

## The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part IV

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### I. THE TRANS SHOWER, ANOTHER TAKE— FROM CRIMINALITY TO MADNESS AND MONSTROSITY<sup>1</sup>

Having come this far with Bursch's argument, it is possible to follow the anti-trans cultural fantasies that the shower and locker room scene trades in as they take a darker turn within the larger case that Bursch and his team offered to the Supreme Court on Harris Funeral Homes's behalf.

After exhausting its case for a trans-exclusive reading of Title VII's sex discrimination ban based on "sex's" original public meaning, and after responding to the claim that Title VII's ban on sex stereotyping covers anti-trans discrimination, the merits brief for Harris Funeral Homes openly confronts the prospect that the Supreme Court's decision will not be based on conservative jurisprudential grounds but on judicial policy preference.<sup>2</sup> Not to miss out on this possible action, the brief tees up a series of first-order policy claims unleashed in rapid-fire succession, all pinned under a section heading

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<sup>1</sup> Earlier parts of this work appear as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87 (2020); and Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III*, 81 OHIO ST. L.J. ONLINE 101 (2020).

<sup>2</sup> Brief for the Petitioner at 17–42, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019).

announcing that “[r]edefining sex discrimination will cause problems and create harms.”<sup>3</sup>

Naturally, showers and locker rooms make an appearance in this section of the merits brief, which eventually takes paternalism to some thin-air heights.<sup>4</sup> One of the brief’s most astounding contentions is that a pro-trans decision in the case may prove *harmful*, but not, as might be expected at this point, to cis-women.<sup>5</sup> Nor is it that a pro-trans ruling in the case would harm employers, though the brief does indicate that they would be improperly saddled with additional constraints on their choices were the Supreme Court to rule for Aimee Stephens.<sup>6</sup> Instead, the brief stakes out the position that a pro-trans, trans-discrimination-is-sex-discrimination ruling in the case will inflict “potential harm” on trans people themselves, described in clinical-sounding terms as suffering “gender-identity issues.”<sup>7</sup>

The merits brief’s text plays this particular anti-trans chord softly. Subtly, mutedly, the brief evinces what, read in context, might generously be defended as pastoral care, concern, and even love toward trans people whose rights, as conventionally understood, it is actively turning the screw against.<sup>8</sup> According

<sup>3</sup> *Id.* at 45.

<sup>4</sup> *See id.* (the section captioned “[r]edefining sex discrimination will cause problems and create harms,” in which this argument appears, includes mention of “showers, restrooms, and locker rooms”); *id.* at 46 (citing to New Mexico’s “nondiscrimination law” and parenthetically noting an exception in it for “sex-specific ‘sleeping quarters,’ ‘showers,’ and ‘restrooms’”). This is not to forget how the brief elsewhere does make just this point about how a pro-trans decision would be harmful to cis-women. *Id.* at 4 (discussing allowing men in domestic abuse shelters with “female survivors of rape and violence”).

<sup>5</sup> This argument does come up in this section of the brief, as anticipated in *id.* at 4 (noting harms to “women and girls” who “compete in sports,” and to “female survivors of rape and violence”); *see id.* at 47–48, 50–53. The brief also notes the “substantial infringements of free speech and religious freedom in the workplace,” *id.* at 48–50, and that “[r]edefining sex discrimination by judicial fiat will . . . directly undermine the separation of powers,” *id.* at 53.

<sup>6</sup> These arguments are summarized in *id.* at 4, and repeated in greater detail in *id.* at 45–46, 49–50 (discussing harms to employers).

<sup>7</sup> Brief for the Petitioner at 4, 54, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019). Additionally, the brief says, specifically: “As to the specific gender-identity issues at stake here, it is not at all clear that judicially amending Title VII as the Sixth Circuit did will have the ameliorative effects that some assume.” *Id.* at 54.

<sup>8</sup> *See, e.g., id.*; *see also* John Bursch, *Difficult Issues Involving Human Sexuality Require Dialogue, Not Scorn, Misinformation*, HILL (Oct. 15, 2019), <https://thehill.com/blogs/congress-blog/civil-rights/465844-difficult-issues-involving-human-sexuality-require-dialogue> [<https://perma.cc/2FLA-LQYA>] (“There’s no question that people experiencing gender dysphoria deserve compassion and respect. There are, however, many unresolved questions and ongoing conversations about the best ways to respect *all* Americans’ dignity and privacy. Such dialogue, and not misinformation, is what Americans need.”). For a view along similar lines that ultimately reach love, *see* RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT* xvi (2018) (“I repeatedly acknowledge that gender dysphoria is a serious condition, that people who

to the brief, the conventional pro-trans arguments have been out of touch with reality, hence wrong, and *anti-trans*, all along, including in this instance. This is because:

As to the specific gender-identity issues at stake here, it is not at all clear that judicially amending Title VII as the Sixth Circuit did [in pro-trans directions] will have the ameliorative effects that some assume. The science regarding gender identity is far from settled, and there are deep disagreements over whether otherwise healthy bodies should be physically modified to align with the mind. The opposite approach—aligning one’s mind with the body—has traditionally been the preferred method for treating other dysphorias, such as anorexia and xenomelia (believing that one or more limbs do not belong).<sup>9</sup>

