INTERWOVEN REMEDIES: THE HEALTHCARE–DISABILITY OVERLAP IN GENDER-AFFIRMING CARE BEHIND BARS

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ABSTRACT

This Article examines a dilemma in disability law in the prison context. The Seventh Circuit held in Bryant v. Madigan *that a disability cannot be "treated" with medical care. That is, prescribed medical treatment cannot be a reasonable accommodation under the Americans with Disabilities Act (ADA). Yet plaintiffs often allege Eighth Amendment medical deliberate indifference claims and disability rights claims for the same injury. This Article situates this tension and explains how plaintiffs have successfully navigated it. The argument is straightforward: if access to a medical service is discriminatorily barred or if a reasonable accommodation is denied, then the plaintiff has an ADA claim. And if medically necessary care is denied and the prison officials acted with deliberate indifference, then the plaintiff also has an Eighth Amendment claim. The Article illustrates how plaintiffs with gender dysphoria may navigate* Bryant *to pursue reasonable accommodations under the ADA. Finally, the Article argues that ADA claims are more advantageous than Eighth Amendment claims from a liberationist perspective that resists ableism and the medicalization of trans people and embraces the full spectrum of accommodations to gender dysphoria that trans people may seek.*

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INTRODUCTION

For nearly three years, I represented trans people in prisons across the country. A number of my clients have filed prison grievances under the Americans with Disabilities Act[1] (ADA) for their needs related to gender dysphoria.[2] For example, my client Jane Doe, a trans woman incarcerated in Georgia, has used the ADA to argue for reasonable accommodations that her prison facility could give her in order to abate her gender dysphoric distress.[3] Specifically, I was able to help my client receive the creative remedies she came up with in order to get her body looking like it did before she was forcibly de-transitioned when her prison medical providers removed her from all hormone therapy for four years.[4] Because she could not convince her facility to put her back onto hormone therapy, she requested breast and buttock padding and body contouring, which would achieve the outward gender expression of the feminized body fat redistribution that occurred on her hormone therapy dosage.[5] Before she could receive the requested items, she experienced severe impairment in her thinking; her mind was filled with thoughts of suicide and self-harm, and she beat her head against the wall in order to stave off those thoughts, until she finally gave in to them and attempted self-castration.[6] Only after enduring that painful experience, retaining attorneys who were able to hire medical experts, and bringing a preliminary injunction motion has she been able to receive hormone therapy again[7] and start to bring her gender expression back to a feminine form, including with the hair removal cream and padding awarded by the court.[8] If the ADA grievance process worked the way it ideally

1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and at 47 U.S.C. § 225).

2. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019) (per curiam) ("Gender dysphoria is a serious but treatable medical condition. Left untreated, however, it can lead to debilitating distress, depression, impairment of function, substance use, self-surgery to alter one's genitals or secondary sex characteristics, self-injurious behaviors, and even suicide.").

3. *See* Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1333, 1335 (N.D. Ga. 2024).

4. *Id.* at 1333, 1340–42.

5. *Id.* at 1340–42.

6. *Id.* at 1333–35.

7. *Id.* at 1335–36 (noting Doe restarted hormone therapy).

8. *Id.* at 1341–42.

should, she would have been able to gain these simple accommodations in commissary items years ago.

Jane Doe's symptoms of gender dysphoria continue to be more manageable as she utilizes these various accommodations and higher dosages of hormone therapy that new medical providers have decided to give her. Although she does not have everything she has asked for—and she still lives in a men's prison—her gender dysphoria has become less disabling. Her thoughts are less fixed on ideating self-injurious behavior. There are still some serious waves of overwhelming suicidal ideation, because her gender dysphoria is not fully treated, and maybe never will be. It would take a miracle for her to truly reduce her dysphoria while still in a sex-segregated facility. She will not be able to experience freedom and gender liberation while incarcerated. Prison has an inherently disabling effect on all,[9] and makes her gender dysphoria symptoms worse.

The Eighth Amendment's cruel and unusual punishment clause[10] is the traditional pathway for seeking necessary medical treatment that has been denied in prison.[11] The U.S. Supreme Court has held that the deliberate indifference to serious medical needs of an incarcerated person violates the Eighth Amendment.[12] To support such a claim, an incarcerated person "must establish 'an objectively serious [medical] need, an objectively insufficient response to that need, subjective awareness of facts signaling the need, and an actual inference of required action from those facts.'"[13] Courts have found an Eighth Amendment violation, for example, when states enforced a complete ban on providing medically necessary care for transgender people seeking to treat their gender dysphoria.[14] But even if Jane Doe can't fully treat her gender dysphoria, she should be able to accommodate it.

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9. *See* LEAH LAKSHMI PIEPZNA-SAMARASINHA, THE FUTURE IS DISABLED: PROPHECIES, LOVE NOTES, AND MOURNING SONGS 24 (Lisa Factora-Borchers ed., 2022) ("Prisons are spaces where people get disabled, or more disabled."). For a broader view of the criminalization of transgender people, as well as a summary of sociological studies of incarcerated transgender people, see Valerie Jenness & Alexis Rowland, *The Structure and Operation of the Transgender Criminal Legal System Nexus in the United States: Inequalities, Administrative Violence, and Injustice at Every Turn*, 2024 ANN. REV. CRIMINOLOGY 283, 285–97 (2024).

10. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

11. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

12. *Id.*

13. Kuhne v. Fla. Dep't of Corr., 745 F.3d 1091, 1094 (11th Cir. 2014) (quoting Taylor v. Adams, 221 F.3d 1254, 1258 (11th Cir. 2000)).

14. *See, e.g.*, Fields v. Smith, 653 F.3d 550, 554–59 (7th Cir. 2011) (affirming permanent injunction enjoining statute that banned hormonal therapy and gender-affirming surgery); Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019) (per curiam) ("[W]here, as here, the record shows that the medically necessary treatment for a prisoner's gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner's suffering, those officials violate the Eight Amendment's prohibition on cruel and unusual punishment."); Rosati v. Igbinoso, 791 F.3d 1037, 1039–40 (9th Cir. 2015) (per curiam) (holding transgender plaintiff alleged deliberate indifference where prison denied gender-affirming surgery because of a blanket policy); *see also* Colwell v. Bannister, 763 F.3d 1060, 1063 (9th Cir. 2014) (holding that a "blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy . . . is the paradigm of deliberate indifference"); Kothmann v. Rosario, 558 F. App'x 907, 911–12 (11th Cir. 2014) (per curiam) (denying qualified immunity when a prison health official intentionally refused to provide accepted,

The ADA is a fitting tool to help those like Jane Doe obtain reasonable accommodations. The ADA is a "broad and visionary" civil rights statute.[15] A national movement of disability rights activists mobilized first to successfully pass congressional legislation,[16] then to amend the Act after decisions by the Supreme Court limited its intended reach.[17] The ADA Amendments Act of 2008[18] (ADAAA) had the express "purpose of reinstating a broad scope of protection under the ADA."[19] By doing so, the ADAAA sought to achieve its purpose "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[20] Congress specified that "[t]he definition of disability [in the amended ADA] shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms [of the ADA]."[21]

The ADA reaches public and private actors. Title I of the ADA protects employees from discrimination by their employer based on an employee's disability.[22] Title II of the ADA protects against discrimination by public entities,[23] and Title III of the ADA prohibits discrimination by private entities in places of public accommodation.[24] The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more major life activities of" a person with a disability.[25] A person can show they are disabled and therefore qualify for protection under the ADA if that person (1) actually has, (2) has a record of having, or (3) is regarded by others as having "a physical or mental impairment that substantially limits one or more major life activities."[26] The ADA explains that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[27]

Title II and Title III prohibit public or private entities from "deny[ing] a qualified individual with a disability the opportunity to participate in or benefit from the

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medically necessary treatment for gender identity disorder). *But see* Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019) (upholding a blanket ban on gender-affirming surgeries because of alleged controversy in the medical and scientific community regarding the treatment).

15. Wendy E. Parmet, *Discrimination and Disability: The Challenges of the ADA*, 18 L., MED. & HEALTH CARE 331, 331 (1990).

16. *See* Amber Trotter, *Federal Law Fails Transgender Community: Americans with Disabilities Act and the Gender Identity Exclusion*, 53 NEW ENG. L. REV. F. 78, 80 (2018); Macy Karin & Lara Bollinger, *Disability Rights: Past, Present, and Future: A Roadmap for Disability Rights*, 23 UDC/DCSL L. REV. 1, 1 (2020).

17. Karin & Bollinger, *supra* note 16, at 1–2.

18. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

19. 29 C.F.R. § 1630.1(c)(4) (2025); *see* § 2(b)(1), 122 Stat. at 3554; 42 U.S.C. § 12101(b)(1).

20. 42 U.S.C. § 12101(b)(1).

21. § 4(a), 122 Stat. at 3555.

22. 42 U.S.C. § 12112(a).

23. *Id.* § 12132; 28 C.F.R. § 35.130(b) (2025).

24. 42 U.S.C. § 12182(a).

25. *Id.* § 12102(1)(A).

26. *Id.* §§ 12102(1)(A)–(C).

27. *Id.* § 12102(2)(A).

aid, benefit, or service" they provide, failing to equally "afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service" afforded to others, or failing to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[28]

Section 504 of the Rehabilitation Act[29] similarly bans discrimination on the basis of disability in federally funded programs and activities, including the failure to provide reasonable accommodations that "assure meaningful access" to federal programs and activities.[30] The Rehabilitation Act predated the ADA, but has been construed in conjunction with Title II of the ADA because they contain textual similarities.[31] The Rehabilitation Act requires covered parties to provide "reasonable accommodation[s]" to individuals with disabilities so they can fully participate in the benefits administered by the covered parties.[32] Similarly, the ADA requires "covered entit[ies]" to provide reasonable accommodations to qualified individuals with disabilities.[33] What qualifies as a reasonable accommodation is quite broad.[34] For example, one court has found that the failure to provide psychiatric treatment or a psychiatric evaluation was a denial of a reasonable accommodation for a psychiatric disability.[35]

For an individual to raise a claim under the ADA, the plaintiff must show that "(1) he has a disability or has been regarded as having a disability; (2) he is otherwise qualified to receive the benefits provided by a public [or private] entity; and (3) that he was denied those benefits or was otherwise discriminated against on the basis of

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28. 28 C.F.R. §§ 35.130(b)(1)(i)–(ii), (d) (2025).

29. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.

30. *See* Alexander v. Choate, 469 U.S. 287, 299–301 (1985).

31. Ingram v. Kubik, 30 F.4th 1241, 1256 (11th Cir. 2022) (explaining that "the same standards govern claims under both" the ADA and the Rehabilitation Act and thus the provisions are construed "interchangeably" (citing Silberman v. Mia. Dade Transit, 927 F.3d 1123, 1133 (11th Cir. 2019))). *Compare* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."), *with* 29 U.S.C. § 794 ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .").

32. 35 C.F.R. § 104.12(a) (2025).

33. 42 U.S.C. § 12112(b)(5)(A); *see also id.* § 12111 (providing the definitions of "covered entity," "qualified individual," and "reasonable accommodation").

34. *See id.* § 12182(b)(2)(A)(ii). Prohibited discrimination under the ADA 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, unless the entity can demonstrate making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

Id.

35. Paine *ex rel.* Eilman v. Johnson, No. 06-cv-3173, 2010 WL 785397, at *8 (N.D. Ill. Feb. 26, 2010).

his disability."[36] To prove the third element, there are "three distinct grounds for relief: (1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations."[37] Under the reasonable accommodation theory, once a plaintiff alleges that reasonable accommodations would give the plaintiff meaningful access to an existing public service or program and that the defendants have refused to provide those accommodations,[38] the burden shifts to the defendants to show that a requested accommodation was unreasonable because it places "undue financial and administrative burdens" on the entity or fundamentally alters the nature of the program—a specific and fact-intensive inquiry.[39]

Given the clear and inclusive definitions in the ADA and Rehabilitation Act, there should be no question that these statutes protect people with disabilities[40] from discrimination when seeking access to medical services when the government provides those services to others.[41] This protection extends to people seeking medical services in state or federal prisons.[42] Indeed, the Supreme Court has held that "it is quite plausible that the alleged deliberate refusal of prison officials to accommodate" an incarcerated person's "disability-related" medical care needs "constitute[s] 'exclu[sion] from participation in or … deni[al of] the benefits of' the prison's 'services, programs, or activities'" in violation of Title II of the ADA.[43]

Enter *Bryant v. Madigan*.[44] In *Bryant*, Chief Judge Posner held for the first time across the circuits that the ADA is "not … violated by a prison's simply failing to attend to the medical needs of its disabled prisoners."[45] Bryant alleged claims under both the Eighth Amendment and the ADA.[46] The Seventh Circuit stated that "[s]leeping in one's cell is not a 'program' or 'activity.'"[47] The court differentiated

36. Fauconier v. Clarke, 966 F.3d 265, 276 (4th Cir. 2020).

37. A Helping Hand, L.L.C. v. Baltimore County, 515 F.3d 356, 362 (4th Cir. 2008).

38. *See* Cadena v. El Paso County, 946 F.3d 717, 725 (5th Cir. 2020); Nat'l Fed'n of the Blind, Inc. v. Lamone, 438 F. Supp. 3d 510, 544 (D. Md. 2020) (explaining that plaintiffs' burden to establish that an accommodation is reasonable is "not a heavy one" (quoting Henrietta D. v. Bloomberg, 331 F.3d 261, 280 (2d Cir. 2003))).

39. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410–12 (1979); Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287 n.17 (1987); Keith v. County of Oakland, 703 F.3d 918, 927 (6th Cir. 2013); Crowder v. Kitagawa, 81 F.3d 1480, 1485–86 (9th Cir. 1996); Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995).

40. This Article uses "people with disabilities" and "disabled people" interchangeably as both terms can describe people with disabilities/disabled people in general, and each individual may have a different preference. *See* Lydia X. Z. Brown, *Ableism/Language*, AUTISTIC HOYA, https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html (Sept. 14, 2022).

41. *Cf.* Parmet, *supra* note 15, at 339–40 (critiquing the ADA for not being clear enough about its protection of medical treatment).

42. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209–10 (1998) (noting the phrase "services, programs, or activities" in 42 U.S.C. § 12132 includes medical prison programs).

43. United States v. Georgia, 546 U.S. 151, 157 (2006) (alterations in original) (quoting 42 U.S.C. § 12132).

44. Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996).

45. *Id.* at 249.

46. *See id.* at 247–48 ("He claims that the defendants' conduct violated both the Eighth Amendment and the [ADA]." (citation omitted)).

47. *Id.* at 249.

Bryant's claim "that he was not given special accommodation" from what the court viewed as more legitimate disability claims—"being excluded from some prison service, program, or activity, for example an exercise program that his paraplegia would prevent him from taking part in without some modification of the program."[48] In short, the court held that, much like "the Eighth Amendment's cruel and unusual punishments clause . . . [t]he ADA does not create a remedy for medical malpractice."[49] The court characterized Bryant's ADA claim as "an end run around [Eighth Amendment jurisprudence]."[50]

Although the Supreme Court has never adopted *Bryant*, most circuit courts have followed in the Seventh Circuit's footsteps.[51] Because most federal circuits have adopted *Bryant*'s framework, and because of the inherent flaws in *Bryant*'s collapse of the Eighth Amendment and ADA analyses discussed herein, *Bryant* has made an outsized impact in curtailing disabled incarcerated people's access to accommodations. I join another contributor to this Symposium[52] in arguing that *Bryant* is unworkable and was wrong when it was decided. This Article shows how people with disabilities can nevertheless navigate around *Bryant*. Using gender dysphoria as a case study, I show how specific remedies can be pursued simultaneously under the Eighth Amendment and the ADA.[53] By reckoning with this specific ADA claim,[54] I hope to show the liberatory possibilities of the ADA for

48. *Id.*

49. *Id.*

50. *Id.*

51. Buchanan v. Maine, 469 F.3d 158, 174–76 (1st Cir. 2006); McGugan v. Aldana-Bernier, 752 F.3d 224, 231–32 (2d Cir. 2014) (applying *Bryant*'s logic in the Rehabilitation Act context); Lesley v. Hee Man Chie, 250 F.3d 47, 54 (5th Cir. 2001) ("Lest questions of medical propriety be conflated with questions of disability discrimination, it must take more than a mere negligent referral to constitute a Rehabilitation Act violation."); Simmons v. Navajo County, 609 F.3d 1011, 1022 (9th Cir. 2010), *overruled in part on other grounds by* Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (en banc); Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) (determining that choosing between non-treatment or surgery is "the sort of purely medical decision[]" that falls outside "the scope of the ADA"); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1289, 1294 (11th Cir. 2005).

52. *See* Samuel Weiss, *Prison Medical Care and Disability Accommodation*, 62 AM. CRIM. L. REV. 1255 (2025).

53. By focusing on gender dysphoria, I continue an academic dialogue with another movement lawyer and scholar. *See* D Dangaran, *Bending Gender: Disability Justice, Abolitionist Queer Theory, and Claims for Gender Dysphoria*, 137 HARV. L. REV. F. 237 (2024); A.D. Sean Lewis, *On the Limits of ADA Inclusion for Trans People*, HARV. L. REV. BLOG (May 17, 2024), https://harvardlawreview.org/blog/2024/05/on-the-limits-of-ada-inclusion-for-trans-people/.

54. Others have written about the unconstitutional and discriminatory treatment of trans people in prison and U.S. Immigration and Customs Enforcement (ICE) detention before. *See, e.g.*, Danielle Matricardi, Comment, *Binary Imprisonment: Transgender Inmates Ensnared Within the System and Confined to Assigned Gender*, 67 MERCER L. REV. 707, 721–36 (2016); Dana O'Day-Senior, Note, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453, 470–75 (2008). Scholars have discussed how to accommodate incarcerated people with gender dysphoria using Eighth Amendment and Equal Protection claims. *See, e.g.*, Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J. C.R. & C.L. 283, 312–32 (2016). Scholars have also detailed the ADA claim for gender dysphoria. *See, e.g.*, Kevin Barry & Jennifer Levi, Blatt v. Cabela's Retail, Inc. *and a New Path for Transgender Rights*, 127 YALE L.J.F. 373, 382–86 (2017); Ali

securing the entire spectrum of accommodations people with disabilities might need over their lifetime. People with gender dysphoria regularly face discriminatory denials of hormone therapy as well as gender confirmation surgery.[55] But each person has individual needs to accommodate their gender dysphoria, and those needs may change over time.[56] Rather than rehash arguments in defense of ADA claims for gender dysphoria,[57] this Article assumes that the claim is viable and focuses on the remedies plaintiffs can seek under the claim—an underdeveloped area of legal scholarship and case law.

This Article proceeds in three Parts. Part I broadly frames the dilemma caused by *Bryant*. First, Part I introduces *Bryant* and critiques it. Second, Part I argues that *United States v. Georgia*[58] creates tension with *Bryant* by requiring a constitutional violation as a precondition for ADA damages; courts often accept that a successful Eighth Amendment companion claim meets this requirement. Finally, Part I illustrates how plaintiffs have successfully navigated *Bryant* by alleging Eighth Amendment and ADA claims simultaneously. In short, a person with a disability

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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, 144–59 (2020). The Fourth Circuit has upheld the viability of the claim, *see* Williams v. Kincaid, 45 F.4th 759, 766–69 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023), and is the only circuit to reach it, *see* Kincaid v. Williams, 143 S. Ct. 2414, 2414–15 (2023) (Alito, J., dissenting) (arguing against the denial of certiorari in order to provide clarity on the question). A majority of district courts have reached the same conclusion as the Fourth Circuit, *see* Dangaran, *supra* note 53, at 255–57, and the number is increasing, *see* Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1348 (N.D. Ga. 2024) (deciding gender dysphoria is not excluded from the ADA but denying the claim on other grounds).

55. *See* Susan S. Bendlin, *Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?*, 67 CLEV. ST. L. REV. 957, 972–74 (2013); Aranda Stathers, Comment, *Freeze-Frames and Blanket Bans: The Unconstitutionality of Prisons' Denial of Gender Confirmation Surgery to Transgender Inmates*, 127 DICK. L. REV. 243, 246–47, 256–64 (2022); Jameson Rammell, *Polarizing Procedures: Transsexual Inmates, Sex Reassignment Surgery, and the Eighth Amendment*, 40 J. MARSHALL L. REV. 747, 748 (2017).

56. *See* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S111 (2022) (stating gender affirming hormone therapy "is customized to meet the individual needs" of the person); *id.* at S57, S159 (indicating trans adolescents' interests and needs regarding reproduction and fertility may "change over time"); *id.* at S85 ("Conceptualizing assessment as an ongoing process is particularly important given gender-related experiences and associated needs may shift throughout the lifespan."); *id.* ("[O]pen-ended discussion is likely to provide a deeper and more accurate understanding of each individual's unique experiences of dysphoria and their associated care needs.").

57. As discussed above, *see supra* note 54 and accompanying text, there has been litigation over the statutory interpretation of the ADA, given its exclusion of "transvestism, transsexualism, … [and] gender identity disorders not resulting from physical impairments" from coverage as a disability. 42 U.S.C. § 2211(b)(1); *see Williams*, 45 F.4th at 766–69 (holding gender dysphoria is protected under the ADA because its meaning differs from gender identity disorder in important respects).

Moreover, I note that there are state statutes that have codified disability rights protections that are more expansive than the ADA, some of which do not contain any such exclusion either on their face or through interpretation by state courts. *See,* Daniella A. Schmidt, *Bathroom Bias: Making the Case for Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155, 168–74 (2013) (surveying state statutes and cases interpreting them). Claims under state disability law can be considered alongside claims under federal disability law. *See, e.g.*, Sharbono v. N. States Power Co., 902 F.3d 891, 893–94 (8th Cir. 2018); Sherrod v. Am. Airlines, Inc., 132 F.3d 1112, 1115–16 (5th Cir. 1998). I thank Katie Eyer for this point.

58. United States v. Georgia, 546 U.S. 151 (2006).

may seek *both* a reasonable accommodation and a medical treatment for the same issue. The argument is straightforward: if access to a medical service is discriminatorily barred, then the plaintiff has an ADA claim. And if necessary medical care is not provided and the prison officials acted with deliberate indifference, then the plaintiff also has an Eighth Amendment claim. Part II provides an extended illustration by framing the potential remedies plaintiffs with gender dysphoria might pursue as ADA accommodations. Finally, Part III argues that ADA claims are the optimal approach for people seeking gender-affirming accommodations in prison because ADA claims conceptualize gender dysphoria in a less ableist, less medicalized, and less rigid way than Eighth Amendment claims.[59]

I. THE FLAWED AND OUTDATED REASONING OF *BRYANT V. MADIGAN*

A. The Supposed Dilemma Between Eighth Amendment and ADA Claims

Ronald Bryant sued Illinois state prison officials after they "had refused his request for guardrails for his bed and . . . as a result he had broken his leg when a severe leg spasm caused him to fall out of bed."[60] The Seventh Circuit mentioned parenthetically that "Bryant is a paraplegic, and leg spasms are a symptom of his condition."[61] Bryant was also "denied pain medication" "after the operation to fix his leg."[62] Bryant raised both Eighth Amendment and ADA claims.[63] "The district judge granted summary judgment for the defendants" on the Eighth Amendment claim based on evidence by the medical practitioners who provided Bryant's care.[64] The district court also "held that the [ADA] is inapplicable to Bryant's claim."[65] The Seventh Circuit remanded Bryant's Eighth Amendment claim,[66] but "conclu[ded] that Bryant failed to state a claim under the ADA."[67]

Chief Judge Posner did not decide whether Title II of the ADA protected incarcerated people.[68] Notably, the Supreme Court determined only two years later that the answer is yes.[69] Instead, the Seventh Circuit determined that "[t]he ADA does not create a remedy for medical malpractice" and that a plaintiff seeking "special

59. The circuit split regarding what types of gender-affirming care are deemed medically necessary, *see supra* note 14, is another reason why pursuing ADA claims would be beneficial right now. For a detailed explanation of the fractured state of Eighth Amendment law for gender-affirming care, see D Dangaran, Note, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 HARV. J.L. & GENDER 151, 180–84 (2021).

60. Bryant v. Madigan, 84 F.3d 246, 247 (7th Cir. 1996).

61. *Id.*

62. *Id.*

63. *Id.* at 247–48.

64. *Id.* at 248.

65. *Id.*

66. *Id.* at 248 (remanding on evidentiary grounds).

67. *Id.* at 249.

68. *See id.* at 248–49 (discussing the issue but not reaching a conclusion).

69. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209–10 (1998) (holding the phrase "services, programs, or activities" in 42 U.S.C. § 12132 includes medical prison programs).

accommodation" in the form of a guardrails next to his bed[70] is not seeking a reasonable accommodation under the ADA, but rather arguing he is receiving "incompetent treatment of his paraplegia."[71] The court determined that "incarceration, which requires the provision of a place to sleep, is not a 'program' or 'activity.'"[72] This holding is also outdated: the U.S. Department of Justice has issued regulations under Title II of the ADA that require that prisons "ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing."[73] And federal courts have recognized that providing a safe, appropriate place to sleep is a "service" protected by Title II of the ADA.[74]

Bryant does not offer a workable framework. The *Bryant* court merely decided that a guardrail for Bryant's bed is closer to medical treatment for Bryant's paraplegia than a reasonable accommodation for the effect that his disability has on his life.[75] In so deciding, the Seventh Circuit makes any sensible distinction between medical care and reasonable accommodations to obtain medical services incomprehensible. For example, a recent Seventh Circuit case held that a plaintiff's request for a lower bunk to accommodate his disabling knee condition was a reasonable accommodation, not a matter of medical malpractice.[76] *Brown* and *Bryant* are nearly indistinguishable on their facts, and yet the Seventh Circuit differentiated *Bryant* when issuing its opinion in *Brown*.[77] Both plaintiffs sought a material adjustment to their living environment such that they would be able to comfortably sleep in a way that took their disability into account. But accommodating paraplegia with a grab-bar was considered treatment,[78] whereas getting a lower bunk to accommodate a knee condition was considered a reasonable accommodation.[79] The *Bryant* doctrine is thus incoherent even within the Seventh Circuit.

One could argue that the decision simply puts Bryant's request on the wrong side of a dividing line between "treatment" and "accommodation"—after all, the

70. *Bryant*, 84 F.3d at 247–49.

71. *Id.* at 249.

72. *Id.*

73. 28 C.F.R. § 35.152(b)(3) (2025). Moreover, the ADAAA listed "sleeping" in its definition of a major life activity that, if substantially limited, would amount to a disability. *See* 42 U.S.C. § 12102. Federal regulations implementing Title II state that failing to accommodate that disability is a violation of the ADA. *See* 28 C.F.R. § 35.130(b)(7)(i) (2025) ("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, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

74. *See, e.g.*, Pierce v. County of Orange, 526 F.3d 1190, 1224 n.44 (9th Cir. 2008) (determining that "[p]roviding inmates with appropriate and adequate bedding . . . facilities are 'services' of the jail" for purposes of the ADA); Dinkins v. Corr. Med. Servs., 734 F.3d 633, 634–35 (8th Cir. 2014) ("[D]enial[] of . . . adequate housing by reason of [plaintiff's] disability can form the basis for viable ADA . . . claims.").

75. *See Bryant*, 84 F.3d at 249.

76. *See* Brown v. Meisner, 81 F.4th 706, 709 (7th Cir. 2023).

77. *Id.*

78. *Bryant*, 84 F.3d at 249.

79. *Brown*, 81 F.4th at 709.

court stated that his complaint framed his request as a "special accommodation."[80] But that argument would accept Chief Judge Posner's framing decision that the ADA cannot be "an end run" around the Eighth Amendment and medical malpractice law by providing protections that are at all tangentially related to medical needs.[81] The issue is that *Bryant* makes no attempt to delineate medical malpractice, medical deliberate indifference, or disability claims. Nevertheless, many courts have followed suit and adopted *Bryant* to some extent, understanding requested accommodations as Eighth Amendment or medical malpractice claims, instead of disability claims under the ADA.[82]

Bryant's pithy logic was as powerful as it was simple—so powerful that the case has endured despite the fact that its component parts—deciding sleeping is not a program or activity, deciding bed guardrails are not a reasonable accommodation, and casting doubt over whether the ADA covers prisons—have been effectively overturned.[83] While the Supreme Court has never adopted *Bryant*, most, if not all, circuit courts have followed the Seventh Circuit's footsteps.[84] Courts have barely fleshed out the dividing line in *Bryant* any more than to say that certain requested remedies fall in the realm of accommodating a disability, whereas others involve

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80. *Bryant*, 84 F.3d at 249.

81. *Id.*

82. *See, e.g.*, Buchanan v. Maine, 469 F.3d 158, 174–76 (1st Cir. 2006). The court notes:

> We have described two situations in which a challenge based on a treatment decision might be made: (1) the treatment decision was so unreasonable as to be arbitrary and capricious, raising an implication of pretext for some discriminatory motive, and (2) if not pretextual, the decision was based on stereotypes of the disabled rather than an individualized inquiry as to the plaintiff's conditions.

Id. at 176; Tardif v. City of New York, 991 F.3d 394, 404–07 (2d Cir. 2021); Simmons v. Navajo County, 609 F.3d 1011, 1022 (9th Cir. 2010), *overruled in part on other grounds by* Barker v. Osemwingie, No. 23-15479, 2024 WL 2890180 (June 10, 2024 9th Cir.); Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) (determining that choosing between non-treatment or surgery is "the sort of purely medical decision[]" that falls outside "the scope of the ADA"); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1289, 1294 (11th Cir. 2005). *But see* Durham v. Kelley, 82 F.4th 217, 226–27, 228–30 (3d Cir. 2023) (finding a cane to be a reasonable accommodation and also finding the denial of a cane violated the Eighth Amendment); Furgess v. Pa. Dep't of Corr., 933 F.3d 285, 291 (3d Cir. 2019) (holding that the failure to provide access to showers was properly alleged as an ADA claim).

83. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 219 (1998) (holding the phrase "services, programs, or activities" in 42 U.S.C. § 12132 includes medical prison programs); *Brown*, 81 F.4th at 709 (holding a bedding request for a physical condition was a reasonable accommodation); 42 U.S.C. § 12102(2)(A) (listing "sleeping" as a "major life activity"); Pierce v. County of Orange, 526 F.3d 1190, 1224 n.44 (9th Cir. 2008) (determining that "[p]roviding inmates with appropriate and adequate bedding . . . facilities are 'services' of the jail" for purposes of the ADA); Dinkins v. Corr. Med. Servs., 734 F.3d 633, 634–35 (8th Cir. 2014) ("[D]enial[] of . . . adequate housing by reason of [plaintiff's] disability can form the basis for viable ADA . . . claims.").

84. *Buchanan*, 469 F.3d at 174–76; McGugan v. Aldana-Bernier, 752 F.3d 224, 231–32 (2d Cir. 2014) (applying *Bryant*'s logic to the Rehabilitation Act context); Lesley v. Hee Man Chie, 250 F.3d 47, 54 (5th Cir. 2001) ("Lest questions of medical propriety be conflated with questions of disability discrimination, it must take more than a mere negligent referral to constitute a Rehabilitation Act violation."); *Simmons*, 609 F.3d at 1022; *Fitzgerald*, 403 F.3d at 1144 (determining that choosing between non-treatment or surgery is "the sort of purely medical decision[]" that falls outside "the scope of the ADA"); *Schiavo*, 403 F.3d at 1294.

medical treatment.[85] No court has issued any workable factors or clear delineations to guide the inquiry. But they parrot *Bryant* and assume its framework is valid and necessary for a plaintiff raising an ADA claim to surmount.[86] The Seventh Circuit's cursory analysis in *Bryant* thus spawned an entire doctrine propped up on a core assumption unmoored from any statutory interpretation of the ADA or constitutional law. Where did Chief Judge Posner derive this unworkable framework?

Chief Judge Posner did not write on a blank slate. *Bryant* limited the ADA based on case law interpreting the Rehabilitation Act.[87] Indeed, one of the two cases cited in support of the court's conclusion that the plaintiff did not properly allege a discrimination claim is a Rehabilitation Act case.[88] The Supreme Court had previously held that the Rehabilitation Act does not grant "equal results" from state-provided healthcare, but rather "evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance."[89] The Court emphasized that Section 504 of the Rehabilitation Act was not "principally concerned with the quality of medical care" that protected individuals would receive.[90] These decisions were based on guidance issued by the federal agency that promulgated rules under Section 504, stating that a "common misconception about the [Rehabilitation Act] is that it would require specialized hospitals and other health care providers to treat all handicapped persons."[91] From this language, courts such as *Bryant* derived the broader proposition that the Rehabilitation Act covered only a narrow slice of behavior that looked like excluding people from programs or services on the basis of their disability.[92]

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85. *See Buchanan*, 469 F.3d at 174–76; McDaniel v. Syed, 115 F.4th 805, 828 (7th Cir. 2024) (summarizing the case law as establishing that "the ADA and the Rehabilitation Act do not apply when a prisoner simply disagrees with his course of medical treatment," which "is different from cases where, as here, a plaintiff offers evidence that the choice to reject his accommodation requests directly affected his mobility, preventing him from moving freely throughout the facility and impairing or preventing his participation in prison activities").

86. *See, e.g.*, *McGugan*, 752 F.3d at 231–32; *Fitzgerald*, 403 F.3d at 1144; *Schiavo*, 403 F.3d at 1294.

87. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.

88. Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996); *see* Donnell C. v. Ill. State Bd. of Educ., 829 F. Supp. 1016, 1017, 1020 (N.D. Ill. 1993).

89. Alexander v. Choate, 469 U.S. 287, 304 (1985).

90. Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 647 (1986). *But see* Wagner *ex rel.* Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1012 (3d Cir. 1995) ("The Supreme Court, however, did not reach the issue of whether a medical treatment decision made on the basis of handicap is immune from scrutiny under section 504, because the Court held there was no evidence that the hospitals had denied treatment on the basis of handicap.").

91. United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook, 729 F.2d 144, 152 (2d Cir. 1984) (quoting 45 C.F.R. pt. 84 app. A at para. 36).

92. *See, e.g.*, 45 C.F.R. pt. 84 app. A at para. 36 (2025) ("[A] burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness."); *Bryant*, 84 F.3d at 249 ("[Bryant] is not complaining of being excluded from some prison service, program, or activity, for example an exercise program that his paraplegia would prevent him from taking part in without some modification of the program.").

This reasoning offers too narrow a reading of the Rehabilitation Act's "reasonable modification" requirement,[93] which mirrors that in the ADA.[94] Mandating public entities to provide "reasonable modifications" or "reasonable accommodations" is one of the most powerful parts of the ADA.[95] In passing the ADAAA, Congress found that "discrimination against individuals with disabilities persists in such critical areas as . . . health services."[96] Congress had the purpose of "reinstating a broad scope of protection to be available under the ADA."[97] Given the expansive definitions provided in the ADA,[98] there is an entire world of potential reasonable accommodations that public entities must provide. Some of these accommodations are actually listed in the ADA as "mitigating measures."[99] *Bryant*'s reasoning is therefore outdated and is irreconcilable with the text of the amended ADA.

Bryant created an atextual exception to the ADA that should not exist. Nearly twenty years after *Bryant* was decided, the Supreme Court has yet to reach the issue. No circuit has explicitly disagreed with the framework, but some have found some remedies that are comparable to the guardrails in *Bryant* to be ADA accommodations while simultaneously holding the denial of that remedy to be an Eighth Amendment violation.[100] Even so, courts still pose the question to litigants in ADA claims.[101]

B. The Inherent Tension Between Bryant *and* United States v. Georgia

There is a grand irony in disability law. ADA litigation faces two contradictory hurdles. The first is the *Bryant* question, asking courts to classify requested relief as either medical care or a disability accommodation. The second, created in

93. *See* 45 C.F.R. § 84.68(b)(7)(i) (2025) ("A [federal funding] recipient shall make reasonable modifications in policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the program or activity.").

94. 28 C.F.R. § 35.130(b)(7))(i) (2025).

95. *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 602 (1999) ("In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.").

96. 42 U.S.C. § 12101(a)(3).

97. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 § 2(b)(1).

98. *Id.* § 3(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."); *id.* § 3(4)(C) ("An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.").

99. *See* 42 U.S.C. § 12102(4)(E)(i)(I) (listing as "mitigating measures" "medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.").

100. See Durham v. Kelley, 82 F.4th 217, 226–30 (3d Cir. 2023) (finding a cane to be a reasonable accommodation the denial of which violated the Eighth Amendment).

101. *See, e.g.*, Oral Argument at 4:00, Montanez v. Price, No. 23-2669 (3d Cir. Sept. 24, 2024), https://www2.ca3.uscourts.gov/oralargument/audio/23-2669_JoseMontanezv.PaulaPrice_etal.mp3 (asking about *Bryant*'s limitation on plaintiff's ADA claim seeking a bedding accommodation).

