that the statute violated the fundamental right of all persons — straight, gay, or otherwise — to control their intimate sexual relations.").

133. *See, e.g.*, *Lawrence*, 539 U.S. at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992))).

134. Washington v. Glucksberg, 521 U.S. 702 (1997).

135. *Id.* at 721.

136. *See, e.g.*, Yoshino, *supra* note 58, at 154 ("Even at the time *Lawrence* was decided, it was difficult to see how these final words could be squared with the first *Glucksberg* requirement. . . . This pointed omission left the status of *Glucksberg* in doubt."); *see also id.* at 162 ("After *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent.").

137. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

138. *Id.* at 2620 (Roberts, C.J., dissenting) ("The majority also relies on Justice Harlan's influential dissenting opinion in Poe v. Ullman. As the majority recounts, that dissent states that '[d]ue process has not been reduced to any formula.'" (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

must involve a more narrowly defined right in order to be considered fundamental.

Similarly, the *Windsor* Court did not clearly state what level of scrutiny it applied. However, given the opinion's emphasis on the Act's purpose and effect of demeaning same-sex couples, it appears to have used rationality review to strike down the law on the basis of its illegitimate purpose.[139] Justice Scalia noted this in dissent, adding that he "would review this classification only for its rationality. . . . As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*."[140]

Obergefell differs from the above cases in that the Court expressly found a fundamental right apart from the dignitary rights it invoked. The Court, dismissing the *Glucksberg* requirement of a "careful description" of the right,[141] declared marriage to be a fundamental right subject to strict scrutiny.[142] One explanation for this may be that the liberty at stake in *Obergefell*, marriage, was a positive liberty, one that entitles a person to "have another do some act for the person entitled."[143] On the other hand, *Lawrence* involved only negative rights, rights "entitling a person to have another refrain from doing an act that might harm the person entitled."[144] While the dignitary rights at stake in *Lawrence* involved the removal of a criminal statute that imposed dignitary harm on homosexuals, the dignitary rights at stake in *Obergefell* required the government to affirmatively validate same-sex marriages in order to correct the harm. The Court has asserted that

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139. *See* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *see also id.* at 2694 ("The principal purpose is to impose inequality, not for other reasons like governmental efficiency.").

140. *Id.* at 2706 (Scalia, J., dissenting). The Court cites U.S. Dep't. of Agriculture v. Moreno, 413 U.S. 528, 534–35 (1973), for the proposition that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Id.* at 2693.

141. *Obergefell*, 135 S. Ct. at 2602 (rejecting respondents' argument that petitioners did not meet Glucksberg's requirement of a careful description of the right as inconsistent with the Court's "approach with respect to the right to marry and the rights of gays and lesbians").

142. *See Obergefell*, 135 S. Ct. at 2604–05 ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").

143. Yoshino, *supra* note 62, at 159 (quoting *Right: Positive Right*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

144. *Id.* (quoting *Right: Negative Right*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

"our Constitution has traditionally protected negative liberties rather than positive ones"[145] and "[t]his may be particularly the case when we move into the realm of unenumerated rights."[146] The reluctance to recognize dignitary rights as fundamental when they involve a positive liberty may account for the Court's reliance on the fundamental right of marriage, rather than dignitary rights in *Obergefell*.

These cases illustrate that the Supreme Court undoubtedly recognizes and credits dignitary rights, and that it may view such rights as fundamental. However, it has never explicitly held that violations of dignitary rights require strict scrutiny analysis, so it remains unclear how the Court will analyze future claims of dignitary rights. What seems clear, however, is that the Court is inclined to strike down laws intended to demean and subordinate classes of people, regardless of what scrutiny is applied. The Court's inconsistency in applying tiered scrutiny in gay-rights jurisprudence, and in particular its willingness to decide cases based on dignity without even specifying the level of scrutiny it applies, indicates that, whereas in previous cases a failure to apply strict scrutiny was a death sentence to a constitutional claim, a claim based on dignity could likely succeed without strict scrutiny.

III. DIGNITY IN THE ADA

The gay-rights cases provide a foundation to assert that the government may not infringe on the dignitary rights of individuals. This Part will examine the impact of the ADA's exclusion of gender dysphoria on the dignity of transgender people, and will conclude by analyzing the constitutionality of the exclusion.

