

amendment, while “narrowly focused,” was something he neither wanted nor thought necessary, especially because many people with now-excluded mental impairments would not have been able to show that they “were qualified for various employment positions.”¹²⁹ Senator Kennedy likewise stated that the amendment was “certainly not one that I would have wanted in the legislation,” but it was one “which we can live with.”¹³⁰ Senator Hatch concluded that the country would “owe [Armstrong] a debt of gratitude when this bill is implemented.”¹³¹

After passing the Senate by a vote of 76-8, the ADA was debated in the House. In the House version of the bill, disability rights advocates changed the list of excluded mental impairments slightly by subdividing the list into “Homosexuality and Bisexuality” (non-impairments) and “Certain Conditions” (impairments listed in the DSM-III-R), and deleting “psychoactive substance-induced organic mental disorders.”¹³² This is the language that was accepted in conference and passed into law.¹³³

C. The ADA as Moral Code

Senator Armstrong wanted to exclude from the ADA nearly all mental impairments, but his legal and pragmatic reasons for doing so do not withstand scrutiny. Antidiscrimination protection for people with mental impairments is not uniquely at odds with civil rights law (the legal concern), nor would such protection necessarily lead to a flood of frivolous litigation (the pragmatic concern).¹³⁴ Armstrong’s moral argument against antidiscrimination protection for people with mental impairments is the only one with any traction. It comes as no surprise, then, that all ten of the mental impairments actually excluded from the ADA have, in Senator Armstrong’s words, “a moral content to them.”¹³⁵ With the passage of Armstrong’s amendment, the ADA became, in effect, a moral code: “disability” coverage applies to those we pity, not those we despise.¹³⁶

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

130. *Id.* at S10785 (statement of Sen. Kennedy).

131. *See id.* at S10785 (statement of Sen. Hatch).

132. H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.).

133. 42 U.S.C. § 12211 (2006). When Congress amended the Rehabilitation Act two years later, it “add[ed] the exclusion set forth in the Americans with Disabilities Act for certain groups.” H.R. REP. NO. 102-973, at 158 (1992) (Conf. Rep.).

134. *See supra* Section III.A.3.

135. 135 CONG. REC. S10753 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong).

136. *See* 42 U.S.C. § 12211 (2006) (excluding transsexualism and GID). Senator Alan Cranston’s (D-CA) opposition to Senator Helms’ amendment excluding transvestites from the Fair Housing Amendments Act proved prescient: “[T]his amendment forsakes the basic principles of fair play, reason, and justice. If we were to start excluding one category of individuals from coverage, we would be threatening to undermine the very essence of antidiscrimination laws... This amendment could open the door to any number of attempts to exclude other disabilities from this and other antidiscrimination laws. . . . [T]he whole purpose of the Fair Housing Act and

Professor Feldblum offers a useful framework for analyzing the various moral views that one may hold about gay people and gay sex, but this framework is equally relevant to those who are transgender.¹³⁷

One possible view . . . is that [being transgender] is morally harmful (and/or sinful) to the individual and to the community. Therefore, it must be discouraged to the greatest extent possible in order to advance the moral health of these individuals and of the communities in which they reside. The second view is that . . . [being transgender] is not good, but it is not inherently harmful; it is more akin to an unfortunate, abnormal health condition that one does not wish for oneself . . ., but it is not a harmful element that must be actively purged from society. The third view is that . . . [being transgender] has the same moral valence as [not being transgender] and [transgender] people are basically similar to [non-transgender] people.¹³⁸

In 1989, GID was despised or, at best, misunderstood, by most.¹³⁹ Senators Armstrong and Helms, consistent with the first view, believed that GID was morally harmful, “abhorrent,” and “deviant.”¹⁴⁰ For them, GID was to be discouraged, not protected under the law.¹⁴¹ Senators Harkin and Kennedy took the second view, believing that GID was unfortunate and abnormal much like other impairments, but not harmful to others.¹⁴² Importantly, no one subscribed to the third view—that GID, or being transgender more generally, was “good.”

In the end, GID was excluded from the ADA because several senators

other antidiscrimination laws is to provide across-the-board evenhanded protection, *not to pick and choose disabilities we approve of and exclude the ones we don't*. If we remove protections from one form of disability, who will be next?” 134 CONG. REC. S19726 (daily ed. Aug. 1, 1988) (statement of Sen. Cranston) (emphasis added); see also *supra* note 62 (only Senators Cranston and Weicker voted against Helms' Fair Housing Act amendment).

137. See Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 69-70 (2006) [hereinafter Feldblum, *Moral Conflict*]; see also Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 140-41 & n.4 (2005) [hereinafter Feldblum, *Gay is Good*] (stating that moral argumentation in support of true equality for gay people “would be relevant to achieving true equality for transgender people as well”).

138. Feldblum, *Moral Conflict*, *supra* note 137, at 69-70.

139. See e.g., Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, in TRANSGENDER RIGHTS *supra* note 2 at 146-50 (describing emergence of self-identified transgender rights movement as recent phenomenon, and noting historical misunderstanding of transgender people among lesbians and gay men); Colker, *Homophobia*, *supra* note 9, at 39 (discussing overwhelming support for Helms amendment excluding “transvestites” from protection under Fair Housing Amendments Act of 1988).

140. 135 CONG. REC. S10772 (daily ed. Sep. 7, 1989) (statement of Sen. Helms).

141. See *supra* Section III.A.1.

142. See *supra* notes 129-130 and accompanying text.

believed that it was not worthy of protection and, in the eleventh hour, the ADA's sponsors and disability rights advocates reluctantly agreed to sacrifice the inclusion of GID in exchange for the ADA's passage in the Senate.¹⁴³ Had there been a transgender lobby at the time and had social perceptions of transgender people evolved,¹⁴⁴ the result may well have been different, and the transgender community might have owed Armstrong far less "a debt of gratitude."¹⁴⁵

The ADA's exclusion of GID has a powerful symbolic impact. As one scholar recently commented, "[f]ederal law has an important expressive function, especially concerning the messages it sends about disadvantaged groups."¹⁴⁶ The fact that Congress went out of its way to exclude GID, along with nine mental impairments that involve some harm to oneself or others, sends a strong message: people with GID have no civil rights worthy of respect.¹⁴⁷ Unlike homosexuality or bisexuality, GID is a mental impairment, the ADA tells us. But unlike other mental impairments, GID is dangerous, despicable, and undeserving of protection—like pedophilia, kleptomania, and pyromania. GID is *not* good.

143. See *supra* Section III.C.

144. See Dallas Denny, *Transgender Communities*, in TRANSGENDER RIGHTS, *supra* note 2 at 174, 183 (2006) (discussing rise of transgender lobby in mid-1990's, and gay, lesbian, and bisexual support for transgender rights by early 2000's); see also *A Blueprint for Equality: A Federal Agenda for Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 2 (March 2012), http://transequality.org/Resources/NCTE_Blueprint_for_Equality2012_FINAL.pdf ("[I]n 2003, transgender people barely had a foot in the door of the Washington offices where major federal policy decisions take place. Now we're at every relevant meeting, and our impact is felt at almost every table where our issues are discussed.").

145. 135 CONG. REC. S10785 (daily ed. Sep. 7, 1989) (statement of Sen. Hatch).

146. Waterstone, *supra* note 19, at 1122.

147. See 42 U.S.C. § 12211 (2006); see also S. Elizabeth Malloy, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 *Women's Rts. L. Rep.* 283, 299 (2011) ("[T]he ADA has instead served to legitimize discrimination against transsexual individuals, not only by deliberately excluding them from protection, but also by placing them in the same category as pedophiles, exhibitionists, and voyeurs."); *id.* at 319 (stating that exclusion of transgender people "from the ADA was effectively a codification of the legal system's hostility towards them"); Colker, *Homophobia*, *supra* note 9 at 50 (noting that "[t]he language concerning transvestites and transsexualism is . . . extremely derogatory" because "[t]ranssexual and transvestite individuals are lumped together with individuals who have 'sexual behavior disorders'"); Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as Moral Code*, 94 *COLUM. L. REV.* 1451, 1479 (1994) ("[T]he result of the ADA's exclusion is not merely to allow private employers to take action against an employee because of that employee's sexual behavior, but to do so with the state's blessing . . . perpetuat[ing] the material, tangible discrimination against sexual minorities."); see also Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 *MCGEORGE L. REV.* 473, 485 (2002) ("The decision to exclude compulsive gamblers, kleptomaniacs, and pyromaniacs from the protections others enjoy surely reflects the majority's dislike of these politically unpopular groups.").

IV. GENDER IDENTITY DISORDER AND THE ADA AMENDMENTS ACT OF 2008:

DISABILITYQUEER

A. New Scope of Coverage

For nearly twenty years, the ADA was widely understood by courts and society at large to protect a narrow class of people: “those” people with impairments that impose severe functional limitations.¹⁴⁸ Two Supreme Court decisions were largely to blame for this development. First, in 1999, in the case of *Sutton v. United Airlines* (and its two companion cases), the Supreme Court held that the ameliorative effects of medication and other measures must be considered in determining whether a person is disabled under the ADA.¹⁴⁹ As a result of *Sutton*, many people who experienced discrimination because of an impairment were nevertheless unprotected by the ADA because their impairments did not rise to the level of a “disability” after taking into account ameliorative measures.¹⁵⁰

Second, in 2002, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court held that the words “substantially limits” and “major life activities” in the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled.” In order to qualify as a “disability,” the Court stated, the impairment must therefore “prevent[] or severely restrict[]” life functions.¹⁵¹ These strict interpretations effectively gutted the ADA, “narrow[ing] the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”¹⁵²

In 2008, Congress responded to these decisions by passing the ADA

148. See Barry, *Toward Universalism*, *supra* note 1, at 250.

149. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488-89 (1999); see also *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

150. See Barry, *Congress Intended*, *supra* note 25 (“In the wake of *Sutton*, lower court decisions struck down the claims of an electrician with muscular dystrophy whose conditional job offer was revoked, in part, because he needed to use a ladder to reach items above his head, a pharmacist who was denied a half-hour uninterrupted lunch break to manage his diabetes, and a law enforcement officer who was fired after an examining physician determined that his depression disqualified him from his job. . . . The Supreme Court had, in effect, created a tragic paradox: the better you manage your medical condition, the less likely you are to be protected from discrimination based on that condition.”).

151. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 187-89, 197-98 (2002), *superseded by statute* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 [hereinafter ADAAA]; see Barry, *Congress Intended*, *supra* note 25 (“Given this ‘demanding standard,’ lower courts ruled against people with a wide range of impairments, including a woman with an amputated arm, a man with a traumatic brain injury, a woman with stage III breast cancer, and a young man with intellectual disabilities.”).

152. ADA Amendments Act of 2008 § 2(a)(2), 42 U.S.C. § 12101 Historical and Statutory Notes; see also *id.* at § 2(a)(5).

Amendments Act, “an attack on everything the Supreme Court and lower courts had relied upon to unduly narrow the definition of disability.”¹⁵³ Through the Amendments, particularly the new-and-improved “regarded-as” prong, Congress clarified that, with a few exceptions, anyone discriminated against (e.g., fired, not hired) based on an impairment is protected by the ADA.¹⁵⁴ It does not matter if the person’s impairment is episodic, mitigated by medication, not functionally limiting, or even non-existent.¹⁵⁵ In each case, that person is covered so long as an impairment (whether real or perceived) was the reason for the discrimination.¹⁵⁶ Because everyone has an impairment of one sort or another (or may be perceived as having one), this means that everyone, with only a few exceptions, is entitled to legal protection.¹⁵⁷ Where the denial of a reasonable accommodation is at issue, a person must show some limitation of a bodily function or life activity, but the Amendments make clear that this showing is not a demanding one.¹⁵⁸

As a result of these changes, ADA protection is now nearly universal or, one might say, “disabilityqueer.”¹⁵⁹ The ADA does not protect “those” people with stigmatized impairments that impose severe functional limitations; it protects all of us who are treated unfairly based on impairment, whether or not our impairments are typically thought of as “disabilities.”¹⁶⁰

153. Barry, *Congress Intended*, *supra* note 25.

154. See 42 U.S.C. § 12102(3)(A) (2009) (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”); *id.* at § 12102(3)(B) (exception for “transitory and minor” impairments); *id.* at § 12201(h) (exception for failure-to-accommodate cases).

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

156. See 42 U.S.C. § 12102(3)(A) (2009); see also Barry, *Toward Universalism*, *supra* note 1, at 208 (discussing breadth of regarded-as prong under ADA Amendments Act).

157. See Barry, *Toward Universalism*, *supra* note 1, at 278-79. The Amendments’ reconstituted regarded-as prong, in effect, converts the Americans with Disabilities Act into the Americans with *Impairments* Act by “protect[ing] nearly anyone who is adversely treated based on any impairment—whether the impairment is actual or perceived, and functionally limiting or not.” Barry, *Congress Intended*, *supra* note 25; see also Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 984 (2012) (“[T]he ADAAA’s ‘regarded as’ prong now prohibits nearly all forms of impairment-based discrimination.”).

158. ADAAA § 2(b)(5) (“[T]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”).

159. See Barry, *Toward Universalism*, *supra* note 1, at 208; see also *supra* note 16 and accompanying text.

160. See *id.* at 278-79, 282; see also GLAD, *TRANSGENDER LEGAL ISSUES, NEW ENGLAND 5* (2011), www.glad.org/uploads/docs/publications/trans-legal-issues.pdf (stating that “[t]he term ‘disability’ in anti-discrimination laws . . . is not used in the popular or colloquial sense, and is not limited to individuals who are significantly debilitated or who appear outwardly ill.”).

The newly amended ADA underscores that disability is not something wrong with some of us—it is something wrong with the way society may treat any of us.¹⁶¹

Take autism, for example. The autism spectrum is immensely broad and includes those with “severe to profound intellectual disabilities” as well as those “who are gifted and more competent than most in the community.”¹⁶² All that an autistic person need show in order to be protected under the ADA is that he or she was discriminated against based on autism.¹⁶³ If the person is denied a reasonable accommodation based on autism, the requisite showing is slightly different, but straightforward.¹⁶⁴ In that case, the person must show that autism substantially limits a major bodily function (like neurological or brain function) or a major life activity (like thinking, concentrating, or social interaction).¹⁶⁵ According to Congress, this should not be difficult to do.¹⁶⁶ In fact, according to the EEOC, the agency charged with enforcing the ADA’s employment provisions, autism is now presumptively covered, as are major depressive disorder, PTSD, obsessive compulsive disorder, and schizophrenia.¹⁶⁷

Given autism’s wide spectrum, the EEOC’s presumptive protection of autism underscores the ADA’s broad scope of coverage.¹⁶⁸ So far as the EEOC is concerned, the ADA now covers not only the non-verbal eighteen-year-old who exhibits self-injurious behavior, but also the socially awkward professor not hired for a job.¹⁶⁹ It covers the person who views autism as a

161. *See id.*

162. Kevin Barry, *Gray Matters: Autism, Impairment, and the End of Binaries*, 49 SAN DIEGO L. REV. 161, 169 (2012) (quoting Dr. Ami Klin). “Although the *DSM-IV* tries to distinguish various points along the autism spectrum by providing diagnostic categories for various subtypes of autism, such as Asperger’s and PDD-NOS,” the *DSM-5* does away with subtypes in favor of a single diagnosis: “Autism Spectrum Disorder.” *Id.* at 170; *see Autism Spectrum Disorder: Proposed Revision*, AM. PSYCHIATRIC ASS’N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. Please see dsm5.org for the final version of the rule [hereinafter *Autism Spectrum Disorder, DSM-5 Proposed Revision*].

163. *See* 42 U.S.C. § 12102(3)(A) (2009) (“regarded as” prong).

164. *See id.* § 12201(h) (requiring that, when alleging failure to accommodate or to make modifications to policies, practices, or procedures, plaintiffs show they actually are or were substantially limited in a major life activity).

165. *See id.* § 12102(2) (defining “major life activity” to include “concentrating” and “thinking” as well as “the operation of a major bodily function” such as “neurological” and “brain” functions); 29 C.F.R. § 1630.2(i)(1) (2011) (stating that “[m]ajor life activities include, but are not limited to . . . interacting with others . . .”).

166. *See* ADAAA § 2(b)(5).

167. *See* 29 C.F.R. § 1630.2(j)(3)(iii) (2011) (“[I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . autism substantially limits brain function . . . major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.”).

168. *See id.*

169. *See supra* note 160 and accompanying text (discussing autism’s variability); *cf.* U.S. EQUAL EMP. OPPORTUNITY COM’N Press Release: *Comfort Suites To Pay \$132,500 For Disability Discrimination Against Clerk With Autism* (Nov. 7, 2011), <http://www.eeoc.gov/eeoc/>

pathology in need of cure as well as the person who views autism as a form of “neurodiversity” and therefore a difference to be celebrated.¹⁷⁰

1. Same Moral Code

In 2008, Congress revisited the ADA and, in striking fashion, remedied a host of problems with the ADA’s definition of disability.¹⁷¹ But it did not remedy all of them. When given the chance to do away with the GID exclusion in 2008, Congress chose not to act—despite the presence of a national transgender lobby calling for an end to the exclusion,¹⁷² despite a wave of legal changes acknowledging the injustices faced by transgender people,¹⁷³ despite refinement of the definition of GID under the DSM,¹⁷⁴ and despite a burgeoning social and political movement dedicated to helping transgender people live in the world.¹⁷⁵

The reason that the ADAAA did not eliminate the GID exclusion is straightforward, albeit unsatisfying. Political support for the ADAAA (originally, the “ADA Restoration Act”) depended on the bill’s *restoring*—not expanding—congressional intent.¹⁷⁶ Because Congress clearly intended

newsroom/release/11-7-11a.cfm (discussing settlement of lawsuit against hotel operator who refused to allow autistic hotel clerk assistance of job coach and subsequently fired clerk); SIMON BARON-COHEN, *THE ESSENTIAL DIFFERENCE: THE TRUTH ABOUT THE MALE AND FEMALE BRAIN* 163-64 (2003) (discussing award-winning professor of mathematics who is autistic).

170. See Barry, *Gray Matters*, *supra* note 162, at 186 (“The neurodiversity movement originated in the 1990s in response to the dominant conception of autism as a disorder and consists primarily of generally high-functioning autistic adults and their families. . . . [T]he neurodiversity movement’s central claim is that autism is not a disorder but a way of being or, more specifically, a ‘different’ way of being, of thinking, of behaving.”).

