

You Should be Ashamed of Yourself: Privacy Claims by Transgender Litigants and Navigating Transnormativity

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INTRODUCTION

In 2016, North Carolina passed one of the first examples of backlash legislation against transgender people. HB2 contained, among other provisions, a “bathroom ban” that forced transgender people to use the restroom associated with their sex assigned at birth. A lawsuit followed shortly after. In their challenge to the law, plaintiffs brought claims under Title IX, as well as equal protection claims.¹ But in addition to those, they claimed that to be forced to use the restroom associated with one’s sex assigned at birth “requires the disclosure of highly personal information regarding transgender people to each person who sees them using a restroom or other facility inconsistent with their gender identity or gender expression.”² Although such a claim may have seemed novel, the advocates cited a 1999 case from the Second Circuit, where the court had ruled that a transgender prisoner had a substantive due process right in the privacy of her transgender status.³ The HB2 plaintiffs and Ms. Devilla, the prisoner in question in the Second Circuit case, were part of a legacy that went much further back—from transsexuals who fought against anti-crossdressing laws in Chicago in the 1970s⁴ to the 1977 student body president of the College of Alameda, who sued a newspaper columnist for outing her.⁵

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¹ *Carcaño v. McCrory*, 203 F.Supp.3d 615, 621 (M.D.N.C. 2016).

² First Amended Complaint at 39, *Carcaño v. McCrory*, 203 F.Supp.3d 615 (M.D.N.C. 2016) (No. 1:16-CV-00236-TDS-JEP); *cf.* Plaintiffs’ Motion for Preliminary Injunction at 35–38, *Carcaño v. McCrory*, 203 F.Supp.3d 615 (M.D.N.C. 2016) (No. 1:16-CV-00236-TDS-JEP).

³ *See Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999).

⁴ *City of Chicago v. Wilson*, 389 N.E.2d 522, 522 (Ill. 1978) (“Prior to trial, defendants moved to dismiss the complaint on the grounds that section 192-8 was unconstitutional in that it denied them equal protection of the law and infringed upon their freedom of expression and privacy.”) For more on the anti-crossdressing cases in particular, *see* Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, L. & HIST. REV 1 (2023).

⁵ *Diaz v. Oakland Trib., Inc.*, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).

Across decades, transgender people in the United States have used privacy claims to vindicate their rights. Some of these cases were brought by advocacy organizations looking to have widespread impact, while others were just brought by individual attorneys on behalf of their clients seeking recompense for the harm they had suffered. Some of them are newer, whereas others date back forty years.

What they have in common is not the lawyers who brought them or their time period, but the use of privacy claims in particular—whether they come from constitutional law or from privacy torts. These privacy claims come with risks. Individual plaintiffs might (reasonably) desire that their transgender status, the details of their transitions, or the circumstances of their birth be kept private. However, the decisions of these cases often presume a universality to experiences of shame and stigma, and that it is not being transgender and others knowing, but societal cishnormativity and transphobia, that is the problem.⁶ As the theorist Sandy Stone put it, tongue firmly in cheek, in 1987: “The highest purpose of the transsexual is to erase herself, to fade into the ‘normal’ population as soon as possible.”⁷ Or consider the formulation of trans rights activist Jamison Green: “[i]n order to be a good – or successful transsexual person, one is not supposed to be a transsexual person at all.”⁸

These privacy claims offer a lens to understand how transgender litigants try to achieve legibility by the legal system, often by combating cishnormativity (the default presumption that everyone is cisgender) with “transnormative” narratives. As described by the sociologist Austin Johnson, transnormativity is the ideology under which “the legitimacy of trans people’s identities is socially evaluated, and trans individuals are rewarded or sanctioned based on how closely their experience aligns with these normative standards.”⁹ Legal transnormativity narratives rely on medicalization and medical gatekeepers to provide evidence of true transgender status, focus on conformity with binary gender roles or passing as part of a binary gender as a key element of correct transness, or finally, emphasize “nascence,” which is the idea that true transgender people knew they were “the other gender” early in life.¹⁰ These narrative tropes end up

⁶ For a discussion of the role of “passing” as a cis-centric framing, see JULIA SERANO, *WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY* 179 (2007).

⁷ Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in 10 *CAMERA OBSCURA: FEMINISM, CULTURE, AND MEDIA STUDIES* 150, 163 (Julie D’Acci, Elisabeth Lyon, Constance Penley, & Sharon Willis eds., 1992).

⁸ Jamison Green, *Look! No Don’t! The Visibility Dilemma for Transsexual Men*, in *THE TRANSGENDER STUDIES READER* 501, 501 (Susan Stryker & Stephen Whittle eds., 2006).

⁹ Austin H. Johnson, *Transnormativity: A New Concept and Its Validation through Documentary Film About Transgender Men*, 86 *SOCIO. INQUIRY* 465, 467 (2016); see also Nova J. Bradford & Austin H. Johnson, *Transnormativity*, in *THE SAGE ENCYCLOPEDIA OF TRANS STUDIES* 870, 870 (Abbie E. Goldberg & Genny Beemyn eds., 2021).

¹⁰ See *infra* Part IV.

creating what are, in effect, criteria distinguishing transgender people who deserve legal protection and potentially recovery from those who are just “crazy.”

Deploying transnormative narratives allows litigants to make their identities legible to a court system that might be otherwise hostile and draw boundaries around the rights that they seek. But this approach has drawbacks. Although transgender people may choose to engage strategically with transnormativity in their own lives, doing so does not typically create legal precedent that can be cited against other trans folks. Transnormativity simply replaces cisnormativity with a different correct way to do gender—another hierarchy.

The long history of privacy claims by transgender litigants provides an especially ripe area for reflecting on how transnormativity shows up in legal decisions. These claims and their implicit requirements illuminate the terrain that litigants and advocates who have broader personal and social goals navigate.

But the use of privacy claims is not just important because they illustrate transnormativity, which is present throughout transgender rights movements. Privacy claims have also served as precursors to more substantive equality claims, and as narrower, potentially more palatable grounds for finding in favor of trans litigants.¹¹ As transgender people face significant anti-trans hatred, privacy-based approaches, like those used in the HB2 litigation in North Carolina, may gain additional appeal, notwithstanding the uncertainty of substantive due process as a doctrine.¹² At least on an individual level, privacy claims can allow for individual recovery while not threatening to jeopardize overall systems of gender division. On the whole, privacy claims brought by transgender people are status quo preserving, meaning they are fundamentally conservative in what they seek and who they benefit.

Through this essay, I take on privacy claims brought by transgender litigants, both on their own merits, and as illustrations of how transnormative tropes manifest. In Part I, I provide some examples of how transgender litigants have used privacy claims. In Part II, I explain how broader critiques of privacy rights apply in the context of transgender litigants, both in terms of the distributional consequences and the assumption of shame and stigma. Then, in Part III, I bring in the concept of transnormativity in more depth, explaining how transnormative narratives show up in privacy claims. Part IV includes a discussion of strategy, where I suggest questions to help those who write about and litigate on behalf of trans people avoid transnormative tropes. Finally, to conclude, I consider who privacy claims are for and what their role is in the lives of transgender people moving forward.

¹¹ See SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 76 (2020).

¹² See generally *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

I. PRIVACY CLAIMS

As the opening paragraph to the introduction illustrates, transgender litigants have been using privacy claims to advance substantive goals for at least fifty years. In this section, I examine one or two examples from the types of claims that reoccur across that history. My purpose is not to document every transgender litigant who brings a privacy claim, but to provide readers with a sense of the types of claims that reoccur across time-periods and context. The first type is the use of routine privacy processes (such as suing under a pseudonym or waiving a publication requirement for a name change) by transgender people, primarily or even solely because they are transgender. The second type, and perhaps the one that has been the subject of the most specific scholarly attention,¹³ are after-the-fact claims for disclosure of transgender status. The third is the use of substantive due process privacy claims to challenge cisnormative systems or anti-transgender legislation.

A. *Routine Privacy Protections*

Transgender litigants pursue routine privacy protections when engaged in other forms of legal process. More generally, courts sometimes use their powers to protect the identities of trans people who appear before them, based on concerns about the potential for stigma.¹⁴ In *Doe v. Blue Cross & Blue Shield of Rhode Island*,¹⁵ a Rhode Island district court held that a trans plaintiff could sue a health insurance company under a pseudonym. Likewise, in *Doe v. Pennsylvania Department of Corrections*,¹⁶ a trans plaintiff was able to sue the Pennsylvania Department of Corrections for employment discrimination without disclosing his real name. The court found that

[I]itigating under his real name would out his transgender status to the world. He avers that up to this day he has kept his transgender status a closely guarded secret, disclosing it only as necessary to comply with legal requirements. Divulging it in connection with this complaint, which alleges harassment arising from intensely personal subject matter, poses a particularly high risk of severely compromising the privacy the Plaintiff has labored to preserve.¹⁷

¹³ Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711, 1741–1746 (2010).

¹⁴ See *Doe v. Borough of Morrisville*, 130 F.R.D. 612, 614 (E.D. Pa. 1990) (“Under special circumstances, however, courts have allowed parties to use fictitious names, particularly where necessary to protect privacy. Examples of these circumstances are abortion, birth control, transexuality [sic], mental illness, welfare rights of illegitimate children, AIDS, and homosexuality.”).

¹⁵ 794 F. Supp. 72, 73 (D. R.I. 1992).

¹⁶ No. 4:19-CV-01584, 2019 WL 5683437 (M.D. Pa. Nov. 1, 2019).

¹⁷ *Id.* at *3.

