ABLY QUEER: THE ADA AS A TOOL IN LGBT ANTIDISCRIMINATION LAW

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Being queer—like deviating from the norm in any way—can be socially disabling. So why not turn to disability law for redress? After a nationwide same-sex marriage ruling from the Supreme Court, many are devoting more attention to the current absence of uniform, federal employment discrimination protections for lesbian, gay, bisexual, and transgender (LGBT) people. As Title VII has grown friendlier to claims made by LGBT individuals, people are debating the merits of cognizing anti-LGBT bias as sex discrimination in the law. Meanwhile, the Equality Act, introduced in Congress in 2015, would ban discrimination on the basis of LGBT status throughout the country. But while vital, Title VII and the Equality Act could leave a gap through which queer people whose identities are not legible within the gender binary and are not politically stable as lesbian, gay, bisexual, or transgender are left out. This Note argues that LGBT people should challenge their current exclusion from the Americans with Disabilities Act (ADA) through constitutional litigation to fill this gap. Through its disavowal of traditional identity politics, the ADA offers an additional comparative advantage that has transformative potential for queer plaintiffs: Its foundation on the social model of disability topples the LGBT rights movement's historic emphasis on respectability to enable unrestrained self-determination.

 J.D., 2016, New York University School of Law; B.A. & B.Mus., 2012, Northwestern University. I am grateful to Professors Kenji Yoshino, Deborah Malamud, Michael Kavey, and Scott Skinner-Thompson for their guidance in the development of this Note. I thank the editors of the *New York University Law Review*, especially Evan Shepherd, for their substantive insights and technical assistance. I am indebted to my family—Ranga, Madhura, and Ajay Nadig—for their unconditional love and rock-solid support through the years. Finally, I thank Daniel Amzallag and James Salem for their friendship and for always challenging me to think deeply about the issues I care about most. All errors are my own.

INTRODUCTION

Kate Lynn Blatt suffered appalling discrimination from her employer. Though assigned male at birth,[1] Blatt prefers feminine pronouns, has long hair, and likes to wear feminine attire.[2] After Blatt began working at Cabela's Retail, Inc., her employer started to call her "he/she," "ladyboy," "fag," "sinner," and "freak" to her face.[3] Blatt was repeatedly subjected to offensive inquiries, such as "[d]o you have a penis?"[4] Her employer kept Blatt secluded from other employees in one area of the store by forcing her to only stock items in its "Gifts Department."[5] After applying for a promotion to the position of Maintenance Technician, Blatt overheard the Maintenance Manager say to another employee, "Can you believe this cross-dressing gay fruit wants a job in my department? The confused sicko can't figure out that he is gay and admit it. I won't interview him under any circumstances."[6] Blatt was fired shortly thereafter.[7]

Yet, what kind of discrimination is this? Homophobia? Transphobia? Sexism? Should the answer turn on how Blatt self-identifies? How she was perceived in the workplace? What if Blatt does not identify as gay or transgender? What if she identifies as neither male nor female? What if she resists any and all self-classification? Would she have any recourse under federal law?

Kate Lynn Blatt should turn to federal disability law. This Note argues that, while current LGBT antidiscrimination paradigms do not offer sufficient answers to these questions, a disability rights approach has unique potential to address precisely this type of situation.[8]

But first, we must examine American gay and lesbian history's fraught relationship with disability, psychiatry, and disease.[9] On

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[1] These are the facts alleged in *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2015 WL 1360179 (E.D. Pa. Mar. 1, 2016), currently pending in federal district court.

[2] Plaintiff's Memorandum of Law in Opposition to Defendant's Partial Motion to Dismiss Plaintiff's First Amended Complaint at 3, Blatt v. Cabela's Retail, Inc., No. 14-4822, 2015 WL 1360179 (E.D. Pa. Jan. 20, 2015) [hereinafter Plaintiff's Memorandum].

[3] *Id.* at 5.

[4] *Id.*

[5] *Id.* at 40–41.

[6] *Id.* at 41.

[7] *Id.* at 7.

[8] *See infra* Section III.B for doctrinal specifics.

[9] The history of transgender experience in the United States is distinct from that of LGB individuals. *See generally* Genny Beemyn, *US History*, *in* TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 501–05 (Laura Erickson-Schroth ed., 2014) (offering historical background on gender nonconformity in Native American cultures, the medicalization of transsexuality and early organizing efforts among cross-dressers, the rise of radical transgender activism and the resultant backlash from lesbian and gay organizations, and the realignment of transgender advocacy with LGB organizing). This Introduction aims to situate normative objections to regarding LGBT

December 15, 1973, the American Psychiatric Association (APA) deleted homosexuality from its list of mental disorders in the Diagnostic and Statistic Manual-II (DSM-II).[10] At the time, controversy over the APA decision took the form of a debate about "whether gays were mentally diseased individuals who needed to change their orientations."[11] As gay activists pushed for the deletion of homosexuality from the manual at the APA's annual conference in San Francisco in 1970, they increasingly felt that "psychiatry was the most dangerous enemy of homosexuals."[12] They had good reason to feel this way.

For much of U.S. history, "to be heterosexual was a condition of humanity."[13] "Anxious to join the human race,"[14] many LGBT people regarded their sexual proclivities as evidence of disease and sought a cure. Law lent its coercive force to the disease conception of homosexuality. In the years leading up to World War II, state legislatures imposed various penalties on homosexuals, such as indefinite incarceration and castration.[15] Meanwhile, hospitals attempted to "rehabilitate" gays and lesbians through prefrontal lobotomies, electrical shock, and other aversion therapies.[16]

While the disease conception of homosexuality has largely lost its stranglehold on American culture, vestiges remain.[17] Although marginalized by the mainstream medical community,[18] "ex-gay conversion therapy" continues to be practiced in certain parts of the United States, mostly by religious organizations.[19] Yet even here, the practice has continued to lose credibility. Just recently, a state jury in New Jersey found that an Orthodox Jewish conversion therapy pro-

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people as disabled in historical context. I focus on the historical pathologization of same-sex desire, since most people in contemporary Western society regard this history as regrettable. In contrast, many in the LGBT community still debate the value of medicalizing gender nonconformity. *See infra* note 47.

10 *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 138 (1981) (discussing the scientific and social significance of the change).

11 Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 775 (2002).

12 BAYER, *supra* note 10, at 106.

13 KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 35 (2006).

14 *Id.*

15 WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 42 (1999).

16 *Id.*

17 Initially labeled "gay-related immune deficiency" or "GRID" in 1982, HIV/AIDS revitalized the disease conception through its disproportionate impact on gay men. *History of HIV and AIDS Overview*, AVERT, http://www.avert.org/professionals/history-hiv-aids/overview#footnoteref6_umhajpy (last updated Aug. 10, 2016).

18 *See* Jack Drescher, *I'm Your Handyman: A History of Reparative Therapies*, 36 J. HOMOSEXUALITY 19, 39 (1998) (discussing how gay conversion camps are not based on sound medical evidence).

19 Yoshino, *supra* note 11, at 800.

gram offering services it claimed to change clients from gay to straight was fraudulent and unconscionable.[20] LGBT rights organizations overwhelmingly lauded this outcome.[21]

At the same time that the gay rights movement successfully severed LGBT status from notions of disease, the disability rights movement in the Western world started to take control of how disability should be conceived in society. Starting in the 1970s, disability rights advocates incorporated into their messaging a "social model" of disability,[22] which was successfully launched into Western academia in 1990 by Michael Oliver's seminal work.[23] As Adam Samaha explains, the social model counsels everyone to see disability as a disadvantage caused by the confluence of two factors: "(1) a person's physical or mental traits plus (2) the surrounding environment, which is at least partly constructed by others."[24] Eclipsing the medical model that historically portrayed disability as a personal flaw,[25] the social model—which "moves causal responsibility for disadvantage from physically and mentally impaired individuals to their architectural, social, and economic environment"[26]—empowered disability advocates in concrete ways.

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[20] Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436 (N.J. Super. Ct. Law Div. Feb. 5, 2015). Two federal circuit courts have upheld state legislation banning such services. Doe *ex rel.* Doe v. Governor of N.J., 783 F.3d 150 (3d Cir. 2015); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).

[21] *E.g.*, *Huge Legal Victory: Jury Finds That Anti-LGBT Conversion Therapy Is Fraud*, HUMAN RIGHTS CAMPAIGN (June 25, 2015), http://www.hrc.org/press/huge-legal-victory-jury-finds-that-anti-lgbt-conversion-therapy-is-fraud.

[22] The Union of the Physically Impaired Against Segregation (UPIAS), a British disability rights group, established the principles that led to the development of the social model of disability by stating: "In our view it is society which disables physically impaired people. Disability is something [that is] imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society." UPIAS, FUNDAMENTAL PRINCIPLES OF DISABILITY 14 (1976). *See* Michael Oliver, *The Social Model in Action: If I Had a Hammer*, *in* IMPLEMENTING THE SOCIAL MODEL OF DISABILITY: THEORY AND RESEARCH 18, 18–20 (Colin Barnes & Geof Mercer eds., 2004) (discussing the social model's origins). These activists politicized existing theories promulgated by various academics. *See, e.g.*, ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2–19 (1963) (situating disability in a framework in which society stigmatizes individuals who deviate from the norm).

[23] MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990).

[24] Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251 (2007).

[25] Through its focus on curing the disabled person, the medical model of disability "assum[es] that any difficulties lie in the individual's deviation from 'normal,' rather than in the lack of accommodation within the environment." PEGGY QUINN, UNDERSTANDING DISABILITY: A LIFESPAN APPROACH, at xix (1998).

[26] Samaha, *supra* note 24, at 1255.

The philosophical foundation of the Americans with Disabilities Act (ADA),[27] considered one of the most significant labor and employment statutes ever signed into law,[28] is the social model of disability.[29] Many provisions of the ADA as originally enacted reflect the social model, because they place responsibility to rectify a defect on *society*, rather than on the disabled individual. Requirements on employers to reasonably accommodate employees[30] and the duty to make certain locations accessible to the mobility-impaired[31] are important examples. With the Americans with Disabilities Act Amendments Act (ADAAA) in 2008,[32] Congress reaffirmed the ADA's normative foundation on the social model of disability. The amendments clarified that to be protected under the ADA based on discrimination suffered as a result of a mental impairment, it does not matter if the person's impairment is episodic, mitigated by medication, not functionally limiting, or even nonexistent.[33]

In light of the ADA's foundation on the social model of disability, I argue that the LGBT rights movement's disavowal of a disability framework within which to conceive of LGBT identity should be reconsidered.[34] However, the ADA unambiguously excludes homo-

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[27] 42 U.S.C. §§ 12101–12213 (2009).

[28] Wayne L. Anderson & Mary Lizabeth Roth, *Deciphering the Americans with Disabilities Act*, 51 J. MO. B. 142, 142 (1995).

[29] *See* Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 L. & SOC'Y REV. 493, 500 (2006) ("At least for the disability activists who campaigned for it . . . the ADA is premised on a 'social model' or 'rights model' of disability . . . ."); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1044 (2004) ("The enactment of the [ADA] was viewed as a watershed . . . not only because of the substantive rights it guaranteed . . . but also because it reflected a departure from the medical model and an adoption of the movement's socio-political model of disability."); Anita Silvers, *(In) Equality, (Ab) Normality, and the Americans with Disabilities Act*, 21 J. MED. & PHIL. 209, 210 (1996) ("The ADA codifies . . . that a disabling condition is a state of society itself, not a physical or mental state of a minority of society's members, and that it is the way society is organized rather than personal deficits which disadvantages this minority.").

[30] *See* 42 U.S.C. §§ 12111(9), 12112(a), (b)(5)(A) (2006) (describing reasonable accommodation requirements).

[31] *See id.* §§ 12182(a), (b)(2)(A)(iv), 12183(a) (2006) (describing reasonable accommodation and discrimination regulations).

[32] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102(2)(A) (2012)).

[33] *See* 42 U.S.C. § 12102(3)(A) (2009) (stating that a person is covered under the "regarded as" disabled prong even if the impairment does not substantially limit or is "perceived," not "actual"); *id*. § 12102(4)(D) (requiring that episodic impairments and impairments in remission be considered in active states); *id.* § 12102(4)(E) (prohibiting consideration of most mitigating measures); *see also* 29 C.F.R. § 1630.2(j)(1)(vi) (2012) (discussing the "regarded as" prong).