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145. *Id.* (citing Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 706 (2006) ("The Constitution, most judges and scholars believe, 'is a charter of negative rather than positive liberties.'" (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983)))).

146. *Id.*

A. THE ADA'S INFRINGEMENT ON DIGNITARY RIGHTS

Enacting a law that prohibits discrimination against one group does not require that the law cover discrimination against all groups.[147] The ADA is an affirmative anti-discrimination law, which by nature will exclude many classes of people: no one has a "right" to be protected by anti-discrimination law. Thus, this Note does not claim that transgender individuals have a right to be protected by the ADA per se, but rather that those individuals who are able to prove that they suffer from a disability, namely gender dysphoria, should be subject to the same requirements as any other person claiming to suffer from a disability.[148] Congress's exclusion of gender dysphoria from the ADA goes beyond simply leaving out a particular group from anti-discrimination legislation. The ADA does not protect only a discrete minority; rather, Congress created an anti-discrimination law including intentionally broad language, but then specifically excluded one group from its protection because of its "immoral content," demeaning and stigmatizing those excluded.[149] Excluding gender dysphoria from the ADA creates two dignitary harms: the first is the "special disability"[150] imposed on transgender people by excluding them from a law that is accessible to almost all others, and the second is the harm caused by having their identity put alongside criminal behaviors.

1. *The "Special Disability" of Exclusion*

The Court's reasoning in *Romer* is applicable to the ADA: transgender individuals are "forbidden the safeguards that others may enjoy or may seek without constraint,"[151] the exclusion "im-

147. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) ("Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' that a legislature need not 'strike at all evils at the same time,' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" (citations omitted)).

148. For further discussion on whether individuals with gender dysphoria would satisfy the general ADA requirements, see *supra* Part I.C; *supra* note 48.

149. *See infra* Part III.B.2.

150. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) ("To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.").

151. *Romer*, 517 U.S. at 631.

poses a special disability upon those persons alone,"[152] and finally, the protections in the ADA are "protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[153] By excluding transgender individuals from a broadly drafted definition of disability, the law "singl[es] out a certain class of citizens for disfavored legal status."[154] Furthermore, much like the Court's statement in *United States v. Windsor* that refusing to recognize same-sex marriages "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition . . . [and p]laces same-sex couples in an unstable position of being in a second-tier marriage,"[155] the ADA's exclusion of gender dysphoria tells transgender individuals that their identity is immoral and unworthy of protection, treating them as second-class citizens to whom the law applies differently. As the Court makes clear in *Windsor*, such "differentiation demeans the [individual], whose moral . . . choices the Constitution protects."[156] The Supreme Court has made it clear that laws subjecting individuals to differential treatment based on moral disapproval of one's identity may impose severe dignitary harms.

2. *Comparison to Criminal Behaviors*

In addition to the dignitary harm caused by transgender individuals being excluded and treated differently than others, the nature of the exclusion creates further dignitary injuries. Gender dysphoria is excluded among a list of illnesses associated with immoral and/or illegal conduct. The shame created by a law that likens one's identity to behavior that is associated with criminals, thus labeling one's identity as immoral, is comparable to the dignitary insult the *Lawrence* Court recognized.[157] While the ADA does not criminalize or impose sanctions on gender identity expression, as the statute in *Lawrence* did by criminalizing sodomy,

152. *Id.*
153. *Id.*
154. *Id.* at 633.
155. *Windsor*, 133 S.Ct. at 2694.
156. *Id.*
157. *See* Lawrence v. Texas, 539 U.S. at 578 ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

it categorizes and analogizes the experience of those who are affected by gender dysphoria with those who suffer from mental illnesses associated with criminal acts including kleptomania, pyromania, and disorders resulting from use of illegal drugs.[158] Specifically, the ADA appears to characterize gender dysphoria as a "sexual behavior disorder,"[159] which includes pedophilia, a disorder that, if acted upon, is hugely and irreversibly damaging to child victims. By contrast, although some people may oppose conduct associated with gender dysphoria, the condition is inextricably connected with an individual's self-identity and imposes no more of a consequence on another person than does someone's race, religion, or sexual orientation.