Bracketing the arch invocation of xenomelia, with its intimation that being trans, specifically a trans woman, is akin to wanting to cut off “one or more limbs,” the brief’s otherwise ostensibly measured chords proceed to sound an “additional reason for caution.”<sup>10</sup>

The brief observes that “one of the most comprehensive scientific studies tracking individuals who underwent sex-reassignment surgery revealed that postoperative outcomes were surprisingly negative.”<sup>11</sup> The self-description in this 2011 study raises a flag about its perspective, including its utility as comparative social science that crosses national, cultural, and temporal boundaries. This study is a “population-based matched cohort study,” its “[s]etting”: “Sweden, 1973–2003.”<sup>12</sup> For itself, the study indicates that its

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experience a gender identity conflict should be treated with respect and compassion, and that we need to find more humane and effective ways to help people who find themselves in that situation.”); *id.* at 173 (“We should be tolerant—indeed, loving—toward those who struggle with their gender identity, but also be aware of the harm done to the common good, particularly to children, when transgender identity is normalized.”).

<sup>9</sup> Brief for the Petitioner at 54, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019) (citations omitted). For earlier commentary that, in part, engages this language from the brief, see Chase Strangio, *These Hate Groups Want the Supreme Court to Erase Trans People*, OUT (Aug. 28, 2019), <https://www.out.com/commentary/2019/8/28/these-hate-groups-want-supreme-court-erase-trans-people> [<https://perma.cc/AMA9-99V9>].

<sup>10</sup> Brief for the Petitioner at 54, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019).

<sup>11</sup> *Id.* (citing Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLOS ONE 1 (2011), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0016885&type=printable> [<https://perma.cc/38HU-X4ZQ>]).

<sup>12</sup> Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLOS ONE 1, 1 (2011), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0016885&type=printable> [<https://perma.cc/38HU-X4ZQ>]. Why this study is probative in the present context in the United States is not discussed. For related thoughts, see Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985) (mapping

objective is “[t]o estimate mortality, morbidity, and criminal rate after surgical sex reassignment of transsexual persons.”<sup>13</sup> Measuring death and disease rates is one thing, but what explains this interest in “criminal rate after surgical sex reassignment of transsexual persons”?<sup>14</sup> This may be objective social science, but the study—apparently to the chagrin of one of its co-authors—has shown itself highly amenable to being inducted into the service of anti-trans projects that advance presumptions of trans-female criminality, as discovered in the shower and locker room scenario Bursch has put forward.<sup>15</sup> The study documents that some trans people have “considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population,” though it warns that its results should not be taken to mean that “sex reassignment *per se* increases morbidity and mortality.”<sup>16</sup> Still, that is an implication that emerges from the merits brief, which ventures that sex reassignment surgery associated with gender identity disorder involves “surprisingly negative” “outcomes,” not that social forces like sexism, including paternalism, operating in anti-trans ways do.<sup>17</sup> No matter that these social forces unquestionably help marginalize and oppress trans people and make trans life be as socially and existentially precarious as it is.

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relevant thoughts on comparative law method and cross-culture practice). For further thoughts, see Richard Bränström & John E. Pachankis, *Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries: A Total Population Study*, 177 AM. J. PSYCHIATRY 727, 727 (2020) (concluding “[i]n this first total population study of transgender individuals with a gender incongruence diagnosis, the longitudinal association between gender-affirming surgery and reduced likelihood of mental health treatment lends support to the decision to provide gender-affirming surgeries to transgender individuals who seek them”).

<sup>13</sup> See Dhejne et al., *supra* note 12, at 1.

<sup>14</sup> *Id.*; see also Elijah Adiv Edelman, *Beyond Resilience: Trans Coalitional Activism as Radical Self-Care*, 38 SOC. TEXT 109, 117 (2020) (noting trans suicide attempt rates).

<sup>15</sup> Detail: According to the study, “[f]emale-to-males, but not male-to-females, had a higher risk for criminal convictions than their respective birth sex controls.” Dhejne, *supra* note 12, at 1. Bursch’s discussions of the shower and locker room scene don’t dwell on this to say the least. See, e.g., Transcript of Oral Argument at 29–30, 37–38, 45, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_4gcj.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf) [<https://perma.cc/8X32-Y5GT>] [hereinafter Harris Funeral Homes Transcript]. Robin Fretwell Wilson documents the critical uptake of this study as seen from the point of view of one of its co-authors, see Robin Fretwell Wilson, *Being Transgender in the Era of Trump: Compassion Should Pick Up Where Science Leaves Off*, 8 U.C. IRVINE L. REV. 583, 603–04 (2018). For an interview with Cecilia Dhejne, the lead co-author of the study, see Cristan Williams, *Fact Check: Study Shows Transition Makes Trans People Suicidal*, TRANSADVOCATE (Nov. 2, 2015), [https://www.transadvocate.com/fact-check-study-shows-transition-makes-trans-people-suicidal\\_n\\_15483.htm](https://www.transadvocate.com/fact-check-study-shows-transition-makes-trans-people-suicidal_n_15483.htm) [<https://perma.cc/M7D2-XVZN>].

<sup>16</sup> Dhejne et al., *supra* note 12, at 1, 7.

<sup>17</sup> Brief for the Petitioner at 54, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019) (“Raising additional reason for caution, one of the most comprehensive scientific studies tracking individuals who underwent sex-reassignment surgery revealed that postoperative outcomes were surprisingly negative.”).

