

**DISABILITY, DUALISM, & GENDER DYSPHORIA: THE
PERSISTENT NEED FOR AN AMENDED ADA**

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I. INTRODUCTION

The last decade has been revolutionary for the trans community: increased social visibility, an estimated population that has nearly doubled, and an unexpected Supreme Court victory all signal progress for a demographic that still battles pervasive discrimination.¹ Now, a recent decision in the Fourth Circuit signals another path forward for trans rights and marks a convergence of two civil rights movements.² In August of 2022, the Fourth Circuit in *Williams v. Kincaid* became the first federal appellate court to recognize gender dysphoria as a disability under the Americans with Disabilities Act (ADA).³

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1. Ali Szemanski, *When Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act*, 43 HARV. J. L. & GENDER 137, 140 (2020); *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731, 1741 (2020).

2. *Williams v. Kincaid*, 45 F.4th 759, 763 (4th Cir. 2022) (finding gender dysphoria qualifies as a disability under the ADA).

3. *Id.*; Shira M. Blank et al., *Fourth Circuit Holds that Americans with Disabilities Act Covers Gender Dysphoria*, NAT’L L. REV., (Aug. 29, 2022), <https://www.natlawreview.com/article/fourth-circuit-holds-americans-disabilities-act-covers-gender-dysphoria> [<https://perma.cc/R78P-Q29B>].

The ADA offers extensive protections, prohibiting “discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.”⁴ Because ADA protections can only apply to individuals with gender dysphoria, a medical condition that only affects some trans people, the impact this ruling has on trans rights will necessarily be limited.⁵ Despite these limitations, this Note defends the Fourth Circuit’s controversial decision and argues that trans people suffering from gender dysphoria should welcome ADA remedies.

Part II begins by defining relevant trans terminology and providing a brief history of trans rights,⁶ before discussing the Fourth Circuit’s decision in *Williams v. Kincaid* and the case law that informed the court’s reasoning.⁷ This Part ends with a short examination of the parallels between the trans rights and disability rights movements.⁸ Part III.A critiques the supposed stigma of disability and argues that amending the ADA’s list of exclusions should be advocates’ long-term goal.⁹ This list, which denies disability coverage on the basis of “gender identity disorders not resulting from physical impairments,”¹⁰ not only reflects legislators’ discriminatory animus,¹¹ but also rests on a dualistic view of mental and physical disorders that is becoming increasingly untenable in light of modern medicine and advances in neuroscience.¹² Part III.B defends the Fourth Circuit’s rationale and analyzes how advocates should approach similar cases in the future.¹³ Part III.C then focuses on the dualism issue, explaining how the ADA’s language reflects an outdated conception of mental illness that has been roundly rejected by the scientific community.¹⁴ Part IV thus concludes that removing all references to transness and gender disorders from the ADA’s exclusions is the best way

4. *What Is the Americans with Disabilities Act?*, ADA NAT’L NETWORK, <https://adata.org/learn-about-ada> [<https://perma.cc/FR8C-PU2W>] (providing overview of ADA and its legal coverage and protections) (last visited Nov. 18, 2023).

5. *Not All Trans People Experience Gender Dysphoria*, GENDERGP (Sept. 6, 2022), <https://www.gendergp.com/not-all-trans-people-experience-gender-dysphoria> [<https://perma.cc/KA76-997G>].

6. See discussion *infra* Parts II.A–B.

7. See discussion *infra* Part II.C.

8. See discussion *infra* Part II.D.

9. See discussion *infra* Part III.A; 42 U.S.C.A. § 12211(b)(1) (West) (excluding “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders” from disability coverage).

10. See discussion *infra* Part III.A.

11. See *infra* pp. 7–8, 12–13.

12. See *infra* pp. 16–18.

13. See discussion *infra* Part III.B.

14. See discussion *infra* Part III.C.

to ensure that people suffering from severe gender dysphoria receive the accommodations they deserve.¹⁵

II. BACKGROUND

A. *Trans Terminology*

Any discussion of progress in the fight for trans rights requires an understanding of contemporary terminology within the trans community. The term “trans” is a common abbreviation for “transgender,” which itself is an umbrella term that encompasses a variety of gender identities.¹⁶ The plethora of trans identities include, but are not limited to, trans men and trans women, as well as non-binary, agender, genderqueer, and other gender diverse people.¹⁷ Essentially, the words “trans” or “transgender” apply to anyone who feels that the gender assigned to them at birth does not adequately capture their subjective experience of gender identity,¹⁸ though not everyone who appears to be gender diverse will identify as transgender.¹⁹

While “transness” refers to a general aspect of someone’s gender identity, “gender dysphoria” is a strictly medical term.²⁰ In the most recent edition of the Diagnostic and Statistical Manual (DSM-5), the American Psychological Association (APA) added the diagnosis of “gender dysphoria,” which it defines as the “clinically significant distress” some experience as a result of “an incongruence between their gender identity and their assigned sex.”²¹ While all trans people feel some disconnect between the gender assigned to them at birth and their personal experience of gender identity, not all trans people suffer from clinically significant

15. See discussion *infra* Part III.D.

16. *What Does ‘Trans’ Mean?*, OULGBTQIA++, <https://www.ouLGBTQIA+.org/what-does-trans-mean.html> (last visited Nov. 12, 2022, 4:26 PM) [<https://perma.cc/5XM2-Y8S6>]; *What Does Transgender Mean?*, AM. PSYCHIATRIC ASS’N <https://www.apa.org/topics/lgbtq/transgender> (last visited Jan. 5, 2024) [<https://perma.cc/R5R5-FJWL>].

(“Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth... ‘Trans’ is sometimes used as shorthand for ‘transgender.’”) (last visited Mar. 4, 2023, 7:57 PM); see also Amy McCrea, Note, *Under the Transgender Umbrella: Improving EDNA’s Protections*, 15 GEO. J. GENDER & L. 543, 545–46 (2014) (explaining that the transgender umbrella includes gender diverse people that do not fit the binary categories of “transmen” and “transwomen”).

17. *What Does ‘Trans’ Mean?*, *supra* note 16; see also McCrea, *supra* note 16.

18. *What Does ‘Trans’ Mean?*, *supra* note 16.

19. *What Does Transgender Mean?*, *supra* note 16.

20. See, e.g., AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2018).

21. *Id.*

distress that rises to the level of gender dysphoria.²² The popular assumption that gender dysphoria is an inherent feature of trans identities is inaccurate and risks erasing a large swath of the transgender community, particularly non-binary people.²³

Non-binary people experience their gender in a way that does not fit the categories of “man” or “woman.”²⁴ A recent study found that there are approximately 1.2 million non-binary adults in the United States.²⁵ While it is difficult to quantify how many non-binary people suffer from gender dysphoria, statistics regarding the prevalence of gender-confirming surgery²⁶ provide a glimpse into the differing impacts of gender dysphoria on various members of the trans community.²⁷ An estimated 9% of non-binary people undergo some form of gender-confirming surgery, compared to 28% of trans women and roughly 50% of trans men.²⁸ The relative rarity of non-binary people opting for gender-confirming surgery is evidence that these members of the trans community may generally experience less severe gender dysphoria overall. Still, this should not deter advocates from supporting disability coverage for those trans people who do suffer from gender dysphoria.

