

## ARTICLES

### TRANSGENDER RIGHTS ARE HUMAN RIGHTS: A CONTEMPLATION OF LITIGATION STRATEGIES IN TRANSGENDER DISCRIMINATION CASES

*Ryan K. Blake\**

*“Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights.”*

*- Former Secretary of State Hillary Clinton<sup>2</sup>*

*“Transgender equality is the civil rights issue of our time.”*

*- Former Vice President Joe Biden*

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\* Ryan is an Associate at Reed Smith, LLP, in Philadelphia, Pennsylvania. He would like to thank his former Professor at the University of Pennsylvania, Tobias B. Wolfe, for inspiring him to write this article, and to continue to work as an advocate.

2. Secretary Clinton in her address in Geneva on International Human Rights Day in 2011. The language was likely inspired by another speech given by (then First Lady) Clinton in 1995, at the United Nations Fourth World Conference on Women in Beijing, in which she stated that “human rights are women’s rights and women’s rights are human rights.” Hillary Clinton, Secretary of State, Address at the Geneva Int’l Human Rights Day (Dec. 6, 2011). Hillary Clinton, First Lady, Address at the Fourth Women’s Conference (Sep. 5, 1995). Interestingly, that speech may have been inspired by the writings of Sarah Moore Grimké, an abolitionist who studied the law in secret so that she could better advocate for those suffering discrimination. Grimké is credited with having said “I recognize no rights but human rights –I know nothing of men’s rights and women’s rights.” Letter from Sarah Grimké, Equality of the Sexes, and the Condition of Woman of 1838, Letter 15 (Oct. 20, 1837), Letters to Katherine Beecher, Angelina Grimke, (Nov. 4, 2018), <https://www.stolaf.edu/people/fitz/COURSES/Grimke3.htm> [https://perma.cc/2UHT-CGP5]. Secretary Clinton’s 2011 speech is available at: <https://www.youtube.com/watch?v=WlqynW5EbIQ> [https://perma.cc/ZML2-Y4GW], her 1995 speech is accessible at: <https://www.youtube.com/watch?v=xXM4E23Efvk> [https://perma.cc/24VS-ABHS].

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## I. INTRODUCTION

Words have massive import, even beyond that initially contemplated by the speaker. A statement as simple as “gay rights are human rights” sparked action on an international scale, and changed the global conversation.<sup>3</sup> Former Vice President Biden’s prescient statement may serve as a similar turning point. With each utterance of the phrase, the former Vice President signals not just his continuing support for the transgender community, but his belief that our lawmakers must push for legislation addressing transgender inequality and discrimination. With rumors persisting about a potential 2020 Biden presidential bid, it’s quite possible this statement could become the position of the next presidential administration in two short years.<sup>4</sup>

These quotes serve as a reminder that irrespective of the state of political affairs in America, the pursuit of equality in the face of discrimination is a ceaseless endeavor. Two of the most important and influential politicians (and former law students) of the last fifty years are actively advocating for transgender rights, and have been doing so for years, sometimes in the face of adversity in the form of hostile Congresses or ‘nasty’ partisan rhetoric. Advocates currently encounter an unyielding Trump Administration, which has tried to reinstitute discriminatory policies in multiple areas, and revoke Obama era guidances that were an important step in validating the transgender lived experience.<sup>5</sup>

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3. A little over a week after the speech, the Office of the High Commissioner for Human Rights (United Nations) released its first report on the human rights of LGBT persons. At the same time, Navi Pillay of South Africa, the U.N. High Commissioner for Human Rights, appealed to U.N. Member States to decriminalize homosexuality and enact comprehensive anti-discrimination laws. Clinton’s speech was even contemplated by the American Psychological Association. See Juneau Gary & Dr. Neal Rubin, *UN MATTERS: Are LGBT rights human rights? Recent developments at the United Nations*, PSYCHOL. INT’L (June 2012), <http://www.apa.org/international/pi/2012/06/un-matters.aspx> [<https://perma.cc/59MM-TKZJ>].

4. See, e.g., Edward-Isaac Dove, *Biden sees one Democrat who can beat Trump in 2020: Joe Biden*, POLITICO (Nov. 10, 2017), <https://www.politico.com/story/2017/11/10/joe-biden-2020-trump-244757> [<https://perma.cc/YZN6-9632>].

5. See, e.g., Emily Tillett, *Trump administration reverses Obama-era protections for transgender prisoners*, CBS NEWS (May 14, 2018), <https://www.cbsnews.com/news/trump->

There has been general confusion during the presidential administration transition over treatment of transgender discrimination. The Obama Administration's Departments of Education and Justice first issued a policy letter (from Education) and then a significant guidance that created new federal legal protections for transgender students – requiring schools to use the names and pronouns consistent with students' gender identity, and mandating access to sex-segregated activities and facilities consistent with students' gender identity. About a month into the Trump Administration, the 2015 letter and 2016 guidance were rescinded, and the Administration has, rather disconcertingly, remained silent on the effect of Title IX itself.<sup>6</sup> This change in federal policy ended challenges to the guidance that were ongoing in Texas and Nebraska.<sup>7</sup>

Further confusion arose after President Trump's tweets announcing the reinstatement of the military "trans ban." Justification for this shift in policy relied upon tired and antiquated tropes situated firmly in unhealthy, heteronormative ideas of gender – the same destructive misconceptions that held women out of combat until two years ago.<sup>8</sup> Fifteen State Attorney Generals filed an amicus brief on behalf of the plaintiffs in *Doe et al v. Trump et al*,<sup>9</sup> citing then Secretary of Defense Ash Carter's determination that the inclusion of transgender individuals would not undermine the military's readiness or effectiveness.<sup>10</sup> Rebuke of the President's statements has been

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administration-reverses-obama-era-protections-for-transgender-prisoners/  
[<https://perma.cc/PXG7-QE8J>] ("Trump administration is rolling back an Obama-era protection for the LGBTQ community with a reversal of guidelines designed to defend transgender inmates from being harassed, assaulted or sexually assaulted while in prison.").

6. Andrew Mytelka, *Trump Administration Rescinds Obama-Era Guidance on Transgender Students*, CHRONICLE HIGHER EDUC. (Feb. 22, 2017), <https://www.chronicle.com/blogs/ticker/trump-administration-rescinds-obama-era-guidance-on-transgender-students/117025> [<https://perma.cc/9Y4C-S587>].

7. "Dear Colleague" Letter from Sandra Battle, Acting Asst. Sec'y for Civil Rights, & T.E. Wheeler, II, Acting Asst. Att'y Gen. for Civil Rights (Feb. 22, 2017). The 2017 guidance was one of the Trump Administration's first forays into education policy. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016); *Texas v. United States*, 679 F. Appx 320 (5th Cir. 2017); *Nebraska v. United States*, No. 4:16-cv-03117 (D. Neb. July 8, 2016) (dismissing without prejudice); *See generally* Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1 (2016); Kristi L. Bowman, *A Counterfactual History of Transgender Students' Rights*, 20 U. PA. J. CONST. L. ONLINE 3 (2018).

8. Bill Chappell, *Pentagon Says Women Can Now Serve In Front-Line Ground Combat Positions*, NPR (Dec. 3, 2015), <https://www.npr.org/sections/thetwo-way/2015/12/03/458319524/pentagon-will-allow-women-in-frontline-ground-combat-positions> [<https://perma.cc/CAU6-3L3F>] (quoting Ash Carter as saying that the military must draw from the "broadest possible pool of talent"). This may have foreshadowed Carter's announcement the following year that the 'trans military ban' would be lifted.

9. *Doe et al. v. Trump et al.*, No. 17-5267, 2017 WL 6553389, U.S. App. D.C. (Dec. 22, 2017).

10. Ash Carter, Secretary of Defense, Dep't of Defense Press Briefing by Secretary Carter on Transgender Serv. Policies in the Pentagon Briefing Room (Jun. 30, 2016) available at: <https://www.defense.gov/News/Transcripts/Transcript->

swift and damning, both in the legal community and in Congress.<sup>11</sup> In *Doe*, Judge Colleen Kollar-Kotelly issued a ruling that enjoins enforcement of two critical sections of the ban. She found that there existed “absolutely no support” for claims that the ongoing service of transgender individuals would have a negative impact on military readiness; in fact, she found that, if anything, there may have been significant evidence that banning such individuals could actually have a negative effect.<sup>12</sup> The judge deemed it necessary to issue a 76-page memorandum accompanying her ruling in which she strongly suggests that the plaintiffs’ constitutional claims were meritorious. The judge did deny the injunction on the ban of funding for medical procedures, including surgery, though it is likely that because military policy will now revert to the pre-Trump-tweet policy, transgender service members will still be able to get all necessary medical care.