Even litigants who seek to assert constitutional claims have sometimes proceeded under pseudonyms.¹⁸

Likewise, transgender people commonly seek privacy protections when changing their names. In many states, name changes can be done two ways — through common law (no legal process required, but less official), and through a court. Most advice for trans people suggests going through the formal name change process before a court.¹⁹ Many states require publication of a court-recognized name change in public, usually a newspaper.²⁰ Such notice must list the old name and the new name²¹ —it is meant to prevent fraud via the name change process.²²

In some cases, courts have allowed trans people not to publish name changes in the newspaper due to semi-individual concerns about threats of violence.²³ In one of those cases, the court cited the previous violence that a transgender woman had faced, employment discrimination from being outed as transgender by a non-matching social security card, as well as the transgender person’s own averment that he was “at great risk for potential harm. . . . I mean it could be anything. I—I—I uh, violence, death, you know, it just depends on who—who gets a hold of me you know” as evidence that the harm that the transgender man faced was potentially significant.²⁴ Likewise, some courts have sealed records of name changes and not required publication, even without individualized evidence of violence, because of the general risk to transgender people.²⁵ Many states also allow for the sealing of such records or non-publication without a specific court decision.

B. *After-The-Fact Individual Claims*

The type of legal claim that has been most well covered by scholarship focusing on transgender litigants and their privacy rights is a claim for outing someone as transgender, brought after the outing has occurred. Most of these claims are based on privacy torts, including intrusion upon

¹⁸ Foster v. Andersen, No. 18-2552-DDC-KGG, 2019 WL 329548, at *1 (D. Kan. Jan. 25, 2019).

¹⁹ See, e.g., the National Center for Transgender Equality’s advice on receiving a name change in Massachusetts. *ID Documents Center | Massachusetts*, <https://transequality.org/documents/state/Massachusetts> (“To obtain a legal name change in Massachusetts, an applicant must submit a petition to the court. The applicant must give public notice of the petition however the publication requirement may be waived for a good cause (Mass. Gen. Laws Ann. ch. 210, §§ 12-14), and is generally waived if an individual is changing their first name only.”)

²⁰ See, e.g., 54 Pa. Cons. Stat. Ann. §§ 701-705.

²¹ *Id.*

²² See *In re A.L. and L.S.*, 81 N.E.3d 283, 286 (Ind. Ct. App. 2017) (quoting lower court judgment explaining that publication requirement is meant to prevent fraud).

²³ See, e.g., *In re A.L. and L.S.*, 81 N.E.3d 283 (Ind. Ct. App. 2017).

²⁴ *In re A.L.*, 81 N.E.3d 283, 290 (Ind. Ct. App. 2017).

²⁵ See *In re E.P.L.*, 891 N.Y.S.2d 619, 621 (N.Y. Sup. Ct. 2009).

seclusion or public disclosure of private facts.²⁶ It is also quite common for transgender people to allege employment discrimination along with these claims.²⁷ However, litigants have also successfully recovered against the government by arguing that disclosure of transgender status violates their substantive due process rights under the Fourteenth Amendment. Below are three examples: *Powell v. Schriver*,²⁸ an often-cited substantive due process case brought by a transgender prisoner; *Doe v. United Consumer Financial Services*,²⁹ a case involving a transgender employee who was outed and then fired; and *Pollock v. Rashid*,³⁰ a case brought against a TV station for sharing information about a transgender prisoner.

1. *Powell v. Schriver*

Dana Kimberly Devilla was an inmate in Albion Correctional Facility when a correctional officer disclosed to other inmates and officers that she was an HIV-positive trans woman.³¹ She sued for violation of her constitutional right to privacy as well as her Eighth Amendment rights.³² Her claim was based on previous Second Circuit case law holding that individuals who are HIV-positive possess a constitutional right to privacy regarding their condition.³³

In *Powell*, the Second Circuit explained that “individuals who have chosen to abandon one gender in favor of another understandably might desire to conduct their affairs as if such a transition was never necessary,” and therefore held that “the Constitution does indeed protect the right to maintain the confidentiality of one’s transsexualism.”³⁴ Despite the pathologizing comments, the Second Circuit actually did not discuss at length the discrimination that trans people face, concluding “it is similarly obvious that an individual who reveals that she is a transsexual potentially exposes herself . . . to discrimination and intolerance.”³⁵ Given the lack of exploration of the issue, it is unclear how well the Second Circuit’s 1999 analysis would stand up to social changes or increased visibility and trans positivity,

²⁶ Allen, *supra* note 13; cf. Quinn Heath, *LGBT Recovery for Intrusions on Privacy: Revisiting Privacy Tort Doctrine Post-Obergefell*, 28 B.U. J. SCI. & TECH. L. 135 (2022).

²⁷ See, e.g., *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001). See also *Ray v. Dir., Ohio Dep’t of Health*, No. 2:18-CV-272, 2018 WL 8804858, at *1 (S.D. Ohio Apr. 5, 2018) (collecting cases).

²⁸ 175 F.3d 107, 108 (2d Cir. 1999).

²⁹ No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

³⁰ 690 N.E. 2d 903 (Oh. Ct. App. 1996).

³¹ *Powell v. Schriver*, 175 F.3d 107, 108 (2d Cir. 1999).

³² *Id.*

³³ *Id.* at 110.

³⁴ *Id.* at 111. Of course, Devilla failed to actually recover because of qualified immunity.

³⁵ *Id.* at 111.

let alone the sea change in substantive due process rights resulting from *Dobbs*.

As for Ms. Devilla, she did not live to see her Second Circuit victory. She passed away in April of 1995, likely of AIDS, and the case was pursued by her executor, the Reverend Wayne Powell. Since 1999, *Powell* has primarily been cited for its qualified immunity holding, and occasionally for its statement that transsexualism is excruciatingly private and intimate for the purpose of applying transgender status substantive due process protection in other contexts.³⁶ Additionally, some claims against a government entity for outing a transgender person have succeeded based on a substantive due process privacy right.³⁷

2. *Doe v. United Consumer Financial Services*

Although Devilla's claim has become a matter of significant historical interest, many privacy claims are much more mundane.³⁸ Take, for example, *Doe v. United Consumer Financial Services*, an Ohio district court case from 2001. Susan Renee Myers originally sued pseudonymously³⁹ for Title VII and ADA violations, as well as for invasion of privacy.⁴⁰ Myers was a trans woman who worked as a temp-to-hire employee at United Consumer Financial Services.⁴¹ The human resource coordinator became suspicious of Myers and began to try to determine whether she was transgender, including

³⁶ See, e.g., *Doe v. Pennsylvania Dep't of Corr*, No. 4:19-CV-0158, 2019 WL 5683437 (M.D. Pa. Nov. 1, 2019).

³⁷ See *Doe v. Dep't of Corr*, No. 1201:20-cv-00023-SPB-RAL, 2021 WL 1583556, at *14 (W.D. Pa. Feb. 19, 2021) ("The DOC Defendant's motion to dismiss does *not* challenge the legal sufficiency of the Fourteenth Amendment right to privacy claim against Anderson."), *report and recommendation adopted*, No. 20-23 Erie, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021), see also *Grimes v. Cnty. Of Cook*, 455 F. Supp. 3d 630, 639 (N.D. Ill. 2020) (allowing plaintiff to pursue a substantive due process-based privacy claim against employer for disclosure of transgender status),

³⁸ See Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711 (2010) (discussing tort claims based on outings); see also *Grimes v. Cnty. Of Cook*, 455 F. Supp. 3d 630, 640 (N.D. Ill. 2020) (allowing a public disclosure of private facts claim based on outing to proceed); *Rudkin v. Roger Beasley Imports, Inc.*, No. A-17-CV-849-LY, 2017 WL 6622561, at *1 (W.D. Tex. Dec. 28, 2017) (discussing public disclosure of private facts claim based on outing), *report and recommendation approved*, No. A-17-CV-849-LY, 2018 WL 2122896 (W.D. Tex. Jan. 31, 2018).

³⁹ See Complaint, *Myers v. United Consumer Fin. Servs.*, No. 1:01-cv-01112 (N.D. Ohio May 7, 2001), available at <https://www.courtlistener.com/docket/11602878/myers-v-united-consumer-financial-services/> [<https://perma.cc/D48U-9VQV>].

⁴⁰ Invasion of privacy is a catch-all tort that includes intrusion upon seclusion, public disclosure of private facts, and intentional infliction of emotional distress under Ohio law. Myers' complaint also included a §1983 claim, but she voluntarily dismissed that. Interestingly, the defendants actually attempted to get her lawyer sanctioned for the inclusion of the §1983 claim. *Id.*; Motion for Rule 11 Sanctions, *Myers v. United Consumer Fin. Servs.*, 1:01-cv-01112 (N.D. Ohio July 18, 2001).

⁴¹ *United Consumer Fin. Servs.*, 2001 WL 34350174, at *1 (N.D. Ohio Nov. 9, 2001).

by attempting to locate Myers' high school records, which was not a normal part of United Consumer's employment process.⁴²

Finally, the HR coordinator called Myers, claiming that she needed to confirm Myers' graduation date.⁴³ Myers informed the HR coordinator of her name change. Subsequently, she was asked to meet with the vice-president of United Consumer Financial Services, who asked her intrusive questions, including "Are you a man or a woman?" and "What gender are you..."⁴⁴ When Myers presented her identification documents, which said she was female, the vice president said that the documents were "not enough" and asked whether she had had "an operation."⁴⁵ The vice president stated that she would be required to provide "medical evidence of her sexuality."⁴⁶ After that conversation, she was sent home and then fired. She subsequently sued.

In her case, the Ohio district court granted a motion to dismiss by defendants with regards to some of her privacy claims, while allowing others to proceed—finding that the questioning by the vice president facially stated a claim for "an intrusion into private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."⁴⁷ However, the judge dismissed the public disclosure of private facts, as the information was not shared broadly enough to qualify, as well as the intrusion upon seclusion claim as it applied to review of her high school records, since these records were public.⁴⁸ There is an irony to the fact that Ms. Myers could not recover for her outing, because the information was either already public (her high school records) or not made public enough (because disclosure was limited to her employers).