B. “Sex” and the Civil Rights Act of 1964

For the majority of the trans civil rights movement, the Civil Rights Act of 1964 appeared to be the only viable legal option for protecting trans rights.²⁹ Title VII of the act prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”³⁰ Because this statute only applies to employment discrimination, however, its capacity

22. *Not All Trans People Experience Gender Dysphoria*, *supra* note 5.

23. *Id.*

24. *What Does ‘Trans’ Mean?* *supra* note 16.

25. Leah Asmelash, *1.2 Million Nonbinary People Live in the US, a New Study Says*, CNN (June 23, 2021, 8:56 PM), <https://www.cnn.com/2021/06/23/us/nonbinary-survey-study-number-trnd-wellness/index.html> [<https://perma.cc/PZ5T-SYCX>].

26. *Gender Affirmation (Confirmation) or Sex Reassignment Surgery*, CLEVELAND CLINIC (May 3, 2021), <https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery> [<https://perma.cc/D8V6-C38Y>] (“Gender affirmation surgery refers to procedures that help people transition to their self-identified gender. Gender-affirming options may include facial surgery, top surgery or bottom surgery. Most people who choose gender affirmation surgeries report improved mental health and quality of life.”).

27. Ian T. Nolan et al., *Demographic and Temporal Trends in Transgender Identities and Gender Confirming Surgery*, 8(3) *TRANSLATIONAL ANDROLOGY & UROLOGY* 184, 185 (2019).

28. *Id.*

29. Szemanski, *supra* note 1, at 138.

30. 42 U.S.C.A. § 2000e-2(a) (West).

for providing expansive trans rights is inherently circumscribed.³¹ Before 2020, Title VII protections for trans people were far from established, as federal circuits were split regarding whether protections based on “sex” apply to trans and other gender diverse individuals.³²

The Supreme Court took the first major step toward expanding sex-based protections under Title VII to include gender diverse people in *Price Waterhouse v. Hopkins*.³³ There, the Court held that adverse employment actions based on “sex stereotyping” constituted sex discrimination under Title VII.³⁴ In *Price Waterhouse*, a woman was denied a well-deserved promotion to partner because of her “macho” demeanor and lack of typical feminine attributes.³⁵ To improve her candidacy, a partner told Hopkins to walk and talk more femininely, style her hair, and wear make-up and jewelry.³⁶ Although Hopkins herself was not trans, by finding that this kind of “sex stereotyping” violated Title VII protections, the Supreme Court altered the legal landscape for trans plaintiffs.³⁷

In 2018, the Sixth Circuit became the first federal circuit court to apply this reasoning to trans people specifically, holding in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes* that discrimination based on transgender status violates Title VII.³⁸ That same year, however, the Eleventh Circuit held that firing an employee due to his sexual orientation did not violate Title VII,³⁹ creating a circuit split regarding the statutory definition of “sex” discrimination. This split was resolved in 2020, when the Supreme Court decided *Bostock v. Clayton County, Georgia* and determined that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁴⁰ Leading up to this decision, the future of Title VII protections for trans individuals was

31. Szemanski, *supra* note 1, at 143 (“Protections for trans individuals under Title VII is precarious at best, especially as the Supreme Court may potentially overturn *Harris Funeral Homes* this term and shut trans plaintiffs out of Title VII altogether.”).

32. *Id.* at 138.

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

34. *Id.* at 255–58.

35. *Id.* at 235.

36. *Id.*

37. Szemanski, *supra* note 1, at 142.

38. *Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018).

39. *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x 964 (11th Cir. 2018), *rev’d and remanded sub nom. Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

40. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020).

seriously in doubt, but the Court surprised advocates by delivering another major victory for trans rights.⁴¹

The Supreme Court's ruling, however, does not dictate how state courts interpret state civil rights statutes, so some state courts still maintain that discriminating against someone based on their transgender identity does not qualify as "sex" discrimination.⁴² Even when the language of a state civil rights statute closely parallels the Federal Civil Rights Act, state courts are not obligated to follow federal precedent.⁴³ So, while trans people are now protected from employment discrimination under federal law, state courts vary.⁴⁴ Only twenty-two states currently prohibit employment discrimination based on gender identity.⁴⁵

C. The ADA: A New Path Toward Legal Protections

Title VII protections for trans people are curbed by more than just state courts' refusal to apply Supreme Court precedent to state law. The primary limitation of Title VII is that it does not extend beyond the workplace.⁴⁶ The ADA, on the other hand, is an expansive civil rights statute that prohibits discrimination against individuals with disabilities in a wide range of contexts, including private employment (Title I), governmental services (Title II), and places of public accommodation (Title III).⁴⁷ Extending ADA coverage to transgender people can therefore fill in the gaps and provide another layer of legal protection.⁴⁸ While simply being

41. Szemanski, *supra* note 1, at 143 ("Protections for trans individuals under Title VII is precarious at best, especially as the Supreme Court may potentially overturn *Harris Funeral Homes* this term and shut trans plaintiffs out of Title VII altogether.").

42. *See Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686 (Iowa 2022).

43. *Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014).

44. MERRICK T. ROSSEIN, *EMPLOYMENT DISCRIMINATION LAW AND LITIGATION* § 27:15 (3rd ed. 2022).

45. *Id.*

46. Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 *YALE HUM. RIGHTS & DEV. L.J.* 1, 39–40 (2013) ("Title VII and the proposed ENDA (which is still a long way from passage) 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. State law, moreover, is a patchwork quilt, with some states extending broad protection to transgender people, others extending narrow protection, and most extending no protection.").

47. *Id.* at 7; *see* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–17 (workplace); §§ 12131–65 (state and local government); §§ 12181–89 (public accommodations) (2006).