171. See ADAAA §4.

172. See *Discrimination*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <http://transequality.org/Issues/discrimination.htm> (last visited Dec. 11, 2012) (“In order to make federal law consistent with the Employment Non-Discrimination Act [bill], Congress should alter or remove problematic language regarding transgender individuals in the Americans with Disabilities Act and related federal agency regulations.”); *cf.* GLAD, *supra* note 160, at 8 (“State disability anti-discrimination laws present an important tool to eradicate irrational discrimination against transgender people in employment, housing, public accommodations and other areas of law.”).

173. See, e.g., Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §4707, 123 Stat. 2838, 2839 (2009) (extending federal hate crimes protection to, among other things, “gender identity”); Media Note, Office of the Spokesman, U.S. Dept. of State, *New Policy on Gender Change in Passports Announced* (June 9, 2010), <http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm> (stating that “[s]exual reassignment surgery is no longer a prerequisite” for issuance of U.S. passport”); see also *infra* notes 202-06 and accompanying text (discussing passage of state laws explicitly protecting people from discrimination based on “gender identity” and federal court decisions protecting transgender people under Title VII).

174. Compare DSM-IV-TR, *supra* note 34, at 576-82, with DSM-III-R, *supra* note 34, at 71-77.

175. See Denny, *supra* note 144, at 182-83 (discussing transgender political activism and appearance of transgender voices in books and films).

176. In this way, the ADA Amendments Act is like any other congressional override, the purpose of which is to reject judicial interpretations of statutes deemed inconsistent with con-

to exclude GID (and Transsexualism) from protection when it passed the ADA in 1990, it would not have been a “restoration” to include those conditions in 2008—it would have been an expansion. Disability rights advocates therefore made the strategic decision to leave for another day the problem of the ADA’s exclusion of these impairments (and several other problems with the ADA).¹⁷⁷

Notwithstanding these political realities, Congress’s refusal to address the ADA’s blanket exclusion of those with GID is deeply troubling. The continued exclusion of GID flies in the face of the ADAAA’s primary purpose, which is to “reinstat[e] a broad scope of protection . . . available under the ADA.”¹⁷⁸ Through its new-and-improved “regarded as” prong, the amended ADA extends antidiscrimination protection to any individual discriminated against based on any impairment *unless* the impairment is “transitory and minor” or is one of those listed alongside GID.¹⁷⁹ While it arguably made sense for Congress to continue to exclude certain impairments that necessarily involve harm to oneself or others (such as exhibitionism, compulsive gambling, pyromania, and kleptomania),¹⁸⁰ and for Congress to guard against a flood of potentially frivolous claims by excluding “transitory and minor” impairments,¹⁸¹ the continued exclusion of GID is nonsensical, offensive, and stigmatizing.¹⁸² GID has as little to do with pedophilia as it does with the common cold, and should be covered by the ADA.

gressional intent. See, e.g., Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 § 181, 123 Stat. 5 (overriding *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); ADAAA (overriding *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (overriding six Supreme Court decisions); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (overriding *Grove City v. Bell*, 465 U.S. 555 (1984)); Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807 (overriding *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)); Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (overriding *United States Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986)); Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (overriding *Smith v. Robinson*, 468 U.S. 992 (1984)); see generally William N. Eskeridge, Jr., *Overriding Supreme Court*, 101 YALE L.J. 331, 332 & n.1 (1991) (discussing congressional overrides of Supreme Court statutory interpretation decisions).

177. See Kevin Barry, Personal Notes on ADA Amendments Act Advocacy Effort; see also Barry, *Toward Universalism*, *supra* note 1, at 251 n.292 (“Given the political difficulties associated with a broad legislative fix, disability rights advocates determined early on that the ADA restoration effort ought to focus on what they believed was the biggest problem—the ADA’s scope of coverage.”).

178. ADAAA § 2(b)(1), 42 U.S.C. § 12101 Historical and Statutory Notes; see also 42 U.S.C. § 12102(4)(A) (“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”).

179. 42 U.S.C. § 12102(3)(A) (2009) (“regarded as” prong); *id.* at § 12102(3)(B) (exception for “transitory and minor” impairments); *id.* at § 12211(b) (exception for GID and certain other mental impairments).

180. See DSM-IV, *supra* note 34, at 525-26, 612-15.

181. See Barry, *Toward Universalism*, *supra* note 1, at 273 & n.410.

182. See *supra* note 145 and accompanying text.

Sometimes laws create the very thing they seek to dismantle.¹⁸³ The 2008 amendments to the ADA demonstrate the law's power to redress disadvantage by expanding protection for those treated unfairly based on their impairments. At the same time, Congress's continued exclusion of GID from protection under the ADA demonstrates the law's power to entrench the disadvantage of people with GID. By refusing to cover GID, the ADA's message to people with GID, and to the transgender community more broadly, is now clearer than ever: nearly twenty years after the passage of the ADA, they still have no civil rights worthy of respect. People with GID are still despicable and even dangerous, and therefore undeserving of legal protection under federal disability law.¹⁸⁴ The ADA's moral code remains, with GID retaining its last-place position in the hierarchy of mental impairments.

V. FEDERAL PROTECTION FOR TRANSGENDER PEOPLE: THE "ADA INCLUSION ACT"

The ADA's exclusion of GID in 1990 was based on nothing more than the moral opprobrium of a small handful of senators, conveyed in the eleventh hour of a marathon floor debate and in the absence of an organized transgender lobby.¹⁸⁵ In 2008, when Congress decided to expand the ADA's definition of "disability" to protect more people,¹⁸⁶ things should have been different for people with GID. Sadly, they were not. Instead of removing the GID exclusion once and for all, Congress enshrined its moral opposition toward people with GID by preserving the exclusion.

This should trouble those who seek true equality for transgender people. While Congress's decision not to revisit the GID exclusion was understandable as a matter of politics, it was wrong as a matter of morality—a set-back for the project of making transgender "good."¹⁸⁷ The ADA should be righted again through passage of a modest bill, the "ADA Inclusion Act," which deletes the words "gender identity disorders not resulting from physical impairments" and "transsexualism" from the ADA's list of excluded impairments.¹⁸⁸

183. See CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* 107 (1988) (discussing how laws "help to create disability").

184. See Levi & Klein, *supra* note 35, at 75 ("At the heart of the federal exclusion of transgender people from the ADA lies bias, bigotry, and misunderstanding of transgender people.").

185. See *supra* Section III.B.

186. See ADAAA §4.

187. See *supra* note 138 and accompanying text.

188. This Article does not argue that "transvestism" should be deleted from the ADA's list of excluded impairments. As discussed above, the impairments excluded from the ADA derive from the DSM. See *supra* notes 118-19 and accompanying text. According to the DSM, "Transvestism" (renamed "Transvestic Fetishism" under the DSM-III-R (1987) and, under the proposed DSM-5, now called "Transvestic Disorder") is highly specific—it refers to sexual

An “ADA Inclusion Act” would no doubt face objections for a variety of reasons and from a variety of constituencies, including the religious community.¹⁸⁹ But the most salient objections would likely come from those with a personal stake in a GID diagnosis, from members of the transgender community “whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.”¹⁹⁰

Importantly, the transgender community is not a monolith. It includes “transsexual” people who have undergone hormonal treatment or surgery in order to align their anatomy and gender identity, people “who undergo

arousal from cross-dressing that results in significant distress or impairment. See *Transvestic Disorder: Proposed Revision*, AM. PSYCHIATRIC ASS’N DSM-5 DEV. Proposed revisions are no longer available online, but are on file with the author. Please see [dsm5.org](http://www.dsm5.org) for the final version of the rule ; see also Ray Blanchard, *The DSM Diagnostic Criteria for Transvestic Fetishism*, available at <http://www.dsm5.org/Documents/Sex%20and%20GID%20Lit%20Reviews/Paraphilias/DSMV.TF.pdf> (discussing changes to “Transvestism” in successive versions of DSM). Importantly, “Transvestism” does not refer more broadly to cross-dressing absent sexual arousal and distress, nor does it refer to GID. DSM-IV, *supra* note 34, at 536-37. Therefore, while those with Transvestic Fetishism would continue to be excluded under the ADA, the “ADA Inclusion Act” would likely protect cross-dressers (under the “regarded-as” prong, 42 U.S.C. § 12102(3)(A) (2006)) and, of course, people with GID.

One might argue that Transvestic Fetishism should *not* be excluded from protection under the ADA because, unlike other sexual disorders such as voyeurism and pedophilia, it does not involve either “the suffering or humiliation of oneself or one’s partner” or “children or other nonconsenting persons.” See DSM-IV, *supra* note 34, at 522-23. Alternatively, one might argue that Transvestic Fetishism should not be excluded because *no* sexual disorder should be excluded, given that the ADA already provides a “safety valve” that allows employers and businesses to discriminate against people who pose a “direct threat” to the health or safety of others, see 42 U.S.C. §12113(b) (2006), and given that the exclusion unfairly deprives protection to those who are “recovered” or are falsely perceived as having a sexual disorder (under the “regarded-as” prong), see *id.* §12102(3)(A). These arguments have much merit. Nevertheless, because “Transvestic Fetishism” is a “sexual disorder” under the DSM—as opposed to GID (and Transsexualism), which is not—an argument for inclusion of Transvestic Fetishism implicates the inclusion of other sexual disorders and, potentially, all of the remaining impairments excluded from the ADA. To avoid conflating support for inclusion of GID with support for inclusion of all sexual disorders, psychoactive substance abuse disorders, and certain impulse-control disorders, the “ADA Inclusion Act” should target the “low-hanging fruit” and seek inclusion of GID (and Transsexualism) only.