Finally, while the exclusion is directed toward individuals suffering from a particular medical condition, gender dysphoria, the ADA violates the dignity of all transgender people. Congress did not exclude gender dysphoria based on an opposition to a specific condition, but rather because it was closely associated with an identity that it deemed immoral.[160] Likewise, the exclusion, while it likely would only be challenged by individuals desiring to make a disability claim based on gender dysphoria, undoubtedly imports Congress's disapproval and badge of inferiority to all people identifying as transgender.

In addition to being consistent with common sense, this logic finds precedential support in the Court's reasoning in *Lawrence*, in which it recognized that regardless of who was directly impacted by a prosecution under sodomy laws, the existence of such laws were a dignitary insult to all homosexuals, as they targeted conduct closely associated with a homosexual identity.[161]

The ADA's comparison to illegal, harmful, and reviled behaviors imposes a stigma on transgender individuals and encourages discrimination against those who express their gender identity. In *Lawrence*, the Court noted that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimi-

158. 42 U.S.C. § 12211(b)(1) (2012).

159. *Id.*

160. *See infra* Part III.B.2.

161. *See* Tribe, *supra* note 130, at 1907 ("[T]he social and cultural meaning of any ban on sodomy, gender-neutral or otherwise, particularly given Bowers, is that being gay or lesbian means being a sodomite, which in turn means being a criminal."); *see also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C.L. Rev. 507, 549–50 (2016).

nation both in the public and in the private spheres."[162] While *Lawrence* dealt with the criminalization of specific conduct, the Court's decision did not rest on a fundamental right to engage in such conduct, nor did it rely on the injustice of prosecuting such cases.[163] Instead, the Court denounced the law because of its effect of stigmatizing and demeaning individuals whose identity is closely associated with such conduct.[164] The same reasoning applies to a law that likens the expression of one's gender identity to criminal conduct. As with homosexual conduct, gender identity is undoubtedly "central to personal dignity and autonomy," and involves "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[165] The government's decision to stigmatize people as quasi-criminal on the basis of their gender identity violates the dignity of transgender individuals.[166] This stigmatization of a class of people is enshrined in law, and ironically, in a law intended to eliminate discrimination.

As discussed in Part II, Professor Ackerman emphasized the role that the justices' own "situation sense" played in their application of the anti-humiliation principle in both *Brown v. Board of Education* and *United States v. Windsor*.[167] Ackerman explained that the Court must use its situation sense in order to "make commonsense judgments about the prevailing meaning of social practices" and to determine whether a law operates in such a way as to humiliate a class of people.[168] If the Court were to apply its situation sense to determine the social meaning both of the special disability placed on transgender individuals by virtue of the exclusion and of the comparison of their identity to criminal con-

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162. *Lawrence*, 539 U.S. at 575.

163. *Id.*

164. *See id.* ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

165. *Id.* at 574 (quoting Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

166. Several scholars have advocated for a fundamental right to gender identity/autonomy. While this argument is beyond the scope of this Note, there is clearly a liberty interest, whether or not fundamental, in expressing one's gender identity. For arguments on gender autonomy as a fundamental right, see, e.g., Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy and Heteronormativity*, 10 L. AND SEXUALITY 123 (2001).

167. See ACKERMAN, *supra* note 65, at 131. Ackerman notes that while Chief Justice Warren in *Brown* "tried to buttress his commonsense claims about humiliation with social science[, K]ennedy made no similar move . . . . Kennedy wrote as if his point was perfectly obvious to any American living in the twenty-first century." *Id.* at 308.

168. *Id.*

duct, it would likely conclude that, much like the laws at issue in *Brown*, *Lawrence*, *Windsor*, and *Obergefell*, the ADA exclusion "denotes the inferiority"[169] of the transgender community. Therefore, the ADA exclusion represents the "institutionalized humiliation" that Professors Ackerman, Yoshino, and Cooper agree that the LGBT line of cases denounces.

Excluding gender dysphoria from the ADA infringes upon the dignity of transgender individuals. The exclusion not only prevents those suffering from the disorder from accessing anti-discrimination protection, but it also violates the dignitary rights of all transgender people by imposing a stigma and contributing to continued discrimination against them.