Past these details, the brief's observations can be collected and rendered in plain English. Those suffering from gender dysphoria, a group which the brief notes includes children, should not be encouraged to abandon their "otherwise healthy bodies" while seeking to "physically modif[y] [them] to align [them] with the mind."<sup>18</sup> People suffering from gender dysphoria should instead be encouraged to get the traditionally preferred method for treating other "dysphorias": treatment that will help them "align . . . mind with the body."<sup>19</sup>

This solution is, of course, a reference to psychiatric care, a vision that transports the brief back to a time and place in which psychiatric cure—getting people to abandon their thoughts of not belonging to the sex they were assigned at birth—was the preferred method for "dealing with" these ways of non-cis life.<sup>20</sup> The brief itself does not formally raise the specter of the asylum, but the study that it cites does: "Sex-reassigned persons also had an increased risk for . . . psychiatric inpatient care."<sup>21</sup> Continuous with logics the brief hews, this prospect may, in some cases, be part of the preferred method for the legal management of trans people, far superior, anyway, to treating "a man who identifies as a woman" as the woman they are not, and giving them sex discrimination protections under law not originally meant for them.<sup>22</sup> That, after all—giving trans people anti-discrimination protections under Title VII's sex discrimination law—is what the brief indicates may be harmful, presumably because it would legitimate and normalize trans life and thereby drive trans people toward the health risks associated with their "dysphoria[]." <sup>23</sup> In this respect, trans people, specifically certain trans women, are not only represented as cis-women's natural enemies. They are also represented as enemies to themselves.<sup>24</sup> In this anti-trans respect at least, cis-women and trans women can

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<sup>18</sup> *Id.* at 54–56. Note that this does locate the brief broadly in the "conversion therapy" debates. What this may mean for the brief's sympathies for conversion therapy not in the setting of trans equality rights remains out of view. Thanks to James Pfeiffer for the initial notation.

<sup>19</sup> *Id.* at 54.

<sup>20</sup> See Transcript of Oral Argument at 6, *Bostock v. Clayton Cty.*; and *Altitude Express, Inc. v. Zarda*, Nos. 17-1618, 17-1623 (Oct. 8, 2019), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/17-1618\\_b97c.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf) [<https://perma.cc/9TZZ-FHMR>] [hereinafter *Bostock Transcript*] ("JUSTICE GINSBURG: . . . Ms. Karlan, how do you answer the argument that back in 1964, this could not have been in Congress's mind because in -- in many states male same-sex relations was a criminal offense; the American Psychiatric Association labeled homosexuality a -- a mental illness?"). See also generally RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* (Robert Hurley trans., Pantheon Books 1978) (1976).

<sup>21</sup> Dhejne, *supra* note 12, at 1.

<sup>22</sup> Harris Funeral Homes Transcript, *supra* note 15, at 29, 44.

<sup>23</sup> See Brief for the Petitioner at 4, 54, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019). For the fuller argument, see *id.* at 54–55.

<sup>24</sup> See *id.* at 54–56.

at last be affirmed to be alike. Out of reach at the moment is a critical perspective that puts the male-female sex binary itself in its sights.<sup>25</sup>

Conveniently, the merits brief relies on the authority of a fellow-traveler for the proposition that the “traditional” approach “for treating other dysphorias” is how this “dysphoria[]” should be treated.<sup>26</sup> The authority, an amicus brief filed by Dr. Paul R. McHugh, M.D., the University Distinguished Service Professor of Psychiatry at the Johns Hopkins University School of Medicine, an eminent and famously conservative psychiatrist, identifies itself as siding with the funeral home, not Stephens, a formality that speaks to its own understanding of whose side it is on.<sup>27</sup> McHugh’s amicus brief is more direct and emphatic than Harris Funeral Homes’s merits brief, and, in its way, than Bursch’s oral argument, but the positions between and among them bear notable family resemblances to one another that should be recognizable by this point.

“Sex,” according to the McHugh brief, is an “undeniable,” “objective,” “biological reality.”<sup>28</sup> Trans identity, by contrast, is a “disbelief in this reality.”<sup>29</sup> The McHugh brief continues:

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<sup>25</sup> For an important perspective on it, see Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1075 (1992) (“Only when sex means more than male or female, only when the word ‘woman’ cannot be coherently understood, will oppression by sex be fatally undermined.”). See also ANDREA DWORKIN, *WOMAN HATING* 183 (1974) (footnote omitted) (“We are, clearly, a multi-sexed species which has its sexuality spread along a vast fluid continuum where the elements called male and female are not discrete. . . . If human beings are multisexed, then all forms of sexual interaction which are directly rooted in the multisexual nature of people must be part of the fabric of human life, accepted into the lexicon of human possibility, integrated into the forms of human community.”).

<sup>26</sup> Brief for the Petitioner at 54, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019).