3. *Pollock v. Rashid*

Myers' case is quite typical—privacy claims get brought as additional causes of action in addition to an employment law claim. Less typical is the case brought by Susan Pollock, an inmate serving in an Ohio state prison, against Norma Rashid, a news anchor for local television station WLWT.⁴⁹ This is one of a small number of claims brought solely for outing

⁴² *Id.* at *1–2.

⁴³ *Id.* at *1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at *2. It's unclear if this is the defendant's wording or the court's wording. Perhaps obviously, one's gender and one's sexuality are different, so it does not seem like the company actually wanted evidence of the plaintiff's sexuality.

⁴⁷ *Id.* at *6.

⁴⁸ *Id.* at *7–8. The case continued on those claims as well as a Title VII sex-stereotyping theory, and the parties were ordered to mediation. After the mediation, Myers dropped her privacy claims, as well as her use of a pseudonym, and eventually the case settled. Order, *Myers v. United Consumer Fin. Servs.*, 1:01-cv-01112 (N.D. Ohio Oct. 3, 2002).

⁴⁹ *Pollock v. Rashid*, 690 N.E. 2d 903 (Ohio Ct. App. 1996).

or drawing attention to one's transgender status.⁵⁰ Pollock was a transsexual⁵¹ woman who had gone through surgery and hormone therapy, who had previously filed suit against the warden of the prison she was being held in, seeking, among other things, to be transferred to a female facility.⁵² The television statement reported on her lawsuit, using a photo that was allegedly not of her, as well as identifying her by her previous (masculine) name.⁵³ Pollock contacted the station to ask for a retraction and for them to interview her. After the station did not respond, she then filed suit, alleging defamation, invasion of privacy, and intentional infliction of emotional distress.⁵⁴

Although the back and forth in the case is lengthy, the appellate court upheld the trial court's dismissal of the invasion of privacy claim, finding that Pollock's lawsuit had made public the facts about herself that she wished to keep private, and thus she could not recover for the news broadcast of these facts.⁵⁵ The *Pollock* court does not actually attempt to parse what information was contained in the lawsuit against the prison warden and what information was published by the news station. It is entirely unclear what information included in the news report was coextensive with the lawsuit—the court doesn't discuss whether it is worth distinguishing between old photos and Ms. Pollack's identity. Without more information, it is difficult to determine whether the court actually believed that all of the information in the news report had been made public or whether it just wished to dispose of the claims of a serial litigant without parsing the specifics.

Ms. Pollock continued the litigation for years, including appealing the eventual summary judgment opinion to an appellate court and the Ohio Supreme Court.⁵⁶

C. *Impact Litigation Against Broader Policies*

In more recent times, substantive due process claims have been used to combat cisnormative legal rules or systems, sometimes with significant success. In this context, cisnormative legal rules refer to practices or procedures that assume that a person's sex assigned at birth is the same as their

⁵⁰ See, e.g., *Diaz v. Oakland Trib., Inc.*, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983); *Schuler v. McGraw-Hill Co.*, 989 F. Supp. 1377 (D.N.M. 1997), *aff'd*, 145 F. 3d 1346 (10th Cir. 1998). Both are discussed at length by Anita Allen. Other outing cases occur in the broader context of employment discrimination. See Allen, *supra* note 13.

⁵¹ I use the term as it is used by the court.

⁵² *Pollock*, 690 N.E. 2d at 906.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 909.

⁵⁶ Ms. Pollock then sued the lawyers for the media defendants, on a variety of claims. *Pollock v. Vollman*, Appeal No. C-010261, Trial No. A-0001303. (Ohio Ct. App. July 31, 2002).

gender—for example, recording sex assigned at birth on a driver’s license or birth certificate and not allowing for updates or changes. The usage of substantive due process rights for this purpose can be seen as far back as the late 1970s, with successful challenges brought by transsexual individuals in Chicago and Houston to cross-dressing ordinances.⁵⁷

In the late 2010s, privacy rights theories were successfully used to sue government agencies for failing to provide options for state identification that accurately reflect gender.⁵⁸ In *Love v. Johnson*,⁵⁹ a group of transgender plaintiffs brought a 42 U.S.C. § 1983 action against the Michigan Secretary of State for failing to provide methods of changing the gender indicated on a driver’s license.⁶⁰ In their complaint, the plaintiffs focused on the fact that they were required to reveal “their transgender status, their transition, and/or medical condition to all who see [their] licenses, including complete strangers” as part of their substantive due process claim.⁶¹ The plaintiffs’ experiences are illustrated with a number of stories, including experiencing embarrassment while voting, being misgendered, and encountering hostile service at a hardware store.⁶²

The *Love* plaintiffs’ informational privacy claim under the Fourteenth Amendment survived a motion to dismiss in the district court because it fit within the Sixth Circuit’s requirements that the “release of personal information could lead to bodily harm” and “the information released was of a sexual, personal, and humiliating nature.”⁶³ The court went on to find that the Michigan Secretary of State had not met the burden of narrow tailoring and held that the plaintiffs had raised a cognizable privacy claim under § 1983, declining to consider the other four constitutional grounds (including equal protection and free speech).⁶⁴ Additional litigation was filed under a similar

⁵⁷ Chicago litigants were combatting a prosecution, *City of Chicago v. Wilson*, 389 N.E.2d 522, 522 (Ill. 1978), whereas the Houston case was affirmative litigation, *Doe v. McConn*, 489 F. Supp. 76, 78 (S.D. Tex. 1980).

⁵⁸ See, e.g., *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *Ray v. Himes*, No. 2:18-CV-272, 2019 WL 11791719 (S.D. Ohio Sept. 12, 2019).

⁵⁹ 146 F. Supp. 3d 848 (E.D. Mich. 2015).

⁶⁰ *Johnson*, 146 F. Supp. 3d at 848.

⁶¹ *Id.* at 857. Michigan’s policy at the time of the lawsuit required a changed birth certificate in order to update the gender marker on a license, even though a person applying for a license for the first time in Michigan was not required to produce their birth certificate.

⁶² *Id.* at 855. The complaint outlines a number of these incidents. (“Emani Love was publicly embarrassed when she went to vote and the precinct worker outed her as transgender after looking at her state I.D. which incorrectly lists her gender as male”; “E.B. felt awkward and embarrassed when he was asked for an I.D. to order a drink at a bar and after seeing the ID, the server started calling him ‘ma’am’”; “When Tina Seitz had to show her driver’s license at a retail store. . .the clerk looked at her license and said ‘that’s not you’”; “Codie Stone had a hostile experience at a hardware store where the clerk was extremely friendly to him before he produced his license after which the clerk’s tone and demeanor changed completely when he provided his license listing the incorrect gender.”).

⁶³ *Id.* at 853.

⁶⁴ *Id.* at 851.

theory, including *Foster et al v. Andersen et al*⁶⁵ in Kansas, which resulted in a consent judgment.⁶⁶ Similarly, in *Arroyo Gonzalez v. Rossello Nevares*⁶⁷ a district court in Puerto Rico held that the failure to allow for gender marker changes on birth certificates violated the transgender plaintiffs' rights to informational privacy.⁶⁸

Likewise in *K.L v. State, Dept. of Admin., Div. of Motor Vehicles*,⁶⁹ an Alaska state appellate court found that the failure to provide a method of correcting gender marker designations on a driver's license violated the right to privacy embodied in the Alaska Constitution.⁷⁰ Other transgender plaintiffs have successfully pushed for state registrars of vital records to dispense with the requirement of genital surgery under due process and privacy rights theories, again based on concerns about stigma.⁷¹

Of course, much more recently, these substantive due process privacy claims have run afoul of *Dobbs*, with an Oklahoma district court finding that the substantive due process privacy right was not rooted in history and tradition, and thus, despite the many circuit courts that had recognized a similar privacy interest, plaintiffs could not prevail upon such a theory.⁷² This more recent doctrinal innovation limits the potential usefulness or validity of a substantive due process privacy theory for combatting existing cisnormative systems.

Substantive due process privacy claims have also been raised in litigation combatting new laws stemming from anti-trans backlash, although such claims seem to have been unsuccessful so far. As mentioned in the introduction, in the litigation over North Carolina's 2016 bathroom ban, HB2, the plaintiffs made a substantive due process privacy argument, though the court found that plaintiffs had not shown they would succeed on the merits at the preliminary injunction stage.⁷³ In that decision, the court noted the significant differences between the circumstances of *Love, K.L., Powell*, and other cases and the one in which plaintiffs found themselves. The court reasoned that in previous cases, the information was directly disclosed via the

⁶⁵ No. 18-2552-DDC-KGG, 2019 WL 329548 (D. Kan. Jan. 25, 2019); see Complaint at 37, *Foster*, No. 18-2552-DDC-KGG (D. Kan. Jan. 25, 2019).

⁶⁶ Consent Judgment, *Dkt #33 Foster*, No. 18-2552-DDC-KGG (D. Kan. Jan. 25, 2019). Parts of the judgment have been set aside post *Dobbs*. See *infra* note 72.

⁶⁷ 305 F. Supp. 3d 327 (D.P.R. 2018).

⁶⁸ *Id.* at 333.

⁶⁹ No. 3AN-11-05431-CI, 2012 WL 2685183 (Alaska Super. Ct. 2012).

⁷⁰ No. 3AN-11-05431-CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. 2012).

⁷¹ See Complaint, at 2, *Grey v. Hasbrouck*, 33 N.E.3d 819 (Ill. App. Ct. 2015) (granting attorneys' fees to plaintiffs who successfully obtained a consent decree eliminating the requirement of genital surgery based on Illinois constitutional due process and privacy right claims).