[34] Some state and local courts have interpreted state disability laws to protect transgender people. *E.g.*, Smith v. City of Jacksonville Corr. Inst., No. 88-5451, 1991 WL 833882 (Fla. Div. Admin. Hrgs. Oct. 2, 1991) (holding that an individual with gender

sexuals, bisexuals, transsexuals, transvestites, and people with a diagnosis of Gender Identity Disorder (GID) that results from mental impairment from protected status based on these identities.[35]

This Note challenges the ADA's LGBT exclusion to argue for ADA coverage of LGBT people. Putting to one side legitimate criticisms the social model has received,[36] I argue that the social model of

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dysphoria was within the disability coverage of the Florida Human Rights Act); Evans v. Hamburger Hamlet & Forncrook, No. 93-E-177, 1996 WL 941676 (Chi. Com. Hum. Rel. May 8, 1996) (denying the defendant's motion to dismiss the disability claim brought by a transsexual plaintiff); Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000), *aff'g sub nom*. Doe v. Yunits, No. 001060A, 2001 WL 33162199 (Mass. Super. Oct. 11, 2000) (holding that a transgender student had stated a viable disability discrimination claim); Lie v. Sky Pub'g Corp., No. 013117J, 2002 WL 31492397 (Mass. Super. Oct. 7, 2002) (holding that the transsexual plaintiff had established a prima facie case of discrimination based on sex and disability under a state law prohibiting employment discrimination); Jette v. Honey Farms Mini Market, No. 95 SEM 0421, 2001 WL 1602799 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination); Doe v. Electro-Craft Corp., No. 87-E-132, 1988 WL 1091932 (N.H. Super. Ct. Apr. 8, 1988) (holding that transsexualism is a disability within the meaning of the state employment discrimination statute); Enriquez v. W. Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination); Doe v. Bell, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (holding that a transsexual foster youth was protected by a state law prohibiting discrimination on the basis of disability in housing). *See also* Doe v. Boeing Co., 846 P.2d 531, 536 (Wash. 1993) (implying that if proof existed that the defendant-employer discriminated against the plaintiff-employee based on gender dysphoria, then disability law could offer redress).

[35] 42 U.S.C. § 12211 (2012). Since its inception, the ADA has excluded the following impairments from coverage: (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; and (3) psychoactive substance use disorders resulting from current use of drugs. *Id.* § 12211(b). The medical community denotes "Gender Identity Disorder" as the diagnosis associated with transgender status, although "Gender Dysphoria" replaced the term in the fifth and most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. AM. PSYCHIATRIC ASS'N, DIAGNOSTICS AND STATISTICAL MANUAL OF MENTAL DISORDERS, 451–59 (5th ed. 2013). While some argue that gender dysphoria results from physical impairment and should therefore fall within ADA coverage, courts have not embraced this view. *See infra* note 138. *See also* H.R. REP. No. 101-596, at 88 (1990) (Conf. Rep.) ("The Senate bill restates current policy under section 504 of the Rehabilitation Act of 1973 that the term 'disability' does not include homosexuality or bisexuality."). I refer to these provisions collectively as the ADA's "LGBT exclusion."

[36] *See, e.g.*, Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability*, *in* ENCOUNTERS WITH STRANGERS: FEMINISM AND DISABILITY 206, 208 (Jenny Morris ed., 1996) (arguing that instead of "tackling the contradictions and complexities" of disabled experience head on, the social model presents impairment as "irrelevant, neutral and, sometimes, positive, but never, ever as the quandary it really is"); Tom Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?*, 2 RES. SOC. SCI. & DISABILITY 9, 16 (2002) (arguing that the social model does not sufficiently credit efforts to avoid becoming impaired in the first place); David Wasserman, *Philosophical Issues in the Definition and Social Response to Disability*, *in* HANDBOOK OF DISABILITY STUDIES

disability that undergirds the ADA is uniquely "queer," since it has potential to recognize that the categories of lesbian, gay, bisexual, and transgender[37] are not definitive, but overlapping and fluid.[38] As opposed to "LGBT" or "gay" identity—which is susceptible to the idea that sexual orientation and gender identity have biological roots[39]—queerness "transcends the need to categorize people" and is "radically sex affirmative, shame affirmative, and open to irrationalism."[40] The social model of disability shares this queer intuition[41] through its insistence that political identity is not fixed or natural, but relational, learned, and dependent on interaction with others. Through this disavowal of traditional identity politics,[42] the social model captures those in the LGBT community who might otherwise evade categorization under "personhood"[43] models of antidiscrimination, like gender-fluid individuals,[44] transgender people who reject the

219, 229 (Gary L. Albrecht et al. eds., 2001) (asserting that the social model's premises are insufficient since social factors alone cannot trigger moral obligations to reconstruct the environment).

[37] Throughout this Note, I use "transgender" as an umbrella term that includes transsexuals, genderqueers, cross-dressers, and other people who exhibit or identify with some sort of gender variance. *See* DAVID VALENTINE, IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY 39 (2007) (explaining the capacity of the term "transgender" to include a wide variety of queer and gender-nonconforming individuals).

[38] *See* ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 1 (1996) (describing "queer" as an "umbrella term for a coalition of culturally marginal sexual self-identifications").

[39] *See* JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 113 (2006) (explaining the conceptual and political limits of a "gay-identity approach").

[40] Sami Zeidan, *The Limits of Queer Theory in LGBT Litigation and the International Human Rights Discourse*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 73, 85 (2006). I do not suggest that LGBT status lacks a physiological or psychological basis. I make the epistemological point that these identities are constantly "mediated through law, society, culture, and discourse." Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 533 n.29 (2013).

[41] *See* Susan Burgess, *Queer (Theory) Eye for the Straight (Legal) Guy:* Lawrence v. Texas' *Makeover of* Bowers v. Hardwick, 59 POL. RES. Q. 401, 403–04 (2006) (explaining queer views of sexuality as political and performative).

[42] This Note refers to "identity politics" as a form of collective identity that "depends on individuals' subjective identification with[in] some broader group" to mobilize "political, military, or other collective action." James M. Jasper & Aidan McGarry, *Introduction: The Identity Dilemma, Social Movements, and Contested Identity*, *in* THE IDENTITY DILEMMA: SOCIAL MOVEMENTS AND COLLECTIVE IDENTITY 1, 1 (Aidan McGarry & James M. Jasper eds., 2015).

[43] "Personhood" indicates a "set of core, stable traits" used in identity politics to advocate for political recognition based on membership in a group. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 39 (2015).

[44] Gender-fluid people maneuver between male and female gender roles. For an extended discussion of this concept, see Andrew Gilden, *Toward A More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 86–87 (2008).

gender binary,[45] and gender-nonconforming individuals[46] more generally. This Note argues that, through its foundation on the social model of disability, the ADA has the potential to enable unrestrained self-determination for queer plaintiffs.

As an openly gay man, I understand that some object to the suggestion that to be lesbian, gay, bisexual, or transgender is to be disabled based on the medical model of disability that fueled the systematic abuse of LGBT Americans in the 1950s and 1960s.[47] Under the medical model, claiming disabled status based on one's identity as gay suggests that homosexuality is itself disabling.[48] But when a gay or transgender person claims disabled status under the social model, a conversion regime of the type that characterized the mid-twentieth century works the opposite way: It is the structure of society—the "stigma, fear, disgust, disregard, and imperfect assumptions about an impaired person's ability to succeed"[49]—that must be converted, not the LGBT individual.

In Part I, I discuss the applicability of sex equality arguments to LGBT discrimination as well as the doctrinal development of the sex discrimination prohibition of Title VII to cover LGBT individuals. In Part II, I discuss efforts in Congress to explicitly protect LGBT people from discrimination on the basis of their status as LGBT and why these efforts could leave a gap that excludes those whose identities are

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[45] Nonbinary transgender people are "gender non-conforming people who do not fit neatly within the binary MTF or FTM categories." Amy McCrea, Note, *Under the Transgender Umbrella: Improving ENDA's Protections*, 15 GEO. J. GENDER & L. 543, 545 (2014) (citing AM. PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 2 (2011), http://www.apa.org/topics/sexuality/transgender.pdf). "MTF" means male-to-female, while "FTM" means female-to-male. *Transgender Terminology*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Jan. 15, 2014), http://www.transequality.org/issues/resources/transgender-terminology.

[46] Gender-nonconforming people "do not follow other people's ideas or stereotypes about how they should look or act based on the female or male sex they were assigned at birth." *Fact Sheet: Transgender & Gender Nonconforming Youth in School*, SYLVIA RIVERA LAW PROJECT, http://srlp.org/resources/fact-sheet-transgender-gender-nonconforming-youth-school (last visited Oct. 14, 2016).

[47] A debate about the merits of medicalization has persisted to this day within the transgender community in the form of a controversy over whether gender identity disorder (GID) should be considered a mental impairment. *See* Judith Butler, *Undiagnosing Gender*, *in* TRANSGENDER RIGHTS 274, 275 (Paisley Currah et al. eds., 2006) (explaining that while GID diagnosis "continues to be valued because it facilitates an economically feasible way of transitioning," it is also "adamantly opposed because it continues to pathologize as a mental disorder what ought to be understood instead as one among many human possibilities of determining one's gender for oneself").

[48] *See* CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS 12 (1988) (explaining how traditional medical views "consider *personal* dysfunction a sufficient criterion for disability").

[49] Samaha, *supra* note 24, at 1261.

not politically stable as lesbian, gay, bisexual, or transgender. Part III makes the case for the ADA to fill this gap through its potential to cover queer people who might otherwise go unprotected under Title VII or an LGBT antidiscrimination statute. First, I argue that the ADA's LGBT exclusion is unconstitutional (Section III.A). Then I describe how the ADA could provide unique advantages to queer plaintiffs vis-à-vis Title VII and an LGBT antidiscrimination statute (Section III.B). I conclude by explaining how characterizing LGBT status as a disability under the social model challenges the hierarchy defined by respectability politics that has historically pervaded the LGBT rights movement (Section III.C).

I
The Sex Discrimination Argument

For decades, gay rights advocates have argued that discrimination against lesbians and gay men constitutes discrimination because of sex.[50] Before the gay rights cases of the 1990s and early 2000s,[51] the argument for constitutionalizing gay rights as Equal Protection claims on a gender discrimination theory was principally strategic. By the mid-to-late twentieth century, Supreme Court precedent was clear that laws discriminating based on sex were subject to heightened scrutiny.[52]

There was normative appeal too. As Andrew Koppelman wrote in the 1990s, "[m]ost Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality."[53] Turning his focus to the arguments of gay rights opponents, Koppelman observed that homosexuality is a "threat to the family" only if survival of the family requires women

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[50] *E.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187 (1988); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 Geo. L.J. 1 (1992).

[51] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing the right to engage in same-sex sexual intimacy under substantive due process); Romer v. Evans, 517 U.S. 620 (1996) (invalidating an anti-LGB state constitutional amendment under rational basis review).

[52] *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[53] Koppelman, *supra* note 50, at 235. Psychologists have found that homophobia highly correlates with restrictive attitudes about gender roles more generally. A.P. MacDonald, Jr. & Richard G. Games, *Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals*, 1 J. Homosexuality 9, 19 (1974).

and men to follow traditional sex roles.[54] Consistent with this observation, social conservatives have historically linked gender equality legislation with the ascendance of rights for gays and lesbians. For example, in the 1970s and 1980s, conservative antifeminists like Phyllis Schlafly opposed federal and state constitutional amendments granting equal rights to women on the grounds that they would require recognition of marriage rights for same-sex couples.[55]

Schlafly's fears were prescient. The sex discrimination argument gained traction in the tidal wave of same-sex marriage litigation[56] that culminated in the Supreme Court's nationwide ruling in *Obergefell v. Hodges*.[57] As some have noted, the sex discrimination argument helps to discredit the usual justifications for the exclusion of same-sex couples from marriage by revealing the sex stereotypes embedded in those justifications.[58] In *Baehr v. Lewin*,[59] the Hawaii Supreme Court embraced the sex discrimination argument in spite of the fact that it was largely absent from the plaintiffs' briefs challenging the Hawaii law excluding same-sex couples.[60] In *Goodridge v. Department of Public Health*, the first litigation to permanently establish a right to same-sex marriage, Justice Greaney provided the crucial vote for the majority based on a sex discrimination rationale.[61] And Justice Kennedy—the "principal architect" of the Court's sexual orientation

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54 Koppelman, *supra* note 50, at 254.

55 PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 90 (1977). When supporters of the Equal Rights Amendment (ERA), a proposed constitutional amendment designed to guarantee equal rights for women, tried to reintroduce the amendment in 1999, Schlafly protested that the "ERA means abortion funding, means *homosexual privileges*, means whatever else." Beth Fouhy, *A New Version of the ERA*, CNN (Aug. 25, 1999, 6:31 PM), http://www.cnn.com/ALLPOLITICS/stories/1999/08/25/fouhy.maloney (emphasis added).