The transgender ban’s assumed failure is not the only encouraging victory against transgender discrimination during the Trump Administration.<sup>13</sup> On November 7, 2017, Democrat Danica Roem defeated a 13-term incumbent who, in 2006, referred to himself as Virginia’s “chief homophobe;” Del. Robert G. Marshall had even introduced a “bathroom bill” similar to the controversial North Carolina legislation.<sup>14</sup> Roem’s victory is impressive – but it’s truly groundbreaking that she will be the first person to campaign as, and take office as, openly transgender.<sup>15</sup> While this election result may be the most perfect

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View/Article/822347/department-of-defense-press-briefing-by-secretary-carter-on-transgender-service/.

11. See e.g., S. 1820, 115th Cong. (2017-18) (a bipartisan bill introduced in September that was co-sponsored by the late Senator John McCain). McCain said in a statement that there was “no reason to force service members who are able to fight, train, and deploy to leave the military—regardless of their gender identity.” Jeremy Herb and Dylan Stafford, *McCain on Trump’s transgender military ban: ‘I think they realize they made a mistake’*, CNN (Jul. 27, 2017), <http://www.cnn.com/2017/07/27/politics/mccain-transgender-ban/index.html> [https://perma.cc/ELP9-TWSE].

12. *Doe* at 488.

13. Presumably, pending cases such as *Stone v. Trump*, 280 F.Supp.3d 747 (D.Md. 2017) and *Stockman v. Trump*, No. 17-CV-6516 2018 WL 4474768 (C.D. Cal. Sep. 18, 2018), will rely on the favorable precedent in *Doe*, but it is certainly not a foregone conclusion that these cases will come out similarly. Those cases are each still embroiled in a lengthy discovery process that will likely see many more Motions for a Protective Order filed by the Government.

14. The North Carolina version of the ‘bathroom bill’ has since seen multiple sections repealed. Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina repeals ‘bathroom bill’*, CNN (Mar. 30, 2017), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> [https://perma.cc/ET3C-3G6S].

15. Antonio Olivo, *Danica Roem of Virginia to be first openly transgender person elected, seated in a U.S. statehouse*, WASH. POST (Nov. 8, 2017), [https://www.washingtonpost.com/local/virginia-politics/danica-roem-will-be-vas-first-openly-transgender-elected-official-after-unseating-conservative-robert-g-marshall-in-house-race/2017/11/07/d534bdde-c0af-11e7-959c-fe2b598d8c00\\_story.html?utm\\_term=.090d403f79ca](https://www.washingtonpost.com/local/virginia-politics/danica-roem-will-be-vas-first-openly-transgender-elected-official-after-unseating-conservative-robert-g-marshall-in-house-race/2017/11/07/d534bdde-c0af-11e7-959c-fe2b598d8c00_story.html?utm_term=.090d403f79ca) [https://perma.cc/H7RR-HG84]. A transgender candidate was elected in New Hampshire in 2012 but did not take office, and a

example of karma in recent American politics, it also stands as one success in a series of victories<sup>16</sup> against anti-transgender sentiment in both legislative, and broader political processes.<sup>17</sup>

Despite the best efforts of the Trump Administration to reject progressive and inclusive understandings of gender, conceptions of sex and gender are radically evolving.<sup>18</sup> In fact, more than fifty major companies, representing 2.4 trillion dollars in annual revenue, recently took a stand against the Trump Administration's thinly-veiled attempt to erase transgender identity from existence.<sup>19</sup> Gender identity<sup>20</sup> may be congruent or incongruent with a doctor's

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transgender person served in the Massachusetts legislature in the early 1990s but was not openly transgender while campaigning.

16. This most recent election may not have been the 'blue wave' that some had hoped for – but could perhaps more appropriately be termed a 'rainbow wave' as multiple LGBT candidates were elected to public office. See, e.g., Hayley Garrison Phillips, *Monika Nemeth Makes History as the First Transgender Person to be Elected to a City Position in DC*, WASHINGTONIAN (Nov. 7, 2018), <https://www.washingtonian.com/2018/11/07/monika-nemeth-anc-first-trans-person-elected-to-washington-dc-office-november-2018-elections/> [<https://perma.cc/7H9D-BDAJ>]; Andrew Kenney, *Colorado's first transgender legislator: How Brianna Titone flipped a Republican district*, DENVER POST (Nov. 10, 2018), <https://www.denverpost.com/2018/11/10/brianna-titone-colorado-first-transgender-lawmaker/> [<https://perma.cc/MKJ2-HGQY>] (Ms. Titone explains that she was inspired by the victory of Danica Roem, which gave her “the courage to say ‘[s]omeone else has done this, and now I have a chance to do this, too.’”); Nic Garcia, *Colorado just elected Jared Polis the nation's first openly gay governor*, DENVER POST (Nov. 9, 2018) <https://www.denverpost.com/2018/11/06/jared-polis-colorado-first-gay-governor/> [<https://perma.cc/95UQ-HYUE>]; Liam Stack, *Christine Hallquist on Her Primary Victory: 'It Gives the Transgender Community Hope'*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/politics/transgender-christine-hallquist-vermont.html> [<https://perma.cc/U2ZV-TLLD>] (Ms. Hallquist made history as the first transgender nominee for governor from either major political party, but went on to lose to her Republican incumbent opponent).

17. See Erica L. Green, Katie Benner, and Robert Pear, *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/WQ5W-7Y67>] (discussing a recently uncovered memorandum by the Department of Health and Human Services, which argues that “key government agencies” must adopt an explicit, uniform definition of gender as having a “biological basis” *ie* the genitalia one was born with). Under this approach, sex would be defined as male or female only, based on “biological traits identifiable by or before birth,” and with no ability to correct the designation at any point thereafter (according to a draft of the memo reviewed by The Times). *Id.* The definition would virtually eliminate federal recognition of the estimated 1.4 million Americans who identify as transgender. *Id.*

18. See *Transgender, intersex, and gender non-conforming people #WontBeErased by pseudoscience* (Oct. 26, 2018), <https://not-binary.org/statement/> [<https://perma.cc/98VK-DJ7X>] (last visited Nov. 15, 2018). This source is a letter signed by nearly 3,000 scientists, doctors, and healthcare professionals, rebuking the Trump Administration's proposed reversion to antiquated conceptions of gender and sex as “in no way grounded in science,” and rejecting the proposal on the basis of its “scientific and ethical failings.” The letter is still gathering signatures online, and currently includes nine Nobel Laureates.

19. See Michael Nigro, *Apple, Amazon, Facebook and more than 50 other companies sign letter against Trump administration's proposed gender definition changes*, CNBC (Nov. 1, 2018), <https://www.cnbc.com/2018/11/01/companies-sign-letter-against-trumps-proposed->

determination of sex made at the time of birth, which is currently based on the appearance of genitals. In fact, despite regressive attempts to otherwise distill gender into two exclusive boxes, “being transgender is a matter of natural diversity and part of a ‘culturally-diverse human phenomenon.’”<sup>21</sup> Equality for transgender individuals is directly linked to a societal acknowledgment and acceptance of their self-identity, whatever that may be, regardless of whether it fits into the traditional binary conception of gender. The source of much transphobia “is a fear of difference” – cisgender individuals may be confused when a transgender person’s outward presentation does not conform to societal expectations, such as their biological sex.<sup>22</sup> The simplistic, fixed/binary view of sex is still broadly enforced by courts, despite mounting scientific and medical evidence to the contrary.<sup>23</sup> This confusion has resulted in a lack of acceptance of the transgender community, which itself is broken into many different self-identifications.<sup>24</sup>

This paper seeks to situate transgender legal advocacy in the context of the current administration, and progressing societal conceptions of gender fluidity. It suggests that transgender advocates should focus on emphasizing the humanity of their clients, accurately representing the lived truth they experience by employing a more balanced approach to transgender rights litigation, and affording transgender litigants greater dignity and respect. Additionally, it explores the idea that by focusing on the lived experience of clients, advocacy will range from supporting binary gender expression to refuting the gender/sex binary in its entirety – and that that apparent

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gender-definition-change.html [https://perma.cc/6BPT-TSG3] (opposing “any administrative and legislative efforts to erase transgender protections through reinterpretation of existing laws and regulations.”).