⁷² *Fowler v. Stitt*, No. 22-CV-115-JWB-SH, 2023 WL 4010694, at *16 (N.D. Okla. June 8, 2023) ("But here, Plaintiffs have failed to allege sufficient facts for the court to conclude that the right to amend the sex designation on their birth certificate has historically been protected.")

⁷³ See, e.g., First Amended Complaint for Declaratory and Injunctive Relief, *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (No. 1:16-CV-00236-TDS-JEP) (asserting constitutional informational privacy claim).

mismatched birth certificate or driver's license, whereas the privacy violation that resulted from HB2 required an inferential leap from their use of a particular bathroom.⁷⁴ Additionally, the Fourth Circuit had a much less favorable informational privacy/substantive due process right than the Sixth Circuit, where many of the successful uses of substantive due process rights had been brought.⁷⁵ Perhaps because of this regional variance, or the bad case law, few litigants have used substantive due process-based privacy claims in class-wide litigation against anti-trans policies since.

II. PRIVACY'S PROBLEMS

Scholars have described many pitfalls of using privacy claims by a broad range of litigants. But even beyond that, privacy has long been the domain of the privileged. As Khiara Bridges has argued in her work, privacy rights in the United States are functionally not extended to the poor, especially poor women.⁷⁶ Bridges points out that poor mothers who seek to access medical care are required to share information about their romantic relationships, employment status, and the mundane details of their lives.⁷⁷ Explaining that wealthier women can protect themselves from these intrusions and that poor women have no meaningful redress under law, Bridges argues that two explanations are possible: that her subjects are deprived of effective privacy rights, or that they do not possess privacy rights at all.⁷⁸

Extending Bridges' thesis to transgender people allows us to understand the problem with privacy claims by transgender people in two ways. First, like Bridges does with poor mothers, we can point out that structural factors about how privacy claims work ensure that they do not provide effective remedies for many of the harms experienced by transgender people, as discussed above.⁷⁹

⁷⁴ *Carcaño*, 203 F. Supp. 3d at 648 ("Even under Part I, an individual's choice of bathroom does not directly or necessarily disclose whether that person is transgender; it merely discloses the sex listed on the person's birth certificate. Part I does not disclose medical information about any persons whose gender identity aligns with their birth certificate, either because they are not transgender or because they have successfully changed their birth certificate to match their gender identity (with or without sex reassignment surgery). Nor does Part I disclose medical information about transgender individuals whose name, appearance, or other characteristics do not readily identify their gender identity. Part I could only disclose an individual's transgender status inasmuch as third parties are able to infer as much in light of the person's birth certificate and appearance.").

⁷⁵ *See, e.g.*, *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998).

⁷⁶ KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 207 (2017).

⁷⁷ *See id.* at 5.

⁷⁸ *Id.* at 208.

⁷⁹ *See Allen, supra* note 13, at 1764 ("In principle, LGBT individuals, like everyone else, can recover for highly offensive wrongful acts of intrusion, publication, or appropriation. But . . . I reluctantly conclude that recovery for invasion of privacy is unlikely where the 'reasonable person' and the 'reasonable LGBT' person part ways."); *see also* Lauren Henry Scholz, *Privacy Remedies*, 94 IND. L.J. 653, 653-659 (2019) (arguing that privacy remedies play a significant role in defining rights).

First, and perhaps most notable, is that many claimants just don't recover. As Anita Allen described in her groundbreaking 2010 article, "the theoretically promising invasion of privacy torts have too often been practical disappointments for LGBT plaintiffs in the courts."⁸⁰ Although Allen's coverage of transgender litigants is quite limited, my own more recent review of the tort cases aligns with hers.⁸¹ The rough outline follows the claim in *Doe*, discussed above—an employer or other organization in power engages in an egregious pattern of behavior. Then a transgender litigant sues, bringing privacy claims alongside more substantive ones. The privacy claims, for a variety of potential reasons, are dismissed.

However, it seems plausible that this phenomenon is not specific to transgender litigants—privacy torts may be easier to claim than to succeed on, more generally.⁸² More relevant is the fact that even when transgender litigants might successfully claim privacy rights, whether grounded in tort or substantive due process, there is a broader set of problems at play. In particular, I focus on inequalities in access to privacy arguments (which I call distributional issues) and the tendency of privacy claims to stigmatize identity or conduct (scripting harms).

A. *Distributional Issues*

Privacy claims by transgender people are more likely to succeed when brought by those with more privilege. In other words, privacy remedies that do exist are more likely to be effective for transgender people who do not face marginalization on any axis other than their gender identity. This is most directly observable in after-the-fact claims rooted in tort law, but the same types of distributional effects also arise in the context of informational privacy from driver's licenses or court documents.

The first reason that privacy claims are likely to be best able to help those who are better positioned is that privacy claims rest on keeping information private, and that is dependent on economic resources and made more difficult by institutional racism. As Scott Skinner-Thompson has described in the broader context of the tort of public disclosure of private facts, the more marginalized a population, the less likely they are to be able

⁸⁰ Allen, *supra* note 13, at 1715–1716.

⁸¹ For a prior version of this article, I reviewed every case that included the word “transgender” or “transsexual” and “privacy” prior to 2018. In the vast majority of the tort cases that I reviewed, transgender litigants were unsuccessful. As Allen points out, such analysis is susceptible to the critique that it does not account for settled cases. Allen, *supra* note 13, at 1762. However, like her, I am skeptical that such widespread settlements are occurring. *See* Allen, *supra* note 13, at 1732 (“But in the absence of evidence either of a strong deterrent effect or a history of favorable settlements, I conclude based on the available evidence that the intrusion tort is a tort of minimal practical utility to LGBT plaintiffs.”).

⁸² *See* Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051 (2018). Scholars have also critiqued the privacy torts from many angles. *See, e.g.*, Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1891 (2010).

to advance the kinds of complete secrecy arguments necessary to recover.⁸³ Skinner-Thompson explains that this phenomenon is true across a number of different axes of marginalization, from economic disadvantage, to race, to queerness.⁸⁴ And Allen notes that many queer people engage in a practice of “selective disclosure,” disclosing their transgender status or sexual orientation to specific people but not more broadly.⁸⁵ This practice means that for many courts, the information is not secret enough to be protected, as it is known to some.⁸⁶

For transgender litigants, complete secrecy often means detailing the lengths they have gone to keep their transgender identity secret, and selective disclosure can result in a lack of recovery.⁸⁷ The all-or-nothing privacy paradigm also fails to allow for circumstances in which a transgender person is comfortable talking about some aspects of their transition or gender identity publicly, but not others.⁸⁸

But more importantly, keeping one’s transgender status secret requires significant personal and monetary costs.⁸⁹ Updating ones’ documentation or undergoing a name change can require significant fees, not to mention the assistance of counsel or experts if pro bono assistance cannot be found.⁹⁰ In the 2015 National Transgender Discrimination Survey, less than one fifth of transgender people who have transitioned had fully updated their identity documents, and one third had not updated any of them.⁹¹ These numbers were lower for Black transgender people⁹² and much lower for Latino/a/x

⁸³ See SKINNER-THOMPSON, *supra* note 11, at 191; see also Skinner-Thompson, *supra* note 82, at 2067.

⁸⁴ SKINNER-THOMPSON, *supra* note 11, at 16, 22, 28.

⁸⁵ Allen, *supra* note 13, at 1746.

⁸⁶ Allen, *supra* note 13, at 1748-50. Some courts do allow for privacy protection in cases of selective disclosure—for example, in cases about proceeding under a pseudonym. See, e.g., *Doe v. Triangle Doughnuts, LLC*, No. 19-CV-5275, 2020 WL 3425150, at *5 (E.D. Pa. Jun. 23, 2020) (allowing suit under pseudonym as plaintiff had “only revealed that she was transgender and HIV-positive to counsel, close friends, family, treating physicians, and employers ‘to the extent required’”). But privacy tort-based claims seem less forgiving than litigation under a pseudonym.

⁸⁷ See *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at *1 (N.D. Ohio Nov. 9, 2001) (finding that high school yearbook information being public meant that information shared was not private).

⁸⁸ See, e.g., *Doe v. Fedcap Rehab. Servs., Inc.*, 17-CV-8220, 2018 WL 2021588, at *2-3 (S.D.N.Y. Apr. 27, 2018) (finding that sharing of information about gender non-conformity publicly weighs against claim that harm would be caused of the disclosure of their trans-masculinity).

⁸⁹ See *Grimes v. Cnty. Of Cook*, 455 F. Supp. 3d 630, 637 (N.D. Ill. 2020) (describing the significant steps that the transgender plaintiff took to keep his transgender status secret).

⁹⁰ See NAT’L CTR. FOR TRANSGENDER EQUAL., *Issues – Identity Documents & Privacy*, <https://transequality.org/issues/identity-documents-privacy> [<https://perma.cc/2UF8-35Q3>] (last visited October 1, 2023).

⁹¹ NAT’L CTR. FOR TRANSGENDER EQUAL., *The Report of the 2015 U.S. Transgender Survey*, 9 (2015), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/XFH9-JKG3>] (last updated Nov. 2017).