189. See, e.g., *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 5 (2009) (written testimony of Craig L. Parshall, Senior Vice-President and Gen’l Counsel, Nat’l Religious Broadcasters), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/111/pdf/testimony/20090923CraigParshallTestimony.pdf> (“Neither the Congress nor the courts have jurisdiction over the religious beliefs of people of faith. . . . Christian ministries that object to those sexual preferences which are in clear violation of the standards of the Bible are standing on a long and well-worn road.”); see also 134 CONG. REC. S4236 (daily ed. Mar. 17, 1988) *supra* note 62 (statement of Sen. Helms). Religious arguments against GID inclusion ought to have less force, especially in the employment context, given the ADA’s explicit exemption for religious entities, see 42 U.S.C. §§ 12113(d), 12187, and the Supreme Court’s recognition of the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 132 S. Ct. 694, 697 (2012), which bars the application of employment discrimination laws to the “employment relationship between a religious institution and its ministers” under the First Amendment. *Id.*

190. Currah et al., *supra* note 2, at xiv.

no medical treatment but also take steps to conform their gender expressions to meet their gender identities,"¹⁹¹ and the "Genderqueer" – i.e., those who "redefine[] or play[] with gender, or who refuse[] gender altogether"; those "who bend/break the rules of gender and blur the boundaries"¹⁹² and "live outside of the gender norms of society."¹⁹³

Given the diversity of the transgender community, transgender attitudes toward GID are wide-ranging. Some transgender people, for example, regard the misalignment of their anatomy and gender identity as a mental impairment and accept the GID diagnosis.¹⁹⁴ Others attribute this misalignment to differences in the brain or central nervous system and therefore believe it to be a physical impairment.¹⁹⁵ Still others reject the notion of "impairment" altogether and argue instead for an understanding of gender nonconformity as "a practice of self-determination, an exercise of autonomy. . . . one among many human possibilities of determining one's gender for oneself."¹⁹⁶ Echoing autism's neurodiversity movement, this thread of the transgender community acknowledges the discomfort experienced by transgender people, but attributes the discomfort to "something caused purely by cultural prejudices rooted in gender stereotypes" – not pathology.¹⁹⁷ Some have even called for elimination of the GID diagnosis altogether.¹⁹⁸

While some members of the transgender community explicitly support

191. Levi & Klein, *supra* note 35, at 80. Not all those who take steps to conform their gender expressions to meet their gender identities identify as transgender; some "identify simply as men and women." U.S. Office of Pers. Mgmt., Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace (May 27, 2011), <http://www.opm.gov/diversity/Transgender/Guidance.asp>.

192. *LGBT Resources – Definition of Terms*, GENDER EQUITY RESOURCE CENTER, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#gender_queer.

193. *Teaching Transgender*, *supra* note 34, at 17.

194. See Levi & Klein, *supra* note 35, at 80-81.

195. See *id.* at 81, 84-85.

196. See Butler, *Undiagnosing Gender*, *supra* note 13, at 275.

197. See Levi & Klein, *supra* note 35, at 81.

198. See Butler, *Undiagnosing Gender*, *supra* note 13, at 275 (stating that "some activist psychiatrists and trans people have argued that [GID] should be eliminated altogether"); see also Denny, *supra* note 144, at 184 (stating that "many transsexuals reject the medical model of transsexualism" that "view[s] them as mentally ill"); Hébert, *supra* note 14, at 541 n.30 ("[P]ortions of the transgender community object to the inclusion of gender identity disorder in the DSM-IV-TR precisely because of the resulting categorization of gender identity disorder as a mental illness and the resulting stigmatization."); *GID (Adult)*, GID REFORM ADVOCATES, www.gidreform.org/gid30285.html (advocating reform of GID diagnosis on grounds that it "serves to confuse cultural nonconformity with mental illness and pathologize ordinary behaviors as symptomatic."); *id.* at www.gidreform.org ("It is time for the medical professionals to affirm that difference is not disease, nonconformity is not pathology, and uniqueness is not illness."); SHANNON MINTER & PHYLLIS RANDOLPH FRYE, GID AND THE TRANSGENDER MOVEMENT: A JOINT STATEMENT BY THE INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY (ICTLEP) AND THE NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR) (Nov. 14, 1996) [hereinafter JOINT STATEMENT], <http://www.transgenderlegal.com/gid1.htm> (arguing that "transsexualism should become a medical rather than a psychiatric status.").

GID's inclusion under the ADA, not all do.¹⁹⁹ For this thread of the transgender community, the ADA Inclusion Act may be controversial for a number of reasons.

A. "Disability Rights Protection is Infeasible and Unnecessary"

The most obvious objection is political: Congress is unlikely to revisit a statute that they amended less than four years ago. This is especially true given the direction of transgender policy in recent years, and even in recent months, which points toward legal protections based on "sex" and "gender identity" – not disability.²⁰⁰ In the wake of the Supreme Court's decision in *Price Waterhouse v. Hopkins*, which held that Title VII's prohibition on "sex" discrimination in the workplace extends to discrimination based on sex stereotypes,²⁰¹ a growing number of federal circuit and district courts have held that Title VII protects transgender people based on their failure to ad-

199. Compare *supra* note 172 and accompanying text, with Jeannie J. Chung, *Identity or Condition?: The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, 21 COLUM. J. GENDER & L. 1, 35-36 (2011) ("[I]t is highly likely that using disability laws will perpetuate the medicalization of transgender individuals, that is, transgender individuals' continued reliance on the medical profession to obtain legal entitlements and protections on the basis of their transgender status. . . . For this reason, disability anti-discrimination laws, with their current emphasis on the medical model of disability, may do more harm than good for transgender individuals."); *id.* at 36 (stating that application of state disability law to transgender people "may further the pathologization of transgender individuals, since the DSM-IV defines GID as a mental illness"), Malloy, *supra* note 147, at 300 ("Perhaps the most controversial issue within the transsexual community with respect to disability anti-discrimination laws concerns whether they should be considered disabled at all."), Rose, *supra* note 9, at 436 n. 199 (noting lack of consensus "even among transsexuals, as to whether [transsexualism] should be classified as a disability"), MINTER & FRYE, JOINT STATEMENT, *supra* note 198 (stating that "the disability rights model is [n]either the only [n]or the most effective way to win civil rights protections for transgendered people," and that it "perpetuat[es] . . . the stereotype that transgendered people are inherently disturbed or unstable"), and *supra* note 198 and accompanying text.

200. Even assuming the political stars aligned in such a way as to allow for further amendment of the ADA, many in the disability rights community might reasonably resist such amendment for fear of opening the ADA to amendments that would make it more difficult for people to assert their rights under the statute. One such proposed amendment would likely be the ADA Notification Act, which has been introduced in seven consecutive Congresses. The ADA Notification Act of 2011, H.R. 881, 112th Cong. § 2 (2011). This bill would prohibit a state or federal court from exercising jurisdiction over an ADA Title III (public accommodations) suit unless "the plaintiff provides the defendant with a written notice of . . . the facts that constitute the alleged violation" by registered mail, and ninety days (which may be extended up to 120 days) elapses without the defendant correcting the alleged violation. *Id.*; see generally Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 17 (2006) (discussing ADA Notification Act).

201. See 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

here to the stereotypes associated with their assigned sex at birth.²⁰² On April 20, 2012, the EEOC issued a groundbreaking decision adopting the reasoning of these courts and holding that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition.”²⁰³ Title VII coverage for transgender people is now the official position of the federal government.

Furthermore, sixteen states plus the District of Columbia, as well as over 150 cities and counties, have passed laws prohibiting discrimination based on gender identity.²⁰⁴ And proposed federal legislation awaits. Since 2007, the Employment Nondiscrimination Act (ENDA), a bill intended to prohibit employment discrimination based on “sexual orientation” and “gender identity,” has been introduced in Congress.²⁰⁵ Given these channels of existing and potential legal protection, one might argue, the transgender community does not need disability rights law. There are two responses to

202. See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 751-57 (2010) (discussing federal appeals court decisions in which transgender workers were covered under Title VII). While a growing number of courts have concluded that, under *Price Waterhouse v. Hopkins*, Title VII prohibits discrimination against transgender people based on their failure to comply with sex stereotypes, courts almost universally agree that Title VII does not prohibit discrimination based on an individual’s transgender status alone. See *id.* at 732, 750. But see *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (holding that employer’s refusal to hire person because she was transsexual was “because of sex” and therefore prohibited under Title VII); see also *Macy*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (“Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. . . . [W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”) (emphasis added).

203. *Macy*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

204. See *Know Your Rights: Employment Discrimination and Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 1 (May 2012), http://transequality.org/Resources/EmploymentKnowYourRights_May2012.pdf. On July 6, 2011, Connecticut became the fifteenth state to prohibit discrimination based on gender identity. Nan Hunter, *Connecticut becomes 15th state to prohibit anti-trans discrimination*, HUNTER OF JUSTICE BLOG (July 6, 2011), <http://hunterofjustice.com/2011/07/15th-state.html>. Interestingly, while law student support for the bill was strong, it was not universal. Compare *An Act Concerning Discrimination: Hearing on H.B. 6599 Before the J. Comm. on the Judiciary*, 2011 Leg., Reg. Sess. (Conn. 2011) (testimony of Ted Rucci, third-year law student, Quinnipiac University School of Law, On Behalf of Quinnipiac University School of Law Q Alliance, Yale Law School Outlaws, and UConn Law School Lambda Law Society (testifying in support of transgender civil rights bill on behalf of all three of Connecticut’s LGBT law student organizations), with *An Act Concerning Discrimination: Hearing on H.B. 6599 Before the J. Comm. on the Judiciary*, 2011 Leg., Reg. Sess. (Conn. 2011) (testimony of James Bailey Brislin, second-year law student, Western New England College School of Law) (testifying in opposition).