48. Barry, *supra* note 46, at 40.

transgender is not a disability, courts have begun to recognize gender dysphoria as a medical condition deserving of disability coverage.⁴⁹

The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”⁵⁰ Among its many protections, the ADA prohibits public entities from discriminating against disabled individuals.⁵¹ According to the statute, no qualified individual shall be “excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity” by reason of their disability.⁵² As part of its anti-discrimination framework, the ADA requires that public entities and employers provide “reasonable accommodations” to ensure that disabled individuals are given equal opportunities.⁵³

The Fourth Circuit’s recent ruling in *Williams v. Kincaid* fortified this emerging route for trans individuals seeking legal protection from discrimination.⁵⁴ In this case, Kesha Williams, a transgender woman suffering from gender dysphoria, experienced delays in medical treatment for her gender dysphoria, as well as harassment from inmates and prison deputies while incarcerated in the Fairfax County Adult Detention Center.⁵⁵ Alleging violations of the Americans with Disabilities Act (ADA), the Rehabilitation Act, the United States Constitution, and state common law, Williams filed actions against the sheriff of Fairfax County, a prison deputy, and a prison nurse.⁵⁶ The Fourth Circuit reversed the district court’s dismissal of Williams’ claims and determined that Williams’ gender dysphoria qualified as a disability under the ADA.⁵⁷

Prior to the *Williams* decision, district courts faced with this issue most often found that the ADA’s list of exclusions⁵⁸ explicitly denied coverage to “both disabling and non-disabling gender identity disorders that do not result from a physical impairment.”⁵⁹ The list of exclusions in the ADA,

49. MARY L. BONAUTO & ARIELLE B. KRISTAN, MASS. CONTINUING LEGAL EDUC., INC., EMPLOYMENT DISCRIMINATION IN MASSACHUSETTS: DISCRIMINATION AND HARASSMENT BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, § 9.3.2 (3rd ed. 2022).

50. 42 U.S.C.A. § 12012(1)(A) (West).

51. *Id.*; § 12132.

52. 42 U.S.C.A. § 12132.

53. 42 U.S.C.A. § 12112(b)(5)(A) (West).

54. *Williams v. Kincaid*, 45 F.4th 759, 763 (4th Cir. 2022).

55. *Id.*

56. *Id.*

57. *Id.* at 773–74.

58. 42 U.S.C.A. § 12211(b)(1) (West) (excluding “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders” from disability coverage).

59. *Doe v. Pennsylvania Dep’t. of Corr.*, 2021 WL 1583556 at *8 (W.D. Pa., 2021) (quoting *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 753–54 (S.D. Ohio 2018));

however, did not arise out of a well-reasoned medical argument; rather, “transsexuals” were excluded “because of the moral opprobrium of two senior U.S. senators, conveyed in the eleventh hour of a marathon day-long floor debate, who believed that all [gender identity disorders] were ‘sexual behavior disorders’ undeserving of legal protection.”⁶⁰ Still, many district courts disregarded the problematic legislative history of the ADA and denied coverage to trans plaintiffs suffering from gender dysphoria.⁶¹

The court in *Blatt v. Cabela’s Retail, Inc.*⁶² took a much different approach, making a key distinction that the Fourth Circuit would later echo in *Williams*.⁶³ The court distinguished the term “gender identity disorder,” which it described as “simply the condition of identifying with a different gender,” from “disabling conditions that persons who identify with a different gender may have—such as Blatt’s gender dysphoria.”⁶⁴ Moreover, because Blatt’s gender dysphoria substantially limited her major life activities of social interaction, reproduction, and occupational functioning, the court found that the condition could qualify as a disability under the ADA.⁶⁵

A third approach that district courts have taken is to challenge the assumption that gender dysphoria does not result from physical impairment.⁶⁶ The court in *Doe v. Massachusetts Department of Corrections* found that the plaintiff had raised a factual dispute regarding the physical causes of her gender dysphoria and noted studies demonstrating how gender dysphoria can have a physical basis.⁶⁷ These studies showed hormonal and genetic factors contributed to the development of dysphoria in utero.⁶⁸ The court also confronted the ADA’s troubled past and highlighted the problematic nature of listing “gender identity disorders not resulting from physical impairments” alongside

see also Michaels v. Akal Sec., Inc., 2010 WL 2573988, at *6 (D. Colo. June 24, 2010) (holding that gender dysphoria is a gender identity disorder and therefore excluded); Gulley-Fernandez v. Wis. Dep’t of Corr., 2015 WL 7777997, at *2 (E.D. Wis. Dec. 1, 2015); Mitchell v. Wall, 2015 WL 10936775, at *1 (W.D. Wis. Aug. 6, 2015); Diamond v. Allen, 2014 WL 6461730, at *4 (M.D. Ga. Nov. 17, 2014); Kastl v. Maricopa Cty. Cmty. Coll. Dist., 2004 WL 2008954, at *1n. 2 (D. Ariz. June 3, 2004).

60. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 510 (2016).

61. *See* cases cited *supra* note 59.

62. *Blatt v. Cabela’s Retail, Inc.*, 2017 WL 2178123 (E.D. Pa., 2017).

63. *Compare id.* at *4, with *Williams v. Kincaid*, 45 F.4th 759, 766 (4th Cir. 2022).

64. *Id.* at *4.

65. *Id.*

66. *Doe v. Pennsylvania Dep’t. of Corr.*, 2021 WL 1583556 at *9 (W.D. Pa., 2021) (citing *Doe v. Massachusetts Dep’t of Corr.*, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018)).

67. *Massachusetts Dep’t of Corr.*, 2018 WL 2994403, at *6.

68. *Id.*

pedophilia, exhibitionism, and voyeurism in the ADA's list of exclusions.⁶⁹ The court voiced the same concerns that many trans advocates have expressed, that pairing gender identity disorders with conduct that is criminal, immoral, or lewd raises questions regarding legislators' prejudice against transgender people.⁷⁰

The Fourth Circuit in *Williams* combined these later two approaches in its decision, both distinguishing gender dysphoria from gender identity disorder and accepting that gender dysphoria can have a physical basis.⁷¹ The court relied heavily on a 2008 amendment that Congress passed in response to a series of Supreme Court decisions limiting the ADA.⁷² This amendment instructed courts that the definition of disability "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the [ADA's] terms."⁷³ With this amendment, Congress intended to make it easier for disabled people to obtain protection and expressly required courts to interpret the amended ADA as broadly as possible.⁷⁴

Despite Congress's mandate regarding broad interpretation, *Williams*' claims still had to overcome the ADA's explicit exclusion of "gender identity disorders not resulting from physical impairments."⁷⁵ In response, *Williams* argued: 1) that gender dysphoria is categorically not a gender identity disorder and 2) even if her gender dysphoria was a gender identity disorder, it arose from a physical impairment and was thus not excluded under the ADA.⁷⁶

In analyzing these arguments, the court pointed out that the ADA's text does not define "gender identity disorder" and does not specifically mention gender dysphoria.⁷⁷ The court then sought to determine what the meaning of "gender identity disorder" was at the time the ADA was enacted.⁷⁸ The court found that when the statute was adopted, "gender identity disorders" did not include gender dysphoria.⁷⁹ In fact, when Congress enacted the ADA in 1990, gender dysphoria was not yet recognized as either an independent diagnosis or a subset of another

69. *Id.* at 7.

70. *Id.*

71. *Williams v. Kincaid*, 45 F.4th 759, 769–772 (4th Cir. 2022).

72. *Id.* at 766.

73. *Id.* (citing *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 332 (4th Cir. 2014)); 29 C.F.R. § 1630.1 (West).

74. *Williams*, 45 F.4th at 766.

75. *Id.*; see 42 U.S.C.A. § 12211(b)(1) (West).

76. *Williams*, 45 F.4th at 766.