56 *See Pending Marriage Equality Cases*, LAMBDA LEGAL (June 24, 2015), http://www.lambdalegal.org/sites/default/files/pending_marriage_equality_cases_06.24.15.jd_.pdf (noting the number of active cases across twenty eight states).

57 135 S. Ct. 2584 (2015) (holding that states must license and recognize same-sex marriages under the Fourteenth Amendment).

58 *E.g.*, Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2138 (2014). *See also* Kitchen v. Herbert, 755 F.3d 1193, 1224–25 (10th Cir. 2014) (rejecting a justification for Utah's same-sex marriage ban that relied on gendered parenting styles).

59 852 P.2d 44, 63–68 (Haw. 1993) (analyzing the plaintiffs' claim to a legal right to same-sex marriage under sex discrimination doctrine).

60 *See* Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *4 n.3 (Haw. Dec. 9, 1999) (Ramil, J., concurring) (noting that the plaintiffs in *Baehr v. Lewin* "did not fully brief the issue of gender discrimination in the context of the equal protection clause of the Hawaii Constitution").

61 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring). In her dissent in *Hernandez v. Robles*, Chief Judge Kaye of the New York Court of Appeals expressly adopted the sex discrimination argument to push for the inclusion of same-sex couples in civil marriage. 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting).

jurisprudence[62]—has confessed that whether laws restricting marriage to opposite-sex couples "can be treated as . . . gender-based classification[s]" is a "difficult question" that he has "wrestle[d] with."[63]

As same-sex marriage dominated the media airtime given to LGBT issues,[64] the sex discrimination argument was percolating in the private employment sphere too. Title VII of the Civil Rights Act of 1964's proscription of discrimination "because of . . . sex"[65] became another site for intramovement debate on the merits of the sex discrimination argument. LGB plaintiffs bringing sex discrimination claims under Title VII found modest success by capitalizing on the sex stereotyping theory of discrimination the Supreme Court established in *Price Waterhouse v. Hopkins*.[66] Analogizing to religion, transgender plaintiffs were able to invoke theories of protection based on their status as gender "converts."[67] Yet in spite of this progress, many courts confronted with sex discrimination claims made by gender and sexual minorities insisted that Congress did not intend the legislation to apply to anything other than "the traditional [binary] concept of sex,"[68] and "that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."[69]

But the pendulum appears to have swung the other way in recent years as Title VII has become more and more receptive to claims made by LGBT individuals. Although federal circuit courts have continued to diverge on whether and how to apply Title VII to claims based on sexual orientation[70] and gender identity,[71] the Equal

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62 Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 156 (2016).

63 Transcript of Oral Argument at 13, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

64 *See* Jake Miller, *After Supreme Court Win, LGBT Activists Look Beyond Same-Sex Marriage*, CBS NEWS (July 1, 2015 5:24 PM), http://www.cbsnews.com/media/after-supreme-court-win-lgbt-activists-look-beyond-same-sex-marriage ("For at least a decade, the most visible, galvanizing cause in the struggle for gay equality was the fight for same-sex marriage. It drove the fundraising, nabbed the headlines, and helped change the way American politics and culture interacted with the LGBT community.").

65 42 U.S.C. § 2000e-2(a)(1) (2006).

66 490 U.S. 228 (1989) (expanding the definition of sex discrimination under Title VII to include discrimination based on noncompliance with gender stereotypes).

67 *See, e.g.*, Schroer v. Billington, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (directly comparing religious converts to sex converts to protect the transgender plaintiff under Title VII).

68 *E.g.*, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984). *But see* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283–84 (1991) (describing how "sex" was added to Title VII as a last-minute amendment to legislation primarily intended to outlaw race discrimination).

69 *Ulane*, 742 F.2d at 1087.

70 *Compare* E.E.O.C. v. Boh Bros. Constr. Co., 731 F.3d 444, 456 (5th Cir. 2013) (holding that an employee who alleged same-sex harassment on the basis of homophobic

Employment Opportunity Commission (EEOC) decision in *Macy v. Holder*[72] was a watershed moment for the sex discrimination argument. In *Macy*, the EEOC ruled that transgender discrimination is, as a categorical matter, sex discrimination under Title VII.[73] In *Baldwin v. Foxx*,[74] the EEOC made a similar conclusion with respect to sexual orientation. Additionally, there has been increasing movement toward interpreting Title IX's analogous sex discrimination provision[75] to cover transgender students.[76] And because the Affordable Care Act incorporates discrimination under Title IX into its own antidiscrimina-

epithets and lewd gestures stated an actionable claim under Title VII), *and* Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 875 (9th Cir. 2001) (holding that firing a gay male because he did not conform to gender norms violated Title VII), *with* Dawson v. Bumble & Bumble, 398 F.3d 211, 223 (2d Cir. 2005) (rejecting the lesbian plaintiff's Title VII claim because the alleged incidents related to her sexual orientation rather than her biological sex), *and* Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (rejecting Spearman's sex stereotyping claim since evidence "clearly demonstrate[d] that Spearman's problems resulted from his altercations with co-workers over work issues, and because of his apparent homosexuality").

71 *Compare* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding, in the analogous context of the Equal Protection Clause, that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination"), *and* Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2005) (holding that allegations that a transgender employee was discriminated against based on the employee's gender-nonconforming behavior and appearance were actionable under Title VII), *with* Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492, 493–94 (9th Cir. 2009) (holding that safety was a nondiscriminatory justification under Title VII for banning the transsexual instructor's use of a women's restroom), *and* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that discrimination based on transsexual status is not sex discrimination under Title VII).

72 EEOC Doc. 0120120821, (Apr. 20, 2012), 2012 WL 1435995.

73 *Id.* at *11. Attorney General Eric Holder then issued a memorandum stating that the Department of Justice (DOJ) will no longer argue that Title VII's prohibition on sex discrimination does not cover discrimination based on transgender status. Memorandum from Eric Holder, Attorney Gen., to U.S. Attorneys & Heads of Dep't Components 2 (Dec. 15, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf.

74 EEOC Doc. 0120133080, (July 15, 2015), 2015 WL 4397641 (holding that allegations of employment discrimination on the basis of sexual orientation necessarily state a claim of sex discrimination under Title VII).

75 Title IX of the Education Amendments of 1972 provides: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (2012). Courts frequently treat Title VII doctrine as persuasive authority for interpreting Title IX (and vice versa). *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 226–28 (2005) (surveying cases that illustrate this trend).

76 *See, e.g.*, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016) (ratifying the Department of Education's interpretation of Title IX to include protections that allow transgender people to use restrooms that accord with their own gender identity); U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016), https://www.justice.gov/opa/file/850986/download (describing joint guidance released by U.S. Departments of Justice and

tion provision,[77] the sex discrimination argument has already begun to extend into the healthcare context.[78]

However, the sex discrimination argument has had its fair share of critics. Normatively, Edward Stein has written that by ignoring arguments about the morality of same-sex sexual acts in favor of an argument grounded on gender stereotypes, "the sex discrimination argument 'closets,' rather than confronts, homophobia."[79] Doctrinally, many courts have carefully cabined sex-stereotyping theory under Title VII such that Title VII is not interpreted to protect LGBT individuals *qua* LGBT individuals, but only to protect them as they challenge sex stereotypes unrelated to sexual preference or transgender status.[80]

Moreover, some advocates fear that the reification of the binary conception of gender, which they view as the inherent basis of a sex discrimination claim, elides the identities of queers who identify as neither male nor female.[81] To find safe haven under Title VII's sex discrimination provision, those who reject the gender binary could be required to marshal forth evidence that their gender identity can be

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Education making clear that both federal agencies treat a student's gender identity as the student's sex for purposes of enforcing Title IX).

[77] Section 1557 of the Affordable Care Act provides: "[A]n individual shall not, on the ground prohibited under . . . Title IX of the Education Amendments of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . . ." 42 U.S.C. § 18116 (2012) (internal citations omitted).

[78] *See* Rumble v. Fairview Health Servs., No. 14-CV-2037, 2015 WL 1197415, at *1 (D. Minn. Mar. 16, 2015) (declining to dismiss the § 1557 claim of an FTM transgender patient who sued his local hospital for discrimination after suffering verbal insults, delays that put him at risk of sepsis, and unnecessary and invasive procedures).

[79] Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 503–04 (2001).

[80] *See* Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of . . . [Perceived] Sex*," 34 N.Y.U. REV. L. & SOC. CHANGE 55, 81 (2010) (discussing some courts' attempts to distinguish between sex discrimination claims and claims based on sexual orientation); Mark E. Berghausen, Note, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 Nw. U. L. REV. 1281, 1284–85 (2011) (describing "Goldilocks case law" under Title VII, where standing caselaw selectively protects gender-nonconforming plaintiffs). *See also* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 735 (2010) (explaining that LGB plaintiffs who "exhibit gender expressions that comport with societal expectations for their biological sex" may not be sufficiently gender-nonconforming in the eyes of courts to invoke sex stereotyping protection under Title VII). Since courts have generally preserved employers' rights to enforce gendered dress codes, *e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc), Title VII will likely prove unavailing for queer plaintiffs who want to entirely opt out of such requirements.

[81] *See* Gelfman, *supra* note 80, at 57 (arguing that sex discrimination doctrine "depends on the underlying yet unstated assumption that sex is binary: one is either a man or a woman, and there is nothing in between or beyond").

cognized within the mutually exclusive framework of male and female.[82] Because of the extraordinarily deep roots that the gender binary has in our culture,[83] courts may continue to ignore sex discrimination claims of those who reject gender altogether[84] rather than conform to the "opposite" gender. As some see it, any conclusion that antigay discrimination has occurred must be predicated on some procedure for determining who is gay; this procedure usually takes the gender binary as its foundation.[85]

Finally, some have maintained that the sex discrimination argument fails to account for the independently debilitating effects that sexism and homophobia can have on lesbians,[86] while others argue that sex-stereotyping doctrine is fundamentally incapable of protecting intersex individuals.[87] Still others fear that including gender nonconformists within the feminist movement will undermine the category of "woman" as well as feminism itself.[88]

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[82] *See* Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) ("Transsexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex."); *cf.* Julie A. Greenberg, *Definitional Dilemmas: Male or Female? Black or White? The Law's Failure to Recognize Intersexuals and Multiracials*, *in* GENDER NONCONFORMITY, RACE, AND SEXUALITY 102, 104–06 (Toni Lester ed., 2002) ("Believing that race was biological and scientifically determinable, courts depended on evidence, including documentation of ancestry, inspection and analysis of physical characteristics, reputation, 'expert' scientific testimony, and the individual's behavior . . . .").

[83] *See* Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 922 n.19 (2002) ("Although some anthropologists maintain that some isolated societies recognize more than two sex or gender categories, no major legal system has established laws governing human behavior based upon anything other than a binary system.").

[84] Richard Ekins & Dave King, *Transgendering, Men, and Masculinities*, *in* HANDBOOK OF STUDIES ON MEN AND MASCULINITIES 379, 389 (Michael S. Kimmel et al. eds., 2005) (citing Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, *in* BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 280, 296 (Julia Epstein & Kristina Straub eds., 1991)).

[85] *See, e.g.*, Stein, *supra* note 79, at 486–87 (noting the importance of a person's sex and sexual attraction in sex discrimination cases).

[86] *See, e.g.*, Alexandra Brodsky & Elizabeth Deutsch, *Are Gay-Marriage Bans a Form of Sexism?*, THE ATLANTIC (Oct. 11, 2014), http://www.theatlantic.com/politics/archive/2014/10/are-gay-marriage-bans-a-form-of-sexism/381365 ("[A] legal regime that understands homophobia only as a form of sexism would fail to comprehend the experiences of queer women caught at the crosshairs of two forms of hate.").

[87] *See, e.g.*, Gelfman, *supra* note 80, at 84 ("[S]ex-stereotyping doctrine . . . cannot protect intersex individuals because the doctrine requires a plaintiff to be classified within the sex binary before it can begin its comparative analysis.").

[88] For descriptions of how some feminists may have excluded transgender and other gender-nonconforming people from movement organizing, see generally RIKI WILCHINS, QUEER THEORY, GENDER THEORY: AN INSTANT PRIMER 15 (2004) (describing how one feminist organization excluded lesbian and bisexual women from membership for a period of time); Cheryl Chase, *"Cultural Practice" or "Reconstructive Surgery"? U.S. Genital*

II
The Limits of Personhood

Specifically enumerating lesbian, gay, bisexual, and transgender people as a protected class is the intuitive response to critiques of the sex discrimination argument. LGBT people frequently face discrimination precisely because of their identification as LGBT—not because they transgress gender stereotypes.[89]

Since 1974, federal legislators have made various attempts to explicitly proscribe discrimination based on LGBT status.[90] In 2015, Senator Jeff Merkley and Representative David Cicilline introduced the Equality Act,[91] a bill in the House of Representatives and Senate that, if passed, would amend the Civil Rights Act of 1964 to include protections against discrimination on the basis of sexual orientation, gender identity, and sex in the areas of employment, housing, public accommodations, public education, federal funding, credit, and the jury system.[92] Whether the Equality Act will pass through both legis-

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Cutting, the Intersex Movement, and Medical Double Standards, *in* Genital Cutting and Transnational Sisterhood: Disputing U.S. Polemics 126, 145–46 (Stanlie M. James & Claire C. Robertson eds., 2002); Michelle Goldberg, *What Is a Woman?*, The New Yorker (Aug. 4, 2014), http://www.newyorker.com/magazine/2014/08/04/woman-2.