205. See, e.g., Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); see also *Employment, Non-Discrimination Act: Legislative Timeline*, HUMAN RIGHTS CAMPAIGN, www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline (tracing history of ENDA bill from 1994 [“sexual orientation” only] to present [including “gender identity”]).

this objection.

1. The More Rights the Better

The first is straightforward: current antidiscrimination protection for transgender people on the basis of “sex” and “gender identity” is precarious at best. While both the EEOC and many courts have interpreted *Price Waterhouse* to prohibit discrimination against transgender people under Title VII,²⁰⁶ successfully making out a case of gender stereotyping is no easy feat, especially where the case involves restroom usage or dressing and grooming standards.²⁰⁷ The ADA, by contrast, is well-suited to combat discrimination against transgender people.²⁰⁸ Unlike Title VII, the ADA explicitly defines discrimination to include the failure of an employer to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”²⁰⁹ Such reasonable accommodations might include, for example, temporarily modifying policies governing restroom usage and dressing and grooming standards, as well as modifying a person’s work schedule or granting a person leave to seek counseling, hormone therapy, electrolysis, reassignment surgery, or other treatment.²¹⁰

206. See *supra* notes 202-203 and accompanying text.

207. See McGinley, *supra* note 202, at 750, 757-61 (stating that while “transgender persons may enjoy partial coverage [under Title VII] . . . their method of proof is difficult and their efforts are often unsuccessful” and noting cases in which courts ruled against transgender plaintiffs); see also Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & An Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 180 (2009) (“The dress and grooming codes cases are the clearest example of narrow protection for gender nonconformity under Title VII.”).

208. Cf. Levi & Klein, *supra* note 35, at 74 n.1 (citing cases in which transgender people were protected under state disability antidiscrimination laws); accord Chung, *supra* note 199, at 15 n.66.

209. 42 U.S.C. § 12112(b)(5)(A) (2006) (ADA Title I); see also 28 C.F.R. § 35.130(b)(7) (2012) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . .”) (Department of Justice regulations implementing ADA Title II); 42 U.S.C. § 12182(b)(2)(A)(ii) (2006) (“[D]iscrimination includes . . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . .”) (ADA Title III). Title VII contains a modest reasonable accommodation requirement, but only for *religion*. 42 U.S.C. § 2000e(j) (2006) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”).

210. See 42 U.S.C. § 12111(9)(B) (2006) (defining “reasonable accommodation” to include “job restructuring” and “part-time or modified work schedules”); 29 C.F.R. Pt. 1630 App. (2012) (“[O]ther accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment . . .”). The question whether ADA coverage of GID would force employer-provided health insurance plans to cover sex reassignment surgery (SRS) and other medical procedures relating to gender reassignment is a fas-

Furthermore, Title VII and the proposed ENDA (which is still a long way from passage)²¹¹ are not comprehensive. Unlike the ADA, they do not extend beyond the workplace to all of the other places that intimately touch transgender lives: the high school and the university, the department store and the restaurant, the homeless shelter and the hotel, the adoption agency and the foster home, the hospital and the senior citizen center, the health club and the beauty shop, the bus station and the airport, the prison and the police station, the department of social services and the registry of motor vehicles.²¹² State law, moreover, is a patchwork quilt, with some states extending broad protection to transgender people, others extending narrow

inating and complex one. While a fulsome discussion of this issue is beyond the scope of this Article, some brief points are in order. Generally speaking, § 501(c)(3) of the ADA permits health insurance plans to make disability-based distinctions—such as the exclusion of SRS—so long as the plan is “bona fide” and its challenged disability-based distinction is not being used as a “subterfuge to evade the purposes of [the ADA].” A plan is “bona fide” if “it exists and pays benefits, and its terms have been accurately communicated to employees.” THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NOTICE CONCERNING THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008, No. 915.002 § III(C)(1) (June 8, 1993), <http://www.eeoc.gov/policy/docs/health.html>. A plan’s disability-based distinction is not being used as a “subterfuge” if it is “justified by the risks or costs associated with the disability,” for example, if the distinction: is attributable to increased risks (and thus increased cost to the health insurance plan) of the disability, and not to the disability per se”; “would have been so expensive as to cause the health insurance plan to become financially insolvent”; or would result in “a drastic increase in premium payments (or in co-payments or deductibles), or a drastic alteration to the scope of coverage or level of benefits provided” *Id.* § III(C)(2). Although elimination of the ADA’s GID exclusion would permit transgender people to challenge health insurance plans’ GID-based distinctions, it is far from clear whether those challenges would be successful. See Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 148-49 (2011) (stating that ADA gives employers “a tremendous amount of discretion in carving out entire categories of treatment, even if doing so would create disability-based distinctions, provided that such treatments are in fact high-cost and will therefore create the needed actuarial data.”); Hong, *supra* note 46, at 96 (stating that “[m]any private insurance companies exclude [G]RS and hormone treatments from their coverage” and “defend the exclusion clause . . . as a reasonable measure to contain costs and disallow superfluous procedures,” but arguing that such clauses are motivated by non-medical and non-fiscal criteria).

211. While passage of ENDA is likely inevitable, it will take some time. In 2007, the “last-minute jitters [of] some Democrats” over ENDA’s trans-inclusive language prompted Members of Congress to introduce a “compromise” bill that stripped out “gender identity,” fracturing the coalition of transgender and gay rights organizations in the process. *A Non-Transgender-Inclusive ENDA? No Way!*, NATIONAL GAY AND LESBIAN TASK FORCE (Sep. 27, 2007) http://www.thetaskforce.org/press/releases/prMF_092707. Neither the trans-inclusive nor the sexual-orientation-only bill passed.

212. Compare 42 U.S.C. § 2000e-2 (2006) (prohibiting discrimination in employment) and Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. § 4 (2011) (same), with Americans with Disabilities Act of 1990 §§ 101-107, 42 U.S.C. §§ 12111-12117 (2006) (prohibiting discrimination in employment), *id.* at §§ 201-245, 42 U.S.C. §§ 12131-12165 (prohibiting discrimination in public services), and *id.* at §§ 301-309, 42 U.S.C. §§ 12181-12189 (prohibiting discrimination by private entities that operate places of public accommodation). For an excellent survey of the various forms of discrimination faced by transgender people, see generally, INJUSTICE AT EVERY TURN, *supra* note 18.

protection, and most extending no protection.²¹³

ADA coverage would therefore fill important gaps and provide another, and surer, layer of needed protection.²¹⁴ To the extent that some redundancies exist, overlapping protection is by no means new to antidiscrimination law and is probably a good thing.²¹⁵ While the political will to further amend the ADA may be a long way off, that is no reason not to pursue it; ENDA is a case in point and well worth the wait.

2. More than Rights: Transgender is “Good”

Second, and more importantly, even if transgender people were to win robust legal protections through laws based on “sex” and “gender identity,” they will have won only part of the battle. As Professor Feldblum argues, in order to achieve *true equality* for transgender people, “changing the public’s perception of the *morality* . . . of changing one’s gender may ultimately be necessary . . .”²¹⁶ Transgender advocacy should therefore seek to win more than rights to fair and equal treatment under sex and gender identity discrimination law; it should seek to win hearts by showing that transgender is “good.”²¹⁷

To do this, transgender advocacy must rebut the moral case against transgender people. The ADA should play a prominent role in this project because the ADA’s GID exclusion *is* the moral case against transgender people; it is a moral attack that likens transgender people to people with pedophilia and pyromania who are harmful to the health of the community.²¹⁸ Rather than ceding the moral floor to the opponents of transgender rights, advocates should seize on the GID exclusion to affirm and advance the moral legitimacy of changing genders and otherwise defying gender norms.

Consider the testimony of Kallista H. Solyn, a transgender woman in Connecticut, who testified before Connecticut’s Judiciary Committee in

213. See *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, TRANSGENDER LAW AND POLICY INSTITUTE & NATIONAL GAY AND LESBIAN TASK FORCE (Aug. 1, 2008), http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf.

214. Cf. Levi & Klein, *supra* note 35, at 75 (arguing that “transgender persons who experience discrimination in employment, housing, public accommodations, and other areas fit neatly within the definition of ‘disability’ used in modern civil rights laws”).

215. The Rehabilitation Act and ADA, for example, target some of the same acts and actors. See Americans with Disabilities Act of 1990 §§ 201-02, 42 U.S.C. §§ 12131-32 (2006) (amended 2009) (prohibiting discrimination by state and local government); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006) (prohibiting discrimination by federally funded entities).

216. Feldblum, *Gay is Good*, *supra* note 137 at 141 (emphasis added).

217. See *id.* at 141-42 (arguing that lack of “[d]irect engagement with the issues of morality surrounding either gay sex or gender identity . . . represents a serious deficiency in our articulation of the justification for LGBT equality”).