77. *Id.*

78. *Id.*

79. *Id.* at 766–67.

condition.⁸⁰ At that time, the DSM defined the essential feature of a gender identity disorder to be “an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity.”⁸¹ By making the clinical diagnosis entirely dependent on one’s incongruent gender identity, the DSM in 1990 essentially defined all transness as a mental disorder.⁸²

This changed in 2013 when advances in medical understanding caused the APA to remove “gender identity disorders” from the current DSM (DSM-5) and add the diagnosis of “gender dysphoria.”⁸³ The court noted how meaningful this difference was: “[r]ather than focusing exclusively on a person’s gender identity, the DSM-5 defines ‘gender dysphoria’ as the ‘clinically significant distress’ felt by some of those who experience ‘an incongruence between their gender identity and their assigned sex.’”⁸⁴ This updated diagnosis distinguished the notion of being transgender from the distress and other disabling symptoms that some, though not all, transgender people experience.⁸⁵

Because the exclusions in the ADA were based on an “obsolete diagnosis,” and the statute’s text made no mention of gender dysphoria, the court agreed with Williams that gender dysphoria is not a gender identity disorder and can therefore qualify as a disability under the ADA.⁸⁶ The court also accepted Williams’ second argument that her gender dysphoria arose from physical impairment.⁸⁷ As evidence of this, the court cited Williams’ need for hormone therapy.⁸⁸ Without these treatments, Williams suffered mental and physical distress.⁸⁹ The court found these facts sufficient to raise the reasonable inference that Williams’ gender dysphoria had a physical basis.⁹⁰

Furthermore, the Fourth Circuit acknowledged the problematic motivations behind the ADA’s notoriously prejudicial list of exclusions.⁹¹ By listing “gender identity disorders” beside “pedophilia, exhibitionism, and voyeurism,” the original ADA imposed implicit moral judgments

80. *Id.* at 767.

81. *Id.* (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 71 (3rd ed., rev. 1987)).

82. *Williams*, 45 F.4th at 767.

83. *Id.*

84. *Id.* (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2018)).

85. *Williams*, 45 F.4th at 768.

86. *Id.* at 769.

87. *Id.* at 770.

88. *Id.*

89. *Id.*

90. *Id.* at 771.

91. *Id.* at 772–73.

upon transgender people and essentially branded them as criminals.⁹² The ADA excluded gender identity disorders not because such disorders could not cause impairment but because, at the time of enactment, “several members of Congress believed that people with [gender identity disorders] were morally bankrupt, dangerous, and sick.”⁹³ The ADA thus became a “moral code separating the deserving disabled from the subjects of scorn.”⁹⁴ Even when Congress expanded the ADA’s definition of disability in the ADA Amendments Act of 2008 (ADAA), the discriminatory list of exclusions was left intact.⁹⁵ Nonetheless, the ADAA’s imperative to courts to interpret the statute broadly in favor of coverage, along with the APA’s replacement of “gender identity disorder” with “gender dysphoria” in the DSM-5, allowed the Fourth Circuit to find that gender dysphoria did qualify as a disability under the ADA.⁹⁶

It remains to be seen how other federal circuit courts will respond to this decision; given the disagreement amongst district courts prior to the *Williams* decision,⁹⁷ a circuit split may be on the horizon. If more federal courts agree with the Fourth Circuit’s assessment, the benefits for some trans people would be undeniable, as the ADA is well-suited to prevent discrimination against trans people suffering from gender dysphoria.⁹⁸ Perhaps the most significant advantage of the ADA is that it requires employers and public entities to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”⁹⁹ Reasonable accommodations for gender dysphoria could include modifying restroom policies, adjusting dressing and grooming standards, and allowing employees to schedule work around

92. *Id.*

93. Barry, *supra* note 46, at 4.

94. *Id.*

95. *Id.* at 2. See 42 USCA § 12211 (West).

96. *Williams*, 45 F.4th at 766–774.

97. Blank et al., *supra* note 3; Compare *Gulley-Fernandez v. Wisconsin Department of Corrections*, 2015 WL 7777997 at *3 (E.D. Wis., 2015) (holding that gender dysphoria is a gender identity disorder and therefore not a “disability” under the Americans with Disabilities Act), with *Blatt v. Cabela’s Retail, Inc.*, 2017 WL 2178123 at *8–*9 (E.D. Pa., 2017) (holding that gender dysphoria falls outside of the ADA’s list of exclusions as long as the condition substantially limits major life activities).

98. Barry, *supra* note 46, at 38.

99. *Id.*; 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 ...”) (implementing ADA Title II by the Department of Justice regulations); 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).

counseling, hormone therapy, reassignment surgery, or other necessary treatments.¹⁰⁰ Moreover, the results of denying incarcerated trans people reasonable accommodations under the ADA can be truly horrific. In *Doe v. Pennsylvania Department of Corrections*, for example, the prison's failure to provide adequate testosterone dosages to a non-binary inmate suffering from gender dysphoria caused them to self-mutilate "by removing their nipples."¹⁰¹

D. Disability and Trans Rights: Converging Civil Rights Movements

Despite the clear benefits of ADA protection, some trans advocates have questioned whether the supposed stigma of disability is worth it.¹⁰² These advocates rightfully want transness and gender nonconformity to be viewed in a positive light as a social "good," and they argue that disability, insofar as it is defined by impairment, cannot be good.¹⁰³ Such concerns reflect the wrought histories of both the trans rights and disability rights movements.¹⁰⁴ Both disabled and trans people are historically marginalized populations who have struggled for autonomy and equal rights.¹⁰⁵

The LGBTQIA+ community has long fought against the pathologizing of their identities.¹⁰⁶ The branding of LGBTQIA+ people as "ill" based on their sexual orientation or gender identity has historically been a major cause of human rights violations against them.¹⁰⁷ Applying stigmatizing medical classifications to LGBTQIA+ people has been used to justify forced sterilization, unwanted hormone therapies, psychiatric evaluations, and conversion therapies, all of which are particularly damaging when forced upon children or adolescents.¹⁰⁸ Past editions of the DSM have defined homosexuality as a "Sociopathic Personality Disturbance" or labeled homosexuality a form of sexual deviance akin to

100. Barry, *supra* note 46, at 38.

101. *Doe v. Pennsylvania Dep't. of Corr.*, 2021 WL 1583556, *4 (W.D. Pa., 2021).

102. Barry, *supra* note 46, at 41–42.

103. *Id.*

104. S.E. Smith, *Is Being Trans a Disability Rights Issue?*, BUSTLE (June 12, 2017), <https://www.bustle.com/p/is-being-trans-a-disability-rights-issue-60576> [<https://perma.cc/D78X-PPRX>].

105. *Id.*

106. *Pathologization: Being Lesbian, Gay, Bisexual and/or Trans is Not an Illness*, INTER-AMERICAN COMM'N ON HUM. RTS. (IACHR) (May 12, 2016), https://www.oas.org/en/iachr/media_center/PReleases/2016/064.asp [<https://perma.cc/UR8W-QUN7>].