20. ‘Gender identity’ refers to an individual’s “basic sense of [gender],” and is a “deeply felt, core component of a person’s identity” that “has a strong biological and genetic component.” Brief for Me. Chapter of the Am. Acad. of Pediatrics et al. as Amici Curiae Supporting Appellants at 5–6, *Doe v. Clenchy*, 2014 ME 11, , ¶ 11, 86 A.3d 600.

21. M. Dru Levasseur, *Gender Identity Defines Sex: Updating The Law To Reflect Modern Medical Science Is Key To Transgender Rights*, 39 VERM. L. REV. 943, 952 (2015), [hereinafter Levasseur, *Gender Identity Defines Sex*] (citing WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NON-CONFORMING PEOPLE 4 (Eli Coleman et al. eds., 7th ed. 2012) (quoting Press Release, WORLD PROF’L ASS’N OF TRANSGENDER HEALTH (May 26, 2010), available at: [http://www.wpath.org/uploaded\\_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf)).

22. Jamison Green, “*If I Follow the Rules, Will You Make Me a Man?*”: *Patterns in Transsexual Validation*, 34 U. LA VERNE L. REV. 23, 29 (2012).

23. See JULIE GREENBERG, *TRANSGENDER RIGHTS 51-2* (Paisley Currah et al. eds., 2006).

24. Transgender can be understood as an umbrella term which can include, amongst others, those who identify as bigender, genderqueer, genderfluid, two-spirit, or drag queens. This terminology only serves to further the confusion amongst the public, who may view the ‘T’ of LGBT to simply be a catch all for those who are being ‘othered’ - even from the greater LGB community. *Transgender People, Gender Identity and Gender Expression*, AM. PSYCHOL. ASS’N, (2018) <https://www.apa.org/topics/lgbt/transgender.aspx> [https://perma.cc/SD9F-P6JL].

contradiction will actually improve legal outcomes for transgender clients in discrimination cases. When advocates acknowledge to courts that transgender individuals have a wide range of opinions and identities based on gender and sex, courts will begin to reflect the shifting court of public opinion, be less likely to apply rigid, formalistic and unfeeling analyses in cases involving discrimination against transgender litigants, and be more likely to expand the legal definitions of gender and sex, to include all those who could potentially identify as transgender litigants.

Part I of this paper examines issues surrounding the challenges to authenticity and invasive questioning that transgender individuals face, both during the litigation process and in their daily lives, and how courts engage in these analyses depending on the litigation strategy utilized. Part II considers the politicization of transgender issues, and commensurate response by transgender rights advocates; it further contemplates Sharon M. McGowan's experience litigating *Schroer v. Billington*, and what advocates should glean from her thoughtful reflections.

## II. THE TRANSGENDER LITIGANT

### A. *The Transgender Litigant Outside the Courtroom*

The government's first affirmative act towards an individual, perhaps unsurprisingly, occurs at birth. An identity of "male" or "female" – based purely on genital appearance – is notated on the birth certificate.<sup>25</sup> This becomes the baby's legal gender. It shapes their life. Of course, for the vast majority, their legal gender fits with their self-identity, and the identification on their birth certificate never presents a problem; they likely never even consider it. But, for those who identify as transgender, or as anything other than the traditional binary M/F, the government labels them as "other" or "abnormal" right out of the womb, and sets them up for a lifetime of discrimination, harassment, and difficulty.<sup>26</sup> Those who identify as transgender, genderqueer, or non-binary are forced to lie about their identity in myriad contexts, including something as fundamental as their driver's license application. Further, until

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25. It is interesting that, for the most part, we unquestioningly accept this governmental imposition on our identity formulation when there exists support for the contention that it is the brain, not the sex organs, that are critical in developing sexual identity. See William Reiner, *To be Male or Female —That Is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224, 225 (1997) ("[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.").

26. See generally JAIME M. GRANT ET. AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 152-55 (2011) (detailing how transgender and gender-nonconforming people face an increased risk of discrimination, harassment, and assault).

recently, college applications required students to select gender, listing only the ‘traditional’ two options.<sup>27</sup>

This paper does not argue that gender should not be assigned at birth – it merely suggests that when the government affirmatively creates an imposing, life-shaping identity at birth, it should recognize the comparatively rare instance in which it inaccurately assigns identity, and correct the dignitary harm it has placed upon the individual without consternation, and without requiring the individual to trek through a costly legal labyrinth.<sup>28</sup>

One of the most aggressive narratives employed against transgender individuals is one of duplicity – identification documents containing governmentally assigned gender markers often do not correspond with a transgender individual’s outwardly presenting gender, which in the best cases leads to unnecessary hassle, and in the worst (but unfortunately more frequent) cases, harassment, assault, and discrimination.<sup>29</sup>

The transgender community is undeniably an at-risk population. The statistics on attempted suicide, economic disparities, and violence are astounding, and transgender service members, specifically, report disturbingly poor health.<sup>30</sup> Transgender women of color face violence at an exceedingly high rate,<sup>31</sup> and a staggering 41% of transgender people have attempted suicide.<sup>32</sup> In another survey, suicide attempts were reported by 63-78% of transgender people who had been subjected to physical or sexual violence at school, 57-61% of those harassed by law enforcement, 60-70% of those who suffered physical or sexual violence by law enforcement, and 69% of those who experienced homelessness.<sup>33</sup>

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27. Luckily, schools are moving towards using more inclusive language. For instance, The University of Pennsylvania’s application has an optional field asking if students have an LGBTQIA identity, and offering them the opportunity to specify that identity. *See Colleges and Universities with LGBTQ Identity Questions as an Option on Admission Applications & Enrollment Forms*, <https://www.campuspride.org/tpc/identity-questions-as-an-option/> [<https://perma.cc/DJ8L-8HAH>].

28. For an excellent explanation of how this compulsory gender identity violates the First Amendment right to freedom from compelled speech, *see* Brian T. Ruocco, *Our Antitotalitarian Constitution And The Right To Identity*, 165 U. PA. L. REV. 193 (2016).

29. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 751-53 (2008) (explaining how legal gender can affect transgender individuals’ interactions with sex-segregated facilities, and increase exposure to discrimination).

30. *See generally* Grant et al., *supra* note 26; *see also* M. Joycelyn Elders, et. al, *Medical Aspects of Transgender Military Service*, 41 ARMED FORCES & SOC’Y. 199 (2015).

31. *See* Levasseur, *Gender Identity Defines Sex* at 6 (citing NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS (NCAVP), LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2012, at 8 (2013) (“[A]ntiLGBTQ and HIV-affected hate violence disproportionately impacts LGBTQ and HIV-affected communities of color, transgender people, and transgender people of color.”)).

32. Grant et al., *supra* note 23, at 2-3.

33. Ruocco, *supra* note 25, at 203-04 (citing ANN P. HAAS ET AL., AM. FOUND. FOR SUICIDE PREVENTION & THE WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2014)).



Unemployment for transgender survey respondents was twice the national average, while transgender people of color experienced unemployment at four times the average.<sup>34</sup> A staggering 90% of employed respondents reported enduring harassment, mistreatment, or discrimination on the job.<sup>35</sup> Additionally, 53% of all respondents reported verbal harassment or disrespect in a place of public accommodation, including hotels, restaurants, buses, airports, and government agencies.<sup>36</sup> The survey further found:

“[n]early every system and institution in the United States [subjects transgender persons] to . . . mistreatment ranging from commonplace disrespect to outright violence, abuse and the denial of human dignity. The consequences of these widespread injustices are human and real, ranging from unemployment and homelessness to illness and death.”<sup>37</sup>

These statistics and findings are impactful, powerful numbers – but they are just that – numbers. They have the unfortunate effect of being both shocking and dehumanizing, simultaneously. For instance, they do not include the lives of people like Leelah Alcorn, a transgender individual who took her own life, and stated in her suicide note “[M]y death needs to mean something. My death needs to be counted in the number of transgender people who commit suicide this year . . .”<sup>38</sup>

These statistics should surely lead the rational person to question whether anyone would make the affirmative choice to expose themselves to these difficulties by identifying as transgender disingenuously.

### *B. The Transgender Litigant Inside the Courtroom*

Transgender litigants have a history of being treated with disrespect by the court system – treated not just as different or ‘other’ but as somehow ‘lesser’.<sup>39</sup> It is this traditionalist view that advocates must reject most vigorously. Until recently, and still in some jurisdictions, courts have looked to historical precedent and have continuously rejected the scientific testimony that other countries have begun to acknowledge as credible and necessary.<sup>40</sup> Despite this

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34. Grant et al., *supra* note 23, at 2. Transgender individuals of color fared “worse than all others in many areas examined” by the survey.