218. See 42 U.S.C. § 12211(b).

2011 in support of a state transgender civil rights bill.²¹⁹ After fourteen years of service to her employer, a privately owned aviation-related company, Ms. Solyn was terminated after informing her supervisor of her plans to undergo gender reassignment surgery. “Within several days of disclosing my intention to transition,” Ms. Solyn explained, “I was asked, by the firm’s owners, to ‘do the right thing for the sake of the company, and resign.’ I refused Being transgender is not a ‘phase or a lifestyle.’ I was born this way and I can no more change my gender identity than I could change the color of my skin.”²²⁰

Ms. Solyn is not sick. In fact, she is not all that different from the rest of us. She, like so many of us, wants to pursue her basic human capabilities, that is, to “live a safe, well-nourished, productive, educated, social, and politically and culturally participatory life of normal length.”²²¹ But, unlike many of us, she cannot do so without changing her gender. While most of us will not undergo hormonal and surgical procedures to transition to the opposite sex, *any one of us* might choose that option if we could not fulfill our basic human capabilities without doing so. One might also choose something less restrictive, “blend[ing] genders as if from a palette.”²²² One might choose to “transition gender roles without a goal of genital surgery, acknowledge one’s gender dysphoria and yet remain in one’s original gender role, to take hormones for a while and then stop, [or] be a woman with breasts and a penis or a man with a vagina”²²³

No matter which path one chooses, nonconformance with gender norms does not destroy community—it perfects it by allowing members of the community to pursue their capabilities to the maximum extent. When viewed in this way, the moral case *against* transgender people, one might reasonably argue, is little more than a failure of empathy.

B. “Disability Rights Protection Stigmatizes Transgender People By Labeling Them ‘Disabled’”

Even if one were to agree that transgender advocacy ought to make the moral case for transgender equality, one might reasonably argue that GID’s inclusion under the ADA is not the right way to do it. Disability rights law cannot make gender nonconformity “good,” the argument goes, because disability is *never* good.²²⁴ According to this view, disability refers to im-

219. *An Act Concerning Discrimination: Hearing on H.B. 6599 Before the Judiciary Committee*, 2011 Leg., Reg. Sess. (Ct. 2011) (statement of Kallista H. Solyn, constituent).

220. *Id.*

221. Feldblum, *Gay is Good*, *supra* note 137, at 158 n.57 (citing Robin L. West, *Rights, Capabilities and the Good Society*, 69 *FORDHAM L. REV.* 1901, 1902 (2001)).

222. Denny, *supra* note 144, at 182

223. *Id.*

224. See Emens, *supra* note 16, at 227, 230 (discussing “the highly negative social status of disability” as compared with other protected classes like race or sex, and stating that

pairments that are stigmatized – those that impose functional limitations that render people “abnormal or defective in mind or body.”²²⁵ At best, all that disability rights law can do is make transgender people the objects of pity. Rather than aid transgender people’s rise from the ranks of morally harmful (the first moral view) to good (the third moral view), GID’s inclusion would lock them in disability’s stigmatizing limbo: *those* people with “unfortunate, abnormal health conditions” who are neither good nor harmful to the community (the second moral view).²²⁶

This argument ignores the impact of the ADA Amendments Act of 2008 (ADAAA), which significantly expands the ADA’s definition of disability in two ways. First, in cases that do not involve a request for reasonable accommodation, the ADAAA clarifies that a person is “disabled” if the person is treated adversely because of an impairment – whether that impairment is real or *perceived*, and whether it actually limits major life activities or *not*.²²⁷ “No-one’s body works perfectly, or consistently, or eternally. We are all in some way impaired.”²²⁸ Since all of us have impairments of one sort or another,²²⁹ and since any of us can be regarded as having an impairment of one sort or another, the ADA now covers all of us.²³⁰ Disability coverage is therefore not stigmatizing – at long last, it is something broadly shared.²³¹

Second, while those seeking reasonable accommodations must still show that their impairments “substantially limit” their “major life activities,” the ADAAA significantly reduces this threshold showing.²³² Recent caselaw under the ADAAA tells the story: ankle injuries,²³³ anxiety disorder,²³⁴ back

“[d]isability is rarely understood as a positive state or identity with social or cultural benefits to its bearers or those around them”).

225. See Bagenstos, *supra* note 26, at 437, 444 (2000) (discussing the minority group approach to disability, which locates disability in a discrete group of people whose medical impairments are “stigmatized,” that is, those who “differ too much from a socially defined ‘norm,’” such that they are considered “abnormal or defective in mind or body.”).

226. Feldblum, *Moral Conflict*, *supra* note 137, at 69-70.

227. See 42 U.S.C. § 12102(3)(A) (2006).

228. Tom Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?*, in 2 RES. IN SOC. SCI. & DISABILITY 9, 24 (Sharon N. Barnartt & Barbara M. Altman eds., 2001).

229. See *id.* at 24-25 (“[T]here is no qualitative difference between disabled people and non-disabled people, because *we are all impaired*. Impairment is not the core component of disability . . . , it is the inherent nature of humanity. For example, the Human Genome Project has shown that every individual’s genome contains mutations[, such] as predispositions to late onset diseases such as cancer, heart disease and dementia . . . [E]veryone has limitations, and . . . everyone is vulnerable to more limitations and will, through the ageing process, inevitably experience functional loss and morbidity.”).

230. Barry, *Toward Universalism*, *supra* note 1, at 278-79.

231. See *id.*

232. See 42 U.S.C. § 12102(4) (2006).

233. Fleck v. Wilmac Corp., No. 10-05562, 2011 WL 1899198, at *5-6 (E.D. Pa. 2011) (denying employer’s motion to dismiss).

234. Gesegnet v. J.B. Hunt Transport, Inc., No. 3:09-CV-828-H, 2011 WL 2119248, at *4

injuries,²³⁵ bipolar disorder,²³⁶ broken legs,²³⁷ carpal tunnel syndrome,²³⁸ depression,²³⁹ diabetes,²⁴⁰ eating disorders,²⁴¹ gastrointestinal problems,²⁴² insomnia,²⁴³ monocular vision,²⁴⁴ obesity,²⁴⁵ pain in the hands, joints, and hip,²⁴⁶ psoriatic arthritis,²⁴⁷ and stuttering²⁴⁸ can all be covered under the ADA. These are not the sort of impairments that are considered to be particularly unfortunate or abnormal, and yet the ADA considers them “disabilities” all the same. Thanks to the 2008 amendments, the ADA is now “disabilityqueer”: it rightly blurs the line between the healthy “us” and the unfortunate “disabled” by focusing on how attitudes—not impairments—limit people’s lives.²⁴⁹ Because the newly amended ADA covers nearly all

(W.D. Ky. 2011) (assuming disability but granting employer’s motion for summary judgment based on employee’s failure to adequately request reasonable accommodation).

235. *Cohen v. CHLN, Inc.*, No. 10-00514, 2011 WL 2713737, at *8 (E.D. Pa. 2011) (denying employer’s motion for summary judgment).

236. *Gesegnet*, 2011 WL 2119248, at *4 (assuming disability but granting employer’s motion for summary judgment based on employee’s failure to adequately request reasonable accommodation).

237. *Patton v. Ecardio Diagnostics LLC*, 793 F. Supp. 2d 964, 968-69 (S.D. Tex. 2011) (denying employer’s motion for summary judgment).

238. *Gibbs v. ADS Alliance Data Systems, Inc.*, No. 10-2421-JWL, 2011 WL 3205779, at *3 (D. Kan. 2011) (denying employer’s motion for summary judgment).

239. *Naber v. Dover Healthcare Associates, Inc.*, 765 F. Supp. 2d 622, 646-47 (D. Del. 2011) (finding issue of fact as to disability but granting employer’s motion for summary judgment because employee failed to show that legitimate, non-discriminatory reason for termination was pretextual); *Kinney v. Century Serv. Corp. II*, No. 1:10-cv-00787-JMS-DML, 2011 WL 3476569, at *10 (S.D. Ind. 2011) (denying employer’s motion for summary judgment).

240. *See Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 861-62 (9th Cir. 2009) (finding issue of fact as to disability under ADA and noting that ADA “bolstered” this conclusion, and reversing grant of summary judgment to employer).

241. *Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 258-59 (D.N.H. 2009) (denying school district’s motion to dismiss as to claim of disability).

242. *Wells v. Cincinnati Children’s Hosp. Medical Center*, 860 F.Supp.2d 469, 477-478 (S.D. Ohio 2012) (denying employer’s motion for summary judgment).

243. *See Beveridge v. HD Supply Waterworks, L.T.D.*, No. 7:08-CV-52 (HL), 2009 WL 4755370, at *5 n.8 (M.D. Ga. 2009) (stating that “under [ADA’s] broadened definition, [an employee with insomnia] would likely be successful in proving he was ‘regarded as’ disabled” based on his termination four days after falling asleep at work).

244. *Markham v. Boeing Company*, No.10-1363-MLB, 2011 WL 6217117, at *4-5 & n.8 (D. Kan. 2011) (finding issue of fact as to disability but granting employer’s motion for summary judgment because employee failed to offer sufficient evidence of causation or pretext); *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 239-41 (D. Mass. 2010) (denying employer’s motion to dismiss).

245. *Lowe v. American Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523, at *7-8 (N.D. Miss. 2010) (denying employer’s motion to dismiss).

246. *Gaus v. Norfolk Southern Railway Co.*, No. 09-1698, 2011 WL 4527359, at *17 (W.D. Pa. 2011) (denying employer’s motion for summary judgment).

247. *See Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 855, 859 (5th Cir. 2010) (stating that amendments to ADA “would be very favorable to [plaintiff’s] case if they are applicable, because they make it easier for a plaintiff with an episodic condition [like psoriatic arthritis] . . . to establish that he is an ‘individual with a disability’”).

248. *Medvic v. Compass Sign Co., LLC*, No. 10-5222, 2011 WL 3513499, at *7 (E.D. Pa. 2011) (denying employer’s motion for summary judgment).