[89] Conceiving of this type of discrimination as anti-LGBT bias rather than gender bias addresses what some consider the most persuasive objection to the sex discrimination argument: that it "ignores, and may render invisible, a central moral wrong of antigay discrimination." *E.g.*, Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. Rev. 519, 521 (2001).

[90] Congresswoman Bella Abzug introduced the Equality Act of 1974, H.R. 14,752, 93d Cong. (1974), which would have added marital status and sexual orientation as protected classes under the Civil Rights Act of 1964. Starting in the late 1990s, legislators attempted to proscribe discrimination based on sexual orientation through the Employment Non-Discrimination Act (ENDA). Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997). None of these bills included protections based on transgender status or gender identity. In 2007, Representative Barney Frank introduced a new version of ENDA that prohibited discrimination on the basis of actual or perceived sexual orientation and gender identity, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007), but this bill too did not ultimately pass. Representative Frank made one last attempt: He sponsored a substantially similar bill that Congress introduced on June 19, 2009 with ten others as cosponsors. Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009). After stagnating, the legislation was reintroduced on June 24, 2009 with 123 cosponsors. H.R. 3017, 111th Cong. (2009). On August 5, 2009, the Senate introduced a version of ENDA that included gender identity protections. S. 1584, 111th Cong. (2009).

[91] S. 1858, 114th Cong. (2015); H.R. 3185, 114th Cong. (2015).

[92] S. 1858, § 2(1).

lative chambers and wind up on a supportive President's desk for signature is currently unknown.[93]

From the perspective of an LGBT rights advocate, the benefits of explicitly proscribing discrimination on the basis of LGBT status are obvious. Many LGBT plaintiffs who failed to successfully invoke sex-stereotyping claims under *Price Waterhouse* would succeed in demonstrating that they were discriminated against based on their status as LGBT. For example, in *Dillon v. Frank*, a gay male plaintiff raised a stereotyping argument that his coworkers abused him because they did not perceive him to be "macho" enough.[94] The Sixth Circuit held that Dillon failed to state a sex-stereotyping claim under Title VII because he could not demonstrate that his homosexual behavior, which his coworkers deemed unacceptable in males, would have been more readily tolerated had he been a homosexual female.[95] The Equality Act would rectify this situation by granting redress to LGBT plaintiffs like Dillon for discrimination on the grounds of LGBT status, regardless of whether they could convince a court that sex discrimination was at play in the adverse employment action.

But while necessary, explicit protection based on LGBT status is not sufficient to protect queer people in their full diversity, since it would leave out those who do not neatly fit into stable gender and sexual categories as politically constructed.

Not every queer person self-identifies as lesbian, gay, bisexual, or transgender in any stable sense. In the context of sexual orientation, many have pointed out that the idea that every queer person has a permanent, stable identity as gay or lesbian is not culturally universal, but instead relies on a narrative of self-discovery through revelation of repressed sexuality.[96] This concept of gay personhood, which is a product of social movements that have their roots in the United States and Western Europe, is both historically and culturally contingent.[97]

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[93] *See* Gabrielle Levy, *Forget SCOTUS: The Next Fight Over Gay Rights Will Be in Congress*, U.S. NEWS & WORLD REPORT (July 23, 2015, 6:19 PM), http://www.usnews.com/news/articles/2015/07/23/equality-act-continues-push-for-lgbt-rights (describing the political difficulties that the Equality Act will face on the road to passage into law).

[94] No. 90-2290, 1992 WL 5436, at *5 (6th Cir. Jan. 15, 1992).

[95] *Id.* at *9.

[96] *See, e.g.*, Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 770–74 (1989) (describing and critiquing the Freudian view of personhood in which "sexuality occupies a psychologically (or even biologically) privileged stratum in the formation of our identity"). *See generally* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 17–49 (Robert Hurley trans., Vintage Books 1990) (1976) (discussing the "repressive hypothesis").

[97] *See* Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of* Lawrence, 14 WM. & MARY BILL RTS. J. 1429, 1442 (2006) ("[A]t the heart of the fabled closet lies a predominantly Western assumption that a gay, lesbian, or bisexual identity is a

A legal system of antidiscrimination protection premised on LGBT personhood excludes those who refuse to ascribe to political categories as currently constructed, while simultaneously taking for granted the power of legal and administrative taxonomies to shape cultural identities.[98] As Janet Halley explains, the personhood model of homosexuality "entirely fails to represent those pro-gay constituencies that deny the centrality of a particularized homosexual orientation to their psychic makeup," either because they "seek to de-emphasize the gender parameters of sexuality," are "experimental about sexuality," or because they "experience sexuality not as serious self-expressiveness but as play, drag, and ironic self-reflexivity."[99] Queers with these types of identities are especially susceptible to erasure in movement-building politics,[100] wherein advocates with stable LGBT identities rely on and reinforce the social order provided by the constructed categories of sex, gender, and sexuality.[101]

These objections to circumscribed notions of LGBT personhood derive from the experiences of real individuals. For example, protections for transgender people have sometimes been expressly conditioned on their willingness to "consistently" express their gender

major determinant in the lives of *all* individuals."). For a powerful critique of this phenomenon vis-à-vis Canadian lesbian actress Ellen Page's television series *Gaycation*, see Tovah Leibowitz, *Ellen Page's Gay Imperialism Is Not Activism*, HARLOT MEDIA (Mar. 17, 2016, 8:53 PM), http://harlot.media/articles/1513/ellen-pages-gay-imperialism-is-not-activism (arguing that Page's determination to explore gay identity in different countries "exposes the ways in which sexual vocabularies of the West are explicitly used to delegitimize and decry other forms of sexual affiliation—ephemeral or sporadic intimacies have no interest in the shallow, violent promises of state recognition").

98 *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 82–83 (1998) (explaining how "artificial inventions of cadastral surveyors, census takers, judges, or police officers" can become "categories that organize people's daily experience precisely because they are embedded in state-created institutions that structure that experience"). *See also* JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES 11–24 (2007) (arguing that some countries deploy Euro-American constructs of gay identity as a nationalistic tool to label certain populations as enlightened and others as backward).

99 Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 520 (1994). Psychologists have observed that young people are especially drawn to queer identities that resist neat compartmentalization within discrete categories. *See, e.g.*, RITCH C. SAVIN-WILLIAMS, THE NEW GAY TEENAGER 1 (2005) (explaining how teenagers are "increasingly redefining, reinterpreting, and renegotiating their sexuality such that possessing a gay, lesbian, or bisexual identity is practically meaningless").

100 *Cf.* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 362 (2000) (describing how both straights and gays help stabilize the concept of sexual orientation, which serves to erase and delegitimize bisexuals).

101 *See* Elaine Craig, *Trans-Phobia and the Relational Production of Gender*, 18 HASTINGS WOMEN'S L.J. 137, 138–39 (2007) (arguing that law reinforces a binary sex/gender system).

identity. In the landmark Department of Justice (DOJ) settlement with the Arcadia Unified School District in California,[102] gender identity was defined as "one's internal sense of gender . . . which is *consistently* and *uniformly* asserted, or for which there is other evidence that the gender identity is sincerely held as part of the student's core identity."[103] This narrow conception of transgender identity threatens to leave out individuals like Brendan Jordan, the teenage YouTube celebrity who rose to Internet stardom through a viral video,[104] since Brendan does not assert queer identity in a "consistent" or "uniform" way. In Brendan's words: "I can't really label it, because, you know, some days my more feminine side comes out—the 'she.' Some other days I don't feel like putting on my fabulous mask, and the 'he' comes out, and I'm totally okay with that."[105]

Recent campaigns by transgender activists and their allies in response to proposed state laws criminalizing transgender people for using public restrooms shed light on the limits of coalition building within the framework of identity politics. As politicians in Florida,[106] Texas,[107] and other states have attempted to pass laws doubling down on sex segregation in public restrooms, an activist photo campaign called #WeJustNeedToPee[108] responded with photos of transgender people looking out of place in restrooms of the genders to which they were assigned at birth: "[A] trans woman with long ringlets and red lipstick in front of urinals, a trans man in a cowboy hat and beard

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102 U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, OCR No. 09-12-1020, DOJ No. 169-12C-70, RESOLUTION AGREEMENT BETWEEN THE ARCADIA UNIFIED SCHOOL DISTRICT, THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, AND THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION (2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf.

103 *Id.* at 2 (emphasis added).

104 Justine David, *Brendan Jordan the Dancing Diva at Downtown Summerlin Grand Opening*, YOUTUBE (Oct. 11, 2014), https://www.youtube.com/watch?v=yOOyfymbipg&.

105 Emma Sarran Webster, *Viral Voguer Brendan Jordan Comes Out as Gender Fluid*, TEEN VOGUE (Feb. 19, 2016, 3:15 PM), http://www.teenvogue.com/story/brendan-jordan-comes-out.

106 Dawn Ennis, *Florida's Trans Bathroom Bill Dies*, THE ADVOCATE (Apr. 28, 2015, 2:18 PM), http://www.advocate.com/politics/2015/04/28/breaking-floridas-trans-bathroom-bill-dies.

107 Demoya Gordon, *Anti-Trans Bathroom Bills Proposed in Texas*, LAMBDA LEGAL (Mar. 5, 2015), http://www.lambdalegal.org/blog/20150305_anti-trans-bathroom-bills-proposed-in-tx.

108 *See* Mitch Kellaway, *Trans Folks Respond to 'Bathroom Bills' with #WeJustNeed toPee Selfies*, THE ADVOCATE (Mar. 14, 2015, 6:00 AM), http://www.advocate.com/politics/transgender/2015/03/14/trans-folks-respond-bathroom-bills-wejustneedtopee-selfies (detailing the rise of the #WeJustNeedToPee campaign).

looking stoic next to a woman at a bathroom sink, with the caption 'Do I look like I belong in women's facilities?'"[109]

Nonbinary transgender people like Alok Vaid-Menon were erased from this narrative, "even though [nonbinary transgender people] often experience the brunt of gender policing, because society continually misgenders [them]."[110] In Alok's words: "I often walk around the city wearing a beard and a skirt. This is when I'm most myself, but it's also when I'm most afraid of people's reactions."[111] There should be space in mainstream LGBT political advocacy for this type of enigmatic queer experience.[112]

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[109] Alok Vaid-Menon, *Greater Transgender Visibility Hasn't Helped Non-Binary People–Like Me*, THE GUARDIAN (Oct. 13, 2015, 7:15 AM), http://www.theguardian.com/commentisfree/2015/oct/13/greater-transgender-visibility-hasnt-helped-nonbinary-people-like-me.

[110] *Id.*

[111] *Id.*

[112] As the #WeJustNeedToPee campaign shows, personhood models of antidiscrimination risk excluding those members of minority groups who are less palatable to the mainstream. *See generally* YOSHINO, *supra* note 13, at 74–164 (explaining how equality-based civil rights paradigms can privilege members of minority groups who assimilate to mainstream norms while disadvantaging those who do not). Through this exclusion, a new hierarchy is created in which "real" group members are validated, while nonconformists are ostracized. *See* Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 53 (2003) ("[C]urrent U.S. anti-discrimination law appears to operate by attempting to eliminate gender norms and stereotypes of the 'real woman' and the 'real man.' But it is clear that in

The required process of appropriate self-identification that queer asylum applicants endure also illustrates how personhood models of antidiscrimination can fall short. To qualify as a "refugee" under current asylum requirements, the applicant must show that her persecution is based on membership in a social group.[113] Narrow conceptions of which LGBT identities constitute a "social group" have restricted the ability of queer individuals to succeed in their asylum claims. In *Hernandez-Montiel v. INS*,[114] an immigration judge denied asylum to Hernandez-Montiel—a gay man from Mexico who began dressing and behaving as a woman at age twelve[115]—because he failed to establish that his persecution was "on account of [membership in] a particular social group," defining the relevant group as homosexual males who choose to dress as women.[116] Luckily for Hernandez-Montiel, he was able to appeal his claim to the Ninth Circuit—the only federal circuit to suggest a "voluntary associational relationship"[117] requirement for asylum in lieu of an immutability requirement—which expanded the definition of "social group" to include the gender-bending plaintiff. Rather than dismissing Hernandez-Montiel's decision to wear women's clothing as a choice outside of his homosexual identity, the Ninth Circuit adopted a broad definition of queerness, stating that "[t]his case is about sexual identity, not fashion."[118]

But what if Hernandez-Montiel candidly admitted that he did not consistently dress as a woman? What if he explained that he chose to dress as a woman only occasionally and freely at his own whim? That his choice in attire *was* an expression of fashion?[119] What definition of

order to eliminate such gender norms and stereotypes, the law must at first construct and reiterate them.").