35. *Id.* at 3.

36. *Id.* at 5.

37. Grant et al., *supra* note 23, at 8.

38. J. Bryan Lowder, *Listen to Leelah Alcorn’s Final Words*, SLATE (Dec. 31, 2014) [http://www.slate.com/blogs/outward/2014/12/31/leelah\\_alcorn\\_transgender\\_teen\\_from\\_ohio\\_should\\_be\\_honored\\_in\\_death.html](http://www.slate.com/blogs/outward/2014/12/31/leelah_alcorn_transgender_teen_from_ohio_should_be_honored_in_death.html) [<https://perma.cc/55H4-DMGT>].

39. This process is described by Taylor Flynn as “a legal shredding of self.” Taylor Flynn, *The Ties that (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in *TRANSGENDER RIGHTS* 32 (Paisley Currah et al. eds., 2006).

40. See Julie Greenberg and Marybeth Herald, *You Can’t Take it With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 WASH. L. REV. 819, 838-40 (2005) (“Most jurisdictions outside of the United States have rejected the outdated tests . . . and have focused on the scientific literature and the importance of brain sex to the development of gender identity.”). Many countries and cultures recognize more than two genders, for example, India, Pakistan, Nepal, New Zealand, Bangladesh, Germany, and some

recognition and slow progression of mainstreaming of the transgender movement, transgender individuals remain “strangers to the law.”<sup>41</sup> Transgender litigants are forced to undergo humiliating anatomical dissection, comparing them to what is considered by the court to be the “norm”;<sup>42</sup> they have been described as mentally ill,<sup>43</sup> and somehow incomplete.<sup>44</sup> Courts of appeals have even gone so far as to reverse trial court decisions that accepted more modern and progressive conceptions of gender, citing instead to Webster’s New Twentieth Century Dictionary or Black’s Law Dictionary definition of “male” as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to female”, and “female” as “designating or of the sex that produces ova and bears offspring: opposed to male.”<sup>45</sup> Fortunately, courts have begun to expand the definition of “sex,” beginning with *Price Waterhouse*<sup>46</sup> collapsing the distinction between sex and gender,<sup>47</sup> but this application has been inconsistent.<sup>48</sup> While the *Macy v. Holder*<sup>49</sup> decision

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Native American tribes. Valentine Pasquosoone, *7 Countries Giving Transgender People Fundamental Rights the United States Still Won't*, IDENTITIES.MIC (Apr. 9, 2014), <http://mic.com/articles/87149/7-countriesgiving-transgender-people-fundamental-rights-the-u-s-still-won-t> [<https://perma.cc/9CH4-GUJ2>].

41. Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150 (2005).

42. Flynn, *supra* note 35, at 37.

43. *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966) (questioning whether laws or records such as birth certificates should be changed to “help psychologically ill persons in their social adaptation.”).

44. *See, e.g., Corbett v. Corbett*, (No.1), [1971] P. 83, 107–8 (Eng.) (issuing decree of nullity based on incapacity of wife to consummate because, according to the judge, “intercourse, using the completely artificial cavity . . . , can [not] possibly be described . . . as ‘ordinary and complete intercourse’” (emphasis added)). This served as the seminal case for the proposition that sex was fixed at birth. For further discussion of the case, *see* Greenberg and Herald, *supra* note 36.

45. *See e.g., In re Estate of Gardiner*, 42 P.3d 120, 135-36 (Kan. 2002).

46. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

47. *See also* *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (“Indeed, for purposes of [Title VII and the Gender Motivated Violence Act], the terms ‘sex’ and ‘gender’ have become interchangeable.”); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995).

48. *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (“Employment discrimination on the basis of transgender identity is employment discrimination ‘because of sex’ and constitutes a violation of Title VII of the Civil Rights Act.”); *see also* *EEOC v. R.G & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 600 (6th Cir. 2018) (“Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.” (emphasis added)). However, even post *Price Waterhouse*, not all courts follow this interpretation of sex discrimination. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220-21 (10th Cir. 2007) (finding that Title VII’s prohibition of sex-based discrimination was not triggered when an employer asked about a transgender woman’s genitals, and then fired her when her answer did not match the gender she presented as); *accord* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (reasoning that a statute’s legislative history “clearly indicates that Congress never considered nor intended that [Title VII] apply

seemed to provide the final word on the matter, advocates must be careful not to experience “victory blindness”;<sup>50</sup> it is unclear if this jurisprudential path will become widely adopted, and it has, on occasion, been ignored in other contexts, such as the right of transgender individuals to use a restroom that corresponds with their gender identity.<sup>51</sup> Moreover, as President Trump appoints conservative judges to the bench, advocates must not assume that those judges will be equally receptive to arguments based on *Price Waterhouse*.

Transgender litigants find themselves in courtrooms based on discrimination they experience in various contexts – the workplace, the military, their schools – which begs the question: what is the theme that runs through each of these cases?

Transgender antagonists have certainly exploited a common theme of their own – fear of that which is different, especially as it relates to the body. Evidence is nearly unrefuted that claims made by opponents of gender identity protections – namely, that those antidiscrimination laws lead to sexual assault or increased voyeurism – are completely unfounded, but that has not stopped the dehumanizing and incendiary rhetoric utilized by anti-transgender activists, sometimes with success.<sup>52</sup>

Transgender rights advocates would do well to seize upon a common theme of their own, and exploit it in a similar fashion, across all transgender rights litigation. As will be discussed more fully in Part II(B), the theme this

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to anything other than the traditional concept of sex”), *rev’g*, 581 F.Supp. 821 (N.D. Ill. 1983); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (1977) (finding that the plaintiff who had been discriminated against *chose* to change her sex, and thus neither she, “nor transsexuals as a class” were within the scope of Title VII). *Contra* Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563 (2007) (“The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.”).

49. *Macy*, EEOC Appeal No. 0120120821 at 14 (2012) (definitively holding discrimination because a person who is transgender is covered by Title VII).

50. *See generally* MICHELANGELO SIGNORILE, *IT’S NOT OVER: GETTING BEYOND TOLERANCE, DEFEATING HOMOPHOBIA AND WINNING TRUE EQUALITY* 1-3 (2015) (warning against succumbing to the enticing feeling that the LGBT equality movement is close to total victory after cases such as *Obergefell*).

51. *See, e.g.*, *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005) (finding that an NPO could not pursue a claim for discrimination when a landlord refused to renew a transgender tenant’s lease based on his objection to their restroom use).

52. *See* Tobias B. Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL. REV. 201, 227 (2012) (“Under the Don’t Ask, Don’t Tell statute and the blanket ban on gay servicemembers that preceded it, the argument that showering bodies would be subjected to unwanted sexual scrutiny helped to erase the reality of gay military personnel from public policy debate.” (footnote omitted)). Campaigns also included such insulting and ridiculous slogans as “Gentlemen, if you have the plumbing—please stay out of the ladies room.” *Id.* at 206; *see also* *STOP the CT “Bathroom Bill” (Gives Cross-Dressing Men Access to Women’s Restrooms, Locker Rooms)*, FREE REPUBLIC (May 10, 2011, 8:11 AM) (“[T]his bill as now constituted, would permit ANY man who claims female ‘gender identity’ even if he just wears a dress . . . MUST be given access to women’s facilities, including public and private women’s restrooms, locker rooms and showers”), <http://www.freerepublic.com/focus/f-news/2717667/posts> [<https://perma.cc/QA2F-92BT>].

paper suggests should be further explored and emphasized by transgender advocates is a simple one: humanity. Transgender rights are human rights, and there exists no scientific evidence which decidedly precludes interpreting gender identity and sex as linked.<sup>53</sup> In fact, science and medical testimony continue to illustrate that this may be the most logical and correct interpretation moving forward.<sup>54</sup>

Transgender advocates may, however, choose to emphasize the difference between sex and gender, with one being predominantly related to the body, and the other relating to the mind. When arguing that laws prohibiting discrimination based on “sex” should be understood to encompass both sex and gender identity, though, advocates may also argue that the concepts of sex and gender are connected. This seeming contradiction creates some complications pertaining to the choice of language when making legal arguments in many discrimination cases. There are variances between describing the lived experience and self-identity of transgender individuals, and making arguments about the interpretation of specific language in anti-discrimination statutes; these ambiguities should not be ignored. This potential contradiction will be explored further in Part II(B).