107. *Id.*

108. *Id.*

pedophilia.¹⁰⁹ Psychologists once claimed that homosexuality was a disorder because it caused patients distress, when the true cause of this distress was the pervasive discrimination and lack of social acceptance that homosexuals often had to endure.¹¹⁰

Some commentators are concerned that the general public will not understand the subtle distinction between being transgender (which is not a disability) and suffering from gender dysphoria (a medical condition that can be disabling).¹¹¹ From this standpoint, the legal precedent established in *Williams* could reinforce the notion that merely being transgender is evidence of an illness and cause people to continue viewing transness as a medical condition that needs to be “cured.”¹¹²

Coincidentally, a major aspect of the disability civil rights movement is rejecting similar discriminatory notions that people with disabilities are necessarily “sick.”¹¹³ Some disabled communities have staunchly rejected the idea that their conditions require a “cure.”¹¹⁴ Members of the deaf community, for example, identify so strongly with deaf culture that many viewed the cochlear implant (a hearing device that offered a “cure” to their deafness) as a form of “genocide.”¹¹⁵ Autism is another example of a condition covered under the ADA that many believe needs no cure.¹¹⁶ The autism spectrum is “immensely broad” and includes many people who are considered gifted.¹¹⁷ So, while some might see autism as a “pathology in need of cure,” others understand it as a form of “neurodiversity” that should be celebrated.¹¹⁸

An alliance between disabled and LGBTQIA+ communities has existed since before the enactment of the ADA.¹¹⁹ This alliance helped pass the original statute in 1990 and ensured that individuals with AIDS were protected from discrimination.¹²⁰ As both these movements evolve and converge, one principle that advocates should continue to stress is this:

109. Emily Ward, *Pride is a State of Mind: The History of the Pathologisation of Queerness*, BRITISH ONLINE ARCHIVES (June 27, 2021), <https://microform.digital/boa/posts/category/articles/415/pride-is-a-state-of-mind-the-history-of-the-pathologisation-of-queerness> [https://perma.cc/E9FX-EGXA].

110. *Id.*

111. Smith, *supra* note 104.

112. *Id.*

113. JOSEPH P. SHAPIRO, NO PITY 22 (1993).

114. *Id.* at 223–224.

115. *Id.*

116. Barry, *supra* note 46, at 30–31.

117. *Id.* at 30.

118. *Id.* at 30–31.

119. Shapiro, *supra* note 113, at 136–137.

120. *Id.* at 137.

“disability is not something wrong with some of us--it is something wrong with the way society may treat any of us.”¹²¹

III. ANALYSIS

A. Fighting Stigma and the Need for an Amended ADA

The Fourth Circuit’s decision in *Williams v. Kincaid* marked both a convergence of civil rights movements and a strategic crossroads for trans rights advocates.¹²² Classifying gender dysphoria as a disability under the ADA has undeniable benefits, but the history of medical classifications being weaponized against the LGBTQIA+ community is a valid cause for concern.¹²³ Of course, people with disabilities have also endured a gruesome history.¹²⁴ Resisting the “disabled” classification out of fear that such a label will stigmatize trans people as “sick” only reinforces the outdated, ableist prejudice that equates disability with a kind of medical inferiority.¹²⁵ Like the gay pride movement of the 1970s, many disabled people have begun rejecting the stigma surrounding their conditions and started to take pride in their identity as disabled people, “parading it instead of closeting it.”¹²⁶ This development shows that pride and disability are not mutually exclusive. By embracing disability pride,

121. Barry, *supra* note 46, at 30.

122. See discussion *supra* Part II.D.

123. See INTER-AMERICAN COMM’N ON HUMAN RIGHTS (IACHR), *supra* note 106.

124. See generally Marie Dagenais-Lewis, *Disability Pride: Rejecting Ableism*, MSN (Jan. 20, 2023), <https://www.msn.com/en-us/news/world/disability-pride-rejecting-ableism/ar-AA16Abuy> [<https://perma.cc/NH6J-AP3L>] (discussing the historical devaluing of disabled lives, from eugenics and systematic sterilization to the use of disabled people in “freak shows,” which remained popular into the 20th century); see also David Ferleger, *Disabilities and the Law: The Evolution of Independence*, 57-SEP FED. LAW. 26, 28 (2010) (describing the history of disabled people, including being forced to live in overcrowded and underfunded institutions, the passage of laws keeping visibly disabled people from appearing in public, medical experimentation on disabled people, and forced sterilization).

125. See Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 34 (2003) (“The first response that always comes up [...] is the argument that trans people do not want to be seen as ‘disabled.’ There is a gut reaction that occurs, where people feel that using disability law claims means we are arguing that we are somehow flawed people. What is at play in this response is ableism, and this reaction is usually resolved by pointing out that the theory of disability law is not about going into court and arguing for rights based on an idea that people with disabilities are flawed. Instead, the disability rights movement, and the legal claims developed by the tireless activism of people in that movement, is about pointing out that disabled people are capable of equal participation, but are currently barred from participating equally by artificial conditions that privilege one type of body or mind and exclude others.”).

126. Shapiro, *supra* note 113, at 20.

people with gender dysphoria can represent a bridge between the trans and disability civil rights movements.

Securing disability rights for people with gender dysphoria will require more decisions like the Fourth Circuit's in *Williams v. Kincaid*.¹²⁷ That said, trans rights advocates' ultimate goal should be amending the ADA's list of exclusions.¹²⁸ The ADA's exclusions are harmful to transgender people on two levels. The list has served as the basis for district court decisions denying ADA protection to individuals with gender dysphoria,¹²⁹ and it perpetuates anti-trans discrimination by grouping gender identity disorders alongside criminal behaviors like pedophilia.¹³⁰ Any concern about the stigma of having the ADA cover individuals with gender dysphoria appears to be far outweighed by the stigma attached to their current exclusion under the law.¹³¹ While others have already proposed amending the ADA to fight this prejudice,¹³² these efforts have not yet been successful.

While some advocates fear the downsides of relying on medical status to confer civil rights, even skeptics have acknowledged the promise of disability law as an alternative route toward trans rights.¹³³ The "medicalization" of civil rights in general has become a hotly debated topic,¹³⁴ though a thorough analysis of that debate is beyond the scope of this Note. Still, although disability law may not be the perfect avenue for broad legal protections for trans people, for plaintiffs like Kesha Williams

127. *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022).

128. 42 U.S.C.A. § 12211(b)(1) (West) (excluding "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" from disability coverage).

129. *See supra* note 59 and accompanying text.

130. § 12211(b)(1) (West); *see supra* pp. 6–9.

131. Barry, *supra* note 46, at 46.

132. *Id.* at 50 ("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.").

133. Spade, *supra* note 125, at 32–33 ("Because gender discrimination claims have often been a dead end or a risky venture, disability discrimination claims have become an important alternative.").