⁹² NAT’L CTR. FOR TRANSGENDER EQUAL., *2015 U.S. Transgender Survey – Report on the Experiences of Black Respondents*, 22 (2015), <https://transequality.org/sites/default/files/docs/>

transgender people.⁹³ The cost of changing identity documents was cited as significant for many people who had not been able to update their documentation.⁹⁴ In the case of many of the historical trans litigants, it was only due to their ability to move far away from their place of birth, not to mention the fact that they had not created an online trail, that allowed them to effectively claim that no one knew they were transgender.⁹⁵

Even beyond identity documents, secrecy often requires not being visibly transgender, sometimes called “passing” or going “stealth.”⁹⁶ Not being out about one’s transgender identity, even selectively, can make it more difficult to connect to community and to be “seen.”⁹⁷

Going stealth often requires medical transition, and access to medical transition has always turned on convincing medical professionals that one is the right kind of trans, a process that is racialized and limited by monetary resources within the United States. As Jules Gill-Peterson and C. Riley Snorton have described, histories of formal transition in the 1960s and 1970s are inescapably linked to Whiteness.⁹⁸ White transgender people have both had easier access to the resources required to effectively transition or maintain privacy over their information, and also been advantaged by the systemic racism of the medical gatekeeping system.⁹⁹

Even beyond the historical and current vision of transition as limited to those who are White, the reality of medical transition limits its availability to those who lack financial resources. Even now, gender affirming care is not covered or is capriciously denied by many insurance companies.¹⁰⁰ In many

usts/USTSBlackRespondentsReport-Nov17.pdf [https://perma.cc/FKC8-5ZG6] (last updated Nov. 2017).

⁹³ NAT’L CTR. FOR TRANSGENDER EQUAL., *2015 U.S. Transgender Survey – Report on the Experiences of Latino/a Respondents*, 23 (2015), <https://transequality.org/sites/default/files/docs/usts/USTSLatinReport-Nov17.pdf> [https://perma.cc/5RL5-LD64] (last updated Nov. 2017).

⁹⁴ *The Report of the 2015 U.S. Transgender Survey*, *supra* note 91, at 82.

⁹⁵ See Meredith Tausan, *Along With Pain, The Joy of Stealth*, THEM (May 26, 2020), <https://www.them.us/story/along-with-pain-the-joy-of-stealth-meredith-tausan-fairest> [https://perma.cc/8P6P-PPJ9] (last visited Sep 25, 2023) (discussing the differences between 10 years ago and now in terms of ability to go “stealth.”)

⁹⁶ See, e.g., Nat Vikitsreth, *The Safety, Privilege, and Invisibility I Found Living Stealth*, THEM (Mar. 31, 2022), <https://www.them.us/story/living-stealth-as-trans-visibility-passing-essay> [https://perma.cc/2YHP-TJMB] (last visited Sep 25, 2023). See also *Grimes v. Cnty. Of Cook*, 455 F. Supp. 3d 630, 639 (N.D. Ill. 2020).

⁹⁷ Even courts in more permissive settings do seem to analyze whether a transgender person is out in their community. *Delaware Valley Aesthetics, PLLC v. Doe 1*, No. CV 20-0456, 2021 WL 2681286, at *3 (E.D. Pa. June 30, 2021) (requiring that transgender woman keep her “transgender status confidential in the community” for a factor to favor anonymity).

⁹⁸ JULES GILL-PETERSON, *HISTORIES OF THE TRANSGENDER CHILD* 27 (2018); C. RILEY SNORTON, *BLACK ON BOTH SIDES* 141 (2017).

⁹⁹ Damien W. Riggs, Ruth Pearce, Carla A. Pfeffer, Sally Hines, Francis White, & Elisabetta Ruspini, *Transnormativity in the Psy Disciplines: Constructing Pathology in the Diagnostic and Statistical Manual of Mental Disorders and Standards of Care*, 74 AM. PSYCHOLOGIST 912 (2019).

¹⁰⁰ *The Report of the 2015 U.S. Transgender Survey*, *supra* note 91, at 95.

states, Medicaid plans, which are one of few healthcare options available to low income people, do not consistently cover gender-affirming care.¹⁰¹ Since Black and Latino/a/x transgender people are disproportionately more likely than transgender people as a whole to lack insurance or to be on Medicaid,¹⁰² claims that implicitly require or rely on medical transition will be more likely to be unavailable to transgender people of color. To avoid belaboring the point further, at each decision point where transgender litigants might take steps to be able to control transgender status information, economic barriers and systemic racism result in those with less privilege facing additional barriers to secrecy.

Second, the types of information that transgender people might seek to keep private is often required by the state. As Khiara Bridges notes in her work on poor mothers, state actors can compel information by virtue of the need to receive state assistance.¹⁰³ Although some courts have exempted information that the state collects from being considered publicly disclosed, not all do.¹⁰⁴ Many cases where transgender litigants bring privacy claims turn on questions of documentation created by the state, such as birth certificates, criminal records, and even, as in *Doe*, high school records.¹⁰⁵ The more that the state is involved in a transgender person's life, the more likely that they will produce public records that might prevent them from recovering against someone who outs them. Given that one result of employment discrimination is that many transgender people participate in underground economies that are criminalized, collateral consequences stemming from criminal charges represent yet another opportunity for the state to produce records that later make it more difficult to keep one's information private.¹⁰⁶

¹⁰¹ See SHAWNA CHEN, *West Virginia's Medicaid Program Must Cover Gender-Affirming Surgeries, Judge Rules*, AXIOS (Aug. 4, 2022), <https://www.axios.com/2022/08/04/west-virginia-medicaid-trans-health> [<https://perma.cc/4K9M-UGPZ>] (last visited Sep 25, 2023).

¹⁰² The percentage of Black USTS survey respondents with no health insurance was 20%, whereas White respondents were 14%. Compare NAT'L CTR. FOR TRANSGENDER EQUAL. *supra* note 90 with NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 92. The percentage of Black USTS survey respondents on Medicaid was 18%, whereas on the survey overall it was 13%. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 92, at 18.

¹⁰³ BRIDGES, *supra* note 76, at 4.

¹⁰⁴ *Doe v. Pa. Dep't of Corr.*, No. 4:19-CV-01584, 2019 WL 5683437, at *3 (M.D. Pa. Nov. 1, 2019) (allowing for plaintiff to proceed under a pseudonym given that "he avers that up to this day he has kept his transgender status a closely guarded secret, disclosing it only as necessary to comply with legal requirements."):

¹⁰⁵ See *Ray v. Himes*, No. 2:18-CV-272, 2019 WL 11791719, at *9 (S.D. Ohio Sept. 12, 2019) (finding that birth certificates were public records but that invasion of privacy interest resulted in the connection between the birth certificate and the person, and thus their public record status was not dispositive); *Brown v. Hamilton Cnty.*, No. 1:16-CV-412, 2018 WL 4558465, at *12 (E.D. Tenn. Sept. 21, 2018) (rejecting public disclosure of private facts claim based on publication of dead name with mugshot because "[p]laintiff has no general constitutional right to the nondisclosure of her criminal record"); *Myers*, *supra* note 39; see also *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (stating that information contained in public record is not "private").

¹⁰⁶ See *Brown*, 2018 WL 4558465 at *1 (discussing previous criminal conviction of transgender woman under deadname).

The requirement of disclosure is not limited to traditional government records. Because of societal transphobia, transgender people often must pursue litigation that risks waiving their privacy rights, if they do not know enough to file under a pseudonym.¹⁰⁷ Although the court's opinion makes it difficult to tell if that is indeed what happened in *Pollock v. Rashid*, the kinds of information litigants must share in order to get access to medical care in prison are often deeply intimate and personal.¹⁰⁸

Finally, there are structural realities to who and how people pursue after-the-fact privacy claims. Litigants must be able to actually show harm stemming from the privacy invasion that is recognized by the law. Such a requirement may explain why many individuals bring privacy claims alongside employment discrimination claims, as firing may provide a clear way to calculate potential damages. Although damages for emotional harm can be a potential recovery, they are limited by caps and generally devalued.¹⁰⁹ But of course, such a litigation strategy requires being employed or offered a job in the first place. As of 2015, the unemployment rate among transgender people of color was 20%, four times higher than the U.S. unemployment rate.¹¹⁰ As per Skinner-Thompson's argument at the beginning of this section, those who have less privilege may be less able to effectively enforce their rights.

Finding a lawyer presents one final structural barrier to who can advance privacy claims. Although some litigants might proceed pro se, many employment cases and tort claims are brought by counsel working for contingency fees, which requires some expected payout and a tortfeasor (or employer) who is not judgment proof. Lawyers in claims against the government under § 1983 may fare better, due to the possibility of attorneys' fees. But even assuming that a transgender litigant had a good case, finding an attorney who might take it on outside of strategic litigation could prove difficult. The deck is stacked against privacy claims, and with that, against transgender litigants being able to use them to effectively vindicate their theoretical privacy rights.

B. Scripting Shame and Stigma

Privacy claims are not just legal tools. They create ways to understand experiences and contextualize them. In her work on the nonconsensual

¹⁰⁷ *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (“The right to maintain the confidentiality of one’s transsexualism may be subject to waiver.”); *see also Pollock v. Rashid*, 690 N.E.2d 903, 909 (Ct. App. Ohio 1996) (dismissing invasion of privacy claim due to the inclusion of relevant facts brought by the plaintiff lawsuit).

¹⁰⁸ *See, e.g.,* First Amended Complaint, *Shiloh Heavenly Quine v. Beard*, No. 14-cv-02726-JST (N.D. Cal. Dec. 10, 2014), *available at* <http://transgenderlawcenter.org/wp-content/uploads/2014/12/Quine-First-Amended-Complaint.pdf> [<https://perma.cc/FQT6-BBB8>].

¹⁰⁹ *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 178–182 (2020).