### III. THE POLITICIZATION OF TRANSGENDER ISSUES

#### A. *The Trump Administration*<sup>55</sup>

External markers are the most noticeable and influential signals for shaping how others perceive gender, upon which we proceed to base our social interactions. Though President Trump may seem more infantilely infatuated with what lies underneath the exterior clothing,<sup>56</sup> the fact of the matter is that in

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53. The DOJ issued a Statement of Interest in *Tooley v. Van Buren Public Schools*, which clarified that gender identity is a component of sex and that “transgender persons may allege sex discrimination based on sex stereotyping under Title IX and the Equal Protection Clause. . .” Statement of Interest of the United States, at 8, *Tooley v. Van Buren Pub. Schs.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015).

54. See generally JULIA SERANO, *WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY* (2d ed. 2016) (somewhat controversially suggesting that there exists evidence that our gender identities are influenced by biology).

55. While I begin this section by discussing President Trump’s comments and policies, it is only fair to note that anti-transgender sentiment in the government certainly did not begin with him. See, e.g., Mark Brown, *Legislation Is No Laughing Matter: House Leaders Yuk It Up Over Bill on Changing Gender on Birth Certificates*, CHI. SUNTIMES (Apr. 25, 2007), <https://www.highbeam.com/doc/1P2-5875562.html> [<https://perma.cc/C3VH-MFEX>] (discussing a 2007 bill introduced in the Illinois legislature that would have made it less difficult for transgender individuals to change gender markers on certain documents. During the debate on the floor, the Republican floor leader joked that he would have a sex change so that he could smell better and stop having to shave. The Democrat presiding over the proceedings called for a vote in a falsetto voice. The measure was unsurprisingly defeated 32-78.).

56. Billy Bush, Opinion, *Yes, Donald Trump, You Did Say That*, N.Y. TIMES (Dec. 3, 2017) <https://www.nytimes.com/2017/12/03/opinion/billy-bush-trump-access-hollywood-tape.html> [<https://perma.cc/6GCW-GPQW>].

most social interactions, outward presentation of gender is the only relevant characteristic; yet the Trump Administration has based much of its overall policy on the traditional view of biological sex, reversing the progress made by the Obama Administration. President Trump himself has gone on record claiming that transgender service has “been a very confusing issue for the military. And I think I’m doing the military a great favor” by re-implementing the ban.<sup>57</sup> The confusion, of course, was caused directly by his own tweeted shift in policy. President Trump’s comments ignore the fact that the cost of banning transgender service members is greater than the cost of maintaining them, and signal an intellectually disingenuous argument necessitated upon willful blindness as to the number of transgender military members currently serving successfully.<sup>58</sup> The Trump Administration, it seems, would rather eradicate transgender people from the military than deal with the minimal costs involved in maintaining these members, even in the face of evidence that the presence of LGB service men and women positively impacted their units.<sup>59</sup> As Senator Barry Goldwater once said, “[Y]ou don’t need to be ‘straight’ to fight and die for your country. You just need to shoot straight.”<sup>60</sup>

The rampant, media-propagated discussion of the transgender military ban is reminiscent of the spirited debates that took place during the Clinton-era institution of Don’t Ask Don’t Tell, which only served to reinforce homophobic stereotypes and acted as an explicit governmental endorsement of discrimination under the guise of concern over “military readiness” and national security. Former Secretary of State Colin Powell described homosexuality at the time as a “problem”, citing concern over AIDS and impressionable young, immature soldiers.<sup>61</sup> When Don’t Ask Don’t Tell was repealed, the legislature left for another day the issue of transgender individuals

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57. Bill Chappell, *Trump’s Transgender Ban in Military Will Focus On New Enlistments*, NPR (Aug. 24, 2017) <https://www.npr.org/sections/thetwo-way/2017/08/24/545759805/trumps-transgender-ban-in-military-will-focus-on-new-enlistments> [https://perma.cc/6HAP-9H6X].

58. AARON BELKIN ET AL., DISCHARGING TRANSGENDER TROOPS WOULD COST \$960 MILLION (2017); see also AGNES GEREKEN SCHAEFER ET AL., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY, RAND CORPORATION at x-xi (2016) (finding that there are between 1,320–6,630 transgender service members in the active component).

59. See JEH JOHNSON & CARTER F. HAM, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” (2010). Additionally, when asked about the actual experience of serving in a unit with a co-worker who they believed was gay or lesbian, 92% stated that the unit’s “ability to work together” was “very good,” “good,” or “neither good nor poor.” These numbers would likely look similar for transgender service members. *Id.*

60. Associated Press, *Goldwater Backs Gay Troops*, N.Y. TIMES (Jun. 11, 1993) <http://www.nytimes.com/1993/06/11/us/goldwater-backs-gay-troops.html> [https://perma.cc/R6W4-YPDY].

61. Russell Berman, *The Awkward Clinton-Era Debate Over ‘Don’t Ask, Don’t Tell’*, THE ATLANTIC (Oct. 10, 2014), <https://www.theatlantic.com/politics/archive/2014/10/the-awkward-clinton-era-debate-over-dont-ask-dont-tell/381374/> [https://perma.cc/NFT2-QW5W].

serving in the military. The back and forth actions of the Obama Administration (studying, then overturning the ban) and the Trump Administration (seemingly reinstating it via Twitter, walking that back, then fighting over it in court) have served only to revive the old debates about “unit cohesion”<sup>62</sup> and “military readiness,” and ignores the fact that LGBT service members have been serving for hundreds of years.<sup>63</sup> This attempt to vitiate the existence of LGBT service members is a reprehensible manifestation of bigotry, camouflaged as patriotic concern over the functionality of our military.

While the repeal of Don’t Ask Don’t Tell did lay a strong foundation for eliminating the anti-transgender policy, President Trump’s policy change has served to refuel attacks against the transgender community by a reinvigorated minority.<sup>64</sup> Often reliant upon paranoid and unsubstantiated fears, such as that men will pretend to be transgender simply to gain access to women’s facilities, these allegations are completely unsupported.<sup>65</sup> Moreover, this argumentative approach cuts directly against the logic that has been employed by conservative lawmakers and advocacy groups for decades regarding Second Amendment rights. The classic “[t]he bad guys, the criminals, don’t follow laws and restricting more of America’s freedoms [such as that to carry a gun] . . . isn’t

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62. The limited research on the effects of foreign military policies with integration of transgender forces indicates little or no impact on unit cohesion, operational effectiveness, or readiness. Commanders noted that the policies had benefits for all service members by creating a more inclusive and diverse force. Policy changes to open more roles to women and to allow gay and lesbian personnel to serve openly in the U.S. military have similarly had no significant impact on unit cohesion, operational effectiveness, or readiness. Schaefer, *supra* note 55, at 44-45.

63. Private Albert Cashier (born Jennie Rodgers) is often considered to be the first transgender American soldier. Cashier fought in the Civil War and continued to live as a man for the remainder of his life, until he was institutionalized shortly before his death. A musical has been created about his life and service entitled *The CivilTY of Albert Cashier*, see *Irish transgender U.S. Civil War hero Albert Cashier*, IRISHCENTRAL.COM (May 28, 2018, 3:47 AM) <https://www.irishcentral.com/opinion/patrickroberts/irish-transgender-and-a-civil-war-hero-meet-albert-cashier> [<https://perma.cc/ULZ5-C3NU>]. Kristin Beck, a twenty-year veteran in the Navy and former member of Seal Team 6, came out as transgender in 2013. Beck’s fellow Seal Team 6 members were positive and supportive when she came out publicly. See Daniel Brown, *Meet Kristin Beck, the transgender Navy SEAL hero fighting Trump’s proposed trans ban*, BUSINESS INSIDER (July 27, 2017) <http://www.businessinsider.com/meet-kristin-beck-2017-7> [<https://perma.cc/KH5K-3RGS>].

64. Trump’s antics have not just empowered anti-transgender antagonists. He has also lent credence to the ‘boys will be boys’ attitude when it comes to disparaging homophobic remarks. See Erik Ortiz, *Pennsylvania lawmaker scolds male colleague during meeting: ‘I’m a heterosexual’*, NBC (Dec. 6, 2017) (discussing a recent incident in which a State Representative lashed out at a colleague who touched his suit sleeve in effort to interrupt him, exclaiming “I’m a heterosexual. I have a wife, I love my wife. I don’t like men, as you might. But stop touching me all the time.”) <https://www.nbcnews.com/politics/politics-news/pennsylvania-lawmaker-scolds-male-colleague-during-meeting-i-m-heterosexual-n826981> [<https://perma.cc/6QEL-QZQK>]. Homosexuality, apparently in the eyes of this particular lawmaker, is a laughing matter.