113 8 U.S.C. § 1101(a)(42)(A) (2012). Although asylum eligibility can be based on race, religion, nationality, or political opinion, *id.*, persecution based on membership in a social group is most applicable to LGBT people. *See id.* § 1158(b)(1)(B) (outlining the applicant's burden of proof in asylum applications).

114 225 F.3d 1084, 1099 (9th Cir. 2000), *rev'd on other grounds*, 409 F.3d 1177, 1187 (2005).

115 *Id.* at 1087.

116 *Id.* at 1089.

117 *Id.* at 1092–93.

118 *Id.* at 1096. The question in *Hernandez-Montiel* is the same question that confronts judges in any case in which they are asked to expand existing categories of protection to cover new plaintiffs: How should courts interpret certain rights that can be articulated at competing levels of generality? *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065–71 (1990) (describing the problem of abstraction in defining privacy rights under substantive due process).

119 The "social group" requirement for queer asylees, like all personhood models of antidiscrimination, requires individuals to characterize certain choices as inherent to their identity. *Cf.* Rubenfeld, *supra* note 96, at 782 (arguing that to characterize access to reproductive rights as essential for gender equality suggests "that motherhood . . . is the fundamental, inescapable, [and] natural backdrop of womanhood").

"social group" could accommodate such a conception of queer identity? Could that definition realistically receive a federal judge's imprimatur?

Even more pertinent uncertainties arise with respect to drafting a capacious definition of LGBT identity in the Equality Act that is capable of garnering sufficient congressional support. For historical perspective, consider the Employment Non-Discrimination Act's (ENDA's) many failed attempts.[120] After Democrats gained control of both houses of Congress in the 2006 midterm elections, ENDA became a legislative priority again. But Representative Frank's 2007 bill, which defined gender identity broadly as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth,"[121] faced staunch opposition—even among some Democrats—which ultimately impelled the House to pass a bill that excluded protections for discrimination based on gender identity.[122] Even victories in the legislative arena for transgender rights exclude some queer people. For example, the historic California School Success and Opportunity Act, signed into law by pro-LGBT Governor Jerry Brown[123] and widely celebrated by LGBT rights groups,[124] fails to account for the needs of nonbinary students who do not wish to proclaim a stable male or female identity.[125]

The uncertain prospects of federal legislation operationalizing a definition of LGBT identity that is sufficiently capacious to capture those whose queer identities are nonbinary and/or politically unstable as LGBT illustrate the central weakness of a traditional antidiscrimination regime: It requires plaintiffs to self-identify as lesbian,

120 For background on the fraught history of this proposed legislation, see *supra* note 90.

121 Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 3(a)(6) (2007). ENDA's most recent version permitted mandatory sex-specific dress codes for transgender employees. The only requirement was that the employee be allowed to abide by the dress code of her posttransition sex. H.R. 3017, 111th Cong. § 8(a)(5) (2009); S. 1584, 111th Cong. § 8(a)(5) (2009). Apparently, granting a nonbinary employee a legal right to opt out of the gendered dress code entirely was a political nonstarter.

122 Alex Reed, *Abandoning ENDA*, 51 HARV. J. LEGIS. 277, 285 (2014).

123 Trudy Ring, *California Gov. Signs Four LGBT-Supportive Bills*, THE ADVOCATE (Oct. 7, 2015, 7:15 PM), http://www.advocate.com/politics/2015/10/07/california-governor-brown-signs-three-lgbt-supportive-bills.

124 *E.g.*, *Victory! CA Bill Will Ensure the Success and Well-being of Transgender Students*, TRANSGENDER LAW CENTER (Mar. 4, 2013), http://translaw.wpengine.com/archives/3544.

125 *See* CAL. EDUC. CODE § 221.5(f) (2013), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201320140AB1266 (allowing students to participate in programs and use facilities consistent with their gender identity irrespective of sex assigned at birth, but not requiring accommodations for students who wish to use neither boys' nor girls' facilities).

gay, bisexual, or transgender only as Congress is willing to define and federal judges are willing to interpret those terms.[126]

III
Disability: A Queerer Approach?

The Americans with Disabilities Act (ADA) has two advantages over Title VII and the Equality Act—one pragmatic and the other politically transformative. Pragmatically, the ADA has the potential to compensate for the doctrinal limits of sex discrimination law as well as the political constraints on drafting a sufficiently broad definition of LGBT identity in the Equality Act, both of which threaten to exclude queer people who identify as nonbinary as well as those whose identities are not stable as LGBT as politically constructed. But there is also a political advantage that is more profound: Through the social model of disability's disavowal of traditional identity politics, the ADA has the potential to topple the LGBT rights movement's historic emphasis on respectability[127] to enable unrestrained self-determination.

The ADA, passed by Congress in 1990, is a wide-ranging federal civil rights law created and designed to protect individuals with physical and mental disabilities against discrimination.[128] A person can show that she is disabled—and therefore protected under the ADA—if that person (1) actually has, (2) has a record of having, or (3) is regarded by others as having a "physical or mental impairment that substantially limits one or more major life activities."[129] Beginning in 1999, the Supreme Court limited the construction and interpretation of the ADA in a series of cases.[130] This judicial narrowing of what

[126] For more on the potential line-drawing problems of such legislation, see McGinley, *supra* note 80, at 770–71.

[127] *See infra* Section III.C (characterizing the social model's focus on invidious motives of discrimination's perpetrators rather than on characteristics of discrimination's victims as an implicit repudiation of respectability).

[128] 42 U.S.C. §§ 12101–12102 (2012).

[129] *Id.* § 12102(1)(A)–(C).

[130] *See* Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198 (2002), *superseded by statute*, Americans with Disabilities Act Amendments of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (holding that to be "substantially limited" in performing a major life activity under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives"); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566–67 (1999), *superseded by statute*, Americans with Disabilities Act Amendments of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (holding that Kirkingburg, who was blind in one eye, was not disabled per se since his brain had accommodated his ability to see through one eye); Murphy v. United Parcel Servs., Inc., 527 U.S. 516, 519, 521 (1999) (holding that Murphy was not disabled because of his hypertension, since he could perform major life activities with medication); Sutton v. United Air Lines, Inc., 527 U.S. 471, 493–94 (1999) (holding that the Sutton twins, who sought protection based on disability after being denied a position as an airline pilot

Congress intended to be broad remedial legislation prompted Congress to explicitly overturn the Court's decisions in these cases with the Americans with Disabilities Act Amendments Act (ADAAA). As the amendments went into effect, the ADA saw a number of substantial changes, including a more expansive definition of "disability."[131]

Of particular significance after the amendments is the vast potential of the "regarded as" prong. Congress originally added the "regarded as" prong to the definition of handicap in the pre-amended ADA to address disability discrimination resulting from stereotypical attitudes and ignorance about disabilities.[132] The ADAAA clarifies that to be "regarded as" having a disability under the ADA, a plaintiff must prove only that she was perceived as having a "physical or mental impairment" that is not "transitory and minor."[133] The ADAAA reaffirmed the congressional intent behind the "regarded as" prong—which the Supreme Court had sharply limited—to include in the ADA's definition of "disability" mental impairments that are not typically thought of as "disabling."[134] After the amendments, it is indisputably clear that an individual would still satisfy the "regarded as" prong even if that person did not *actually* have a disability, but was only *regarded as* having a disability.[135] Crucially, the "regarded as" prong shifts focus from the disabled individual to the negative reactions of others to that person.[136]

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because of poor vision, were not disabled since their vision could be corrected to 20/20 with glasses and they remained generally employable); *see also* RUTH COLKER & PAUL D. GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION 33–36 (8th ed. 2013) (discussing how these cases constricted ADA coverage).

131 For example, Congress expanded "major life activit[y]" to include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102(2)(A) (2012)). It similarly expanded the category of "[m]ajor bodily function[s]," which falls under "major life activity," to include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.*

132 Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, *in* TRANSGENDER RIGHTS, *supra* note 47, at 74, 88.

133 ADA Amendments Act of 2008 § 4(a).

134 *See* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 208 (2010) (explaining how the ADAAA "provides nearly universal nondiscrimination protection under the ADA's 'regarded as' prong and . . . extends reasonable accommodations under the first and second prongs to a broader but not unlimited group of people").

135 ADA Amendments Act of 2008 § 4(a).

136 *See* Yamuna Menon, Note, *The Intersex Community and the Americans with Disabilities Act*, 43 CONN. L. REV. 1221, 1242 (2011) (describing this shift in focus as a

A. Unconstitutionality of the ADA's LGBT Exclusion

Not only does the ADA's exclusion of homosexuals, bisexuals, transsexuals, transvestites, and those with GID that results from mental impairment (the "LGBT exclusion") stigmatize LGBT people,[137] but it also tangibly harms LGBT individuals' ability to seek protections on the basis of disability.[138] While legislative repeal of the ADA's LGBT exclusion would suffice,[139] I submit that pursuing constitutional litigation to invalidate the exclusion is worth the gamble.[140]

Examining the legislative history of the exclusion helps to understand its motivations. On the Senate floor, Senator Armstrong[141] and

"distinguishing feature" of the ADA that "makes it a unique federal non-discrimination statute").

137 *See* Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1122 (2010) (describing the expressive function of federal law concerning messages it sends about disadvantaged groups).

138 Some argue that those with gender dysphoria should be protected under the ADA—even with its current exclusion—as a matter of statutory interpretation. *See, e.g.*, Second Statement of Interest of the United States of America at 2, Blatt v. Cabela's Retail, Inc., No. 5:14-cv-4822-JFL (E.D. Pa. Nov. 16, 2015), http://www.glad.org/uploads/docs/cases/blatt-v-cabelas/blatt-v-cabelas-doj-soi-11-16-15.pdf (arguing that "under a reasonable interpretation of the [ADA], Plaintiff's gender dysphoria falls outside the scope of the GID Exclusion because a growing body of scientific evidence suggests that it may 'result[ ] from [a] physical impairment'"). However, many transgender plaintiffs have had their ADA claims dismissed due to the LGBT exclusion. For example, in *Johnson v. Fresh Mark*, a case in which the plaintiff was fired after her employer informed her that she could not return to work without a doctor's note stating "whether she was male or female and whether there was any reason she should be using the restroom of the opposite gender," the Sixth Circuit affirmed dismissal of the plaintiff's ADA claim based on the statute's LGBT exclusion. 98 F. App'x 461, 461 (6th Cir. 2004). *See also* Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 WL 31098541, at *3 n.47 (E.D. La. Sept. 16, 2002) (observing that the plaintiff with GID was barred from bringing a claim under the ADA); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174, at *6 (N.D. Ohio Nov. 9, 2001) ("The plain language of the [ADA] indicates that transsexualism is excluded from the definition of disability no matter how it is characterized . . . .").

139 *See* Kevin M. Barry, *Disabilityqueer: Federal Disability Rights for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1 (2013) (arguing for the legislative repeal of GID from the ADA's list of excluded impairments).

140 Constitutional litigation always risks creating harmful precedent. *See, e.g.*, Memorandum from the ACLU et al., *Why the Ballot Box and Not the Courts Should Be the Next Step on Marriage in California* 3 (May 2009), https://www.aclu.org/files/pdfs/lgbt/ballot_box_20090527.pdf (arguing that federal constitutional litigation challenging Proposition 8 was too risky since "[a] loss would likely set back the fight for [same-sex] marriage nationwide, and hurt LGBT parents, employees, and students all over America"). Since explicit exclusion of LGBT status from statutory causes of action like that in the ADA is rare, the negative ripple effect of a potential loss, even at the Supreme Court, is limited.

141 *See* 135 CONG. REC. 19,853 (1989) (statement of Sen. Armstrong) (explaining that Senator Armstrong "could not imagine the [ADA's] sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content to them or which in the opinion of some people have moral content").