249. *See* 154 CONG. REC. S8843 (daily ed. Sep. 16, 2008) (Statement of Managers) (“The

impairments, not just those typically considered to be “disabilities,” there is good reason for GID to be within that scope of coverage.²⁵⁰

C. “Disability Rights Protection Stigmatizes Transgender People by Legitimizing the GID Diagnosis”

But what about those who do not believe that GID is an *impairment* at all—would GID’s inclusion under the ADA stigmatize transgender people by legitimizing the GID diagnosis? This is a harder question. As many commentators have noted, “[b]eing transgender is a quintessentially stigmatic condition. . . .”²⁵¹ People who do not adhere to gender norms are considered the epitome of “abnormal”: neglect, prejudice, and stereotypes are hallmarks of their experience; murder, suicide, homelessness, joblessness, and poverty are tragically common in their community.²⁵²

The GID diagnosis plays a paradoxical role with regard to stigma. On the one hand, it alleviates suffering by “facilitat[ing] access to medical and technological means for transitioning. . . . [I]t makes life livable.”²⁵³ But the diagnosis also comes at a price. As Professor Judith Butler writes,

[GID] subscribes to forms of psychological assessment that assume that the diagnosed person is affected by forces he or she does not

[ADAAA] . . . ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’”); see also Barry, *Toward Universalism*, *supra* note 1, at 278.

250. See GLAD, *supra* note 160, at 6 & n.4 (“Misunderstandings about the term ‘disability,’ and the stigma associated with disability, should not prevent people’s access to the courts and other protections Rather than restrict the valid legal options of transgender people [under disability law], work must be done to eliminate the stigma associated with disability.”); see also Chung, *supra* note 199, 34 (stating that “applying disability laws to individuals not ‘traditionally’ thought of as disabled,” like transgender people, “advances a more dynamic interpretation of disability anti-discrimination statutes”).

251. Levi & Klein, *supra* note 35, at 88.

252. According to a 2011 survey of transgender individuals conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, survey respondents were “nearly four times more likely to have a household income of less than \$10,000/year compared to the general population” and experienced unemployment and homelessness at twice the rate of the general population. Also, “41% of respondents reported attempting suicide compared to 1.6% of the general population” and nearly all reported some form of discrimination or harassment – in school and at work, and in housing, healthcare, and public accommodations. INJUSTICE AT EVERY TURN, *supra* note 18, at 2. International Transgender Day of Remembrance is held each year on November 20 to memorialize members of the Transgender community who have been murdered. See *The Matthew Shepard Hate Crimes Prevention Act: Hearing on S. 909, Before the S. Comm. on Judiciary*, 111th Cong. 1 (2009) (statement of the National Center for Transgender Equality), available at http://transequality.org/PDFs/S909_NCTE_testimony.pdf (“The transgender community has anecdotally reported on more than one bias motivated murder of a transgender person per month over the past few decades.”).

253. Butler, *supra* note 13, at 274, 285.

understand; it assumes that there is delusion or dysphoria in such people; it assumes that certain gender norms have not been properly embodied and that an error and a failure have taken place; it makes assumptions about fathers and mothers, and what normal family life is and should have been; it assumes the language of correction, adaptation, and normalization; it seeks to uphold the gender norms of the world as it is currently constituted and tends to pathologize any effort to produce gender in ways that fail to conform to existing norms. . . .²⁵⁴

As a result, the diagnosis “takes on a life of its own, . . . mak[ing] life harder for those who suffer by being pathologized and who lose certain rights and liberties, including child custody, employment, and housing, by virtue of the stigma attached to the diagnosis”²⁵⁵ According to Professor Butler, the “pathologizing force” of the GID diagnosis can disable—and even kill—transgender people by “mak[ing] them feel in a stigmatized position and, in some cases, contribut[ing] to a suicidal conclusion.”²⁵⁶ With good reason, many in the transgender community have sought to eliminate GID as a DSM diagnosis altogether, just as the gay community successfully did with homosexuality years ago.²⁵⁷

1. The ADA Already Recognizes GID as an Impairment

The stigma surrounding a GID diagnosis should not be underestimated, and the stakes are high.²⁵⁸ While the GID diagnosis no doubt plays a role in

254. *Id.* at 275.

255. *Id.* at 285; *see also* INJUSTICE AT EVERY TURN, *supra* note 18, at 197 (noting “perceived stigma attached with [gender-related] mental health diagnoses”).

256. Butler, *supra* note 13, at 276; *see also id.* 295 (“[O]ne has to ask whether the diagnosis of transgendered youth does not act precisely as peer pressure, as an elevated form of teasing, as a euphemized form of social violence.”). For a thoughtful discussion of the promise and problems inherent in the overlap between disability rights and transgender rights, *see* Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 35 (2003) (“I do not want to make trans rights dependent upon GID diagnoses, because such diagnoses are not accessible to many low income people; because I believe that the diagnostic and treatment processes for GID are regulatory and promote a regime of coercive binary gender; and because I believe that GID is still being misused by some mental health practitioners as a basis for involuntary psychiatric treatment for gender transgressive people. I do not want to legitimize those practices through my reliance on the medical approach to gender nonconformity.”).

257. Compare Chung, *Identity or Condition?*, *supra* note 199 (discussing transgender community’s opposition to GID diagnosis), with KUTCHINS & KIRK, *supra* note 3, at 71-72 (explaining history of gay liberation movement’s successful efforts to delete homosexuality from DSM in 1974).

258. *See* Butler, *supra* note 13, at 276; *cf.* KUTCHINS & KIRK, *supra* note 3, at 77 (“If homosexuality were still considered a mental illness, business and insurance companies would not be offering health coverage for domestic partners, the army would still be using psychiatry to screen suspected homosexuals for discharge, and many of the other advances in gay rights would not be part of our culture.”); *id.* at 61-62 (discussing transformation of homosexuality

the stigmatization of transgender people, ADA coverage of GID would do nothing to further its legitimacy – at least nothing more than the ADA does at present. Unlike homosexuality and bisexuality, which the ADA states “are not *impairments* and as such are not disabilities,” the ADA states only that GID is not a covered “disability.”²⁵⁹ Implicitly, the ADA therefore already recognizes that GID *is* an impairment, but refuses to cover GID by stating that it is not a “disability” (only “disabilities” are covered under the ADA – not impairments).²⁶⁰ The only change made by the ADA Inclusion Act would be to allow GID to be considered a covered “disability.”

But this textual argument aside, the risk of stigmatizing transgender people by covering them under the law seems far outweighed by the stigma that attaches to their continued exclusion under the law. While it is possible that GID coverage *might* stigmatize transgender people by somehow strengthening the “status” of the GID diagnosis, it is more likely that the ADA’s exclusion of GID *currently* stigmatizes transgender people by marking them as undeserving of legal protection.²⁶¹ This is especially true given that Congress did nothing to change the GID exclusion when it expanded the definition of “disability” in 2008.²⁶² Having the law on one’s side seems far less stigmatizing than having a law that continues to group GID with pyromania and pedophilia and permits discrimination with impunity. In fact, it is these very prejudices and stereotypes that the ADA is designed to remedy. As Professor Levi notes, “[t]o avoid relying on disability law for protections because of stigma would exacerbate the problem the laws seek to redress.”²⁶³

2. Social Construction is Not a Reason to Deprive Legal Protection

Another argument against disability rights protection for GID is that GID is a social construction, not an impairment. The problem with this argument is that all impairments – both physical and mental – are, to a certain extent, socially constructed. All impairments are named and diagnosed, and the process of naming and diagnosis are social, and therefore contin-

from something “on which most traditional moral opprobrium rested” to something “good” following removal of homosexuality from DSM, and stating that “[n]o longer was the problem an individual moral struggle to overcome temptation and avoid sin or a psychological struggle to overcome overwhelming desires”) (internal quotation marks omitted).

259. 42 U.S.C. § 12211(a)-(b) (2006) (emphasis added).

260. *Id.* § 12211(b).

261. *See id.*; *see also* Hiegel, *supra* note 147, at 1,453 (“By leaving open a space of permissive employer discrimination, the Act identifies the sexual ‘deviant’ as the new pariah, using the legal machinery of the state to mark as outsiders those whose noncompliant body renders them unfit for full integration into a working community.”).

262. *See supra* section IV.A.1.

263. Jennifer L. Levi, *Clothes Don’t Make the Man (or Woman), But Gender Might*, 15 COLUMBIA J. GENDER & L. 90, 106 (2006).

gent, exercises.²⁶⁴ Autism, for example, need never have been named and diagnosed.²⁶⁵ Children exhibiting the subjective behavioral features we now call autism could have been diagnosed with “childhood schizophrenia” or need never have been diagnosed at all.²⁶⁶ These same contingencies apply to GID, which has been named and renamed over the years (from “Transsexualism” in the DSM-III-R to “Gender Identity Disorder” in the DSM-IV to “Gender Dysphoria” in the proposed DSM-5), and which is diagnosed based on subjective behavioral criteria.²⁶⁷ The fact that impairments are socially constructed, by itself, does not justify withholding legal protection.