65. Katy Steinmetz, *Why LGBT Advocates Say Bathroom ‘Predators’ Argument Is a Red Herring*, TIME (May 2, 2016), <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/> [<https://perma.cc/9FFS-5ERC>].

the answer” has been employed against gun-control advocates for decades.<sup>66</sup> Why, then, does the same logic not apply in the case of ‘bathroom bills’? If perverted, voyeuristic men were going to put on a dress simply to gain access to a women’s locker room, they would do so regardless of what the law allowed or disallowed. These campaigns reveal a fundamental misunderstanding of what it means to be transgender. Or, perhaps more accurately, what it *doesn’t* mean when a person is transgender. Being transgender does not make one a pervert, a criminal, or any more likely to engage in lascivious activities. These restrictive laws serve simply to reinforce cis-gendered, harmful understandings of what gender is ‘supposed to be’ – as opposed to all that gender expression and identity can and should be.

If there has been a positive to be drawn from President Trump’s drastic transformation in policy, it’s that it has shone a spotlight on the discrimination transgender people face in many aspects of their lives. The political response to the President’s actions has been far more supportive of transgender troops than LGB troops experienced during the enforcement period of Don’t Ask Don’t Tell.

#### *B. The Future of Transgender Rights Advocacy*

Some members of the transgender community challenge the gender binary. For instance, Mark Daniel Snyder, who identifies as genderqueer, explains that he “enjoys the wide range of gender diversity and expression.” As Snyder eloquently describes it, “I feel like as a genderqueer person I’m able to see the world of gender in more color almost. I view gender as a galaxy and all the stars, and it’s so expansive and diverse, and I’m just one little star in there.”<sup>67</sup> There are also those in the transgender community who situate themselves firmly in the normative gender expression of their self-identified gender – those who accept a binary interpretation of gender, at least as it pertains to themselves, and simply wish to be recognized as that side of the binary.

Transgender advocates should embrace this division and disagreement within the community, as it illustrates that these are real people who are grappling with complex and important issues. This multitude of voices must be amplified, celebrated, and validated. There is no right way to be male, female, transgender, genderqueer, or human. Most in this extended community would agree with the proposition that our laws and institutions should welcome and

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66. This quote is attributed to Sarah Palin, though she is by no means the only politician to endorse the sentiment. Evan DeFilippis, *Rebutting the ‘Criminals don’t follow laws’ and ‘Gun Control only hurts law-abiding citizens’ argument against gun control*, ARMED WITH REASON (Aug. 2, 2013, 7:25 PM) <https://www.armedwithreason.com/rebutting-the-criminals-dont-follow-laws-and-gun-control-only-hurts-law-abiding-citizens-argument-against-gun-control/> [<https://perma.cc/9BRD-XP99>].

67. Zack Ford, *The Quiet Clash Between Transgender Women And Drag Queens*, THINKPROGRESS (June 25, 2014, 1:03PM) <https://thinkprogress.org/the-quiet-clash-between-transgender-women-and-drag-queens-297a9da4c5f6/> [<https://perma.cc/L3KY-PHHL>].

accommodate people of all identities and opinions regarding the gender binary, but no individual self-identity should be representative or defining of a whole community of people. Thus, advocates must focus on amplifying the collective voice – with the collective message – that all transgender clients share in their humanity. This discrimination is based on a rejection of their fundamental self-identity, which is further influenced by the collapsible distinction between gender and sex, regardless of adherence to the gender binary.

At least one member of the Supreme Court may find these voices persuasive. There is speculation that Justice Kennedy’s opinions in gender and sexual identity cases can be partially explained by a desire to be on the “right side of history,”<sup>68</sup> which is consistent with his opinion in the landmark *Obergefell* case, as young adults and recent graduates are more supportive of LGBT rights, and accepting of LGBT individuals. Though public opinion research has only recently begun tracking opinions about transgender identity and rights, specifically, it is not a stretch to assume public sentiment towards transgender rights is similarly gaining traction in a positive, more inclusive direction.<sup>69</sup>

How, then, can advocates seize on the momentum of changing public opinion in the face of hostile legislation? As Professor Tobias Wolff explains it, anti-transgender antagonists wield a powerful weapon:

The rhetoric of the bathroom in the debate over gender-identity protections seeks to exploit an underlying anxiety that has played a role in many efforts at civil rights reform: anxiety over the body. The body can be a site of vulnerability and pain, shame and pleasure, excitement and embarrassment—human experiences that are often unmediated by rational thought and impervious to reasoned argument. When opponents of civil rights

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68. Michael Klarman, Opinion, *Gay Rights May Get its Brown v. Board of Education*, N.Y. TIMES (Oct. 11, 2012) (“Justice Kennedy’s opinions often suggest that he wants to be on the right side of history, which matters greatly here because the future of gay marriage in America is so clear.”).

69. Andrew Flores, Taylor N.T. Brown & Andrew S. Park, *Public Support for Transgender Rights: A Twenty-Three Country Survey*, 8 (Williams Inst. 2016). For example, in a 2016 poll conducted in Arizona, roughly 32% of respondents age 51 or older said transgender individuals should be able to use the bathroom of the gender with which they identify, compared to 45% of the group aged 36-50 and 51% of those aged 18-35. Alia Beard Rau, *Poll: Education, age, influence stands on transgender bathroom issue*, ARIZ. REPUBLIC (Oct. 23, 2016, 6:03 AM) <https://www.azcentral.com/story/news/politics/arizona/2016/10/23/poll-arizona-bathroom-access-transgender/9248310/> [<https://perma.cc/24EJ-LAL8>]. See also Frank Newport, *Disentangling Attitudes Toward Bathroom Use*, GALLUP (May 20, 2016) <https://news.gallup.com/opinion/polling-matters/191774/disentangling-attitudes-toward-transgender-bathroom.aspx> [<https://perma.cc/7RDW-GDXZ>]. Gallup has polled about attitudes towards gay and lesbian individuals since at least 1977, but only began similar polling about transgender individuals in 2016. *Gay and Lesbian Rights*, GALLUP (2017) <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<https://perma.cc/2XAN-85MQ>].



reform mobilize these primal forces in response to progressive efforts, they wield a potent tool for preserving existing arrangements of status and power.<sup>70</sup>

How can advocates combat the weaponization of this primal fear – this anxiety over the body? This is a task made even more problematic as the White House continuously virtue signals its anti-transgender sentiment, consistently ‘othering’ transgender people and claiming that the law supports this treatment. Advocating for a constitutional doctrine that recognizes gender categories as completely socially constructed and arbitrary (therefore labeling sex classifications as a suspect class, and requiring the application of strict scrutiny) is perhaps too broad, and thus unrealistic.<sup>71</sup> However, accentuating the differences between transgender people and cis-gendered people may reinforce stigma, lead to further ostracization of the community, and not actually satisfy a client’s goal of recognition and respect.<sup>72</sup>

Thus, advocates must walk a tight-rope between ‘winning their case’, meeting their client’s goals (which may be about more than simply achieving a positive verdict in court), and subtly pointing courts in the direction of recognizing gender identity as part of sex, thereby treating those who have a different gender identity than society expects with more deference and respect.<sup>73</sup> Sharon M. McGowan’s article, *Working With Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on Schroer v. Billington*, artfully considers these different factors, beginning with a powerful statement made by her client, Diane Schroer: “I haven’t gone through all this only to have a court vindicate my rights as a gender non-conforming man.”<sup>74</sup> Ms. Schroer did not want to be recognized as anything she was not,

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70. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L & P REV. 201, 202 (2012). Professor Wolff’s article examines the concept of erasure, and situates that within the context of fear of rampant voyeurism in the bathroom, where we become exceedingly conscious of our bodies, and rely on social convention to cooperate in our modesty. Professor Wolff’s analysis can be applied to any number of recent transgender rights cases. *See, e.g., Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 394 (E.D. Pa. 2017) (denying a preliminary injunction, and finding that the plaintiffs were unlikely to prevail on the merits of their contention that allowing transgender students to use locker rooms or bathrooms corresponding to their gender identities violated non-transgender students “fundamental right to bodily privacy.”). The main argument by plaintiffs in that case hinged on the assumption that transgender students would somehow encroach upon the bodily privacy of others while using the sex-segregated facilities - the exact paranoid fear that Professor Wolff discusses. *Id.*

71. For an article advocating this approach, *see* Chinyere Ezie, *Deconstructing The Body: Transgender And Intersex Identities And Sex Discrimination – The Need For Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141 (2011).