134. Compare Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1212–1213 (2020) (arguing that the benefits of medicalized civil rights outweigh the downsides, in part because rights based on medical status are often more robust than the rights other disadvantaged groups receive. Medical status also conveys that certain disadvantages are not the "fault" of the individual.), with Allison K. Hoffman, *How Medicalization of Civil Rights Could Disappoint*, 72 STAN. L. REV. 165, 166 (2020) (claiming that it might be "sociologically harmful in the longer term to translate civil rights from social into medical frameworks" and noting "medicalization could obscure parts of discrimination altogether, by focusing only on discrimination that manifests in medically meaningful harms").

there is currently no other option available.¹³⁵ Title VII protections against sex discrimination are limited to the workplace and generally offer no help to trans inmates facing civil rights violations,¹³⁶ and insufficient accommodations for trans inmates add an additional degree of cruelty to their punishments.¹³⁷ Protecting people like Kesha Williams and avoiding outcomes like the tragic self-mutilation in *Doe v. Pennsylvania Department of Corrections*¹³⁸ justify continued efforts to amend the ADA.

B. Defending the Decision in Williams v. Kincaid

Amending the ADA is an ambitious, long-term goal. In the meantime, more people with gender dysphoria will need to persuade courts that they are deserving of ADA protections. If and when other federal circuit courts address this issue, judges and advocates will have to grapple with the two major arguments in *Williams*,¹³⁹ as well as the blatant discrimination embodied in the ADA's list of exclusions.¹⁴⁰ While the Fourth Circuit's decision was certainly a victory for Kesha Williams and a promising sign for incarcerated trans people specifically,¹⁴¹ the impact of the case on future litigation is far from certain. In their petition for certiorari, which has since been denied by the Supreme Court, the defendants in *Williams* argued that a circuit split is now "inevitable."¹⁴² If petitioners' prediction holds true, this controversy regarding gender dysphoria and the ADA could rage on for years to come.

In their petition for writ of certiorari, petitioners argued that the Fourth Circuit ignored the plain language of the ADA and authored a mistaken, revisionist opinion in finding that gender dysphoria was not excluded from the ADA's definition of disability.¹⁴³ The major problem with the Fourth Circuit's reasoning, they claimed, was that it disregarded the plurality of the word "disorders."¹⁴⁴ Petitioner's argument regarding the statutory interpretation of the ADA boiled down to this: gender identity disorders

135. Kevin Barry & Jennifer Levi, *Blatt v. Cabela's Retail, Inc. and A New Path for Transgender Rights*, 127 YALE L.J. F. 373, 393 (2017).

136. See Konnoth, *supra* note 134, at 1217.

137. See *Doe v. Pennsylvania Dep't. of Corr.*, 2021 WL 1583556, at *4 (W.D. Pa., 2021) (failing to provide adequate hormone treatments to inmate with gender dysphoria led them to self-mutilate).

138. *Id.*

139. See *supra* pp. 8–9.

140. See *supra* pp. 7, 9.

141. *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022).

142. Petition for Writ of Certiorari at 19, *Williams v. Kincaid*, 143 S.Ct. 2414 (2023) (No. 22-633), 2023 WL 144876 at *19.

143. *Id.* at 7.

144. *Id.* at 9.

are a general category of disorders, and although gender dysphoria is a narrower, more descriptive diagnosis, it nonetheless fits into this excluded category.¹⁴⁵ Whereas the Fourth Circuit emphasized the importance of the American Psychiatric Association’s decision to add “gender dysphoria” and remove “gender identity disorder” from the DSM-5,¹⁴⁶ petitioners maintained that gender dysphoria is nonetheless a “development and evolution of a gender identity disorder” and should thus be excluded from ADA coverage.¹⁴⁷

This argument between courts and advocates over the meaning and significance of the diagnostic manual’s revision illustrates some of the problems with relying on a specific medical status for civil rights. First, medical civil rights claims require that courts delegate aspects of legal decision-making to medical institutions, which lack democratic legitimacy.¹⁴⁸ Moreover, the supposed objectivity of medical consensus has at times been used to justify civil rights violations, from sanctioning the sterilization of Black women to defining whiteness for immigration purposes.¹⁴⁹ In fact, many socially progressive changes in the medical community, like the decision to depathologize homosexuality, diagnostic changes related to gender identity, and the development of adult ADHD as a diagnosis, were developed by a relatively small contingent of activists, experts, and professional associations.¹⁵⁰

The point here is that medical understanding is imperfect, constantly evolving, and potentially disconnected from shifting societal values. This is particularly relevant for cases involving gender dysphoria because, as the court in *Doe v. Massachusetts Department of Corrections* points out, the medical community is currently re-evaluating the condition.¹⁵¹ Of course, medical experts still provide useful evidence, but neither courts nor advocates should expect gender dysphoria cases to be resolutely decided by deferring to a single medical authority.

In future cases, advocates should focus on medical evidence that shows the physical basis of gender dysphoria, instead of debating various interpretations of the DSM-5.¹⁵² In the petition for writ of certiorari,

145. *Id.* at 10–13.

146. *Williams*, 45 F.4th at 767.

147. Petition for Writ of Certiorari at 14, *Williams*, 143 S.Ct. 2414 (No. 22-633).

148. *See* Konnoth, *supra* note 134, at 1210.

149. Hoffman, *supra* note 134, at 170.

150. Konnoth, *supra* note 134, at 1210.

151. *Doe v. Massachusetts Dep’t of Corr.*, 2018 WL 2994403, at *7 (D. Mass. June 14, 2018).

152. *See, e.g.*, Petition for Writ of Certiorari at 13–15, *Williams v. Kincaid*, 143 S.Ct. 2414 (2023) (No. 22-633) (citing a quote from the APA that stated “[i]n the upcoming fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), people

Kincaid harshly criticized both the Fourth Circuit's reliance on the DSM-5 and the court's distinction between gender dysphoria and gender identity disorders, while essentially ignoring the court's second determination that gender dysphoria can result from physical impairment.¹⁵³ The Fourth Circuit's rejection of the previous DSM's "obsolete" diagnosis was admirable, but this premise was not essential to the court's conclusion.¹⁵⁴ As long as the court decided that Williams' gender dysphoria arose from physical impairment, the ADA's list of exclusions would not apply.¹⁵⁵

In order to survive summary judgment motions and eventually win these cases, trans advocates should utilize expert testimony and emerging medical research that shows the physical causes and symptoms of gender dysphoria.¹⁵⁶ Courts that have embraced the "physical impairment" argument have articulated their views in slightly different ways.¹⁵⁷ The Fourth Circuit majority emphasized Williams' need for hormone treatment and the physical distress she experienced when denied these treatments.¹⁵⁸ In *Doe v. Massachusetts Department of Corrections*, the court focused more on contemporary scientific research on the physical causes of gender dysphoria, as opposed to the plaintiff's specific treatments or symptoms.¹⁵⁹ The court credited recent studies that showed gender dysphoria diagnoses have a "physical etiology."¹⁶⁰ While it refused to take a definitive position on gender dysphoria's physical basis, the court nonetheless held that the medical evidence was sufficient to raise a dispute of fact as to whether the

whose gender at birth is contrary to the one they identify with will be diagnosed with gender dysphoria" as evidence that gender dysphoria is still a gender identity disorder); *Gender Dysphoria*, AM. PSYCHIATRIC ASS'N (2013), https://www.psychiatry.org/FileLibrary/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf. [<https://perma.cc/S9GX-NHB2>].