United States v. Georgia, requires courts to find a valid companion constitutional claim in order to abrogate state sovereign immunity in order to pursue damages.[102] Courts have held that, per *Georgia*, a plaintiff can "plead a companion constitutional claim arising from the same facts as the ADA claim" in order to establish that Congress abrogated the relevant state's Eleventh Amendment immunity as related to a particular case.[103] That claim is very often the Eighth Amendment claim for medical deliberate indifference.[104]

Georgia contemplates that plaintiffs will have a medical care claim and an ADA claim that arise from the same issue. This decision casts doubt on the *Bryant* framework altogether. Even though *Bryant* is most often decided in the context of injunctive relief[105] and *Georgia* is a case about damages,[106] plaintiffs often need to frame their exact disability issue as a medical deliberate indifference case in order to prevail.[107] This irony dooms *Bryant*'s framework. The Supreme Court has shown in *Georgia* that there is not a carve out for healthcare accommodations under the ADA.

Georgia is in inherent tension with *Bryant* and its progeny. Nothing in *Bryant* explicitly limits its reasoning to injunctive claims, so to the extent that *Bryant* has been part of any courts' determination of ADA damages claims, *Bryant*'s contribution to the reasoning should be ignored. The *Georgia* Court explicitly considered the plaintiff's Eighth Amendment claim (as applied to the states via the Fourteenth Amendment) as well as the plaintiff's ADA claim and held that the plaintiff not only *could* have a medical deliberate indifference claim and a companion ADA claim, but *needed to* have a constitutional claim in order to abrogate state sovereign immunity.[108] Thus, even if *Georgia* is in a different doctrinal silo of abrogation, it contradicts *Bryant*'s understanding of what qualifies as disability discrimination.

Georgia clearly held that medical services can be a program, service, or activity under the ADA, creating tension with *Bryant*'s errant discussion in that regard.[109]

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102. *See* United States v. Georgia, 546 U.S. 151, 159 (2006) ("Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.").

103. *Durham*, 82 F.4th at 228.

104. *See id.* at 229; *see also* Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1346 n.14 (N.D. Ga. 2024) ("[T]he Court already found that Plaintiff is likely to succeed on her Eighth Amendment claim related to Defendants' provision of medical care. So, sovereign immunity does not apply.").

105. *Bryant* also comes up in damages-only cases. *See* Love v. Westville Corr. Ctr., 103 F.3d 558, 559 (7th Cir. 1996) (discussing *Bryant* after detailing the damages claim and showing the plaintiff had been released).

106. Since *Georgia* was decided, the Court has never decided whether its reasoning extends to all Title II claims, including injunctive claims.

107. *See Durham*, 82 F.4th at 229 ("Here, as in *Georgia*, Durham alleges violation of both Title II and the Eighth Amendment arising from the same conduct. Because we hold below that Durham has properly pleaded his Eighth Amendment deliberate indifference claims, his parallel claims for money damages against the State under Title II may proceed.").

108. *See* United States v. Georgia, 546 U.S. 151, 157–59 (2006).

109. *See id.* at 157 ("[I]t is quite plausible that the alleged deliberate refusal of prison officials to accommodate [the plaintiff's] disability-related needs in such fundamentals as . . . medical care . . . constituted 'exclu[sion] from participation in or deni[al of] the benefits of' the prison's 'services, programs, or activities.'"

C. Charting the Course: Bringing Simultaneous Eighth Amendment and ADA Claims

Despite the problems with *Bryant*'s framework and the contradictions in the doctrine more broadly as shown by *Georgia*, many courts have made an effort to navigate through or around *Bryant* when plaintiffs alleged ADA claims of a medical nature.[110] When plaintiffs have prevailed in their ADA claims, courts have often determined that remedies that prison officials attempted to frame as medical care were actually reasonable accommodations.[111] Sometimes courts have held that both the Eighth Amendment claim and the ADA claim could prevail.[112] Attempting to derive a coherent framework out of the cases that exist is a fool's errand.

One way forward is to hew all interpretation of the ADA closely to the Rehabilitation Act case law. The Fifth Circuit's decision in *Lesley v. Hee Man Chie*[113] is instructive for how this path might work.[114] There, the Fifth Circuit faced a Rehabilitation Act claim brought by an HIV-positive woman who was referred by her OB/GYN, the defendant, "to another hospital that, in his judgment, was better qualified to handle deliveries by HIV-positive patients."[115] In determining whether the defendant's decision to not treat the plaintiff himself was a denial of medical services "solely by reason of her disability," the Fifth Circuit weighed the doctor's argument that "the Rehabilitation Act was never intended to interfere with bona fide medical judgments as to how best to treat a patient with a disability"

(third and fourth alterations in original) (quoting 42 U.S.C. § 12132)); *see also* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209–10 (1998) (holding the phrase "services, programs, or activities" in 42 U.S.C. § 12132 includes medical prison programs).

110. *See, e.g.*, Buchanan v. Maine, 469 F.3d 158, 174–76 (1st Cir. 2006); McGugan v. Aldana-Bernier, 752 F.3d 224, 231–32 (2d Cir. 2014) (applying *Bryant*'s logic in the Rehabilitation Act context); Furgess v. Pa. Dep't of Corr., 933 F.3d 285, 291 (3d Cir. 2019); Lesley v. Hee Man Chie, 250 F.3d 47, 54 (5th Cir. 2001) ("Lest questions of medical propriety be conflated with questions of disability discrimination, it must take more than a mere negligent referral to constitute a Rehabilitation Act violation."); McDaniel v. Syed, 115 F.4th 805, 827 (7th Cir. 2024); Reed v. Columbia St. Mary's Hosp., 915 F.3d 473, 486 & n.6 (7th Cir. 2019) (holding that medical professionals' decision to withhold psychiatric treatment could support a failure-to-accommodate claim under the Rehabilitation Act and directing the district court to address whether the treatment was withheld as an exercise of medical judgment for her appropriate treatment); Simmons v. Navajo County, 609 F.3d 1011, 1022 (9th Cir. 2010), *overruled in part on other grounds by* Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (en banc); Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) (determining that choosing between non-treatment or surgery is "the sort of purely medical decision[]" that falls outside "the scope of the ADA"); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1289, 1294 (11th Cir. 2005).

111. *See, e.g.*, *Furgess*, 933 F.3d at 291 (holding that the failure to provide access to showers were properly alleged as ADA claims); Wagner ex rel. Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1011-12 (3d Cir. 1995), 1014 (holding a geriatric center violated Section 504 of the Rehabilitation Act by not admitting a woman with Alzheimer's because they were unable to accommodate her behavioral symptoms); *McDaniel*, 115 F.4th at 812 (holding the denial of a no-stairs unit to accommodate mobility impairments is a triable ADA and Rehabilitation Act claim).

112. *See, e.g.*, Durham v. Kelley, 82 F.4th 217, 226–30 (3d Cir. 2023) (finding a cane to be a reasonable accommodation the denial of which violated the Eighth Amendment).

113. 250 F.3d 47 (5th Cir. 2001).

114. Though the plaintiff initially brought an ADA claim, it was dismissed by stipulation before the court issued its decision. *See id.* at 51.

115. *Id.* at 49.

against the plaintiff's argument that the transfer was "a discriminatory act cloaked as an exercise of medical judgment" because the defendant "was perfectly competent to treat her."[116]

The Fifth Circuit adopted a test that seems workable on its face, but may actually be fairly limited in its applications. The Fifth Circuit held:

> Under the Rehabilitation Act, a patient may challenge her doctor's decision to refer her elsewhere by showing the decision to be devoid of any reasonable medical support. This is not to say, however, that the Rehabilitation Act prohibits unreasonable medical decisions as such. Rather, the point of considering a medical decision's reasonableness in this context is to determine whether the decision was unreasonable *in a way that reveals it to be discriminatory*. In other words, a plaintiff's showing of medical unreasonableness must be framed within some larger theory of disability discrimination. For example, a plaintiff may argue that her physician's decision was so unreasonable—in the sense of being arbitrary and capricious—as to imply that it was pretext for some discriminatory motive, such as animus, fear, or "apathetic attitudes." Or, instead of arguing pretext, a plaintiff may argue that her physician's decision was discriminatory on its face, because it rested on stereotypes of the disabled rather than an individualized inquiry in to the patient's condition—and hence was "unreasonable" in that sense.[117]

The Fifth Circuit's test depends on a finding of discriminatory motive that asks too much of an ADA plaintiff. In my client Jane Doe's case, for example, the district court (erroneously, for reasons described below[118]) relied on an animus requirement to deny Jane Doe's ADA claims for preliminary injunctive relief.[119] My client alleged that her medical providers told her that they could not prescribe gender-affirming surgery for her because the prison officials did not want to pay for it.[120] But the district court held that it would "not transfer evidence of intent for something specific (denial of surgery) to something very different (provision of padding and hair removal cream)."[121] The district court held that Jane Doe's surgery claim was either moot or not yet ripe,[122] so it did not conduct the ADA analysis as to the surgery denial.[123] But Doe's case shows that the "larger theory of disability discrimination" that the Fifth Circuit's test requires a plaintiff to establish might need to be extremely tailored to each accommodation requested, not simply linked to the discrimination against their disability more broadly. Establishing subjective intent for a discriminatory denial of *each* specific request—

116. *Id.* at 53.
117. *Id.* at 55 (citations omitted).
118. *See infra* notes 121–26 and accompanying text.
119. Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1349 (N.D. Ga. 2024).
120. *Id.*
121. *Id.*
122. *Id.* at 1338.
123. *See id.* at 1349.

as Jane Doe did for her surgery claim—is a challenging burden, particularly where medical professionals and other prison officials do not make their reason for denial explicit.

Moreover, under current law, discriminatory animus can be a requirement to get damages under the ADA, but it is not required for injunctive relief.[124] Prisons have an affirmative duty under the ADA to provide reasonable accommodations.[125] That is, under the ADA and Section 504 of the Rehabilitation Act, prison administrators bear the burden of proving that the accommodation would impose "undue financial and administrative burdens" or require "a fundamental alteration in the nature of the program."[126] "Because failing to grant a reasonable accommodation is itself direct evidence of discrimination, plaintiffs who meet this burden need not provide additional evidence of discriminatory intent."[127]

Title II's prohibition on excluding or denying the benefits of services, programs, or activities of a public entity "by reason of" an individual's disability does indeed sound like it creates some kind of heightened subjective intent requirement.[128] But to allege a reasonable accommodation claim, a plaintiff need only show that a public entity was aware of and denied a reasonable accommodation that would ameliorate the plaintiff's disability.[129]

A necessary part of the plaintiff's pleadings is to show what major life activities their disability impairs.[130] Even when a disability is a medical illness, this showing places the claim into the realm of reasonable accommodations, not just the Eighth Amendment—or, at least, it should. I suggest the following shorthand as an organizing principle: a reasonable accommodation helps someone live with a disability, whereas medical care treats a medical condition.

Here is the challenging needle to thread: an *accommodation* can include access to medical services. Courts traditionally think of the denial of access to medical services as a disparate treatment claim.[131] But that is not the *only* option for an ADA pleading. Under a reasonable accommodation theory, plaintiffs can argue

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124. *See* Silberman v. Miami Dade Transit, 927 F.3d 1123, 1134 (11th Cir. 2019); Dudley v. Singleton, 508 F. Supp. 3d 1118, 1142 (N.D. Ala. 2020) ("[A] failure to make reasonable accommodation claim requires no animus or discriminatory motivation." (internal quotation marks omitted) (quoting Nadler v. Harvey, No. 06-12692, 2007 WL 2404705, at *4, *8 (11th Cir. 2007))).

125. *See* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005); Brooks v. Colo. Dep't of Corr., 12 F.4th 1160, 1167 (10th Cir. 2021) (citing 28 C.F.R. § 35.130).

126. Schaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259, 1265 & n.2 (11th Cir. 2019) (interpreting "reasonable accommodations" in the Fair Housing Act context by looking to the ADA and the Rehabilitation Act); *see also* McElwee v. County of Orange, 700 F.3d 635, 641 (2d Cir. 2012).

127. Finley v. Huss, 102 F.4th 789, 820 (6th Cir. 2024).

128. 42 U.S.C. § 12132.

129. *See Dudley*, 508 F. Supp. 3d at 1145 (collecting cases); *id.* (stating that a plaintiff needs to show that the defendants had "enough information to know of both the disability and a desire for an accommodation" or that a reasonable defendant would have made "appropriate inquiries about the possible need for an accommodation" (quoting United States v. Hialeah Hous. Auth., 418 F. App'x 872, 876 (11th Cir. 2011))).

130. *See* 42 U.S.C. § 12102.

131. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 219 (1998).

that they require a policy modification or an accommodation to access a prison program or service that the facility normally provides. It is easy to think of instances when a reasonable accommodation is necessary in order to get medical care. Thus, arguing that a particular remedy falls into one category or the other dismisses the fact that often, the remedy can be understood as either.

A First Circuit case is illustrative. In *Kiman v. New Hampshire Department of Corrections*,[132] Matthew Kiman, who has amyotrophic lateral sclerosis (ALS),[133] sued under Title II of the ADA, arguing the defendants "fail[ed] to properly treat his disease" and "reasonably accommodate his resulting disability."[134] Even though Mr. Kiman "reported experiencing numbness and pain [in] his left leg and left buttocks" and "having weakness and pain [in] his left shoulder," he "did not see a specialist" for these issues while incarcerated.[135] After he was released, a neuromuscular specialist told Mr. Kiman that he might have ALS or some form of muscular dystrophy.[136] When Mr. Kiman returned to the New Hampshire State Prison after a parole violation, he told medical staff upon his initial intake that he had muscular dystrophy and was prescribed physical therapy.[137] He requested various accommodations, including being handcuffed in front of his body and having access to a cane, a bottom bunk, an accessible shower, all his prescribed medications, and a housing tier on the same floor as the kitchen (to avoid stairs).[138] The district court that initially denied relief "found that Kiman's doctors at the prison followed the relevant diagnostic protocol and properly treated his condition."[139] And the district court denied all of his reasonable accommodation requests as either improperly grieved or as justified by security concerns and thus not violative of Title II.[140]

The First Circuit acknowledged that medical services are covered by the ADA.[141] Applying *Bryant*, however, the First Circuit held that some of his claims were not proven to be "based on discriminatory medical care."[142] The First Circuit "conclude[d] that the district court erred in failing to consider evidence . . . related to the defendants' denial of Kiman's access to prescription medications, a shower chair or accessible shower facilities, front cuffing, and bottom tier and bunk placements."[143] "Unlike the defendants' decisions regarding the diagnosis and treatment of Kiman's ALS, the defendants' failure to give him access to his medications

132. 451 F.3d 274 (1st Cir. 2006).

133. *Id.* at 276 & n.1 ("ALS is a progressive neurodegenerative disease that causes motor neurons in the brain and spinal cord to die, affecting the brain's ability to initiate and control muscle movement.").

134. *Id.* at 276.

135. *Id.* at 277.

136. *Id.*

137. *Id.*

138. *See id.* at 277–80.

139. *Id.* at 283.

140. *See id.* at 283–84.

141. *See id.* at 286–87.

142. *See id.* at 284.

143. *Id.* at 286.

[was] not . . . a medical 'judgment' subject to differing opinion," but "an outright denial of medical services," the court said.[144] Similarly, the First Circuit held that the alleged facts supported Kiman's argument that the defendants outright prevented his use of a shower chair and thus prevented his access to an accessible shower.[145] And the record also supported Kiman's discrimination claims for failure to provide cuffing and bunking accommodations.[146] Critically, the First Circuit remanded to allow the district court to consider *Georgia*, noting that "[t]he district court should examine whether a reasonable factfinder could conclude that the defendants' conduct violated Kiman's rights under the Fourteenth Amendment, including his Eighth Amendment rights."[147] The organizing principle in *Kiman* is thus whether medical judgment was involved or not. But even the denial of prescription medications—arguably a medical judgment—*could* be an ADA claim.

The panel's instinct in *Kiman* does not stand alone. Recently, numerous courts have examined Eighth Amendment claims and ADA claims that arise from the same discriminatory denials, either granting both or denying one or both on the merits rather than by relying on the *Bryant* framework.[148] A panel of the Seventh Circuit painstakingly walked through the doctrine from *Bryant* onward before concluding it does not apply to mobility cases, which may sound in both Eighth Amendment and ADA theories.[149] In this recent discussion of *Bryant*, the court attempted to clarify the law, "read[ing] the cases, taken together, as establishing a few general principles."[150] "First, the ADA and the Rehabilitation Act do not apply when a prisoner simply disagrees with his course of medical treatment."[151] Indeed, such a disagreement would not even amount to an Eighth Amendment claim.[152] Second, discussing both *Bryant* and *Georgia*, the Seventh Circuit explained that "simple disagreement with treatment is different from cases where . . . a plaintiff offers evidence that the choice to reject his accommodation requests directly affected his mobility."[153] The court seemed to focus on mobility as an exception to

144. *Id.* at 287.

145. *See id.* at 287–88.

146. *See id.* at 289–90.

147. *Id.* at 291 n.19.

148. *See, e.g.*, Sosa v. Mass. Dep't of Corr., 80 F.4th 15, 30–33 (1st Cir. 2023) (discussing and rejecting both Eighth Amendment and ADA claims arising under the same impairment); Durham v. Kelley, 82 F.4th 217, 225–30 (3d Cir. 2023) (granting both ADA and Eighth Amendment claims on the same mobility issues); Cadena v. El Paso County, 946 F.3d 717, 729 (5th Cir. 2020) (granting ADA reasonable accommodations but denying Eighth Amendment claim because there was no affirmative obligation to provide mobility aids, concluding the plaintiff's claim sounded in malpractice); Finley v. Huss, 102 F.4th 789, 804–07, 821–25 (6th Cir. 2024) (discussing housing decisions under both Eighth Amendment and ADA theories); Jaros v. Ill. Dep't of Corr., 684 F.3d 667, 670–72 (7th Cir. 2012) (discussing grab bars under both the Eighth Amendment and ADA theory); Brooks v. Colo. Dep't of Corr., 12 F.4th 1160, 1170–74 (10th Cir. 2021) (granting ADA claim but finding no subjective deliberate indifference and thus denying Eighth Amendment claim).

149. *See* McDaniel v. Syed, 115 F.4th 805, 825–28 (7th Cir. 2024).

150. *Id.* at 828.

151. *Id.*

152. *See id.* at 832 (laying out the demanding Eighth Amendment standard).

153. *Id.* at 828.

the "general point" that "[w]hen prisoners are unhappy with the medical care they have received, legal redress may be available through medical malpractice suits or Eighth Amendment suits, not under the ADA or the Rehabilitation Act."[154]

But the general principle as explained should apply evenly to other types of major life activities. Denying an accommodation to aid the plaintiff's mobility meant "preventing him from moving freely throughout the facility and impairing or preventing his participation in prison activities."[155] Surely other major life activities would have similar consequences and could therefore be conceived as part of this principle. Take, for instance, sleeping, which the ADAAA lists as a major life activity.[156] And courts have held that "appropriate and adequate bedding" is a "service" under the ADA.[157] So too with bathing.[158] Denying a safe place to sleep and to shower *is* denying major life activities, akin to "moving freely throughout the facility."[159] If prison officials deny such a service *only* because of the person's disability, there should be a cognizable ADA claim. A close examination of accommodating gender dysphoria will help to show why the discussion of *Bryant*'s progeny as allowing some medical claims to exist in both the Eighth Amendment and ADA contexts extends beyond mobility.

II. SEEKING REASONABLE ACCOMMODATIONS FOR GENDER DYSPHORIA

A. Reconceptualizing Reasonable Accommodations

As stated above, a reasonable accommodation helps someone live with a disability, whereas medical care *treats* a medical condition[160]—possibly, perhaps often, to the point of being "cured." This definition creates a challenge for gender dysphoria. Legal scholars who have advocated that the ADA covers gender dysphoria have called gender dysphoria a "treatable medical condition."[161] Courts have followed suit.[162] But when the medical condition is "[l]eft untreated," disabling consequences occur, such as "impairment of function."[163] Under Eighth Amendment

154. *Id.* at 825.

155. *Id.* at 828.

156. 42 U.S.C. § 12102(2)(A).

157. See Pierce v. County of Orange, 526 F.3d 1190, 1224 n.44 (9th Cir. 2008).

158. *See id.*; *see also* Armstrong v. Schwarzenegger, 622 F.3d 1058, 1068 (9th Cir. 2010) (observing that bathing is one of the "fundamentals of life").

159. *McDaniel*, 115 F.4th at 828; *see* 42 U.S.C. § 12102(2)(A) (listing "sleeping" immediately before "walking" in the list of major life activities).

160. *See supra* text accompanying notes 122–27; *see also supra* text accompanying notes 30–35.

161. *See, e.g.*, Kevin M. Barry, Brian Farrell, Jennifer Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 517, 521 (2016).

162. *See, e.g.*, Kosilek v. Spencer, 774 F.3d 63, 86 (1st Cir. 2014) (en banc) ("That [gender dysphoria] . . . mandates treatment, is not in dispute in this case."); De'lonta v. Johnson, 708 F.3d 520, 523–25 (4th Cir. 2013) (discussing sex reassignment surgery as the plaintiff's preferred choice of treatment); Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019) ("Gender dysphoria is a serious but treatable medical condition."); Soneeya v. Spencer, 851 F. Supp. 2d 228, 245 (D. Mass. 2012) (holding that the plaintiff had shown "that, if left untreated, [gender dysphoria] is likely to cause her serious harm").

163. *Edmo*, 935 F.3d at 769.

doctrine, litigants have struggled to show that their gender-affirming care is not just a preferred course of treatment,[164] but rather so necessary that its denial is akin to the outright denial that the *Kiman* court could see when a plaintiff was denied access to their prescribed medications. The ADA offers a pathway forward.

The underlying theory espoused by plaintiffs bringing Eighth Amendment claims for gender-affirming care relies on a treatment rationale that has mixed success before the federal courts.[165] For plaintiffs who are already receiving some type of care—for example, hormone therapy—the argument is that the hormone therapy is insufficiently treating the medical condition and therefore an elevated form of treatment, such as surgery, is required.[166] Conceptually, this is an easy framework that has potential to support a powerful argument. But it relies on thinking of surgery as medical care and gender dysphoria as fully treatable. As described below, this is not ideal for some litigants who may want to resist the medicalization of their needs.

By contrast, the ADA's framework—and particularly reasonable accommodation claims[167]—allows for a much more fluid conception of the medical services. In the ADA context, a disability requiring reasonable accommodation is defined without regard to any mitigating measures the plaintiff is already receiving.[168] So someone with gender dysphoria who is medically treated with hormone therapy and psychotherapy may nevertheless experience gender dysphoria as an impairment that substantially limits a major life activity—and, thus, the person would be a qualified individual with a disability. Seeking the reasonable accommodation of medical services would therefore become a potential pathway for alleviating their impairment, if only *Bryant* could be surmounted.

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164. *See Kosilek*, 774 F.3d at 90. The *Kosilek* court stated:

> The law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to 'second guess medical judgments' or to require that the [department of corrections] adopt the more compassionate of two adequate options.

Id. (quoting Layne v. Vinzant, 657 F.2d 468, 471 (1st Cir. 1981); *see also* Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019); Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1277–78 (11th Cir. 2020).

165. *See Kosilek*, 774 F.3d at 90 (rejecting claim); *Edmo*, 935 F.3d at 769, 803 (upholding claim); *Gibson*, 920 F.3d at 216 (rejecting claim); *Keohane*, 952 F.3d at 1277–78 (rejecting claim).

166. *See Edmo*, 935 F.3d at 769–70.

167. As stated above, individual plaintiffs have two other types of claims under the ADA: intentional discrimination (or disparate treatment) and disparate impact. *See, e.g.*, A Helping Hand, LLC v. Baltimore County, 515 F.3d 356, 362 (4th Cir. 2008). The ADA also contemplates a structural claim by which plaintiffs must show that in administering a program subject to the ADA, a defendant utilizes "methods of administration" that "have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability" or "have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3) (2025). Such a claim has been raised successfully in prison contexts before. *See* Tellis v. LeBlanc, No. 18-541, 2022 WL 67572, at *8 (W.D. La. Jan. 6, 2022); Dunn v. Dunn, 318 F.R.D. 652, 664–65 (M.D. Ala. 2016); Cota v. Maxwell-Jolly, 688 F. Supp. 2d 980, 995–96 (N.D. Cal. 2010). I focus here on reasonable accommodations because of the far more plaintiff-friendly standard of proof compared to other forms of discrimination claims.

168. *See* 42 U.S.C. § 12102(4)(E)(i) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . ."); *id.* (listing "medication" as a mitigating measure).