<sup>27</sup> *Id.*; Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 22, 2019); cf. Dean Spade, *Mutilating Gender*, in *THE TRANSGENDER STUDIES READER* 315, 320 (Susan Stryker & Stephen Whittle eds., 2006) (“Anne Bolin quotes an MTF she spoke with: ‘[Psychiatrists and therapists] . . . use you, suck you dry, and tell you their pitiful opinions, and my response is: What right do you have to determine whether I live or die?’”) (citing CLAUDINE GRIGGS, *S/HE: CHANGING SEX AND CHANGING CLOTHES* 32 (1998) (italics in original)) [hereinafter Spade, *Mutilating Gender*]. It is worth tracing the operation of thinking along these lines in U.S. DEP’T OF DEF., *DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS* 2, 19–27, 44 (Feb. 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF> [<https://perma.cc/55KQ-HXJG>] (discussing “mental health” standards in relation to exclusion of trans persons from military service, seen to threaten “effectiveness, lethality, and survivability”).

<sup>28</sup> Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner at 5–9, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 22, 2019). The notion of objectivity appears in different forms in the brief. See, e.g., *id.* at 2 (“‘sex’ has consistently referred to be objectively and biologically male or female”); *id.* at 6 (describing “sex” as “objectively recognizable, not assigned”).

<sup>29</sup> *Id.* at 5.

No matter how difficult the condition of gender dysphoria may be, nothing about it affects the objective reality that those suffering from it remain the male or female persons that they were in the womb, at birth, and thereafter – any more than an anorexic’s belief that she is overweight changes the fact that she is, in reality, slender.<sup>30</sup>

In a non-clinical sense, this characterization of trans people portrays them as suffering from a dictionary definition of *psychosis*: a “severe mental illness characterized by loss of contact with reality.”<sup>31</sup> The severity here is attested to in its way by the McHugh brief’s intervention, which points out the realities that trans people have lost touch with are those of “objective” sex.<sup>32</sup> The brief advises that, instead of pretending, Hans Christian Andersen-like, that trans women and men are anything but who they “really” are—the sex “they were in the womb, at birth, and thereafter”—“the contemporary transgender parade” must be stopped, for it is plainly “shrink[ing] from . . . clear facts.”<sup>33</sup> Almost comically, the brief shifts to a curious third-person voice that adverts to and positions itself at least partially within the narrative of *The Emperor’s New Clothes*, proudly announcing that: “McHugh [has] recognized that he is ‘ever trying to be the boy among the bystanders who points to what’s real. [He does] so not only because truth matters, but also because overlooked amid the hoopla . . . stand many victims.’”<sup>34</sup> Victims—the victims here are the naked emperors this boy is pointing to, all of whom are trans—who “[f]rom a medical and scientific standpoint” could be helped through psychiatric care that, as Harris Funeral Homes’s merits brief notices, would get the mind to conform to the body’s truth.<sup>35</sup>

Dropped into the shower and locker room scene, which is thus revealed as a capacious vessel for conveying a full range of anti-trans forms, this thinking reconfigures that scene as a scene of possibility in which trans women aren’t only common sexual criminals or criminal-like persons akin to rapists, traffickers, and domestic abusers. The trans women in the showers and locker rooms—like all trans people, according to the larger thought—are out of their

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<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Psychosis*, OXFORD ENGLISH DICTIONARY (3d ed. 2007).

<sup>32</sup> See *supra* note 28.

<sup>33</sup> Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner at 4, 10, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 22, 2019) (citation omitted).

<sup>34</sup> *Id.* at 4–5 (second alteration in original). For a classic translation of the famous tale, see Hans Christian Andersen, *The Emperor’s New Clothes*, in THE COMPLETE FAIRY TALES AND STORIES 77 (Erik Christian Haugaard trans., 1974).

<sup>35</sup> Brief for Dr. Paul R. McHugh, M.D., Professor of Psychiatry as Amicus Curiae Supporting Petitioner at 5, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 22, 2019) (citation omitted); *supra* note 9 and accompanying text. A similar note of victimization expressed with greater specificity is in ANDERSON, *supra* note 8, at 4 (“After listening to trans activists, we will hear from their victims: people who have transitioned and come to regret it.”).

minds, living lives mentally broken from the world's realities, including those of bodily sex. The study the merits brief cites establishes a trans penchant for lethality that is regularly turned inward, directed at themselves, but the shower and locker room scene, as a fantasy construction, advertises the prospect that this lethality might be redirected outward, thence inflicted by trans women on others.<sup>36</sup> Here trans women are elevated from among the ranks of common criminals to the circles of the criminally insane.<sup>37</sup> This is a profound dishonor.

Notably, the maneuver does not lay the predicate for a legal excuse. What it is, is the basis for a social and legal indictment.<sup>38</sup> As excruciating as it is to encounter it, trans criminality, as constructed in these arguments, involves not the actions of a rational actor but a mentally-ill sexual aggressor, a sexual monster in this sense, reminiscent of old, hateful cultural visions and nightmares of male-female, intersexed beasts.<sup>39</sup> Who can be sure what this figure, being a

<sup>36</sup> See Dhejne et al., *supra* note 12, at 6 (“In line with the increased mortality rate from suicide, sex reassigned individuals were also at a higher risk for suicide attempts, though this was not statistically significant for the time period 1989–2003”); *id.* (“[M]ale-to-females are at a higher risk for suicide attempts after sex reassignment, whereas female-to-males maintain a female pattern of suicide attempts after sex reassignment[.]”).