B. RATIONALITY REVIEW

Excluding gender dysphoria from the ADA constitutes a violation of dignitary rights that is not rationally related to a legitimate government interest and therefore fails the most basic level of constitutional scrutiny. Both the text of the exclusion and the legislative history behind the ADA show that the exclusion stemmed from an animus toward those with conditions deemed to be morally reprehensible. This Note does not argue that the exclusion of all of the listed disorders was motivated by irrational animus: arguably, as many of the disorders are closely related to serious criminal behavior, excluding them from the ADA would likely pass constitutional muster under rational basis review. However, gender dysphoria is neither criminal nor harmful to oneself or others; rather, it is the diagnosis for significant distress that may be experienced by those exercising their liberty to express their gender autonomy.[170] Excluding such a disorder on the basis of moral disapproval[171] "raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,"[172] and such "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[173]

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169. *Brown*, 347 U.S. at 483.

170. For discussion on the definition of and symptoms associated with gender dysphoria, see *supra* Part I.B.

171. For discussion on the role that morality plays in the analysis of animus, see *infra* Part III.B.3.

172. Romer v. Evans, 517 U.S. 620, 621 (1986).

173. *Id.* (citing U.S. Dep't. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

1. *A Textual Reading*

Section 12211(b)(1) of the ADA provides that "the term 'disability' shall not include . . . *transvestism*, *transsexualism*, pedophilia, exhibitionism, voyeurism, *gender identity disorders* not resulting from physical impairments, *or other sexual behavior disorders*."[174] As the other excluded disorders are largely associated with criminal acts, this implies that the drafters equated the expression of transgender identity to committing a crime. Indeed, the text of the ADA shows that the drafters clearly mischaracterized gender identity disorders as "sexual behavior disorders."[175] This mischaracterization indicates that the drafters' labeling reflected their own moral beliefs about the condition rather than a medically accurate description. Sexual behavior disorders, which the DSM terms "paraphilic disorders," involve an "intense and persistent sexual interest."[176] In contrast, gender dysphoria does not involve sexual interest or sexual behavior at all, but rather results from the incongruence between one's assigned gender and one's experienced gender.[177] Although GID was previously listed in the DSM-III as a subclass of "Psychosexual Disorders," a revised version of the DSM, the DSM-III-R, was published three years prior to the passage of the ADA.[178] The DSM-III-R removed gender identity disorder from that category and listed it instead under the category of "Disorders Usually First Evident in Infancy, Childhood, or Adolescence."[179] The DSM-5 has clarified this further by providing a separate chapter on "Gender Dysphoria," thus completely detaching it from Paraphilic Disorders, or sexual behavior disorders.[180] Thus, classifying gender identity disorder as a sexual behavior disorder was incorrect at the time the ADA was passed and remains incorrect today. This mischaracterization provides evidence that the drafters excluded gender identity disorders based on their own moral animus, despite scientific and medical consensus to the contrary.

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174. 42 U.S.C. § 12211(b)(1) (2012) (emphasis added).
175. *Id.*
176. *See* AM. PSYCHIATRIC ASS'N, *Paraphilic Disorders*, *in* DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).
177. AM. PSYCHIATRIC ASS'N, *Gender Dysphoria*, *supra* note 8.
178. Barry, *supra* note 34, at 10 n.34.
179. *Id.*
180. *Gender Dysphoria Fact Sheet*, *supra* note 37.

Additionally, the statute's structure makes clear that gender identity disorder was not, like homosexuality, excluded because it was considered to be an identity or behavioral characteristic rather than a "disability." Section 12211(a) states that "homosexuality and bisexuality *are not impairments* and as such are not disabilities under this chapter."[181] In contrast, gender identity disorders (and other related conditions, including transvestism and transsexualism) are labeled under "Certain Conditions" that "the term 'disability' shall not include."[182] Thus, Congress distinguished between labels that it believed did not constitute an impairment or disability (e.g., homosexuality and bisexuality) and disorders that it excluded for other reasons (gender dysphoria). This indicates that the drafters knew gender dysphoria was an impairment that would otherwise be subject to the Act. Additionally, while homosexuality was removed from the DSM almost two decades prior to the passage of the ADA, the DSM has included some form of gender identity disorder in every publication since 1980.[183] Thus, it seems clear from the text that Congress's exclusion of gender identity disorders was not based on a belief that such disorders were not medical conditions. Rather, the text leaves room for an inference that the drafters chose to exclude them because they deemed them to be immoral and unworthy of protection.