Courts have so far been fixated on the question of whether gender dysphoria is excluded from the ADA.[169] Once plaintiffs get past that hurdle, it should be easy to explain why gender dysphoria is disabling. The ADA clearly states that "[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."[170] Discrimination includes limiting a person's ability to access services of a public facility.[171] The reasonable accommodations available to trans people behind bars who are experiencing gender dysphoric distress are limited only by the facility's ability to "demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[172] Prisons simply cannot meet this burden when reasonable accommodations for individualized medical services are raised without relying on the escape hatch in *Bryant*. But like mobility,[173] the major life activities impaired by gender dysphoria can often have a totalizing effect on the person's ability to participate in any programs or services.

B. Gender-Affirming Accommodations Behind Bars

1. Major Life Activities Impaired by Gender Dysphoria

ADA case law has already indicated some of the impaired major life activities or discriminatorily barred programs and services that would justify an ADA claim. For example, "denials of . . . adequate housing by reason of [one's] disability can form the basis for viable ADA . . . claims."[174] Relatedly, as stated above, sleeping is a major life activity,[175] and bathing is a service under the ADA.[176] Gender dysphoria can exacerbate or cause "debilitating distress and anxiety,"[177] sleeplessness,[178] and an inability to think.[179] If reasonable accommodations will alleviate these conditions and allow safe and unfettered sleeping, bathing, communicating, thinking, and walking, facilities shall provide them. These considerations broadly cover categories of requests that fall under safety concerns. A second category of requests, access to medical services, is squarely protected by the ADA as well.[180]

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169. *See, e.g.*, Kincaid v. Williams, 143 S. Ct. 2414, 2414–15 (2023) (Alito, J., dissenting from the denial of certiorari); Williams v. Kincaid, 45 F.4th 759, 766–69 (4th Cir. 2022).

170. 28 C.F.R. § 35.130(b)(7) (2025) (emphasis added).

171. *See id.* § 35.130(b)(1).

172. *Id.* § 35.130(b)(7).

173. *See* McDaniel v. Syed, 115 F.4th 805, 828 (7th Cir. 2024).

174. Dinkins v. Corr. Med. Servs., 743 F.3d 633, 634 (8th Cir. 2014) (per curiam); *see also* Pierce v. County of Orange, 526 F.3d 1190, 1224 n.44 (9th Cir. 2008) (describing appropriate bedding as a service under the ADA).

175. 42 U.S.C. § 12102(2)(A).

176. Armstrong v. Schwarzenegger, 622 F.3d 1058, 1068 (9th Cir. 2010).

177. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 594 (4th Cir. 2020) (citation omitted).

178. *See* Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *4 (D. Mass. June 14, 2018).

179. Guthrie v. Noel, No. 20-CV-02351, 2023 WL 8115928, at *3 (M.D. Pa. Sept. 11, 2023).

180. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209–10 (1998) (noting the phrase "services, programs, or activities" in 42 U.S.C. § 12132 includes medical prison programs).

Since 2018, there have been over a dozen cases brought by plaintiffs alleging ADA claims related to their gender dysphoria while in jails or prisons.[181] The litigants advanced various theories of how gender dysphoria was disabling for them.[182] The next section aims to inform the plaintiffs in pending cases as they move forward in litigation, as well as any future claimants, of the strongest way to allege ADA claims with *Bryant* in mind as a potential hurdle.

2. Safety Accommodations

Gender dysphoria can impair trans people's thinking, sleeping, communicating, interacting with others, and showering while they are housed in cells, units, or facilities with people of a different gender identity—for example, when a trans woman is forced to live with men, or a trans man is forced to be roommates with a woman.[183] When trans women refuse a housing assignment on the basis of their exacerbated gender dysphoria living with a man, prison administrators might put them into solitary confinement (also called "segregation") as punishment.[184] Some may be placed into solitary confinement for suicidal ideation or attempts.[185] The World Professional Association for Transgender Health recommends that trans people should not be housed in prolonged solitary confinement because "isolation can cause severe psychological harm and gross disturbances of functioning."[186]

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181. *See, e.g.*, Williams v. Kincaid, 45 F.4th 759, 766–69 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023); Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1348 (N.D. Ga. 2024); *Guthrie*, 2023 WL 8115928, at *1; Griffith v. El Paso County, No. 21-cv-00387, 2023 WL 2242503, at *16–18 (D. Colo. Feb. 27, 2023); Fly v. United States, No. 18-cv-063, 2023 WL 10447544, at *21 (D.N.D. Dec. 15, 2023), *report and recommendation adopted in relevant part*, 2024 WL 1188806 (D.N.D. Jan. 29, 2024); Lewis v. LeMasters, No. 23-CV-015, 2023 WL 2905557, at *1 (E.D. Ky. Mar. 23, 2023); McGinn v. El Paso County, 640 F. Supp. 3d 1070, 1073 (D. Colo. 2022); Doe v. Pa. Dep't of Corr., 585 F. Supp. 3d 797, 801 (W.D. Pa. 2022); Gregory v. Jeffreys, No. 21-1097, 2022 WL 617408, at *6 (C.D. Ill. Mar. 2, 2022); Shorter v. Garland, No. 19cv108, 2021 WL 6062280, at *1–2 (N.D. Fla. Dec. 22, 2021); Sutton v. Washington, No. C19-1500, 2021 WL 9782776, at *18–19 (W.D. Wash. July 21, 2021); Hampton v. Baldwin, No. 18-CV-550, 2019 WL 2118219, at *2 (S.D. Ill. May 15, 2019); Harvard v. Inch, 411 F. Supp. 3d 1220, 1240, 1245–46 (N.D. Fla. 2019); Iglesias v. True, 403 F. Supp. 3d 680, 687 (S.D. Ill. 2019); Doe v. Mass. Dep't of Corr., 2018 WL 2994403, at *1.

182. *See, e.g.*, Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d at 1333–35 (connecting gender dysphoria to anxiety, depression, suicidal thoughts, and self-injurious behavior including self-castration); *Guthrie*, 2023 WL 8115928, at *3 (stating her distress includes "an inability to shower without underwear on, 'repeated thoughts of autocastration,' suicidal ideation," and "panic attacks when she anticipates a strip search"); *Harvard*, 411 F. Supp. 3d at 1240 (finding a plaintiff with gender dysphoria and other disabilities had impairments that substantially interfered with major life activities, including being placed on suicide watch fifty times and cutting or otherwise injuring herself at least forty times).

183. *See Harvard*, 411 F. Supp. 3d at 1240 (holding suicidal ideation and self-injurious behavior substantially limited ability to care for oneself); *Guthrie*, 2023 WL 8115928, at *13 (alleging "interacting with others, sleeping, thinking, communicating and bathing" are impaired by gender dysphoria).

184. *See Gregory*, 2022 WL 617408, at *1 (noting that plaintiff "was advised she could refuse housing and would be taken to segregation").

185. *See Harvard*, 411 F. Supp. 3d at 1245 (describing plaintiff Harvard, who has gender dysphoria and was placed in solitary confinement due to her suicidal ideation, which was linked to her gender dysphoria).

186. Coleman et al., *supra* note 56, at S108.

In light of these disabling effects of gender dysphoria, the following reasonable accommodations for adequate housing are warranted: transferring trans women to a women's facility,[187] adequate housing that guarantees a safe place to sleep,[188] removing trans women from segregation,[189] not punishing trans people for refusing roommate assignments,[190] and providing single-cell housing (allowing trans people to have an entire cell that is part of the general population but without a roommate).[191] Relatedly, trans people may need separate shower time in order to protect their right to access the service of showering.[192] Just as people with mobility impairments may experience discriminatory treatment in attempting to use the shower,[193] so do trans people. Communicating, thinking, walking, and sleeping would be significantly aided by using trans people's chosen names and pronouns.[194] Finally, prisons can accommodate trans people by requiring the gender of the officer conducting searches to match with the gender identity of a trans person being searched, particularly for strip searches, to reduce the impairment on accessing visitation opportunities or any programs that would require a strip search,[195] as well as to ameliorate the impairment on thinking, due to stigmatization and fear of safety, that may occur with cross-gender strip searches.[196]

3. Access to Medical Services

The recognized treatment for someone with gender dysphoria includes medical support that allows the individual to physically transition from their birth-assigned

187. *See, e.g.*, *Gregory*, 2022 WL 617408, at *6.

188. *See* Dinkins v. Corr. Med. Servs., 743 F.3d 633, 634–35 (8th Cir. 2014) ("[D]enial[] of . . . adequate housing by reason of [plaintiff's] disability can form the basis for viable ADA . . . claims."); Pierce v. County of Orange, 526 F.3d 1190, 1224 n.44 (9th Cir. 2008).

189. *See Harvard*, 411 F. Supp. 3d at 1240, 1245–46. The ADA expressly recognizes that isolation or segregation of persons with disabilities is a form of discrimination. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 & n.11 (1999); 42 U.S.C. §§ 12101(a)(2), (5).

190. *See Gregory*, 2022 WL 617408, at *1 (noting that plaintiff "was advised she could refuse housing and would be taken to segregation"); Sutton v. Washington, No. C19-1500, 2021 WL 9782776, at *2 (W.D. Wash. July 21, 2021) (alleging plaintiff "received multiple infractions for refusing cell assignments because of fears for her safety").

191. *See Gregory*, 2022 WL 617408, at *1 (requesting a move to a single cell for protection); *see also* Fly v. United States, No. 18-cv-063, 2023 WL 10447544, at *9 (D.N.D. Dec. 15, 2023), *report and recommendation adopted in relevant part*, 2024 WL 1188806 (D.N.D. Jan. 29, 2024) (noting that when the plaintiff was moved to a single cell, they felt safer); Lewis v. LeMasters, No. 23-CV-015, 2023 WL 2905557, at *1 (E.D. Ky. Mar. 23, 2023) (requesting single-cell accommodations as a reasonable accommodation).

192. *Cf.* Furgess v. Pa. Dep't of Corr., 933 F.3d 285, 290–91 (3d Cir. 2019) (concluding showering is a program, service, or activity protected by the ADA).

193. *See* Durham v. Kelley, 82 F.4th 217, 225–27 (3d Cir. 2023).

194. *See, e.g.*, Griffith v. El Paso County, No. 21-cv-00387, 2023 WL 2242503, at *18 (D. Colo. Feb. 27, 2023) (relying on the intentional use of the wrong pronoun to support finding causation in plaintiff's ADA claim); *see also Fly*, 2023 WL 10447544, at *21 (alleging wrong pronoun usage as part of ADA claim); *Sutton*, 2021 WL 9782776, at *5 (same); Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *4 (D. Mass. June 14, 2018) (same).

195. *See* Guthrie v. Noel, No. 20-CV-02351, 2023 WL 8115928, at *3 (M.D. Pa. Sept. 11, 2023).

196. Doe v. Mass. Dep't of Corr., 2018 WL 2994403, at *4, *11.

sex to the sex associated with their gender identity.[197] Medical support can include hormone therapy,[198] hair removal,[199] and gender-confirmation surgery (also known as gender-affirming surgery).[200] Trans people may pursue many kinds of surgeries, including facial feminization surgery, tracheal shaving, reduction or implantation of breast tissue, an orchiectomy (removal of the testicles), hysterectomy (removal of the uterus), vaginoplasty (construction of a vagina), or phalloplasty (construction of a penis).[201] There are many types of surgical options and thus care providers must take "an individualized approach to care."[202]

There is a clear ADA claim for the discriminatory denial of access to medical services, including prescribed medications.[203] The *Bryant* dilemma, however, is particularly apparent when seeking these remedies.[204] Thus, it is important for potential plaintiffs to articulate that access to these accommodations are often prevented simply because of a disability—i.e., if not for gender dysphoria, the treatment could be accessible. For instance, breast cancer patients receive the same mastectomy that trans men seek, and may also receive a breast reconstruction surgery that is the same as what trans women seek.[205] When a trans man is denied a mastectomy that other incarcerated people receive, the apparent disparity might amount to evidence of intentional discrimination, which would allow a plaintiff to seek compensatory damages.[206] Additionally, denying such surgeries can often lead to self-castration and suicidal ideation.[207] Thus, thinking, breathing, walking, sleeping, and other major life functions can be implicated by gender dysphoric distress related to surgical needs.

It may also be helpful to distinguish the surgical care itself from the *access* to the specialists who may provide that care. For example, a person in a wheelchair who is prevented from going up or down a staircase to access the service or benefits provided on that floor raises a claim regarding *access* rather than a claim regarding the service itself.[208] Similarly, if a person seeking gender-affirming care

197. Coleman et al., *supra* note 56, at S18, S81–87.

198. *Id.* at S55.

199. *Id.* at S18.

200. *Id.* at S86–87.

201. *Id.* at S18, S125, S130.

202. *Id.* at S130.