<sup>37</sup> Andrea Long Chu, *My New Vagina Won't Make Me Happy*, N.Y. TIMES (Nov. 24, 2018), <https://www.nytimes.com/2018/11/24/opinion/sunday/vaginoplasty-transgender-medicine.html> [<https://perma.cc/A9TX-H2TH>] (observing, after describing the author's own experiences with “dysphoria,” “[m]any conservatives call this crazy”). A reply is in ANDERSON, *supra* note 8, at xv–xvi (“Of course I never call people with gender dysphoria ‘crazy.’ And in this book I explicitly state that I take no position on the technical question of whether someone's thinking that he or she is the opposite sex is a clinical delusion. . . . I recognize the real distress that gender dysphoria can cause, but never do I call people experiencing it crazy.”).

<sup>38</sup> The legal indictment here is, of course, highly stylized.

<sup>39</sup> Some of this history is noted in Marc Spindelman, *Obergefell's Dreams*, 77 OHIO ST. L.J. 1039, 1096–1101 (2016). A different dimension of this history is noted in Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 110 (2019) (following anti-trans ideas in Mary Daly's and Janice Raymond's work). A stunning reversal of trans monstrosity that recognizes the justice-inflected sense of anti-anti-trans rage, partly responding to the medicalization, including the psychiatrization, of trans life is in Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in THE TRANSGENDER STUDIES READER 244, 245 (Susan Stryker & Stephen Whittle eds., 2006) (“Like the monster [Mary Shelley's Frankenstein], I am too often perceived as less than fully human due to the means of my embodiment; like the monster's as well, my exclusion from human community fuels a deep and abiding rage in me that I, like the monster, direct against the conditions in which I must struggle to exist.”); *id.* at 246 (“I want to lay claim to the dark power of my monstrous identity without using it as a weapon against others or being wounded by it myself. . . . Just as the words ‘dyke,’ ‘fag,’ ‘queer,’ ‘slut,’ and ‘whore’ have been reclaimed, . . . words like ‘creature,’ ‘monster,’ and ‘unnatural’ need to be reclaimed by the transgendered. [This way] . . . we may dispel their ability to harm us.”); *id.* at 249 (“Rage colors me. . . . It is a rage bred by the necessity of existing in external circumstances that work against my survival.”); *id.* at 254 (“[W]e transsexuals often suffer for the pain of



mentally disturbed, possibly deranged force will do? The figure is unknown, unknowable, unpredictable, though most assuredly sexually violent. What might this mean for the *mise-en-scène* of naked bodies in the ladies' shower and locker room? Will the scene be limited to the fright and resultant trauma of women looking at these crazed, criminal bodies? Will those bodies seek some kind of merger with the cis-women's bodies in the scene, and if so, in what combinations? Will these crazed, criminal bodies use physical violence or the threat of it, perhaps in the form of "rage" directed against the women that these bodies-minds think they are or wish to be? Stepping outside the logics of the shower and locker room scene, it must be asked: Is this mythic, unhinged queer monster itself a complex projection of what may be seen to be behind it—the homicidal panic of imaginary cis-straight men?

What's being discussed here are the operations of deep ways of social being that are themselves embedded in a cultural setting that has long constructed trans people as both sexual threats and criminally insane—notions that are readily reactivated as part of an argument seeking to turn back a pro-trans sex discrimination claim through a wink-and-nod group smear involving trans criminality.

The cultural stage for these maneuvers has already been set in an important way by another renowned Baltimore-based psychiatrist and one of his erstwhile clients.

*The Silence of the Lambs*, that unforgettable cultural representation featuring Dr. Hannibal Lecter, himself a memorable combination of intelligence, erudition, cultural refinement, with savagery, and, don't forget, campiness ("Oh, and, Senator, just one more thing. *Love your suit!*"), involves his one-time patient "Buffalo Bill," "real" name: Jame Gumb, who believes himself to be "transsexual" and who kidnaps women and holds them hostage before killing them and skinning them to make a woman's skinsuit he can wear so as to give himself the appearance of the female body that he wants and wants to be.<sup>40</sup>

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others, but we do not willingly abide the rage of others directed against us. . . . I assert my worth as a monster in spite of the conditions my monstrosity requires me to face, and redefine a life worth living." Another urgent reversal, this one of anti-intersex thought and practice is in Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, in *THE TRANSGENDER STUDIES READER* 300 (Susan Stryker & Stephen Whittle eds., 2006) (tracking, mapping, and prospecting a normative intersex politics).

<sup>40</sup> *THE SILENCE OF THE LAMBS* 104:43 (Orion Pictures 1991). For easy access to this clip, see Movieclips, *The Silence of the Lambs (7/12) Movie CLIP - Love Your Suit (1991) HD*, YOUTUBE (July 30, 2013), <https://www.youtube.com/watch?v=RZAkOfxIW6g> [<https://perma.cc/6N6M-JQRJ>] ("*Love your suit!*"). For discussion that may be used to configure Gumb's performance for the camera as a paraphilic act of "autogynephil[ia]," see Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to 'Degender' a Women's Space*, 45 *WOMEN'S STUD. INT'L F.* 42, 49 (2014) (borrowing the term of a certain type of paraphiliac coined by Ray Blanchard, "autogynephile"). The term "autogynephilia" "refers to a man who is aroused by the thought of himself as a woman[.]"