2. *Legislative History*

While reviewing the text provides some insight into the purpose behind the exclusion, the legislative history provides significant evidence of the drafters' motivations.[184] There is evidence that animus played a role in the ADA exclusion, both in the legislative history of the ADA and also of the Fair Housing Act (FHA). The FHA was passed approximately a year earlier, and Senator Helms (R-NC), one of the same Senators who subsequently sup-

181. 42 U.S.C. § 12211(a) (2012).

182. *Id.* § 12211(b).

183. Jack Drescher, *Transsexualism, Gender Identity Disorder and the DSM*, 14 J. OF GAY & LESBIAN MENTAL HEALTH 109, 112, 118 (Apr. 7, 2010), *available at* http://www.tandfonline.com/doi/pdf/10.1080/19359701003589637 [https://perma.cc/RZV5-S3TM].

184. The legislative history of the ADA utilized in this Note was compiled by Professor Kevin Barry in his previous articles on the exclusion of gender identity disorders from the ADA. *See* Barry, *Disabilityqueer*, *supra* note 34; *see also* Barry, *A Bare Desire to Harm*, *supra* note 161.

ported the GID exclusion in the ADA, succeeded in passing an amendment to exclude transvestism from the FHA's definition of "handicap."[185] This amendment was offered in response to the decisions in *Doe v. Postal Service* and *Blackwell v. U.S. Dept. of Treasury*[186] holding that transsexualism and transvestism were handicaps covered by the Rehabilitation Act.[187] At the time of the FHA, Senator Helms referred to transvestism as a "moral problem[ ], not [a] mental handicap[ ]" and noted that "[i]t should be clear to the courts that Congress does not intend for transvestites to receive the benefits and protections that is [sic] provided for handicapped individuals."[188] Opposing this amendment, Senator Cranston (D-CA) protested that this exclusion subverted Congress's purpose of eliminating the stigma of mental illnesses and would "single out one category of individuals who are already being discriminated against and say to them . . . 'Congress has decided that it no longer cares whether or not you are cast out of our society.'"[189] However, the exclusion passed and was added to the FHA.

In 1989, Senators Thomas Harkin (D-IA) and Ted Kennedy (D-MA) introduced the Americans with Disabilities Act.[190] The ADA progressed through the Senate Committee on Labor and Human Resources with a broad definition of disability and no exclusions. When the bill reached the Senate floor debate, however, Senator William Armstrong (R-CO) questioned the Act's inclusion of mental disorders, and specifically those disorders that "might have a moral content to them or which in the opinion of some people have a moral content."[191] Similarly, Senator Warren Rudman (R-NH) objected to the inclusion of diagnoses for "behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons

185. *See* Barry, *supra* note 161, at 529 ("This time, Senator Helms succeeded, with the Senate voting 89–2 in favor of the amendment, making the Fair Housing Act the first anti-discrimination law to explicitly exclude transgender people.").

186. *See* Blackwell v. U.S. Dep't of Treasury, 656 F. Supp 713 (D.D.C. 1986), *aff'd in part*, *vacated in part on other grounds*, 830 F.2d 1183 (D.C. Cir. 1987); *see also* Doe v. U.S. Postal Serv., No. 84-3296, 1985 WL 9446 (D.D.C. June 12, 1985).

187. *See, e.g.*, Barry, *supra* note 161, at 529 ("Senator Helms cited the 1985 case of *Doe v. U.S. Postal Service* and the 1986 case of *Blackwell v. U.S. Department of Treasury*, in which federal district courts held — wrongly, in his opinion — that transsexualism and transvestism, respectively, were covered 'handicaps' under the Rehabilitation Act.").

188. *Id.* at 527.

189. *Id.* at 529 n.137.

190. *Id.* at 529.