203. *See, e.g.*, Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 277–80, 287 (1st Cir. 2006) (holding the outright denial of medical care, including prescribed medications, could be an ADA claim).

204. *See, e.g.*, Fly v. United States, No. 18-cv-063, 2023 WL 10447544, at *21 (D.N.D. Dec. 15, 2023), *report and recommendation adopted in relevant part*, 2024 WL 1188806 (D.N.D. Jan. 29, 2024) ("[T]o the extent that the ADA claims arise in the context of a denial of medical treatment, courts have concluded that 'negligent medical treatment for a prisoner's disability is not actionable under the ADA.'" (quoting Johnson v. Douglas Cnty. Dep't of Corr., No. 17CV458, 2018 WL 1383180, at *4 (D. Neb. Mar. 19, 2018))).

205. Complaint, Fuller v. Ga. Dep't of Corr., No. 1:25-cv-246 (N.D. Ga. Jan. 17, 2025).

206. Silberman v. Mia. Dade Transit, 927 F.3d 1123, 1134 (11th Cir. 2019) (noting that to obtain compensatory damages a plaintiff must show "intentional discrimination").

207. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019) (per curiam).

208. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 513–14, 531–34 (2004); Parker v. Universidad de Puerto Rico, 225 F.3d 1, 5–7 (1st Cir. 2000).

is never even allowed to be evaluated by a specialist who provides that care, there is an outright denial of medical services that is more than enough to establish an ADA claim. Mental health departments in prisons need to have psychiatrists on staff or on contract to prescribe psychotropic medication. So too, they need to have trained endocrinologists to prescribe and titrate hormone therapy, or dermatologists to conduct laser hair removal. Access to these specialized medical services is a necessary component of the ADA's protection to allow full treatment of people with gender dysphoria.[209]

Finally, gender-affirming items purchased in the commissary or by special order are perhaps the clearest form of a reasonable accommodation, rather than a medical treatment, though these items can be rightly pursued under the Eighth Amendment as well.[210] Wigs can be a reasonable accommodation for a trans woman who experiences gender dysphoria around her pattern male baldness. Communicating, thinking, and sleeping can be affected by the constant reminder of gender dysphoria through one's appearance. Similarly, trans men who want to use binders to flatten their chests are making an effort to accommodate the ways gender dysphoria might impair major life functions such as communicating, thinking, sleeping, walking, and showering. Because hormone therapy redistributes fat around the body to achieve a more feminine body shape, at least one court has awarded buttock and breast padding to a trans woman as an interim measure, until her hormone therapy achieved the desired—prescribed—effects;[211] though this decision was made under the Eighth Amendment,[212] the argument follows, in theory, under the ADA as well.

The above accounting of hypothetical and real examples of accommodations for people with gender dysphoria can hopefully provide guidance to courts and litigants alike. But seeing the options under this legal theory still may not satisfy some critics. In the next Part, I offer a normative defense against those within the transgender rights movement who have critiqued the use of ADA claims for gender dysphoria.

III. IN DEFENSE OF ADA CLAIMS

This Part will provide a brief, three-part normative defense of ADA claims for gender dysphoria, building on the exchange I have had with litigator and scholar A.D. Lewis.[213] Each Section in this Part compares the normative implications of

209. *Cf.* Wagner *ex rel.* Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1010–20 (3d Cir. 1995) (upholding a Rehabilitation Act claim brought against an Alzheimer's facility that maintained it was not able to treat a potential patient's Alzheimer's conditions).

210. *See, e.g.*, Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1263 (11th Cir. 2020) (noting plaintiff sought "female undergarments and makeup, and to grow out her hair in a long, feminine style" to aid in "'social transitioning'—that is, the ability to live consistently with one's gender identity, including by dressing and grooming accordingly").

211. Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1340–42 (N.D. Ga. 2024).

212. *See id.*

213. *See supra* note 53.

ADA claims for gender dysphoria with those of Eighth Amendment claims. Rather than simply defending the legitimacy of ADA claims, this Article suggests that Eighth Amendment claims are in fact the culprit of the issues Lewis and others have raised with ADA claims. Each of the arguments in this Part relies on the fact that "gender dysphoria" is a diagnosis in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5).[214] If the diagnosis changes in the future, as it very well may, these arguments may or may not remain accurate.

A. Spectrum of Accommodations

ADA claims can require public entities and employers to accommodate gender dysphoria through a spectrum of social, hormonal, surgical, and other interventions. The ADA already proceeds with a spectrum of accommodations. If a client does not want gender-affirming surgery, for example, other reasonable accommodations, like a wig, should be able to be provided without medical intervention. This is how it works, for example, in the mobility impairment context.[215] Whether a person needs a cane, crutches, wheelchair, or motorized wheelchair all depends on the person's specific needs. There should be no need to go through the rigmarole of seeking out a medical expert and bringing expensive litigation simply to get a trans woman or nonbinary person a reasonable modification to a policy to allow them to have long hair or makeup,[216] or to get a trans man or nonbinary person binders.[217]

Such items are examples of "social transition"—the process of trans people finding ways to express their gender identity that are "authentic and socially perceptible."[218] Social transition in institutional settings includes access to hygiene products and clothing that align with one's gender identity, as well as the use of the individual's proper and chosen name by others.[219]

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214. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 511 (5th ed., text rev. 2022).

215. *See,* McDaniel v. Syed, 115 F.4th 805, 825–27 (7th Cir. 2024) (collecting cases where courts found requested mobility devices to be reasonable accommodations for impaired mobility).

216. *See, e.g.*, Bayse v. Philbin, No. CV-122-024, 2024 WL 695414, at *12 (S.D. Ga. Feb. 20, 2024), *report and recommendation adopted by* 2024 WL 1291525 (S.D. Ga. Mar. 26, 2024) (discussing the plaintiff's clearly expressed need for social transitioning accommodations to the prison's hair length policy). *Bayse* was brought under the Eighth Amendment. *Id.* at *12. But it could have been brought under the ADA for the reasons discussed in this Article. Under the ADA, the district court would not have needed to contend with *Keohane v. Florida Department of Corrections Secretary*, 952 F.3d 1257 (11th Cir. 2020), a binding Eighth Amendment case that held that social transitioning items were not proven to be medically necessary for a specific transgender plaintiff, *id.* at 1274.

217. *See* Maia Kobabe & Sarah Peitzmeier, *Transphobia Makes Chest Binding More Dangerous*, TIME (May 8, 2024, 7:00 AM), https://time.com/6975583/transphobia-chest-binding-dangerous-essay/ (discussing chest binding, the process of "flatten[ing] the chest in order to appear masculine or androgynous" allowing transmasculine people to "affirm their gender identity and harmonize their physical presentation with their sense of self").

218. Coleman et al., *supra* note 56, at S107.

219. *Id.*

For example, my client Jane Doe sought reasonable accommodations when she was told physical transition through hormone therapy was no longer permitted.[220] She testified at her preliminary injunction hearing about how, when she "is on too low a dose of HRT, her body hair grows back and she loses feminine bodily proportions."[221] Accordingly, she requested makeup, breast padding, buttocks padding, and a wig in order to look as feminine as she did before, when she was receiving adequate hormone therapy.[222] All of these items were within the purview of her facility to provide to her without the need to turn to a medical specialist. If the prison officials in charge of her facility were so inclined, they could have provided her these items as a response to her grievances, even before the district court ordered padding and hair removal cream.[223]

The ADA grievance process exists precisely to accommodate these types of needs that do not require medical services. If she filed medical grievances for these items (which she did), the accommodations could have been denied as not determined medically necessary by a medical provider, assuming no doctor or nurse prescribed the items for her. I note, however, that a nurse practitioner later prescribed her a wig, and that has also not been provided because of the same security risk rationale the defendants raised in the preliminary injunction hearing.[224] But if she also filed ADA grievances (which she did), the ADA coordinator would determine whether any of these items could be ordered as reasonable accommodations.[225] Georgia's policies state that "[r]easonable [a]ccommodations shall include, but not be limited to, medical care, mental health care, . . . and provision of programs, services, and activities."[226] The reasonable accommodations that can be granted under the ADA, as recognized by Georgia policy, therefore undoubtedly include the social transitioning items requested.

It is also possible for hormone therapy or surgery to be sought under the ADA. In such cases, however, a conservative application of the ADA might make it necessary to already have a prescription from a medical provider.[227] If, for example, an incarcerated person had received a prescription for hormone therapy and a specific gender-affirming surgery before they were incarcerated, but a facility barred them from accessing it, they would have an ADA claim to challenge the prohibition on accessing their prescribed care. So, too, if they received a referral for a surgical consultation from a provider in their facility, but the prison administrators

220. Doe v. Ga. Dep't of Corr., 730 F. Supp. 3d 1327, 1333 (N.D. Ga. 2024) (noting that when her hormone therapy was discontinued, her body changed and her feminization was "inverted").

221. *Id.* at 1340 (citation omitted).

222. *Id.*

223. *Id.* at 1342.

224. *See id.* at 1341.

225. *See* Ga. Dep't of Corr., Standard Operating Procedures 103.63.

226. *Id.* at 103.63(IV)(D)(1)(b).

227. *See, e.g.*, Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 277–80, 287 (1st Cir. 2006) (holding the outright denial of medical care, including prescribed medications, could be an ADA claim).

delayed or denied the consultation for non-medical reasons. Such claims pose the next frontier for ADA litigation in the prison context.

B. Ableism

In a blog post, Talila A. Lewis defined ableism as:

> A system of assigning value to people's bodies and minds based on societally constructed ideas of normalcy, productivity, desirability, intelligence, excellence, and fitness. These constructed ideas are deeply rooted in eugenics, anti-Blackness, misogyny, colonialism, imperialism, and capitalism. This systemic oppression that leads to people and society determining people's value based on their culture, age, language, appearance, religion, birth or living place, "health/wellness", and/or their ability to satisfactorily re/produce, "excel" and "behave." You do not have to be disabled to experience ableism.[228]

This capacious definition provides a lot of room for discussion. Professor Jamelia Morgan has argued that Eighth Amendment jurisprudence reinforces ableism, particularly for mental health and psychiatric disabilities.[229] She provides a narrower definition of ableism: "a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society."[230] Morgan argues that the courts have led litigants to "shift[] the focus of the constitutional inquiry to diagnosed disabilities rather than the evidence of symptoms caused by isolation," specifically when courts require "that plaintiffs manifest a diagnosis of 'mental illness.'"[231] She notes various ableist implications of requiring plaintiffs to show a physical manifestation of disability.[232] Morgan then argues that lawyers are trained or forced to argue within the ableist jurisprudence through zealous advocacy in the terms of the Eighth Amendment, working to prove their clients should receive constitutional protection by showing that they are "physically, mentally, and emotionally damaged" because "prisons inherently were not built to meet the needs of people with physical or mental disabilities."[233]

Morgan helpfully and clearly articulates some of the risks in normalizing ableism through Eighth Amendment litigation.[234] Morgan calls on litigators to inform courts of the ways prison is disabling, while also describing their clients' disabilities.[235] In raising this argument, particularly in the gender dysphoria context,

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228. Talila A. Lewis, *Working Definition of Ableism—January 2022 Update*, TALILA A. LEWIS: TL'S BLOG (Jan. 1, 2022), https://www.talilalewis.com/blog/working-definition-of-ableism-january-2022-update.

229. Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 982–85 (2019).

230. *Id.* at 980.

231. *Id.* at 983.

232. *See id.* at 983–84.

233. *Id.* at 986.

234. *See id.* at 987.

235. *See id.* at 989.

lawyers do not treat "disability as metaphor," as Professor Doron Dorfman argued.[236] Dorfman argued that in the case of gender dysphoria and specific other contexts, "disability means something unrelated to impairment; rather, it takes on meaning related to disadvantage, inability, or impediment"—what he categorized as "metaphoric uses."[237] He argued that "using disability as a linguistic metaphor should no longer be invoked in legislation and case law today."[238] The more consequential and troubling argument, however, is the categorization itself. Without espousing a clear organizing principle, Dorfman served as a gatekeeper in fielding who "the disability community" includes, and who simply uses "disability as metaphor."[239] Mincing no words, Dorfman asks those who he has deemed not disabled to stop "trying to fit other identities under the umbrella of disability" and "push toward expanding accommodation mandates to other areas of law."[240]

Rather than seeking to use metaphor, lawyers accept the truth as told by our clients that their gender dysphoria, like their experience in hostile prison environments, *is* disabling. There is no need for a protectionist stance towards ADA litigation. In the case of transgender people with serious impairments to major life functions that are derived from their gender dysphoria and the prison system that exacerbates that dysphoria, disability is not a "narrative device,"[241] but a reality.