153. See Petition for Writ of Certiorari at 10–13, *Williams*, 143 S.Ct. 2414 (No. 22-633) (criticizing the Fourth Circuit's "flawed" reasoning and arguing that it only "selectively" relied on parts of the DSM-5 to justify its decision.).

154. See *Williams v. Kincaid*, 45 F.4th 759, 769 (4th Cir. 2022).

155. 42 U.S.C.A. § 12211(b)(1) (West) (excluding from the "disability" definition "gender identity disorders *not resulting from physical impairments*." (emphasis added)).

156. See *Massachusetts Dep't of Corr.*, 2018 WL 2994403, at *7 (noting the need for expert testimony before the court could definitively decide whether gender dysphoria has a physical basis).

157. Compare *Williams v. Kincaid*, 45 F.4th 759, 771 (4th Cir. 2022) (citing Williams' need for hormone therapy as evidence that her gender dysphoria has a physical basis), with *Doe v. Massachusetts Dep't of Corr.*, WL 2994403, at *6 (D. Mass. June 14, 2018) (relying on immersing scientific literature on the physical causes of gender dysphoria).

158. *Williams*, 45 F.4th at 770–71.

159. See generally *Doe v. Massachusetts Dep't of Corr.*, 2018 WL 2994403 (D. Mass. June 14, 2018).

160. *Id.* at *6.

ADA's list of exclusions apply to gender dysphoria.¹⁶¹ At least two other federal district courts have found this line of reasoning convincing enough to deny defendants' motions to dismiss.¹⁶² These decisions show the strength of this line of argumentation. Courts appear more likely to consider the question of physical impairment to be a fact-intensive issue that cannot be defeated by defendants' motions to dismiss.

C. Zooming Out: Dualism and the Outdated ADA

So far, this Note has discussed various problems with the ADA.¹⁶³ The fact that trans people like Kesha Williams must rely on a statute with such an unapologetically transphobic legislative history¹⁶⁴ is deeply troubling. Fortunately, the scientific literature appears to be trending in the right direction in establishing a physical basis for gender dysphoria,¹⁶⁵ which should help advocates and their clients avoid defeat at the hands of the ADA's exclusions.¹⁶⁶ This final section proposes a new line of argument that could be used to both 1) advocate for plaintiffs seeking ADA coverage for gender dysphoria in court and 2) show legislators that the ADA's list of exclusions are outdated based on contemporary scientific understanding and should therefore be amended.

The ADA denies disability coverage to "gender disorders not resulting from physical impairment,"¹⁶⁷ yet in light of contemporary understanding of the brain, every disorder necessarily results from a physical impairment

161. *Id.* at 7.

162. *See* *Tay v. Dennison*, 2020 WL 2100761, at *3 (S.D. Ill., 2020) ("At this point in the case, the Court cannot categorically say that gender dysphoria falls within the ADA's exclusionary language."); *see also* *Shorter v. Barr*, 2020 WL 1942785, at *10 (N.D. Fla., 2020) ("This Court should also err on the side of caution and deny Defendant Barr's motion to dismiss the Rehabilitation Act claim on the basis of the Act's exclusion of "gender identity disorder not resulting from physical impairments.").

163. *See infra* Part II.C and III.A–B.

164. Barry, *supra* note 46, at 4.

165. *See generally* Ferdinand Boucher & Tudor Chinnah, *Gender Dysphoria: A Review Investigating the Relationship Between Genetic Influences and Brain Development*, 11 *ADOLESCENT HEALTH, MED. & THERAPEUTICS* 89, 97 (2020) (concluding "that the causal importance of biological influences [on gender dysphoria] via genes and hormones is clear"); Madeleine Foreman et al., *Genetic Link Between Gender Dysphoria and Sex Hormone Signaling*, 104 *J. CLIN. ENDOCRINOLOGY & METABOLISM* 390, 394 (2019) ("[T]he results of our study of transgender women support the hypothesis that gender dysphoria has a polygenic basis, involving interactions among multiple genes and polymorphisms that may alter the sexual differentiation of the brain in utero, contributing to the development of gender dysphoria in transgender women.").

166. *See supra* p.16 and note 158.

167. 42 U.S.C.A. § 12211(b)(1) (West).

insofar as every mental disorder corresponds to a brain disorder.¹⁶⁸ The old distinction between physical and mental disease is fundamentally flawed because mental phenomena arise from the brain, and the brain is a physical entity.¹⁶⁹ As neuroscientist Steven Hyman put it, “[t]he term ‘mental disorders’ is an unfortunate anachronism, one retained from a time when these disorders were not universally understood to reflect abnormalities of brain structure, connectivity or function.”¹⁷⁰ The “central role of the brain in these disorders,” Hyman explained, “is no longer in doubt.”¹⁷¹ Thus, any disorder must necessarily result from a physical impairment, even if such an impairment only involves someone’s neurological makeup.¹⁷²

The ADA as currently written espouses an antiscientific and antiquated view that some mental phenomena are completely disconnected from the physical world.¹⁷³ This is what philosophers would call a form of “dualism,”¹⁷⁴ but even contemporary dualist philosophers still concede that mental processes are caused by physical processes.¹⁷⁵ For people living in modern society, the fact that mental processes are caused by the brain should hardly be controversial, especially given growing discussions around mental health and the pervasive use of psychiatric medications.¹⁷⁶

168. Martha J. Farah, *Neuroethics: The Practical and the Philosophical*, 9 TRENDS COGNITIVE SCIS., 34, 35 (2005), <https://www.sciencedirect.com/science/article/pii/S1364661304002955#section-cited-by> [<https://perma.cc/KMU4-98T4>] (explaining how psychological traits have physical correlates that are measurable with current brain imaging technology).

169. *See id.*; *see also* R.E. Kendell, *The Distinction Between Mental and Physical Illness*, 178 BRIT. J. PSYCHIATRY, 490, 492 (2001), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/5FA9AC9A9A8F7D6395BF41B3CD004305/S0007125000156752a.pdf/the-distinction-between-mental-and-physical-illness.pdf> [<https://perma.cc/GYD4-S2CV>] (“Not only is the distinction between mental and physical illness unfounded and incompatible with contemporary understanding of disease, it is also damaging to the long-term interests of the patients themselves.”).