“No,” some might further argue, “autism is ‘real,’ while GID is not.” What they mean is that GID does not refer to some objectively-measurable biological pathology and, therefore, it is not an impairment but rather the pathologizing of a perfectly healthy way of being.²⁶⁸ According to this reasoning, however, autism (and many other mental impairments) is not an “impairment” either. While the discovery of some biological pathology underlying autism appears likely, there is none yet.²⁶⁹ And there are plenty of autistic people (i.e., the neurodiversity movement) who, like many in the transgender community, resist the pathologizing of autism and instead recast autism as a different way of thinking and being that should not be cured or normalized.²⁷⁰ Given that both autism and GID lack an objectively-measurable pathology, and given that many members of both communities regard these “impairments” as different ways of being, why should the law treat them differently?

“Okay, then,” one might further argue, “the ADA should exclude both autism and GID because neither is an impairment.” Rather than amending the ADA to treat GID and autism as protected impairments, the argument goes, the ADA ought to be amended to treat GID and autism the same as homosexuality and bisexuality, that is, as not impairments at all.²⁷¹ But this argument also misses its mark. Autism and GID do not cease being impairments because many of those classified as having these conditions do

264. See Barry, *Gray Matters*, *supra* note 162, at 204-05.

265. See *id.* at 209.

266. See *id.*

267. See *Gender Dysphoria, DSM-5 Proposed Revision*, *supra* note 3; DSM-IV, *supra* note 34, at 532-38; DSM-III-R, *supra* note 34, at 74-76.

268. Cf. Butler, *supra* note 13, at 275 (“[T]he diagnosis [of GID] is 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.”).

269. See Barry, *Gray Matters*, *supra* note 162, at 168, 173-74.

270. See *id.* at 186-89; see also Malloy, *supra* note 147, at 301 (“Some [transgender] activists contend that th[e disability] categorization is demeaning and stereotypical because it implies that transsexual individuals are not normal. In this regard, the transsexual community is not alone; individuals in existing disabled groups, such as paraplegics and the deaf, are also resistant to being characterized as such.”) (citation omitted).

271. See 42 U.S.C. 12211(a) (2006).

not consider them to be impairments. The medical establishment, of course, continues to believe that autism and GID are impairments²⁷² but, more importantly, so do many of those diagnosed. The lived experiences of those classified as having these conditions are not universal. While the neurodiverse may resist the pathologizing of autism, forego medical “treatment” such as Applied Behavioral Analysis, and advocate against “cures,” many parents of autistic children may do just the opposite.²⁷³ Likewise, while many transgender people resist the GID diagnosis and forego hormonal treatment and surgery to align their anatomy with their gender identity, many others seek out the diagnosis and treatment for it.²⁷⁴ Rejecting the GID diagnosis is therefore not a principled reason for withholding legal protection for GID—it merely favors one side’s experience over another’s.

D. “Disability Rights Protection Would be Underinclusive”

Another argument against disability rights protection for GID is that it is bound to be under-inclusive. The ADA Inclusion Act would most likely cover a person diagnosed with GID whose distress substantially limits the person’s brain function or ability to sleep, eat, or concentrate, whose life-long medical treatment (or attendant side effects) substantially limits the person’s ability to “car[e] for oneself,” or whose genital surgery substantially limits “the operation of . . . reproductive functions.”²⁷⁵ But, one might argue, it probably would not cover transgender people who do not have the diagnosis because they do not want it,²⁷⁶ because they do not meet the diagnostic criteria, or because they lack access to the medical system that provides such a diagnosis.²⁷⁷

This argument fails to account for recent changes to the law. As discussed above, the 2008 amendments make clear that the ADA covers nearly anyone who is “disabled” (i.e., adversely treated) based on an impairment,

272. *Autism Spectrum Disorder, DSM-5 Proposed Revision*, *supra* note 3.

273. See Barry, *Gray Matters*, *supra* note 162, at 171-72, 186.

274. See Butler, *supra* note 13, at 274-75.

275. See 42 U.S.C. § 12102(2)(A)(2006) (“[M]ajor life activities include, but are not limited to, caring for oneself, eating, sleeping . . . concentrating”); *id.* § 12102(2)(B) (“[A] major life activity also includes the operation of a major bodily function, including but not limited to . . . reproductive functions.”).

276. See Butler, *supra* note 13, at 275.

277. See Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 730 (2005) (stating that “[l]ow-income transgender people who are unable to afford trans-friendly healthcare . . . are unlikely to be able to avail themselves of legal protections that have emerged” from courts’ reliance on diagnosis of GID); see also *About Us*, THE JIM COLLINS FOUNDATION, http://jimcollinsfoundation.org/?page_id=34 (last visited Dec. 11, 2012) (dedicated to “rais[ing] money to fund gender-confirming surgeries for those transgender people who need surgery to live a healthy life, but have no ability to pay for it themselves”).

whether that impairment is real or perceived, limiting or not.²⁷⁸ A transgender man who does not seek out a GID diagnosis or otherwise avail himself of medical interventions (and would not qualify for a GID diagnosis even if he did), and who is not functionally limited in any way, but who dresses in traditionally male clothing and is discriminated against as a result, is most likely “regarded as” having GID.²⁷⁹ The ADA Inclusion Act would most likely cover him.²⁸⁰

As other commentators have noted, this argument also ignores “a truism of a limitation of disability antidiscrimination laws generally,” which is that not all people will be found “disabled.”²⁸¹ While the 2008 amendments drastically lower the bar for legal protection, this truism remains. “This is not a reason, however, to forego pursuing critical nondiscrimination protections for those transgender people who can meet the definition of disability.”²⁸² Consider autism’s vast spectrum, where some autistic people are profoundly limited in their life functioning (e.g., self-care, speaking), and others are not.²⁸³ Consider also the neurodiversity movement’s outer rim, the so-called “autistic cousins” (i.e., non-autistic people with significant social and communication abnormalities that render them significantly “autistic-like”).²⁸⁴ While “cousins,” and even some high-functioning autistic people, will inevitably be denied accommodations under the amended ADA,²⁸⁵ the neurodiversity movement does not—and should not—suggest that autism should not be protected under the law. The same reasoning arguably applies to the transgender community and GID.

VI. CONCLUSION

When the ADA was signed into law in 1990, President George H.W.

278. See 42 U.S.C. § 12102(3)(A) (2009).

279. See *id.*

280. Unlike a person with GID who is substantially limited in a major life activity, a person “regarded as” having GID would not be entitled to a reasonable accommodation. 42 U.S.C. § 12201(h) (2006).

281. Levi & Klein, *supra* note 35, at 87.

282. *Id.*

283. See *supra* note 162 and accompanying text; cf. SIMON BARON-COHEN, *supra* note 169, at 163-64.

284. See Jim Sinclair, *Autism Network International: The Development of a Community and its Culture*, AUTISM NETWORK INTERNATIONAL (Jan. 2005), http://www.autreat.com/History_of_ANI.html. Mirroring the breadth of the neurodiversity and transgender communities, the Deaf community includes those *without* hearing impairments. See Harlan Lane, *Constructions of Deafness*, 10 *DISABILITY & SOC'Y* 171, 179 (1995) (“The claim that one is in the DEAF-WORLD, or that someone else is, is not a claim about hearing status at all. . . . All degrees of hearing can be found among Deaf people . . . and most people who are hearing-impaired are not members of the DEAF-WORLD.”).

285. See Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 *AM. J.L. & MED.* 483, 512-13 (2010) (citing instances where courts denied relief to Autistic plaintiffs under the (unamended) ADA).

Bush announced that the law would “take[] a sledgehammer to . . . the shameful wall of exclusion” separating people with various impairments from “the rich mosaic of the American mainstream.”²⁸⁶ Importantly, the ADA did not remove that wall for everyone. On the eve of passage in the Senate, the ADA’s sponsors struck a fateful bargain with several senators, which maintained the wall for people with GID, pedophilia, pyromania, kleptomania, and several other mental impairments considered “immoral, improper, or illegal.”²⁸⁷ From its inception, the ADA was a moral code that excluded from protection those impairments considered morally harmful.

In the years that followed, members of the transgender community coalesced into a formidable political and social movement demanding access to America’s mainstream. Their advocacy has done much to raise the profile—and morality—of gender nonconformance. The shameful wall excluding transgender people is falling. Transgender is finally becoming “good.”

While legal protections have played an important role in this development, federal disability law is a notable exception. When Congress decided to expand the definition of “disability” in 2008 to include nearly everyone, rendering the ADA “disabilityqueer,” Congress deliberately chose not to revisit the GID exclusion. Far from removing the wall of exclusion for transgender people, the 2008 amendments reinforced it. Legal advancements outside of disability law, including a resounding victory before the EEOC in April 2012, have burst holes in the wall. Yet the ADA’s GID exclusion still stands—a monument to moral opposition toward gender nonconformity, a bulwark against *true* transgender equality.

Reasonable arguments against federal disability protection for GID can surely be made. One might argue, for example, that disability protection is not needed or is under-inclusive, or that disability protection is itself stigmatizing. But none of these arguments squarely rebut the moral opposition underlying GID’s exclusion from the ADA, nor do they adequately account for the 2008 amendments’ expansion of what it means to be “disabled.” An “ADA Inclusion Act” would advance transgender policy by removing gender nonconforming people from the ranks of the morally dangerous and providing them with the same protection as nearly everyone else who is discriminated against based on impairment.

The shameful wall of exclusion for transgender people will fall, and true equality for transgender people will come, when the moral case against transgender equality is exposed for what it is—a failure of empathy. Removal of the ADA’s GID exclusion, a prominent piece of that wall, ought to be part of the project of making transgender “good.”

286. George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), available at http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

287. See 135 CONG. REC. S10796 *supra* note 57 and accompanying text (statement of Sen. Warren Rudman).