Disability activists have helped to keep our focus on structural and societal change. Disability claims can similarly attempt to move away from an individual's impairments and shift the focus on the public entity (or private entity) to organize life in a way that removes barriers and creates a more inclusive world. If the law can catch up with the real target of disability justice (which ties challenges to ableism with efforts to combat misogyny, transphobia, and racism), then the entire system would need to change. Advocates, litigators, and scholars should embrace this opportunity, not shy away from it.[242]

C. Medicalization

As part of his argument against disability as metaphor, Dorfman critiques the use of the ADA by transgender litigants with gender dysphoria.[243] Specifically, he asserts that "normatively speaking, the connection between impairment and disability status, which requires formal medical diagnosis of gender dysphoria, can lead to problematic results."[244] This is a common response to the proposed ADA

236. *See* Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1761 (2022).
237. *Id.* at 1770.
238. *Id.*
239. *Id.* at 1788.
240. *See id.* at 1811.
241. *Id.* at 1765.
242. For a discussion of the intersectional possibilities of bringing prison litigation in carceral contexts, see LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 254–61 (2020).
243. *See* Dorfman, *supra* note 236, at 1798–1800.
244. *Id.* at 1799.

claim, including by trans scholars.[245] I have responded to this critique elsewhere,[246] and now expand upon the ideas I have stated there.

Dorfman discusses the Fourth Circuit's decision in *Williams v. Kincaid*,[247] which is the first and only federal circuit court decision to reach the question whether gender dysphoria is a disability protected by the ADA, or is excluded by the ADA's written exclusion for transvestism, transsexuality, and other gender identity disorders.[248] Through conducting textualist statutory interpretation, the Fourth Circuit determined that gender dysphoria does not fit the term "gender identity disorders" as written in the ADA in 1990.[249] The key distinction, according to the Fourth Circuit, is that "a diagnosis of gender dysphoria, unlike that of gender identity disorder, concerns itself primarily with *distress* and other disabling symptoms, rather than simply being transgender."[250]

A central flaw in Dorfman's argument against *Williams* is his statement that "disability status ... requires formal medical diagnosis of gender dysphoria."[251] While that may be true under the Eighth Amendment, it is not true for the ADA. Like any other disability, as Dorfman argues strongly at the outset before turning to this example, "impairment" is a necessary component to disability.[252] But as to gender dysphoria, Dorfman raises the specter of those "uninsured transgender people" or those who are unable to be diagnosed as falling outside of protections.[253] This is simply incorrect, at least for ADA claims.

Plaintiffs do not need to have a diagnosis of a disability in order to have a viable ADA claim.[254] What is relevant to determining whether a plaintiff is a qualifying individual with a disability is not what formal diagnosis the plaintiff has received, but the limitations they experience.[255] The Supreme Court has held that "the ADA

245. *See* Lewis, *supra* note 53.

246. *See* Dangaran, *supra* note 53, at 264–66 (discussing this critique as raised by trans scholars and arguing that there is a pragmatic benefit to using the ADA for gender dysphoria such that lawyers would protect both the rights and the autonomy of their clients by pursuing the claim when clients would like to).

247. Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023).

248. *See id.* at 766.

249. *See id.* at 766–69.

250. *Id.* at 768 (cleaned up) (emphasis in original).

251. Dorfman, *supra* note 236, at 1799.

252. *See id.* at 1799–1800. Dorfman speaks of the troubling connection between impairment and disability status with caution in the gender dysphoria context but with defensive rigidity in general. *See id.* at 1759 (arguing those "groups that do not live with impairments, including transgender" people, now invoke disability rights law (footnote omitted)); *id.* at 1770 (critiquing the metaphorical use of disability as "something unrelated to impairment"). Dorfman simply seems unable to accept that gender dysphoria can be an impairment.

253. *See id.* at 1799 n.198.

254. *In re* Chavis, 306 A.3d 653, 672 (Md. 2023) ("Simply put, 'a diagnosis is not necessary for an ADA claim to succeed." (quoting Hrdlicka v. Gen. Motors, L.L.C., 63 F.4th 555, 568 (6th Cir. 2023))).

255. *See* Shaikh v. Tex. A&M Univ. Coll. of Med., 739 F. App'x 215, 223 n.8 (5th Cir. 2018) ("Section 504 and the ADA define 'disability' in terms of the limitations that an impairment imposes on an individual, not the individual's particular diagnosis."); Amyette v. Providence Health Sys., 388 F. App'x 606, 607 (9th Cir. 2010) ("Under the ADA, however, 'disability' is a carefully defined term of art, which is measured by reference to limitations on major life activities, not by reference to doctors' past assessments of the plaintiff's condition.").

requires those claiming the Act's protection to prove a disability by offering evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial."[256] Plaintiffs can self-report their impairment,[257] or the disability can be perceived by other people.[258] The ADA therefore actualizes disabled people's lived experience without depending on an external medical authority—as the Eighth Amendment requires. I think people misunderstand this because of all of the discussion regarding the "gender identity disorders" exclusion from previous iterations of the DSM.[259] But, again, an actual diagnosis is not necessary when pleading the ADA claim.[260] This differentiates ADA claims from Eighth Amendment claims.[261] ADA claims are therefore easier, cheaper, and more accessible across a spectrum of needs.

Moreover, the ADA complaint process is an alternate method that does not require waiting for a specialist consultation whatsoever.[262] ADA claims can be brought on behalf of trans people who have not been able to receive a gender dysphoria diagnosis. That person would allege that a major life activity (sleeping, for example) has been seriously impaired because of gender dysphoric thoughts—even if they have not taken any steps whatsoever towards changing their gender expression to align with their gender identity, and have not otherwise felt any symptoms related to gender dysphoria. This is not a case that would necessarily make it to court; indeed, such a plaintiff may not even seek out a lawyer who is knowledgeable about gender dysphoria. But if the ADA claim is to have its full force in this context, such a claim would be viable.

The trans legal movement will need to overcome the hurdle of unlearning the medicalized form of this claim. That may need to start with accepting that gender dysphoria is not ever going away. Trans people need to compartmentalize our trans

256. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002) (cleaned up) (citation omitted), *superseded on other grounds by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(5), 122 Stat. 3553; *see also Toyota Motor Mfg*., 534 U.S. at 198 ("It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment.").

257. *See, e.g*., Alejandro v. Palm Beach State Coll., 843 F. Supp. 2d 1263, 1267–68, 1270 (S.D. Fla. 2012) (describing a psychiatrist's letter, based on a plaintiff's self-report, that plaintiff's PTSD resurfaced and she needed a service dog).

258. *See* 42 U.S.C. § 12102(1)(A)–(C) (defining "disability" to mean a "physical or mental impairment," a "record of such an impairment," or "being regarded as having such an impairment"); *see* Sutton v. United Air Lines, Inc., 527 U.S. 471, 478 (1999).

259. *See generally* Dangaran, *supra* note 53, at 254–58.

260. *In re* Chavis, 306 A.3d 653, 672 (Md. 2023) ("Simply put, 'a diagnosis is not necessary for an ADA claim to succeed." (quoting Hrdlicka v. Gen. Motors, L.L.C., 63 F.4th 555, 568 (6th Cir. 2023))).

261. *See, e.g*., Morris v. Fletcher, 311 F. Supp. 3d 824, 830–33 (W.D. Va. 2018) (discussing plaintiff's self-diagnosis of gender identity disorder as inadequate for establishing serious medical need for an Eighth Amendment claim); Jones v. Doe, No. GLR-15-3065, 2016 WL3027529, at *6 (D. Md. May 26, 2016) ("Defendants cannot be said to be deliberately indifferent to Jones's medical need to receive treatment for gender dysphoria because Jones has not been diagnosed with gender dysphoria."); Long v. Nix, 877 F. Supp. 1358, 1365–66 (D. Iowa 1995) (finding no serious medical need where plaintiff was not diagnosed with transsexualism).

262. *In re Chavis*, 306 A.3d at 672.

identities from the potentially disabling condition of gender dysphoria. Because of accommodations, we do not always experience the disabling effects of gender dysphoria. This does not mean we are pathologizing being trans altogether. On the contrary, once we are able to bifurcate accommodating the impairment that gender dysphoria creates in our lives, being trans may get easier. This will feel different for everyone. Someone might say, "I always have a little bit of dysphoria. Just not so much that it's disabling me throughout my day." Another person may truly feel like they never have experienced dysphoria, but they have known for a long time that they are trans. But for all of us, there is an amount of gender dysphoria that becomes disabling so as to impair or limit a major life activity.[263] And we seek out reasonable accommodations in order to hope we stay below that level.

Even if we never fully get rid of gender dysphoria, we can live and function fully in society. A helpful thought to understand this, at least for me, is the fact that after having gender confirmation surgery—genital reconstruction, specifically—a trans person will never stop using hormone therapy because it is providing that person's body with the hormones they need; they would be hormonally deficient otherwise. Similarly, a trans woman who has already experienced balding may need to wear a wig forever in order to alleviate her gender dysphoria. The ADA contemplates such accommodations, not as cures or treatment, but reasonable measures to help to mitigate impairments to major life activities. The Eighth Amendment, on the other hand, seeks to provide treatment in medically necessary circumstances that one imagines would not need to be sustained for life. The injury or illness can be treated. The accommodations to reach that state are going to vacillate wildly based on the individual person, as they do for any disability. When viewed this way, the medical treatment theory under the Eighth Amendment claim looks more like a metaphor than the ADA claim, which much more accurately describes what trans life navigating the ups and downs of dysphoria might feel like.[264]

The Eighth Amendment's reliance on the medical framework is the proper target for the criticisms raised by others. I nevertheless emphasize that even these claims should not be removed from our arsenal. Medical deliberate indifference claims are an important arrow in the constitutional litigator's quiver. And those incarcerated people who rely on this claim as a path for relief should receive the pragmatic support that lawyers should provide. So, to be clear, litigants should proceed with these claims where they are pragmatic.[265] My intervention here is

263. For some people, this looks like committing self-injurious behavior, such as self-castration or suicide. For others, it may manifest as discomfort speaking with others and revealing the sound of your voice, or walking outside the home and being perceived as a gender that does not align with your gender identity.

264. The ADAAA allows claims for intermittent or "episodic" disabilities. 42 U.S.C. § 12102(4)(D).

265. For a description of different strategies in the trans rights movement, including a more pragmatic or "ambivalent-utilitarian" approach, see J.S. Welsh, *Assimilation, Expansion, and Ambivalence: Strategic Fault Lines in the Pro-Trans Legal Movement*, 110 CALIF. L. REV. 1447, 1459–68 (2022). In my previous work, I have called gender-affirming care claims a "non-carceral intervention" that can function as harm reduction. *See* Dangaran, *supra* note 59, at 205–06.

intended only to show why lawyers should also educate their clients about the ways the ADA claim might actually serve them even better than the well-worn Eighth Amendment claim. I have come to understand living with gender dysphoria as navigating the crests of distressing waves, hoping I can stay above water but sometimes crashing and struggling my way back to shore. Reasonable accommodations are lifeboats, safe harbors, life vests. (*That* is a metaphor, not gender dysphoria as a disability).[266]

CONCLUSION

Bryant should not bar discrimination claims for gender dysphoria, or for any disability when the accommodation sought is the nondiscriminatory provision of medical services. *Bryant* offers a false choice between medical care and accommodations that fails to understand how disabilities work. Recognizing the error and navigating around *Bryant*—if it is never to be definitively overturned, which would, of course, be the ideal scenario—unlocks new avenues for trans people in prison to gain access to significant measures that would help to alleviate their gender dysphoria—particularly if Eighth Amendment claims fail.

As disability justice movement worker Leah Lakshmi Piepzna-Samarasinha said: "[O]ur power is the strongest when we employ a diversity of tactics on our own terms."[267] With more access to reasonable accommodations, trans people in prison can alleviate some of the pressures of the cisnormative gender binary that they usually must succumb to. ADA claims offer people experiencing gender dysphoria in prison, and also in the free world, a path towards accessing important remedies and understanding themselves as part of a larger community of people who are finding ways to mitigate the physical and mental impairments in their lives. Especially in the current climate of hostility towards trans people, ADA claims can help get the trans community necessary protections. Advocates should use the ADA to find ways to support the trans community for years to come, looking to a future that situates trans people in community with disabled people, struggling together on our own terms.

266. *Cf.* Dorfman, *supra* note 236, at 1799.

267. PIEPZNA-SAMARASINHA, *supra* note 9, at 161.