Senator Rudman[142] worried that the ADA might be interpreted to cover mental impairments that have "moral content." Unabashedly homophobic[143] Senator Jesse Helms was more specific. He expressed alarm over the ADA's presumptive coverage of "homosexuals" and "transvestites."[144] To console him, Senator Tom Harkin assured Senator Helms that he did not have to worry, since "behavior characteristics" such as "homosexuality and bisexuality are not disabilities under any medical standards."[145] Senator Helms was not sufficiently soothed. At a time when open declarations of anti-LGBT sentiment were more culturally acceptable,[146] Helms worried that employers would not be able to apply "moral standards" in deciding whether to hire certain employees.[147] His and other Senators' fears over "transvestites" led to the 1989 amendment to the ADA, which prohibits any transgender status that results from mental impairment from receiving protection on the basis of disability.[148]

LGBT rights litigators should invoke the Equal Protection cases[149] that employ what various constitutional law scholars have

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142 *See id.* 19,896 (statement of Sen. Rudman) ("A diagnosis of certain types of mental illnesses is frequently made on the basis of a pattern of socially unacceptable behavior . . . . In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition . . . .").

143 *See, e.g.*, Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 266 (2013) ("Senator Jesse Helms (R-NC) thundered that gays 'seek to force their agenda upon the vast majority of the American people who reject the homosexual lifestyle.'" (citing 142 CONG. REC. S10068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms))); David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326, 327 n.2 (2012) ("[D]uring debates on the Defense of Marriage Act in 1996, anti-gay Senator Jesse Helms quoted an unnamed Baptist minister when he used the phrase 'Adam and Eve not Adam and Steve' on the Senate floor."); Sara K. Rankin, *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 66 RUTGERS L. REV. 563, 590–91 (2014) ("Not only should Congress discredit such manufactured evidence of anti-gay violence, Senator Helms opined, but it should recognize homosexuals as the perpetrators of crimes instead of as potential victims.") (citing 136 CONG. REC. 1761 (1990) (statement of Sen. Helms)).

144 135 CONG. REC. S10765 (daily ed. Sept. 7, 1989) (statement of Sen. Helms).

145 *Id.* at S10786 (statement of Sen. Harkin).

146 *See* Mark McCormack, *The Rise and Fall of Homophobia*, *in* THE DECLINING SIGNIFICANCE OF HOMOPHOBIA: HOW TEENAGE BOYS ARE REDEFINING MASCULINITY AND HETEROSEXUALITY 57 (2012) (arguing that homophobia peaked in the 1980s because of the AIDS crisis, resurging conservative politics, and the rise of the religious right).

147 L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 540 n.29 (2009) (citing 135 CONG. REC. 19,863–64, 19,870, 19,884 (1989)).

148 135 CONG. REC. 19,864, 19,884, 19,933 (1989). Senator Armstrong introduced Amendment No. 722, which comprised a list of excluded mental impairments—among them, "gender identity disorders." *Id.* at 19,884.

149 *E.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

termed "rational basis with bite"[150] to argue that the ADA's LGBT exclusion is unconstitutional.[151] As Russell Robinson argues, when read together, *Romer v. Evans*,[152] *Lawrence v. Texas*,[153] *United States v. Windsor*,[154] and *Obergefell v. Hodges*[155] "effectively announce that sexual orientation enjoys a tier of its own" in equal protection analysis.[156] Gay rights advocates should capitalize on and strengthen this tier in constitutional doctrine—and integrate transgender individuals into it[157]—through challenging the ADA's exclusion of LGBT individuals.

Under Robinson's framework, two versions of animus—a "thick" and "thin" one—characterize the Court's sexual orientation jurisprudence.[158] Under the thick version, LGBT rights litigators can avail themselves of the heightened scrutiny that sexual orientation classifications have received.[159] The thick version of animus captures

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[150] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 749–66 (3d ed. 2009) (discussing review of gender classifications); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 495–99 (6th ed. 2009) (discussing cases that apply rational basis review to laws touching upon gender and sexual orientation); Cass R. Sunstein, *The Supreme Court, 1995 Term–Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62–63 (1996) (describing *Cleburne*, *Romer*, and *Moreno* as rejecting the extreme "belief that members of the relevant group are not fully human"). This characterization indicates that these are the main cases in which the Court applied the typically deferential rational basis review to invalidate state action.

[151] I acknowledge the irony of this strategy in the greater context of this Note: While I advise queer plaintiffs to invoke the ADA to resist self-identification in stable personhood categories, I seem to have no problem entrenching those very same categories through constitutionally challenging the ADA's LGBT exclusion. I respond with two points: First, since courts have interpreted the ADA's LGBT exclusion to bar myriad queer plaintiffs from ADA coverage, *see supra* note 138, I must address the exclusion through either constitutional challenge or legislative repeal to make the argument I want to make in this Note. Second, after the ADA is rid of its LGBT exclusion, queer plaintiffs need not invoke the personhood categories reified by the constitutional litigation I advocate here; indeed, I support the ADA as a tool precisely because it minimizes the importance of these categories.

[152] 517 U.S. 620 (1996).

[153] 539 U.S. 558 (2003).

[154] 133 S. Ct. 2675 (2013).

[155] 135 S. Ct. 2584 (2015).

[156] Robinson, *supra* note 62, at 165.

[157] This integration makes sense normatively, since "homophobia and transphobia are tightly intertwined" and "antigay bias so often takes the form of violence and discrimination against those who are seen as transgressing gender norms." *See* Shannon P. Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, *in* TRANSGENDER RIGHTS, *supra* note 47, at 141–42 (discussing the positives and negatives of merging transgender issues with gay issues).

[158] Robinson, *supra* note 62, at 185.

[159] Even if the Court has not explicitly stated that sexual orientation classifications receive heightened scrutiny, it has shown its receptivity to this claim in practice. *See id*. at 165–66 (discussing the heightened equal protection standard applied in the Court's sexual orientation cases); *see also* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484

"antigay stereotyping and implicit and structural biases against LGBT sexuality and identity"[160] within its ambit. An important illustration of the thick version is Justice Kennedy's analysis in *Obergefell*, which allowed that "reasonable and sincere" people can oppose same-sex marriage in "good faith."[161] Through this language, Justice Kennedy clearly disavows the claim that same-sex marriage opponents are bigots.[162] Robinson explains that, through this analysis, *Obergefell* "breaks new ground" in recognizing as constitutionally suspect prejudice that—even if not "based on hatred"—nonetheless unfairly disadvantages LGBT people.[163]

That the ADA retained its exclusion of LGBT individuals,[164] even after Congress expanded the ADA's definition of disability to include conditions not typically thought of as disabling through the ADAAA,[165] should satisfy the "thick" version of animus. The ADA's legislative history shows that Congress intended the statute to prohibit discrimination against persons with impairments that invoke fear and discomfort in others and against those who have no impairment but are only "regarded as" having one.[166] Through the ADAAA, Congress reaffirmed the ADA's foundation on the social model of disability, as demonstrated by the fact that the ADA has recently been interpreted to cover disabilities that are *nonexistent*.[167] This broad coverage belies any benign justification for excluding LGB status from

(9th Cir. 2014) (holding that, in the Ninth Circuit, *Windsor* compels heightened scrutiny for sexual orientation classifications).

160 Robinson, *supra* note 62, at 186. *Cf.* Castaneda v. Partida, 430 U.S. 482, 496, 501 (1977) (overturning the disproportionate exclusion of Mexican-Americans from juries); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210–11 (1973) (holding that a school system with a history of intentional segregation has the burden of showing that present segregation is neither intentional nor stemming from past acts). Both *Castaneda* and *Keyes* show how equal protection doctrine has the potential to "lift its suspicious gaze beyond caste-like oppression to perceive and strike down evolving forms of discrimination." Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1822 (2012).

161 Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) ("Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.").

162 Robinson, *supra* note 62, at 192.

163 *Id.*

164 42 U.S.C. § 12211 (2012).

165 *See* Barry, *supra* note 134, at 208 (explaining how the ADAAA expanded accommodations availability under the first and second prongs as well as coverage under the "regarded as" prong).

166 *See* Levi & Klein, *supra* note 132, at 88–89.

167 *See* 42 U.S.C. § 12102(3)(A) (2012) (stating that a person is covered under the "regarded as" prong even if the impairment does not substantially limit or is "perceived," not "actual").

the ADA on the grounds that LGB status is not tantamount to disease.

Unfortunately, there is limited authority to insist on applying the "thick" version of animus in this way. Without the thick version, advocates would be left to argue under the "thin" version that is characterized by the typically deferential rational basis standard.[168] It is unclear whether one can credibly argue that the thin version of animus, which is characterized by "active hostility,"[169] is satisfied with respect to the ADA's exclusion of LGB individuals. Senator Helms's comments linking homosexuality to drug addiction[170] are nasty, to be sure, but the fact that homosexuality and bisexuality were excluded on the ostensible grounds that they do not constitute impairments suggests that Congress's motives for excluding LGB status from the ADA were benign.[171] Traditionally, these types of seemingly incidental group-based exclusions from legislatively conferred benefits have not sufficed to constitute an Equal Protection violation.[172]

While the case for the unconstitutionality of excluding LGB individuals under the "thin" version is weak, the argument with respect to transgender individuals is strong.[173] Congress excluded transvestites, transsexuals, and those with nonphysical GID (the "transgender exclusion") from the ADA through an explicit amendment that has documented reliance on moral disapproval.[174] Senator Helms's ratio-

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[168] *See* Robinson, *supra* note 62, at 164 (citing Williams v. Lee Optical of Okla., Inc., 483, 488–89 (1955)) ("As a general matter, the Court subjects laws to a minimum rationality test, which merely asks whether the law reasonably advances a legitimate state interest. Government enjoys wide latitude in this domain, and the Court almost always upholds such laws.").

[169] *Id.* at 185–86.

[170] *See* 135 CONG. REC. 19,865 (1989) (statement of Sen. Helms). Senator Helms objected to ADA coverage of five groups: "homosexuals"; "transvestites"; illegal drug users and alcoholics; "[p]eople who are HIV positive or have active AIDS disease"; and those with "psychosis, neurosis, or other mental, psychological disease[s] or disorder[s]," namely, pedophilia, schizophrenia, kleptomania, manic depression, intellectual disabilities, and psychotic disorders. *Id.* at 19,863–66.

[171] The legislative history of the pre-amended ADA supports this benign characterization. In the House version of the bill, the text separates the list of excluded mental impairments into two separate sections: "Homosexuality and Bisexuality" (non-impairments) and "Certain Conditions" (impairments listed in the DSM-III-R). H.R. REP. NO. 101-596, at 51 (1990) (Conf. Rep.).

[172] *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (holding that a state disability insurance program's provision that excluded benefits for disability resulting from normal pregnancy did not violate the Equal Protection Clause).

[173] LGBT advocates could bring constitutional litigation challenging the transgender exclusion, while leaving the exclusion of LGB individuals for legislative repeal. This approach would create constitutional antidiscrimination precedent with respect to transgender individuals, which is currently lacking (at least at the Supreme Court level).

[174] *See supra* notes 141–48 and accompanying text (quoting the congressional record from the ADA's legislative history to establish moral disapproval as the primary

nale for vigorously supporting this amendment is precisely the type of evil that the "regarded as" prong was meant to address. Consider this comment:

> 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 exclude transvestites? How did you get into this business of classifying people who are HIV positive . . . 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.[175]

Outright hostility toward transgender people and those living with HIV motivated the ADA's transgender exclusion when Senator Helms made this comment in 1989.[176] While Congress ultimately rejected attempts to exclude HIV status from ADA coverage based on moral disapproval,[177] that moral disapproval remains codified in federal law through the ADA's transgender exclusion. Because the Supreme Court has declared, in the years since the passage of the ADA, that moral disapproval of this type does not satisfy rational basis review,[178] Senator Helms's concerns for the ability of employers to screen potential employees for appropriate moral standards is not only *not* a justification for excluding transgender individuals, but also affirmative evidence of the exclusion's constitutional illegitimacy.[179]

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justification for the ADA's transgender exclusion). Jennifer Levi, who directs the GLBTQ Legal Advocates & Defenders' (GLAD's) Transgender Rights Project, has commented that, given the "rank animus" behind it, the ADA's transgender exclusion "serves to marginalize and stigmatize a minority group that the DOJ has recognized needs and deserves legal protections." Chris Johnson, *DOJ Slammed for Ducking on Trans Exclusion in ADA*, WASHINGTON BLADE (July 27, 2015, 6:17 PM), http://www.washingtonblade.com/2015/07/27/doj-slammed-for-ducking-on-trans-exclusion-in-ada.

175 135 CONG. REC. 19,866, 19,870 (1989).

176 By "changing nearly everything about the definition of disability *except* the ADA's list of exclusions," the Congress that passed the ADAAA in 2008 appeared to ratify the "moral disapprobation" against transgender individuals. Barry, *supra* note 139, at 5.