191. 135 Cong. Rec. S19,853 (1989) (statement of Sen. Armstrong).

we do not fully understand" and noted that "[w]here we as a people have through a variety of means, including our legal code, expressed disapproval of certain conduct," employers should not be legally held accountable for taking into account such conduct in employment-related decisions.[192] Senator Helms specifically expressed concerns about coverage of five groups of individuals: homosexuals; *transvestites*; illegal drug users and alcoholics; "people who are HIV positive or have active AIDS disease"; and those with "psychosis, neurosis, or other mental, psychological diseases or disorders," such as pedophilia, schizophrenia, kleptomania, manic depression, intellectual disabilities, and psychotic disorders.[193]

Senator Helms further stated:

> If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. *But how in the world did you get to the place that you did not even [ex]clude transvestites*? How did you get into this business of classifying people who are HIV positive, most of whom are drug addicts or homosexuals or bisexuals, as disabled? . . . What I get out of all of this is here comes the U.S. Government telling the employer that he cannot set up any moral standards for his business by asking someone if he is HIV positive, even though 85 percent of those people are engaged in activities that most Americans find abhorrent. . . . *[H]e cannot say, look I feel very strongly about people who engage in sexually deviant behavior or unlawful sexual practices*.[194]

After expressing his concerns in floor debate, Senator Armstrong drafted an amendment proposing the exclusion of a four-page long list of mental disorders taken from the DSM-III-R, including gender identity disorder.[195] While disability advocates immediately rejected the proposal, the sponsors of the ADA insisted on negotiating with Senator Armstrong, because "negotia-

192. 135 Cong. Rec. S19,896 (1989) (statement of Sen. Rudman).

193. 135 Cong. Rec. S19,866 (1989) (statements of Sen. Helms); Barry, *supra* note 161, at 532 (emphasis added).

194. 135 Cong. Rec. S19,866 (1989) (statement of Sen. Helms); 135 Cong Rec. S19,870 (1989) (statement of Sen. Helms); Barry, *supra* note 161, at 531–32 (emphasis added).

195. Barry, *supra* note 161, at 533.

tion was the only option" to get the bill passed.[196] Thus, disability advocates drafted a compromise proposal excluding approximately five conditions, including homosexuality and bisexuality, which disability advocates felt comfortable excluding because they were not considered impairments.[197] Gender identity disorder was not included in this initial list of exclusions.[198] However, this list was deemed inadequate to appease those requesting the amendment,[199] and thus the final amendment, Amendment No. 722, included approximately ten more conditions, including GID.[200] After Senator Armstrong introduced the amendment,[201] ADA co-sponsor Senator Harkin referred to it as "a compromise amendment to deal with various concerns that have been raised."[202] Similarly, co-sponsor Senator Kennedy noted, "[i]t really represents a compromise. It is certainly not one that I would have wanted in the legislation."[203] The House changed the format of the amendment, but adopted the transgender exclusions "with no opposition at all."[204] Given that the various Senators proposing the exclusion made statements clearly indicating their intention to single out those disorders that they found morally reprehensible, and to give those disorders different treatment under the law, the legislative history provides evidence that the exclusion of gender dysphoria came about as a compromise measure intended to pacify those who deemed such disorders to be immoral and quasi-criminal.

3. *Lacking Legitimate Purpose*

Under rationality review, the government generally must meet a very deferential standard: that the act was rationally related to some government purpose. However, the Court has held that animus is not a legitimate purpose, and that classifications

196. Barry, *supra* note 34, at 24.
197. *See id.* ("Disability rights advocates saw little downside to excluding those, since neither homosexuality nor bisexuality was considered a mental impairment under the DSM-III-R (and, therefore, was not a disability to begin with).").
198. *Id.*
199. *Id.*
200. 135 Cong. Rec. S19,884 (1989) (Amend. No. 722).
201. *Id.* (statement of Sen. Armstrong) (describing Amendment No. 722 as a "product of a compromise which we have been working on through the evening").
202. 135 Cong. Rec. S19,885 (1989) (statement of Sen. Harkin).
203. 135 Cong. Rec. S19,884 (1989) (statement of Sen. Kennedy).
204. Barry, *supra* note 161, at 537–38.