¹¹⁰ *The Report of the 2015 U.S. Transgender Survey*, *supra* note 91.

sharing of intimate imagery (NCII, also known as “revenge porn”), Brenda Dvoskin highlights that narratives of harm and violence that occur due to privacy invasions and result in discrimination and harassment can be conceptualized as “scripts.”¹¹¹

Dvoskin points out that law and scholarship around non-consensual intimate imagery frame the sharing of nude images as a specifically dire type of harm, one that is “unanswerable.”¹¹² Advocates emphasize the significant and very real consequences of images being shared without permission or viewed with consent.¹¹³ In the context of non-consensual intimate imagery, a significant number of the harms that are attributed to the violation of privacy come from the consequences of “bigoted attitudes” and the stigma around sexual imagery.¹¹⁴

As Dvoskin points out, the work of scholars like Danielle Citron and Mary Anne Franks is that the harms of NCII must be both “acknowledged and contested,” with law as one tool to push back against harmful social norms.¹¹⁵ They see the law as vital for achieving both of these things. But as Dvoskin argues, law is not just “an ex-post reaction to harmful social norms, but as constitutive of those norms and the spaces where those norms develop.”¹¹⁶

Dvoskin’s work highlights an essential problem for those who seek to use privacy to protect against harms that stem from societal discrimination. It is impossible to disentangle the internal feelings and experiences of the victim about the privacy violation from the reality of what said violation means in a context in which the shared information can (and is) used to fire them, harass them, and otherwise uproot their life.

To be clear, Dvoskin is not suggesting, and nor am I, that victims’ feelings of shame, stigma, and fear are not real. However, queer scholars have long pointed out that the project of making a harm visible can also end up failing to contest the ideological system that produces it. Per Dvoskin, “the experience is scripted because it gets its meaning from the social decision to prioritize certain interpretations and exclude others.”¹¹⁷

In the context of NCII, scripts reinscribe the idea that people should feel shame about their own bodies and the production of sexually explicit materials. These scripts are appealing because of the real harm that results due to discrimination against women and feminine people for the production of or appearance in sexually explicit materials. It is difficult for those

¹¹¹ See Brenda Dvoskin, *Speaking Back to Sexual Privacy Invasions*, 99 WASH. L. REV. *13–14, 24 (forthcoming 2023).

¹¹² *Id.* at 14.

¹¹³ *Id.* at 13–14.

¹¹⁴ *Id.* at 18.

¹¹⁵ *Id.* at 17.

¹¹⁶ *Id.* at 17.

¹¹⁷ *Id.* at 25.

who wish to make use of the remedies created under laws prohibiting NCI without participating in this particular scripted process.

The concept of scripts and their relationship to privacy and harm allows for a nuanced critique of the use of privacy claims by transgender litigants. Although some litigants experience significant distress, the material harms that come from privacy invasions primarily stem from transphobia and the ability for people in the world to harm or discriminate against trans people for being trans. It is certainly possible, and in some cases, probable, that outing someone as transgender is done with the intention of invoking societal structures of transphobia. But fundamentally, the privacy violation and discriminatory harm are different events.

Despite that, transgender people are encouraged to see their transgender status being made public as outing, and that outing as the harm, in and of itself. Case law ties these things tightly together, even from a doctrinal angle—public disclosure of private facts requires a showing of damages to be actionable. To conflate them assumes that being discriminated against is the natural result of being out, or outed, as transgender.

Transgender litigants follow the script at their own peril. It is hard to separate even modern-day litigation over outing from lines like the one in *Powell v. Schriver*, about transsexualism being “excruciatingly private and intimate.”¹¹⁸ Both substantive due process privacy rights and traditional privacy torts turn on a theoretically objective metric of what is shameful, outrageous, or deserving of societal opprobrium.¹¹⁹ As Kathleen Guzman pointed out in her 1995 article on outing of lesbians and gay men, “[a] successful private facts plaintiff perpetuates the characterization of homosexuality as secret and objectionable, leaving the plaintiff vulnerable to another form of degradation, this time self-imposed.”¹²⁰ In order to gain access to the tools of privacy law, transgender litigants must recite the same statistics of violence, stories of harm, and explanations of stigma that many of us seek to avoid. And they are encouraged to explain these dynamics as resulting from them being out as transgender, rather than naming them as what they are—the effects of transphobia. “The project of making the experience visible precludes critical examination of the workings of the ideological system itself.”¹²¹

I am not arguing that transgender litigants can just “script” away societal transphobia or sexism, or that those who argue that their privacy has been violated are lying about their feelings of anguish and fear. And some transgender people might want to keep their transgender status private,

¹¹⁸ *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

¹¹⁹ For a more in-depth discussion of the offensiveness prong, see Patricia Sanchez Abril & Alissa del Riego, *Judging Offensiveness: A Rubric for Privacy Torts*, 100 N.C. L. REV. 1557 (2021).

¹²⁰ Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1590 (1995).

¹²¹ Joan W. Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773, 778 (1991).

independent of the scripts that come along with privacy law claims. But it is hard to read court decisions where transgender litigants win and where judges say, in passing, lines like “[the p]laintiff wants to live and present herself to the public as a female, so she does not publicly identify herself as transgender,” as if those two things are mutually exclusive.¹²² Other claims that sound in different bodies of law rarely require the same explanation of stigma that privacy claims seem to.

III. TRANSNORMATIVE TROPES

Privacy claims brought by transgender plaintiffs almost always rely on normative assumptions about gender. As a starting point, they generally depend on the social rule that people who are not visibly gender non-conforming are presumed to be cisgender.¹²³

But deployment of assumptions and narratives go beyond this obvious invocation. Early decisions involving the privacy of transgender litigants demonstrate many of the characteristics of cisnormative narratives, including pathologization, aversion, and sexualization of transgender people.¹²⁴ It is part of what makes them so jarring to read. Take, for example, *Doe v. McConn*,¹²⁵ where the court opens by saying “Transsexualism is a rare syndrome of gender identity disturbance which appears to occur more frequently in male than in female subjects. The cause of this syndrome is unknown.”¹²⁶ Note that this is a case where transgender litigants win.

In seeking to push back against these types of transphobic arguments, transgender people and advocates more broadly had to point to something else. Medical criteria and diagnoses had a structural advantage during that search, as they had the advantage of the legitimacy of credentialed professionals that judges would recognize, as well as the creation of a specific positive test that individual people could be measured against.¹²⁷ Enter transnormativity. Although those who cite transnormative tropes are not explicitly arguing in favor of restricting rights or legal protection, by citing certain factors as evidence of what makes a person trans, the negative

¹²² *Doe v. Triangle Doughnuts, LLC*, No. 19-CV-5275, 2020 WL 3425150, at *5 (E.D. Pa. June 23, 2020).

¹²³ To explain this in more detail, plaintiffs who wish to show that their transgender status was private do not usually cite examples of themselves verbally claiming that they were cisgender. Instead, they rely on the idea that no one suspected them of being transgender, or that there was no reason to do so, as proof. *See, e.g.*, *Grimes v. Cnty. of Cook*, 455 F. Supp. 3d 630, 637 (N.D. Ill. 2020).

¹²⁴ *See* Nova J. Bradford & Moin Syed, *Transnormativity and Transgender Identity Development: A Master Narrative Approach*, 81 *SEX ROLES* 306 (2019) (describing elements of cisnormative narratives); *Doe v. McConn*, 489 F. Supp. 76, 77 (S.D. Tex. 1980).

¹²⁵ 489 F. Supp. 76 (S.D. Tex. 1980).

¹²⁶ *Id.* at 77.

¹²⁷ Johnson, *supra* note 9, at 467; *see also* Riggs et al., *supra* note 99, at 916 (discussing the rise of medical diagnosis as a vehicle for understanding trans experience).

implication is clear.¹²⁸ As Austin Johnson explains, for those who do not adhere to transnormative narratives, “transnormativity marginalizes and at times eclipses experiences, restricting their access to gender affirmation in interactions with both transgender and cisgender people and institutions.”¹²⁹

Prior to Johnson, many other scholars had articulated key elements of hierarchy within transness.¹³⁰ I draw on that work, as well as Johnson and Nova Bradford and Moin Syed, to identify four key aspects of transnormativity. First, transnormative narratives emphasize medical diagnosis as defining transness and medical intervention as standard. Second, transnormative narratives emphasize “nascence,” the idea that trans identities manifest early in life and are static or intrinsic.¹³¹ Finally, transnormative narratives use gender role allegiance/gender-conformity as an essential marker of the truth of a person’s transgender identity, affirming binary gender identities while downplaying or ignoring fluid or non-binary ones.¹³² Some of these elements have an obvious conceptual relationship to certain types of privacy claims (for example, those that make it easier to pass). But others are further afield and cannot be explained by reference to a need to pass as cisgender.

Given that transnormativity developed in response to cisnormative systems and to allow for trans identity to be intelligible and policed by cis and trans people alike, its presence in legal argument more generally is unsurprising. After all, in order to bring an equal protection claim based on suspect class membership, one first might need to show that one is a member of a suspect class, which requires some level of definition of who is and is not included. However, privacy claims should not require that litigants prove their transgender status—the presence of privacy rights does not, in many cases, turn on the exact boundaries of who is transgender and who is not.¹³³ But yet more recent decisions often contain aspects of transnormativity, some of which may come directly from litigants and others which may be adopted by the courts without specific instigation.

A. *Medicalization*

Core to Johnson’s concept of transnormativity is that transgender people who wish to and then undergo medical transition steps are privileged

¹²⁸ Although it may seem self-evident that legal rights could require such scripts, it is worth noting that there are areas of law where courts are discouraged from interrogating the specificity and outer limits of belonging in a group. First Amendment religion claims, for example.

¹²⁹ Johnson, *supra* note 9, at 467.

¹³⁰ See, e.g., KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* (1995); Mel Chen, *Everywhere Archives: Transgendering, Trans Asians, and The Internet*, 25 AUSTRALIAN FEMINIST STUD. 199 (2010). See generally DEAN SPADE, *NORMAL LIFE* (2008).

¹³¹ This is also known as the “born in the wrong body” trope.

¹³² Bradford & Syed, *supra* note 124, at 313.