177 *See* Bragdon v. Abbott, 524 U.S. 624, 644–45 (1998) (discussing Congress's intent to cover asymptomatic HIV under the ADA). Apparently, an employer's potential moral disapproval of those living with HIV was a reason for inclusion, not ostracism. *See* Clarke, *supra* note 43, at 41 (describing the "internalized stigma" of those living with HIV as a "reason for protection" under ADA).

178 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634 (1996) (stating that a law "born of animosity" towards gays and lesbians cannot be said to further a legitimate government interest).

179 That the ADA's transgender exclusion is inconsistent with Congress's primary intent in passing the statute should arouse judicial suspicion. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("In determining whether a law is motivated[sic] by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration.") (quoting *Romer*, 517 U.S. at 633).

B. Protecting Those Outside Stable Categories

Eliminating the ADA's LGBT exclusion would permit queer people to access important antidiscrimination remedies that would probably be otherwise unavailable.

The facts alleged in *Blatt v. Cabela's Retail, Inc.*, described in the Introduction of this Note, demonstrate how the ADA has unique potential to meet the needs of queer plaintiffs. Through its rejection of protection based on established parameters of personhood in favor of protection based on a socially disabling condition, the ADA has a distinct advantage vis-à-vis Title VII's sex discrimination provision and the Equality Act since it does not require Blatt to self-identify in any political category—male, female, lesbian, gay, bisexual, or transgender[180]—in order to invoke antidiscrimination protection.[181]

For a plaintiff to demonstrate she was "regarded as" having a disability under the ADA,[182] she must prove that she had a nonlimiting impairment that the defendant erroneously believed substantially limited a major life activity.[183] In contrast to the medical model of disability, the social model that characterizes the ADA draws focus away from one's body parts and desires to change those body parts, which has been a maddeningly constant source of discussion in transgender rights cases.[184] If Blatt does not want or cannot afford to change her

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[180] While Blatt happens to identify as transgender, Plaintiff's Memorandum, *supra* note 2, at 3, I maintain that this self-identification is emphatically irrelevant to her ability to bring a successful ADA claim—unless Blatt wishes to procure a reasonable accommodation, which requires a showing of "actual" disability. *See infra* notes 195–98 and accompanying text (positing that at least some transgender individuals could succeed in demonstrating "actual" disability to procure reasonable accommodation under the ADA).

[181] As Blatt's experience shows, homophobia and transphobia are often inextricably linked. *See* Minter, *supra* note 157, at 158 ("Often it is nearly impossible to distinguish between discrimination based on gender identity and sexual orientation, because so much of it turns on ideas of how men and women should act." (internal citations omitted)). By focusing on how defendant-employers "regard[ ]" employees as impaired, 42 U.S.C. § 12102(1)(C) (2012), the ADA accounts for this reality: To recover, queer plaintiffs need not disentangle one form of identity-based bias from the other.

[182] 42 U.S.C. § 12102(1)(C).

[183] Keyes v. Catholic Charities of the Archdiocese of Phila., 415 F. App'x 405, 410 (3d Cir. 2011). While the ADA requires that the actual or perceived impairment affect a major life activity, 42 U.S.C. § 12102(1)(A) (2012), the statute's implementing regulations specify that the disability need not be permanent. Rather, the disability could last for a time as short as six months or possibly even less. 29 C.F.R. § 1630.2(j)(1)(ix) (2011).

[184] *See* Marybeth Herald, *Explaining the Differences: Transgender Theories and Court Practice*, *in* QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 187, 188–201 (Scott Barclay et al. eds., 2009) (surveying cases in which courts treated the functioning of a transgender person's anatomy as dispositive in adjudicating that person's legal claim); Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, *in* TRANSGENDER RIGHTS, *supra* note 47, at 217, 229 (explaining why the "trend in gender rights litigation toward the recognition of gender identity change only

anatomy, a disability paradigm would still protect her, whereas protection on the basis of transgender status might not.[185] And in contrast to other frameworks of antidiscrimination, disability law allows mutability.[186] Thus, if Blatt wore feminine attire only occasionally and freely at her own whim, her claim to ADA protection would not be weakened.

With respect to the requirement that the extant or "regarded as" disability "substantially limit" a "major life activity,"[187] LGBT plaintiffs can assert that their workplace colleagues and supervisors regarded their queer identities as substantially impairing them from interacting with others, reproducing, and/or functioning adequately in social and occupational spheres.[188] The Supreme Court has held that reproduction and "the sexual dynamics surrounding it" are "major life activit[ies]" in terms of the ADA.[189] Blatt can point out that her employer falsely believed that she had a mental condition that substantially impaired several of her major life activities—specifically, her ability to think coherently and interact with others. This misperception is evidenced by the fact that her employer kept her secluded from

in the context of medicalization" is problematic for transgender people who do not want or cannot afford surgery).

185 *See* Spade, *supra* note 184, at 229–30 (noting how those without reconstructive surgery will remain unprotected when the legal focus is on the functioning of reproductive organs).

186 *See* Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 130–35 (2013) (surveying post-ADAAA cases in which courts recognized temporary pregnancy-related conditions as disabilities). For a discussion of the ethical and political problems created by arguing for LGB rights based on immutability, see Edward Stein, *Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 615–27 (2014). *But see* Chandler Burr, *The Only Question that Matters: Do People Choose Their Sexual Orientation?*, LOG CABIN REPUBLICANS, http://www.chandlerburr.com/articles/Burr_White_Paper.html (last visited Oct. 14, 2016) (arguing that the claim that sexual orientation is biologically ordained is both true and of paramount importance in advocating for gay rights).

187 42 U.S.C. § 12102(1)–(3) (2012).

188 Exactly which disabilities queer plaintiffs can argue they were "regarded as" having will depend on the specific facts at issue in each alleged instance of discrimination, so I refrain from offering an exhaustive list here.

189 Bragdon v. Abbott, 524 U.S. 624, 638 (1998). Lower federal courts have consistently strengthened this precedent. *See, e.g.*, Adams v. Rice, 531 F.3d 936, 948 (D.C. Cir. 2008) (relying on *Bragdon*'s holding that the "life activity of engaging in sexual relations" is recognized under the ADA); Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 384 (3d Cir. 2004) (interpreting *Bragdon* to hold that a major life activity "need not constitute volitional or public behavior; . . . need not be an activity that is performed regularly or frequently; but . . . does have to have importance to human life comparable to that of activities listed in the regulatory examples"); Furnish v. SVI Sys., Inc., 270 F.3d 445, 449 (7th Cir. 2001) (noting that the Supreme Court considers reproduction a "major life activity" under the ADA).

other employees.[190] Blatt could also argue that her denial of a promotion was premised on the Maintenance Manager erroneously assuming that she could not think coherently, as evidenced by the Maintenance Manager's referring to Blatt as a "confused sicko."[191] Courts have consistently deemed these types of activities to satisfy the "major life activity" requirement of the ADA.[192]

A disability rights framework also has the potential to ensure accommodations for some queer people in situations in which a traditional antidiscrimination framework would not. Under the amended ADA, a reasonable accommodations claim is only available if the plaintiff has an actual impairment, so plaintiffs who rely solely on the "regarded as" prong cannot request accommodations under the statute.[193] Thus, transgender plaintiffs would have to argue that they are actually disabled to seek accommodations, while LGB plaintiffs would presumably be excluded entirely from this remedy.[194]

For those transgender people who are able and willing to prove they are disabled in a sufficiently "actual" way,[195] an accommodations framework offers important advantages compared to Title VII and the Equality Act. For example, a prohibition of discrimination based on transgender status would not help a transwoman attempting to secure medical coverage for a trachea shave[196] if the health insurer did not cover trachea shaves for anyone else, whereas an accommodations framework could. The accommodations framework also potentially offers plaintiffs like Blatt a legal avenue to insist on appropriate bath-

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190 Plaintiff's Memorandum, *supra* note 2, at 40–41.

191 *Id.* at 41.

192 *See, e.g.*, McAlindin v. City of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that interacting with others constitutes a major life activity); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (holding that thinking constitutes a major life activity).

193 42 U.S.C. § 12201(h) (2012).

194 *See* 42 U.S.C. § 12211(a) (stating that homosexuality and bisexuality are not disabilities under the ADA). I support modifying the ADA to allow plaintiffs to pursue reasonable accommodations under the "regarded as" prong. For an explanation why the current limitation betrays the social model and is bad policy more generally, see Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 216–18 (2012).

195 The success transgender plaintiffs have had in pursuing coverage under state disability laws, *see supra* note 34 (collecting such cases), suggests that at least some of these individuals could prove they are "actually" disabled to find coverage under the ADA as well.

196 A trachea shave is "one of the most common surgical procedures for transsexuals." Andrea James, *Trachea Shave*, TRANSSEXUAL ROAD MAP, http://www.tsroadmap.com/physical/face/trachea.html (last updated May 31, 2015).

room access.[197] While a person must show some limitation of a bodily function or life activity to prove denial of a reasonable accommodation, the ADAAA makes clear that this showing is not supposed to be demanding.[198] Through the ADA's asymmetric approach to protection,[199] reasonable accommodation claims avoid what some consider the most formidable obstacle that confronts plaintiffs in employment discrimination cases: the demand for comparator evidence.[200] And unlike the traditional antidiscrimination model, the accommodations framework does not require plaintiffs to shoehorn society-wide systems that disadvantage minority populations into an oversimplified perpetrator/victim paradigm.[201]

Kate Lynn Blatt's experience with discrimination only highlights the story of one queer individual who could potentially recover under the ADA. Other stories wait to be told.

C. Toppling Respectability to Transform LGBT Politics

A disability rights approach grounded in the social model has a distinct advantage over other modes of LGBT advocacy since it challenges respectability politics.[202]

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[197] *See* Daniella A. Schmidt, Note, *Bathroom Bias: Making the Case for Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155, 160 (2013) (calling on transgender people to use disability law to access gendered bathrooms).

[198] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008) ("[T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.").

[199] *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 879 (2008) ("The ADA protects only a subgroup of the population—those who are disabled—rather than protecting everyone along an axis of his or her identity (as Title VII does for race or sex) or even protecting the most able and the least able.").

[200] *E.g.*, Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1367 (2012). The comparator requirement—the need for the plaintiff to prove that but for her protected status she would not have suffered the adverse employment action—severely diminishes plaintiffs' chances of success in most discrimination cases, since adequate comparators are rarely available in the modern-day workplace. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 751–64 (2011) (demonstrating this doctrinal trend).

[201] *See* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 42–43 (2015) (describing typical antidiscrimination discourses as targeting "aberrant individuals with overtly biased intentions" while ignoring and even validating "all the daily disparities in life chances that shape our world").

[202] *See* BEVERLY SKEGGS, FORMATIONS OF CLASS AND GENDER: BECOMING RESPECTABLE 118 (1997) (identifying respectability as one way that "sexual practice is evaluated," and "distinctions [are] drawn, legitimated and maintained"). By way of analogy, in the context of racial justice advocacy on behalf of African-Americans, proponents of respectability politics support "taking care in presenting oneself publicly," avoiding saying or doing "anything that will reflect badly on blacks . . . or needlessly alienate potential allies," and "focusing more on those whose victimization is clearest and likeliest to elicit the greatest sympathy from the general public." Randall Kennedy, *Lifting*

There has been a long and unfortunate history of hierarchy and exclusion in the LGBT rights movement, which has taken on both intentional and inadvertent forms. A few examples: During the AIDS epidemic, some gays who practiced traditional monogamous sexuality embraced sex-negative and homophobic narratives of the epidemic to "blame[ ] gay and bisexual men's sexual recklessness for its spread" and "adopted the epidemic as a catalyst for 'civilizing' those men."[203] With the recent advent of the prophylactic drug Truvada,[204] this discourse of shame and discipline has resurfaced.[205] The "It Gets Better Project," a YouTube campaign started in 2010 to prevent suicide among LGBT youth by having gay adults convey the message that these teenagers' lives will improve,[206] unwittingly alienated LGBT youth of low socioeconomic status by suggesting that "the only way to achieve safety is to escape to safe locations," while "utterly failing to account for poverty which would preclude the financial ease implicit in such geographic escapism."[207] Plaintiff selection in prominent same-sex marriage cases has followed this pattern. As Ariel Levy observed of the celebrated plaintiff Edith Windsor, "[she] doesn't 'look gay'. . . . Her pink lipstick and pearls . . . [made] it easier . . . for people across the country to feel that they understood her, that she embodied values they could relate to."[208]

If a litigation strategy intended to advance the rights of gays requires placing someone who doesn't "look gay" at its focal center, it

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as We Climb: A Progressive Defense of Respectability Politics, HARPER'S MAGAZINE, Oct. 2015, at 24, 26, https://harpers.org/archive/2015/10/lifting-as-we-climb.