72. *See generally*, Aaron J. Curtis, *Conformity or Nonconformity? Designing Legal Remedies To Protect Transgender Students From Discrimination*, 53 HARV. J. ON LEGIS. 459 (2016).

73. *Id.* at 205.

74. Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205 (2010). This article, and the case it contemplates, occurred prior to the release of the DSM-V, which takes a different approach to gender identity disorder, or gender dysphoria. *See infra* note 90.

she didn't want to fit into whatever box the judge could comprehend, she wanted to be acknowledged and validated in her identity as a transgender person, not as a gender non-conforming man. In other words, it wasn't just the verdict, but how the verdict was reached, and even the labeling language used by the judge and her attorneys, that mattered to Ms. Schroer.

While considering legal strategies, McGowan and Ms. Schroer had to determine whether they would plead in their complaint that she was a gender non-conforming man who was the victim of sex stereotyping, rather than a transgender woman; they were more likely to succeed if they pled the former, but the latter was more accurate to Ms. Schroer's actual self-identity.<sup>75</sup> Also under consideration was whether to present being transgender as a medical issue.<sup>76</sup> McGowan was rightfully concerned over potentially exposing her client to unnecessary "prying questions."<sup>77</sup> Regardless, the Defendant argued, essentially (through expert testimony) that Ms. Schroer "was, is, and will always be, a man."<sup>78</sup> In response, McGowan argued:

"[s]uch a conclusion would not only be at odds with federal and state policies . . . but also would contradict the view of everyone who interacted with her on a daily basis. We attempted to assure the court that it need not, and in fact should not, endorse such an artificial view of reality."<sup>79</sup>

This framing acknowledged the reality of Ms. Schroer's lived experience; that she was, is, and always will be, a woman. This choice was faithful to Ms. Schroer's identity, but risked confusing the court.

Therefore, the complaint alleged not only violations of Title VII under a sex stereotyping theory, but also that "by rescinding its offer of employment and otherwise refusing to hire Ms. Schroer because of her decisions regarding her course of medical treatment for her gender dysphoria without constitutionally sufficient justification, the [employer] violated Ms. Schroer's rights guaranteed by the Due Process Clause."<sup>80</sup> McGowan "attempted both to convince the court that gender identity was, in fact, part of one's biological sex, and that a definitive biological etiology was not necessary in order for gender

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75. Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205, 228 (2010) (considering the precedent of *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) in which the plaintiff police officer succeeded in his discrimination case in which he pled as a gender nonconforming man as opposed to a transgender woman).

76. *Id.* at 228.

77. *Id.* at 233. A concern which was realized during the deposition of her client. *Id.*

78. *Id.* at 237 (citing Tr. of Bench Trial at 424-25, *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2005)).

79. *Id.*

80. *Id.* at 224. McGowan explains that the due process argument was included in the complaint because the case "was as much about Ms. Schroer's right to define herself without government penalty as it was about her right to be free of discrimination because of sex." *Id.* at 228.

identity to be part of ‘sex’ as a matter of law.”<sup>81</sup> Ms. Schroer and her attorneys understood the litigation risks involved in relying on biological truths as a basis for asserting claims of equality, liberty, and autonomy, and thus developed the “safety valve” of not requiring the court to find that there is a known definitive biological determinant of gender identity in order to find in favor of Ms. Schroer.<sup>82</sup> While this may not have been exactly in line with the client’s goals, it did allow for a greater chance of success on the Title VII claim. The question remains, however, whether this was a missed opportunity to create good law in the arena of gender identity.

The question of whether there is a precise biological explanation for sex and gender identity often operates as a red herring in transgender discrimination cases. Transgender antagonists espouse the necessity of this explanation only because to do otherwise is to admit that scientific evidence illustrates and increasingly recognizes the importance of gender identity to sex, and accepts that they are, at the very least, related concepts.<sup>83</sup> Once a court rules that there is a known, definitive biological determinant of gender identity, transgender antagonists could lose one avenue of argument that is often made in these discrimination cases.

Sex is a multi-faceted and difficult concept with which courts must grapple. Advocates must highlight the humanity of their clients, and de-emphasize a rigid, formalistic and definitional approach to transgender discrimination litigation.<sup>84</sup> In one recent transgender discrimination case, an

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81. Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205, 235 (2010).

82. *Id.* at 237.

83. See generally Claire Ainsworth, *Sex redefined*, NATURE, Feb. 18, 2015, at 288 (“The idea of two sexes is simplistic. Biologists now think there is a wider spectrum than that.”). Professionals in the fields of science and medicine have begun to accept as fact that sex and gender are difficult concepts that may exist on a spectrum. Take, for example, the case of the pregnant middle-aged woman described by Claire Ainsworth, who didn’t find out until her third pregnancy that she was, at least chromosomally-speaking, part male. *Id.* It has become abundantly clear that the fields of science, medicine, and law may each have different ways of interpreting sex and gender from a purely definitional perspective. However, this paper suggests that law should take a cue from the fields of science and medicine, and begin to consider sex and gender as not only related, but also non-binary.

84. A case that seemingly is good precedent for transgender advocates, *Nichols v. Azteca Rest. Enters.*, held that the harassment of a male employee based upon the perception that he was effeminate was discrimination “because of sex”, and did so based on the plaintiff’s gender expression and social sex role without any inquiry into the biological origins of these aspects of sex. *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001). The issue with this ruling, however, is that it is still beholden to the language of “sex” discrimination versus “gender” discrimination. Strict adherence to the language of laws that were written before gender identity was a concept that was remotely understood requires courts to jump through the hoops of linguistic interpretation to fit a ruling with what they believe is just. Instead, advocates should be arguing that sex is part of gender, and gender is part of sex, and no matter how you slice it, discrimination laws protect transgender individuals from discrimination based on their status as transgender (what we refer to as their gender identity).

exemplary brief written by Gay and Lesbian Advocates and Defenders (“GLAD”) began with a simple, factual statement: “Susan Doe is a girl. She is also transgender.”<sup>85</sup> In that case, a teenage transgender girl was made to use a non-communal, staff-only restroom – which was found to be a violation of the Maine Human Rights law prohibiting discrimination because of one’s gender identity.<sup>86</sup> GLAD managed, at the outset of the case, to reframe the issue by emphasizing for the court that the plaintiff, first and foremost, was a girl. Like in *Schroer*, the advocates made it easy for the court to understand, and presented the fact that their client also happened to be transgender as simple reality. This girl was being discriminated against due to her status as a transgender person. Simple. That is not to say that the advocates abandoned completely the formalistic approach, but rather that they were able to foreground for the court the humanity of their client, and thus de-emphasize rigid application of the definition of sex as being completely separate from gender or gender identity.

Another problem faced by transgender advocates is that LGB and T rights advocacy groups do not always have the same goals. For instance, those who are members of neither the legal nor the LGBT community likely assumed that when Don’t Ask Don’t Tell was repealed in 2011, transgender individuals would be able to serve openly in the military along with their LGB colleagues. The reality, of course, is that transgender open service was not possible until 2016.<sup>87</sup> This misconception may be due in part to the persistent lumping together of ‘LGB’ issues with ‘T’ issues. It’s simpler for society en masse to understand these issues together, and so many now consider the issues irretrievably intertwined legally, socio-politically, or otherwise – for better or worse. However, the truth is more complex, as transgender people as a class sometimes suffer from a different form of discrimination than those who are lesbian, gay, or bisexual.

While the LGBT community can share in the immutability of the characteristic over which they are oft-discriminated, it is perhaps now more useful to consider transgender legal issues and representation separately. In so doing, advocates will be able to help judges understand the complexities of gender identity and expression, separate from considerations and preconceived notions involving homosexuality.

The response from the legal community to the Trump Administration’s policy shift has been swift, and thus far, mostly successful, as courts may be more willing to consider the innate and immutable nature of gender identity in the face of an anti-transgender White House. Some courts, though, had already

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85. Brief of Appellants John & Jane Doe as Parents & Next Friend of Susan Doe at 2, *Doe v. Clenchy*, 2011 Me. Super. LEXIS 70 (No. PEN-12-582).

86. *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 603 (Me. 2014).

87. Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. TIMES (Jun. 30, 2016), <https://www.nytimes.com/2016/07/01/us/transgender-military.html> [<https://perma.cc/7MVP-CA2T>].

begun to subject transgender discrimination cases to intermediate scrutiny.<sup>88</sup> The recent change in the *Diagnostic and Statistical Manual of Mental Disorders* may be partially to thank for this change, as medical opinions begin to reframe understandings of gender identity disorder or gender dysphoria.<sup>89</sup> The shift reflects recognition that the disagreement between biological sex (gender assigned at birth) and self-identity may not be pathological if it does not cause the individual distress. Many transgender people are not distressed by their gender identity, rather, they are caused distress by society's lack of acceptance of that gender identity. These people should not be labelled "mentally ill." We should not be trying to *cure* them – instead, we should be trying to cure the societal ill that *causes* the distress by refusing to accept that which convention has taught us is simply too different.<sup>90</sup> DSM-V seems to recognize this distinction, insofar as it limits a gender dysphoria diagnosis to those who are caused distress as a direct result of the gender identity conflict.<sup>91</sup>

It is time for transgender legal advocates to stop thinking solely in terms of litigation strategy, and start thinking about how their arguments could

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88. See, e.g., Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ., 208 F. Supp. 3d 850, 872–74 (S.D. Ohio 2016) (finding that "transgender status is a quasi-suspect class under the Equal Protection Clause"); Adkins v. City of N.Y., 143 F. Supp. 3d 134, 140 (S.D. N.Y. 2015) ("[T]he Court concludes that transgender people are a quasi-suspect class. Accordingly, the Court must apply intermediate scrutiny to defendants' treatment of plaintiff."); Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004) (holding that the facts alleged by a transsexual plaintiff to support claims of gender discrimination on the basis of sex stereotyping "easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution"); see also Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288-289 (W.D. Pa. 2017) ("Thus, all of the indicia for the application of the heightened intermediate scrutiny standard are present here. (citation omitted) Moreover, as to these Plaintiffs, gender identity is entirely akin to "sex" as that term has been customarily used in the Equal Protection analysis. It is deeply ingrained and inherent in their very beings. . . [G]ender identity is neither transitory nor temporary."); Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730, 750 (2018) ("Mr. Grimm was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated . . . Because the [policy] relies on sex-based stereotypes, the Court finds that review of the [policy] is subject to intermediate scrutiny.").

89. See Wayne Parry, *Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity*, HUFFINGTON POST (Aug. 4, 2013), [https://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5\\_n\\_3385287.html](https://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html) [<https://perma.cc/F2JA-K4MF>].

90. See Alex Sharpe, *Transgender Marriage and the Legal Obligation to Disclose Gender History*, 75 MOD. L. REV. 33, 42-43 (2012) ("While both intersex and transgender people may undergo genital surgeries, in the case of intersex people, surgery is understood as assisting nature, whereas in the case of transgender people, surgery is understood as a departure from it." (quoting Alex Sharpe, *English Transgender Law Reform and the Spectre of Corbett*, 10 FEMINIST LEGAL STUD. 65 (2002))). It is this departure which is the basis for much of the discrimination transgender people face.

91. See Boyden v. Conlin, No. 17-cv-264-wmc, 14 (W.D. Wis. Sep. 18, 2018) (discussing the DSM-5 definition of gender dysphoria as including "clinically significant distress or impairment in social, school, or other important areas of functioning.").

instead bolster and be true to the transgender lived experience.<sup>92</sup> Sometimes what advocates think of in strategic terms, transgender clients think of as *fundamental to who they are*. It is important that advocates not get lost in the litigious language of the law, and always remember that their goal must be to uplift the transgender community by emphasizing the obvious. Transgender people are human beings. And courts should respect their deeply-felt gender identity in the same way courts respect the deeply-held religious beliefs of litigants in religious freedom cases. There is, of course, a difficult –to-reconcile tension that exists between winning cases, and being completely true to a client’s lived experience. But what possible compelling interest could exist for discriminating against transgender people simply because they have a different gender identity than we have become socially conditioned to expect? It is time for courts to broaden their definitions of sex and gender to be inclusive of *all* people. It is time the legal system caught up with the court of public opinion in applying heightened scrutiny to discrimination against transgender litigants. Transgender rights are human rights.

#### IV. CONCLUSION

We are at an inflection point in the battle for basic human rights, both in this country and across the globe. From Sarah Moore Grimké to Secretary Clinton and the countless other advocates in the nearly hundred and fifty years between, we have made progress towards the international recognition of these basic rights. Whether it be for transgender individuals, immigrants, women, or racial or religious minorities, advocates have worked tirelessly – devoted their lives – to the pursuit of justice for others, and true equality in the eyes of the law. The substantial progress that has been made does not stop, and will not stop, no matter which political party holds a supermajority, no matter who occupies the Oval Office, and no matter what bloviation you read on your twitter feed this morning.

This is not just about recognizing transgender persons’ fundamental identity, it’s about our identity as a country, a global society. Rhetorical flourish accomplishes nothing without commensurate advocacy in the courtroom and out, and through this advocacy we can help remove the shackles of fear and hatred that have burgeoned under the Trump Administration. Advocates can look to brilliant legal minds such as Shannon Minter,<sup>93</sup> and

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92. See Sharon M. McGowan, *Working With Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. at 205 (“Some of the more challenging issues in the case, which I initially viewed as merely litigation strategy concerns, involved for Ms. Schroer fundamental questions about how her lawyer would present her life experience and, to some extent, defend the validity of her very identity to a court.”).

93. Shannon Minter has been an incredible advocate for LGBT rights for decades. In 2015, President Barack Obama appointed Minter to the President’s Commission on White House Fellowships. Minter, who is the legal director of the National Center for Lesbian Rights, has been lead counsel in numerous victories for the LGBT community. In 2001 Minter represented the lesbian partner of Diane Whipple in a wrongful death case stemming

Tobias Wolff,<sup>94</sup> amongst many others, for proof as to the impact good lawyering can have on LGBT rights cases.

We are all human. Understanding and questioning one's own identity is a philosophical inquiry beyond the pale of any legal paper. Forcing a court, or any government entity, to question *another person's* self-identity is asking an impossible and unnecessarily invasive task. Each individual's identity is deeply-felt, subjective, and informed by thousands of considerations and micro-experiences. Faith, family, ethnicity, education, upbringing, economic situation, occupation, sexual preference, military service – the list is figuratively endless. However, there is one thing that every person on this planet has in common; one part of our identity that is undoubtedly the same. We are all human.

As advocates consider alternative litigation strategies during the Trump Administration, they must not forget that sometimes the mightiest weapon is the simplest. Transgender rights are human rights. We are all human. No matter the context, transgender individuals are entitled to respect and deference for whatever their self-identity may be, and no employer, government official, school district, or any law for that matter, may discriminate against them on that basis.

The transgender military ban will inevitably fail on due process or equal treatment grounds. Whether courts utilize the analytical framework of sex discrimination, Dru Levasseur's more progressive approach, labeling gender identity as the primary sex characteristic, or a different analysis, the policy itself is unconstitutional. More worrisome is the possibility that in response to this failure of policy by the Trump Administration, and beat-back by the court system, the Administration will learn from its mistakes. The next attack on transgender rights won't be announced via tweet. It likely won't be blatant or explicit. But it's coming. It is my sincere hope that advocates focus their briefs, oral arguments, and energy on one, simple theme. If we allow the formalistic application of the law to deprive individuals of their basic rights, the legal system has failed. Gender is a galaxy. Transgender rights are human rights. We are all human.

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from a dog mauling. That case resulted in a landmark decision in California that extended tort claims to same-sex domestic partners. Minter was also heavily involved in overturning Proposition 8 in California, and was one of two lead attorneys in *Doe*.

94. Professor Wolff served as the chief advisor and spokesperson on LGBT issues for President Barack Obama throughout his 2007-08 presidential campaign, and was instrumental in the eventual repeal of "Don't Ask, Don't Tell". He also served as lead appellate counsel for Vanessa Willock in *Elane Photography, LLC v. Willock*, in which the Supreme Court declined to review a ruling by the New Mexico Supreme Court that a photography studio violated the state's anti-discrimination laws when it refused to photograph a same-sex commitment ceremony. 2012-NMCA-086, 284 P.3d 428. I also have it on excellent authority that he currently teaches a popular class at the University of Pennsylvania Law School entitled *Law and Sexuality*, which allows students to explore the concepts considered in this Article, among many others.