may not be "drawn for the purpose of disadvantaging the group burdened by the law."[205] The Court in *Windsor* struck down DOMA because "[t]he avowed purpose and practical effect of the law . . . in question are to impose a disadvantage, a separate status, and so a stigma."[206] The disadvantages imposed on transgender individuals are not "incidental"[207] to the purpose of the exclusion, but rather are themselves the purpose and effect of the exclusion. The text and the legislative history of the GID exclusion show that the amendment's purpose was to categorically exclude a class of people whose conduct some Senators deemed to be "immoral" and "improper."[208]

While some will undoubtedly argue that morality can be a legitimate governmental purpose, and that in fact the government regulates morality in a multitude of ways, only one of which is through criminal law, morality cannot serve as a legitimate justification in this case. First, it should be recognized that moral opprobrium was also the motivation behind the statutes discriminating against homosexuals in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. In *Obergefell*, Justice Kennedy explicitly acknowledged those who "deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises," but concluded that "when [ ] sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[209] Justice Kennedy further stated that denying such liberty "would disparage their choices and diminish their personhood."[210] While *Obergefell* was based on the fundamental right to marry, the same logic applies when dignitary rights are infringed. First, while the ADA exclusion does not prohibit transgender individuals from expressing their gender identity, it discriminates against them by denying them the ability to seek access to protections to which others are entitled by virtue of an

205. Romer v. Evans, 517 U.S. 620, 633 (1999).
206. United States v. Windsor, 135 S. Ct. 2675, 2692 (2013).
207. *See Romer*, 517 U.S. at 636 ("Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons.").
208. *See, e.g.*, *supra* note 194 and accompanying text (statement of Sen. Helms).
209. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).
210. *Id.*

actual or perceived medical disability.[211] Additionally, the exclusion, by way of comparing gender identity disorder to disorders associated with criminal conduct, "demeans [and] stigmatizes" transgender individuals, and "disparage[s] their choices and diminish[es] their personhood."[212]

According to *Obergefell*, the sincerely-held moral beliefs of some cannot constitute a legitimate governmental purpose to justify denying the dignitary rights of others. GID and its related disorders are the only impairments excluded from the ADA that do not involve harm to oneself or others, and thus there is no rational basis for their exclusion other than the "bare [ ] desire to harm"[213] a class of people deemed unworthy of civil rights.

Given that the exclusion of gender dysphoria from the ADA violates the dignitary rights of transgender individuals and lacks a legitimate governmental purpose, the exclusion provision should be held unconstitutional.

IV. CONCLUSION

The ADA was created with the noble intention of eliminating the barriers that individuals with disabilities face as a result of discrimination in employment, public services, and public accommodations. However, the explicit exclusion of gender identity disorders has subverted this goal, as the provision is discriminatory and violates the dignitary rights of transgender individuals. The exclusion demeans transgender individuals by listing them among a special carve-out for disorders associated with immoral and illegal conduct, thus prohibiting them from seeking protections under the Act.

While recent jurisprudence has created an open question as to what scrutiny courts should apply when considering dignitary violations, the exclusion of disorders associated with transgender individuals cannot withstand even rationality review — the standard most deferential to the legislature. The exclusion was enacted with the purpose of labeling a politically unpopular class as undeserving of protection against discrimination, despite the fact that individuals in the group may otherwise fit squarely within the class that the Act aimed to protect. Both the text and

211. *See supra* Part III.A.
212. *Obergefell*, 135 S.Ct. at 2602.
213. United States Dep't. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

legislative history of the Act show that the exclusion was based on moral opposition to expression of a gender identity inconsistent with one's sex. The drafters used a medically inaccurate label (sexual behavior disorders) and comparisons to illegal and harmful conduct, further demonstrating their moral opprobrium.

The Supreme Court has made clear that Congress may not legislate based on a bare desire to harm a politically unpopular group, and yet, such a provision has remained operational in one of the most progressive and far-reaching pieces of anti-discrimination legislation currently existing. Excluding gender dysphoria from the ADA not only denies many transgender individuals access to essential protections, but also implicitly encourages discrimination against them in settings in which the ADA would otherwise protect them. The government must eliminate such an enshrinement of discrimination in anti-discrimination law, so transgender individuals may be put on equal footing with all others who seek disability protection on the basis of an actual or perceived disorder.