The film's narrative indicates the symbolic danger that may be thought to be lurking within the shower and locker room scene. It posits not a sweet, innocuous trans woman but one who's capable of terrifying, rageful escalations, as when Gumb famously tells Catherine Martin, one of his victims being held in a pit, "It places the lotion in the basket,"<sup>41</sup> until Catherine's noncompliant attempts to negotiate and humanize herself in Gumb's eyes causes Gumb to snap and bark directly at her in a deep, booming, menacing, and completely masculine voice: "Put the *fucking* lotion in the basket!"<sup>42</sup> Here is a cultural narrative giving instruction that trans women, detestably figured in this representation as a criminally insane cultural subject, may never, but could always lose it like that, including in the shower and locker room hostage scene.

Needless to say, these cultural logics are awful, hateful, and wildly riven by their own spectacularly unhinged anti-trans normativity. They also importantly build on what, in the setting of the film, is an important, but easily missed, misidentification. Although Jame Gumb apparently identifies as "transsexual," Lecter's professional assessment is that that is not the case. In an exchange between Lecter and a puzzled FBI Special Agent-in-training Clarice M. Starling, Starling indicates she cannot quite figure what to make of Gumb's pattern of criminal violence given what she knows about "transsexualism." She authoritatively reports to Lecter: "There's no correlation in the literature between transsexualism and violence, transsexuals are very passive."<sup>43</sup> Lecter praises Starling: "Clever girl!"<sup>44</sup> He then informs her that Gumb, who wasn't "born a criminal . . . [but] was made one through years of systematic [childhood] abuse," is "not a real transsexual, but he thinks he is, he tries to be, he's tried to be a lot of things, I expect."<sup>45</sup> Of "Buffalo Bill" (really Gumb) Lecter says: He "hates his own identity, you see, and he thinks that makes him a transsexual, but his pathology is a thousand times more savage and more terrifying."<sup>46</sup> Confounding matters further in another direction is an exchange Lecter later has with the junior Senator from Tennessee, Ruth Martin. In an airport hangar, Lecter (before praising her suit) tells Martin and the others there that Gumb, whom he misnames "Louis Friend," came to him via another former patient, Benjamin Raspail.<sup>47</sup> Lecter reports: "They were lovers, you see."<sup>48</sup>

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Laura Cameron, *How the Psychiatrist Who Co-Wrote the Manual on Sex Talks About Sex*, VICE (Apr. 11, 2013), [https://www.vice.com/en\\_us/article/ypp93m/heres-how-the-guy-who-wrote-the-manual-on-sex-talks-about-sex](https://www.vice.com/en_us/article/ypp93m/heres-how-the-guy-who-wrote-the-manual-on-sex-talks-about-sex) [<https://perma.cc/SS4K-2YJR>].

<sup>41</sup> THE SILENCE OF THE LAMBS, *supra* note 40, at 58:27.

<sup>42</sup> *Id.* at 58:53.

<sup>43</sup> *Id.* at 55:49.

<sup>44</sup> *Id.* at 55:54.

<sup>45</sup> *Id.* at 56:50, 57:24.

<sup>46</sup> *Id.* at 57:32.

<sup>47</sup> THE SILENCE OF THE LAMBS, *supra* note 40, at 1:03:25. This is an anagram for "iron sulfide also known as fool's gold," as Starling notes to Lecter. *Id.* at 1:07:56. Here, the name is both misleading and relates back to the notion that Gumb's appearance is itself deceiving.

<sup>48</sup> *Id.* at 1:03:37.

While the “truth” of the film is complexly braided around these complications, what has been widely carried forward in the cultural imagination about *The Silence of the Lambs* is the oversimplified approximation that Gumb actually “is” the “transsexual” he believes himself to be notwithstanding Lecter’s professional assessment. Apprehending the film as an anti-trans cultural artifact, the film negatively supplies its audience—and those in the larger cultural milieu it informs—with ready-made resources for thinking about the fate that Gumb meets in the context of the film’s anti-trans morality tale. The intrepid, rube-y, butch-y, and faintly lesbian FBI Special-Agent-in-training Starling, representing the state’s authority, but still a woman who might yet become one of Gumb’s victims, squares off against the threat Gumb poses head on. This “savagely” criminal monster Jame Gumb, whose insanity partly entails him thinking he’s a “transsexual,” gets his comeuppance when Starling, gun in trembling hands as she moves through a dark house stripped of her own ordinary powers of sight, and very afraid, hears the sound of Gumb cocking a gun in order to kill her. Locating the sound, Starling spins around and stops Gumb dead, pumping Gumb’s body full of lead.<sup>49</sup>

So understood, the moral structure of the film supplies a wholly discreditable narrative about how the body that believes itself to be trans may, even must, be treated, in order to bring this body’s predations to an end. This cultural endorsement of lethal violence fortifies still-circulating cultural logics that underwrite real—not fictive—parades of deathly horrors that anyone who has spent any time thinking seriously about the conditions of trans life cannot possibly miss: the actual, material anti-trans murders that regularly happen today and that urgently must be stopped. The lives to be remembered and the names to be spoken on the next Trans Day of Remembrance—the list of trans and gender non-conforming lives that have been cut short by fatal violence, many of whom are Black trans women—is a reminder that, in the wider cultural diffusion of legal rulings, a decision for Aimee Stephens might actually save trans lives from being violently ended because they don’t conform to traditional, biological, conventional notions of sex.<sup>50</sup>

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<sup>49</sup> The rapid-fire suggestion of anti-trans policy arguments in Harris Funeral Homes’s merits brief rhetorically echoes differently in this light.