¹³³ At least this is true of tort claims.

within trans hierarchies. This is because access to medical treatment structures modern transgender identity in the United States.¹³⁴ As Johnson says, “a medical professional must determine that the individual is indeed the gender they claim to be and thus assign a trans identity, via a diagnosis of gender dysphoria, to that individual before they receive recommendation to proceed with medical and legal transition.”¹³⁵

Given that, it is not surprising that medical evidence is invoked as proof of transgender identity in legal cases. However, what is notable is that in many of the privacy cases, the fundamental truth of whether someone is transgender is not part of the legal claim, *per se*—the presence of medical information or diagnoses serves to legitimize the transgender subject. In other words, medical expertise or transition steps distinguish the transsexual from the crossdresser, or articulate the seriousness with which the transgender person pursued secrecy.

In early cases, this relationship is quite direct. In *Doe v. McConn*, a case challenging an anti-cross-dressing ordinance, one of the plaintiffs was actually a psychiatrist who was treating the transgender plaintiffs.¹³⁶ The court relied on information from that plaintiff to find the ordinance unconstitutional “as applied to individuals undergoing psychiatric therapy in preparation for sex-reassignment surgery.”¹³⁷

But moreover, it is gender dysphoria or transgender status’ origins as medical information that allows for individual claims based on substantive due process privacy rights.¹³⁸ In *Powell*, the court originally drew a comparison between being outed as HIV-positive and being outed as transsexual, relying specifically on the privacy of medical information to justify its holding.¹³⁹ This explicit connection to medical diagnosis and information might explain why transgender litigants seem to use substantive due process privacy claims more than other marginalized groups. However, doing so rests the protection for transgender litigants who bring such claims on the explicit connection between their transgender status and their medical information, which perpetuates the idea that medical transition and acceptance by the medical establishment is what defines transness. As I note above, access to medical care is not evenly distributed. Furthermore, defining transgender identity based on medical standards reaffirms the role of

¹³⁴ Johnson, *supra* note 9, at 484.

¹³⁵ *Id.* at 469.

¹³⁶ *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980).

¹³⁷ *Id.* at 79–80.

¹³⁸ See *Doe v. Pennsylvania Dep’t of Corr.*, No. 20-CV-00023, 2021 WL 1583556, at *2 (W.D. Pa. Feb. 19, 2021), *report and recommendation adopted*, No. CV 20-23, 2021 WL 1115373 at *13 (W.D. Pa. Mar. 24, 2021) (explaining that *Doe*’s substantive due process privacy claim turns on medical information); *Powell v. Schriver*, 175 F.3d 107, 108 (2d Cir. 1999) (same).

¹³⁹ *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (“Finally, we noted that the interest in the privacy of medical information will vary with the condition.”)

(primarily cisgender) gatekeepers as determining what qualifies as gender non-conforming enough to merit access to care.¹⁴⁰

B. *Nascence*

Nascence refers to the idea that trans identities are expected to “manifest very early in life” or that “gender identity is an inherent, intrinsic and essential quality of a person.”¹⁴¹ Many transgender narratives across contexts highlight early expressions of “cross-gender” expression or desire as evidence of early transgender truth.¹⁴² The intrinsic or inherent element of gender identity is also used to distinguish being transgender from “chosen” means of gender expression. Just as a matter of logistics, the earlier that a transgender person comes out as transgender, the higher the likelihood they are able to successfully engage in the types of identity management and privacy protection required to recover damages in privacy cases. One would expect early trans identity to show up as relevant to when a trans litigant is engaged in the process of keeping their gender identity a secret.

But nascence is usually used in privacy cases as evidence of the truth of gender identity claims.¹⁴³ In *Diaz v. Oakland Tribune*,¹⁴⁴ Diaz’s testimony that “since she was young she had had the feeling of being a woman.”¹⁴⁵ In cases involving birth certificate gender marker changes, the longevity and nascence of plaintiff’s gender is discussed in the fact section, with one transgender woman explaining that “she never questioned that she was a girl, so informed her family when she was a young girl, and told her mother that she was . . . transgender at the age 14”, and another explaining that he had known he was “different” since age 4.¹⁴⁶ In most public disclosure of private facts claims, or in substantive due process privacy claims, whether the information being shared is deeply felt or present consistently is not an element of the legal claim. The presence of nascence language in these cases likely indicates more about the desire to show the seriousness of the transgender litigant’s identity.

¹⁴⁰ Riggs et al., *supra* note 99, at 920.

¹⁴¹ Bradford & Syed, *supra* note 124, at 316; *See also* Talia Mae Bettcher, *Trapped in the wrong theory: Rethinking Trans Oppression and Resistance*, 39 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y, 383–406 (2014).

¹⁴² Johnson, *supra* note 9, at 476.

¹⁴³ *See* Doe v. Pennsylvania Dep’t of Corr., No. 20-CV-00023, 2021 WL 1583556, at *2 (W.D. Pa. Feb. 19, 2021), *report and recommendation adopted*, No. CV 20-23, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021) (explaining that “[s]ince Doe was a small child, they have felt uncomfortable in their body and preferred to be a boy).

¹⁴⁴ 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).

¹⁴⁵ *Diaz v. Oakland Trib., Inc.*, 188 Cal. Rptr. 762, 765 (Cal. Ct. App. 1983).

¹⁴⁶ *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 330 (D.P.R. 2018).

C. *Gender Role Conformity and Binary Gender Preferences*

Another aspect of transnormativity is the expectation of rigid conformity to one's gender role, based on gender identity, and a consonant social preference for binary gender identities over non-binary ones.¹⁴⁷ In order for transgender identities to fit within existing cultural structures, and for transgender people's transness to be legible as their gender identity, their expression is required to align with that identity, to the point where deviations from it can cause questioning of their identity.¹⁴⁸ Conformity with traditional gender roles becomes a requirement for gender identity affirmation.¹⁴⁹

Privacy claims are tailor-made to include transnormative tropes around gender role conformity and binary gender preferences. As mentioned above, part of this relies on the fact that keeping one's transgender status a secret requires passing as cisgender. Thus, evidence of gender role conformity is, in itself, valuable evidence of the secrecy of information that privacy claims require. Courts often provide explanations of how well litigants passed, suggesting that such passing is part of how their transgender status should be understood as genuine and their claims viable.¹⁵⁰

For example, in *Grimes v. County of Cook*,¹⁵¹ the court explains that Grimes, a transgender man, had "male pattern baldness, a low voice, a full beard, and a male build." (Never mind that women, including cisgender women, can experience "male pattern baldness.") The judge cited these facts, along with the sentiment that "Grimes has presented as 'unambiguously male' since at least 2008," and that "no one could look or sound like [Grimes] whose designated sex at birth was female without significant medical interventions."¹⁵² Likewise, in *Diaz v. Oakland Tribune*, Toni Ann Diaz's success at passing as a woman is noted in the court's opinion.¹⁵³

Litigants who pass less well, such as Ms. Myers (who was called Mrs. Doubtfire by her coworkers), often have more trouble recovering, as courts seem to engage in a preference for litigants who demonstrate gender

¹⁴⁷ Bradford & Syed, *supra* note 124, at 315–16.

¹⁴⁸ *Id.* at 316 (describing how a presumably non-binary person who used they/them was asked if they wanted their pronouns changed because they adopted a more feminine mode of gender expression).

¹⁴⁹ *Id.* (discussing how a trans man experienced pressure to endorse masculine gender roles or that he would not be accepted "as a man").

¹⁵⁰ See *Grimes v. Cnty. Of Cook*, 455 F. Supp. 3d 630, 637 (N.D. Ill. 2020).

¹⁵¹ 455 F. Supp. 3d 630 (N.D. Ill. 2020).

¹⁵² *Id.*

¹⁵³ *Diaz v. Oakland Trib., Inc.*, 188 Cal. Rptr. 762 at 765 (Cal. Ct. App. 1983) ("According to Diaz the surgery was a success. By all outward appearances she looked and behaved as a woman and was accepted by the public as a woman.").

role conformity and compliance.¹⁵⁴ Indeed, in *Myers*, the court notes that if Myers has passed more effectively, she might not have been fired at all.¹⁵⁵

Even non-binary litigants end up subject to claims about gender role conformity. For example, in *Doe v. Penn. Department of Corrections*, Doe was a non-binary prisoner whose gender dysphoria stemmed in part from their testosterone treatment but lack of hair removal.¹⁵⁶ Doe's legal claim is based on their desire to not fully conform to the expectations of masculinity, but their history is framed in terms of their childhood desire to be a boy.¹⁵⁷

Although steps taken to keep information private are a part of privacy claims, the idea that passing and gender role conformance should be part of the analysis to determine if a transgender litigant's claim is viable does not necessarily follow.

As courts have found in the cases involving drivers' licenses and birth certificates, there is a difference between an inference or perception of a person as transgender and the information being forcibly revealed.¹⁵⁸ Lengthy explanations about gender role conformance and passing conflate these pieces of information, seeming to suggest that only those who present in gender role-conforming ways or pass are entitled to privacy.

Additionally, as becomes obvious when one considers non-binary litigants, focusing on gender role-conformity or assuming the necessity of passing flattens transgender identity. To be clear, if privacy claims depend on passing as cisgender, non-binary people who use they/them or neopronouns are unlikely to find them useful. Passing as cisgender would amount to identity invalidation—many non-binary people cannot become successful transsexuals by disappearing.

However, not all privacy claims are solely about transgender status. As in *Doe*, there can be aspects of one's non-binary identity or medical transition that a transgender litigant would like keep secret, such as the medical transition steps they have pursued or their birth sex. Cases that rely on shame, stigma, or potential violence as the root of the privacy claim will make it more difficult for non-binary people who are otherwise out to succeed in advancing privacy arguments over aspects of their transition. Judges may also not understand why certain types of disclosures create privacy harms for non-binary people in particular, as in *Doe v. FedCap*

¹⁵⁴ *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174 at *1 (N.D. Ohio Nov. 9, 2001). These sentiments are more present in sections before the privacy claims are decided.