203 Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 425 (2012). *See also* Gayle S. Rubin, *Thinking Sex, Note for a Radical Theory of the Politics of Sexuality*, *in* SEXUALITY, GENDER, AND THE LAW 551, 555 (William N. Eskridge, Jr. & Nan D. Hunter eds., 2d ed. 2004) (diagramming hierarchies that validate "sanctifiable, safe, healthy, mature, legal or politically correct" sex and stigmatize "bad, abnormal, unnatural, [and] damned" sex).

204 *What is TRUVADA for PrEP?*, GILEAD SCI., INC., https://start.truvada.com (last visited Oct. 24, 2016) (describing how Truvada can be used to help reduce the risk of HIV-1 infection).

205 *See, e.g.*, Christopher Wallenberg, *Even at 80, Activist and Writer Larry Kramer Isn't About to Play Nice*, BOSTON GLOBE, June 29, 2015, at G1, https://www.bostonglobe.com/arts/2015/06/28/even-activist-and-writer-larry-kramer-isn-about-play-nice/lkPTxOZRgaX5NSlgpgs02L/story.html (quoting activist Larry Kramer as saying that gay men "shouldn't use [Truvada] as an excuse to go back to living the kind of life that got us into all this trouble in the first place").

206 *What is the It Gets Better Project?*, IT GETS BETTER PROJECT, http://www.itgetsbetter.org/pages/about-it-gets-better-project (last visited Oct. 14, 2016).

207 Michael Johnson, Jr., *The It Gets Better Project: A Study in (and of) Whiteness – in LGBT Youth and Media Cultures*, *in* QUEER YOUTH AND MEDIA CULTURES 278, 281 (Christopher Pullen ed., 2014).

208 Ariel Levy, *The Perfect Wife*, THE NEW YORKER, Sept. 30, 2013, at 54, 61, http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife.

may be time to reevaluate the strategy—or at least have a frank discussion about who is truly benefitting from it.[209] In contrast to typical LGBT antidiscrimination models that encourage—if not require—the use of "perfect plaintiffs,"[210] the ADA repudiates exclusionary politics[211] and alleviates the pressure on queer plaintiffs to sufficiently conform to mainstream norms. Because the social model of disability by definition targets a combination of environmental and individual traits,[212] Edith Windsor is, at least theoretically, no more likely to prevail under a social disability rights approach than is a young, flamboyant gay man who cross-dresses in skimpy attire.[213] Under the social model of disability, that one can assimilate to society's norma-

[209] Some in the LGBT community argue that same-sex marriage legalization benefits already-privileged LGBT people, while it ignores—and even affirmatively harms—those LGBT people lower on the social ladder. *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 113–14 (1999) ("Marriage, in short, would make for good gays . . . . Yet the image of the Good Gay is never invoked without its shadow in mind—the Bad Queer . . . ."); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 757, 758 (Mark Blasius & Shane Phelan eds., 1997) ("The moment we argue . . . that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices."); Dean Spade & Craig Willse, *Marriage Will Never Set Us Free*, ORGANIZING UPGRADE (Sept. 6, 2013), http://www.organizingupgrade.com/index.php/modules-menu/beyond-capitalism/item/1002-marriage-will-never-set-us-free ("Legalizing same-sex marriage puts a stamp of 'equality' on systems that remain brutally harmful, because a few more-privileged people will get something from the change.").

[210] *See, e.g.*, Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136, 141, 145–52 (2015) (outlining the "heteronormative and traditional characteristics present in the carefully curated set of *Obergefell* plaintiffs").

[211] As LGBT advocates have responded to the flurry of antitransgender legislation popping up in state legislatures throughout the country, intramovement political exclusion has been acutely prevalent. *See, e.g.*, Walt Heyer, *Drop the T From LGBT*, THE FEDERALIST (Apr. 21, 2016), http://thefederalist.com/2016/04/21/drop-the-t-from-lgbt (arguing that LGB people should disavow the needs of transgender individuals from their political agenda to avoid possible stigma); Qasima Wideman, *Y'All White Queers Better Quiet Down in North Carolina*, THE ADVOCATE (Apr. 6, 2016 6:23 AM), http://www.advocate.com/commentary/2016/4/06/yall-white-queers-better-quiet-down-north-carolina ("White trans women affiliated with big-name nonprofits . . . were allowed to speak briefly on the ways the bill would affect them. . . . These women bragged about how well they passed as cis and implored the General Assembly to admit them into the cult of white womanhood . . . .").

[212] *See* Shelley L. Tremain, *On the Government of Disability*, 27 SOC. THEORY & PRAC. 617, 630 (2001) ("In the terms of the social model . . . disability is a form of social disadvantage that is imposed on top of one's impairment.").

[213] *See* Levy, *supra* note 208, at 61 ("When selecting the ideal plaintiff, one experienced movement attorney told me, 'Women are better than men, post-sexual is better than young.'"). As Roberta Kaplan, the lawyer who argued Windsor's case at the Supreme Court, wrote: "Even though she was a lesbian, as an older woman, she was less threatening to social conservatives than . . . a young, sexually active gay man . . . . [U]pon seeing her for the first time, your mind would not necessarily turn to sex. And I wanted to keep it that

tive ideal more readily than the other suggests something wrong with the normative ideal, not with either queer individual.

Objections to identifying LGBT people as disabled—lest society view this identification as conceding that LGBT people are defective—reinforce this exclusionary pattern. One might oppose a disability rights approach out of fear that judges, juries, legislators, and the public more generally may fail to grasp the ADA's embrace of the social model that places responsibility for an individual's disability on society rather than on the disabled individual. In a world in which the media oversimplifies issues into "black and white sound-bytes,"[214] is it worth it to risk relegating LGBT identity to the status of disability?

To answer this question in the negative threatens to undo the achievements of the social model of disability by restoring the medical model, which reinforces the idea that disabled status is inherently shameful. A highly heterogeneous group, disabled individuals have long been denied equal rights based on irrational fear and prejudice[215] that bears striking resemblance to the "medical" propaganda that has historically been used to subordinate LGBT individuals.[216] By allying ourselves with the disability rights movement through seeking ADA coverage, LGBT individuals can strengthen the social model's cultural dominance and help cast the medical model to the dustbin of history. This will benefit both the queer *and* disabled.

Conclusion

As the LGBT rights movement stands at a crossroads, it behooves movement leaders to take stock of those who will benefit—and be excluded—from advocacy strategies moving forward. While Title VII of the Civil Rights Act has become more protective of LGBT people who identify within the gender binary and whose discrimination results from noncompliance with gender stereotypes, it excludes queer people whose discrimination takes other forms. And

way." Roberta Kaplan, Then Comes Marriage: *United States v. Windsor* and the Defeat of DOMA 122 (2015).

214 *Cf.* Julie M. Spanbauer, *Breast Implants as Beauty Ritual: Woman's Sceptre and Prison*, 9 Yale J.L. & Feminism 157, 204 (1997) (describing unfair media representations of women who suffer harms as a result of undergoing breast augmentation surgery).

215 Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law 45 (2010).

216 *See, e.g.*, *Medical Consequences of What Homosexuals Do*, Family Research Inst., http://www.familyresearchinst.org/2009/02/medical-consequences-of-what-homosexuals-do (last visited Oct. 14, 2016) ("The typical sexual practices of homosexuals are a medical horror story—imagine exchanging saliva, feces, semen and/or blood with dozens of different men each year. Imagine drinking urine, ingesting feces and experiencing rectal trauma on a regular basis.").

while the Equality Act would cover those whose identities are stable as LGBT as politically constructed, it threatens to leave out individuals like Brendan Jordan and Alok Vaid-Menon, whose queer identities are more dynamic and less likely to appeal to the average straight, white, male congressman[217] or federal judge.[218]

The ADA can and should fill these gaps. The vast antidiscrimination statute, which Congress reaffirmed as defining "disability" through the social model in the ADAAA, enables plaintiffs to combat their discrimination without labeling it within the parameters of mainstream political discourse. By bringing constitutional litigation to challenge the ADA's LGBT exclusion, advocates can fortify the queerness that many feel the LGBT rights movement has abandoned[219] and assist disability rights advocates by strengthening the cultural dominance of the social model.[220]

One might criticize this Note on the grounds that while I emphasize the political and judicial limitations that threaten to exclude certain queer people from Title VII and Equality Act coverage, I do not sufficiently grapple with those same practical limitations with respect to the ADA. One might even argue that using the ADA in the manner I prescribe is even *more* practically unfeasible, since it would likely get pushback from LGBT rights organizations. I offer two points in response: First, I welcome efforts to expand existing antidiscrimination doctrine to cover more queer individuals. Indeed, these efforts are proving somewhat successful with respect to Title VII.[221] The ADA would then simply provide one more means of redress with comparative advantages, like the ability to articulate theories of discrimination outside a gendered paradigm for all plaintiffs and request

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217 *See* Philip Bump, *The New Congress Is 80 Percent White, 80 Percent Male and 92 Percent Christian*, WASH. POST (Jan. 5, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/01/05/the-new-congress-is-80-percent-white-80-percent-male-and-92-percent-christian (analyzing the demographics of Congress).

218 *See* Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167 (2013) (explaining that, despite the "increasing number of female and minority judges," white males "still occupy a majority of judgeships in American courts").

219 *See* Elizabeth A. Armstrong, *From Struggle to Settlement: The Crystallization of a Field of Lesbian/Gay Organizations in San Francisco 1969–1973*, *in* SOCIAL MOVEMENTS AND ORGANIZATION THEORY 161, 161 (Gerald F. Davis et al. eds., 2005) ("Many scholars have remarked upon the transformation of gay liberation from a radical movement into one focused on identity building and gay rights.").

220 *See* Levi & Klein, *supra* note 132, at 75 (calling on the transgender community to "work with others both inside and outside the disability community to eliminate the stigma associated with disability" and ensure that courts "properly understand and apply disability antidiscrimination laws").

221 *See supra* Part I (discussing the doctrinal development of the sex discrimination prohibition of Title VII to cover LGBT individuals).

reasonable accommodations for transgender plaintiffs who can demonstrate "actual" disability.[222] Second, pragmatic considerations aside, the ADA still has an advantage over Title VII and the Equality Act, because its foundation on the social model of disability has the potential to transform LGBT politics by toppling its historic emphasis on respectability.[223] In theory, the social model tolerates no hierarchies among queer individuals. LGBT advocates should start working to operationalize that theory into practice through litigation under the ADA.

The goal of this Note has not been to establish precisely which types of adverse treatment could be interpreted as "regarding" a LGBT individual as "substantially impaired" with respect to "major life activities" to find coverage under the ADA. After offering some suggestions through Kate Lynn Blatt's story in Section III.B, I leave that task to future plaintiffs. I decline to assuage "slippery slope" concerns not because I think they aren't legitimate—they are[224]—but because my goal has been to inspire queer plaintiffs to *begin to explore* the metes and bounds of what an antidiscrimination approach grounded in the social model of disability could be, without preemptively demarcating what precisely those metes and bounds should be. Ridding the ADA of its LGBT exclusion will allow the caselaw on viable causes of action under the statute for queer individuals to grow, subject to the judgment of federal courts and possible further clarification from Congress.

One year before the APA removed homosexuality from its list of mental disorders and almost twenty years before the ADA was signed into law, a federal court in our nation's capital prophetically invoked the social model of disability. Citing *Brown v. Board of Education*,[225] that court held that a school board's refusal to educate disabled chil-

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[222] *See supra* Section III.B (discussing advantages of protection under the ADA vis-à-vis Title VII's sex discrimination provision and the Equality Act).

[223] *See supra* Section III.C (characterizing the social model's focus on invidious motives of discrimination's perpetrators rather than on characteristics of discrimination's victims as an implicit repudation of respectability).

[224] *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 40–46 (2006) (arguing that bias in the modern workplace lies beyond the reach of antidiscrimination law's doctrinal and normative resources); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1182–91 (1999) (arguing that treating unconscious bias as illegal discrimination poses the danger "that employers will respond to liability by engaging in inefficiently expensive precautions against the threat of being held liable"). *See generally* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that market competition has greatly reduced indefensible discrimination, that remaining discrimination probably serves some defensible ends, and that discrimination litigation is inefficient).

[225] 347 U.S. 483 (1954) (invalidating racially segregated public schools under the Equal Protection Clause).

dren alongside "normal" kids denied the disabled children their right to equality under the law, and that insufficient school funding did not suffice to justify the exclusionary policy.[226] In the more than forty years since then, the influence of the social model of disability has grown to radically transform what it means to be disabled. It has weakened the societal premium placed on normalcy in favor of a more transformative social justice politics.

The time has come for LGBT people to reclaim disability status—on our own terms.

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[226] Mills v. Bd. of Educ., 348 F. Supp. 866, 874–76 (D.D.C. 1972).