<sup>50</sup> Reported as only a partial list and circumscribed nationally, “because too often these stories go unreported -- or misreported,” so far, in 2020, many are still mourning the following individuals: Dustin Parker, 25; Neulisa Luciano Ruiz; Yampi Méndez Arocho, 19; Monika Diamond, 34; Lexi, 33; Johanna Metzger; Serena Angelique Velázquez Ramos, 32; Layla Pelaez Sánchez, 21; Penélope Díaz Ramírez; Nina Pop; Helle Jae O’Regan, 20; Tony McDade; Dominique “Rem’mie” Fells; Riah Milton, 25; and Jayne Thompson, 33. *Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> [<https://perma.cc/75AH-Q4BU>] (ages listed where available). Others being mourned who have died as a result of violence in 2020 include John Scott Devore/Scottlyn Kelly Devore, 51, and Alexa Ruiz, 28. *Remembering Our Dead*, TRANSLIVESMATTER, <https://tdor.translivesmatter.info/reports?from=2020-01-01&to=2020>

To be very clear here, noting these prospects is not meant in any way to suggest that Bursch, including through his depictions of the trans shower and locker room scene, which dovetails with those kind, pastoral sensibilities about the cure that suffering trans people need, has sought to make any sort of argument whatsoever that recommends lethal anti-trans violence.<sup>51</sup> He, after all, is preaching love or toward love—not hate.<sup>52</sup> Indeed, in the setting of the merits brief that includes his name, suggestions about the possibilities of psychiatric cure are carefully articulated separate and apart, hence divorced, from the brief's references to showers and locker rooms. The point being advanced here, then, recognizing all that, is that the shower and locker room scene, with its otherwise frothy anti-trans logics, is readily subject to amplification and intensification by means of just the sorts of thinking found in arguments that the merits brief filed on behalf of Harris Funeral Homes, with other briefs, makes. Those arguments work the way they do in no small part because they move in the same direction as those profoundly anti-trans cultural logics that tell nasty lies about who trans people are while spinning off recommendations about how they should be seen and treated by and under law.

Saying this is in no way to forget Harris Funeral Homes's merits brief's careful plea to give psychiatry another chance, in the setting of the case a policy argument for not treating anti-trans discrimination as sex discrimination under Title VII, is no sort of modest proposal.<sup>53</sup> Too immodest apparently for prime time, however, the point was dropped during Bursch's oral argument at the Supreme Court. If a florid pro-psychiatric vision of trans people drives legal normativity, it wouldn't likely exhaust itself in refuting a Title VII sex

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-12-31&country=USA&view=list&filter= [https://perma.cc/XLV3-KLAS]. And then, of course, there are those whose lives have been lost in other ways who are being grieved by family, birth and/or chosen, and by others whose lives they touched.

<sup>51</sup> The phobically perfected form of this homicidal anti-trans violence is the total elimination of all trans people. The possibility of morality underwriting such an undertaking is documented by Stryker, *supra* note 39, at 245 (quoting JANICE G. RAYMOND, *THE TRANSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1979)), noting the anti-trans commentary holding that “the problem of transsexuality would best be served by morally mandating it out of existence,” though in that setting it is not expressly linked with a call for any kind of lethal use of force.

<sup>52</sup> See *supra* text accompanying note 8.

<sup>53</sup> Brief for the Petitioner at 54–55, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019). Nor is it, in the wider scene of “medical discourse, practices and institutions” that manage trans life and manage and “undermine transgender access to body-modifying procedures,” an uncomplicated one. Spade, *Mutilating Gender*, *supra* note 27, at 315. For some of the challenges and potential traps that pro-trans projects face when they seek to engage, loosen, and otherwise alter and/or overcome the strictures of “these discourses, practices, and institutions,” as seen from within a critical trans perspective that has “progressive, subversive, radical, or liberatory political ideals” in its sights, see *id.* at 315, 319 (speaking to how “[a]n approach that recognizes the possibility of a norm-resistant, politicized, and feminist desire for gender-related body alteration need not reject the critique of medical practice regarding transsexuality nor embrace the normalizing regulations of the diagnostic and treatment processes”).

discrimination claim. Its energies drive toward eliminating trans people by what the merits brief, like McHugh's amicus brief, portrays as wholly respectable, professionally appropriate means, which would, of course, never *ever* resort to unwanted violence against trans bodies—unless perhaps absolutely necessary to get a body to take their cure. An anti-trans politics of erasure can take many forms. The orderly, professional, psychiatric elimination of trans people is but one. If successful, the elimination of trans people this way would leave no subjects with needs for anti-trans protections under antidiscrimination law.

Before moving too far away from the sharp edges of the anti-trans intensity that Bursch's arguments in the case can inspire, it is worth tactically seeking to recapture them and all that "rage" that Justice Sonia Sotomayor said is gripping the country for one additional moment.<sup>54</sup> To be caught up in this impassioned resistance to trans sex discrimination rights is potentially to be transported away from the idealized space in which the rule of law's reason, "reason free from passion," governs, where thought, functioning soberly, calmly, and deliberatively.<sup>55</sup> Anti-trans rage, which arguments like Bursch's shower and locker room scene can inspire, indeed, seem designed to inspire, can readily take someone in a space of quiet reason, thinking about how anti-trans discrimination does or doesn't fit within existing Title VII sex discrimination rules, and move them in a flash to—or toward—a state of anti-trans panic that in the court of reason ought to stay beyond the law's normative realm.