¹⁵⁵ *Id.* at *4 (discussing how her employment discrimination claim, brought under a sex stereotyping theory, could succeed based on her insufficient compliance with gendered expectations). Notably this theory benefits Myers.

¹⁵⁶ *See Doe v. Pennsylvania Dep't of Corr.*, No. 120CV00023SPBRAL, 2021 WL 1583556, at *2 (W.D. Pa. Feb. 19, 2021).

¹⁵⁷ *Id.* Doe successfully made out a privacy claim based on the disclosure of their gender dysphoria and medical treatment. *Id.* at *1.

¹⁵⁸ *See Grimes*, 455 F. Supp. 3d at 641 (distinguishing between perception or inference and confirmation of transgender status).

Rehabilitation Services,¹⁵⁹ where a judge denied a motion to proceed under a pseudonym on the grounds that the plaintiff was out as non-binary, while ignoring an argument that they advanced that they sought to obscure access to information about their sex assigned at birth and the direction of their gender transition.¹⁶⁰

It is exactly this kind of claim that transnormativity limits. Medicalized, present from birth, binary/gender-conforming transgender identities have been historically perceived as more valid by those with structural power. These tropes define how judges understand transgender litigants, and they result in rulings that sometimes depend on them. Even as time passes and fewer transgender people might identify with the idea that privacy should look like always passing, the case law makes it difficult to avoid.

IV. TRANSNORMATIVITY AND LEGAL STRATEGY

Why should we care if privacy claims by transgender litigants reinforce hierarchies about who counts as really transgender? Admittedly, transnormativity can seem like an abstract sociological concept, and its disciplining role may appear more theoretical than practical. Certainly there is enough else to worry about—organizations that work on LGBTQ+ issues, more specifically those that focus on transgender people, are fighting massive increases in anti-trans legislation on the state level and a significant rightward turn in the federal courts, not to mention the ongoing effects of late-stage capitalism and a pandemic.

At this moment, it may seem like critical approaches that suggest that transgender litigants might want to refrain from tropes that have proved successful time and time again is a distraction from the work of winning. If a privacy claim allows a transgender person to change their driver's license marker, who cares if it was won by arguing that to be trans is to be born in the wrong body? A win is a win even if the decision heralded by advocates talks about how there are two gender identities, male and female.¹⁶¹

But we've been here before, and we know how it ends. LGBTQ+ advocacy organizations have long been accused of focusing on the needs of the most privileged members of "the community," as with the fight over "equal marriage."¹⁶² As Dean Spade articulated in 2008, focusing on legal reform that serves more privileged LGBTQ+ people limits the potential of

¹⁵⁹ 17-CV-8220, 2018 WL 2021588 (S.D.N.Y. Apr. 27, 2018).

¹⁶⁰ See *Doe v. FedCap Rehabilitation Services*, 17-CV-8220, 2018 WL 2021588, at *2-3 (S.D.N.Y. Apr. 27, 2018). Admittedly, the transgender litigant did not make their argument any easier by appearing in *The New York Times*. But the overall point stands.

¹⁶¹ See *Doe v. Joseph Ladapo*, 4:23-cv-00114-RH-MAF at *1 (N.D. Fl. June 6, 2023) ("As [a] person goes through life, the person also has a gender identity—a deeply felt internal sense of being male or female.").

¹⁶² See, e.g., *Marriage*, AGAINST EQUALITY: QUEER CHALLENGES TO THE POLITICS OF INCLUSION, <http://www.againstequality.org/about/marriage/> [<https://perma.cc/9M4Y-WQSS>]

our movements, committing us to a strategy that does not serve the broader “us” in the long run.¹⁶³ In movements to protect transgender lives, we must reject the idea that winning for the “right people” first has ever been a strategy for liberation. Beyond Spade’s critique, the reality is that piecemeal reform has still resulted in significant backlash that endangers even the very people who thought their rights had been secured.

The narratives used in litigation are not a sideshow or an afterthought. Lawyers create the ideal transgender plaintiff even as they claim only to choose them. The cases that lawyers choose, the stories they tell and the strategies they pick define the contours of whose rights are seen as worth fighting for in the first place.

But perhaps more relevant to the discussion of transnormativity and the privacy claims, it is not just holdings of cases that matter. As we make arguments that depend upon narratives of transness that have never been accurate and will get less so, advocates are building the edifices that the next generation will have to contend with. The 1980 case of *Doe v. McConn*, where the court’s opinion opens by describing transsexualism as “a rare syndrome of gender identity disturbance” feels cringeworthy now.¹⁶⁴ It does not take very much imagination to guess that cases where litigants turn again and again to medical diagnosis and passing might feel similar in twenty years.

Lawyers who put forward arguments have the ability to avoid some of these outcomes, although often what gets written into opinions is beyond the control of individual parties. At the very least, they can avoid transnormative framing and scripts that assume that being transgender is inherently bad in cases where they do not advantage their clients. To that end, here are some questions for lawyers advocating on behalf of transgender clients to consider as they make key decisions around storytelling.

- *Does the “script” that I am reciting require transgender people to seek to pass as cisgender, or as one binary gender or the other, to receive the protections that I seek for my client?*
- *Am I suggesting that my client is the correct kind of trans? Is it because they went through medical transition? Is it because of when they went through medical transition? Can I avoid that?*
- *Do I say that there are certain markers of transness that are not actually common to all members of the community?*
- *Do the markers of transness I name depend on access to resources or approval from primarily cisgender establishment figures, for example, medical transition?*

¹⁶³ SPADE, *supra* note 130, at 31–34.

¹⁶⁴ *Doe v. McConn*, 489 F. Supp. 76, 77 (S.D. Tex. 1980).

- *Can I win for my client, or my class, and present a multiplicity of approaches to gender? If not, what are the stakes of the litigation and who stands to benefit?*
- *Am I assuming that trans people should want a specific relationship to being trans? Do I state, or imply, that being transgender is worse than being cisgender due to something other than societal transphobia?*

CONCLUSION: BEYOND PRIVACY, TOWARDS EUPHORIA

In her canonical article “The Empire Strikes Back,” Sandy Stone, a trans feminist writer and thinker, describes the process by which Harry Benjamin came to treat transgender women of the 1960s and 1970s through his clinic at Stanford.¹⁶⁵ In his book, *THE TRANSEXUAL PHENOMENON*, Benjamin had described what he believed was the true transsexual, for whom surgery would be helpful. And sure enough, researchers at the Stanford clinic found that there were many women who came in who met his criteria, and they had surgery, went through “charm school,” and came out happier on the other side.¹⁶⁶ At least one of them was so successful at passing that she later succeeded in a public disclosure of private facts case for her outing.¹⁶⁷

But as Stone puts it, “[i]t took a surprisingly long time—several years—for the researchers to realize that the reason the candidates’ behavioral profiles matched Benjamin’s so well was that the candidates, too, had read Benjamin’s book, which was passed from hand to hand within the transsexual community, and they were only too happy to provide the behavior that led to acceptance for surgery.”¹⁶⁸ The trans women who went to the Stanford clinic understood what was required for the treatment they sought, and patterned their stories accordingly.

Whether we call it transnormativity or something else, trans people have always engaged strategically with selecting narratives to get access to material resources.¹⁶⁹ In recounting this tale, Stone asks “Who is telling the story for whom, and how do the storytellers differentiate between the story they tell and the story they hear?”¹⁷⁰ This is the question for Stone

¹⁶⁵ Stone, *supra* note 7, at 160–62.

¹⁶⁶ *Id.* at 160.

¹⁶⁷ Toni Ann Diaz was a patient of the Stanford Clinic. *Diaz v. Oakland Trib., Inc.*, 188 Cal. Rptr. at 765.

¹⁶⁸ Stone, *supra* note 7, at 161.

¹⁶⁹ See Austin H. Johnson, *Rejecting, Reframing, and Reintroducing: Trans People’s Strategic Engagement with the Medicalisation of Gender Dysphoria*, 41 *SOCIOLOGY OF HEALTH & ILLNESS* 517, 529 (2019); see also Riggs et al. *supra* note 99, at 912.

¹⁷⁰ Stone, *supra* note 7, at 161.

(and Judith Butler, and many others) of gender.¹⁷¹ It is also the story of how transgender litigants, and cisgender litigants, engage with the law.

In privacy claims, transgender people, lawyers and litigants alike, introduce the evidence that is most likely to succeed. Unfortunately, under our current legal system, this is not evidence of joy at keeping a secret or of how conforming documentation creates the satisfaction of recognition. Violence, stigma, and most of all, harm, is the kind of evidence that the law understands and requires for claims that fall under the auspices of privacy. If the claims of harm and shame are the script, then transnormative tropes are the *scènes à faire*—obligatory for the genre, requiring more effort to avoid them than to just leave them in.

But these scripts, as appealing as they are, give little agency for experiences of being trans that deviate from those mapped during the 1990s. It seems silly to say that their flaw is that privacy claims require wanting privacy, but over time, it has become more and more clear that privacy, for many of the litigants covered by these cases, was a means to an end.

Privacy claims were the tool that they had at a time when few others existed. Privacy was a way to limit the harm that might later befall them. But it is not clear these claims even did that particularly well. Given that, it makes sense to interrogate how much privacy should bear the weight of protecting transgender people. Rather than continually attempting to reimagine privacy, we can create a deeper understanding of transgender life that centers the genuine goal of transgender joy (and yes, euphoria).

¹⁷¹ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 4 (Lind J. Nicholson, 1st ed. 2006).