170. Steven E. Hyman, *Can neuroscience be integrated into the DSM-V?*, 8 NATURE REV. NEUROSCIENCE 725, 725 (2007).

171. *Id.*

172. *Id.*; *see also* Kendell, *supra* note 169.

173. Matthew W. Lawrence, *The Effects of Rejecting Mind-Body Dualism on U.S. Law*, 26 WM. & MARY J. RACE, GENDER, & SOC. JUST. L. 77, 77 (2019), <https://scholarship.law.wm.edu/wmjowl/vol26/iss1/5> [<https://perma.cc/HVL6-5DM>] (discussing how mind-body dualism still pervades U.S. law despite advances in neuroscience showing that mental phenomena can be described in physical terms).

174. *Id.* at 78 (“Mind-body dualism (‘dualism’) is the belief that there is a categorical difference between the physical body and the mind.”).

175. *Id.* at 79; *see also* Hyman, *supra* note 170.

176. *See generally* Deidre McPhillips, *90% of US Adults Say the United States is Experiencing a Mental Health Crisis, CNN/KFF Poll Finds*, CNN (Oct. 5, 2022, 11:17AM), <https://www.cnn.com/2022/10/05/health/cnn-kff-mental-health-poll-wellness>

As of 2020, nearly 77 million Americans were prescribed psychiatric medications for various ailments including ADHD, depression, and anxiety.¹⁷⁷ These medications are substances that, when ingested, “influence biological function by mimicking the action of neurotransmitters upon neurons,” which impacts “brain functions like emotion, thought, and behavior.”¹⁷⁸ The use of medications to treat mental disorders shows the underlying physical component of these impairments. By implying that a disorder can exist independent of the physical functions of the brain, the ADA’s exclusion of “gender identity disorders not resulting from physical impairment”¹⁷⁹ is scientifically nonsensical.

The U.S. legal system has been slow to catch up to the truths of modern neuroscience. As law professor Matthew Lawrence notes, “[w]hile neuroscience continues to make it clearer that mental processes, effects, disorders, and states can be described through physical observation, the metaphysical notion of mind-body dualism still pervades the U.S. legal system.”¹⁸⁰ This has led members of the legal community to call on courts and legislatures to rid the country’s doctrine of dualism in favor of statutes that better reflect the integrated reality of human thought and action.¹⁸¹ Legal distinctions between mental and physical phenomena ignore the fundamental interconnectedness of the body and mind.¹⁸² People cannot be reduced to minds separate from their bodies; they are necessarily both at once.¹⁸³ Amending the ADA’s list of exclusions would not only help protect people with gender dysphoria, but it would mark one small step toward a legal system that better reflects the consensus of the scientific community.¹⁸⁴

/index.html [https://perma.cc/9EF2-76DY]; see also *Number Of People Taking Psychiatric Drugs in the United States*, CITIZENS COMM’N ON HUM. RTS. INT’L MENTAL HEALTH INDUS. WATCHDOG, <https://www.cchrint.org/psychiatric-drugs/people-taking-psychiatric-drugs/> (last visited Mar. 19, 2023) [https://perma.cc/7WDR-TLCK].

177. CITIZENS COMM’N ON HUM. RTS. INT’L MENTAL HEALTH INDUS. WATCHDOG, *supra* note 176.

178. Greg Wadley, *How Psychoactive Drugs Shape Human Culture: A Multi-Disciplinary Perspective*, 126 *BRAIN RSCH. BULL.*, 138–39 (2016).

179. 42 U.S.C.A. § 12211(b)(1) (West).

180. Lawrence, *supra* note 173.

181. Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 *IND. L.J.* 975, 1010 (2015).

182. *Id.* at 978–79 (“Mind and body are interconnected, especially so for the complex states of being and doing like harm, compulsion, and intentionality that tend to carry the greatest significance in law. Yet much of our doctrine [...] treats mind and body as if they work and matter in critically different ways.”).

183. *Id.* at 1009–10.

184. *Id.* at 1009 (“Contemporary neuroscience, psychology, and psychiatry make plain that our mental and physical lives interact with each other (and our environment)”).

IV. CONCLUSION

By circumventing the ADA's exclusions, the Fourth Circuit's decision in *Williams v. Kincaid* was a victory for trans rights and deserves to be rigorously defended. *Williams* and the lower court decisions that shaped the court's opinion provide useful strategies for trans plaintiffs seeking coverage under the ADA. Until the dream of an amended ADA is realized, cases like *Williams* will continue to arise. Advocates now know these cases can be won in at least one federal circuit court.

Despite being thoroughly rejected by the schools of psychiatry, psychology, and neuroscience, mind-body dualism continues to have a pernicious influence on the American legal system.¹⁸⁵ The ADA's exclusion of "gender disorders not resulting from physical impairment"¹⁸⁶ is just one example of a harmful law that relies on the faulty distinction between the mental and the physical. Although amending the ADA will not help all transgender people, removing this incoherent exclusion will greatly expand protections for trans people suffering from clinically significant gender dysphoria, while better aligning the law with modern science.

Moreover, rather than fearing the supposed stigma of disability, trans rights activists should reject ableist prejudice and recognize this opportunity to align two civil rights movements. Securing ADA protections for people with gender dysphoria is well worth it.

Strengthening the rights and legal remedies for transgender people continues to be an issue of critical importance. While trans people have recently enjoyed legal victories at the federal level, anti-LGBTQIA+ rhetoric is once again intensifying and anti-transgender legislation is being debated and enacted at the state level.¹⁸⁷ On March 3, 2023, the host of the Conservative Political Action Conference, Michael Knowles, declared that "transgenderism must be eradicated from public life entirely."¹⁸⁸ Conservatives have begun accusing LGBTQIA+ people and their allies of being of "groomers," harkening back to the anti-gay rhetoric of the 70s,

185. Fox & Stein, *supra* note 181, at 978–79.

186. 42 U.S.C.A. § 12211(b)(1) (West).

187. Davis J. Villano, Note, *Note: Queer Liberation's Long March Towards Equality: How LGBTQIA+ Advocates May Seek to Combat the Rise of Anti-LGBTQIA+ State-Level Legislation and Substantiate Broader Lasting Legal Protections in a Post-Bostock World*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 155, 171 (2022).

188. Peter Wade & Patrick Reis, *CPAC Speaker Calls for Eradication of 'Transgenderism'—and Somehow Claims He's Not Calling for Elimination of Transgender People*, ROLLING STONE (Mar. 6, 2023), <https://www.rollingstone.com/politics/politics-news/cpac-speaker-transgender-people-eradicated-1234690924/> [<https://perma.cc/A2BD-QYW8>].

when conservatives often cast gay people as child molesters.¹⁸⁹ Hate crimes against transgender people are on the rise.¹⁹⁰ In the face of this virulent discrimination, amending an outdated federal law that categorizes trans people alongside pedophiles is an absolute necessity.

189. Villano, *supra* note 187, at 174–75.

190. *Id.* at 167.