Notice how on this level, technically, the shower and locker room scene that Bursch depicts functions as, but is not itself, a conventional analytic argument. Just so, it would be foolish to overlook how the shower scene states a powerful, if tremendously problematic, cultural image-case. It is in that sense an argument that, with its specter of a phallic trans woman naked in a shower and locker room with vulnerable cis-women, delivers a complete answer to the suggestion that trans people should be given any sort of protections that would allow this kind of thing to happen. All in caps: NO!

The leap this argument makes from the facts of the case to the space that it seeks to occupy is remarkable. NO!, but never mind that Aimee Stephens worked quietly as a funeral director and an embalmer without relevant incident in the record for years.<sup>56</sup> NO!, but never mind that Stephens's firing, by Harris Funeral Homes's own admission, had nothing to do with her using the ladies' bathroom, much less a shower or a locker room at work.<sup>57</sup> NO!, but never mind

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<sup>54</sup> The precise language Justice Sonia Sotomayor uses here is "raging." Bostock Transcript, *supra* note 21, at 12.

<sup>55</sup> LEGALLY BLONDE 26:07 (Metro-Goldwyn-Mayer 2001). The original is ARISTOTLE, THE POLITICS OF ARISTOTLE 146 (Ernest Baker trans., 1946) ("Law [as the pure voice of God and reason] may thus be defined as 'Reason free from all passion.'").

<sup>56</sup> EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567, 572 (6th Cir. 2018) (noting job as "Funeral Director/Embalmer" and that "Rost admitted that he did not fire Stephens for any performance-related issues"), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

<sup>57</sup> *Id.*

that, from what appears in the record, Stephens did her job with the quiet professionalism required of this professional undertaking.<sup>58</sup> NO!, but never mind that she was fired simply for coming out and wanting to be herself, including wishing to dress in conformity with her gender identity, at work.<sup>59</sup> NO!, but never mind that Stephens, relating in her own ways to the day-to-day struggles of being trans and living within a market economy, wanted to be herself and to provide for herself and her wife.<sup>60</sup> The leap that Bursch's argument makes from the facts of the case to the shower and locker room scene he wants to make into the ground of and for judicial decision is nothing short of spectacular. It is an invitation—not a command—to swell into a rageful, even panicked, anti-trans state.

It may take work to see the complexly full simplicity of the deeply anti-trans position that Bursch's argument mobilizes through what are, in fact, tiny gestures toward the shower and locker room scene that is central to his anti-trans case. Or not. For some, this all may be very easy to see. In any event, having once gotten far enough away from the intensity of the scene to see it in a fully critical light, the question is: What will the Supreme Court do with it when deciding the cases?

*Next time: But why the shower? How has it functioned in the U.S. cultural archive, including in the context of LGBT rights, classically as an instrument to resist them? What might the shower, which is importantly connected to the closet, yet teach about what happened at the Supreme Court in the Title VII sex*

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., Emanuella Grinberg, *She Came Out as Transgender and Got Fired. Now Her Case Might Become a Test for LGBTQ Rights Before the US Supreme Court*, CNN (Sept. 3, 2018), <https://www.cnn.com/2018/08/29/politics/harris-funeral-homes-lawsuit/index.html> [<https://perma.cc/N3Q8-5B3P>] (“Stephens’ health began to decline due to kidney failure and she could no longer work. Money became tight and Donna Stephens had to take on extra jobs while she grappled with her spouse’s transition. They sold their van, their camper and a piano to make ends meet.”); see also, e.g., Katelyn Burns, *Aimee Stephens, Who Brought the First Major Trans Rights Case to the Supreme Court, Has Died*, VOX (May 12, 2020), <https://www.vox.com/identities/2020/5/8/21251746/aimee-stephens-trans-supreme-court-health> [<https://perma.cc/GJK5-EGCK>] (“‘Being fired from her employer caused an immediate financial strain, leading her spouse Donna to take on several jobs,’ . . . ‘Friends and family have stepped in when they can, but years of lost income have taken a toll on their finances.’”) (quoting statement on *Aimee Stephens End-of-Life Costs*, GoFundMe, [https://www.gofundme.com/f/aimee-stephens-endof-life-costs?utm\\_source=facebook&fbclid=IwAR24RAqXkfZPVS50oLyZDWWuczKaSQIBPiF FNsy24M37O28TdwKgYpWeXo](https://www.gofundme.com/f/aimee-stephens-endof-life-costs?utm_source=facebook&fbclid=IwAR24RAqXkfZPVS50oLyZDWWuczKaSQIBPiF FNsy24M37O28TdwKgYpWeXo) (last visited August 14, 2021) [<https://perma.cc/Y94L-V23K>]); *id.* (“The details of the end of her life — and the financial strain from her experience with job discrimination — are common for trans people in the US. Trans people are three times more likely than their cisgender peers to be unemployed, according to the 2015 US Transgender Survey. Meanwhile, 29 percent of trans people live in poverty, and one in five trans people in the US will experience homelessness in their lifetimes.”) (emphasis removed).

*discrimination cases? What might it reveal about some of the most spectacular moments during oral arguments in them?*